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05 October 2018

BY COURIER AND BY E-MAIL

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Re: **Manolium-Processing LLC v. the Republic of Belarus – C-26**

Dear Members of the Arbitral Tribunal,

1. In accordance with the Arbitral Tribunal's Communication A 13 granting the Claimant's request to submit additional evidence in support of its Interim Measures Request of 28 July 2018, Claimant hereby files these Comments to Respondent's Response to Claimant's Interim Measures Request, accompanied by the following evidence:

- 1) First Witness Statement of Leonid Torot'ko of 5 October 2018;¹
- 2) Third Witness Statement of Andrey Dolgov of 5 October 2018.²

¹ Exhibit CWS-3. First Witness Statement of L. Torot'ko of 5 October 2018.

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2. The terms and abbreviations appearing in these Comments have the same meaning as defined in the Notice of Arbitration, Statement of Claim and Interim Measures Request.

I. INTRODUCTION

3. On 28 July 2018, Claimant submitted its Interim Measures Request (the "**IM Request**") asking that this Tribunal order Respondent to stop the pattern of harassment of Claimant's witnesses and representatives by those associated with or acting on behalf of Respondent. The IM Request was accompanied by the Second Witness Statement of A. Dolgov,³ which described that intimidation in detail.
4. On 21 September 2018, Respondent submitted its Response to Interim Measures Request (the "**Respondent's Response to IM Request**"), accompanied by the First Witness Statement of V. Koroban of 21 September 2018.⁴
5. Respondent's Response to IM Request and First Witness Statement of V. Koroban confirm the misdeeds described by Claimant and demonstrate the need for the protections sought by Claimant in the IM Request.
6. Moreover, notwithstanding the fact that Claimant has already asked the Tribunal to order the cessation of all such actions, Respondent has in the last few days continued to pressure witnesses through the Directorate of the Department for Financial Investigations of the Belarus State Control Committee (the "**Financial Police**"). [REDACTED]
[REDACTED]
[REDACTED]

² **Exhibit CWS-4.** Third Witness Statement of A. Dolgov of 5 October 2018. **Exhibit**

³ **CWS-2.** Second Witness Statement of A. Dolgov of 28 July 2018. **Exhibit RWS-1.**

⁴ First Witness Statement of V. Koroban of 21 September 2018.

7. As explained more fully below, Respondent's Response to IM Request and the accompanying circumstances reinforce the urgent need for the protections sought by Claimant in the IM Request. Claimant therefore respectfully reiterates its request that the IM Request be granted in full.

II. RESPONDENT CONTINUES TO USE CRIMINAL PROCEEDINGS TO PRESSURE CLAIMANT AND POTENTIAL WITNESSES

8. Respondent resists the IM Request by informing Claimant and the Arbitral Tribunal that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].⁵

9. This does not preclude the need for the relief sought. A single resolution from a single government entity does not prevent the type of intimidation that Respondent has used in this case or others.

10. In fact, Respondent continues to use its police powers to intimidate witnesses even *after* the IM Request and even *after* the Tribunal's direction not to aggravate the Dispute.⁶ [REDACTED]
[REDACTED]
[REDACTED]

11. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED] [REDACTED]

⁵ Respondent's Response to IM Request, paras. 6; 32–34. Exhibit R-6. [REDACTED]
[REDACTED]
[REDACTED].

⁶ Arbitral Tribunal's Communication to the Parties of 1 August 2018 (A 10).

[REDACTED]
[REDACTED] These issues are directly relevant to Mr. Dolgov, the Claimant's key witness.

12. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] These issues further indicate a forthcoming attempt of Respondent to contact Mr. Dolgov directly.

13. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Again, this indicates an effort to contact or otherwise pressure Mr. Dolgov.

14. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Once again, this is a strong evidence of an effort to intimidate Mr. Dolgov.

⁷ Exhibit CWS-4. Third Witness Statement of A. Dolgov of 5 October 2018, para. 17.
⁸ Exhibit CWS-4. Third Witness Statement of A. Dolgov of 5 October 2018, paras. 18.
⁹ Exhibit CWS-4. Third Witness Statement of A. Dolgov of 5 October 2018, paras. 19-20.
¹⁰ Exhibit CWS-4. Third Witness Statement of A. Dolgov of 5 October 2018, para. 21-22.

