IN THE MATTER OF THE DISPUTE UNDER THE TREATIES ON THE MUTUAL ENCOURAGEMENT AND PROTECTION OF INVESTMENTS BETWEEN UKRAINE AND BELARUS OF 14 DECEMBER 1995 AND BETWEEN SWITZERLAND AND BELARUS OF 28 MAY 1993

BETWEEN

MR. GENNADY MYKHAILENKO
&
UNITED PIPE EXPORT COMPANY TRADING AG

Investors

– and –

THE REPUBLIC OF BELARUS

Contracting Party

NOTICE OF INTENT TO SUBMIT DISPUTE TO ARBITRATION

I. PRELIMINARY STATEMENT OF INTENT

1. In accordance with Article 9 of the Treaty on the Mutual Encouragement and Protection of Investments between the Government of the Republic of Belarus and the Government of Ukraine dated 14 December 1995 (the "**Ukraine-Belarus BIT**"), and in accordance with Article 9 of the Treaty on the Mutual Encouragement and Protection of Investments between the Government of Switzerland and the Government of Belarus dated 28 May 1993 (the "**Swiss-Belarus BIT**"), we hereby give you notice of the existence of a dispute between Mr. Gennady Mykhailenko and United Pipe Export Company Trading AG, on the one hand, and the Republic of Belarus ("**Belarus**" or the "**State**"), on the other.

2. Not only did Belarus expropriate our clients' factory for the production of cold-shaped seamless steel pipes, the first of its kind in Belarus, but following the illegal arrest and lengthy detention without charge by the State Security Agency of Belarus (the Belarus "KGB") of Mr. Mykhailenko, a foreign investor, as well as an obvious show trial that made a mockery of both justice and due process, Belarus forced our client to spend ***six full years*** in a Belarus labor camp in dreadful conditions, being forced to work six days a week and sharing a cell with dozens of other prisoners. To add insult to injury, this foreign investor was forced on a regular basis by prison guards to watch President Lukashenko's speeches on television, and to listen to them being read to him by guards. Moreover, as regular communication, let alone management of his associated businesses, was impossible due to his imposed captivity in Belarus for six years, the investor's related businesses and investments quite foreseeably fell into ruins and he lost, quite literally, everything he owned and his life's work due to the wrongful acts of Belarus.

3. It should come as no surprise to Belarus that the destruction of a foreign investor's investments, without the payment of prompt, adequate and effective relief, combined with the imprisonment of a foreign investor in subhuman conditions for six years is impermissible under international law. Notably, such treatment by a foreign investor is in plain violation of both the Ukraine-Belarus BIT and the Swiss-Belarus BIT, on the basis of which we intend to bring our clients' arbitration claims against Belarus. Our clients intend to bring this arbitration in a well-established and transparent forum, such as the International Center for Settlement of Investment Disputes (ICSID) in Washington, D.C., which is possible since Belarus is a party to the Convention on the Settlement of

Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

4. On the basis of Belarus' breaches of these two bilateral treaties, our clients are entitled to no less than 175 million USD in damages in compensation, on the basis of direct loss, but also on the basis of the significant moral harm Belarus inflicted on a foreign investor during his six years of imprisonment at a harsh Belarusian labor camp. Such compensation cannot bring back the six years of his life that Mr. Mykhailenko lost due to Belarus, but it will at least assist him in reconstituting his investments, all of which were devastated due to Belarus' illegal acts.

5. Although Belarus claims that it respects the rule of law, and although it promotes itself as a safe destination for foreign investment, its treatment of our clients' investments in Belarus conclusively shows the perils of investing in the country. No one, and especially not a foreign investor contributing to the economic development of Belarus, should be subjected to such treatment.

6. Unfortunately, Belarus' record with respect to international law, and even its own laws, is exceedingly grim under the current regime, headed by a President known internationally as the "*last dictator of Europe*."[1] Indeed, we find it to be telling that former Prime Minister Chigir, who himself signed the Ukraine-Belarus BIT on which these claims are partially based, was arrested, charged and sentenced for similar "economic crimes" as our client, although unlike our client he was released following the outcry of the international community.

7. Consistent reports indicate that basic fundamental legal safeguards are wholly absent in Belarus, the judiciary and even lawyers lack *de facto* independence, and the atavistic KGB is brutal, dangerous and acts with impunity. Transparency International, for instance, has criticized Belarus for its inability to uphold the rule of law or control

[1] UN Report of the Special Rapporteur on the situation of human rights in Belarus, for 2005 - http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/102/02/PDF/G0610202.pdf?OpenElement, for 2006 - http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/101/97/PDF/G0710197.pdf?OpenElement, of 18 April 2013 - http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-52_en.pdf; Freedom House, *Freedom in the World 2007 - Belarus*, http://www.freedomhouse.org/report/freedom-world/2007/belarus; Amnesty International, *Amnesty International Report 2007 - Belarus*, 23 May 2007, http://www.refworld.org/docid/46558ebf25.html; Human Rights Watch, Belarus - Country summary, January 2012, http://www.hrw.org/sites/default/files/related_material/belarus_2.pdf.

corruption.[2] Moreover, the 2011 conclusions of the United Nations Committee against Torture stress the Committee's many serious concerns regarding the lack of rule of law in Belarus, such as the frequent denial of basic fundamental legal safeguards, the lack of independence of the judiciary, and the many abusive practices of the Belarus KGB.[3] [4]

8. What is unique about the current dispute is that Belarus targeted a foreign investor and his investments in Belarus, rather than another human rights group or the political opposition within Belarus, which has significant implications regarding the legal regime applicable to the dispute and the remedies that are available. Many victims of the current regime in Belarus have no recourse to independent and impartial courts with respect to the egregious human rights violations which have become the norm in Belarus, and they have no recourse to even the European Court of Human Rights since Belarus is the sole member of Europe which is not a party to the European Convention on Human Rights. The investments of foreign investors, however, have additional legal protections arising from Belarus' binding international commitments concerning such investments, which allow foreign investors to have their cases heard before independent and impartial arbitral tribunals.

9. We expect that the circumstances of our client's arrest, the expropriation of his business, and his imprisonment in subhuman conditions for six years will, at the very least, serve as a cautionary tale for businessmen considering investing in Belarus, and we expect any

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[2] Transparency International; *Country Profile on Belarus*, available at: http://www.transparency.org/country#BLR_DataResearch (last accessed by author on 26 July 2013)

[3] World Bank Institute Report; *Worldwide Governance Indicators – Country Data Report for Belarus (1996 to 2011),* available at: http://info.worldbank.org/governance/wgi/pdf/c25.pdf (last accessed by author on 26 July 2013

[4] In 2011, the Committee Against Torture underlined its many serious concerns regarding the rule of law in Belarus, including: (1) serious concern concerning the lack of legal process that takes place when individuals are detained by the KGB; (2) serious concern that Belarus detainees are "frequently denied basic fundamental legal safeguards"; (3) serious concern regarding the disappearance without trial of a number of prominent individuals, including a Minister of the Interior; (4) serious concern that detainees at pretrial detention facilities of the KGB are tortured by the KGB, with the Committee noting that detainees are "tortured, ill-treated and threatened by law enforcement officials"; (5) deep concern regarding the "impunity" of Belarus officials, the lack of independent investigation and complaint mechanisms, and the widespread "intimidation of the judiciary"; (6) deep concern regarding the lack of de facto independence of the judiciary, with a bar of lawyers who are de facto subordinate to the Ministry of Defence, and prosecutors who are favored by Courts of Belarus; and (7) very poor conditions of detention in Belarus, including "overcrowding, poor diet and lack of access to facilities for basic hygiene and inadequate medical care". *See* Committee Against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention*, Forty-seventh session 31 October–25 November 2011 (CAT/C/BLR/CO/4), available at: http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.BLR.CO.4_en.pdf

arbitral proceedings to be followed with great interest by other potential investors in the country.

10. Redacted [redacted]

11. Should Belarus be unwilling to negotiate, however, please have no doubt that Belarus will be facing its first international arbitration brought on the basis of a bilateral investment treaty, before the ICSID in Washington. In this respect, we put you on notice that, should Belarus be unwilling to comply with the inevitable award against it, our objective will be to enforce the award solely against the assets of members of the current regime, such as the assets of KGB officials, judges, politicians and prosecutors which have already been frozen abroad under European Union and United States' sanctions.

12. Our notice of dispute will begin by explaining the facts of our clients' case against Belarus (**II**), before explaining why an investment arbitration tribunal has jurisdiction to rule on this dispute (**III**). It will then examine Belarus' egregious treaty breaches (**IV**), prior to turning to the issue of the compensation our clients are seeking to repair their harm (**V**).

II. FACTUAL HISTORY REGARDING OUR CLIENT'S INVESTMENT IN BELARUS

13. We describe below the context in which our physical client invested in Belarus, and his treatment by Belarus following many years of successful collaboration.

A. Mr. Mykhailenko and U.P.E.Co. Trading invest in Belarus

14. An established and highly successful businessman in both his homeland, Ukraine, as well as in the Republic of Cyprus prior to investing in Belarus, Mr. Mykhailenko's field of expertise lay in the production, trading and brokering of cold-shaped seamless steel pipes. He was acknowledged by his peers to be a leader in this industry.

15. Cold-shaping or rolling of seamless steel pipes is an industrial process used to improve the mechanical properties of steel pipes and tubes, and to obtain a smooth surface and more standardized dimensions. Such cold-shaped seamless pipes are used in a variety of industries, notably in machinery building, ship-building, oil and gas, petrochemicals, the space and aviation industries, and many other sectors of the nuclear and energy industries. Prior to Mr. Mykhailenko's investment in Belarus, Belarus lacked the capacity to produce cold-shaped seamless pipes altogether.

16. Mr. Mykhailenko was attracted to invest in Belarus due to its sizeable market for industrial cold-shaped seamless steel pipes, which was worth approximately USD 20 million per year in Belarus alone, not taking into account export potential.[5] Moreover, the Free Economic Zone Gomel-Raton, which even today is being promoted by the official internet portal of the President of Belarus as a region which "*invites foreign investors for mutually beneficial co-operation encouraged by the favorable local conditions for investors*," had promised Mr. Mykhailenko both tax incentives for his investments as well as plentiful, skilled Russian-speaking labor and the availability of land for his factory.[6]

17. In 1999, seeing what appeared to be a good opportunity to construct Belarus' first factory for the production of cold-shaped seamless steel pipes for both the domestic and export markets, Mr. Mykhailenko seized it, recognizing the benefits for both himself and for Belarusian industry more broadly. A sophisticated business plan for the investment was prepared in 1999, anticipating the production of twenty thousand tons of cold-shaped seamless steel pipes with two cold-rolling tube mills ("CRTMs"), CRTM-80 machine-building and general-purpose pipes, to be followed by a third mill (type CRTM-110). At roughly the same time as this initial business plan was taking shape, Mr. Mykhailenko created a Swiss parent company for his investments in Belarus named Upeco Trading AG ("Upeco Trading"), which he ultimately intended to float on the Swiss stock exchange. In order to manage operations on the ground in Belarus, he additionally created a local subsidiary of Upeco Trading named Production Unitary Foreign Entreprise UPECO INDUSTRIES ("UPECO INDUSTRIES" or the "Company"), which

[5] Report of the National Center on Marketing and Price study on cold-shaped seamless steel pipes import for 2004, dated 12 November 2001

[6] Official Internet Portal of the President of the Republic of Belarus, http://president.gov.by/en/press29050.html

owned and managed the factory Mr. Mykhailenko had built in Belarus. UPECO INDUSTRIES was registered on the State register of companies on 17 December 1999, under the number 810000069. On the same date, the Company was also registered as a legal resident of the Free Economic Zone Gomel-Raton under the number 1/3-12.

18. On 14 February 2000, the administration of Gomel-Raton registered the charter capital of UPECO INDUSTRIES as being of USD 1,300,000 in-kind and of USD 300,000 in cash, provided by Mr. Mykhailenko.[7] He oversaw the construction, implementation and development of Belarus' first seamless steel tube factory personally and, in September 2001, the first mill, a CRTM-32 was delivered at UPECO INDUSTRIES. During this time, additional property was acquired to house the Directors of UPECO INDUSTRIES, the first of which was Mr. Mykhailenko himself.

19. On 11 March 2002, Upeco Trading transferred its shares in UPECO INDUSTRIES to U.P.E.Co. Trading AG, another Swiss company. This was done in a transaction designed to permit Steel Siders SRL, an Italian company, to obtain a 50% indirect shareholding in UPECO INDUSTRIES, with Mr. Mykhailenko keeping the remaining 50% of the shares and remaining the Director of the factory. Steel Siders was owned by an Italian national named Mr. Gerardo Carolino, who was very active in the Central European steel tube industry, and who Mr. Mykhailenko had initially met at an exposition being held at the Ukrainian NTPZ plant a decade earlier, in 1992. At the time, Mr. Mykhailenko was unaware of Mr. Carolino's close ties to Eastern European oligarchs operating in Central Europe, but as Mr. Carolino owned a number of plants, especially those producing feedstock pipe, a partnership seemed favorable to Mr. Mykhailenko.

20. After three years of labor and investments, in the fall of 2002 UPECO INDUSTRIES began producing and selling seamless steel tubes, although it continued to expand its production to different classes of pipes by the addition of new mills. UPECO INDUSTRIES also registered its trademark "Belarussian Tube Works," and production capacity steadily increased.[8]

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[7] Audit Report n° 2 by B. P. Bulynko, on the formation of the charter capital of UPECO IDUSTRIES of 15 January 2002

[8] Notifications from the National Center of Intellectual Property of Belarus, dated 17 April 2002 and 13 May 2003

21. UPECO INDUSTRIES was profitable from the outset, with revenue rapidly increasing by 110% in 2004 compared to 2003, and by 25% during the first three months of 2005 alone. Since its inception, the number of personnel employed at the enterprise increased three-fold (from 31 to 92 individuals), and its production capacity increased six-fold. The Company was in the process of constructing workshop, administrative and service buildings for its employees as the business expanded.

22. The significance of the young and dynamic business to the national economy and to national industry was already recognized by the State, as the Company was the only producer of cold-shaped seamless steel pipes in Belarus.[9] Accordingly, the Ministry of Economy of Belarus included the Company, in 2004 and 2005, on its list of companies party to the State's program for import substitution, which called for the replacement of foreign imports with domestic production.[10] This national import substitution program for 2001-2005 was introduced by the Council of Ministers of Belarus in order to protect the domestic market by reinforcing the development of competitive import-substituting products, increasing exports and creating jobs.[11] UPECO INDUSTRIES, under the name of Belorussian Tube Works, had also begun participating in trade fairs, and by November 2004 UPECO INDUSTRIES participated in the 10th International specialized exposition "Metal-Expo" in Moscow alongside the world's biggest metallurgical companies.

