

UNDER THE ARBITRATION RULES OF THE UNITED NATIONS

COMMISSION ON INTERNATIONAL TRADE

IN THE PROCEEDING BETWEEN

SERGEI PAUSHOK

CJSC GOLDEN EAST COMPANY

CJSC VOSTOKNEFTEGAZ COMPANY

**Claimants**

-AND-

**THE GOVERNMENT OF MONGOLIA**

**Respondent**

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**AWARD ON JURISDICTION AND LIABILITY**

**APRIL 28, 2011**

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*Members of the Tribunal*

The Honorable Marc Lalonde, P.C., O.C., Q.C. (President)

Dr. Horacio A. Grigera Naón (Arbitrator)

Professor Brigitte Stern (Arbitrator)

*Secretary of the Tribunal*

M<sup>e</sup> Lev Alexeev

*For Claimants:*

Mr. George M. von Mehren  
Mr. Stephen P. Anway  
Mr. Rostislav Pekař  
Mr. Stephen Fazio  
Mr. Ivan Trifonov  
Ms. Irina Golovanova  
Mr. Sergey Treshchev *et al.*  
Squire, Sanders & Dempsey L.L.P.

*For Respondent:*

Mr. Michael D. Nolan  
Mr. Edward G. Baldwin  
Mr. Frédéric G. Sourgens  
Milbank Tweed Hadley & McCloy L.L.P.  
Ms. Tainvankhuu Altangerel  
Ministry of Justice and Home Affairs,  
Mongolia

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## INDEX OF DEFINITIONS AND ABBREVIATIONS

The following procedural definitions and abbreviations are used in the present Award:

Claimants' <i>Notice of Arbitration</i> , November 30, 2007:	" <b>Notice of Arbitration</b> " or "C. NA"
Claimants' <i>Request for Interim Measures including a Temporary Restraining Order Prior to March 24, 2008</i> :	"RIM"
Tribunal's <i>Temporary Restraining Order</i> , March 23, 2008:	"TRO"
Respondent's <i>Opposition to Claimants' March 14, 2008 Request for Interim Measures</i> , April 30, 2008:	" <b>Opposition to the RIM</b> "
Claimants' <i>Reply on Interim Measures</i> , May 30, 2008:	" <b>Reply on Interim Measures</b> "
Respondent's <i>Rejoinder to the Request for Interim Measures</i> , June 30, 2008:	" <b>Rejoinder to the Request for Interim Measures</b> "
Claimants' <i>Statement of Claim</i> , June 27, 2008:	"C. SC"
Tribunal's <i>Order on Interim Measures</i> , September 2, 2008:	"OIM"
Respondent's <i>Defense, Objections to Jurisdiction, Counterclaim</i> , September 26, 2008:	" <b>R. Defense</b> "
Claimants' <i>Reply, Answer on Jurisdiction, Defense to Counterclaim, Objections to Jurisdiction over the Counterclaims and Statement of Claim with respect to the New Facts</i> , November 28, 2008:	"C. Reply"
Respondent's <i>Rejoinder, Reply on Jurisdiction, Reply on Counterclaim, Answer on Jurisdiction over Counterclaims and Defense with respect to the New Facts</i> , February 20, 2009:	" <b>R. Rejoinder</b> "
Claimants' <i>Rejoinder on Jurisdiction and on Counterclaim</i> , March 13, 2009:	"C. Rejoinder"
Claimants' <i>Reply on the New Facts and Statement of Claim with respect to December 2, 2008 events</i> , March 27, 2009:	"C. Reply New Facts"
Respondent's <i>Rejoinder on the New Facts and Defence with respect to December 2, 2008 events</i> , April 15, 2009:	" <b>R. Rejoinder New Facts</b> "
Claimants' <i>Post-Hearing Brief on Jurisdiction and Liability</i> , June 12, 2009:	"C. PHB"
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Claimants' <i>Submission on Jurisdiction and Applicable Law Regarding the Negotiations of a Stability Agreement in 2001</i> , November 30, 2009:	"C. SPHB"
Respondent's <i>Submission Concerning the Questions Put by Chairman Lalonde in his Letter of September 15, 2009</i> , November 30, 2009:	" <b>R. SPHB</b> "
Tribunal's present Award on Jurisdiction and Liability:	"Award"
Exhibit filed by Claimants. For instance, CE-1:	CE - [Latin digit]

Exhibit filed by Respondent. For instance, RE-1:	RE - [Latin digit]
Witness statements filed by the Parties. For instance, Paushok-I:	[name of the witness] - [Roman digit]
Exhibit filed in support of a witness statement. For instance, Paushok Ex.-1:	[name of the witness] <u>Ex.</u> - [Latin digit]
Authority cited by Claimants. For instance, CA-1:	CA - [Latin digit]
Authority cited by Respondent. For instance, RA-1:	"RA- [Latin digit]"
Transcripts of the Hearing on jurisdiction and liability (held in Frankfurt, Germany, from April 23, 2009 to April 30, 2009). For instance, D1:P103:L4-6 refers to the portion of the transcript taken on Day 1 and appearing at lines 4 to 6 on page 103	D [Latin digit] : P [Latin digit]: L[Latin digit]

## 1. PARTIES AND INVESTMENTS

1. Claimants in this arbitration are Mr. Sergei Paushok, CJSC Golden East Company ("**Golden East**"), and CJSC Vostokneftegaz Company ("**Vostokneftegaz**") (collectively "**Claimants**").
2. Mr. Sergei Paushok is a national of the Russian Federation.
3. Golden East is a closed joint stock company constituted in accordance with the laws of the Russian Federation with a registered office in that State.
4. Vostokneftegaz is a closed joint stock company constituted in accordance with the laws of the Russian Federation with a registered office in that State.
5. Claimant Paushok is the sole shareholder of both Golden-East and Vostokneftegaz. The structure of Claimant Paushok's shareholdings, which include Russian and Mongolian companies other than Golden-East and Vostokneftegaz, is set out in the chart attached hereto as **Annex 1**.
6. As appears from Annex 1, Claimants, directly or indirectly, own 100% of the outstanding shares of KOO Golden East-Mongolia ("**GEM**"), a gold mining company, KOO Bumbat ("**Bumbat**"), also a gold mining company, and KOO Vostokneftegaz ("**VNGM**"), an oil and gas company. GEM, Bumbat and VNGM are constituted pursuant to the laws of Mongolia and are operating in that country.
7. In these proceedings, Claimants are represented by Squire, Sanders & Dempsey, L.L.P.
8. Respondent is the Republic of Mongolia ("**Mongolia**" or "**Respondent**").
9. In these proceedings, Respondent is represented by Milbank, Tweed, Hadley & McCloy L.L.P. and the Ministry of Justice and Home Affairs of Mongolia.

## 2. PROCEDURAL HISTORY

10. On November 30, 2007, Claimants issued a Notice of Arbitration (the "**Notice of Arbitration**" or the "**C. NA**") against the Government of Mongolia, in accordance with Article 3 of the *Arbitration Rules of the United Nations Commission on International Trade Law* (the "**UNCITRAL Rules**"). A table outlining all the proceedings filed in this arbitration as well as their respective subject matter is attached as **Annex 2** (save the proceedings related to the Request for Interim Measures addressed hereinbelow).
11. In their Notice of Arbitration, Claimants alleged that Respondent breached its obligations under the *Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Russian Federation and the Government of Mongolia* (the "**Treaty**" or the "**BIT**") by, among others, enacting and enforcing the law "*On Imposition of Price Increase (Windfall) Taxes on Some Commodities*" (the "**WPT Law**") and the law "*On Minerals*" (the "**2006 Minerals Law**").

12. Article 6 of the Treaty allows the investor of a Contracting Party to initiate arbitration against the other Contracting Party pursuant to the UNCITRAL Rules:

"Disputes between one of the Contracting Parties and an investor of the other Contracting Party, arising in connection with realization of investments, including disputes concerning the amount, terms or method of payment of the compensation, shall, whenever possible, be settled through negotiations.

If a dispute cannot be settled in such manner within six months from the moment of its occurrence, it may be referred to:

- (a) A competent court or arbitral tribunal of the Contracting Party in which territory the investments were made;
- (b) The Arbitration Institute of the Stockholm Chamber of Commerce;
- (c) an *ad hoc* arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."

13. In their Notice of Arbitration, Claimants appointed Dr. Horacio A. Grigera Naón as arbitrator.
14. On February 18, 2008, Respondent appointed Professor Brigitte Stern as arbitrator.
15. On March 12, 2008, Arbitrators Stern and Grigera Naón, further to consultation with Counsel to the Parties, appointed the Honorable Marc Lalonde as President of the Tribunal.
16. Subsequently, the Tribunal, further to consultation with the Parties, appointed Me Lev Alexeev as Secretary of the Tribunal.
17. On March 14, 2008, Claimants submitted to the Tribunal a *Request for Interim Measures including a Temporary Restraining Order Prior to March 24, 2008* (the "**RIM**"), accompanied by the first witness statement of Claimant Paushok ("**Paushok-I**") pursuant to Articles 15 and 26 of the UNCITRAL Rules. A complete list of all the witness statements filed in support of the subsequent proceedings is attached as **Annex 3**.
18. In their RIM, Claimants requested an order from the Tribunal directing Respondent during the pendency of the arbitral proceedings:
- (1) To suspend enforcement of the WPT Law, the 2006 Minerals Law, and penalties for alleged late tax payments against GEM;

- (2) To suspend any criminal action against Claimants or their investments and guarantee free movement in and out of Mongolia for GEM's representatives, managers and employees;
  - (3) To suspend any other conduct that aggravates the dispute, including, but not limited to, disparagement of Claimants or their investment in the media or unjustified refusal of permission to continue to mine gold in the same way and at the same levels as were approved in 2006 and 2007.
19. Claimants also requested the issuance of a temporary restraining order directing Respondent to refrain from the activities listed in sub-paragraphs (1), (2) and (3) above pending the Tribunal's decision on interim measures.
20. The request for the issuance of a temporary restraining order was based on the alleged intention of Respondent to prosecute the enforced collection of taxes and fees disputed in this arbitration on March 24, 2008.
21. Subsequent to the RIM, various letters and telephone communications were exchanged between the Parties and the members of the Tribunal, including (i) a letter from Counsel for Respondent dated March 22, 2008 and opposing the issuance of a temporary restraining order and (ii) a telephone conference call between Counsel for the Parties and the President of the Tribunal on March 22, 2008.
22. On March 23, 2008, the Tribunal issued the following temporary restraining order (the "TRO"):
  - "1- Taking into account the undertaking already given, Respondent shall refrain from seizing or obtaining a lien on the assets of Claimants and shall allow Claimants to maintain their ordinary business operations;
  - 2- Claimants shall immediately sign an undertaking not to move assets out of Mongolia nor to take any action which would alter in any way the ownership and/or financial interests of the Claimants with respect to their assets in Mongolia, without prior notice to and agreement of Respondent;
  - 3- Claimants shall, within seven days, provide Respondent with a complete list of their assets in Mongolia;
  - 4- The issue raised by Respondent of the provision of security by Claimants shall be dealt with at the time of the consideration of the Request for Interim Measures;
  - 5- The briefing schedule for any issue related to Claimants' interim measures application shall be decided in a separate



procedural order by the Tribunal, after consultation with the Parties.

Pending its decision on interim measures, the Tribunal urges the Parties to refrain from any action which could lead to further injury and aggravation of the dispute between the Parties."

23. On April 18, 2008, an organizational meeting was held at the offices of Stikeman Elliott L.L.P. located at 1155, René-Lévesque Blvd West, 40<sup>th</sup> floor, Montreal, Québec, Canada. The purpose of this meeting was to establish the terms of reference and to discuss various procedural and logistical issues.
24. In addition to the members of the Tribunal and the Secretary thereof, the following Counsel attended that meeting:
  - Mr. George M. von Mehren and Mr. Stephen P. Anway (Counsel for Claimants), and
  - Mr. Michael D. Nolan and Mr. Edward G. Baldwin (Counsel for Respondent)
25. It was decided at the meeting that this arbitration will be split in two phases, the first phase dealing with the issues of Jurisdiction/ Admissibility and Liability ("**Phase 1**") and, should the need be, the second phase dealing with the issues of Damages ("**Phase 2**"). This Award on Jurisdiction and Liability is rendered further to the completion of Phase 1.
26. Further to the meeting, the contents of which, as per Counsel for the Parties' request and agreement, were not transcribed, the Secretary of the Tribunal communicated to Counsel for the Parties detailed minutes of the said meeting on April 29, 2008.
27. On April 30, 2008, Respondent submitted its *Opposition to Claimants' March 14, 2008 Request for Interim Measures* (the "**Opposition to the RIM**").
28. On the basis of the minutes of the meeting referred to in paragraph 26, Counsel for the Parties prepared a draft Procedural Order no. 1 and submitted same for consideration to the Tribunal on May 14, 2008.
29. On May 30, 2008, Claimants submitted their *Reply on Interim Measures*, amending their Request for Interim Measures and limiting the relief sought to the extension of the temporary restraining order in an Order on Interim Measures.
30. On June 3, 2008, the President of the Tribunal issued Procedural Order no. 1, which dealt with all the procedural and logistical issues, save the timetable of submissions and hearing for Phase 1 (Jurisdiction/Admissibility and Liability). Under that Order, The Hague was selected as the seat of the arbitration. The applicable law is public international law and the law of Mongolia as far as it is relevant

31. On June 4, 2008, the Tribunal, having received various observations from the Parties, issued Procedural Order no. 2, which mainly dealt with the timetable for Phase 1 (Jurisdiction/ Admissibility and Liability).
32. On June 27, 2008, Claimants submitted their *Statement of Claim* (the "C. SC").
33. On June 30, 2008, Respondent submitted its *Rejoinder to the Request for Interim Measures*.
34. On July 2, 2008, a conference call was held between Counsel for the Parties and the President of the Tribunal in order to address various organizational and procedural issues in relation to the forthcoming hearing on interim measures.
35. From the date of filing of the RIM until the date of the hearing on interim measures, Counsel for the Parties addressed numerous letters to the members of the Tribunal with respect to the said request as well as in relation to issues peripheral thereto.
36. On July 8, 2008, a full day hearing on interim measures was held at the offices of Stikeman Elliott L.L.P. located at 1155, René-Lévesque Blvd West, 40<sup>th</sup> floor, Montreal, Québec, Canada (the "**Interim Hearing**").
37. In addition to the members of the Tribunal, the Secretary of the Tribunal and the Court Reporter, this Interim Hearing was attended by:

On behalf of Claimants:

Mr. George M. von Mehren (Counsel for Claimants)  
Mr. Stephen P. Anway (Counsel for Claimants)  
Mr. Rostislav Pekař (Counsel for Claimants)  
Ms. Irina Golovanova (Counsel for Claimants)  
Mr. Trevor Covey (Counsel for Claimants)  
Mr. Sergei Paushok (CJSC Golden East Company, CJSC Vostokneftegaz Company)  
Ms. Yana Ibragimova (CJSC Golden East Company)  
Ms. Marina Spirina (CJSC Golden East Company)

On behalf of Respondent:

Mr. Michael D. Nolan (Counsel for Respondent)  
Mr. Edward G. Baldwin (Counsel for Respondent)  
Mr. Frédéric G. Sourgens (Counsel for Respondent)  
Ms. Tainvankhuu Altangerel (Ministry of Justice and Home Affairs, Mongolia)

38. At the Interim Hearing, Counsel for the Parties presented oral submissions to the Tribunal and Mr. Paushok was heard as a witness and questioned by the Tribunal. Questions from the Tribunal and Mr. Paushok's answers thereto were interpreted by Ms. Golovanova, with occasional assistance from the Secretary of the Tribunal.

39. Verbatim transcripts of the Interim Hearing were produced in English and were concurrently available for viewing throughout the Interim Hearing. Copies of the transcripts were distributed to the Tribunal and the Parties a few days after the Interim Hearing.
40. Having consulted with Counsel for the Parties, the Tribunal decided that post-hearing submissions were not required and took the RIM under advisement.
41. On August 23, 2008, Claimants requested leave from the Tribunal to supplement their Statement of Claim in order to add certain allegation related to Respondent's acts in relation to Bumbat and the conversion of exploration licenses into mining licenses (respectively the "**New Facts**" and the "**Request to Supplement**").
42. The Tribunal deliberated on various occasions on the Request for Interim Measures.
43. On September 2, 2008, the Tribunal issued its Order on Interim Measures (the "**OIM**"), granting Claimants' request in part and deciding as follows:

"Claimants' application for interim measures of protection under Article 26 of the UNCITRAL Rules is granted in accordance with the terms and subject to the conditions below:

1. Payment to Respondent of the Windfall Profit tax owing by GEM (including interest and penalties) is suspended until the Tribunal has ruled on the merits of Claimants' Request for relief.
2. Taking note of the undertaking previously made by Respondent on March 19, 2008 and confirmed at the Hearing, Respondent shall refrain from seizing or obtaining a lien on the assets of GEM and other assets of Claimants in connection with the WPT owing to Respondent or from directly or indirectly taking any other action leading to the same or similar effect, except in accordance with the Tribunal's Orders, and shall allow GEM and Claimants to maintain their ordinary business operations in Mongolia.
3. Following their previous undertaking in that regard on March 26, 2008, Claimants shall not move assets out of Mongolia, nor take any action which would alter in any way the ownership and/or financial interests of Claimants with respect to their assets in Mongolia, without prior notice to and agreement of Respondent. Sale and pledges of gold are authorized provided the funds thus obtained are used for the ordinary business operations of GEM. Under no circumstances should such funds be used for other purposes; in particular, no transfer of funds or assets of any kind should be made outside of Mongolia (except for deposit into

the escrow account under the conditions described below) or to any of the Claimants or any person, corporation or business related to them, without Respondent's agreement.

4. Claimants shall provide gradually increasing security as described below. The Tribunal may increase or decrease the security for good cause shown premised on the evolution of GEM's business. Claimants shall submit for approval by the Tribunal, within twenty days of the present Order, a detailed proposal, which will have been discussed with Respondent, concerning the implementation of one of the following measures of protection which they will have selected:
  - (a) An escrow account in an internationally recognized financial or other institution outside Mongolia and Russia and acceptable to the Tribunal;
  - (b) The provision of a bank guarantee to the same effect and under the same conditions from an internationally recognized financial or other institution outside Mongolia and Russia and acceptable to the Tribunal.