15. These brazen acts even after the Tribunal's instruction not to aggravate this Dispute serve as strong evidence that Respondent will stop at nothing to obtain evidence and pressure witnesses to help its case. They also indicate the intent of the State to use all powers at its disposal to pressure Mr. Dolgov through intimidation of his family members, present and former colleagues and other affiliated persons.
16. Claimant recognizes that Respondent has a right to collect evidence in this arbitration. Yet Respondent cannot be allowed to create an unfair advantage by using its criminal powers [REDACTED] to do so.
17. The IM Request seeks to prevent Respondent from creating such an unfair advantage and aggravating this Dispute by improperly using the police powers of the Belarusian state. Respondent claims it has no intention of doing this. If Respondent is to be believed, it should have no problem with the requested relief. The IM Request is therefore justified.

III. THE KOROBAN WITNESS STATEMENT PROCURED BY RESPONDENT DEMONSTRATES THE PRESSURE PLACED ON MR. KOROBAN BY RESPONDENT

18. Respondent attempts to explain away its misdeeds with a witness statement from one of the victims of its intimidation—a former deputy director on construction of Claimant's Belarusian entity Manolium-Engineering, Mr. Vikentiy Koroban. This transparently biased witness statement should not shield Respondent.
19. Specifically, at Respondent's behest, Mr. Koroban claimed in his recent witness statement that:¹¹

¹¹ **Exhibit RWS-1.** First Witness Statement of V. Koroban of 21 September 2018, para. 15.

"15. Mr. Dolgov asserts that I am concerned about my safety in the Republic of Belarus. This is not true. I am not worried for my safety. The only one who has ever told me about potential criminal prosecution was Mr. Torotko, as I describe in paragraph 11 above".

20. Yet Respondent's own evidence confirms a very different story. The fact is, Mr. Koroban's recent recanting of his prior concern for his safety is itself strong evidence of the pressure he is under. There is no other plausible explanation for his contradictory statements and behaviour. This is evident for at least three reasons.

21. **First**, Mr. Koroban has now presented three different descriptions of his visit to the Minsk City Executive Committee.

(i) Mr. Koroban first claimed that he visited the Minsk City Executive Committee voluntarily to discuss the circumstances of the arbitration with Respondent:¹²

"8. In mid-July 2018, I voluntarily and without coercion came to the Minsk City Executive Committee ("MCEC") and discussed the circumstances relating to this arbitration". [Claimant's emphasis]

(ii) However, just a couple of paragraphs later, Mr. Koroban contradicted this statement by claiming that he was in the Minsk City Executive Committee by accident and did not discuss the arbitration, but rather simply overheard conversations of the Minsk City Executive Committee employees without participating in those discussions:¹³

"10. I mentioned in the conversation to Mr Torotko that I had been into the office of MCEC and overheard MCEC staff

¹² **Exhibit RWS-1.** First Witness Statement of V. Koroban of 21 September 2018, para. 8.

¹³ **Exhibit RWS-1.** First Witness Statement of V. Koroban of 21 September 2018, para. 10.

discussing the dispute relating to the Claimant". [Claimant's emphasis]

- (iii) The story changed again shortly after, when Mr. Koroban unequivocally denied even being present at the Minsk City Executive Committee, in a phone call with Mr. Dolgov:¹⁴

"13. Mr Dolgov also was interested if I had been to MCEC in connection with the arbitration and asked what I had discussed there. I said I had not gone there, because I did not wish to discuss this topic with him". [Claimant's emphasis]

22. Mr. Koroban's changing story, even within the same witness statement, demonstrates that his current testimony regarding the circumstances of his visit to the Minsk City Executive Committee cannot be believed.
23. **Second**, Mr. Koroban admits that he lied to Mr. Dolgov about meeting with representatives of Respondent, because he *"did not wish to discuss this topic with him"*¹⁵. In light of Mr. Koroban's concession to concealing the true facts of this meeting, there is no reason to believe him now.
24. Mr. Koroban's further discussion confirms that there was no valid motivation for the admitted lie. He explained that:¹⁶

"7. I see nothing wrong with meeting with the representatives of the Republic of Belarus in the arbitration and supplying them with the information I possess. I am retired and have no interest in the outcome of the dispute".

