On September 23, 2014 the Economic Court of the CIS passed Decision № 01-1/1-14 "On Interpretation of Article 11 of the Moscow Convention for the Protection of Investor's Rights dated March 28, 1997".

Article 11 of the 1997 Convention reads as follows:

"*Disputes related to making investments under the present Convention shall be examined by the courts or arbitration courts of the states-parties to the disputes, by the Economic Court of the Commonwealth of Independent States and/or other international courts or international arbitration courts*".

Interpretation of Article 11 of the 1997 Convention is given in paragraphs 1, 2, 3 and 4 of the Decision of the CIS EC dated September 23, 2014.

Paragraphs 1 and 4 of the mentioned interpretation should be viewed together, since they contain one and the same idea – the idea of absence of an arbitration agreement in Article 11 of the 1997 Convention.

These paragraphs set forth as follows:

"*1. The provisions of Article 11 of the Convention for the Protection of Investor's Rights dated March 28, 1997 are of a general nature, being limited just by determination of potential types of institutions which may examine the disputes related to making investments under the present Convention.*

...

4. The provisions of Article 11 of the Convention for the Protection of Investor's Rights dated March 28, 1997 to the effect that disputes related to making investments may be examined by international arbitration courts establish solely the principal possibility of their examination in international arbitration subject to conclusion of arbitration agreements according to the established procedure.

The provisions of Article 11 of the Convention may not be considered as an arbitration agreement to examine a dispute related to investment making".

Paragraphs 1 and 4 of interpretation of Article 11 of the 1997 Convention contained in the Decision of the CIS EC dated September 23, 2014 state that Article 11 may not be considered as an arbitration agreement:

1) the states agreed on the "*potential types of institutions*" which may examined the disputes

2)the states agreed on a principal possibility of their examination by such institutions "*by way of international arbitration subject to conclusion of arbitration agreements according to the established procedure*".

Of further interest is also paragraph 3 of the Decision of the CIS EC dated September 23, 2014:

"3. *According to Article 11 of the Convention for the Protection of Investor's Rights dated March 28, 1997, disputes related to making investments under this Convention may be a subject-matter of examination in a specific international arbitration court provided that the competence of such court is stipulated by the national legislation of a state-party to the dispute, in a treaty to which the state-party to the dispute is a participant and/or in a separate agreement between the investor and the state-party to the dispute".*

In order for an investment dispute to be examined in an international arbitration envisaged by Article 11 such arbitration should be specified in the agreement between the investor and the state.

Thus, on page 38 of the MCCI Award dated June 30, 2014 the following is stated:

"*In the Claimants' opinion, the procedure of conclusion of an arbitration agreement in investment arbitration, the parties to which are the state and investor, shall be determined in a multilateral or bilateral agreement on the promotion and protection of capital investments or in the national legislation of the state.*

A treaty or a national law contains a unilateral obligation of the state (consent of the state to the fact, that investor may file a claim against it with any international body for settlement of investment disputes). Specific bodies or a certain category of bodies may be designated. This is a unilateral public law obligation of the state which is included into a treaty or a national law and is subject to international public law.

At the moment of filing the statement of claim with the body chosen by the investor the investor expresses its consent and in such a way concludes an arbitration agreement."

Thus, the competence of the MCCI Arbitration arises in accordance with Article 11 of the 1997 Convention **on the basis of a separate agreement between the investor and the state-party to the dispute by way of filing by the investor of the statement of claim with a specific body falling under the category of institutes mentioned in Article 11 (the specific international arbitration court).**

It is also necessary to consider paragraph 2 of the Decision of the CIS EC dated September 23, 2014:

"Investment protection disputes under the Convention for the Protection of Investor's Rights dated March 28, 2014 may be examined by international courts when such courts fall under jurisdiction in rem and jurisdiction in personam of an international court determined in accordance with its constituent documents and other international legal instruments which establish the possibility of dispute examination in international courts.