If Respondent is not satisfied with the arrangement proposed by Claimants, the Tribunal will issue the appropriate order upon request by one of the Parties.

5. The cost of the escrow account shall be borne equally by Claimants and Respondent but can be made part of the claim for compensation by each Party.
7. Claimants shall deposit in the escrow account (if such is the option retained), on the first working day of each month following the establishment of that account, the sum of US\$ 2 million, until a final award is rendered in the present case or until the sum in the escrow account has reached 50% of the total amount of the accrued WPT claimed by Respondent, including interest and penalties, whichever comes first. The monies deposited in the escrow account may be invested in financial instruments of high liquidity. The decision regarding the scope of the security is adopted by majority, Dr. Horacio A. Grigera Naón being of the view that tax penalties should be excluded from the determination or calculation of the security.
7. Claimants may use the income resulting from the sale of gold by GEM for deposit into the escrow account, provided that, in no circumstance, such transfer would result in a

reduction of shareholders' equity in GEM below the sum of MNT 31,578,323,602.35 mentioned at line 2.3.20 of the Balance Sheet of the Financial Statements of December 31, 2007 (after inclusion in the liabilities of the company the amount of WPT payable at that time - but not actually paid - of MNT 35,241,117,584.00 mentioned at line 2.1.1.12. Each such transfer shall be preceded by an affidavit signed by Director S.V. Paushok and the Chief Accountant of GEM confirming that fact and sent to Respondent and the Tribunal.

8. If, instead of the escrow account, the bank guarantee option is retained, arrangements to the same effect shall be put into place.
9. Claimants shall, every six months, provide Respondent with a complete list of their assets in Mongolia.
10. The scope of this Order does not extend beyond the subject-matter of this dispute and does not prevent Mongolia, after due consideration in good-faith of the Tribunal's direction under paragraph 11 below, from exercising its rights against GEM or Claimants in matters unrelated to this dispute, including taxes owing in other respect than the Windfall Profit Tax.
11. The Parties shall refrain, until a final award is rendered in this case, from any action which could lead to further injury and aggravation of the dispute between the Parties.
12. The Tribunal reserves for later consideration its decision on costs arising from these proceedings.
13. The Temporary Restraining Order is terminated.
14. The Tribunal reserves the right to amend or revoke the present Order at any time during the proceedings, upon request by one of the Parties demonstrating the need for such action. In particular, failure by Claimants to timely provide or maintain the required security could lead to the immediate revocation of the present Order."

[references omitted]

44. As described more fully herein below, Claimants failed to provide one of the forms of security provided for in the OIM and, therefore, the latter expired on December 2, 2008.

45. On September 24, 2008, the Tribunal, having received various observations from the Parties, issued Procedural Order no. 3, whereby the Tribunal ordered the production of certain documents by Respondent, granted Claimants' Request to Supplement and amended the procedural timetable accordingly.
46. On September 26, 2008, Respondent filed its *Defense, Objections to Jurisdiction, Counterclaim* (the "**R. Defense**").
47. From September 22 until October 16, 2008, the Parties exchanged among themselves and with the Tribunal a voluminous correspondence with respect to the implementation of the OIM, Claimants proposing alternative forms of security and Respondent seeking security for costs and requesting that the OIM be varied in several respects on the basis of alleged violations of the TRO by Claimants (the "**OIM-related Requests**").
48. On November 5, 2008, the Tribunal adjudicated the OIM-related Requests and issued Procedural Order no. 4, whereby it reaffirmed the OIM, invited the Parties, in light of Claimants' inability to provide one of the forms of security set out in the OIM, to come to a negotiated solution with respect to the implementation thereof by November 21, 2008 and advised the Parties that failure to provide one of the forms of security set out in the OIM or to come to an alternative agreement would lead to the automatic termination of the OIM on December 2, 2008.
49. On November 17, 2008, the Tribunal issued Procedural Order no. 5, ordering the production of certain documents by Respondent, including documents the production of which had already been ordered by Procedural Order no. 3.
50. On November 28, 2008, Claimants filed their *Reply, Answer on Jurisdiction, Defense to Counterclaim, Objections to Jurisdiction over the Counterclaims and Statement of Claim with respect to the New Facts* (the "**C. Reply**").
51. On December 19, 2008, the Tribunal held a conference call with the Parties with respect to the issues related to the alleged failure by Claimants to timely disclose certain documents and the organization of the Hearing on Jurisdiction/Admissibility and Liability. On the same day, the Tribunal issued Procedural Order no. 6, which dealt with the issues addressed during the conference call, modified the timetable with respect to the remaining steps of Phase 1 and took notice of the fact that the Parties agreed holding the Hearing on Jurisdiction/Admissibility and Liability in Frankfurt, Germany.
52. On February 20, 2009, Respondent filed its *Rejoinder, Reply on Jurisdiction, Reply on Counterclaim, Answer on Jurisdiction over Counterclaims and Defense with respect to the New Facts* (the "**R. Rejoinder**").
53. By a letter dated March 3, 2009, Claimants advised the Tribunal that they would not file their *Reply on Objections to Jurisdiction over Counterclaims*, the issue having been fully briefed, and that, by the same token, the need for Respondent's *Rejoinder on Objections to Jurisdiction over Counterclaims* was no longer required. Claimants also sought that the procedural timetable be varied in such a way as *Claimants' Reply regarding New Facts and Respondent's Rejoinder regarding New Facts* be joined to their respective submissions on

Damages (Phase 2), if any, rather than being submitted as provided for in Procedural Order no. 3. On March 8, 2009, Respondent opposed Claimants' Request for the modification of the timetable with respect to the proceedings related to the New Facts.

54. On March 13, 2009, Claimants filed their *Rejoinder on Jurisdiction and on Counterclaim*, without including however their Reply on the New Facts as directed by Procedural Order no. 3 (the "**C. Rejoinder**").
55. On March 16, 2009, the Tribunal issued Procedural Order no. 7, whereby it took notice that no further submissions on the issue of jurisdiction over counterclaims would be filed, set the dates by which the submissions on the New Facts as well as on the events of December 2, 2008 had to be filed and allowed Claimants to adduce a brief expert rebuttal evidence by way of direct examination of Professor Temuulen Bataa at the Hearing on Jurisdiction/Admissibility and Liability.
56. On the same day, the Tribunal communicated with the Parties (i) requesting the Parties to provide, by April 1<sup>st</sup>, 2009, a joint detailed hearing scenario with respect to the allocation of time at the Hearing, the order and the length of the oral submissions, the number and the identity of the witnesses, the sequence and the length of the examinations and (ii) advising the Parties that it would rule on any on the above issues should the Parties be unable to come to an agreement.
57. On March 27, 2009, Claimants filed their *Reply on the New Facts and Statement of Claim with respect to December 2, 2008 events* (the "**C. Reply New Facts**").
58. On April 6, 2009, the Parties having been unable to agree on all the issues addressed in the Tribunal's communication of March 16, 2009, the Tribunal issued Procedural Order no. 8, which dealt with the issues related to the holding of the Hearing on Jurisdiction/Admissibility and Liability.
59. On April 14, 2009, a conference call was held among Counsel for the Parties and the Chairman to discuss Respondent's request of April 9, 2009 for some of its witnesses to appear by videoconference at the Hearing on Jurisdiction/Admissibility and Liability.
60. On April 15, 2009, Respondent filed its *Rejoinder on the New Facts and Defence with respect to December 2, 2008 events* (the "**R. Rejoinder New Facts**"), which submission completed Phase 1 pre-hearing briefing.
61. On April 21, 2009, the Tribunal issued Procedural Order no. 9, granting in part, in light of Claimants' consent, Respondent's request to have some of its witnesses to appear by videoconference at the Hearing on Jurisdiction/Admissibility and Liability.
62. From April 23 to April 30, 2008, a seven-day Hearing on Jurisdiction/Admissibility and Liability took place at the offices of Milbank Tweed Hadley & McCloy L.L.P. located at 15, Taunusanlage, Frankfurt, Germany (the "**Hearing on Jurisdiction and Liability**" or the "**Hearing**").

63. In addition to the members of the Tribunal, the Secretary of the Tribunal, the Court Reporter and the Russian and Mongolian interpreters, the Hearing on Jurisdiction and Liability was attended by the following individuals:

On behalf of Claimants:

Mr. George M. von Mehren  
Mr. Stephen P. Anway  
Mr. Rostislav Pekař  
Mr. Stephen Fazio  
Mr. Ivan Trifonov  
Ms. Irina Golovanova  
Mr. Ondrej Sekanina (attending by video-conference from Ulan Bator, Mongolia)  
Mr. Denis Kolpakov

Counsel for Claimants of Squire, Sanders and Dempsey L.L.P.

Mr. Sergei Paushok (for himself, Golden East and Vostokneftegaz)

On behalf of Respondent:

Mr. Michael D. Nolan  
Mr. Edward G. Baldwin  
Mr. Frédéric G. Sourgens

Counsel for Respondent of Milbank Tweed Hadley & McCloy L.L.P.

Ms. Tainvankhuu Altangerel  
Counsel for Respondent of the Ministry of Justice and Home Affairs, Mongolia.

64. The following witnesses were examined and cross-examined at the Hearing on Jurisdiction and Liability:

Witnesses for Claimants:

NAME	TITLE/ROLE	DATE OF TESTIMONY
Ms. Yana Ibragimova	GEM's Head of legal department	23-04-2009
Mr. Sergei Paushok	Claimant and CEO of GEM	24-04-2009
Ms. M. Spirina	GEM's Deputy executive director for finance and economy	24-04-2009
Mr. Vladimir Akatkin	GEM's Chief geologist	25-04-2009
Professor Temuulen Bataa	Expert in Mongolian law	29-04-2009 30-04-2009
Mr. Brent Kazcmarek	Financial Expert, Navigant Consulting, Inc.	30-04-2009



Witnesses for Respondent:

NAME	TITLE/ROLE	DATE OF TESTIMONY
Mr. Erdenebold Jamiyansengee	Section Chief of the Division for Combating Economic Crime for the Criminal Police Department of Mongolia	25-04-2009
Mr. Jambalsuren Narantuya	First Secretary and Head of Law Section of Secretariat of State Great Khural	25-04-2009
Ms. Bolormaa Dorj	Governor of Zaamar soum, Tuv Province	25-04-2009
Mr. Chagnaadorj Gombo	Founder of NGO Ariun Suvarga	25-04-2009
Mr. Gungaa Bayasgalan	State Secretary of the Ministry of Justice and Home Affairs of Mongolia	27-04-2009
Mr. Nyamtseren Batbayar	Director of the Mining Department of the Mineral Resources and Petroleum Authority of Mongolia	27-04-2009
Mr. B. Ganbat	Deputy Director of the Legal Department of the Ministry of Finance	27-04-2009 28-04-2009
Mr. N. Tumendemberel	State Secretary for the Ministry of Finance from August 2000 to May 2003, currently Director of the Finance and Investment Department of the Ministry of Health, Mongolia	28-04-2009 29-04-2009
Mr. Dalaijamts Guushir	Advisor for the National Human Rights Commission of Mongolia	29-04-2009
Ms. B. Oyunchimeg	Court enforcement officer for the 123rd district of the Chingeltei district of Ulaanbaatar Bailiff's office	29-04-2009
Mr. L. Myagmarsuren	GEM's Mongolian employee from August 1999 to December 2008	30-04-2009
Professor Tumenjargal Mendsaikhan	Expert in Mongolian law	30-04-2009
Mr. Michael M. Mulligan	Financial Expert, Capstone Advisory Group, LLC	30-04-2009

65. Verbatim transcripts of the Hearing on Jurisdiction and Liability were produced in English and were concurrently available for viewing throughout the Hearing. Copies of the transcripts were distributed to the Tribunal and Parties some time after the Hearing.

66. On May 12, 2009, the Tribunal, through its Secretary, communicated with the Parties in order to indicate some of the matters that it wished to be covered in the Parties' Post Hearing Briefs.
67. On May 19, 2009, the Tribunal, through its Secretary, provided the Parties with various versions of translation of section 3.1 of the BIT (which it had previously received from the independent interpreters hired by the Parties for the Hearing) and requested that the Parties attempt to agree on a common translation, failing which the Tribunal was going to consider the versions already at its disposal.
68. On June 1, 2009, Counsel for Claimants informed the Tribunal that the Parties were unable to agree on a common translation of section 3.1 of the BIT and asked the Tribunal to consider the translations already at its disposal.
69. On June 12, 2009, the Parties submitted their *Post-Hearing Briefs on Jurisdiction and Liability* (individually the "C. PHB" and the "R. PHB").
70. On September 15, 2010, the Tribunal requested the Parties to submit, by October 30, 2009, briefs on the issue of the jurisdiction *ratione temporis* of the Tribunal to deal with the issue of the request of GEM in 2001 for a stability agreement concerning taxation and the substantive law applicable to that issue. This request of the Tribunal was prompted by the fact that neither Party had addressed these issues in its previous submissions.
71. On October 12, 2009, Counsel for Claimants requested the Tribunal to extend the date set for the filing of the foregoing briefs by one month to November 30, 2009.
72. On October 14, 2009, Counsel for Respondent informed the Tribunal that they did not object to Claimants' request for extension.
73. On the same day, the Tribunal informed the Parties that Claimants' request for extension was granted and directed the Parties to file their briefs by November 30, 2009.
74. On November 30, 2009, Claimants filed their *Submission on Jurisdiction and Applicable Law Regarding the Negotiations of a Stability Agreement in 2001* (the "C. SPHB").
75. On the same day, Respondent filed its *Submission Concerning the Questions Put by Chairman Lalonde in his Letter of September 15, 2009* (the "R. SPHB").
76. On December 1, 2009, Counsel for Respondent sent to the Tribunal a letter in which they commented on some of the statements made in C. SPHB. In a subsequent e-mail dated January 18, 2010, Counsel for Claimants submitted that that letter was improper as outside of the briefing schedule.
77. On December 14, 2009, Respondent filed a *Submission Concerning New Facts Relating To Claimants' Activities In Mongolia*, whereby requesting the Tribunal:
  - (1) To reopen the hearings, admit new evidence and grant leave to amend the Statement of Defense and the Counterclaims;

- (2) To grant interim measures ordering Claimants to place into escrow USD 74.3 million; and
  - (3) To set a schedule for briefing of the foregoing issues.
78. On December 16, 2009, the Tribunal, through its Secretary, requested that Claimants file their answer to Respondent's *Submission Concerning New Facts Relating To Claimants' Activities In Mongolia by January 11, 2010*.
79. On January 5, 2010, the Tribunal, through its Secretary, requested Respondent to submit an English translation of R-181 which had been previously filed in Mongolian only. The requested translation of R-181 was provided to the Tribunal on January 6, 2010.
80. On January 11, 2010, Claimants filed their Response to *Mongolia's Submission of December 14, 2009*.
81. On January 18, 2010, Respondent sent to the Tribunal a letter brief commenting on Claimants' Response to Mongolia's Submission of December 14, 2009.
82. On the same day, Counsel for Claimants wrote to the Tribunal objecting to the foregoing Respondent's letter brief.
83. On the same day, the Tribunal requested Claimants to submit an English translation of CE-134 which had been previously filed in Mongolian only. The requested translation of CE-134 was provided to the Tribunal on January 20, 2010.
84. On February 15, 2010, the Tribunal issued its *Decision on Respondent's Submission concerning New Facts relating to Claimants' Activities in Mongolia*, whereby dismissing all of Respondent's requests.
85. On November 24, 2010, the Tribunal received a letter from Respondent indicating that the alleged bank fraud referred to in its previous correspondence might have an effect on this arbitration and the eventual issuance of an award under the Dutch Arbitration Act.
86. On November 25, 2010, in a letter to the Tribunal, Claimants stated that, since Respondent was not asking the Tribunal to do anything, they saw no point in providing a response to that letter.
87. On November 29, 2010, the Tribunal acknowledged receipt of that correspondence from the Parties.
88. On January 19, 2011, Counsel for the Respondent again sent a letter to the Tribunal, commenting on certain press articles with respect to Mr. Paushok and his operations in Russia and providing copies of said press articles to the Tribunal.
89. On January 20, 2011, Counsel for the Claimants objected to the Respondent's communication of January 19, 2011.

90. On January 24, 2011, the Tribunal informed Counsel for the Parties that the matters raised in Respondent's letter of January 19, 2011 were clearly outside of the scope of the dispute submitted to the Tribunal and, therefore, the Tribunal would not take it into account for the purpose of the present Award.
91. The Tribunal deliberated on various occasions before issuing this Award on Jurisdiction and Liability (the "**Award**").

### 3. SUMMARY OF FACTS

92. This summary of facts does not purport to be exhaustive. When necessary, other sections of this Award will include further discussion of facts relevant to the particular issues addressed in those sections.
93. The Treaty was concluded on November 29, 1995, entered into force on February 26, 2006 and applies to investments made since January 1, 1949.<sup>1</sup>
94. Since 1997 and until December 2008, GEM was engaged in the business of exploring and developing placer gold deposits in Mongolia.
95. According to Claimants, GEM was the second largest gold mining company in Mongolia, operating five open pit mines, holding, as of November 2008, 52 exploration and production licenses and employing 1470 individuals, including approximately 700 Mongolian nationals. Over the course of its operations, GEM extracted more than 25 tons of chemically pure gold from its operations within Mongolia, including approximately four tons of chemically pure gold in 2006.
96. The main competitor of GEM in Mongolia was KOO Boroo Gold ("**Boroo**"), a gold mining company owned by Canadian interests. The relevancy of Boroo Gold's operations for this arbitration is limited to the issues related to the stability agreements executed between Boroo and Respondent.
97. A stability agreement is an agreement between a State and an investor for the purpose of stabilizing (freezing), at least to a certain extent and for a certain period of time, the taxes payable by an investor and/or other legislative, regulatory or administrative measures affecting it. In the context of this arbitration, the subject-matter of the various stability agreements entered into by Mongolia is limited to taxation.
98. In May 2001, GEM submitted an application for a stability agreement, by way of which GEM was looking to freeze the taxation regime applicable thereto and to set specific rates for all the 14 taxes then applicable to GEM.<sup>2</sup>
99. Further to GEM's application for a stability agreement, on June 5, 2001, the Ministry of Finance appointed a working group (the "**Working Group**"), which included Mr.