¹⁴ **Exhibit RWS-1.** First Witness Statement of V. Koroban of 21 September 2018, para. 13.

¹⁵ **Exhibit RWS-1.** First Witness Statement of V. Koroban of 21 September 2018, para. 13.

¹⁶ **Exhibit RWS-1.** First Witness Statement of V. Koroban of 21 September 2018, para. 7.

25. If this is true, and Mr. Koroban sees *"nothing wrong with meeting with the representatives of the Republic of Belarus in the arbitration"*, it would make no sense for him to lie to Mr. Dolgov. Yet he admitted to doing just that.
26. As Mr. Dolgov explains, Mr. Koroban told him an entirely different story of his *"visit"* to the Minsk City Executive Committee and his discussion with Respondent's representatives than the story he now tells. Mr. Dolgov describes his conversation with Mr. Koroban as follows:¹⁷

"10. On 20 July 2018, I called V. Koroban in the presence of Manolium-Processing's Counsel (Vladimir Khvalei and Alexandra Shmarko) and asked him to tell me about the meeting at the MCEC in greater detail.

11. To my surprise, V. Koroban informed me that actually, nobody had "summoned" him and that he had come to the MCEC for his own business and accidentally witnessed the discussion of the arbitration proceedings by the MCEC's representatives.

12. In addition, V. Koroban stated that no representatives of an international law firm together with an interpreter were present at the MCEC and that nobody asked him about his work at Manolium-Engineering, the project related to the Investment Contract and whether I had offered any bribes to representatives of the governmental authorities of the Republic of Belarus.

13. I was absolutely shocked by the fact that the man with whom I had worked for such a long time and who had been my deputy, offered me, quite unexpectedly, the version of events completely different from the version that he had offered to L. Torot'ko. For this reason, on the same day, 20 July 2018, I sent V. Koroban the following sms: "Vikentiy

¹⁷ **Exhibit CWS-4.** Third Witness Statement of A. Dolgov of 5 October 2018, paras. 10-13.

Vaclavovich! Telling lies at your age is not a nice thing to do! This is what I think! I apologize!"".

27. The content of this phone conversation was witnessed and is confirmed by Claimant's Counsel.
28. **Third**, Mr. Koroban's statement about the scope of the "*discussion*" he had at the Minsk City Executive Committee is directly contradicted by the description of that "*discussion*" by both Respondent's Counsel and the statement of Claimant's witness, Mr. Torot'ko.
29. Mr. Koroban claimed that he did not tell Mr. Torot'ko or anyone else about meetings with "*foreign lawyers*":¹⁸

"10. [...] Contrary to what is suggested in the WS, I did not tell Mr Torotko or anyone else about meetings with foreign lawyers, let alone meetings in the presence of an interpreter". [Claimant's emphasis]

30. Yet Respondent in its Response to IM Request expressly confirms that White & Case and representatives of the Minsk City Executive Committee met with Mr. Koroban to prepare Respondent's Statement of Defence for this arbitration:¹⁹

"36. In July 2018, Mr Vikentiy Koroban met with representatives of MCEC and White & Case at MCEC's office in Minsk as part of the Respondent's preparation of its Statement of Defence in the present proceedings".

¹⁸ **Exhibit RWS-1**. First Witness Statement of V. Koroban of 21 September 2018, para. 10.

¹⁹ **Respondent's Response to IM Request**, para. 36.

31. Respondent confirmed the same in its Communication to the Tribunal of 25 September 2018:²⁰

"3. [...] Mr Koroban's meeting with MCEC in July 2018 took place alongside representatives of White & Case as part of the Respondent's preparation of its position in these proceedings. This is also supported by Mr Koroban's WS. [...]"

32. The description in Mr. Torot'ko's witness statement is in accord:²¹

"15. In July 2018, V. Koroban called me and said that he had been "summoned" to the Minsk City Executive Committee (the "MCEC").

[...]