23. In April 2004, Mr. Mykhailenko, on behalf of UPECO INDUSTRIES, had requested the Belarusian Ministry of Foreign Affairs to investigate acts of dumping that UPECO INDUSTRIES suspected Ukrainian manufacturers of cold-shaped seamless steel pipes were undertaking in the Belarusian market. On 16 March 2005, the Minister of Foreign Affairs of Belarus officially commenced an anti-dumping investigation in relation to the import from Ukraine of cold-shaped seamless steel pipes of a 10-60mm diameter.[12] The two Ukrainian factories concerned by the anti-dumping investigation were the Nizhnedneprovsky Tube Rolling Plant and the Nikopol Steel Pipe Plant YutiSt, in

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9 Letter from Mr. Kudelia I. L., the Director of the administration of the Free Economic Zone Gomel-Raton, dated 9 February 2005

10 Letters from Mr. Skvortzov A. I., the Deputy-Director of the administration of the Free Economic Zone Gomel-Raton, dated 22 June 2004 and 17 March 2005

11 Decree of Council of Ministers on the State program for import substitution for 2001-2005, dated 13 October 2000

12 Letter from Mr. Mihnevich, Deputy-Minister of Foreign Affairs of Belarus, dated 28 Mars 2005

Dnepropetrovsk, both controlled by the Ukrainian company Interpipe and its majority-owner, the Ukrainian billionaire Mr. Victor Pinchuk.[13]

24. The Company also had a stable balance sheet, and Mr. Mykhailenko was in the process of establishing good economic and business relations with leading Belarusian enterprises which represented important sources of revenue. Such enterprises included, *inter alia*: the Minsk Motor Plant, the Minsk Tractor Works, Naftan, the Mozyr Oil Refinery, BelAz, and Byelorussian Steel Works. The Company's products were exported to a number of non-CIS countries, including the Baltic States, and were well-reputed and well-received across the region for their quality.

25. In a bid to consolidate the Company's success, Mr. Mykhailenko began, in late 2004, to examine ways in which the business could expand. He was specifically interested in purchasing the Italian-based feedstock pipe producer Pietra, and accordingly undertook a technical and commercial audit of the company, which its owners had decided to sell. Mr. Mykhailenko wished to sell products in Belarus and Russia in tandem with the UPECO INDUSTRIES plant in Belarus and to source hot-rolled feedstock of 12,000 tons per year that was required by UPECO INDUSTRIES directly through Pietra, over which he was in the process of obtaining ownership, thereby cutting out the middlemen upon which UPECO INDUSTRIES relied and obtaining control of the entire chain of production of seamless steel tubes and pipes. By May 2005, Mr. Mykhailenko was at an advanced stage of negotiating the purchase of Pietra with Mr. Mario Finardi.

26. This incorporation of Pietra into the U.P.E.Co. Trading group would have been highly profitable had it been allowed to proceed; the industry consulting group that audited Pietra, Global Steel Consultants UK, estimated that the Company would subsequently generate an operating profit of between six and seven million euros per year, in addition to the costs that expenses that U.P.E.Co. would save by controlling all stages of the chain of production.

[13] Letter from Mr. Mihnevici A. Y., Deputy-Minister of Foreign Affairs of Belarus, to the participants in the anti-dumping investigations, dated 24 June 2005. In March 2006, the Ministry of Foreign Affairs officially terminated its anti-dumping investigation because UPECO INDUSTRIES, after Mr. Mykhailenko's arrest, stopped the production of cold-shaped seamless steel pipes. Economic News, Ukraine, "Не дотрубили", № .55 (262) of 30 March 2006

27. In addition, given the Belarus import-substitution program, combined with the anti-dumping investigations targeting the main pipe importer into Belarus, Interpipe, which were progressing, not only did UPECO INDUSTRIES have a monopoly on domestic production of seamless steel pipes, but it was on the verge of obtaining the majority of the USD 20 million per annum domestic market, once anti-dumping measures had been put in place and dumping on the part of Interpipe had been stopped.

28. In short, Mr. Mhykailenko's investments in Belarus were flourishing and rapidly expanding until 17 May 2005, when, after six years of investing in Belarus the Belarus State decided to bring his investments to a sudden halt.

29. What ensued may only be described as any respectable foreign investor's worst nightmare.

B. Mr. Mhykailenko's sudden arrest and pre-trial detention by the Belarus KGB

30. On the morning of 17 May 2005, armed officers of the State Security Agency of Belarus (the Belarus "KGB"), showed up, unannounced, at the UPECO INDUSTRIES factory in Gomel, and arrested our client, without attempting to provide any explanation for their actions. Mr. Mhykailenko would not see a judge until 27 April 2006, nearly a full year later, and he would not regain his liberty for six years.

31. On that morning in May 2005, Mr. V. A. Joglo, the Deputy-Director of the investigation department of the KGB of Gomel, Mr. Barbarovich, Chief of economic investigations, and two KGB agents showed up on the premises of UPECO INDUSTRIES and told Mr. Mhykailenko to accompany them to their offices. At first, the officers were cordial, but their tone changed abruptly upon arrival at the KGB office, when Mr. Barbarovich started shouting at Mr. Mhykailenko, calling him a "*hohol*" (a highly derogatory term for Ukrainians in Belarus), a "*piece of shit*" that had come to Belarus to make money, and indicating that he and his comrades would ensure that no one worked with Mr. Mhykailenko again. The KGB strip-searched Mr. Mhykailenko, and made him stand naked while his possessions were examined.

32. Six different KGB officers took turns interrogating the foreign investor, over the period of three days, for approximately twelve hours per day, while holding Mr. Mykhailenko in a pre-trial detention center. Although he requested a lawyer, this request was refused.

During his first three weeks of detention, he was not informed of the precise charges against him, other than being told that they were somehow related to an alleged "economic crime."

33. Mr. Joglo threatened Mr. Mhykailenko that he could be held by his investigatory unit for up to three years, and stated that he could avoid "*suffering*" by immediately confessing to his economic crimes, which is something that Mr. Mhykailenko has refused to do to this day, and rightly so, despite the enormous pressure put on him by Belarus to obtain a false confession.

34. It was only on 20 May 2005, in reaction to Mr. Mykhailenko's colleagues' and relatives' questions concerning his disappearance, that he was allowed to briefly speak with the Consul at the Ukrainian Embassy in Belarus and his personal lawyer via telephone. The KGB refused to let Mr. Mhykailenko see his lawyer in person, however, and during the initial three days of questioning, he was only allowed to see a State-appointed lawyer.

35. During the eleven months that Mr. Mykhailenko was held in detention at the remand prison ("SIZO") of Gomel awaiting trial, in highly insalubrious conditions, he was not allowed to see a judge and, as previously noted, the first time he saw one was on 27 April 2006. He was allowed little communication with the outside world, which was permitted only via letters, which were conditional on the permission of the KGB and the censorship of Mr. Joglo.

36. During this difficult period, Mr. Mhykailenko's fate rested primarily in the hands of two individuals: Mr. V. A. Joglo, the Deputy-Director of the Gomel KGB's investigation department and, Mr. O. P. Polovinko, the Prosecutor of Gomel Region.

37. Over one hundred individuals with similar roles and responsibilities as Mr. Joglo and Mr. Polovinko, that is to say Prosecutors and Belarus KGB agents, have already been targeted by European sanctions for their failure to uphold the rule of law, notably by Council Regulation (EC) No. 765/2006. The implementing regulations of Council Regulation (EC) No. 765/2006 concerning restrictive measures in respect of Belarus have frozen the assets of numerous, similar individuals involved in the current regime, on the basis of their serious violations of human rights, their repression of civil society and their activities that seriously "*undermine the rule of law*." Dozens of KGB investigators and dozens of State Prosecutors, including the Chairman of the KGB in Gomel himself, as

well as Deputy Head of the Investigation Committee of the KGB in Gomel, dozens of Belarusian judges, and even the First Deputy Minister of Justice, who heads judicial services and controls the State bar for lawyers, have been targeted by these sanctions for their serious violations of the rule of law. While Mr. Joglo and Mr. Polovinko do not appear to have been specifically targeted by the sanctions, yet, it is clear that the Prosecutorial authorities of Belarus, as well as the KGB, do not serve to uphold the rule of law, but rather serve to undermine it.

38. Three weeks after his arrest on 17 May 2005, Mr. Mykhailenko was finally informed by letter from Mr. Polovinko, dated 7 June 2005, of the charges being made against him. Belarus had decided to make them on the basis of Article 237(1) "*extortion of credit and subsidies*" and Article 235(2) "*legalization ("laundering") of assets obtained through crime*" of the Belarus Criminal Code.

39. It is clear that these charges had no basis in reality, and despite the ransacking of Mr. Mhykailenko's offices and home in Belarus, no incriminating evidence was found and, nine months later, these charges were therefore dropped, only to be replaced by completely new charges.

40. Thus, by letter on 27 February 2006, Mr. C. A. Melguy, the senior assistant Prosecutor of Mr. Polovinko, informed Mr. Mykhailenko that he was no longer being charged under Articles 237(1) and 235(2) of the Belarus Criminal Code, but that Belarus had changed its mind and would now charge him under article 382 of the Belarus criminal code, for the absurdly wrongheaded crime of "*self assignment of title or power of authority*", the catch-all crime found in Article 209(4) of the criminal procedure code for "*fraud on very large scale*," and for alleged "*property damage by the removing property gains as a result of fraud, breach of trust, without signs of theft, on large scale*" under Article 216(2) of the Belarusian criminal code. The former charge is so absurd that even the Belarusian courts would ultimately be unable to find any shred of evidence potentially justifying its application. The latter charges were also baseless and fall within the category of general economic crimes that Belarus commonly uses to silence its political, non-governmental and independent media opponents, a common practice in Belarus which the Council of Europe has condemned as abusive:

> "The Committee deeply regrets the numerous politically-motivated abuses of the criminal justice system that have taken place in recent years

> and are still taking place in the Republic of Belarus, including the arbitrary application of specific provisions criminalizing legitimate, peaceful activities of opposition parties, non-governmental organizations and independent media, and arbitrary convictions of political opponents, following unfair court proceedings, under general criminal provisions such as embezzlement, fraud, counterfeit or tax evasion."[14]

41. Ironically, not only was the Belarus State's pre-trial detention of Mr. Mykhailenko arbitrary and discriminatory, but it was in fact *premised* on the very fact that he was a foreign investor. When the initial charges – which were dropped as noted– were brought, the Belarus Prosecutor, Mr. Polovinko, specifically justified the pre-trial detention of Mr. Mykhailenko on the grounds that he had foreign citizenship:

> "Taking into account the materials of the criminal case and the severity of charges the choice of this measure of suppression is grounded. Furthermore, **taking into account that Mykhailenko G. K. is a foreign citizen and his family leaves [sic] outside the borders of Republic of Belarus**, there are grounds to believe that if he is being released he can disappear from the criminal pursuit and the Court, and in this way obstruct the preliminary investigation and the examination of the criminal case."[15]

42. Given the near-complete lack of transparency in Belarus, and the absence of the rule of law in the country, the true reasons for targeting Mr. Mhykailenko and his investments are difficult to ascertain with precision, although we intend to determine the truth regarding this matter during the course of arbitration, since it is important for our client.

43. It is most likely that UPECO INDUSTRIES was seen as standing in the way of President Lukashenko's announced drive to re-nationalize the steel industry, and it was decided that it would be easiest to simply eliminate him on the basis of "economic crimes," as is common in Belarus. Mr. Mhykailenko had had warm relations with the previous General Director of the State-owned Byelorussian Steel Works, who had visited UPECO INDUSTRIES on numerous occasions to view the mills and procedures he was using until 2003, when this General Director was arrested by the KGB and replaced. At the time, Mr. Mhykailenko had been in talks with the General Director, and the Deputy

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[14] Council of Europe, Doc. 11464, 10 December 2007, *Abuse of the criminal justice system in Belarus*, Report by Committee on Legal Affairs and Human Rights

[15] Letter from Mr. Polovinco O. P., the prosecutor of Gomel Region, to Mrs. Elijasovoi V. P. and Mr. Mykhailenko of 22 November 2005; see also the letter from Mr. Polovinco O. P., the prosecutor of Gomel Region, to Mrs. V. P. Elijasovoi, Mr. Mykhailenko and others of 7 June 2005

General Director, who was also subsequently arrested by the KGB in 2011, regarding a potential joint venture whereby UPECO INDUSTRIES would supply technologically-advanced pipes in return for Byelorussian Steel Works' billet. While Mr. Mhykailenko continued to allow Byelorussian Steel Works officials to visit UPECO INDUSTRIES following the General Director's arrest, and to show its directors the technology behind making cold-shaped seamless steel tubes, he did not have the same warm relations with his successor and, following President Lukashenko's announcement in November 2004 that Byelorussian Steel Works would begin manufacturing pipes itself (albeit less sophisticated and lower quality hot-rolled steel pipes), Mr. Mhykailenko may simply have been viewed as an unnecessary competitor by the State.

44. Alternatively, East European steel tube oligarchs unhappy about the anti-dumping proceedings Mr. Mhykailenko had initiated may have exploited corrupt Belarus State organs to retaliate.

45. Regardless of whether the executive of Belarus itself chose to eliminate Mr. Mhykailenko using State machinery, as seems most likely, or whether corrupt Belarus State organs were merely exploited to protect outside financial interests, it is plain that the acts of Belarus' organs are attributable to Belarus, and Belarus is therefore responsible for them under international law. As indicated in Article 4(1) of the International Law Commission's Responsibility of States for Internationally Wrongful Acts, "*The conduct of any State organ shall be considered an act of that State under international law whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State*."[16]

46. Mr. Mykhailenko tried to bring his unjustified and unlawful detention to the attention of anyone who could help him. Belarus ignored the Ukrainian Embassy's requests for his liberty, however. Our client, along with his family members, also wrote numerous State bodies in Belarus in order to protest against the illegality of his detention and the arbitrary actions of Mr. Joglo and Mr. Polovinko, to no avail.

[16] Art. 4(1) International Law Commission's Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, Vol. II Part II

47. A dozen complaints were also sent to the KGB and Prosecutor's office of Gomel by Mr. Mhykailenko and his family but ignored. In addition, numerous complaints were sent to the General Prosecutor of the Belarussian Republic,[17] the Administration of President Lukashenko,[18] to the Security Council of Belarus,[19] to the Court of Gomel District,[20] to the Court of Gomel Region[21] and to the Constitutional Court of Belarus[22]. These Courts,[23] and the Security Council of Belarus,[24] answered Mr. Mykhailenko in a Kafkaesque manner indicating that all complaints about the actions and decisions of the investigating authorities should be sent to the Prosecutor in charge of overseeing the case being fabricated against him, i.e. Mr. Polovinko, the very Prosecutor the foreign investor was making complaints about.

48. The four-sentence answer of Mr. Azemsha, the Head of Anti-Corruption and Organised Crime Department of the Prosecutor's Office of the Republic, to Mr. Mykhailenko's complaints concerning the illegality of his detention were no better. Mr. Azemsha merely indicated that "[t]*here are no reasons to stop the criminal investigations and to release* [Mr. Mykhailenko] *from detention,*"[25] without considering if there *were* any sound reasons for keeping him imprisoned.