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<sup>1</sup> Article 9 of the Treaty, CE-91.

<sup>2</sup> CE-131, CE-96, CE-215 section 2.3 and attachment.

Ganbat, who testified at the Hearing on Jurisdiction and Liability, to consider GEM's application.<sup>3</sup>

100. Ultimately, GEM and Mongolia did not come to an agreement with respect to the terms of a stability agreement (for reasons upon which the Parties disagree and which are further addressed in the relevant part of this Award) and, therefore, no such agreement was signed. In this context, the Tribunal notes that on May 9, 2000, Boroo's initial stability agreement<sup>4</sup> was amended to "confirm" that Boroo's tax regime was entirely frozen (i.e. Boroo was exempted from novel taxes).<sup>5</sup>
101. Since 2005, VNGM is/was, along with GEM, involved in the construction of a major oil and gas refinery project in Mongolia (the "**Oil and Gas Refinery Project**"). According to Claimants, the expenses for the Oil and Gas Refinery Project, including the pre-construction phase, exceeded USD 20 million.
102. The price of gold on the world market remained below USD 362 per ounce between January 1997 and December 2001. In 2002, the price of gold started increasing dramatically to reach USD 720.1 per ounce on May 11, 2006.
103. On or about May 12, 2006, Mongolia's major political parties caused the Great Khural (Parliament) to pass a law "*On Imposition of Price Increase (Windfall) Taxes on Some Commodities*" (the "**WPT Law**").<sup>6</sup>
104. Pursuant to sections 4.1.4, 6.2 and 7 of the WPT Law, any gold sales at prices in excess of USD 500 per ounce were subject to a tax at the rate of 68% on the amount exceeding a base price of USD 500 per ounce (the "**Windfall Profit Tax**" or the "**WPT**"). The base price was set as a fixed amount, without reference to any production cost index. The sale reference price was the price set by the London Metal Exchange (as discussed herein below in the context of Claimants' claim in relation to the WPT paid by GEM prior to the declaration of unconstitutionality, the London Metal Exchange does not set a price for gold).
105. Having negatively affected the income yield of Claimants' investment (Claimants indeed allege that the WPT put GEM in a position where it would have to sell its gold at a loss), the imposition of the WPT and the events connected therewith are the main factors which prompted Claimants to institute the present proceedings and constitute the crux of the dispute between the Parties.
106. As early as May 16, 2006 and on numerous occasions thereafter, Claimant Paushok, both by way of written communications and meetings in person, brought the issue of the WPT Law and its negative effects on his investments to the attention of high Mongolian officials, including the then President, His Excellency Mr. Enkhbayar, but to no avail.

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<sup>3</sup> RE-163.

<sup>4</sup> CE-119.

<sup>5</sup> CE-125, Article 9.

<sup>6</sup> CE-2.

107. The WPT Law came into force on June 8, 2006.
108. On July 8, 2006, Mongolia also changed the requirements for employment of foreign nationals by mining companies, the Great Khural passing the law "*On Minerals*" (the "**2006 Minerals Law**").<sup>7</sup>
109. Pursuant to section 43 of the 2006 Minerals Law, the maximum number of foreign nationals employed by a mining company is limited to 10% of its workforce unless the company pays a penalty equal to ten times the minimum monthly salary for each foreign national it employs above that percentage (the "**Foreign Workers Fee**" or the "**FWF**"), whereas prior to the adoption of the 2006 Minerals Law, the Law On Export of Workforce and Import of Foreign Workforce Specialists<sup>8</sup>, which is still applicable to the industries other than the mining industry, only required the payment of a fee equal to two times the minimum wage of each foreign worker approved by the Mongolian agency responsible for labor matters.<sup>9</sup>
110. According to Claimants, GEM had to pay approximately MNT 588,300,000 (about USD 500,000 at the exchange rate prevailing in November 2008) each month in penalty as its operations required the employment of a substantial number of foreign workers.
111. On July 19, 2006, expecting a swift abolition or reduction of the WPT and in an attempt to alleviate the financial consequences of the WPT by postponing the sales of gold, GEM entered into a so-called Safe Custody/Sale and Purchase of Precious Metal Agreement (the "**SCSA**"<sup>10</sup>) with the Central Bank of Mongolia ("**MongolBank**"), which agreement was later amended by a Supplementary Agreement No. 1 dated October 5, 2006.<sup>11</sup>
112. Pursuant to the SCSA (as amended), with respect to which the Parties do not agree either on the qualification nor the consequences thereof, GEM and MongolBank seem to have agreed as follows:
- (1) GEM would deliver to MongolBank for safekeeping and eventual sale at least one million grams of chemically pure gold prior to December 25, 2007;
  - (2) Upon delivery of gold, MongolBank would advance to GEM sums equal to 85% of the value of the delivered quantity of gold;
  - (3) At least one ton of the gold delivered for safekeeping would be sold to MongolBank on a date designated by GEM by way of a letter (the "**Sale Letter**") during the period prior to December 25, 2007 (the "**Sale Date**");

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<sup>7</sup> CE-3.

<sup>8</sup> CE-59.

<sup>9</sup> Article 9.2, CE-59.

<sup>10</sup> CE-15.

<sup>11</sup> CE-16.

- (4) The ultimate purchase price of the gold would be determined in accordance with the price of gold as of the Sale Date.
113. In accordance with the SCSA, on various dates between July 20, 2006 and January 19, 2007 (the "**Delivery Dates**"), GEM deposited unrefined gold bullion bars (weighting 3,299,984 grams and containing 2,951,025.20 grams of chemically pure gold) into the custody of MongolBank for safekeeping (the "**Gold**"), which Gold represented approximately 75% of GEM's annual production for 2006 and more than 13% of the total volume of gold production in Mongolia in that year.
114. According to Claimants, GEM ceased depositing its gold with MongolBank after January 19, 2007, because it needed the gold to secure loans from various commercial banks in Mongolia.
115. In the fall of 2006, the Mongolian Cabinet attempted to amend the WPT Law to increase the base price to USD 650, but the Great Khural refused to act. In May 2008, the Cabinet again attempted to reform the gold taxation, abolishing the WPT Law and replacing it with increased royalties, but to no avail. In November 2008, the Great Khural amended the WPT Law to increase the base price taken into account by to the WPT from USD 500 to USD 850.
116. On December 13, 2006, the Constitutional Court of Mongolia found Articles 4.1.4 and 6.2 of the WPT Law unconstitutional as those articles set the base price of gold by reference to the *London Metal Exchange* which does not establish the price of gold. It suspended the application of the WPT Law and urged the Great Khural to promptly amend it to remedy that deficiency.
117. On December 21, 2006, the Mongolian Parliament promptly cured that defect by passing an amendment to the WPT Law, defining the reference price as a price determined daily by the Central Bank of Mongolia (the "**WPT Law Amendment**").
118. Being of the view that the WPT Law Amendment had no retroactive effect and having paid the WPT on certain sales that occurred between June 8, 2006 and December 21, 2006 in the amount of MNT 611,927,045 (approximately USD 523,000), GEM, shortly after the ruling of the Constitutional Court, brought an action before the Court of first instance in the Chingeltey district seeking the return of the WPT that it had paid prior to the WPT Law Amendment.
119. On April 9, 2007, the Court of first instance of the Chingeltey district upheld GEM's claim for reimbursement of the WPT paid in its entirety (Decision No. 354), but that decision was subsequently reversed by the Capital Court<sup>12</sup>, the decision of which was subsequently confirmed by the Supreme Court of Mongolia.<sup>13</sup>

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<sup>12</sup> Decision of the Capital Court No. 254 dated May 31, 2007, CE-66.

<sup>13</sup> Decision of the Supreme Court No. 6/3376 dated November 8, 2007, CE-67.

120. On August 7, 2007, the Main Tax Office of Mongolia (the "**Tax Office**") audited GEM and concluded that the amounts received under the SCSA at the Delivery Dates by GEM from MongolBank were proceeds from a sale and thus subject to the Windfall Profit Tax, and the subsoil resources (royalty) tax.
121. The Tax Office then issued the Assessment Statement of the State Tax Inspectors No. 210906 (the "**First Tax Assessment**")<sup>14</sup>, which covered the period from July 20, 2006 to January 2007, was based on the value of the 85% prepayment for the gold at the Delivery Dates and required GEM to pay MNT 11,172,300,000 (approximately USD 9,494,926) in royalties as well as the WPT plus interest in the amount of MNT 5,428,300,000 (approximately USD 4,613,312). These amounts break down as follows (in MNT millions):

Royalties 2006	Interest on R. 2006	WPT 2006	Interest on WPT '6
3417,5	1708,7	7439,3	3719,6
Royalties Jan. 2007	Interest on R. 2007	WPT Jan. 2007	Interest on WPT '7
82,8	0	232,7	0
Total R.: 3500,3	Total I. on R.: 1708,7	Total WPT: 7672	3719,6
Total Royalties and WPT: 11172,3		Total interest on R. and WPT: 5428,3	
<b>Grand Total: MNT 16,600,600,000 (USD 14,108,238)</b>			

122. Despite the unclear language of the First Tax Assessment and in light of Annex 2 of Paushok-I, it seems that, at least as far as the WPT is concerned, this assessment covered only the "sale" of the first 1,010,046.29 grams of chemically pure gold (approximately one ton) out of 2,951,025.20 grams of chemically pure gold (corresponding to the actual weight of gold bars of 3,299,984 grams) deposited with MongolBank pursuant to the SCSA. The WPT allegedly due further to the "sale" of the remaining 1,940,978.91 grams of chemically pure gold had been apparently withheld and remitted to the tax authorities on a date unspecified by MongolBank itself.<sup>15</sup>
123. Believing that the imposition of the WPT on a sale that had not occurred yet is improper, GEM refused to pay the taxes and penalties and challenged the First Tax Assessment by way of administrative means and recourses before Mongolian Courts. However, as set out below, all GEM's attempts to quash the First Tax Assessment proved unsuccessful and GEM subsequently paid all the amounts assessed under the First Tax Assessment (i.e. MNT 11,915,300,000), save for part of the interest, which remained outstanding in the amount of MNT 4,685,300,000 (GEM having paid interest in the amount of MNT 743,000,000 out of the total amount of interest of MNT 5,428,300,000 due in relation to both the WPT and the royalties).<sup>16</sup>
124. That same month (August 2007), Nove Energo, a Czech company that was supposed to build the refinery for the Oil and Gas Project as well as the Czech Export Bank, the main

<sup>14</sup> CE-18.

<sup>15</sup> Paushok-I, Annex 2.

<sup>16</sup> *Idem*.



financier of the project, suspended their involvement and financing allegedly due to GEM's lack of liquidity and its dispute with the Tax Office.<sup>17</sup>

125. Around the same time, having been alerted by the actions of the Mongolian tax authorities, GEM enquired with MongolBank about the status of the Gold delivered pursuant to the SCSA and learned from a MongolBank press release that the Gold had been refined and exported out of Mongolia and, so, according to Claimants, contrary to the terms of the SCSA.<sup>18</sup>
126. On September 13, 2007, the Tax Office issued a notice reminding GEM of its obligation to pay the amount of MNT 16,600,600,000 (approximately USD 14,108,238) due pursuant to the First Tax Assessment within ten days of the date of the notice (Notice no. 2107090001).<sup>19</sup>
127. On September 27, 2007, the Tax Office seized GEM's bank accounts. The accounts remained seized until October 18, 2007.<sup>20</sup>
128. Subsequently, GEM unsuccessfully challenged the First Tax Assessment, including by way of recourses before Mongolian Courts, as outlined below.
129. On October 11, 2007, the Capital Administrative Court rejected GEM's challenge of the First Tax Assessment, concluding that GEM sold the Gold to MongolBank, and, thus, became a payer of the WPT, as appears from a copy of the Capital Administrative Court Decision No. 254.<sup>21</sup> This decision was subsequently confirmed by the Supreme Court of Mongolia (Decision of the Supreme Court No. 249 dated December 11, 2007).<sup>22</sup>
130. According to Claimants, in October 2007, MongolBank, dissatisfied with GEM's inquiries with respect to the status of the Gold, instructed Mongolian banks under MongolBank's supervision to suspend their business with GEM until the dispute between MongolBank and GEM would be resolved.
131. In October 2007, GEM learned that the Gold might have been deposited with the Bank of Nova Scotia in London (this information was later confirmed by MongolBank) and, thus, initiated proceedings before the English courts to localize and secure the Gold. In December 2007, however, the English Appellate Court reversed the lower court (which had ruled in favor of GEM) and concluded that MongolBank enjoys sovereign immunity.

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<sup>17</sup> C. SC, ¶40; CE-83; CE-84.

<sup>18</sup> C. SC, ¶81; Paushok-II, ¶99; Paushok Ex.-81; Paushok Ex.-82.

<sup>19</sup> Ibragimova Ex.-12.

<sup>20</sup> C. NA, ¶59, C. SC ¶79, Ibragimova-I, ¶13.

<sup>21</sup> CE-19.

<sup>22</sup> CE-68.

132. On November 6, 2007, MongolBank, in response to GEM's letters, confirmed that it was willing to return the Gold refined 999,9 finesse but was not in a position to return the actual physical Gold deposited by GEM (as it had been refined).<sup>23</sup>
133. On November 7, 2007 and November 8, 2007, GEM sold to commercial banks the gold mined since February 2007.
134. On November 8, 2007, Claimants informed Respondent and MongolBank of their intention to initiate the present proceedings and issued a Notice of Arbitration against Respondent on November 30, 2007, which Notice of Arbitration was delivered to Respondent on December 3, 2007.
135. After November 8, 2007, the dispute between the Parties became highly publicized in Mongolian media, local newspapers publishing several articles which were highly critical of Claimant Paushok.
136. On December 8, 2007, Claimant Paushok left Mongolia for Russia.
137. On or prior to December 10, 2007, the Tax Office issued another tax assessment against GEM with respect to the WPT on the gold sold to commercial banks (Trade and Development Bank, Zoos, Anod and Ulan Bator) on November 7, 2007 and November 8, 2007 in the amount of MNT 28,321,741,000 billion (approximately USD 24 million) (Notice no. 2106020024 <sup>24</sup>, the "**Second Tax Assessment**"). The amount claimed therein breaks down as follows:

Deductions at source	83,990,000
WPT	28,237,751,000
Total	28,321,741,000

138. On December 12, 2007, one day after the rejection of GEM's last available appeal by the Supreme Court on December 11, 2007, GEM obtained a loan from Bank Golomt and paid the WPT (without interest) due under the First Tax Assessment in the amount of MNT 7,672,000,000 (approximately USD 6,519,930) (Payment Order no. PPT-02204 dated December 12, 2007).<sup>25</sup> On a date unspecified, GEM also paid MNT 743,000,000 on account of interest on royalties claimed in the First Tax Assessment (the total sum claimed under that heading amounting to MNT 1,708,700,000).
139. On December 13, 2007, GEM sent a letter to Mr. Zandanbat, the chief of the State Budget Revenue Control Department (Letter no. 1551/05<sup>26</sup>), requesting a 60-day grace period for the payment of the balance of the taxes due pursuant to the Second Tax Assessment (i.e. taxes on the gold sold to commercial banks on November 7 and 8, 2007). GEM would later request a longer grace period (up to one year) both from the tax authorities and the

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<sup>23</sup> CE-25.

<sup>24</sup> CE-88.

<sup>25</sup> Ibragimova Ex.-25.

<sup>26</sup> Ibragimova Ex.-30.

then Prime Minister (His Excellency Mr. S. Bayar) in order to allow GEM to pay this amount over the year 2008 from its own revenues but these requests were denied.<sup>27</sup>

140. Further to the Second Tax Assessment, on December 17, 2007, the head of the Tax Office, Mr. Zorig, gave an interview to Odryin Sonin, a Mongolian newspaper, and is reported to have made the following statement.<sup>28</sup>

"Of course, we will do our best to make [GEM pay all taxes]. The company's licenses might be suspended or canceled altogether. This is a way out for the state to make the company pay all taxes due."

141. On December 19, 2007, Mr. Zandanbat, the chief of the State Budget Revenue Control Department, responded that the tax authorities would decide on GEM's request of December 13, 2007, depending on whether GEM was going to pay the WPT and the royalties allegedly due upon completion of final settlements under the SCSA (which was going to expire on December 25, 2007) and the balance of interest (MNT 4,685,300,000) due pursuant to the First Tax Assessment (Letter no. 1/597).<sup>29</sup>
142. By letters dated December 24<sup>30</sup> and 25<sup>31</sup>, 2007, GEM advised MongolBank that it was willing to sell 1,010,046.290 grams of chemically pure gold and requested the return of the remaining 1,940,978.91 grams of chemically pure gold deposited with MongolBank (the "**Remaining Gold**"), the whole in accordance with the SCSA.
143. On December 25, 2007, MongolBank informed GEM that it had to sell all the gold deposited pursuant to the SCSA, implicitly refusing GEM's request for return of the gold not sold<sup>32</sup> and "purchasing" the Remaining Gold.
144. It seems that on the occasion of the sale by GEM to MongolBank of 1,010,046.290 grams of chemically pure gold, the WPT, in the total amount of MNT 7,993,276,343 (USD 6,831,860) without interest, was mostly paid by GEM (MNT 7,672,000,000 or USD 6,557,265) and partly withheld by MongolBank (MNT 321,276,343 or USD 274,595), whereas MongolBank withheld the entirety of the WPT allegedly due in relation to the "sale" of the Remaining Gold (MNT 15,323,498,355 or USD 13,097,007) and remitted the amount so collected to the Ministry of Finance of Mongolia. The interest on the WPT assessed by the Tax Office in relation to the sale of the Gold to MongolBank pursuant to

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<sup>27</sup> Ibragimova Ex.-32 to Ex.-36.

<sup>28</sup> CE-6.

<sup>29</sup> Ibragimova Ex.-31.

<sup>30</sup> CE-23.

<sup>31</sup> CE-24.

<sup>32</sup> CE-17.

the SCSA amounted to MNT 3,719,600,000 (USD 3,179,145)<sup>33</sup>, but had not been paid either by GEM or MongolBank<sup>34</sup>.