The reference in Article 11 to the possibility of examination of investment disputes by international courts is not a sufficient ground for investors to refer to any international court".

This paragraph coincides completely with the position of the MCCI Arbitration set forth in the Award dated June 30, 2014 as well as with the position of the Claimant stated in particular in the Statement of Claim.

In particular the Statement of Claim (extended version) on its page 107 sets forth as follows:

"The Investor is entitled to choose itself such a court, taking into account that such court should have competence to examine international disputes (be international) and be competent to examine investment disputes. In fact, there are few international arbitration courts which Rules provides for examination of investment disputes. The investor has the right to refer to any of them. At the moment of referral the offer is accepted and an arbitration clause is concluded.

Basing on para. 1 Article 1 of the Rules of the Arbitration at the Moscow CCI, this Arbitration acts as an "international commercial arbitration" (See Exhibit C-16).

Basing on Article 2 of the Regulations on the Arbitration at the Moscow CCI, "any dispute arising out of contractual and civil law relations may be referred to arbitration by agreement of the parties to the arbitration proceedings"(see Exhibit C-17). Based in para. 1(3) Article 3 of the Rules of Arbitration at the Moscow CCI, "civil law relations" disputes out of which may be referred to the court include "disputes in the field of investment activity" (see Exhibit C-16).

The documents which underlie the activity of the Arbitration do not contain a prohibition to examine the disputes with participation of the state"..

On page 42 of the Award of the MCCI Arbitration dated June 30, 2014 the following is stated:

"In the opinion of the Claimants' representatives, the investor is entitled to independently choose an international arbitration court bearing in mind that such court should have the right to settle international disputes (be an international one) and the right to settle investment disputes.

According to Article 1 of the Regulations approved by the Order of the President of the Moscow CCI dated July 20, 2012 № 20, the MCCI Arbitration is a permanent arbitration institution (court of referees) operating in accordance

with the Federal Law "On Arbitration Courts in the Russian Federation" and the Law of the Russian Federation "On International Commercial Arbitration". In this case the Law of the Russian Federation "On International Commercial Arbitration" dated July 7, 1993 shall apply.

According to Article 1 of the Rules, the MCCI Arbitration is a permanent arbitration institution (court of referees) set up by the Moscow CCI for settlement of disputes out of contractual and other civil law relations in accordance with its jurisdiction. Basing on para. 1.3 Article 3 of the Rules disputes in the sphere of investment activity can be referred to the MCCI Arbitration.

Basing on para.2 Article 1 of the Rules of the MCCI Arbitration this arbitration court acts as "international commercial arbitration". By virtue of Article 2 of the Regulations on the MCCI Arbitration, "any dispute arising out of contractual and civil law relations may be referred to arbitration by agreement of the parties to arbitration proceedings", and by virtue of para. 1(3) Article 3 of the Rules of the MCCI Arbitration "civil law relations" disputes in connection with which may be referred to the court include "disputes in the sphere of investment activity".

The documents which underlie the work of the MCCI Arbitration do not contain a prohibition to examine the disputes with participation of the state."

Conclusion:

Thus, the Decision of the CIS EC dated September 23, 2014 is based on the fact that Article 11 of the 1997 Convention does not contain an arbitration agreement but solely establishes the "types of institutions" which may examine the disputes under the present Convention. I.e. the parties to the Convention have assumed unilateral obligations that disputes may be examined by these types of institutions, however only (para.3) subject to existence of a separate agreement between a state-party to the dispute and an investor in respect of a certain institution (a specific arbitration court). Such an agreement is reached, for example, by way of recourse of an investor to a specific international arbitration (international arbitration courts are referred to the institutions which are determined by Article 11 of the Convention). Taking into account the provisions of para.2, only that specific international arbitration may be chosen which Rules provide for examination of disputes between a state and an investor.

The above mentioned allows to conclude that the Decision of the CIS EC corresponds completely to the Claimant's position and to the stance of the MCCI Arbitration it took in determining its jurisdiction over the present dispute.