49. In order to contest his wrongful detention, Mr. Mykhailenko also requested his lawyer to file a claim against the administration of the Free Economic Zone Gomel-Raton under articles 9 and 11 of the Investment Code of Belarus. This claim was suspended by a

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17 Letters from Mr. Mykhailenko to the general prosecutor of Belarus of 14 and 29 June 2005, 14, 19 and 28 July 2005, 1, 4, 12 and 26 August 2005, 13 and 21 September 2005, 6 and 11 October 2005, 14 and 30 December 2005, 1 January 2006

18 Letters from Mr. Mykhailenko to the Administration of the President of Belarus of 28 July 2005 and 15 November 2005

19 Letter from Mr. Mykhailenko to the State Security Council of Belarus of 6 October 2005

20 Letters from Mr. Mykhailenko to the Court of Gomel Central District of 28 July 2005 and 12 August 2005

21 Letters from Mr. Mykhailenko to the Court of Gomel Region of 6 June 2005, 5 and 28 July 2005, 28 August 2005, 19 September 2005, 25 and 28 November 2005

22 Letter from Mr. Mykhailenko to the Constitutional Court of Belarus of 16 September 2005

23 Letter from Ms. L. S. Mihalikova, the President of the Court of Gomel Region, to Mr. Mykhailenko of 17 June 2005; Letter from Mr. G. I. Dmitrenko, the President of the Court of Gomel Central District, to Mr. Mykhailenko of 16 August 2005; Letter from Mr. A. V. Mariskin, the Deputy-President of the Constitutional Court of Belarus, to Mr. Mykhailenko of 25 January 2006

24 Letter from Mr. A. E. Baranov, the Director of the Secretariat of the Security Council of Belarus, to Mrs. V. P. Elijasovoi, of 22 November 2005

25 Letter from Mr. S. I. Azemsha S. I., Head of Anti-Corruption and Organised Crime Legislation Control Department of the Office of the Public Prosecutor of the Republic of Belarus, to Mr. Mykhailenko dated 27 January 2006

decision of the District Court of Gomel dated 13 January 2006, due to "*procedural irregularities*."

50. None of the foreign investor's significant efforts made a difference to his wrongful detention, and during his year of pre-trial detention, with minimal communication with the outside world, his investments in Belarus and elsewhere, which badly required his stewardship, quite foreseeably began to fall into ruins.

51. During this year, the conditions of the overcrowded Belarus prison where he was held were wretched, with thirty-five people squeezed into one small room of approximately 20 square meters. The prison guards would allow Mr. Mhykailenko to walk in the prison yard, which itself was approximately six square meters, for one hour per day, with approximately twenty other prisoners. The food was terrible and unless food was brought in by outsiders (with the limit of 30 kg of food per month), the prisoners became malnourished.

52. This caused significant psychological anguish to the foreign investor, who became desperate and eventually slit his wrists, although he was told that this drastic measure would not help him.

C. The highly inequitable and unjust initial trial

53. The "criminal investigation" by the KGB against him was transferred to the Belarus judiciary in early March 2006, and the first hearing of his "trial" began in April 2006.

54. From the outset, it was clear that the trial would be a farce, since each time the KGB agents felt that the case was not progressing in the manner they wanted, they would simply stop the process and take the trial Judge, Mr. Shapiro, out of the courtroom to give him instructions. To make matters worse, Mr. Mhykailenko's lawyer was subject to the control of the Ministry of Justice, and he was refused leave to obtain independent, international counsel who could act without fear of professional retaliation by the regime.

55. The new accusations against Mr. Mykhailenko were based on loans UPECO INDUSTRIES obtained from the Belvnesheconombank bank in Gomel, which had never complained that it had in any way been harmed. They concerned the security that had been provided with respect to three loan agreements, although until Mr. Mhykailenko was arrested there had never been an incident concerning their repayment.

56. On 5 September 2003, UPECO INDUSTRIES had obtained a small loan of USD 210,930 from the Bank in order to buy mills and an induction installation. On the day of our client's arrest, the Company needed to pay back USD 88,480 of this loan. On 2 March 2004, a loan of EUR 80,000 had also been granted by Belvnesheconombank to the Company for buying a metallic bath and reactive oil. According to the KGB, on 17 May 2005 the company still owed EUR 74,999. On 11 October 2004, a line of credit up to USD 760,000 had also been accorded to the Company in order to buy 300 tons of feedstock pipes. This was to be repaid by 10 October 2010. Out of the sum provided by the bank, USD 348,227 had been drawn and, according to the KGB on 17 May 2005, at the time of Mr. Mhykailenko's arrest, the company still needed to reimburse USD 293,999. UPECO INDUSTRIES was profitable and increasing its margins, however, and there would have been no issue concerning payment of these loans if the Director of UPECO had not been imprisoned for six years.

57. In Belarus' second round of allegations, Mr. Mykhailenko was accused of having provided the Bank an overpriced contract of sale of a CRTM-32 mill for USD 750,000, between the Cypriot company Centipede Enterprises and the Swiss company Upeco Trading dated 24 May 2001, as indirect security for loans made by Belvnesheconombank. It was also alleged that Mr. Mykhailenko had provided additional contracts at inflated prices for pipes, mills and industrial goods, which were also taken into account by Belvnesheconombank when granting its loans.

58. These contracts were concluded between UPECO INDUSTRIES and Centipede Enterprises for the sale of a metallic bath for EUR 72,392 and reactive oil for EUR 7,607. Centipede Enterprises was the successful Cyprus-based business that Mr. Mhykailenko had run since 1994 to trade steel pipes, whose activities were in full compliance with Cypriot and Swiss law, and which had been established in Cyprus as a trading company. Centipede sold the mill to Upeco Trading on 24 May 2001, after which Upeco Trading transferred the mill into the charter capital of UPECO INDUSTRIES, which was then accounted for as a contribution in kind.[26] According to the KGB, however, USD 750,000 did not reflect the original purchase price of the mill,

[26] Act of transfer of equipment from Upeco Trading AG into the charter capital to UPECO INDUSTRIES of 4 September 2001

and the purchase price for additional goods was allegedly also overstated in contracts between Centipede Enterprises and Upeco Trading.

59. On the basis that these contracts, between a Swiss company and a Cypriot company, did not reflect the "*true*" value of the assets that were used to provide security for loans, Mr. Mykhailenko was charged with the acquisition of property and acquisition of the right to property fraudulently and with "*abuse of trust, repeatedly and on a very large scale*" (Article 209(4) of the Criminal Code), by fraudulently obtaining the difference in the sales contracts between Centipede Enterprises and Upeco Trading. It was alleged that these Swiss-Cyprus transactions also caused harm to the Bank, from the day of his arrest, in the amount of USD 18,711 and EUR 56,142 (BYR 191,482,473).

60. In essence, the Belarus KGB, who concocted the charges, and the Court, failed to understand the economic and accounting aspects of transfer-pricing between intra-group companies, and the principles that underlie them. Mr. Mhykailenko, who had never been accused of any criminal conduct in the past, let alone convicted of one, relied upon his lawyers to ensure full compliance with the domestic laws concerned in these transactions. In this respect, it should be noted that neither Switzerland nor Cyprus, the two countries who were primarily concerned with respect to the transfer of property, ever charged Mr. Mhykailenko or Centipede Enterprises with any criminal conduct, despite the fact that they were the countries the most implicated in these transactions. Unfortunately, the investigators, and the Belarus Court itself, lacked sophistication, or were more likely acting in bad faith, and Mr. Mhykailenko even had to explain the concept of a break-even point to them in an investment project during the course of the trial, which KGB agents insisted was incorrect until the advice of an outside expert was obtained.

61. The Belarus prosecutor also claimed that Mr. Mykhailenko caused "*property damage*" by "*removing property gains as a result of fraud, abuse of trust, without signs of theft, on a large scale*" (Article 216(2), Belarus Criminal Code), and in this respect Mr. Mykhailenko was eventually accused of causing the Bank losses corresponding to the sum of a loan made by the bank to UPECO INDUSTRIES for USD 363,768.50 and EUR 18,857.50 (BYR 828,923,680), which could not be repaid since he was imprisoned and his investments were falling in disrepair in his absence.

62. The lower court trial hearing took place between 27 April 2006 and 6 June 2006 in the Court of Gomel District, before the single judge Mr. A. I. Shapiro, and in presence of the public prosecutor, Mr. V. F. Savchenko. Mr. Mykahilenko was represented by two attorneys named Ms. P. L. Borisova and Mr. L. I. Shkodi.

63. Although these criminal allegations were based on the "harm" caused by the loans that UPECO INDUSTRIES contracted with the Belvnesheconombank bank, the Court was never presented with *any* documents or testimony that either Mr. Mykhailenko, or UPECO INDUSTRIES, had ever been unable to service the loans until the arrest of Mr. Mykhailenko, nor did the Belvnesheconombank ever accuse him or UPECO INDUSTRIES of this. Indeed, the regular servicing of all loans is evidenced by the letter of Mr. G. A. Egorov, the Director of the Central Office of Belvnesheconombank of 24 August 2005, to Mr. Mykhailenko. In this letter, Mr. G. A. Egorov also confirms that during the period that Mr. Mykhailenko was the Director of UPECO INDUSTRIES, i.e. until his unlawful arrest, the Bank had made no claims concerning the breach of loan agreements:

> "**"Belvnesheconombank" had no complaints regarding the loan agreement against Upeco Industries during the period [Mr. Mykhailenko was] it general Director** and also no complaints in this period were reported to the police until the credit was identified as being overdue (14 and 15 June 2005)."[27]

64. Furthermore, during the hearing before the Court of Gomel District on 3 May 2006, Mr. M. K. Lesun, the Director of Belvnesheconombank branch in Gomel, also appeared as a witness, and confirmed that the statements of Mr. Egorov were correct. He declared that before Mr. Mykhailenko's arrest the Bank had made no claims regarding the loans and added that "*if the company had still been active the loan would have been re-paid*",[28] and that "*the loans stopped being serviced after May 2005, i.e. after the arrest of Mr. Mykhailenko G. K.*".[29]

65. Moreover, the Decision of the Commercial Court of Gomel Region, dated 26 January 2007, concerning the Bank's request to declare its debts to the State-appointed

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[27] Letter from Mr. G. A. Egorov, the Director of Belvnesheconombank office in Minsk, to Mr. Mykhailenko, dated 24 August 2005

[28] Protocol of the hearing of witnesses in Court of Gomel District dated 27 April 2006, p. 13, ¶ 5

[29] Protocol from the hearing in Court of Gomel District dated 27 April 2006, p. 14, ¶ 2

Liquidation Commission for UPECO INDUSTRIES, indicates that the starting point for calculating the penalties for the delay in reimbursing the credits was 30 June 2005, a month after Mykhailenko's arrest.

66. In short, the only harm caused to the bank, on the basis of which the foreign investor was imprisoned for six years, was caused by Belarus undermining a flourishing investment that could have continued servicing all loans if the foreign investor was able to maintain control of the investment.

67. In the Sentence of 30 June 2006, Judge Shapiro was unable to find any aggravating factor whatsoever in the actions of Mr. Mykhailenko. Rather, he acknowledged the existence of mitigating factors, including the absence of any previous criminal convictions and a positive character report.

68. Nevertheless, he refused to consider the mitigating factors and instead chose to sentence the foreign investor to the harshest penalties imaginable, sentencing Mr. Mykhailenko to a prison sentence that exceeded the maximum prison sentence for either of the crimes he was falsely alleged to have committed. Thus, he sentenced Mr. Mykhailenko to 5 years of imprisonment and the expropriation of his goods under Article 209(4), and to 4 years of imprisonment under Article 216(2), while combining the two sentences together, in part, and ordering the foreign investor to 6 years of imprisonment in a strict-regime labor camp.

69. The judge also ruled that Belarus should expropriate Mr. Mhykailenko's shares in UPECO INDUTRIES, and confiscate his other assets, ordering that Belarus should "***[s]end the property of Mykhailenko G. K., [and] his shares in the statutory capital of Upeco Industries […] to the State in the order of confiscation of his property***."[30]

70. When Mr. Mhykailenko was seized by the KGB, no payments were overdue or could not be met in full; however, his debts had not been serviced since his detention. Over the course of his year in detention no one else at UPECO INDUSTRIES, and not even his partner (who later tried to sell Mr. Mhykailenko's 50% stake in the project to Belarus), did anything about them, so the bank eventually became a civil party and asked for their reimbursement. The judge ruled that Mr. Mhykailenko was obliged to repay the loans

[30] Sentence of the Court of Gomel District of 30 June 2006

taken by UPECO INDUSTRIES in assistance of his investment, ordering him to pay Belvnesheconombank for UPECO INDUSTRIES' loans in the amount of BYR 1,160,103,910 (USD 539,583[31]), which were calculated with interest on the outstanding amounts.

71. In short, although our client had done nothing that was illegal with respect to contracts that were not even subject to Belarus law, a Belarus judge ordered the expropriation of the foreign investor's investment, the foreign investor's imprisonment, and the payment of damages, plus interest, on loans that were unpaid precisely because of Belarus' physical detention of Mr. Mhykailenko. Not only had Mr. Mhykailenko been eliminated for six full years, but the State had no competition in the steel tube industry that it had just decided to enter, and Mr. Mhykailenko was paid no compensation by the State for the expropriation of his investment.

D. Appeals of the trial court's decision sentencing the foreign investor to prison and expropriating his investment

72. Mr. Mykhailenko had 10 days to appeal the sentence of 30 June 2006 and did so. The Prosecutor of Gomel, Mr. Polovinko, also partially appealed the Sentence. Both of the appeals were rejected.

73. In his appeal against the Sentence of 30 June 2006, Mr. Mykhailenko noted the he did not commit any crime as all of the contracts with Belvnesheconombank were concluded in accordance with the law of Belarus, and that the "damages" to the Bank were caused only because of his arrest and the subsequent closure of the UPECO INDUSTRIES factory in June 2005.[32]

74. He also noted that he could not have increased the charter capital of UPECO INDUSTRIES at that time, since on 4 September 2001, he was not yet the Director of UPECO INDUSTRIES. He also noted the Court's errors in calculating the damages to the Bank; namely, the difference in the price of the pipes did not take into account the transportation expenses from Italy, i.e. the reasons for intra-group transfer pricing

[31] At a rate of 1/2150 USD/BYR in May 2005, http://www.freecurrencyrates.com/exchange-rate-history/USD-BYR/2005

[32] Decision of Commercial Court of Gomel Region regarding the initiation of liquidation proceedings against UPECO INDUSTRIES, of 17 August 2006

modifications. Nor did they take into account the fact that the expert's determination of the value of the mill was based on the value of it many years after it was purchased, after it had been left outside in the rain for an extended period of time. He also noted that, during the investigations it had never been shown that Mr. Mykhailenko signed the loan agreement with any intention to steal money. He also denied that UPECO INDUSTRIES was insolvent, as later alleged, and noted that no fraud had ever been committed to the Bank. Such arguments were to no avail.