145. In December 2007, the Mongolian Ministry of Industry and Trade refused to approve GEM's exploration and production plans for 2008. According to Claimants, the refusal was in retaliation to GEM's refusal to pay the WPT assessed against it. According to Respondent, the refusal was based on GEM's failure to meet the regulatory conditions required for such a plan to be approved.<sup>35</sup>
146. As GEM postponed all of its sales of gold until the latter part of the year (both in reason of the WPT and in order to benefit from the continuing increase in the price of gold in world markets), GEM sold the gold mined in 2007 at the year end (November 7 and 8 as mentioned above) for a total of USD 101 million (when the price of gold was USD 832 per ounce).
147. According to Claimants, despite the substantial increase of the price of gold over 2007, GEM lost USD 1M on the occasion of the sale referred to in the preceding paragraph as GEM's costs, including other taxes, amounted to USD 75M and the WPT amounted to USD 27M.<sup>36</sup>
148. On January 4, 2008, GEM wrote to the then newly elected Prime Minister of Mongolia, His Excellency Mr. S. Bayar, requesting him to restructure the payment of (i) the WPT (and another minor tax) claimed pursuant to the Second Tax Assessment and (ii) the outstanding interest claimed pursuant to the First Tax Assessment in order to allow GEM to pay these amounts over the year 2008 from its own revenues.<sup>37</sup>
149. As a result of the exchange of correspondence which was taking place between GEM and the tax authorities, on January 24, 2008, GEM and the Tax Office executed a schedule of payment of the WPT due pursuant to the Second Tax Assessment (MNT 31,321,517,584<sup>38</sup>) and interest due pursuant to the First Tax Assessment (MNT 4,685,300,000<sup>39</sup>) in the total amount of MNT 36,006,817,584 (Schedule of Windfall

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<sup>33</sup> First Tax Assessment, CE-18.

<sup>34</sup> Paushok-I, Annex 2.

<sup>35</sup> RIM, ¶¶38 and ff.

<sup>36</sup> RIM, ¶54.

<sup>37</sup> RE-5.

<sup>38</sup> The evidence submitted by the Parties does not allow to reconcile the amount set in the repayment schedule (MNT 31,321,517,584, RE-1) with the amount set in the Second Tax Assessment (MNT 28,237,751,000), Notice no. 2106020024, CE-88), as well as with the amount mentioned in the draft repayment schedule submitted by GEM (MNT 28,237,751,000, letter dated December 29, 2007, Ibragimova Ex.-36). However, this fact does not have any direct bearing on the decision rendered by the Tribunal.

<sup>39</sup> This amount of MNT 4,685,300,000 represents the difference between the total amount of interest due for the late payment of the royalties and the WPT assessed under the First Tax Assessment (i.e. MNT 5,428,300,000, see Statement of the State Tax Inspector No. 210906 dated August 7, 2007, CE-18 and the payment made by GEM on a date unspecified in the amount of MNT 743,000,000 (see Paushok-I, Annex 2).

Tax Payment 2007 and Penalties Imposed by Tax Inspector Act No. 210906<sup>40</sup>, the "**Schedule of Payment**").

150. The Schedule of Payment extended the payment deadline from January 24, 2008 to March 24, 2008.
151. On February 10, 2008, GEM's alleged outstanding tax liabilities increased because GEM's corporate income tax of MNT 6,426 billion (approximately USD 5.5 million) became due. GEM does not dispute that the corporate income tax was owed but alleges that it was not able to pay this amount on time by reason of its disrupted cash-flow.
152. On February 22, 2008, the Tax Office created a working group with the purpose of examining the allegations of tax evasion by GEM by way of hiding and removing assets in the amount of MNT 3,332,587.40 (USD 2,860).<sup>41</sup>
153. On the same day, the Tax Office, having noticed that GEM had exported operating machinery and equipment, informed that company of its intention to seize the assets thereof for failure to make payments in accordance with the Payment Schedule as well as GEM's failure to pay corporate income taxes, in the total amount of MNT 43 billion (USD 37 million).<sup>42</sup>
154. On February 25, 2008, the Tax Office filed a claim against GEM with the Bayangol District Court to collect the balance of MNT 4,685,300,000 payable under the First Tax Assessment and representing the interest for the late payment of royalties and the WPT (the "**Collection Claim**")<sup>43</sup>, along with a petition for seizure before judgment of GEM's assets.<sup>44</sup>
155. On March 13, 2008, the Tax Office amended the amount sought in the Collection Claim filed with the Bayangol District Court, increasing the said amount by MNT 40,187,161,500, the said amount being the sum of amounts allegedly due for the corporate income tax (MNT 6,424,060,600), deductions at source (MNT 619,893,200), the WPT (MNT 33,075,468,500) and the value added tax (MNT 67,739,200)<sup>45</sup>, the total sum being then claimed in the Collection Claim amounting to MNT 44,872,461,500 (USD 38,124,436).
156. On March 23, 2008, the Tribunal issued a Temporary Restraining Order, the conclusions of which are reproduced herein above (see "Procedural History" section).

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<sup>40</sup> RE-1.

<sup>41</sup> CE-4.

<sup>42</sup> CE-4.

<sup>43</sup> Ibragimova Ex.-46.

<sup>44</sup> Ibragimova Ex.-47.

<sup>45</sup> Ibragimova Ex.-54.

157. On March 25, 2008, the Tax Office sent to GEM a notice of failure to meet its tax liabilities that became due on March 24, 2008, pursuant to, among others, the Schedule of Payment, requesting to pay the total amount claimed in the Collection Claim within three days of the date of the notice (Notice no. 2106020024)<sup>46</sup>.
158. On May 12, 2008, the Bayangol District Court issued Ruling No. 1606<sup>47</sup> dismissing the Collection Claim on the basis of *lis pendens* with the present arbitration.
159. According to Claimants, Mongolian authorities (namely the Mongolian Special Board for Mineral Resources, a body of the Mongolian Government responsible for, *inter alia*, the approval of gold-mining projects) retaliated against GEM (and Bumbat) further to the initiation of the present proceedings by, among others, delaying the approval of Bumbat's project to mine gold from the Baga Hailaast placer deposit (Minutes of meeting of July 24, 2008<sup>48</sup>) and delayed or refused the conversion of exploration licenses into mining licenses with respect to five different sites.<sup>49</sup>
160. On September 2, 2008, the Tribunal issued its Order on Interim Measures, the conclusions of which are reproduced herein above (see "Procedural History" section).
161. On November 25, 2008, the Great Khural amended the WPT increasing the USD 500 threshold to USD 850.<sup>50</sup>
162. On November 27, 2008, the Tax Office filed a request with the Capital Administrative Court to issue an order and a writ of execution regarding the enforcement of its Decision No. 254, dated October 11, 2007.<sup>51</sup> It bears mention that the said decision only dismissed GEM's challenge of the First Tax Assessment and that the outstanding balance thereunder amounted to MNT 4,685,300,000, a fact of which the Tax Office could not have been unaware of as it requested the payment thereof in the Schedule of Payment.<sup>52</sup>
163. On the same day, the Capital Administrative Court granted the Tax Office's request and issued the "Court Order"<sup>53</sup> and the "Writ of Execution"<sup>54</sup> for the enforcement of this court's Decision No. 254, dated October 11, 2007<sup>55</sup>.

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<sup>46</sup> The Tribunal notes that the said Notice no. 2106020024 dated March 25, 2008, (Ibragimova Ex.-57) bears the same number as Notice no. 2106020024 dated December 10, 2007 and referred herein as the "Second Tax Assessment", (CE-88 and Ibragimova Ex.-28). Despite this fact, the contents of these two documents are completely different.

<sup>47</sup> Ibragimova Ex.-58.

<sup>48</sup> CE-111.

<sup>49</sup> C. Reply, ¶¶94 and ff.

<sup>50</sup> CE-189.

<sup>51</sup> CE-17.

<sup>52</sup> RE-1.

<sup>53</sup> Ibragimova Ex.-105.

<sup>54</sup> Ibragimova Ex.-106.

<sup>55</sup> CE-17.

164. Claimants let the OIM expire by not making the USD 2 million/month payment into the escrow account and, alternatively, not providing an equivalent bank guarantee. In a letter to the Parties dated November 24, 2008, the Tribunal pointed out that GEM's alleged cash flow inability to support a monthly payment of USD 2 million (Letter from Claimants to the Tribunal, dated September 30, 2008) was irrelevant as the OIM was not addressed to GEM and Claimants themselves could have made the required payments should they have had the means to do so.
165. The OIM expired on December 2, 2008.
166. Upon expiration of the OIM, Mongolian officials from various courts and governmental bodies attended GEM's and VNGM's offices, mines and facilities and took a series of measures against GEM, VNGM, Bumbat, KOO Yakhton ("**Yakhthon**"), and KOO Vostok-Energo, a/k/a KOO East-Energo ("**Vostok-Energo**"), seizing each company's bank accounts and the contents thereof<sup>56</sup>, putting liens on all assets of GEM and VNGM<sup>57</sup> and seizing approximately 12 kg of gold.<sup>58</sup>
167. Subsequently, the Mongolian authorities also refused to extend the work permits of GEM's foreign employees on the basis of GEM's failure to pay the Foreign Workers fee for 2007 and so, according to Claimants, contrary to prior administrative practice.<sup>59</sup>
168. According to Claimants, as a result of the above actions, GEM has been forced to discontinue its gold-mining and gold-processing activities, keeping only 168 employees (out of 939) to physically protect GEM's assets and maintain a minimum operation at GEM's headquarters.
169. On December 4, 2008, the Tax Office issued a notice claiming the payment of taxes, including the WPT for years 2007 and 2008 and interest due under the First Tax Assessment, in the total amount of MNT 56,423,191,700 (USD 48 million) within 10 days from the date of the notice (Notice no. 2108120001, dated December 4, 2008,<sup>60</sup> the "**Third Tax Assessment**").
170. On December 4 and 5, 2008, GEM complained about the actions of the Court Bailiff's Office to the Senior Bailiff<sup>61</sup>. On December 8, 2008, the Senior Bailiff summarily dismissed GEM's complaint of December 5, 2008.<sup>62</sup>
171. The outcome of GEM's complaint of December 4, 2008 is unknown.

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<sup>56</sup> Ibragimova Ex.-125 to Ex.-129.

<sup>57</sup> Ibragimova Ex.-114 to Ex.-123.

<sup>58</sup> Ibragimova Ex.-130.

<sup>59</sup> Ibragimova Ex.-162, Ex.-163 and Ex.-165.

<sup>60</sup> CE-194.

<sup>61</sup> Ibragimova Ex.-131 and Ex.-132.

<sup>62</sup> Ibragimova Ex.-135.

172. On December 11, 2008, GEM filed a complaint against the allegedly unlawful enforcement by the Court Bailiff's Office with the Sukhe-Bator District Court.<sup>63</sup>
173. On December 17, 2008, on an *ex parte* application, Justice Zhavkhlan of the Sukhe-Bator District Court decided to suspend the enforcement of the Court Order of November 27, 2008<sup>64</sup> pending the resolution of GEM's complaint (Judge Order no. 7556).<sup>65</sup> Justice Zhavkhlan's decision was served on the Court Bailiff's Office the same day.<sup>66</sup>
174. Disregarding the ruling of Justice Zhavkhlan, the Court Bailiff's Office continued the enforcement of the Court Order of November 27, 2008<sup>67</sup> by issuing an Order on Seizure of Property no. 6, dated December 19, 2008<sup>68</sup>, which prompted complaints from GEM to Justice Zhavkhlan on December 22, 2008<sup>69</sup> and the Department for Judicial Enforcement on December 26, 2008.<sup>70</sup>
175. On December 22, 2008, the Capital Court Bailiff's Office lodged an appeal against the decision of Justice Zhavkhlan. On or about the same day, Senior Bailiff Batsukh reportedly met with Justice Zhavkhlan to discuss the case.<sup>71</sup>
176. On December 23, 2008, the Capital Court Bailiff's Office petitioned Chief Justice N. Sukhbaatar of the Sukhe-Bator District Court to have Justice Zhavkhlan removed from the case opposing GEM and the Court Bailiff's Office for having rendered an *ex parte* decision.<sup>72</sup>
177. On December 24, 2008, equally on an *ex parte* basis, Chief Justice N. Sukhbaatar of the Sukhe-Bator District Court accepted Court Bailiff's Office's challenge of Justice Zhavkhlan, removed him from the case and assigned same to Justice Altanchimeg (Order of Justice N. Sukhbaatar no. 002, dated December 24, 2008).<sup>73</sup>
178. On the same day and without hearing GEM, Chief Justice Sukhbaatar and Justices Altanchimeg and Monkhzul of the Sukhe-Bator District Court allowed the appeal lodged by the Court Bailiff's Office against the decision of Justice Zhavkhlan and

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<sup>63</sup> Ibragimova Ex.-136. The Tribunal has not been made aware as to whether a decision had been issued by the Sukhe-Baattar District Court on GEM's complaint of December 11, 2008 against the unlawful enforcement by the Court Bailiff's Office.

<sup>64</sup> Ibragimova Ex.-105.

<sup>65</sup> Ibragimova Ex.-137.

<sup>66</sup> Ibragimova Ex.-141.

<sup>67</sup> Ibragimova Ex.-105.

<sup>68</sup> Ibragimova Ex.-139.

<sup>69</sup> Ibragimova Ex.-142.

<sup>70</sup> Ibragimova Ex.-141.

<sup>71</sup> Ibragimova Ex.-143.

<sup>72</sup> Ibragimova Ex.-143.

<sup>73</sup> Ibragimova Ex.-145.



annulled the suspension of the enforcement proceedings (Court Judgment no. 03, dated December 24, 2008).<sup>74</sup>

179. Relying on the above decision, the Department for Judicial Enforcement dismissed GEM's complaints with respect to the disregard of Justice Zhavkhlan's decision while it was executory (from December 17, 2008 to December 24, 2008) (Letter from the Department for Judicial Enforcement to GEM dated December 31, 2008).<sup>75</sup>
180. After the occurrence of the enforcement measures undertaken by Respondent against GEM and other Claimants' Mongolian companies, the Parties attempted to negotiate a *modus vivendi* which would have allowed the continuation of Claimants' Mongolian companies' operations during the pendency of this arbitration, but were unable to come to an agreement.
181. In August 2009, Mongolia repealed the WPT, with the repeal being effective in 2011.<sup>76</sup>
182. The Tribunal will now proceed to consider the following issues relating to its jurisdiction and the admissibility of Claimants' claims, the substance of those claims and its jurisdiction over the counterclaims and their admissibility. The Tribunal has given careful consideration to the factual and legal arguments raised by the Parties in their written and oral submissions. The Tribunal's reasons, while not necessarily repeating every argument advanced by the Parties, deal with those that the Tribunal considers the determinative factors required to decide those issues.

#### 4. JURISDICTION AND ADMISSIBILITY OF THE CLAIMS

183. The table below lists, following the order of Respondent's submissions, the nine objections to jurisdiction raised by Respondent:

##### Objections raised by Respondent

Proceeding	Objection	Scope (Claims concerned)
R. Defense (reiterated in R. Rejoinder)	Six-month negotiation period	All claims
R. Defense (reiterated in R. Rejoinder)	Abuse of the arbitral process	All claims
R. Defense (reiterated in R. Rejoinder)	Failure to apply for a stability agreement	All treatment claims (WPT and FWF)
R. Rejoinder	Claimants' standing	SCSA-related claims
R. Rejoinder	Exhaustion of local remedies	SCSA-related claims
R. Rejoinder	Bumbat - Lack of protected investment	"New Facts"
R. Rejoinder	ITERA loans - Not Claimants' investment	Undetermined
Hearing and R. PHB	Lack of protected investment	All claims

<sup>74</sup> Ibragimova Ex.-146.

<sup>75</sup> Ibragimova Ex.-134.

<sup>76</sup> R. SPHB, ¶48.

Proceeding	Objection	Scope (Claims concerned)
R. SPHB	Objection <i>ratione temporis</i>	2001 stability agreement negotiations related claims

184. This section addresses the arguments of the parties with respect to the five general objections to jurisdiction and admissibility relevant to all of Claimants' Claims namely:

- (1) Lack of protected investment;
- (2) ITERA loans were not made by Claimants;
- (3) Failure to abide by the six month negotiation period;
- (4) Abuse of arbitral process;
- (5) Failure to apply for a stability agreement.

185. Objections relating to specific claims, namely:

- (1) *Ratione temporis* objection (with respect to the 2001 stability agreement negotiation claims);
- (2) Claimants' standing (with respect to the SCSA related claims);
- (3) Exhaustion of local remedies to reform a contractual gap (with respect to the SCSA-related claims);
- (4) Lack of protected investment - Bumbat (with respect to the "New Facts" related claims);

are addressed in the individual sections pertaining to the claims concerned by a given objection.

186. In its Order on Interim Measures, the Tribunal discussed the issue of *prima facie* jurisdiction and concluded that Claimants had succeeded in establishing such jurisdiction.

187. At this stage, the Tribunal must rule not only as to whether the Tribunal has *prima facie* jurisdiction but full and effective jurisdiction to render an award in this case. It will therefore proceed to consider each objection raised by Respondent. Some objections raised in the earlier part of this case were not raised again during the Hearing on jurisdiction and liability or in Respondent's Post-Hearing Brief. But since none of the objections were formally abandoned, the Tribunal will address all of them.

#### 4.1. LACK OF PROTECTED INVESTMENT

##### 4.1.1 ARGUMENT OF THE PARTIES

188. In its Post-Hearing Brief<sup>77</sup>, Respondent raises a jurisdictional objection based on the lack of an investment protected under the Treaty and argues that Claimants would not have met their burden of proof with respect to same.
189. According to Respondent, the definition of "investment" under the Treaty refers to assets "invested by an investor of one Contracting Party in the territory of the other Contracting Party."<sup>78</sup> Thus, "investment" does not include companies as such and is limited to contributions by an investor.<sup>79</sup>
190. In light of the foregoing, Respondent submits that the filing of registration certificates of various companies (GEM, VNG, Yakhton) is not sufficient to establish the Tribunal's jurisdiction as these certificates do not prove Claimants' contributions.<sup>80</sup>
191. Respondent further asserts that Mr. Paushok's testimony regarding an investment of "USD 34.4 million in the form of direct contributions by [him] and [his] companies"<sup>81</sup> is insufficient, unsupported by documentary evidence and does not allow to determine who exactly made these contributions.<sup>82</sup>
192. Respondent also takes issue with the alleged loans from ITERA International Energy LLP and Mr. Paushok to GEM in the amount of USD 18 million as the documentary evidence demonstrates that these loans were provided by ITERA International Energy LLP alone.<sup>83</sup>
193. Respondent concludes its objection as follows:<sup>84</sup>

"32. To the extent that Claimants have come forward with documentary evidence as to a purported investment, such as the ITERA loan documentation, the documents have contradicted Mr. Paushok's witness testimony. What remains in evidence are unsubstantiated statements made by Claimants and registration certificates. As Claimants' counsel should know from their experience in international investment arbitration, proof of "mere ownership of shares"

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<sup>77</sup> R. PHB, ¶¶12-33.