17. As I was told by V. Koroban, when he came to the MCEC, at the meeting MCEC's representatives whom he didn't know (whose names he could not recall at the time of our conversation), representatives of a foreign law firm and an interpreter were waiting for him. V. Koroban also informed me that the conversation had been conducted in Russian.

18. V. Koroban told me that during the conversation he was asked questions concerning the conclusion of the Investment Contract within the Tender for investment projects in 2003, payments to the contractors related to the construction of the Communal and New Communal Facilities, the legality of Manolium-Engineering's operations and the sufficiency of funds for investment under the Investment Contract, and also questions related to payment of salary and forms of payment of salary in Manolium-Engineering (officially or "in envelopes"), failure to return the land plots on which Manolium-Engineering carried out

²⁰ Respondent's Communication to the Arbitral Tribunal of 25 September 2018 (RS-12), para. 3.

²¹ Exhibit CWS-3. First Witness Statement of L. Torot'ko of 5 October 2018, paras. 15, 17-20, 25-26.

construction of facilities in Uruchye-6, and relationship between A. Dolgov and the MCEC. V. Koroban also informed me that he had been asked whether A. Dolgov had given bribes to representatives of Belarusian government authorities.

19. I was very surprised that V. Koroban had been asked questions about bribes and payment of salary "in envelopes" because such things had not occurred.

20. Then I asked V. Koroban whether he had visited the MCEC for interview or had already visited other government authorities for similar meetings, the police, the prosecutor's office or court, and V. Koroban answered that he had visited exactly the MCEC.

[...]

25. I also learned from A. Dolgov and Manolium-Processing's Counsel that on 20 July 2018, during his conversation with A. Dolgov, V. Koroban denied that he had been summoned to the MCEC and that he had been interviewed by, denied the presence of lawyers of an international law firm and an interpreter, and denied that he had been asked particular questions during such interview.

26. I believe that such a behavior is very strange. It is quite possible that V. Koroban is afraid of something and, hence, does not know how to behave: at first, he called me and told me about the circumstances of his meeting at the MCEC, and then started to deny them. However, I remember everything he told me and everything I stated above very well".

33. All evidence, except the recent statement of Mr. Koroban, indicates conclusively that Mr. Koroban was summoned to the Minsk City Executive Committee to discuss, and did discuss, this arbitration with Respondent's

representatives and Counsel. Mr. Koroban's claim to the contrary in his witness statement that he "did not tell Mr Torotko or anyone else about meetings with foreign lawyers, let alone meetings in the presence of an interpreter"²² stands alone. The circumstances demonstrate that this statement should not be believed, and should not preclude Claimant's IM Request.

34. Respondent defends the propriety of its meeting at the Minsk City Executive Committee with Mr. Koroban to gather information for this arbitration by claiming that "*there is no property in a witness*".²³ While correct in principle, the *freedom* of a witness to cooperate does not equal a *carte blanche* authorization for a State to *coerce* that cooperation.
35. The facts of this meeting demonstrate precisely that coercion. The weight of credible evidence demonstrates that Mr. Koroban's "*cooperation*" was done out of fear for his well-being. This, of course, calls into serious question the veracity of his testimony. It also demonstrates the need for the Interim Measures sought by Claimant in the IM Request.

IV. THE REPUBLIC OF BELARUS HAS A LONG RECORD OF USING CRIMINAL INVESTIGATIONS AS A MEANS TO PRESSURE CLAIMANTS AND WITNESSES

36. Unfortunately, Respondent's intimidation of Mr. Koroban is far from unique. Belarus has a long track record of initiating baseless criminal cases and jailing key witnesses in commercial disputes.

²² **Exhibit RWS-1.** First Witness Statement of V. Koroban of 21 September 2018, para. 10.

²³ **Respondent's Response to IM Request**, para. 36.