75. In a Decision of 15 September 2006, the appellate panel of Court of Gomel Region, composed of chairman E. V. Tkaciuk and judges G. A. Sviatko, I. D. Vladiko, rejected the foreign investor's appeal in its entirety, maintaining the harshest possible sentence for what were legal and justifiable actions.

76. The prosecutor of Gomel, Mr. Polovinko, also appealed the Sentence of 30 June 2006. Mr. Polovinko requested the partial reversal of the Sentence with respect to the recovery from Mr. Mykhailenko in favor of the Belvnesheconombank of damages of BYR 1,160,103,910. The prosecutor stated that there were loan agreements between the Bank and UPECO INDUSTRIES and thus the Bank could still recover the assets of the Company. On 24 November 2006, Mr. Polovinko then decided to suspend the execution of the Sentence of the Court of Gomel District of 30 June 2006 and the Decision on appeal of the Court of Gomel Region of 15 September 2006 until the decision of the Court on its Appeal.

77. By a Decision of 4 December 2006, the Presidium of the Court of Gomel Region, composed of judges A. N. Tozika, B. L. Belousova, N. V Marataeva, I. A. Takvarovoi, S. N. Karopi, L. M. Buyankovoi and Z. M. Kamalievoi, dismissed the appeal of the Prosecutor of Gomel Region and upheld the Sentence of 30 June 2006 and the Decision on appeal of 15 September 2006.

78. The Vice-President of the Supreme Court of Belarus then filed an appeal before the Supreme Court of Belarus against the Decisions on the Appeals of 15 September 2006 and 4 December 2006. This appeal requested the cassation of these two Decisions as they were decided by the same judges who had also decided on the protests of Mr. Mykhailenko against his year-long detention during the investigation and against the

extension of the period of detention in 2005. These two judges were respectively I. D. Vladiko and I. A. Takvarovoi.

79. By Decision of 31 May 2007, however, the criminal panel of Supreme Court of Belarus, presided by N. I. Ghermenciuka and judges I. P. Gogolia and M. A. Semukova, decided that there were breaches of the Criminal Proceedings Code and set aside the two Decisions on appeal, and the case was sent back to the same Court to decide if the Sentence of 30 June 2006 against Mr. Mykhailenko was legal and grounded.[33] This time, Mr. Mhykailenko was not even invited to the proceedings, as he had already been sent to the prison camp.

80. Despite the flurry of judicial activity, nothing essential changed since the time of the trial proceedings, and the appellate criminal panel of the Court of Gomel Region, presided by V. S. Osipova and judges A. V. Sujaeva and V. A. Kaliuko, by a Decision of 20 June 2007, upheld the initial indictment by merely copy-pasting, with a few minor modifications, the Decision on appeal of 15 September 2006 that had been set aside by the Supreme Court.

81. Meanwhile, UPECO INDUSTRIES had collapsed, as well as Mr. Mhykailenko's Pietra project, and Mr. Mykhailenko had been transferred to the labor colony in Bobruisk, where he was obliged to work 6 days per week until his release on 17 May 2011, almost 6 years to the day he was first detained by the KGB. In the labor colony, Mr. Mykhailenko suffered physical exhaustion, like the other prisoners, and permanent psychological pressure. The conditions in the colony were very harsh. The prisoners were lodged in an open space of 50m2 for 60 persons with bunk beds and the food was virtually inedible. Our client was forced to do hard labor 12 hours per day and 6 days per week. In their rare free time, prisoners even had to watch the TV broadcasts on Mr. Lukashenko's speeches and the "triumphs" of his regime. In the labor camp, he was again often called with irony by the staff and other prisoners the "hohol."

E. Local conclusions concerning the legitimacy of the foreign investor's trial

82. A Belarusian lawyer working for a N.G.O. named the Association for Human Rights Defense International, analyzed the proceedings and concluded that they were gravely

[33] Decision of the Supreme Court of Belarus dated 31 May 2007

flawed both with respect to the Belarusian Criminal Code and the Code Of Criminal Procedure, as well as with respect to international law, concluding:

> "Having examined the materials of the criminal case on a charge of Mykhailenko G. K., having analyzed norms of the Criminal and Criminal Procedure Code, [Association for Human Rights Defense International] considers that **the analyzed Decision in the present case do not meet the requirements of the legislation of the Republic of Belarus and international law, as ratified by the Republic of Belarus**."[34]

83. The circumstances of Mr. Mykhailenko's arrest prove that, from the beginning, the procedure instigated was abusive and orchestrated by the KGB in collaboration, or at the very least with the support and cooperation of, the prosecutor of Gomel, Mr. Polovinko.

84. As previously noted, the accusations against Mr. Mykhailenko on the day of his arrest were for extortion of credit and money laundering under articles under Articles 237(1) and 235(2) of the Criminal Code. Yet, as this independent lawyer noted, nine months after his arrest and two months before the hearing Mr. Mykhailenko was informed about the completely modified accusations under Articles 209(4) and 216(2) of the Criminal Code.

85. Moreover, the Belarusian lawyer noted that these charges were directly related to the credit UPECO INDUSTRIES had obtained from Belvnesheconombank, but they should have never been made in the first place as the Bank never made any claim against UPECO INDUSTRIES or Mr. Mykhailenko, and as the Company was always up to date in servicing its loans (until the foreign investor's incarceration).[35] The KGB, the prosecutor and the judiciary were well aware of this, as described below.

86. The qualification of abuse of trust by the judges under both Articles 209(4) and 216(2) was also concluded to be mistaken. Abuse of trust implies a crime committed by person in a position of authority over another person or within an organization, for example as a supervisor. Belarus law shares the same concept of abuse of trust, and Mr. Mykhailenko's relationship with bank employees cannot be qualified as an abuse of trust,

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[34] Expert legal opinion provided by the Association for Human Rights Defense International, 5 December 2006, ¶ 3

[35] This was confirmed by the HDR expert legal opinion provided by the Association for Human Rights Defense International, 5 December 2006, ¶ 27.

since they were merely business relations regulated by legislation on the granting of loans.[36]

87. The lawyer also noted that the sentence of the sole judge Shapiro O. I. of 30 June 2006 was disproportionate and "*extremely severe*"[37], as well as the fact that the Court of Gomel did not find any aggravating factor in the actions of Mr. Mykhailenko to justify this harsh sentence. The lawyer also cited the Court's acknowledgement of the existence of mitigating factors including the absence of any previous criminal convictions; the fact that he had young children, and more generally a positive character report.[38]

> "Thus the court by finding Mykhailenko G.K. guilty of the incriminated actions had not discovered in his actions any aggravating factor. Furthermore, the Court accepted in his actions the presence of the following mitigating factors: positive personal characteristics, dependent minor children and the fact that he was never convicted for crime."[39]

88. Moreover, the lawyer noted that pursuant to Article 69(1) of the Belarusian Criminal Code, the length of internment for any given crime cannot exceed half of the maximum length of internment for that given crime provided by law, where there are any mitigating factors or where there are no aggravating factors. Therefore, despite the fact that in these circumstances the punishment under Article 216(2) of the Criminal Code could not exceed 2.5 years of imprisonment, the judge Shapiro O. I. had sentenced Mr. Mykhailenko to a longer period of time.[40]

89. After further examination of the facts, and the Court's application of Belarus law, the lawyer concluded that the Decision(s) of the judiciary concerning the foreign investor "***do not meet the requirements of the current legislation of the Republic of Belarus and***

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36 Expert legal opinion provided by the Association for Human Rights Defense International, 5 December 2006, ¶ 44

37 Expert legal opinion provided by the Association for Human Rights Defense International, 5 December 2006, ¶ 56

38 Sentence of the Court of Gomel District of 30 June 2006, p. 18, ¶¶ 4 and 5

39 Expert legal opinion provided by the Association for Human Rights Defense International, 5 December 2006, ¶ 53

40 Expert legal opinion provided by the Association for Human Rights Defense International, 5 December 2006, ¶¶ 54 and 55

international legislation ratified by the Republic of Belarus and are illegal, unreasonable and should be set aside."[41]

90. In sum, although we do not have the burden of proving that the foreign investor was innocent under Belarusian law in order to obtain compensation from Belarus, he clearly was.

F. The impact of the detention of the foreign investor on his investments

91. Mr. Mykhailenko was central to the running of UPECO INDUSTRIES. He was managing the plant on a daily basis, he had conceived and initiated the investments, and he was the sole contact for all foreign customers and suppliers, as well as the only English speaker at the company.[42]

92. The arrest of Mr. Mykhailenko, and the suspension of his position as Director of UPECO INDUSTRIES, by the Decree issued by Mr. Joglo in the name of the KGB, on 6 June 2005 (the "Suspension Decree"), with the approval of the prosecutor of Gomel, Mr. Polovinko, represented the beginning of the Company's difficulties that led to its forced liquidation by Belarus, which was described in 2012 by the Press as one of the biggest bankruptcies in the country.[43]

93. The Suspension Decree requested the administration of Gomel-Raton to liaise with the parent company, U.P.E.Co. Trading, and to arrange for the nomination of a new director of UPECO INDUSTRIES to replace our client. Consequently, on 30 May 2005, Mr. Ivan Tycovenko, an official from Gomel-Raton administration, who knew nothing of how to run the plant, was appointed as a temporary administrator by the Gomel-Raton administration with limited power of attorney given by Mr. Baumgartner, the Director of U.P.E.Co. Trading. It is unclear precisely what happened next, as our client was largely cut off from the outside world at this time due to his detention and had little access to information, but the factory ceased all operations in June 2005.

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41 Expert legal opinion provided by the Association for Human Rights Defense International, 5 December 2006, ¶ 58

42 Letter from UPECO INDUSTRIES' Deputy-Directors to the Court of Gomel of May 2005

43 The top biggest bankruptcies in Belarus in 2012, www.ej.by, dated 22 January 2013 http://www.ej.by/news/economy/2013/01/22/top_samyh_gromkih_bankrotstv_v_belarusi_v_2012_godu__.html

94. In late December 2005, after six months of inactivity at the plant of UPECO INDUSTRIES, and the non-repayment of loans since the foreign investor's arrest, the Inspection of the Ministry for Taxation and Levies informed the Gomel-Raton administration about its initiation of liquidation proceedings. On 17 August 2006, the Commercial Court of Gomel ordered the liquidation of UPECO INDUSTRIES and appointed a Liquidation Commission. Here again, the decision was taken without UPECO INDUSTRIES' participation in the proceedings, as there was nobody to represent it.[44]

95. The liquidation proceedings continued until late 2009. All of UPECO INDUSTRIES' assets were sold in six public auctions during 2009 and the Company was declared bankrupt, as there was allegedly not enough money to pay Belvneshcombank and the panoply of taxes and penalties to the various states' organs that had been ordered.[45] According to the liquidation commission, the debts of UPECO INDUSTRIES amounted to BYR 3,935,748,985 (USD 1,441,666[46]), although they had been virtually non-existent at the time of the foreign investor's arrest and could have easily been paid. They were composed as follows:[47]

Extraordinary payments	BYR	100,269,715
Charges for redundancy	BYR	87,635,540
State taxies	BYR	478,447,679
Reimbursement of loans guaranteed by the Company's assets to Belvnesheconombank	BYR	1,629,295,182
Payment to the creditors of the 5th rank and the punitive damages decided by the Commercial Courts	BYR	1,640,100,869
TOTAL	BYR USD	3,935,748,985 1,441,666

44 Decision of Commercial Court of Gomel Region regarding the initiation of liquidation proceedings against UPECO INDUSTRIES of 17 August 2006

45 Declaration on bankruptcy of UPECO INDUSTRIES, by Liquidation Commission of 12 October 2009

46 At a rate of 1/2730 USD/BYR on October 2009, http://www.freecurrencyrates.com/exchange-rate-history/USD-BYR/2009

47 Declaration on bankruptcy of UPECO INDUSTRIES, by Liquidation Commission of 12 October 2009

96. The sum allegedly obtained from the sale in public auction of UPECO INDUSTRIES' assets amounted to BYR 3,872,348,743 (USD 1,418,442). The difference between the declared debts and the assets was claimed to be BYR 63,400,242 (USD 23,224), taking into account the additional interest that had accrued since Mr. Mhykailenko's arrest. Its remaining assets were auctioned in October 2010, and it is unclear what happened to them.[48]

97. While the investment was being stripped of its assets and liquidated, UPECO INDUSTRIES was also expropriated of its Director's lodging, in Gomel, acquired in April 2003 from a company named PTK Kvestor.[49] Taking advantage of the situation that UPECO INDUSTRIES had been stripped of its Director, and with Mr. Mhykailenko in a prison camp and unable to defend his interests, the seller filed a claim before the Commercial Court of Gomel for the termination of the sales contract alleging the non-payment of the full price for the apartment. The Commercial Court of Gomel by its decision of 22 December 2005 terminated the sales contract despite the fact that UPECO INDUSTRIES was unable to defend its position in court at all, and despite the fact that it was false that the full price had not been paid.

98. Later, the Liquidation Commission for UPECO INDUSTRIES "discovered" that the price for the apartment had been paid in full and that the procedure initiated by PTK Kvestor was abusive and ungrounded. In fact, on 26 December 2003 UPECO INDUSTRIES had paid the price by delivering the seller pipes amounting to BYR 37,368,139 (USD 17,300).[50] PTK Kvestor had also acknowledged the receipt of the full price for the apartment in its letter n° 29 of 29 December 2004.

99. The KGB was fully aware of these commercial proceedings, yet did nothing about them, declaring only that they "*do not have power to act before the Commercial Court of Gomel Region in order to stop the enforcement measures regarding the apartment*."[51] While the apartment was worth significantly less than the factory itself, the KGB's

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48 http://old.investar.by/ru/projects/property/2/8/34638

49 Sale contract of an apartment between PTK Kvestor and UPECO INDUSTRIES, dated 22 April 2003

50 Letter from Mr. A. H. Amelicenko, the President on of the Liquidation Commission, to the Gomel Center for Combating Economic Crimes of 14 December 2006

51 Letter from Mr. V. A. Joglo, the Deputy-Director of the investigation department of KGB, to Mr. Mykhailenko, dated 30 November 2005

refusal to do anything to prevent an unfounded claim, while doing everything possible to destroy a foreign investment, speaks volumes.

100. In the absence of Mr. Mykhailenko for 6 years, the agreement to purchase the Pietra plant obviously could not be finalized, although its signing was a foregone conclusion. UPECO INDUSTRIES' employees also lost their jobs, to the complete indifference of the current regime, and his flourishing pipe-trading business in Cyprus also failed due to his six years of detention.

101. Our client Redacted [redacted]. This was entirely foreseeable to Belarus.

102. While the investment in Belarus was *de facto* expropriated the day he was imprisoned by the KGB, the direct judicial expropriation of it without any compensation took place on 30 June 2006, when the Gomel District Court first issued a ruling calling for the State to:

> "**Send the property of Mykhailenko G. K.**,[…] **his shares in the statutory capital of Upeco Industries at a ratio of 400:1000 (as he holds 499 shares out of 1,000 shares in his quality of founder of United Pipe Export Company Trading AG -t.13;, l.d.160-163) to the State in the order of confiscation of his property**."