<sup>78</sup> Article 1 b of the Treaty.

<sup>79</sup> R. PHB, ¶13.

<sup>80</sup> R. PHB, ¶16.

<sup>81</sup> Paushok-II, ¶43, as well as during the Hearing.

<sup>82</sup> R. PHB, ¶¶17-18, 24-31.

<sup>83</sup> RE-95A; RE-95B, R. PHB, ¶¶19 to 23.

<sup>84</sup> R. PHB, ¶¶32-33.

may be insufficient to satisfy the jurisdictional requirements of the Russia-Mongolia BIT.

33. Consequently, the Tribunal must dismiss:

- Claims based solely on the registration certificates. These certificates are insufficient to substantiate an investment sufficient to meet the requirements of Article 1 and 6 of the Russian-Mongolian BIT.
- Claims relating to the USD 18 million loan investment. These loans were issued by an ITERA entity. These claims include all investments detailed in Appendix III of the Reply, as these assets were purchased by GEM with ITERA funds.
- Claims relating to the alleged USD 34.4 million. This alleged amount was not made by Claimants, but other entities, according to Claimants themselves. Further, the source of funding of these investments and their use has not been disclosed.
- Claims relating to the USD 1 million investment claimed by Mr. Paushok at the Hearing. Allegations of such an investment are directly contradicted by contemporaneous documentary evidence. "

194. In their Post-Hearing Brief<sup>85</sup>, Claimants assert that this objection is ill-founded in fact and in law.

195. First, Claimants observe that Mongolia's objection is time-barred pursuant to Article 21(3) of the UNCITRAL Arbitration Rules as it had not been raised in the Statement of Defense<sup>86</sup> and further point out that Respondent acknowledged at ¶227 of its Rejoinder that Claimants' shares in GEM are an investment for the purpose of the Treaty.<sup>87</sup>

196. Second, Claimants submit that they proved their direct and indirect ownership of 100% of shareholdings in GEM, VNGM, Yakhton and Bumbat and a 40% shareholding in Vostokenergo and take the position that this is sufficient evidence of investment for the purpose of the Treaty, as ownership of the shares in these Mongolian companies is

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<sup>85</sup> C. PHB, ¶¶113 to 132.

<sup>86</sup> C. PHB, ¶¶114-115.

<sup>87</sup> C. PHB, ¶228.

expressly listed as an example of a protected investment under Article 1(b) of the Treaty.<sup>88</sup>

197. Third, Claimants argue that there is undisputed evidence of the following contributions (assuming such evidence is required)<sup>89</sup>:

"(1) Mr. Paushok contributed USD 1 million of his own money to start GEM between 1997 and 1999;"<sup>90</sup> and

(2) Mr. Paushok caused two of his 100%-owned companies, Kifold and Yakhton, to contribute USD 34.4 million into the charter capital of GEM."<sup>91</sup>

198. Fourth, Claimants submit that the Treaty defines protected investments as "all kind of assets" rather than just contributions<sup>92</sup>, which are but one example of investment.<sup>93</sup> According to Claimants, Respondent's interpretation would lead to absurd conclusions, namely that the Treaty does not even protect the value of Russian investors' shares in Mongolian companies (because the investment would be limited to the amount for which the investor bought the shares but not the shares as such), and is incompatible with the compensation standard set forth in Article 4 of the Treaty.<sup>94</sup>

199. Claimants are also of the view that the definition of investment includes the term "income" as such, which is mentioned in Article 1(c) of the Treaty. Even if such is not the case ("income" is not included in "investment"), "Claimants do not assert any claims with respect to any payments from GEM and/or Claimants' other Mongolian companies to Claimants".<sup>95</sup>

#### **4.1.2 TRIBUNAL'S ANALYSIS**

200. First of all, the Tribunal agrees with Respondent that Claimants bear the burden of the proof to demonstrate that their investment is protected by Article 6 of the Treaty. The dispute has to arise "in connection with realization of investments, including disputes concerning the amount, terms or method of payment of the compensation."<sup>96</sup>

201. The Tribunal disagrees however with Respondent's interpretation in so far as it argues that "investments" does not include "companies" and is limited to "contributions" in the

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<sup>88</sup> C. PHB, ¶¶116-117.

<sup>89</sup> C. PHB, ¶¶119 and 120, see also C. Reply, ¶254 and its Appendix III, ¶¶6-13.

<sup>90</sup> D2:P85:L2-3.

<sup>91</sup> D2:P85:L2 - P87:L3; D2:P89:L25 - P90:L22.

<sup>92</sup> *Saluka Investments BV v. The Czech Republic*, Partial Award, March 17, 2006, CA-59.

<sup>93</sup> C. PHB, ¶¶121-125.

<sup>94</sup> C. PHB, ¶¶127-132.

<sup>95</sup> C. PHB, ¶¶125-126.

<sup>96</sup> Article 6 of the Treaty.

definition of investment. The definition provided in Article 1 (b) of the Treaty is quite broad, embracing "all kinds of assets invested by an investor", including "in particular, but without limitation [...] financial means, as well as shares, contributions and other kinds of interests". That Article also refers, among other examples of investment, to "the right to conduct business activities, granted by law or contract, including in particular the right to prospect, extract and exploit natural resources". If "shares" in companies can constitute "investment", it would be absurd to argue that a company the shares of which are owned 100% by an investor would not constitute an "investment" as defined in the Treaty. Respondent has repeatedly presented this argument in its submissions but the Tribunal does not find support for it in the definition of investment contained in the Treaty.

202. In the present instance, Claimants' investment are the shares of GEM, a company incorporated under Mongolian law as required by that country in order to engage into the mining business and, through ownership of those shares, Claimants are entitled to make claims concerning alleged Treaty breaches resulting from actions affecting the assets of GEM, including its rights to mine gold deposits or its contractual rights and thereby affecting the value of their shares. It is therefore important to note that Claimants must prove that their claims arise out of the Treaty itself and not merely be an attempt to exercise contractual rights belonging to GEM. To argue that Claimants could not make such Treaty claims would render it practically meaningless in many instances; a large number of countries require foreign investors to incorporate a local company in order to engage into activities in sectors which are considered of strategic importance (mining, oil and gas, communications etc.). In such situations, a BIT would be rendered practically without effect if it were right to argue that any action taken by a State against such local companies or their assets would be not be subject to Treaty claims by a foreign investor because its investment is merely constituted of shares in that local company.
203. In the case of *Azurix v. Argentina*, both the Tribunal and the *ad hoc* Committee on annulment reached the same conclusion on a corporate structure very similar to the one in the present case.
204. The Tribunal stated:

"We conclude the discussion on *jus standi* by affirming the *jus standi* of Azurix in these proceedings: Azurix is the investor that made the investment through indirectly owned and controlled subsidiaries.<sup>97</sup>"

The *ad hoc* Committee concluded similarly that:

"Although assets of ABA would as a matter of law belong to ABA and not to Azurix, Azurix nonetheless had, by virtue of its controlling shareholding in ABA "interests in the assets" of ABA

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<sup>97</sup> *Azurix Corp v. Argentina*, ICSID Case No ARB/01/12, Decision on Jurisdiction, December 8, 2003, ¶74.

[...], and through that shareholding indirectly controlled those assets. Assets of Azurix would also be an "investment" of Azurix for the purposes of the BIT. Additionally, the legal and contractual rights of ABA [...], including the rights under the Concession, being indirectly controlled by Azurix throughout its majority shareholding in ABA would similarly be "investments" of Azurix for the purposes of the BIT.<sup>98</sup>

205. Respondent has also spent considerable time arguing that Claimants do not qualify as investors because, at best, they were nominal shareholders. It has however, recognized that they were the direct or indirect shareholders of 100% of GEM, VGNM, Yakthon and Bumbat and of 40% of Vostokenergo.<sup>99</sup> Respondent disputes the amounts effectively invested by Claimants, and Mr. Paushok in particular, and argue that the amounts would at best be very low. But nowhere in the Treaty is there a mention of a minimum size of investment to qualify as investor. Whether most of the money used in the creation and the development of GEM was borrowed or originated from Claimants themselves is irrelevant for the purpose of jurisdiction in this case.
206. The Tribunal has to look at the situation as it stood at the time of the alleged breaches of the Treaty by Respondent from the time of its entry into force on February 26, 2006. The fact is that, at that time, GEM was the second largest producer of gold in Mongolia, with annual gold sales in 2006 and 2007 well in excess of USD 100 million and that Claimants at that time owned 100% of the shares of GEM. Respondent itself has also argued that GEM made hundreds of millions of dollars of revenues prior to 2006. It is clear that such an enterprise cannot be built out of thin air whatever the form of the initial investment. Claimants as shareholders of GEM at the time of the alleged breaches were owners of shares having a significant value by any standard and those shares come under the definition of "investment" under the Treaty.
207. In light of the conclusion of the Tribunal as to the existence of an investment, there is no need to rule on the argument of Claimants that Respondent's objection is time-barred.

## 4.2. ITERA LOANS ARE NOT CLAIMANTS' INVESTMENTS

### 4.2.1 ARGUMENTS OF THE PARTIES

208. Respondent asserts that the Tribunal does not have jurisdiction *ratione materiae* over the loans from ITERA International Energy LLP ("ITERA") to GEM in the amount of USD 18 million in 1999 ("**ITERA Loans**") as same are alleged in C. Reply.<sup>100</sup>
209. Respondent submits that ITERA not being a Claimant in this arbitration, these loans do not qualify as Claimants' investment.<sup>101</sup>

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<sup>98</sup> *Azurix Corp v. Argentina*, ICSID Case No ARB/01/12, Decision on the Application for Annulment, September 1, 2009, ¶94.

<sup>99</sup> D1:P77:L8-11.

<sup>100</sup> R. Rejoinder, ¶¶265-269.

210. Claimants respond that ITERA loans having been fully repaid, they do not form part of Claimants' claims and have been alleged to demonstrate the volume of the initial investment by the then shareholders of GEM.<sup>102</sup>

#### 4.2.2 TRIBUNAL'S ANALYSIS

211. There is no claim by ITERA before this Tribunal and Claimants have stated that they make no claim in connection with a contribution from that company. The objection of Respondent is therefore without object.

### 4.3. FAILURE TO ABIDE BY THE SIX MONTH NEGOTIATION PERIOD

#### 4.3.1 ARGUMENTS OF THE PARTIES

212. Relying on Article 6 of the Treaty, Respondent argues that Claimants' failure to abide by the six month negotiation period deprives the Tribunal of jurisdiction to adjudicate all of Claimants' Claims. In support of its objection, Respondent refers to *Enron Corp. and Ponderosa Assets v. The Argentine Republic*<sup>103</sup> and *Generation Ukraine Inc. v. Ukraine*<sup>104</sup> and articulates it as follows:<sup>105</sup>

"278. Mongolia in the Statement of Defense has submitted that Claimants did not abide by the 6-month negotiation period required by the terms of the BIT. Mongolia noted for the Tribunal that *Claimants* never sent a dispute notice to the Mongolian authorities, but rather addressed these authorities only in their capacity *as officers of GEM*. Additionally, Mongolia observed that the letters sent to Mongolian authorities never concerned a specific incidence or claim, but rather concerned only a policy disagreement with the law itself. Mongolia therefore submitted that the Tribunal would not have jurisdiction over Claimants' Claims.

279. Claimants do not address these issues. Rather, they assert broadly that the notice period has been abided by letters from GEM and that, in any event, the 6 month waiting period does not constitute a jurisdictional requirement. GEM's letters cannot credibly concern a negotiation between its shareholders and Mongolia. Further, Claimants' legal argument is flawed, as the waiting period does constitute a jurisdictional requirement. [...]

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<sup>101</sup> R. Rejoinder, ¶269.

<sup>102</sup> C. Rejoinder, ¶¶113-116.

<sup>103</sup> *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, RA-54.

<sup>104</sup> *Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, RA-46.

<sup>105</sup> R. Defense, ¶348; R. Rejoinder, ¶¶278-282.



282. [...] In light of the fact that no negotiations took place or could take place between Mongolia and Claimants as to their potential international legal rights under the Russian Mongolian BIT, this claim must be dismissed." [emphasis in the original]

213. Claimants meet this objection with a three-fold defense:<sup>106</sup>

- (1) Claimants complied with the six-month waiting period as (i) they waited more than six months after the WPT was enacted to commence this arbitration; (ii) assuming a notice was required pursuant to Article 6 of the Treaty, such a notice was provided to the then President of Mongolia, Mr. Enkhbayar, on May 16, 2006<sup>107</sup>, which notice made clear, despite being on GEM's letterhead, that the dispute concerned the rights of investors in the Mongolian mining sector; and (iii) Mr. Paushok met with Mongolian officials more than 30 times to discuss his disagreement with the WPT between May 2006 and late 2007;<sup>108</sup>
- (2) Claimants were not required to wait six months because negotiations would have been manifestly futile;<sup>109</sup> and
- (3) The six-month waiting period is not a jurisdictional requirement.<sup>110</sup>

214. Finally, Claimants argue that in any event more than six months has now passed since Claimants commenced this arbitration<sup>111</sup>.

215. Respondent also invokes the failure to abide by the six-month negotiation period as a substantive defense (as opposed to a jurisdictional objection) to Claimants' treatment claims.

216. In this regard, Respondent opines that the failure to abide by the six-month negotiation period also "relates to the reasonableness of Claimants' conduct and their entitlement to receive compensation for government behavior which they by their actions exacerbated, or at the very least, provided no chance of remediation"<sup>112</sup>.

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<sup>106</sup> C. Reply, ¶¶502 to 510; C. Rejoinder, ¶¶62-82.

<sup>107</sup> CE-46.

<sup>108</sup> C. Rejoinder, ¶¶64-72.

<sup>109</sup> C. Rejoinder, ¶¶73-75.

<sup>110</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13. Decision of the Tribunal on Objections to Jurisdiction, August 6, 2003, ¶184, CA-21; *Lauder v. Czech Republic, Ad hoc UNCITRAL*, Final Award, September 3, 2001, ¶187, CA-22, C. Rejoinder, ¶¶76-81.

<sup>111</sup> C. Rejoinder, ¶82.

<sup>112</sup> R. Defense, ¶269.

217. Claimants submit that not only they complied with all the requirements of Article 6 of the Treaty but also that the argument raised by Respondent is ill-founded and, in any event, moot.<sup>113</sup>

#### 4.3.2 TRIBUNAL'S ANALYSIS

218. Claimants did not fail to abide by the six-month negotiating period.
219. The WPT Law which constitutes the crux of the present dispute came into force on June 8, 2006 and the Notice of Arbitration against Respondent was issued on November 30, 2007. The Tribunal has uncontested evidence that, as early as May 2006 and on numerous occasions subsequently, Claimant Paushok raised with senior officials, ministers and even the President of Mongolia the issue of the negative impact of the WPT upon GEM and investors in the gold mining industry.
220. *Arguendo*, even if they had failed to abide by the negotiating period, this would not go to jurisdiction, as that delay has long expired. In that case, the failure to abide by the waiting period would come under the damages rather than the jurisdiction heading.<sup>114</sup>
221. Finally, the Tribunal is of the view that Respondent's reliance on the six month negotiation period as a substantive defense has no basis in law.

#### 4.4. ABUSE OF ARBITRAL PROCESS

##### 4.4.1 ARGUMENTS OF THE PARTIES

222. Respondent argues that Claimants abused their right to claim in arbitration under the Treaty by reason of their pre-arbitration and arbitration conduct, which renders Claimants' claims being in breach of the principle of good faith and, thus, inadmissible. In this context, Respondent accuses Claimants, among others, of (1) systematic tax evasion by way of inter-company loans and service agreements, (2) having caused GEM to violate its obligations under the mining licenses with regard to environmental restoration and obligations to observe reasonable health and safety standards for their workers; (3) having violated the TRO and the OIM.<sup>115</sup>
223. Claimants argue that the "abuse of rights" objection does not have either factual or legal support:

"89. [...] Claimants are not required to guess the legal basis for Mongolia's jurisdictional objection on which it (rather than Claimants) bears the burden of proof. Having provided absolutely no legal basis for its objection, Mongolia can

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<sup>113</sup> C. Reply, ¶¶326-328.

<sup>114</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13. Decision of the Tribunal on Objections to Jurisdiction, August 6, 2003, ¶184, CA-21; *Lauder v. Czech Republic*, Ad hoc UNCITRAL, Final Award, September. 3, 2001, ¶187, CA-22, C. Rejoinder, ¶¶76-81.

<sup>115</sup> R. Defense, ¶¶349-356; R. Rejoinder, ¶¶270-277.

hardly expect Claimants to wade into the minutia of its claims of misconduct, which would only further stray the Tribunal's attention from the substantial merits of Claimants' Claims."<sup>116</sup>

#### **4.4.2 TRIBUNAL'S ANALYSIS**

224. While Claimants decided not to advance the security required by the OIM, such conduct does not, by itself, deprive the Tribunal of its jurisdiction or render Claimants' claims inadmissible. This is a matter which may have some influence on the conclusions of a tribunal as to the conduct of a party in a particular case but this goes to the merits of the case, not to jurisdiction or admissibility. In the present instance, the failure of Claimants to provide the ordered security resulted in allowing Respondent to implement measures to secure its tax claims against Claimants, which it did.
225. As to the other allegations made by Respondent under this heading (improper transfer of funds - prior to and during the arbitration -, environment, health and safety matters), they rather go to the merits of the case and the Tribunal, whatever conclusion it reaches on other grounds, is not of the view that the actions attributed to Claimants can be considered as abuses of the legal process.