37. This was precisely the fate of well-known Russian businessman Vladislav Baumgertner, who was jailed during a business trip to Belarus in 2013 that occurred in parallel with a commercial dispute with the government.²⁴
38. In 2003-2013, Mr. Baumgertner was the CEO of the world's largest potash producer, Russian company *Uralkali*.
39. In July 2013, *Uralkali* decided to change its marketing strategy and sell potash for export directly and not via *Belarusian Potash Company*, its joint venture with state-owned *Belaruskali*.
40. The Prime Minister of Belarus, Mikhail Myasnikovich, invited the Chairman of the Board of Directors of *Uralkali*, Alexander Voloshin, *Uralkali's* leading shareholder, Suleiman Kerimov, and Mr. Baumgertner to visit the country in August 2013. Only Mr. Baumgertner went to this meeting.
41. After having business talks with the Prime-Minister of Belarus, on 26 August 2013, Mr. Baumgertner went to the airport of Minsk where he was handcuffed by Belarusian law enforcement authorities and delivered to the detention facilities of the Committee of State Security of the Republic of Belarus.
42. Belarusian law enforcement authorities charged Mr. Baumgertner with abuse of power and seeking gain at the expense of the Republic of Belarus. The allegations of the Belarus Investigative Committee were that Mr. Baumgertner and other persons provided discounts on products to some buyers, without telling about this to Belarusian partners, and then transferred received margin to controlled companies. The official loss incurred by

²⁴ See, e.g., **Exhibit C-209**. Reuters website, "*From potash powerbroker to Minsk prison, the cost of crossing Belarus*", 8 September 2013 // Available at: <https://www.reuters.com/article/us-uralkali-ceo/from-potash-powerbroker-to-minsk-prison-the-cost-of-crossing-belarus-idUSBRE98703G20130908>. **Exhibit C-210**. RadioFreeEurope RadioLiberty website, *Russia Puts Uralkali Chief Under House Arrest*, 10 December 2013 // Available at: <https://www.rferl.org/a/russia-uralkali-ceo-house-arrest/25196085.html>.

Belarusian side, according to Belarusian law enforcement authorities, was approximately USD 100 million.

43. After Mr. Baumgertner was arrested on 26 August 2013, the President of the Republic of Belarus, publicly demanded the change of shareholders of *Uralkali*.
44. Mr. Baumgertner spent one month in Belarusian detention facilities before his pre-trial restriction was changed to home detention under 24 hours supervision of the Committee of the State Security of the Republic of Belarus.
45. After several rounds of negotiations of the Presidents of the Republic of Belarus, initiation of fictitious criminal case against Baumgertner in Russia to effect extradition, Belarus statements that Mr. Baumgertner would be extradited to Russia after Mr. Suleiman Kerimov sells his shares in *Uralkali* and after the loss incurred by Belarus in the amount of USD 1,5-2 billion is compensated, the Public Prosecutor's Office of Belarus agreed to extradite Mr. Baumgertner to Russia on 21 November 2013, *i.e.* almost three months after his arrest.
46. Most notably, this event took place after two days from the sale of shares of Mr. Kerimov in *Uralkali* (21,75%) to another Russian businessman, Mr. Mikhail Prokhorov.
47. The experience of Michael Furman, an official of a Russian company called CJSC "*Grand Express*" that has initiated another investment arbitration against the Republic of Belarus, provides a timely and particularly egregious example of this practice.²⁵

²⁵ **Exhibit C-211.** ICSID website, *GRAND EXPRESS Non-Public Joint Stock Company v. Republic of Belarus*, ICSID Case No. ARB(AF)/18/1, Case Details // Available at: [https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB\(AF\)%2f18%2f1](https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB(AF)%2f18%2f1) (Accessed on 4 October 2018).

48. Mr. Furman was recently arrested in the Athens International Airport at the request of Belarusian law enforcement authorities. Because the claims against him were baseless, he challenged his detention in the Greek courts. The Greek court agreed that the criminal proceedings brought by Belarus against Mr. Furman were framed up under artificial grounds and ordered Mr. Furman's release.²⁶
49. *Modus operandi* of the Republic of Belarus does not go unnoticed by other members of the international community. Recently the European Parliament has condemned "*repressive and undemocratic policy towards journalists, lawyers, political activists and civil society actors*" in Belarus conducted by the State.²⁷
50. Respondent's pressure of Mr. Koroban and other witnesses and representatives should come as no surprise in light of this long track record of abuse. It should not be allowed to continue.