103. For these alleged crimes, which are false and which remain wholly unproven today, under even the most rudimentary standards of legal justice, Mr. Mykhailenko was sentenced, on 30 June 2006 to 6 years of imprisonment at Bubruisk labor camp:

> "From the combination of the crimes committed on the basis of Part 1 and Part 2 of Article 72 of the Criminal Code, by, partial summation of punishments assigned Mykhailenko G. K. is sentenced to 6 years imprisonment with confiscation of property, in colony with strong regime."[52]

104. It should come as no surprise to the reader of this notice that such show trials are a common feature of Belarusian 'justice'. Belarus is known and condemned by the

[52] Sentence of the Court of Gomel District of 30 June 2006

international community[53] for its practice of arbitrary detention on the back of kangaroo court trials, as well as for the discriminatory imbalance of powers between the prosecution and the defence, and the non-respect of the presumption of innocence:

> "In 2004, the Working Group on Arbitrary Detention visited Belarus. In its report (E/CN.4/2005/6/Add.3), it noted **the evident imbalance between the powers of the prosecution and the rights of the defence, in breach of international standards**. This situation is of extreme concern since Belarus is the last country in Europe to apply the death penalty. **A system which deprives accused persons of their right to defence can lead more easily to judicial errors. Such imbalance is embodied further by the abusive nature of the detention system.** Physical conditions of pretrial detention are harsh. Detainees are often put under strong psychological pressure. **The presumption of innocence is seriously undermined**." [54]

105. Luckily, Mr. Mhykailenko was not simply one of the ordinary Belarusians who is detained, imprisoned, and sometimes executed by the brutal regime in power, with no recourse at all to correct the abuse of State organs. As a foreign investor, he has additional rights that Belarus must respect under international law, which he is fully entitled to invoke, both on his behalf and on behalf of the Swiss company he co-founded, as will be examined below.

III. AN ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE UNDER TWO BILATERAL INVESTMENT TREATIES

106. Our client has two jurisdictional bases for bringing this claim, firstly pursuant to the Belarus-Swiss BIT, in the name of the Swiss parent company which owned UPECO INDUSTRIES directly, and secondly, pursuant to the Belarus-Ukraine BIT, in the name of Mr. Mykhailenko, *in personam*, as founder and primary investor in the Company.

107. As set forth below, a future arbitral tribunal will have jurisdiction (**A**) *ratione personae*, (**B**) *ratione materie* and (**C**) *ratione temporis* over the present dispute between Mr. Mykhailenko and the Company against Belarus, should arbitration be necessary.

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[53] Council of Europe, Committee on Legal Affairs and Human Rights, *Abuse of the Criminal Justice System in Belarus,* Doc 11464, 10 December 2007

[54] UN Report of the Special Rapporteur on the situation of human rights in Belarus, Adrian Severin, 16 January 2006

A. An arbitral tribunal has jurisdiction *ratione personae* over this dispute

108. Belarus is clearly a "Contracting Party" within the terms of both Treaties. In addition, both Claimants qualify as investors in Belarus, as explained below.

109. Under Article 1(2) of the Ukraine-Belarus BIT, which is set forth below, physical individuals clearly qualify as investors:

> "2. The term "investor" means any natural or legal person who invests in the territory of another Contracting Party:
> a) the term "individual" in relation to any of the Contracting Parties shall mean any natural person who is a national of either Contracting Party in accordance with its laws;
> b) the term "legal person" with respect to any Contracting Party means any enterprise established in accordance with the laws of each Contracting Party and who has the right to invest in the other Contracting Party"

110. Mr. Mhykailenko is a national of Ukraine, a fact that was never disputed in the various legal proceedings brought against our client by Belarus. In addition, he plainly invested in Belarus by creating the Company, which is also a fact that also has never been called in dispute. Thus, he qualifies as an investor under this BIT.

111. U.P.E.Co. Trading also qualifies as an investor under Article 1(1)(a) of the Switzerland-Belarus BIT, since corporations may be investors under the terms of this BIT:

> "Article. 1 Définitions
> Aux fins du présent Accord:
>
> (1) Le terme «investisseur» désigne, en ce qui concerne chaque Partie Contractante,
>
> […]
>
> (b) les entités juridiques, y compris les sociétés, les sociétés enregistrées, les sociétés de personnes et autres entreprises ou organisations, qui sont constituées ou organisées de toute autre manière conformément à la législation de cette Partie Contractante, et qui ont leur siège, en même temps que des activités économiques réelles, sur le territoire de cette même Partie Contractante;"

112. Since U.P.E.Co. Trading is a Swiss legal entity, which invested in Belarus, it also clearly qualifies as an investor under the Switzerland-Belarus BIT.

113. This being a dispute between an investor of Ukraine and an investor of Switzerland against Belarus, a future arbitral tribunal plainly has jurisdiction over either both parties.

B. An arbitral tribunal has jurisdiction *ratione materiae* over this dispute

114. Regarding jurisdiction *ratione materiae*, Article 9(2) of the Ukraine-Belarus BIT provides in pertinent part as follows:

> "2. If any dispute between an investor of one Contracting Party and the other Contracting Party can not be thus settled within six months from the date of the written notice, the investor has the right to submit the dispute to:
> a) local court and/or arbitration in accordance with law of the Contracting Party;
> b) the International Centre for Settlement of Investment Disputes (ICSID), established by the Washington Convention of 18 March 1965 for the resolution of disputes relating to investments between States and Nationals of other States, or
> c) an *ad hoc* arbitral tribunal that shall, if the parties to the dispute have not otherwise agreed, be established and operate in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties may agree in writing to change the rules of this Regulation. The arbitration decision shall be final and binding on both parties to the dispute.
> […]"

115. In substance, identical provisions are provided at Article 9(2) of the Switzerland-Belarus BIT.

116. If any such dispute has not been amicably settled within six months from the time when the matter was raised by one of the parties to the dispute, it may, at the request of either party, therefore be submitted to arbitration. It shall be finally settled either in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted by the General Assembly of the United Nations in resolution 31/98 of 15 December 1976 or according to the Washington Convention of 18 March 1965 for the resolution of disputes relating to investments between States and Nationals of other States.

117. Article 6, paragraph 1 of the Treaty, in turn, provides in pertinent part as follows:

> "1. Investments of investors of either Contracting Party shall not be nationalized, expropriated or subject to any other measures having effect equivalent to nationalization or expropriation (hereinafter referred to as

> 'expropriation') in the territory of the other Contracting Party, except in the public interest of the latter Contracting Party. Expropriation will be conducted in accordance with the procedure established by the legislation of the latter Contracting Party on a non-discriminatory basis and will be subject to conditions on the payment of immediate, adequate and effective compensation. The amount of compensation to be paid in the currency in which the investments were made, or in any other currency acceptable to the investor in accordance with the legislation of the Contracting Party in whose territory the expropriation took place, and will be the market value of the expropriated investment at the time immediately prior to the implementation of expropriation or her disclosure, depending on what was formerly the case. Payment will include interest accrued on the basis of the LIBOR rate from the date of expropriation, shall be paid without undue delay, be effectively realizable and may be transferred without restriction in a convertible currency."

118. As illustrated at length below in **Part IV**, Claimants' principal claims in this arbitration are that Claimants' investments were expropriated without payment of any compensation, both effectively at the time of his illegal arrest and detention by the KGB, which resulted in the *de facto* expropriation of his investment, and then officially by judicial decree. Investment is defined in Article 1(1) of the Ukraine-Belarus BIT as following:

> "any kind of financial, material, equipment and other property and intellectual property invested in connection with economic activities of investors - individuals and legal entities - of one Contracting Party in the territory of the other Contracting Party in accordance with applicable law and will cover the latest in particularly, but not exclusively:
> a) movable and immovable property and any other property rights such as the right to a lien, pledge, collateral for the loan rights and similar rights;
> b) shares, stocks, bonds, debentures, legal entities, securities, and any other form of participation in companies;
> c) the requirements for the sums of money or performance of any obligations which have an economic value associated with the investment;
> d) intellectual property rights, including copyrights, trademarks, patents, industrial designs, technical processes, "know-how", trade secrets, trade names and "goodwill" associated with an investment;
> e) any right to engage in economic activities, including the right to exploration, development and exploitation of natural resources."

119. The future claimants owned a steel tubing factory in Belarus, belonging to UPECO INDUSTRIES, which was a company owned by Upeco Trading, itself created and owned by Mr. Mykhailenko. By a transaction of 11 March 2002, U.P.E.Co. Trading, a company

owned in equal shares by Mr. Mykhailenko, and Steel Sider, bought from Upeco Trading the 100% shares in UPECO INDUSTRIES. Thus, at the moment when Belarus' breaches occurred U.P.E.Co. Trading was a direct owner of the investment in Belarus and Mr. Mykahilenko was an indirect investor, as the owner of 50% of shares in U.P.E.Co. Trading. This fact was not lost on Belarus, which repeatedly attempted to have the foreign investor return his shares in U.P.E.Co. Trading while he was incarcerated.

120. As demonstrated in **Part IV.B** below, Belarus' actions have had the effect of dispossessing Claimants, directly, of these investments under each Treaty. The economic value of these assets, which would have generated tens of millions of USD for both Claimants per year over the past and future decades, has been reduced to zero. Mr. Mykhailenko may still hold legal title to the assets, but the benefit of use and enjoyment of them has been completely destroyed.

121. According to the terms of Article 10 of the Ukraine-Belarus Treaty, after six months of failed attempts to settle the parties' dispute an arbitral tribunal will have jurisdiction to rule on disputes concerning flagrant measures of dispossession such as those here. While the Swiss-Belarus Treaty provides for a waiting period of 12 months, the most-favoured nation clause of the Swiss-Belarus Treaty allows U.P.E.Co. Trading to commence this arbitration by importing the shorter, and more favourable conditions contained in the Ukraine-Belarus BIT.[55]

122. Hence, the Tribunal has jurisdiction over the subject matter of this dispute on the basis of both BITs, no later than six months after the date of this notice.

C. An arbitral tribunal has jurisdiction *ratione temporis* over this dispute

123. Finally, the temporal conditions for the Tribunal's exercise of jurisdiction have been satisfied in full.

124. Article 2 of the Ukraine-Belarus BIT states to be covered assets invested "*either before or after the entry into force of this [BIT]*", so it has no applicable temporal condition. The Swiss-Belarus BIT likewise does not provide a temporal condition.

[55] See, e.g., *Emilio Agustín Maffezini v. The Kingdom of Spain*, Decision of the Tribunal on the Objections to Jurisdiction, 25 January 2000, ¶¶ 52-56

125. In any event, Claimants' investments in Belarus are protected under the Treaty as they were made after the entry into force of both BITs, respectively on 25 April 1996 and on 13 July 1994. They were also made after Belarus became a Party to the ICSID Convention on 9 August 1992.

126. In conclusion, the record establishes each of the elements of jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis* under both Treaties. A future arbitral tribunal therefore has jurisdiction in the current arbitration.

127. The following section addresses the standards of protection afforded our clients' investment in by the BITs, and Belarus' numerous breaches of those standards and thus its liability to our clients for monetary damages.

IV. BELARUS CLEARLY BREACHED THE BILATERAL INVESTMENT TREATIES IT HAD SIGNED AND RATIFIED

128. The actions described in **Part II** of this notice violate a number Belarus' obligations under the bilateral investment treaty between the Belarus-Ukraine BIT, and under the Belarus-Swiss BIT, notably those obligations concerning the just treatment of foreign investors and investments.

A. Protection afforded under BITs and Belarus' national legislation

129. An investor of an investment in Belarus, of either Swiss or Ukrainian nationality is afforded broad protections under both the applicable BITS and national investment legislation. These are briefly examined below.

1. Belarus-Ukraine BIT

130. Article 3 of the Belarus-Ukraine BIT provides for the promotion and protection of investments. Article 3(1) obliges each contracting party to "*encourage and create favourable conditions for investors* […] *and admit such investments in accordance with its legislation.*" Article 3(2) obliges the contracting parties to provide fair and equitable treatment to one another's investments, as well as full protection and security:

> "Investments of investors of either contracting Party shall enjoy fair and equitable treatment and receive full protection and security in the territory of the other Contracting Party."

131. Article 4(1) of the Belarus-Ukraine BIT reiterates the requirement of fair and equitable treatment of investors, and also affords investors the same protections to which other foreign investors in the host state are entitled:

> "Each Contracting Party shall provide in its territory to investments of investors of another Contracting Party treatment that is fair and equitable and not less favorable than that which it accords to investments of its own investors or to investments of investors of any third state."

132. Article 6(1) of Belarus-Ukraine BIT identifies the limited circumstances in which investments may be expropriated by the host State, stipulating that any such legal expropriation will in any event be appropriately compensated:

> "Investments of investors of either Contracting Party shall not be nationalized, expropriated or subject to any other measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party, except in the public interest of the latter Contracting Party. Expropriation will be conducted […] on a non-discriminatory basis and will be subject to conditions on the payment of immediate, adequate and effective."

2. Belarus-Swiss BIT

133. The Belarus-Swiss BIT provides similar protections to investors as those provided under the Belarus-Ukraine BIT, notably encouraging and admitting investors of the other contracting party (Article 2), and providing for just and equitable treatment of investments of investors no less favorable than that afforded to other investors (Article 3(2) [56]).

134. Article 3(1) provides that the host state will not employ unjustified or discriminatory measures that would hinder the management, use, maintenance, enjoyment, growth or disposal of the investment of an investor of the other contracting party:

> "Chaque Partie Contractante protégera sur son territoire les investissements effectués conformément à ses lois et règlements par des investisseurs de l'autre Partie Contractante et n'entravera pas, par des

[56] "*Chaque Partie Contractante assurera sur son territoire un traitement juste et équitable aux investissements des investisseurs de l'autre Partie Contractante. Ce traitement ne sera pas moins favorable que celui accordé par chaque Partie Contractante à des investissements effectués sur son territoire par ses propres investisseurs ou que celui accordé par chaque Partie Contractante à des investissements effectués sur son territoire par les investisseurs de la nation la plus favorisée, si ce dernier traitement est plus favorable.*"

> mesures injustifiées ou discriminatoires, la gestion, l'entretien, l'utilisation, la jouissance, l'accroissement, la vente et, le cas échéant, la liquidation de tels investissements."

135. In addition, Article 5(1) describes the circumstances in which investments may be expropriated by a host state:

> "Aucune des Parties Contractantes ne prendra, directement ou indirectement, des mesures d'expropriation, de nationalisation ou toute autre mesure ayant le même caractère ou le même effet, à l'encontre des investissements d'investisseurs de l'autre Partie Contractante, si ce n'est pour des raisons d'intérêt public et à condition que ces mesures ne soient pas discriminatoires, qu'elles soient conformes aux prescriptions légales et qu'elles donnent lieu au paiement d'une indemnité adéquate. Le montant de l'indemnité, intérêt compris, sera effectivement réalisable et librement transférable, et il sera versé sans retard à l'ayant droit, sans égard à son domicile ou à son siège."