#### **4.5. FAILURE TO APPLY FOR AND TO OBTAIN A STABILITY AGREEMENT**

##### **4.5.1 ARGUMENTS OF THE PARTIES**

226. Respondent first contended that GEM's failure to apply for a stability agreement destroys Claimants' reasonable and legitimate expectations with respect to the stability of the tax environment and, thus, bars, all Claimants' treatment claims:

"175. [...] Where a stability agreement is available and relatively easy to obtain, a failure of an investor to invest an amount adequate to qualify for such an agreement and to apply for one strongly militates against the notion that an investor's professed expectation of tax stability was reasonable.[...]

255. To the extent that Claimants could make a claim with regard to a fair and equitable treatment violation under the Russian-Mongolian BIT, Claimants would have to show that their investment-backed expectations were reasonable and legitimate on the basis of the authorities cited by them. As set out above, the question of tax-related treatment requires a showing of reasonableness of expectations that is greater than may have been the case with regard to other subject matters. An investor, choosing not to commit to investing the required minimal amount and to apply for a stability agreement, does not meet this burden under the treaty.

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<sup>116</sup> C. Reply, ¶¶511-524; C. Rejoinder, ¶¶83-89.

Rather, the investor as a practical matter could have a reasonable investment-backed expectation only if it had in its hands an undertaking to that effect and that was bargained for and in exchange of a significant developmental contribution. In this case, Claimants did not commit to investing the required minimal amount and apply for such an undertaking. Therefore, Claimants cannot invoke a breach of the treatment protection in the Russian-Mongolian BIT with regard to changes in Mongolian tax laws.<sup>117</sup>

227. Once Claimants disproved Respondent's allegation that GEM did not apply for a stability agreement (proving that GEM applied for a stability agreement but was denied such by Respondent, as explained herein below), Respondent reiterated its argument on the basis of GEM's alleged refusal to commit to make additional investments in order to enter into a stability agreement with Mongolia.<sup>118</sup>
228. Respondent asserts that stability agreements were readily available and it would have been sufficient for GEM to commit to a prospective (future) investment of USD 2 million (which GEM allegedly refused to do) to achieve a stability agreement with Mongolia, which stability agreement would have protected GEM against novel taxes, including the WPT<sup>119</sup> and the FWF.<sup>120</sup>
229. In its Post-Hearing Brief, Respondent summarizes its position as follows (i) stability agreements were readily available to mining investors; (ii) a stability agreement would have protected GEM against the WPT (and other novel taxes) and (iii) GEM did not obtain a stability agreement because it failed to undertake to invest future funds.<sup>121</sup>
230. Claimants argue that Respondent's position is ill-founded in law as neither the protections available under the Treaty nor Claimants' treatment claims under the Treaty are conditional upon the existence of a stability agreement.<sup>122</sup>
231. Claimants also argue that Respondent's position is ill-founded in fact, as GEM did apply for a stability agreement:

"112. As a factual matter, Mongolia's stability agreement theory also fails. As set forth above, the cross-examination of Mongolia's witnesses at the Hearing revealed affirmative evidence of discrimination regarding Mongolia's denial of GEM's application for a stability agreement. With equal

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<sup>117</sup> R. Defense, ¶¶175-181, ¶255; also see R. Rejoinder, ¶6, ¶¶75-77.

<sup>118</sup> R. Rejoinder, ¶6, ¶¶75-77.

<sup>119</sup> R. PHB, ¶¶61-70.

<sup>120</sup> R. Defense, ¶¶298-299

<sup>121</sup> R. PHB, ¶¶61-70.

<sup>122</sup> C. Reply, ¶¶550-569; C. PHB, ¶¶107-112.

force, that same evidence shows that (i) GEM did apply for a stability agreement, and (ii) Mongolia would not agree to grant protections beyond those in the model stability agreement. Given that novel taxes were not protected in the model stability agreement, Mongolia cannot now argue that GEM would have been protected from the WPT and the FWF if it had signed it."<sup>123</sup>

#### 4.5.2 TRIBUNAL'S ANALYSIS

232. In its Defense, Respondent alleged that Claimants were not entitled to the protection of the Treaty because GEM had not applied for a stability agreement (in light of Claimants' Reply, that allegation was not repeated by Respondent in its Rejoinder). Claimants alleged in their Reply that GEM did apply for a stability agreement and the Tribunal is satisfied, on the basis of the written and oral evidence submitted to it, that such an application, albeit unsuccessful, was made. Even if they had not done so, the Tribunal does not see how that failure to make an application for a stability agreement would be sufficient to conclude that Claimants' treatment claims under the Treaty are inadmissible. Respondent has presented no valid argument in support of such a statement and this objection is therefore dismissed. Claimants base their claims on the Treaty; nowhere in that Treaty can one find a provision that would require anything like a stability agreement before they could contest the validity of the WPT or the FWF or any other action undertaken by Respondent subsequently to the entry into force of the Treaty.
233. It bears mention that Respondent also seemingly presented the "stability agreement argument" as a substantive defense to the WPT and FWF-related claims. Thus, the issue of the stability agreement will be further discussed in this Award later in the context of the WPT and FWF-related claims and the 2001 Stability Agreement Negotiations claims. Specifically in relation to this latter claim (the 2001 Stability Agreement Negotiations claims), the dates relating to an application for a stability agreement are going to be of significant importance to determine whether the Treaty can be invoked in connection with the treatment of GEM's application for a stability agreement by Mongolia. The objection to jurisdiction *ratione temporis* will be addressed separately when dealing with that issue.

#### 4.6. CONCLUSION ON JURISDICTION AND ADMISSIBILITY OF THE CLAIMS

234. The Tribunal therefore dismisses the five general objections to jurisdiction and admissibility raised by Respondent. As stated earlier, the four remaining objections to jurisdiction and admissibility limited to specific claims (i.e. the 2001 Stability Agreement Negotiations, the Safe Custody and Sale Agreement and the "New Facts" related claims) are addressed in the individual sections pertaining to these claims.

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<sup>123</sup> C. PHB, ¶112.

## 5. CLAIMANTS' CLAIMS

235. The Tribunal will now proceed to consider the Claimants' claims, which are organized by their subject matter (rather than by sections of the Treaty or applicable standards of protection) as follows:

- (1) Enactment and enforcement of the WPT (section 5.2);
- (2) WPT paid prior to December 21, 2006 (section 5.3);
- (3) Enactment and enforcement of the FWF and imposition of quotas (section 5.4);
- (4) 2001 Stability Agreement negotiations (section 5.5);
- (5) Safe Custody and Sale Agreement (section 5.6);
- (6) Delay in the approval of a Bumbat project and conversion of licenses ("New Facts") (section 5.7); and
- (7) Events of December 2, 2008 and thereafter (section 5.8).

236. However, prior to addressing the foregoing Claimants' claims and Respondent's counterclaims, the Tribunal will, as a preliminary matter, expose the Parties' views of the interpretation of Articles 2 and 3 of the Treaty and briefly express its own views on this subject.

### 5.1. INTERPRETATION OF ARTICLES 2 AND 3 OF THE TREATY

#### 5.1.1 ARGUMENTS OF THE PARTIES

237. Claimants submit that the Treaty, including Articles 2 and 3 thereof, is to be interpreted broadly, in view, *inter alia*, of the object and purpose of the Treaty, i.e. to create favourable conditions for investment as stated in the preamble of the Treaty<sup>124</sup>. Claimants mention however that even though an expansive interpretation of the Treaty is warranted, their claims would succeed even on a narrow interpretation thereof.<sup>125</sup>

238. More specifically with respect to Article 3(1) of the Treaty, Claimants state that "a review of the international investment jurisprudence supports an expansive interpretation of the "fair and equitable" standard in Article 3. In particular the "fair and equitable" standard requires the host country (i) to protect the investor's reasonable and legitimate expectations; (ii) to act transparently in its relations with the foreign investor; (iii) to

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<sup>124</sup> C. SC, ¶¶130-138, C. Reply, ¶¶174-180.

<sup>125</sup> C. Reply, ¶173.

provide stability and predictability in its business and legal framework; and (iv) to provide judicial process that is not so unfair as to amount to a denial of justice".<sup>126</sup>

239. Claimants contest Respondent's argument to the effect that FET is limited to the standard of "non-impairment by discriminatory measures" and submit that Article 3(1) of the Treaty sets forth two standards (i) fair and equitable treatment (with no qualification) and (ii) non-impairment of the operation of and disposal with investments by discriminatory measures:<sup>127</sup>

"[...] the non-impairment of the operation of and disposal with investments by discriminatory measures [standard] is included in, but certainly does not limit, the first one. It is a non-exhaustive example of conduct prohibited under the general standard of fair and equitable treatment".<sup>128</sup>

240. Claimants thus argue that the FET standard is unqualified and encompasses a series of discrete principles (including, but not limited to, the protection of legitimate expectations), as stated by the *Rumeli* tribunal<sup>129</sup>:

"The parties rightly agree that the fair and equitable treatment standard encompasses inter alia the following concrete principles:

- The State must act in a transparent manner;
- The State is obliged to act in good faith;
- The State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;
- The State must respect procedural propriety and due process.

The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations."<sup>130</sup>

241. In addition, Claimants dispute Respondent's assertion that Claimants' claims fail because they do not relate to the operation of or disposal with investment:

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<sup>126</sup> C. SC, ¶¶139-148.

<sup>127</sup> C. Reply, ¶¶103, 107-126; C. PHB, ¶91; generally see C. Reply, ¶¶103-154.

<sup>128</sup> C. Reply, ¶109.

<sup>129</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶609.

<sup>130</sup> C. Reply, ¶¶107-108, 127-143.

"(i) Claimants' claims do relate to the operation and disposal of their investments; (ii) the plain wording of Article 3(1) makes clear that the qualification requiring that an investment relate to the "operation of or disposal with" the investment only applies to the standard of "non-impairment by discriminatory measures," not to the fair and equitable treatment standard; and (iii) Mongolia's argument relies on an artificial distinction between direct rights of shareholders to ownership in the shares and their indirect rights in the assets of the company—a distinction that tribunals have resoundingly rejected."<sup>131</sup>

242. Finally, Claimants, relying on the MFN clause in Article 3(2) of the Treaty, invoke the clearly unrestricted FET standards of protection found in Article 2(2)(a) of the US-Mongolia BIT<sup>132</sup> and Article 3(1) of the Denmark-Mongolia BIT<sup>133</sup> as well as "the broader standard of "[non-impairment] by unreasonable and discriminatory measures [of] the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments," which is found, for example, in the U.S.-Mongolia BIT<sup>134</sup>" (as well as in Article 2(2) the Denmark-Mongolia BIT.<sup>135</sup>
243. According to Respondent, Claimants misconstrue the treatment standard under the Treaty as the protections found in Articles 2 and 3 of the Treaty have to be read restrictively based on (i) the *contra proferentem* rule (the applicability of which Claimants contest as "they do not stand in the shoes of the Russian Federation nor are they parties to the Treaty"<sup>136</sup>; (ii) the object and purpose of the Treaty [relying on the last paragraph of the preamble] and the allegedly detrimental impact on Claimants' investment [Claimants deny both the relevance of this allegation and its truthfulness],<sup>137</sup> and (iii) the restrictive wording of Article 3(1) of the Treaty, including the lack of reference to international law.<sup>138</sup>
244. Respondent concludes that Article 3(1) contains one single standard of protection (rather than two as argued by Claimants): fair and equitable treatment limited to non-impairment by discriminatory measures, which standard is further limited as it extends only to the operation of and disposal with investments (as opposed to the latter's use and enjoyment). The result of this narrow definition of FET would be that a "higher bar is set to establish the reasonableness of investment-backed expectations".<sup>139</sup>

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<sup>131</sup> C. Reply, ¶¶104, 144-154.

<sup>132</sup> CE-51.

<sup>133</sup> CE-78; C. Reply, ¶158

<sup>134</sup> CE-51.

<sup>135</sup> C. PHB, ¶¶91-94; C. SC, ¶¶178-180.

<sup>136</sup> C. Reply, ¶¶181-183.

<sup>137</sup> C. Reply, ¶184.

<sup>138</sup> R. Defense, ¶¶182-203.

<sup>139</sup> R. Defense, ¶¶248-250; see also R. Defense, ¶¶251-253.



245. According to Respondent, as Claimants, in their quality of shareholders, claim with respect to the use and enjoyment of their investment (shares), these claims are to be dismissed as Article 3(1) does not provide protection for the use and enjoyment of an investment.<sup>140</sup>
246. With respect to the MFN clause, Respondent takes the position that the MFN clause in the Treaty cannot be invoked by Claimants in order to broaden the protections available thereunder:
- "207. The [MFN] clause by reference to "the treatment, mentioned under paragraph 1 of this Article" is expressly limited to claims concerning "the operation of or disposal with investments". This reference excludes claims that concern the "management", "use", "maintenance" or "enjoyment" of investments. [...]"
208. Claimants' investments in Mongolia are shareholdings. The MFN clause therefore applies only to the "the operation of or disposal with" the shares. It does not apply to their use or enjoyment. The regulations [the WPT and the FWF] concern the profitability of Golden East-Mongolia. The profitability of an enterprise concerns the use and enjoyment of shares in the form of dividends and other financial benefits flowing from them. It does not concern the operation or disposal of the shares."<sup>141</sup>
247. Furthermore, Respondent objects to the application of the MFN clause on the basis of (i) the exclusion regarding double taxation treaties and other agreements regarding taxation found in Article 3(4) of the Treaty (especially given the fact that Russia adopted a similar position in another arbitration) and (ii) the impossibility to use the MFN clause in order to import the preambles, which in turn state the object and purpose of a given treaty, from other treaties (which Claimants do by relying on investments awards rendered under bilateral investment treaties containing preambles different from those found in the Treaty).<sup>142</sup>
248. With respect to the alleged applicability of the MFN clause to the "operation of or disposal with investments" only, Claimants argue that such an interpretation would defeat the very purpose of an MFN clause, i.e. to harmonize "the benefits that Mongolia

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<sup>140</sup> R. Defense, ¶254, see also R. PHB, ¶¶38-41, ¶122 the latter specifically with respect to the discrimination claims generally see also R. Rejoinder, ¶¶78-94 and R. PHB, ¶¶34-42.

<sup>141</sup> R. Defense, ¶¶204-217; see also R. Rejoinder, ¶¶162-164; R. PHB, ¶43.

<sup>142</sup> R. Defense, ¶¶210-217; see also R. Rejoinder, ¶¶161-170.

offers under the Treaty with any more favourable benefits that Mongolia offers under other investment treaties."<sup>143</sup>

249. Claimants also submit that (i) the taxation-related exclusion raised by Respondent is not applicable as Claimants do not attempt to invoke the benefits of a taxation-related treaty but rather those of other bilateral investment treaties and (ii) the position adopted by Russia in another arbitration with respect to this issue is irrelevant.<sup>144</sup> Furthermore, Claimants add that they do not use the MFN clause to import the preambles from other treaties but rather rely on the various case law cited in their submissions, as the awards cited are persuasive and the issues analyzed therein are relevant for the Tribunal's analysis.<sup>145</sup>

### 5.1.2 TRIBUNAL'S ANALYSIS

250. To use Respondent's words, "the Treaty is to be neutrally read according to its ordinary meaning and context"<sup>146</sup>, all in accordance with the terms of the *Vienna Convention on the Law of Treaties*.
251. Applying that rule, the Tribunal cannot share Respondent's conclusion about the interpretation of Article 3(1).
252. First, the Tribunal does not agree that Article 3(1) contains a single standard of protection, i.e. fair and equitable treatment limited to non-impairment by discriminatory measures. Such a reading flies in the face of the plain text of Article 3(1) which accords "investments of investors of the other Contracting Party and activities associated with investments fair and equitable regime that excludes the application of measures of a discriminatory character that might impair the operation of or disposal with investments".
253. In the Tribunal's opinion, it is wrong to read the last exclusion as if it were restricting the definition of fair and equitable treatment. The Tribunal has found persuasive the arguments presented by Claimants in that regard. That expression, in the present case, cannot be interpreted as being limited to the protection of legitimate expectations and non-discrimination but covers a number of other principles which have been mentioned in a number of arbitral awards. The *Rumeli* award<sup>147</sup>, for example, lists the following principles to be applied: transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety and respect of the investor's reasonable and legitimate expectations.

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<sup>143</sup> C. Reply, ¶¶105, 155-167.

<sup>144</sup> C. Reply, ¶168-172.

<sup>145</sup> C. Reply, ¶¶185-191.

<sup>146</sup> R. Defense, ¶203.

<sup>147</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008.

254. Second, the Tribunal equally disagrees with Respondent's interpretation to the effect that the FET is limited to "the operation and disposal with investments" as opposed to its use and enjoyment and that a restrictive interpretation should be given to those words. In any event, as will be seen later in this Award, any of the claims made by Claimants could be brought under "the operation of and disposal with investments" but, even more importantly, the MFN clause of the Treaty allows for the integration into it of the broader provisions contained in the U.S. Mongolia BIT and the Denmark-Mongolia BIT. As this issue has arisen mainly in connection with the SCSA, the Tribunal will discuss this matter more extensively in the section on that Agreement.
255. This being said, the Tribunal will consider the interpretation of the Treaty in the context of the specific claims made by Claimants.

## 5.2. ENACTMENT AND ENFORCEMENT OF THE WINDFALL PROFIT TAX

### 5.2.1 ARGUMENTS OF THE PARTIES

256. Claimants allege that by enacting and enforcing the WPT, Respondent violated several treatment standards set forth in Articles 2 and 3 of the Treaty ("**Treatment Claims**") and the non-expropriation provision set forth in Article 4 of the Treaty ("**Expropriation Claims**"). The arguments invoked by the Parties in support of these two categories of claims are summarized separately below.

#### 5.2.1.1 Treatment Claims

257. Claimants summarize the key elements of the factual predicate of the WPT-related treatment claims and the WPT's characteristics as follows:

"84. Mongolia offers no credible explanation—still less actual evidence—to justify the unprecedented haste with which the WPT was adopted. Nor does Mongolia offer any explanation of what consideration was given to the most critical aspects of the WPT. Indeed, the evidence before the Tribunal suggests that there was none. And the predictable happened: The WPT rendered Mongolia's mining taxation system in discord with international standards, shook investor confidence in the stability and transparency of Mongolia's legislative environment, and subjected Mongolia to broad criticism internationally. Under the circumstances, Mongolia's tepid defense of the WPT is both telling and understandable. [...]