V. MR. KOROBAN IS AFRAID OF CRIMINAL PROSECUTION IN BELARUS

51. Despite his facial claims to the contrary, Mr. Koroban's statement indicates that he fears criminal prosecution in Belarus. Mr. Koroban in his statement referred to a threat of criminal prosecution he discussed with Mr. Torot'ko:²⁸

"11. Mr. Torotko told me that it was a mistake for me to have gone to MCEC, hinting that now Mr. Dolgov and I would face a threat of criminal prosecution. Mr. Torotko said he would call Mr. Dolgov about this".

²⁶ **Exhibit C-212.** Decision of Court of Appeal of Athens, Greece of 14 September 2018.

²⁷ **Exhibit C-213.** News Tut.by website, "*European Parliament Members has condemned harassment and detention of journalists in Belarus*", 4 October 2018 // Available at: <https://news.tut.by/economics/610406.html> (Accessed on 5 October 2018).

²⁸ **Exhibit RWS-1.** First Witness Statement of V. Koroban of 21 September 2018, para. 11.

52. Mr. Torot'ko, as a former colonel of the Belarusian Ministry of Internal Affairs,²⁹ is well-aware that Belarus frequently uses criminal proceedings to pressure anyone who disagree with the position of the Belarusian authorities. This is what exactly was discussed between L. Torot'ko and Mr. Koroban:³⁰

"22. I don't understand what V. Koroban had in mind when he said that I had hinted to him a threat of criminal prosecution. I haven't worked with government authorities for a long time and, therefore, could not have threatened him with a criminal prosecution even in theory.

23. We did discuss the possibility of a criminal liability but only in the context of the fact that Belarus sometimes initiates criminal cases against businessmen in order to exert pressure on them and, so long as V. Koroban was summoned to the MCEC, we may well expect that criminal case will be initiated against management of Manolium-Engineering". [Claimant's emphasis]

53. His warning of future targeting by criminal authorities of management at Manolium-Engineering after the "*summoning*" of Mr. Koroban to the Minsk City Executive Committee thus carries particular weight. This is precisely the harm that the IM Request seeks to prevent.

54. The IM Request seeks simple, yet critical, relief. It seeks only to prevent Respondent from aggravating this Dispute or creating an unfair advantage by using its police powers to intimidate witnesses and "*investigate*" this case. This is necessary and appropriate to maintain *status quo*.

²⁹ **Exhibit RWS-1.** First Witness Statement of V. Koroban of 21 September 2018, para. 9.

³⁰ **Exhibit CWS-3.** First Witness Statement of L. Torot'ko of 5 October 2018, paras. 22-23.

VI. RELIEF SOUGHT

55. On the basis of the above circumstances, Claimant respectfully reiterates its Interim Measures Request and respectfully requests that the Arbitral Tribunal order that Respondent:

- (i) Abstain from initiating any criminal proceedings and/or suspend any current criminal proceedings with regard to any former and current employees of Claimant and the companies affiliated with Claimant until completion of the arbitration;
- (ii) Refrain from contacting any shareholders, officials and employees of Claimant and Manolium-Engineering without express consent of Claimant and prior authorization of the Arbitral Tribunal;
- (iii) Refrain from any other actions that could further aggravate the Dispute and violate the integrity of the arbitration proceedings.

Respectfully submitted,



Vladimir Khvalei

Baker & McKenzie CIS Limited, partner

**LIST OF CLAIMANT'S FACTUAL EXHIBITS TO COMMENTS TO
RESPONDENT'S RESPONSE TO INTERIM MEASURES
REQUEST OF 5 OCTOBER 2018**

- Exhibit C-209.** Reuters website, "*From potash powerbroker to Minsk prison, the cost of crossing Belarus*", 8 September 2013
- Exhibit C-210.** RadioFreeEurope RadioLiberty website, "*Russia Puts Uralkali Chief Under House Arrest*", 10 December 2013
- Exhibit C-211.** ICSID website, "*GRAND EXPRESS Non-Public Joint Stock Company v. Republic of Belarus*", ICSID Case No. ARB(AF)/18/1, Case Details
- Exhibit C-212.** Decision of Court of Appeal of Athens, Greece of 14 September 2018
- Exhibit C-213.** News Tut.by website, "*European Parliament Members has condemned harassment and detention of journalists in Belarus*", 4 October 2018