3. Investment Code of the Republic of Belarus[57]

136. Belarus' Investment Code also defines the general legal conditions of carrying out investment activities in Belarus. It influences a potential investor's legitimate expectations of the Belarus investment regime and the rules by which investors and Belarus should abide, and the applicable standards. Its Article 11 also specifically prohibits expropriation except where adequate compensation is provided:

> "Investments shall not be nationalized and be brought into requisition free of charge and also equal measures shall not be taken. Nationalization and requisition is possible only when compensation of value of nationalized and requisitioned property and other losses, caused by nationalization and requisition, is prompt and completed."

137. Accordingly, in line with its cumulative obligations under the Belarus-Ukraine BIT, the Belarus-Swiss BIT, and Belarus' Investment Code, along with its obligations pursuant to customary international law, Belarus' duties towards its investors of Ukrainian or Swiss effective nationality, which may not be inferior to those duties accorded to its own investors or those of other foreign investors include the following:

(i) to provide fair and equitable treatment, including the duty not to deny justice to an investor;

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[57] Dated 22 June 2001

(ii) to provide full protection and security to investors' investments;

(iii) not to impair an investor's use, enjoyment etc. of an investment by arbitrary or discriminatory means; and

(iv) not to expropriate an investor's assets except where in the public interest, and not without prompt, adequate and effective compensation.

138. The jurisprudence and doctrine regarding each of these standards is set out below.

B. Standards of protection

1. Fair and equitable treatment

139. Commentators concur that the fair and equitable treatment standard can be given its plain meaning, i.e., fairness and equity of treatment as these terms are generally understood (as opposed to unfair and inequitable.[58]) Alternatively, the fair and equitable standard can mean that investors shall be treated in a manner commensurate to the international minimum standard for investors.[59]

140. In either case, the phrase 'fair and equitable treatment' is imprecisely defined, thereby permitting arbitrators to apply the necessary standards to the dispute in question in light of the factual matrix before them. In a recent case, the arbitral tribunal considered that the fair and equitable standard "*basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors*."[60] Other tribunals have used a similar interpretation of the meaning of 'fair and equitable'.[61]

141. Certain principles have emerged in the arbitral jurisprudence that help tribunals define or identify fair and equitable treatment, or unfair and inequitable treatment. Notably:

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58 F.A. Mann, "*British Treaties for the Promotion and Protection of Investments*", 52 British Y.B. Int'l L. 241, 244 (1981)

59 UNCTAD (1999), Fair and Equitable Treatment 1 (1999), UNCTAD Series on Issues in International Investment Agreements/UNCTAD/ITE/IIT/11 (Vol. III) ("UNCTAD Paper")

60 *Swisslion DOO Skopje v. Macedonia, former Yugoslav Republic of, ICSID* Case No. ARB/09/16, Award, 6 July 2012, ¶ 273, Available at http://italaw.com/sites/default/files/case-documents/ita1080.pdf

61 *PSEG Global, The North American Coal Corporation, and Konya Ingin Electrik ve Ticaret Sirketi v.Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 239, Available at http://italaw.com/sites/default/files/case-documents/ita0695.pdf; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No ARB/03/15, Award of 31 October 2011, ¶ 373, Available at http://italaw.com/sites/default/files/case-documents/ita0270.pdf

i. The host state must act in good faith (*Tecmed*,[62] *Waste Management*,[63] *Rumeli*[64] and *Spyridon*[65]);

ii. The host state's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process (*Waste Management*,[66] *Rumeli*[67] and *Spyridon*[68] *SD Myers*,[69] and *Occidental*[70]);

iii. The host state must act in a transparent manner (*Metalcad*,[71] *Siemens*,[72] *LG&E*,[73] *Saluka*,[74] *Tecmed*,[75] *Maffezini*,[76] *Waste Management*,[77] *Rumeli*[78] and *Spyridon*[79]);

iv. The host state's conduct cannot breach the investor's legitimate expectations (*Tecmed*,[80] *Saluka*,[81] *Azurix*,[82] and *ADC*[83]); and

v. The host state must act consistently vis-à-vis the investor (*CME*,[84] *MTD Equity*,[85] and *El Paso*[86]).

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62 *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, ¶ 153, Available at http://italaw.com/documents/Tecnicas_001.pdf

63 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, ¶ 138, http://italaw.com/documents/laudo_ingles.pdf

64 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 28 July 2008, ¶ 583, Available at http://italaw.com/documents/Telsimaward.pdf

65 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (December 7, 2011), ¶ 314, Available at http://italaw.com/documents/SpyridonRoussalis_v_Romania_Award_7Dec2011.pdf

66 *Supra* note 64, ¶ 98

67 *Supra* note 65, ¶ 583

68 *Supra* note 66, ¶ 314

69 *SD Myers Inc. v. Government of Canada* (UNCITRAL), First Partial Award, 13 November 2000, ¶ 263, Available at http://italaw.com/sites/default/files/case-documents/ita0747.pdf

70 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶¶ 162-163

71 *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶99, Available at http://italaw.com/documents/MetacladAward-English.pdf

72 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (February 6, 2007), at ¶¶308-309. Available at http://www.italaw.com/documents/Siemens-Argentina-Award.pdf

73 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case N° ARB/02/1, Decision on Liability (October 3, 2006), at ¶ 128. Available at http://italaw.com/documents/ARB021_LGE-Decision-on-Liability-en.pdf

74 *Saluka Investments v. Czech Republic*, UNCITRAL, Partial Award (March 17,2006), at ¶ 307

75 *Supra* note 63, ¶ 154

76 *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case N° ARB/9717, Award (November 13, 2000), at ¶ 83: Available at http://italaw.com/documents/Maffezini-Award-English.pdf

77 *Supra* note 64, ¶ 138

78 *Supra* note 65, ¶583

79 *Supra* note 66, ¶314

80 *Supra* note 63, ¶154

81 *Supra* note 75, ¶¶301-302

82 *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Final Award (July 14, 2006), at ¶ 372. Available at http://italaw.com/documents/AzurixAwardJuly2006.pdf

83 *ADC Affliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award (October 2, 2006), at ¶ 424. Available at http://italaw.com/documents/ADCvHungaryAward.pdf

142. As demonstrated above, the host State of investment, Belarus, did anything but act in good faith. In fact, from the foreign investor's unlawful detention by the KGB, resulting in the *de facto* expropriation of his investment, to its one-sided interpretation of facts and its failure to do anything to protect the investors' or UPECO INDUSTRIES' interests in the investment, to the exceedingly harsh sentencing exceeding the maximum prison terms stipulated under Belarusian law, to the State-orchestrated liquidation of UPECO INDUSTRIES and the auctioning of its underlying assets, the Belarusian State performed in what may only be described as utter bad faith with only one objective: eliminating the foreign investor and destroying his investment.

143. Belarus' summary trial and conviction of Mr. Mykhailenko – on fabricated and unsubstantiated charges – also constitutes a clear breach of the State's obligation to act in good faith. Indeed, the manner in which Mr. Mykhailenko was treated, throughout his detention, includes textbook examples of unfair and inequitable treatment.

144. Belarus' behavior was also fully incommensurate with the protection of our client's legitimate expectations. In this respect, a very basic legitimate expectation of every foreign investor is that his rights will be protected and that the rule of law will exist in the host State of investment. However, as noted, *supra*, even agencies of the United Nations have concluded that the rule of law is lacking in Belarus, and our client became another victim of President Lukashenko's corrupt and kleptocratic regime, which cares far more for the rule of men than the rule of law. Few if any of his legal rights were respected, from the time when he was arrested without warning by the KGB, nothing was done to protect his investments by the State, and all measures were taken merely to eliminate him and his investment.

145. Belarus' behavior was, in addition, arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory and lacking in due process. The foreign investor was discriminated against precisely because he was a foreign investor, which was the very basis for detaining him on bogus charges that were not even used against him over the course of a

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84 *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL), Partial Award ¶611 (Sept. 13, 2001)

85 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (May 25, 2004), at ¶99. Available at http://italaw.com/documents/MTD-Award_000.pdf

86 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (October 31, 2011), at ¶¶ 375-379. Available at http://italaw.com/documents/El_Paso_v._Argentina_Award_ENG.pdf

year, the KGB made up the case against the investor as it went along and completely changed the charges not long before the trial began, the KGB and prison guards called him derogatory names on the basis of his nationality, it was unfair for the foreign investor not to be permitted to hire an independent attorney, it was idiosyncratic (to say the least) for the KGB to guide the judges assigned to the case, it was unjust for the trial court to give the harshest sentence possible against the foreign investor despite numerous mitigating factors, and the investor's trial itself was a sham based on a non-Belarusian transaction that had not even been complained about by the bank that had allegedly been harmed. Moreover, forcing our client to watch propaganda videos extolling the merits of President Lukashenko is anything if not idiosyncratic.

146. Nor did Belarus, at any point, act transparently. It initially failed to disclose to Claimants any basis on which its charges against Mr. Mykhailenko were supposedly founded, and it did not provide sufficiently clear explanations as to why his alleged crimes constituted breaches of Belarusian law justifying the treatment to which he was subjected. Belarus' actions indeed represent a gross breach of Claimants' legitimate expectations that they would be treated fairly and equitably by the host State of investment, not least in light of customary international law, the existence of the Belarus-Ukraine BIT and the Belarus-Swiss BITs, and Belarus' own investment legislation.

147. In addition, Mr. Mhykailenko was not provided with sufficient information to know with certainty why he was suddenly attacked by the State and was unable to receive precise information concerning the fate of his investments, notably with respect to their administration, liquidation and auctioning. Moreover, no one could have anticipated that a sales contract made between companies located in Cyprus and Switzerland, which has never been found to be illegal in other jurisdictions, would be used against him as the basis of the foreign investor's imprisonment for six years.

148. It is widely understood that the duty not to deny justice constitutes part of the fair and equitable treatment standard,[87] as well as standing as an independent principle under public international law. Although it is unnecessary to prove a denial of justice in order

[87] *Supra* note 65, ¶ 654; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶¶ 128-129. Available at http://italaw.com/documents/Loewen-Award-2.pdf; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 221. Available at http://italaw.com/sites/default/files/case-documents/ita0023_0.pdf

to establish a breach of the fair and equitable treaty standard, a denial of justice clearly took place.

149. The jurisprudence of international tribunals reveals that a denial of justice is generally procedural. Yet, there may be cases where proof of the failed process may be substantiated by a decision so blatantly wrong that no honest or competent court could possibly have rendered it.[88] Tribunals have also held that collusion, either between a State, judicial authorities and a local party,[89] or among organs of the State,[90] can amount to a denial of justice.

150. The judicial system of the host State must be driven by the principle of due process, a fundamental principle of law for the administration of justice, the breach of which can also amount to a denial of justice. Due process is a course of legal proceedings according to the rules and principles that have been established to guarantee fairness and for the enforcement and protection of private rights. As held by the ICSID tribunal in *Rumeli*, "*a court procedure which does not comply with due process is in breach of the duty* [not to deny justice]."[91]

151. Procedural denial of justice thus corresponds to fundamental breaches of due process adversely affecting a party. These irregularities must be acts "*which per se cause damage due to their rendering a just decision impossible*."[92] In this respect, the International Court of Justice in *ELSI* set the standard for procedural denial of justice as a "*willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety*."[93]

152. The notion of procedural denial of justice as an attack on judicial propriety has also been confirmed by the arbitral tribunal in *Loewen*, which held that procedural denial of justice

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88 Jan Paulsson, *Denial of Justice in International Law*, 1 (2005), ¶ 98

89 *France v. Venezuela* (Antoine Fabiani case No. 1), V Moore's Int'l Arb. 4878 (1898)

90 *US v. Great Britain* (Robert E. Brown case) (Nov. 23, 1923), VI Reports of International Arbitral Awards 120 (United Nations)

91 *Supra* note 65, ¶ 653

92 *United States v. United Mexican States* (B. E. Chattin Case), Award (July 23, 1927), Reports of International Arbitral Awards, United Nations, Volume IV, pp. 282-312, ¶ 312. Available at http://untreaty.un.org/cod/riaa/cases/vol_IV/282-312.pdf

93 *Elettronica Sicula S.P.A. (ELSI) Case (United Stated of America v. Italy)*, Judgment of 20 July 1989, CIJ, Reports of Judgments, Advisory Opinions and Orders, 1989, pp. 15-82, p. 76. Available at http://www.icj-cij.org/docket/files/76/6707.pdf

amounted to "*manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety*."[94]

153. Examples of irregularities constituting a procedural denial of justice include, as set forth by the Presiding Commissioner in the *Chattin* case:

> "*absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court*."[95]

154. Other examples include "*to sentence [a party] without evidence, or to impose on [same] disproportionate or unusual penalties*."[96]

155. Although rarer, it is also possible that an arbitral tribunal may sanction a host State for denial of justice in circumstances where a misapplication of the law in the sense of judicial impropriety occurred, not merely a mistake of law. These are decisions that "*no competent judge could reasonably have made*,"[97] that are "*so unfair as to amount to a denial of justice,*"[98] and where "*the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it*."[99] In other words, the decisions must show that the State has not provided "*even a minimally adequate justice system*."[100]

156. The standard set out in the above paragraph was confirmed by the ICSID tribunal in *Rumeli*, which held that "*a breach of the standard can also be found when the decision is so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith*."[101]

157. In the present case, Belarus has manifestly breached its duty not to deny Claimants justice. It is clear on the basis of the evidence before us that its very purpose was to

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94 *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3, Award (June 26, 2003) , ¶ 132. Available at http://italaw.com/documents/Loewen-Award-2.pdf

95 *Supra* note 93, ¶ 295

96 *Supra* note 93,¶ 312

97 Paulsson, *op. cit.*, ¶ 200

98 Paulsson, *op. cit.*, ¶ 200

99 Paulsson, *op. cit.*,¶ 98

100 *Supra* note 65, ¶ 653

101 *Supra* note 65, ¶ 653

persecute Mr. Mykhailenko for crimes of which he was innocent, in order to expropriate his investment and have him eliminated. The judicial proceedings to which Mr. Mykhailenko was subjected demonstrate the State's willful disregard for due process, and an affront to the most basic sense of judicial propriety, not least because of the illegal manner of his arrest, the arbitrary change in the charges against, the physical conditions in which he was detained, the absence of a proper investigation and presentation of charges against him, the withholding of information from Mr. Mykhailenko in relation to the charges against him, and the incredibly disproportionate severity of Mr. Mykhailenko's sentence.

158. Although we intend to show during arbitral proceedings that our client was sentenced on false grounds to clear the harm that has been done to his formerly excellent name, given the shocking lack of due process he was afforded Belarus was guilty of a denial of justice on a procedural basis alone.