195. The most important factual characteristics of the WPT are undisputed. [...]

- (a) the Mongolian Cabinet repeatedly proposed to repeal the WPT as inconsistent with international standards and with the need to develop the State economy;

- (b) production of gold in Mongolia fell sharply following the introduction of the WPT;
- (c) the Mongolian Parliament adopted the WPT in less than one week, without any consultations with the Mongolian mining industry and without any analysis of the law's potential impact on the mining industry and the Mongolian budget;
- (d) the key parameters of the WPT were set without any contemporaneous justification whatsoever;
- (e) the WPT on gold does not include any mechanism that would account for actual production costs and their escalation;
- (f) the WPT now taxes not only GEM's profits, but also a part of its production and other costs, including certain other tax costs;
- (g) the WPT only applies to the producers of gold and copper and leaves intact potential windfall profits of other industries, including the producers of crude oil;
- (h) copper producers receive much more favorable treatment under the WPT because the tax does not apply to their costs of smelting, extraction, and production of concentrate and guarantees that 100% profit over their operating costs will not be subject to the tax; and
- (i) the WPT is not levied against the largest producer of gold in Mongolia, Canadian owned Boroo Gold.<sup>148</sup>

258. Based on the foregoing, Claimants argue that, by enacting and enforcing the WPT, Respondent breached Articles 2 and 3 of the Treaty and customary international law:<sup>149</sup>

- (1) Article 2: The WPT violates the "full legal protection and security" standard as well as Respondent's obligation to encourage Russian investments because the WPT undermined "the previously stable and secure investment gold-mining climate [and] devalued the advantages granted to foreign investors in the mining sector under the legislation enacted in 1997".<sup>150</sup>

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<sup>148</sup> C. Reply, ¶¶84, 195.

<sup>149</sup> C. SC, ¶¶152-223; see also C. Reply, ¶343.

<sup>150</sup> C. SC, ¶¶215-216, C. Reply, ¶¶29-336; C. PHB, ¶102.

- (2) Article 3(1): The WPT violates the FET standard as (i) it frustrated Claimants' legitimate expectations;<sup>151</sup> (ii) its enactment and enforcement were non-transparent<sup>152</sup>; (iii) it altered the predictability of the business and legal framework;<sup>153</sup>
- (3) Article 3(1): The WPT violates the "non-impairment" standard as it is (i) discriminatory;<sup>154</sup> (ii) arbitrary<sup>155</sup> and (iii) unreasonable<sup>156</sup>. These violations of the "non-impairment" standard also constitute violations of the FET standard as these two standards overlap;<sup>157</sup>
- (4) Article 3(2): The WPT violates the national and most favored nation treatments as it discriminates against Claimants in favor of (i) Mongolian companies active in the mining and extraction of natural resources such as crude oil (cross-sectoral discrimination) and copper (discrimination between gold and copper) and (ii) Canadian-owned Boroo Gold, against which Respondent does not enforce the WPT (discrimination between foreign gold producers of different nationalities).<sup>158</sup> The MFN and national treatments being part of the regime set forth in Article 3(1), these violations also constitute violations of the "non-impairment" and FET standards;<sup>159</sup> and
- (5) Customary international law: The WPT is not in compliance with customary international law as it violates the international minimum standard of treatment as well as all of the foregoing obligations (if customary international law is coextensive with the Treaty).<sup>160</sup>

259. Taking issue with the various facets of the FET and "non-impairment" standards invoked by Claimants (which, as more fully explained below, Respondent believes to be either duplicative of the FET and non-discrimination standards or outright alien to the Treaty), Respondent denies having violated any provision of the Treaty, including Articles 2 and 3 thereof, as well as any principle of customary international law.

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<sup>151</sup> C. SC, ¶¶158-162; C. Reply, ¶¶251-273.

<sup>152</sup> C. SC, ¶¶163-170; C. Reply, ¶¶274-278, 281-282.

<sup>153</sup> C. SC, ¶¶171-177; C. Reply, ¶¶289-304.

<sup>154</sup> C. SC, ¶¶178-198.

<sup>155</sup> C. SC, ¶¶178-183, 199-205; C. Reply, ¶¶305-321.

<sup>156</sup> C. SC, ¶¶178-183, 206-213; C. Reply, ¶¶322-325.

<sup>157</sup> C. SC, ¶214.

<sup>158</sup> With regard to their discrimination claims, Claimants rely on *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Award, July 1, 2004, CA-28. A more detailed summary of Claimants' discrimination arguments is presented herein below.

<sup>159</sup> C. SC, ¶¶178-198, C. PHB, ¶¶55-67.

<sup>160</sup> C. SC, ¶¶217-222, C. Reply, ¶¶337-342.

260. The Sections below contain a summary of Respondent's defenses against the various facets of the Treatment Claims summarized above.

#### **5.2.1.1.1 Legitimate Expectations and Predictability of Business and Legal Framework**

261. With respect to both the WPT and the FWF, Respondent relies on its broad regulatory powers regarding taxation and immigration, two areas which are "traditionally the most exacting of investor expectations" and, thus, are "subject to a high requirement of reasonableness with respect to an investor's expectations".<sup>161</sup>

262. Respondent argues that Claimants' failure to engage in any due diligence in Mongolia prior to making their investment implies an assumption of risk by Claimants and entails that they could not have any reasonable expectations with respect to their investment which would in turn deprive them of any protection under Article 3(1).<sup>162</sup>

263. Respondent also submits that even if Claimants would have engaged in sufficient due diligence, their claims would still fail as it is unreasonable to expect that Mongolia, a social market economy in transition, would not change its tax and employment laws. Respondent further stresses that at the time the investment was made in 1997, the price of an ounce of gold was approximately USD 320 per ounce and that a reasonable investor would not have made an investment decision on the basis of a potential gold prices above USD 500 in 2006, but would have rather considered such prices to be a windfall.<sup>163</sup>

264. Respondent also asserts that (i) Mongolia's WPT law is not without precedent and was modeled on a Russian windfall tax on crude oil exports;<sup>164</sup> (ii) WPT is not inconsistent with international standards<sup>165</sup> and (iii) Mongolia had a rational basis to enact the WPT.<sup>166</sup>

265. Respondent raises the same defenses against Claimants' arguments in relation to the predictability of the business and legal framework.<sup>167</sup>

#### **5.2.1.1.2 Discrimination**

266. In response to Claimants' discrimination claims (which, if founded, would amount to a violation of several treaty obligations, including the FET and "non-impairment"

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<sup>161</sup> R. Defense, ¶¶169-175.

<sup>162</sup> R. Defense, ¶¶256-261; see also R. Rejoinder, ¶¶48-54.

<sup>163</sup> R. Defense, ¶¶262-266; see also R. Rejoinder, ¶¶6, 55-57.

<sup>164</sup> R. Rejoinder, ¶¶58-60.

<sup>165</sup> R. Rejoinder, ¶¶61-62.

<sup>166</sup> R. Rejoinder, ¶¶71-74.

<sup>167</sup> R. Rejoinder, ¶¶95-96.

standards as well as the national and MFN treatments), Respondent raises the following defenses (presented by type of discrimination):

(1) All types of discrimination

The WPT is applied with regard to all investors in the Mongolian gold sector regardless of their nationality.<sup>168</sup>

Discrimination protections concern disparate treatment on account of nationality only (*Feldman*<sup>169</sup>, *Champion Trading*<sup>170</sup>). The WPT is applied with regard to all investors in the Mongolian gold sector regardless of their nationality, including Mongolian gold producers, and, thus, Mongolia does not discriminate against Russian investors [lack of direct or implied animus against Russian investors]. "[...] Claimants do not allege that their Russian nationality has anything to do with the treatment they received. To the extent that Claimants make any claims on account of nationality, Claimants generically allege that the law was generally directed against foreign investors [...]"<sup>171</sup>

Respondent challenges Claimants' factual allegations regarding the animus against foreign investors and, relying on *PSEG*<sup>172</sup>, states that "a disparate impact of a government measure on an industry sector with significant foreign participation does suffice to prove discrimination."<sup>173</sup>

(2) Cross-sectoral discrimination

The WPT reasonably applies to key economic sectors.<sup>174</sup>

2.1. Cross sector analyses are inappropriate to establish discrimination or failure to accord national treatment as a matter of general investment and trade jurisprudence.<sup>175</sup>

"Any discrimination analysis must look to a relevant *tertium comparationis*. The criteria for such a *tertium comparationis* aptly have been discussed and defined in the WTO/GATT context in which questions of discrimination and national treatment take a

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<sup>168</sup> R. Rejoinder, ¶¶103-109, see also, R. Defense, ¶¶114-115, 280-281, R. PHB, ¶¶123-125.

<sup>169</sup> *Feldman v. Mexico*, ICSID Case No. ARB (AF) 99/1, Award and Separate Opinion, December 16, 2002, RA-43.

<sup>170</sup> *Champion Trading Company and Ameritrade International Inc v Egypt*, ICSID Case No. ARB ARB/02/19, Award, October 27, 2006, RA-48.

<sup>171</sup> R. Rejoinder, ¶106, R. Defense, ¶¶276, 278-281, R. PHB, ¶¶123-125.

<sup>172</sup> *PSEG Global Inc. and Konya Ilgin Elektrik v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, CA-29.

<sup>173</sup> R. Rejoinder, ¶¶107- 108.

<sup>174</sup> R. Defense, ¶¶275-281, R. Rejoinder, ¶¶110-121, R. PHB, ¶127.

<sup>175</sup> R. Rejoinder, ¶¶111-112.

far more pronounced role than they do in investor-state arbitrations. The WTO/GATT framework makes a comparison of like products and defines such products as products which are "directly competitive or substitutable."<sup>176</sup>

2.2. The *Occidental* case was decided on the basis of the specific wording of the underlying national treatment provision.

With respect to cross-sectoral discrimination, Respondent submits that Claimants' reliance on *Occidental v. Ecuador*<sup>177</sup> is improper as that case was adjudicated on the basis of a national treatment provision (namely Article II(1) of the U.S.-Ecuador BIT) broader than the national treatment provision of the Treaty (Article 3(2) of the Treaty) and not on the basis of the non-discrimination provision (Article II(3)(b) of the U.S.-Ecuador BIT).<sup>178</sup>

Further, the *Occidental* tribunal relied on the term "in like situations" found in the applicable national treatment provision (Article II(1) of the U.S.-Ecuador BIT) whereas such term is not part of the Treaty.

"114. [...]the *Occidental* analysis construes the term "in like situations" in the national treatment protection of the U.S.-Ecuador BIT – missing from the Russia-Mongolia BIT – as a technical term. [...]"

115. [...] The *Occidental* tribunal justified its cross-sector analysis in the national treatment context by expressly distinguishing prevalent WTO/GATT jurisprudence on national treatment exactly because the BIT used "in like situations" rather than "like products", thus implicitly acknowledging the relevance of the WTO/GATT approach in situations not involving such distinctive treaty language.

116. The approach of *Occidental* is [...] inapplicable in connection with the national treatment under the Russian-Mongolia BIT. The BIT in this arbitration does not use the term "in like situations" in the national treatment provision. The BIT accordingly does not allow for a derogation from the narrower and more sensible market definition set out in the WTO context [based on a comparison of like products and defining such products

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<sup>176</sup> R. Rejoinder, ¶111.

<sup>177</sup> *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Award, July 1, 2004, CA-28.

<sup>178</sup> R. Defense, ¶¶275, 276, R. PHB, ¶127.



as products which are "directly competitive or substitutable"]<sup>179</sup>

2.3. The *Occidental* case has not been followed by investment jurisprudence.

Respondent further argues<sup>180</sup> that the *Occidental* national treatment standard analysis has not been followed in *Champion Trading*<sup>181</sup> and *Sempra*.<sup>182</sup>

2.4. Even if the *Occidental* case were applicable, the comparator is not appropriate

"Mongolia had a rational basis to apply the Windfall Profits Tax to gold and copper mining but not to other sectors".<sup>183</sup>

Even if the principle set out in *Occidental v. Ecuador* were applicable, the industry chosen by Claimants, i.e. oil extraction, would be inappropriate as Mongolia produces very small quantities of that commodity and imports most of it.<sup>184</sup>

Respondent submits that Claimants' Counsel stated at the Hearing that the *Occidental* tribunal considered measures relating to oil in connection with "other products" that were "Ecuador's major export goods". Claimants have never argued that oil is a "major export" of Mongolia. In fact, Mongolia is an importer of oil, not an exporter.<sup>185</sup>

Respondent further argues that:

121. The mining and petroleum industries have a completely different history in Mongolia. Mongolian mining companies had a long benefit of record low tax and royalty rates. Given the state of the Mongolian mining industries, companies in that sector actually could take advantage of these rates and sell significant amounts of gold and copper with such a low regulatory exposure. The same is not true for the petroleum industry. There is thus a rational basis for a correction in the gold and copper sector that is entirely lacking in the

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<sup>179</sup> R. Rejoinder, ¶¶114-116; see also R. PHB, ¶127.

<sup>180</sup> R. Rejoinder, ¶¶117-119; see also R. PHB, ¶127.

<sup>181</sup> *Champion Trading Company and Ameritrade International Inc v Egypt*, ICSID Case No. ARB/02/19, Award, October 27, 2006, RA-48.

<sup>182</sup> *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, CA-63.

<sup>183</sup> R. Rejoinder, ¶¶120-121.

<sup>184</sup> R. Defense, ¶277, R. Rejoinder, ¶120, R. PHB, ¶127.

<sup>185</sup> R. PHB, ¶126.

petroleum sector: investors garnered a significant benefit from being under-taxed on significant revenue."<sup>186</sup>

(3) Discrimination between copper and gold

The WPT reasonably distinguishes between gold and copper mining.<sup>187</sup>

Respondent alleges that (1) the comparison with copper is improper (as it is not a "like product");<sup>188</sup> (2) different treatment of Erdenet, the only meaningful copper producer, and gold producers is reasonable and based on differences in transparency, size and sophistication and the desire to encourage the building of a copper smelting facility in Mongolia<sup>189</sup> and (3) "providing a flexible cost formula [as it is the case for copper] for the setting of gold prices would have invited gold miners artificially to inflate costs to such a degree as to avoid paying the tax".<sup>190</sup>

With respect to Erdenet, a copper producer, Respondent submits there is no evidence of discrimination against Russian investors (Russia and Mongolia being respectively 49% and 51% shareholders of Erdenet, which is subject to the WPT) and that "given the differences in cost structures and transparency inherent in dealing with an enterprise of the size and sophistication of Erdenet as compared to Golden East-Mongolia, Erdenet does not make for an adequate *tertium comparationis* for purposes of establishing whether companies in the copper industry or the gold industry are treated disparately."<sup>191</sup>

(4) Discrimination between GEM and Boroo Gold

This claim is addressed in the "2001 Stability Agreements Negotiations Claims" section herein below.

267. Claimants challenge the foregoing defenses to the discrimination claims as follows (in the same order as above):

(1) All types of discrimination

With respect to the discriminatory intent (*animus*), Claimants submit that Respondent had same as (i) "the WPT treats copper sales differently than the gold sales on the very face of the legislation itself"<sup>192</sup> and (ii) "the WPT was

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<sup>186</sup> R. Rejoinder, ¶121.

<sup>187</sup> R. Rejoinder, ¶¶122-127, also see R. PHB, ¶¶128-130.

<sup>188</sup> R. Rejoinder, ¶123.

<sup>189</sup> R. Rejoinder, ¶¶124-125.

<sup>190</sup> R. Rejoinder, ¶126.

<sup>191</sup> R. Defense, ¶¶273-274.

<sup>192</sup> C. Reply, ¶245.

prompted by a popular animus against foreign investors as reported by Mongolian media."<sup>193</sup>

In any event, Claimants, relying on *Occidental v. Ecuador*, argue that such a discriminatory intent is not required to establish discrimination and that "the actual impact of a measure on the investment is the determining factor to ascertain whether discrimination occurred".<sup>194</sup>

With respect to the actual impact of the WPT on Claimants' investment, Claimants stress that the WPT has been disproportionately applied to GEM. For instance, Claimants allege that GEM's USD 23 million payment in 2007 represented 80-85% of Mongolia's total WPT income and so despite the fact that GEM has never made up more than 25% of the total gold production in Mongolia. The 80-85% figure would have been even higher (89-93%) if GEM had paid the additional USD 31 million that were due for other sales in 2007.<sup>195</sup>

Claimants further submit that the applicability of the WPT to Mongolian gold producers does not constitute a defense and that a similar argument was rejected by the *Occidental v. Ecuador* tribunal.<sup>196</sup>

(2) Cross-sectoral discrimination

Claimants argue that *Occidental v. Ecuador*<sup>197</sup> is applicable in the present case as Article 3(2) of the Treaty is in fact broader than Article II(1) of the U.S.-Ecuador BIT (the latter, contrary to the former, referring to treatment "in like situations").

Further, Claimants are of the view that "the small volume of the [Mongolian] oil production does nothing to explain why Mongolian oil producers can keep their windfall profits while producers of gold must forfeit 68% of them."<sup>198</sup>

Claimants further submit that the applicability of the WPT to Mongolian gold producers does not constitute a defense to the cross-industry discrimination claim and that a similar argument was rejected by the *Occidental v. Ecuador* tribunal.<sup>199</sup>

(3) Discrimination between copper and gold

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<sup>193</sup> CE-56; C. Reply, ¶246.

<sup>194</sup> C. Reply, ¶248.

<sup>195</sup> C. PHB, ¶¶77-80.

<sup>196</sup> C. Reply, ¶¶203-212, C. PHB, ¶56.

<sup>197</sup> *Occidental v. Ecuador Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Award, July 1, 2004,, CA-28.

<sup>198</sup> C. Reply, ¶¶203-212, C. PHB, ¶56.

<sup>199</sup> C. Reply, ¶¶203-212, C. PHB, ¶56.

Claimants reply that Respondent's reference to Russia's partial ownership of Erdenet is irrelevant in that context as "Mongolia discriminates against GEM and other gold producers not only when compared with [the producers of other natural resources, such as crude oil], but also when compared to Erdenet and other copper producers because the WPT on gold sales is calculated differently than the WPT is calculated on copper sales".<sup>200</sup>

With respect to Respondent's argument regarding the distinction between Erdenet and GEM, Claimants point out that the only real difference between Erdenet and GEM is their size (which is irrelevant for the purpose of the discrimination argument) and that the differences between two companies, as opposed to the differences between two industries, are irrelevant per se. Claimants add that as a factual matter, "there are no major differences between Mongolian copper producing and gold producing companies in their transparency and sophistication - either generally or specifically between Erdenet and GEM"<sup>201</sup>.