2. Full protection and security

159. It is widely understood that treatment which is not fair and equitable necessarily constitutes an absence of full protection and security, as was held by the arbitral tribunal in *Occidental*.[102]

160. The obligation to accord full protection and security requires the host State to exercise due diligence in the protection of foreign investments.[103] International law has interpreted this due diligence to impose an objective standard of vigilance and thus to require the State to afford the degree of protection and security that should be legitimately expected to be secured by a reasonably well-organized modern state.[104]

161. The State has a "*primary obligation*" to exercise due diligence to provide adequate protection, "*failure to comply with which creates international responsibility*."[105]

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102 *Occidental Exploration & Production Co. v. The Republic of Ecuador* (UNCITRAL), Final Award (July 1, 2004), at ¶ 187. Available at http://italaw.com/documents/Oxy-EcuadorFinalAward_001.pdf

103 Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* , Martinus Nijhoff Publishers 1995

104 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), ¶ 77, http://italaw.com/documents/AsianAgriculture-Award.pdf

105 *Supra* note 105, ¶ 76

162. The full protection and security standard not only encompasses the physical security of foreign investors and their investments, which was woefully neglected in this case, but also the legal security in which the investment operates, as held by the arbitral tribunal in *Azurix*:

> "*The Tribunal is persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security. The cases referred to above show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view*."[106]

In the present case, Mr. Mykhailenko's treatment at the hands of the Belarusian authorities is irreconcilable with the right to full protection and security. The harsh conditions in which he was kept, the physical abuse he endured whilst in detention, along with the absence of his legal security, were compounded by the lack of protection and security afforded to his investment from other State organs, including the KGB. Indeed, rather than protecting his investment, the State took all measures available to it to deprive Mr. Mykhailenko of his investment, thereby breaching its obligation to provide full protection and security to both Claimants. While the underlying problem in Belarus is the State itself, and while it is difficult for the Belarusian State to protect a foreign investor from itself, the lack of good governance and the failure of the rule of law do not justify the State's repeated attacks on a foreign investor and his investments in a manner that can only be described as punitive.

3. Arbitrary and discriminatory measures

163. A measure that breaches national or most-favoured nation treatment would be unavoidably "discriminatory" for the purposes of the BIT standard.[107]

164. The standard of protection against arbitrariness or discrimination is related to that of fair and equitable treatment: "*Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment. The standard is next related to*

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106 *Supra* note 83, ¶ 408

107 *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶ 355. Available at http://italaw.com/sites/default/files/case-documents/ita0081.pdf

impairment"[108] of the management, maintenance, use, enjoyment, conduct, operation, expansion, sale, disposal or liquidation of such investment.

165. Arbitrariness is defined as "*not so much something opposed to a rule of law, as something opposed to the rule of law* […] *It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.*"[109] An act is arbitrary because it is "*not founded on reason or fact* […] *but on mere fear reflecting national preference*."[110]

166. According to Schreuer, the following should be considered as arbitrary:

> "[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 willful disregard of due process and proper procedure."[111]

167. A measure is discriminatory when it provides "*the foreign investment with a treatment less favorable than domestic investment.*"[112] Discrimination occurs "*when the measure against foreign investment and the measure against domestic investment are of a different nature, and the former is less favourable than the latter.*"[113]

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108 *CMS Gas Transmission Co. v. the Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶ 290. Available at http://italaw.com/documents/CMS_FinalAward_000.pdf; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, ¶ 485: "*Les principes de TJE et de PSPE sont intimement liés aux interdictions de discrimination et de caractère arbitraire*."; S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 Brit. Y.B. of Int'l L. 133 (1999): "[…] *if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, then the fair and equitable standard has been violated. This follows from the idea that fair and equitable treatment inherently precludes arbitrary and capricious actions against investors.*"

109 *Supra* note 94, ¶ 128, http://www.icj-cij.org/docket/files/76/6707.pdf

110 *Ronald S. Lauder v. Czech Republic* (UNCITRAL), Final Award (Sept. 3, 2001), ¶ 232, http://italaw.com/documents/LauderAward.pdf

111 Legal Opinion of Prof. Scheurer, accepted and applied by the arbitral tribunal in, in *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, 8 October 2009, ¶ 303. Available at http://italaw.com/sites/default/files/case-documents/ita0267.pdf

112 *Supra* note 111, ¶ 231

113 *Supra* note 111, ¶ 257

168. Discrimination by a host State implies that similar cases are treated differently and without reasonable justification,[114] and it covers all forms of discrimination including discrimination based on race, religion, political affiliation, disability or nationality.[115] According to this legal standard, an investor must not be treated, because of its nationality, less favourably than other foreign investors.[116]

In the case at hand, the State's actions correspond to each and every category of arbitrary conduct identified by Schreuer. There was no apparent legitimate purpose to the State's actions which inflicted severe financial, physical, mental and emotional harm on Mr. Mykhailenko and destroyed his investments. The sham legal measures the State took against Claimants were not based on any legal standard, but instead were a thin disguise for the expropriation of Claimants' investments and were, in any event, in breach of due process and therefore constitute a denial of justice. It is equally evident that these actions were inspired by Claimants' foreign nationality, a fact on which some of the State's actions were explicitly based, such as the issue of whether the foreign investor should be held without bail.

4. Expropriation

169. The standard for determining whether a State's conduct amounts to an expropriation "*is the actual effect of the measures on the investor's property*."[117] An expropriation occurs when the "*actual effect*" of a State's actions is to deprive the investor "*of parts of the value of his investment*"[118] or "*of the use or reasonably-to-be-expected economic benefit of property*."[119] In Telenor Mobile, the arbitral tribunal held that expropriation can be direct either indirect:

> "[…] expropriation can take various forms. Direct expropriation involves the seizure of the investor's property. But expropriation may also be

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114 *Supra* note 75, ¶ 313

115 U. Kriebaum *Arbitrary/ Unreasonable or Discriminatory Measures*, in M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds), *International Investment Law* (Baden Baden: Nomos, forthcoming 2013), p. 8, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268927

116 *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award, 3 November 2008, ¶ 198. Available at http://italaw.com/sites/default/files/case-documents/ita0555.pdf

117 Alan Redfern, Martin Hunter, Nigel Blackaby, and Constantine Partasides, *Law and Practice of International Commercial Arbitration,* (Sweet and Maxwell, 2004), ¶ 11-32

118 *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt,* ICSID Case ARB/99/6, Award (April 12, 2002), ¶ 107. Available at http://italaw.com/documents/MECement-award.pdf.

119 *Supra* note 72, ¶ 103

> indirect, as where, without the taking of property, the measure of which complaint is made substantially deprives the investment of economic value."[120] [121]

170. Indirect expropriation occurs even where there is no physical taking of property:

> "Some measures short of physical takings may also amount to takings in that they permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way."[122]

171. Similarly, legal title will not necessarily be affected:

> "A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.
> While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral."[123]

172. The form of expropriation is of no importance; international law looks to the effect of the expropriatory measure on the investor's property - the 'sole effect doctrine'.[124]

> "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."[125]

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120 *Telenor Mobile Communications A.S. c. The Republic of Hungary*, ICSID No. ARB/04/15, Award (September 13, 2006), ¶ 63. Available at http://italaw.com/documents/TelenorvHungaryAward_002.pdf

121 See also, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Republic of Argentina*, and *AWG Group v. Republic of Argentina*, Consolidated ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, ¶¶ 132 and 134. Available at http://www.italaw.com/documents/SuezVivendiAWGDecisiononLiability.pdf

122 *Expropriation*, UNCTAD Series on Issues in International Investment Agreements II, 2012, p. xi. Available at http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf

123 *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran, The Government of the Islamic Republic of Iran, and others*, Award, IUSCT Case No. 7 (141-7-2), 29 June 1984, in Pieter Sanders (ed), *Yearbook Commercial Arbitration* 1985 - Volume X, (Kluwer Law International 1985), p. 223

124 Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer Law International 2009), pp. 325 and 326

125 *Supra* note 124

173. An expropriation does not have to be for the benefit of the host State for it to be unlawful, although the acts taken against our clients appear to be founded on the re-nationalization of State assets. A State can expropriate an investment, or take measures equivalent to an expropriation in connection with an investment, for the benefit of a third-party. The arbitral tribunal in *Metalclad*[126] clearly recognized that expropriation could also include "*covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State*."[127]

174. Under customary international law states may legitimately exercise their sovereign police powers in a *bona fide*, proportional, and reasonable manner.[128] International tribunals may determine if such application of police power constitutes, in fact and effect, an unlawful expropriation. In such cases "*reference to international standards will be of assistance in determining whether the state measure is reasonable in the circumstances. In the absence of accepted international standards, evidence of consistent and general comparative practice in a variety of states is likely to be relevant,* […]."[129]

175. In the present case, Mr. Mhykailenko's investments in Belarus were expropriated in two phases: first, an effective expropriation took place when the founder, Director and shareholder of UPECO INDUSTRIES was forced into detention without access to modern means of communication, and his business interests crumbled. Second, a *de jure* expropriation occurred when the trial court ordered a seizure of the foreign investor's assets, including UPECO INDUSTRIES.

176. Mr. Mykhailenko himself played a pivotal role in promoting, financing and managing the project. His arrest and 6 subsequent years of imprisonment directly caused the cessation of the investment project, thereby constituting constructive expropriation. These investments were then also directly expropriated by the State, which ordered the confiscation of "*shares in the statutory capital of Upeco Industries at a ratio of 400:1000*

126 *Supra* note 72

127 Supra note 72

128 Newcombe and Paradell, *op. cit.* p. 358

129 Newcombe and Paradell, *op. cit*. p. 360

(as he holds 499 shares out of 1,000 shares in his quality of founder of United Pipe Export Company Trading AG […]."[130]

177. The multiple breaches of Claimants' treaty rights as foreign investors caused them significant losses, which remain entirely uncompensated today by Belarus. They also caused the founder, Director and shareholder of UPECO INDUSTRIES significant moral and physical harm, entitling the foreign investor to moral damages.

178. Therefore, Claimants are seeking both direct damages and moral damages from Belarus, a portion of which Claimants have generously agreed to donate to human rights groups supporting efforts to re-establish the rule of law in the country.

C. Claimants are owed at least USD 115 million in compensation for direct economic harm

179. The Ukraine-Belarus BIT and the Switzerland-Belarus BIT do not specify the precise manner in which compensation must be calculated. It must, however, be determined in accordance with the general principles of international law, which is summarized by the ILC Articles on State Responsibility.[131] Article 31 provide for the State to make full reparation for the injury caused by its internationally wrongful act.[132] A compensable damage includes "*any damage, whether material or moral, caused by the internationally wrongful act*."[133] Consequently, a State will be liable to make such reparation in the form of restitution, compensation and/or satisfaction, either separately or in combination.[134] In the case of compensation, such compensation shall cover any financially assessable damage:

> "The compensation shall cover any financially assessable damages including loss of profits insofar as it is established."[135]

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130 Sentence of the Court of Gomel District of 30 June 2006

131 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. available at: http://www.refworld.org/docid/3ddb8f804.html [accessed on 30 July 2013]

132 *Supra* note 133, Article 31 (1)

133 *Supra* note 133, Article 31 (2)

134 *Supra* note 133, Article 34

135 *Supra* note 133, Article 36 (2)

180. The principle of full reparation as the applicable standard under international law was confirmed by the decision of the Permanent Court of International Justice in *Chorzow Factory*:

> "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[136]

181. In turn, arbitral tribunals have confirmed that unlawful expropriations are to be compensated under the international law standard set forth above.[137]

182. As to the breaches of Belarus' obligations under the BITs and international law other than unlawful expropriation, some arbitral tribunals have applied the principle of full reparation set forth in *Chorzow Factory*.[138]

183. In determining damages for violations of fair and equitable treatment, arbitral tribunals have applied the approach of compensation for the difference in the fair market value of the investment resulting from the treaty breaches. The notion of fair market value generally understood as:

> "the price, expressed in term of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."[139]

184. In valuing investors' loss of profits in relation to their investment or the fair market value, it is common to apply the discounted cash flow ("DCF") method in expropriation

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136 *Chorzow Factory Case (Germany v. Poland)*, 1927 P.C.I.J. (Ser. A) No. 9, ¶ 125. Available at http://www.icj-cij.org/pcij/serie_A/A_09/28_Usine_de_Chorzow_Competence_Arret.pdf

137 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶¶ 792-797, http://italaw.com/sites/default/files/case-documents/italaw1094.pdf; Supra note 84, ¶ 483; Supra note 73, ¶ 349

138 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶¶ 311-315, http://italaw.com/sites/default/files/case-documents/ita0747.pdf; *supra* note 72, ¶ 122 ; *supra* note 86 ¶ 238

139 *Supra* note 87, ¶702

cases.[140] Under the DCF method the cash flows are projected into the future and discounted to their present value.[141]

185. We have chosen to use such a DCF model to determine the harm to our clients for the expropriation of their ownership of the UPECO INDUSTRIES tube factory. Our preliminary assessment of the value of UPECO INDUSTRIES is USD 60 million, based on a DCF model prepared by a quantum expert from a well-known professional services firm headquartered in London. This does not include compensation for half of the cost of the apartment of UPECO INDUSTRIES that was effectively expropriated by Belarus during the foreign investor's imprisonment, for which we are also seeking compensation.[142]

186. Regarding compensation for Belarus' acts preventing the completion of the purchase of Pietra, which we are also seeking, a strict DCF model is less appropriate since the project had to be abandoned. In cases where the loss of future profit can be difficult to quantify with absolute certainty because the project had to be abandoned following a State's unlawful act, arbitral tribunals are fully empowered to award compensation for such a loss. The concept of loss of business opportunity or loss of chance are recognised in a number of national systems and were also codified in UNIDROIT Principles of International Commercial Contracts, which provide in article 7.4.3(2) that "[c]*ompensation may be due for the loss of a chance in proportion to the probability of its occurrence*."

187. The arbitral tribunal in the *Sapphire* case applied this concept and awarded damages for the loss of chance to make profits. There, the tribunal noted that the investor had to prove only a degree of probability of the chance of success:

> "It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the

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140 Michael Pryles, *Lost of Profit and Capital Investment*, p. 8. Available at http://www.arbitration-icca.org/media/0/12223892171920/damages_in_the_international_arbitration_paper.pdf. (last accessed on 30 July 2013)

141 S. Ripinsky with K. Williams, *Damages in International Investment Law* (BIICL, November 2008) p. 296

142 Sale Contract of the apartment in Gomel between PTK Kvestor and UPECO INDUSTRIES

> judge to be able to admit with sufficient probability the existence and extent of the damage."[143]

188. In practice, arbitral tribunals have discretionary power in deciding the amount awarded in order to compensate the loss of a chance.

> "In theory, the loss of a chance is assessed by reference to the degree of probability of the chance turning out in the plaintiff's favour, although in practice the amount awarded on this account is often discretionary."[144]

189. All of Mr. Mykhailenko's businesses quite predictably collapsed following his incarceration for six years. In particular, the nearly-finalized agreement to purchase the Pietra plant collapsed, causing significant additional economic harm to the foreign investor. We are therefore seeking damages regarding the failed purchase of the Pietra steel tube plant in Italy, which was prevented solely due to Belarus' unlawful imprisonment of our client. We estimate the value of the harm caused to our clients in this respect to be a minimum of USD 55 million, based on the detailed commercial and technical audit prepared by the UK-based Global Steel Consultants for Mr. Mhykailenko in November 2004.

190. In addition to this USD 115 million in compensation for direct economic harm, Belarus owes the foreign investor a significant amount of compensation for the egregious moral harm imposed on him.

D. The foreign investor Mr. Mykhailenko is owed at least USD 10 million for each year he was wrongfully detained in a harsh Belarus labor camp without cause

191. We are convinced, based upon our examination of the relevant jurisprudence and doctrine that an arbitral tribunal charged with examining Belarus' breaches of its obligations pursuant to the Belarus-Ukraine BIT and the Belarus-Swiss BIT, would award Mr. Mykhailenko significant monetary compensation for the very serious non-pecuniary damages suffered at the hands of Belarus. In fact, it is very difficult to imagine a stronger case for moral damages than this one in the context of an investment treaty arbitration.

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143 *Sapphire International Petroleum, Ltd. v. National Iranian Oil Company*, 35 ILR 136 (1963)

144 S. Ripinsky with K. Williams, *Damages in International Investment Law* (BIICL, November 2008) p. 291

192. Moral damages arise in the context of the infringement of personality rights – physical injury, violence, wrongful harassment and wrongful imprisonment or deportation.

193. Compensation for moral damages is widely accepted across a variety of legal traditions, as well as in international law. In his 1923 Opinion in the *Lusitania* cases, Umpire Parker refused to accept Germany's submission that mental suffering **cannot** be taken in to account in assessing compensation. In explaining his reasoning, Umpire Parker made express reference to the term 'prejudice moral' and French precedents:

> "Mental suffering is a fact just as real as physical suffering, and susceptible of measurement by the same standards. The interdependency of the mind and the body, now universally recognized, may result in a mental shock producing physical disorders. But quite apart from any such result, there can be no doubt of the reality of mental suffering, of sickness of mind as well as sickness of body. Why, then, should he be remediless of this injury? The courts of France under the provisions of the Code Napoleon have always held that mental suffering or 'prejudice morale' is a proper element to be considered in actions brought for injuries resulting in death. A like rule obtains in several American States, including Louisiana, South Carolina, and Florida. The difficulty of measuring mental suffering or loss of mental capacity is conceded, but the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree."[145]

194. Thus, according to Umpire Parker, the difficulty in quantifying mental suffering should not deter courts or tribunals from making monetary awards for such type of damage or loss. His opinion further elaborated on the concept of damages, finding that someone "*injured is* […] *entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation*",[146] excluding, however, punitive damages.[147]

195. Various courts and tribunals have granted moral damages to victims of human rights abuses, with a view to redressing the mental or physical suffering sustained.[148] Such courts include the Inter-American Court of Human Rights, the European Court of Human Rights, to which Belarus is not a party, and the European Court of Justice. In the 2012

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145 Opinion in the Lusitania Cases, *US v. Germany*, 1 November 1923, VII RIAA 32, ¶ 36

146 *Supra* note 146, p. 40

147 *Supra* note 146, p. 33

148 *Velásquez Rodríguez Case*, Merits, Inter-Am. Ct. H.R. (Ser. C) No. 7 (1989), ¶ ¶ 27, 50

Diallio case, the International Court of Justice awarded moral damages, noting that the quantification of moral damages necessarily "*rests on equitable considerations*".[149]

196. International recognition of the duty of a state to compensate for moral damages suffered as a result of its internationally wrongful act(s) is recorded in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles"). Providing guidance as to what constitutes 'moral damages', the commentary of the ILC Articles' states as follows:

> "'[m]oral damage' includes such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life."[150]

197. Dumberry has provided the following four categories which refine the definition of moral damages:

(i) personal injury which does not lead to loss of income or financial expense;
(ii) emotional harm (feelings of indignity, humiliation, shame, defamation, injury to reputation and feelings, loss of loved ones, loss of enjoyment of life);
(iii) pathological damage (mental stress, anxiety, anguish, pain, suffering, nervous strain, shock, fright, fear or threat); and
(iv) injury to the credit and reputation of a legal entity.

198. Arbitral tribunals constituted under the aegis of ICSID, applying international law, are equally entitled to award moral damages.In *Desert Line*, the first international investment treaty arbitration in which a tribunal awarded compensation for moral damages, the tribunal recalled the principle, set out in the *Lusitania* cases and in James Crawford's commentary on the ILC Articles,[151] that non-material damages may be "*very real, and the mere fact that they are difficult to estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated*."[152]

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149 *Ahmadou Sadio Diallo (Guinea v. Congo*) Judgment of June 19, 2012, ¶ 18

150 *Supra* note 133, Article 31

151 J. Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts : A Retrospect* (2002) Symposium : The ILC's State Responsibility Articles

152 *Supra* note 152, ¶ 289

199. The tribunal found that whilst investment treaties are primarily concerned with property and economic values, they do not preclude a party from, if they chose to, "*in exceptional circumstances, ask for moral damages*."[153]

200. In the above case, it found that when armed gunmen expelled the executives of the claimant from Yemen, those executives were subjected to physical duress, which was malicious, and therefore constitutive of "*fault-based liability*".[154] The claimant's prejudice, which pales in comparison to the harm inflicted on Mr. Mykhailenko, affected the physical health of the claimant's executives and the claimant's credit and reputation.

201. In the ICSID case *Lemire*, the tribunal debated whether Mr. Lemire's treatment by Ukraine constituted the type of 'exceptional circumstances' that warrant an award of moral damages, as set out in *Desert Line.* Upon examining the case law, the tribunal identified three cumulative criteria that would meet the 'exceptional circumstances' test:

(i) the State's actions imply physical threat, illegal detention, or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;

(ii) the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and

(iii) both cause and effect are grave or substantial.

202. Other international investment treaty tribunals have subsequently adopted this test,[155] despite criticisms of it being too demanding. Indeed, certain commentators argue that proof of grave or egregious acts is **not** a requirement to award compensation for moral damages, and fear that the notion of 'exceptional circumstances', as introduced in *Desert Line*, suggests a higher standard of unacceptable conduct in the context of moral damages as compared to other types of compensatory damage. Consequently, it is argued, the reference to 'exceptional circumstances' should be understood to be in recognition of the unusual nature of such claims in the context of investment treaty claims; it is important not to confuse the concept of moral damages, and the context in which they are most

153 *Supra* note 152, ¶ 289

154 *Supra* note 152, ¶ 290

155 *Senor Tza Yap Shum vThe Republic of Peru*, ICSID Case No. ARB/07/6, Final Award, 7 July 2011, ¶ 281. Available at http://www.italaw.com/cases/1126

often awarded.[156] This is a non-issue in the current dispute, however, given the quite obviously grave and egregious acts taken against our client.

203. It has further been opined that the specific behaviour of the obligor may be taken into account when it comes to the consequences of a state's responsibility and the calculation of damages. Accordingly, where the precise damages are hard to quantify, the standard of proof should be lowered if the State's conduct "*can be labelled as outrageous or otherwise reckless*."[157]

204. Various tribunals have suggested that the calculation of moral damages should be "*equitable*",[158] satisfied by awarding on the investor's principal claims,[159] or measured "*in proportion*"[160] to the investment's value. Dumberry in particular contends that the amount of compensation should be proportionate to the seriousness of the offence committed by a state and its degree of responsibility; "[a] *tribunal may award a greater amount of compensation where the conduct of the state is especially malicious or shocking*."[161] On the flipside of the same coin, one tribunal considered the steps taken by the host state to remedy human rights abuses when assessing the quantum of compensation.[162]

205. Where a BIT affords protection to the investor as well as to the investment, a successful claim for moral damages will show that the infringement of the investor's personality rights is directly related to the investment. In *Desert Line*, the tribunal recognised that a legal person (as opposed to a natural one) may also be awarded moral damages. It moreover recognised that damages suffered by the claimant's executives could be the

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156 J. Cabresa, *Moral Damages in Investment Arbitration and Public International Law*, paper presented at the Third Annual Investment Treaty Arbitration Conference: A Debate and Discussion, Interpretation in Investment Arbitration, Apr. 30, 2009, at p. 13

157 I. Schwenzer & P. Hachem, *Moral Damages in International Investment Arbitration*, S. Kröll, L.A. Mistelis, P. Perales Viscasillas & V. Rogers (eds), *Liber Amicorum* Eric Bergsten : International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, 411-430, 2011 Kluwer Law International

158 *Benvenuti & Bonfant v People's Republic of the Congo* ICSID Case No. ARB/77/2, Award, 8 August 1980, ¶ 4.96, 21 *ILM* 1478 (1982)

159 *Pey Casado v Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, ¶ 704. Available at http://www.italaw.com/sites/default/files/case-documents/ita0638.pdf

160 *Supra* note 152, ¶ 289

161 P. Dumberry, *Compensation for Moral Damages in Investor-State Arbitration Disputes*, in M.J.Moser & D.T.Tascher (eds), Journal of International Arbitration, Kluwer Law International, 2010, Vol 27(3), p. 272.

162 *Letelier and Moffit*, cited in P. Dumberry, *op. cit.* pp. 272-273

subject of moral damages.[163] The *Desert Line* tribunal did not distinguish between the injury suffered by physical persons (the claimant's employees), and the damages suffered by the claimant corporation itself. Instead, it employed a practical approach to the damages suffered by the employees and awarded the claimant company compensation for those damages.

206. Certain arbitral tribunals have examined the nature of the host state's conduct towards an investor, and not just the consequences of its actions, when quantifying damages. In doing so, they have expressed their concerns about that host state's treatment of foreign investors, seeking to do more than simply remediate the actual damage suffered. As one author has put it; "*in some cases, under the guise of compensation, a mild form of sanction has been imposed to induce the delinquent government to improve its administration of justice*."[164]

207. A number of commentators have also argued outright that particularly condemnable governmental actions towards foreign investors should have a bearing not just on the requisite standard of proof but on the quantification itself of the amount of compensation to be awarded for moral damages. It has been argued, "*the goal is not only to remediate the actual damages suffered but also to send a 'clear message' to the host state*."[165]

208. Gary Born has notably argued, in his dissenting opinion in *Biwater*, that an "*unacceptable breach of fundamental international rights and protections*"[166] by the state warranted an award of costs, be it for moral damages or otherwise, and that such award "*better advances the objectives of BITs and the ICSID Convention*."[167] We could not agree more, and we note that not having the true rule of law in a country, which is plainly the case with respect to Belarus, grievously undermines foreign investment and harms the objectives of the Treaties, as well as the ICSID Convention.

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163 *Supra* note 152 ¶ 290

164 E. Jimenez de Arechaga, *International Responsibility*, Manual of Public International Law 571 (M. Sorensen ed., 1968) (referring to the following cases: *Janes*, 1926, IV U.N.R.I.A.A. 89; *Putnam*, 1927, IV U.N.R.I.A.A. 151; *Massey*, 1927, IV U.N.R.I.A.A. 155; *Kennedy*, 1927, IV U.N.R.I.A.A. 194).

165 P. Dumberry, *op.cit.* pp. 247-276

166 *Biwater Gauff (Tanzania) Ltd. V Tanzania*, ICSID Case No. ARB/05/22, 24 July 2008, Concurring and Dissenting Opinion of Gary Born, 18 July 2008, ¶ 33

167 *Supra* note 173, ¶ 32

209. In the case at hand, it is clear that Mr. Mhykailenko is entitled to moral damages from Belarus. The nature of the damages suffered by Mr. Mykhailenko fall squarely within the types of harm contemplated as qualifying for moral damages in arbitral jurisprudence and doctrine, including, but not limited to, the following:

(i) personal injuries sustained whilst he was in detention;
(ii) emotional harm (feelings of indignity, humiliation, shame, defamation, injury to reputation and feelings, the effects of his divorce and estrangement from his [only] son, loss of enjoyment of life); and
(iii) pathological damage (mental stress, anxiety, anguish, pain, suffering, nervous strain, shock, fright, fear and threat).

210. The nature of the Belarusian authorities' conduct, which represented egregious breaches of multiple basic standards of protection under the BITs, will be taken into account by an arbitral tribunal when seeking to quantify such moral damages. An international arbitral tribunal would also be sensitive to Belarus' international reputation for publicly displaying a healthy disregard for human rights, which would undoubtedly compound its quantification of moral damages.

211. Whilst it is hard to estimate precisely what sum an arbitral tribunal might award in moral damages for Belarus' acts, it is reasonable to presume that they would seek to provide moral damages in proportion to the gravity of the breach. In the case at hand, the record shows that Belarus' acts are undeniably grave, qualifying as "exceptional circumstances" in the strictest sense of the meaning interpreted pursuant to *Desert Line*,[168] and more than meeting the test set out in *Lemire*.[169]

212. In light of the above, our client is owed at least USD 60 million in moral damages, which represents USD 10 million for each year of his life that he spent being mistreated in a Belarus hard labor camp.

213. Such an amount is commensurate with compensation for similar harm paid by other States for similar wrongs. For instance, the United States was ordered to pay USD 101.7

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[168] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶¶ 283-291. Available at http://www.italaw.com/sites/default/files/case-documents/ita0248_0.pdf

[169] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB(AF)/98/1, Award, 18 September 2000, ¶¶ 530 – 541. Available at http://italaw.com/documents/LemireVUkraine_Award_28March2011.pdf

million to men who were wrongfully detained by the United States due to the actions of the Federal Bureau of Investigation in the case *Limone v. United States*, 579 F.3d 79 (1st Cir. 2009). There, however, the conditions of detention were far better, and the Americans did not have significant investments that were negatively impacted by State conduct.

V. AMICABLE SETTLEMENT

214. Given the prior treatment of our client, we wish to inform you that the slightest threat to our client's safety or security by the Belarus KGB or another State organ will not be tolerated, and we intend to exercise every legal, diplomatic, political and economic means available to ensure his safety.

215. Redacted

219. If settlement fails, then we will not hesitate to initiate an investment treaty arbitration to recover in full the amounts owed to our clients under the Belarus-Ukraine BIT and the

Belarus-Swiss BIT, in non-confidential ICSID proceedings that will also serve to warn other foreign investors of the dangers of investing in Belarus. After we win this arbitration, we will not hesitate to seek full compensation through the attachment of assets of its State-owned enterprises, including commercial airplanes, as well as the significant amount of State funds that have already been frozen by the EU and the United States outside of Belarus.

220. That said, we trust that you will be willing to negotiate an amicable resolution to this dispute in good faith, and we look forward to hearing from you.

Yours sincerely,

William Kirtley

Date:

2/6/2013