If evidence of discriminatory intent is required, Claimants submit that Respondent had same as "the WPT treats copper sales differently than the gold sales on the very face of the legislation itself"<sup>202</sup>.

In response to Respondent's assertions regarding systematic cost inflation by gold producers, Claimants reply that (1) "Mongolia's ex post facto argument that gold-miners are categorically dishonest (as opposed to copper miners) is disingenuous. Mongolia imposes other taxes [on gold and copper miners, such as the corporate income tax] without making any such distinction" and (2) "the factual predicate for this assertion is a statement in the World Bank discussion paper about small scale [Ninja] miners, [which has] nothing to do with reporting costs, and the practices of Ninja miners are hardly applicable to major gold mining companies;"<sup>203</sup>

(4) Discrimination between GEM and Boroo Gold

This claim is addressed in the "2001 Stability Agreements Negotiations Claims" section herein below.

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<sup>200</sup> C. Reply, ¶¶221; C. PHB, ¶57.

<sup>201</sup> C. Reply, ¶¶213, 217-223.

<sup>202</sup> C. Reply, ¶245.

<sup>203</sup> C. PHB, ¶¶34-36.

### 5.2.1.1.3 Transparency, Non-Arbitrariness and Reasonableness

268. In its Rejoinder, Respondent submits that legislative processes are not within the scope of any transparency conception as discussed by the international investment tribunals<sup>204</sup> but still raises the following defenses regarding the transparency claim:<sup>205</sup>

- (1) "[T]he pre-2006 taxation and royalty regime governing gold mining in Mongolia was heavily imbalanced in favor the mining companies and did not allow Mongolia to receive the benefit of its natural resources, as had been recognized by international authorities and heavily discussed within Mongolia". This regime allowed GEM to reap "more than a quarter-billion U.S. dollars with a minimal, and still unsubstantiated, investment. "
- (2) Vigorous discussions [in the Mongolian Parliament, the media and the Mongolian population at large] regarding changes to Mongolia's tax laws took place for quite some time prior to enactment of the Windfall Profits Tax in 2006.
- (3) Skyrocketing gold prices led to further public discussions regarding changes to the tax regime. When gold prices began to skyrocket in earnest in late 2005 and early 2006, Mongolian Parliamentarians began to discuss plans for a change in the revenue structure from the mining industry with constituents leading to drafts of the WPT being discussed as early as April 2006 in the media.
- (4) Interested persons had the ability to comment on the WPT before its passage. Various NGOs and international groups, including the World Bank, analyzed and commented on drafts of the WPT before its passage and lobbied against its adoption, with the Mongolian mining sector taking an active role for months in resisting changes to the tax laws.
- (5) The legislative process governing the passage of the WPT was consistent with Mongolian law and practice. The passage of the WPT followed constitutional requirements of parliamentary process and was consistent with Mongolian legislative practice.
- (6) Discussions regarding the mining tax regime continued in Mongolia, resulting in the "effective repeal" of the WPT. After passage of the WPT, public discourse and analysis of

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<sup>204</sup> R. Rejoinder, ¶¶3, 9-15.

<sup>205</sup> R. Rejoinder, ¶2.

the tax regime continued in Mongolia, leading to the eventual change of the base price of gold for the application of the WPT from USD 500 to USD 850. Claimants have called this an "effective repeal" of the WPT.

269. Respondent's defense to the transparency claim is articulated as follows:

- (1) Transparency relates to the procedure of the *implementation* [as opposed to enactment] of laws and regulations, not to whether a law was passed in "six days" (which in any event is not correct);<sup>206</sup> "[emphasis in the original]
- (2) Claimants conception of transparency defies common sense as it elevates form over substance and does not protect investors from any real impairment of their investment;<sup>207</sup>
- (3) The WPT followed years of public debate about changing the 1997 Mining Law;<sup>208</sup>
- (4) The WPT was passed in conformity with Mongolian legislative practice;<sup>209</sup>
- (5) The debate in Mongolia regarding the management of its natural resources continued after the passage of the WPT;<sup>210</sup>
- (6) Claimants' allegations regarding the process by which the WPT was considered and passed show that Claimants were not engaged participants in the mining sector;<sup>211</sup> and
- (7) Claimants' conception of transparency rests on an imagined standard that it not consistently met in any democratic society.<sup>212</sup>

270. Adding that the Parliament had a rational basis to enact the WPT and acted after due deliberation and detailed engagement of the underlying issues, Respondent invokes the same defenses in the context of the non-arbitrariness and reasonableness standards.<sup>213</sup>

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<sup>206</sup> R. Rejoinder, ¶¶9-15.

<sup>207</sup> R. Rejoinder, ¶216.

<sup>208</sup> R. Rejoinder, ¶¶17-22.

<sup>209</sup> R. Rejoinder, ¶¶23-32.

<sup>210</sup> R. Rejoinder, ¶¶33-36.

<sup>211</sup> R. Rejoinder, ¶¶37-38.

<sup>212</sup> R. Rejoinder, ¶39.

<sup>213</sup> R. Rejoinder, ¶¶97-102.

#### 5.2.1.1.4 Customary international law

271. As seen above, Respondent contests the relevancy of any standard of protection save a restrictive FET protection and the protection against discrimination.<sup>214</sup>
272. Respondent in fact argues that the lack of reference to customary international law in Article 3(1) of the Treaty is indicative of the very limited scope of the protections granted, which protections are below the customary international law standard.<sup>215</sup>
273. Respondent submits that Claimants' reliance on the press release of the Mongolian Government<sup>216</sup> stating that the WPT should be repealed in order to harmonize the tax burden with international standards is inappropriate as the press release was not referring to the international minimum standard of treatment and, in any event, it does not amount to a legal conclusion.<sup>217</sup>
274. In its Reply<sup>218</sup>, Claimants state that whether the press release<sup>219</sup> contains a legal conclusion or not is irrelevant.<sup>220</sup>
275. Claimants further opine that the WPT is not in compliance with customary international law not only because it violates the international minimum standard of treatment but also, on the assumption that the customary international law is coextensive with the Treaty, because it violates the Treaty protections.<sup>221</sup>
276. As to the scope of protection granted by the Treaty, Claimants state that (i) "a treaty can be interpreted to dispense of important principles of customary international law only if it clearly states such an intention"<sup>222</sup> (which is not the case of the Treaty) and (ii) a BIT containing an MFN clause cannot, by definition, provide for a standard of treatment below the international minimum standard.<sup>223</sup>
277. In response to the foregoing, Respondent argues<sup>224</sup> that Claimants have not adduced evidence of the existence of a customary international law rule with respect to taxes<sup>225</sup>.

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<sup>214</sup> R. Defense, ¶¶247, 282.

<sup>215</sup> R. Defense, ¶¶200, 252, 283.

<sup>216</sup> CE-30.

<sup>217</sup> R. Defense, ¶¶109, 129, R. Rejoinder, ¶173.

<sup>218</sup> C. Reply, ¶¶337-342.

<sup>219</sup> CE-30.

<sup>220</sup> C. Reply, ¶¶337-338.

<sup>221</sup> C. Reply, ¶339.

<sup>222</sup> *Ellettronica Sicula S.p.A( ELSI) (United States of America v. Italy)*, July 20, 1989, I.C.J., 15, CA-91.

<sup>223</sup> C. Reply, ¶¶340-341.

<sup>224</sup> R. Rejoinder, ¶¶173-176.

<sup>225</sup> R. Rejoinder, ¶¶173-175.

Relying on the dissenting opinion of Judge Schwebel in *ELSI*<sup>226</sup>, Respondent contests that the minimum international standard of treatment is part of customary international law.<sup>227</sup>

#### 5.2.1.1.5 Full Protection and Security and Duty to Encourage Investments

278. As to the full protection and security standard and the duty to encourage investments, set forth in Article 2 of the Treaty, Respondent argues that this standard amounts to a reiteration of fair and equitable treatment and that any claims based thereon fail for the reasons similar to those advanced with respect to the claims based on the fair and equitable treatment. Respondent further contends that the WPT did not remove the security and the legal protection from Claimants.<sup>228</sup>
279. Claimants disagree with this statement and argue that the failure to encourage Russian investment in Mongolia amounts to an independent violation of Article 2 of the Treaty as the latter imposes an objective requirement of stability, certainty and foreseeability (the objective character of protection becomes all the more important if one accepts Respondent's incorrect assertion to the effect that the FET standard of the Treaty imposes a subjective standard reduced to the protection of Claimants' specific expectations that does not include the requirement of a stable and predictable business and legal framework for Claimants' investment.<sup>229</sup>

#### 5.2.1.2 Expropriation Claims

280. Claimants argue that, by enacting and enforcing the WPT, Respondent also breached Article 4 of the Treaty.<sup>230</sup>
281. According to Claimants, Article 4 of the Treaty must be interpreted in view of the MFN clause in Article 3(2) of the Treaty. The MFN clause is applicable to expropriation and nationalization because these are measures that "impair" the operation of and disposal with investments within the meaning of Article 3(1) of the Treaty. Thus, Claimants invoke, among others, the benefit of Article V of the Netherlands-Mongolia BIT that protects against any direct or indirect deprivation of investments.<sup>231</sup>
282. With respect to their expropriations claims, Claimants rely on the test set forth in *EnCana Corporation v. Ecuador*:<sup>232</sup>

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<sup>226</sup> *Elektronika Sicula S.p.A (ELSI) (United States of America v. Italy)*, July 20, 1989, I.C.J., 15, CA-91, RA-53.

<sup>227</sup> R. Rejoinder, ¶¶176.

<sup>228</sup> R. Defense, ¶¶295-297; R. Rejoinder, ¶¶171-172.

<sup>229</sup> See R. Defense, ¶¶282-283 C. Reply, ¶¶329-336.

<sup>230</sup> C. SC, ¶¶278-295; C. Reply, ¶¶424-488; C. PHB, ¶103.

<sup>231</sup> C. SC, ¶¶280-287.

<sup>232</sup> , C. SC, ¶288.



"It is well settled that taxation is a specific category of measures for the purposes of expropriation. This is because it relates to a universal State prerogative to create a new legal liability on a class of persons to pay money to the government in respect of some defined class of transactions. By definition, taxation is not accompanied by the payment of any compensation—and, therefore, under traditional legal principals would ipso facto be illegal. Therefore, international law sets forth a specific test for the assessment whether tax measures are expropriatory: a tax is an unlawful deprivation if it is "extraordinary, punitive in amount or arbitrary in its incidence." The Windfall Profit Tax constitutes an illegal deprivation because it is all of these things."<sup>233</sup> [emphasis added]

283. Claimants argue that the WPT meets the foregoing test and, thus, is expropriatory because it is (the criteria below being disjunctive):<sup>234</sup>
- (1) **extraordinary** as (1) it does not conform to international standards; (2) it does not account for production costs; (3) it caused an unprecedented deterioration of the legal framework applicable to the Mongolian gold-mining industry; (4) it is unprecedented in the relatively long history of taxation in Mongolia and (5) it had an extraordinary detrimental impact on non-exempt gold-mining companies in Mongolia, causing, inter alia, an important fall in the production of gold;<sup>235</sup>
  - (2) **punitive in amount** as (1) it fails as a systemic response to any problems invoked by Mongolia because the latter discharged from the tax its largest potential source of revenue, Boroo Gold, making GEM a scapegoat and (2) if enforced, the WPT would drive GEM out of business (the WPT allegedly drove out of business several other gold producers);<sup>236</sup>
  - (3) **arbitrary and discriminatory** in its incidence because (1) it is not based on any rational decision making or a reasoned judgment that would involve balancing Mongolia's interest against the burden being imposed on Claimants (which makes the WPT arbitrary) and (2) it is discriminatory for the reasons identical to those invoked in the context of the Treatment claims.<sup>237</sup>
284. Claimants also argue that the WPT is not in the public interest because (1) Mongolia failed to allege any principled public interest other than the increase of its tax revenues,

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<sup>233</sup> *EnCana Corporation v. Ecuador*, LCIA Case No. UN3481, Award (Feb. 3, 2006), ¶177.

<sup>234</sup> C. Reply, ¶¶470, 483.

<sup>235</sup> C. SC, ¶289, C. Reply, ¶¶474-480.

<sup>236</sup> C. SC, ¶290, C. Reply, ¶¶481-482.

<sup>237</sup> C. SC, ¶291; C. Reply, ¶¶483-488.

which is not sufficient; (2) gold production and revenue intake decreased as a result of the WPT and (3) the largest potential source of revenue (Boroo Gold) was forgone.<sup>238</sup>

285. Respondent is of the view that Claimants failed to make out the expropriation claims and argues, relying on the test set forth in the *LG&E* case<sup>239</sup> that the WPT does not constitute indirect expropriation (as would be the case of most tax laws, if the Claimants analysis were accepted) because:<sup>240</sup>

- (1) it did not deprive Claimants of essentially the entire benefit of their investment (there was no substantial impact translating into a loss of control over the investment);
- (2) it was not a disproportionate exercise of State power, taking into account the need the WPT was addressing;<sup>241</sup> and
- (3) it is not a permanent measure.

286. Respondent further takes the position that even on the basis of the *EnCana* test<sup>242</sup>, the WPT is not expropriatory because:<sup>243</sup>

- (1) the WPT applies to future revenues (the *EnCana* tribunal making a distinction between prospective and retroactive measures);<sup>244</sup>
- (2) the WPT is not punitive as (i) Claimants, having presented distorted financial picture, failed to establish the alleged detrimental impact of the WPT on GEM and (ii) Boroo Gold is not paying the WPT on the basis of a stability agreement which was available to GEM had it accepted to make additional (future) investments;<sup>245</sup>
- (3) the WPT is not extraordinary as (i) Claimants failed to adduce any credible evidence establishing same and (ii) the WPT was modeled on the Russian crude oil exports tax and is similar to the U.S. windfall tax that was in place for 8 years;<sup>246</sup>

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<sup>238</sup> C. SC, ¶¶292-295.

<sup>239</sup> *LG&E v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award on Liability, October 3, 2006, CA-58.

<sup>240</sup> R. Defense ¶¶308-326, R. Rejoinder, ¶¶222, 229-238.

<sup>241</sup> R. Rejoinder, ¶240.

<sup>242</sup> *EnCana Corporation v Ecuador*, LCIA Case No. UN3481, Award, February 3, 2006, CA-57.

<sup>243</sup> R. Rejoinder, ¶¶239-254.

<sup>244</sup> R. Rejoinder, ¶¶245-246.

<sup>245</sup> R. Rejoinder, ¶247.

<sup>246</sup> R. Rejoinder, ¶¶248-253.

- (4) the WPT is not arbitrary as Mongolia had a rational basis for enacting the WPT as set forth in the Treatment Claims section above.<sup>247</sup>

287. Claimants submit that all the three defenses (see ¶283 above) raised by Respondent in its Defense are ill-founded.<sup>248</sup>

1. Loss of control and object of expropriation

288. First, Claimants assert that "loss of control" is not an appropriate test in the tax context<sup>249</sup>. Relying on *Pope & Talbot*<sup>250</sup>, *CME*<sup>251</sup>, *Tecmed*<sup>252</sup> and *EnCana*<sup>253</sup>, Claimants argue that the finding of a loss of control is not a *sine qua non* of expropriation but is merely one of the possible manifestations of the significant interference requirement and that any government interference resulting in less than full ownership and control of the investment would support a finding of expropriation.<sup>254</sup>

289. Claimants also opine that even if the Tribunal concludes that the "loss of control" is a *sine qua non* criterion for a finding of expropriation and that Respondent did not expropriate Claimants' entire investment, Respondent has nonetheless expropriated parts of their investments. Relying on a series of investment awards which purportedly recognized that an expropriation claim stands even when only a part of the investment is expropriated, Claimants argue as follows:

"459. In line with the above authorities, Mongolia expropriated GEM's (i) right to conduct business embodied in its gold-mining licenses, (ii) financial means, and (iii) right to returns. [Claimants invoke the benefit of the MFN clause and Art. 2(2) of the Austria-Mongolia BIT which expressly includes the returns]. More specifically, although the WPT does not take all of GEM's returns, it has unquestionably taken so much as to push GEM to the precipice of insolvency. If Mongolia enforced the WPT against GEM, GEM would not be left with enough funds to continue its gold-mining business. [...] it does not matter that Mongolia has not taken, for example, GEM's machinery. So long as GEM cannot use its machinery to mine gold in a profitable way, it is not

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<sup>247</sup> R. Rejoinder, ¶254.

<sup>248</sup> C. Reply, ¶¶424-488.

<sup>249</sup> C. Reply, ¶¶430-448.

<sup>250</sup> *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, ¶116, April 10, 2001, CA-49.

<sup>251</sup> *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, September 13, 2001, CA-47.

<sup>252</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, CA-51.

<sup>253</sup> *EnCana Corporation v. Ecuador*, LCIA Case No. UN3481, Award, February 3, 2006, CA-57.

<sup>254</sup> C. Reply, ¶¶441-448.

better off having the machinery than it would be if Mongolia had taken it.

460. In any event, even if Mongolia's expropriation has been only partial thus far, it is only because of the temporary lack of the enforcement of the WPT.[...]. If the WPT was enforced, it would spell imminent bankruptcy for GEM. And Mongolia's expropriation would then be complete."<sup>255</sup>

290. Respondent disputes that either GEM's mining licenses or the returns on investment constitute an "investment" within the definition of the Treaty<sup>256</sup> and argues that in any event none of the alleged Claimants' investments has been expropriated, save for the fact that the "returns on investments" were affected:

"228. In any event, Mongolia notes that Claimants have failed to establish that any of these rights or assets could have been expropriated by the Windfall Profits Tax. All of these rights and assets were not affected by the Windfall Profits Tax. (Claimants still own GEM's shares. GEM is still the holder of its licenses to explore and exploit mine reserves in Mongolia. Claimants are still in control of GEM.) Only "income" derived from these rights and assets, itself independently defined in the treaty, has been affected by it. Income, however, is not the subject matter of an investment claim. Only the investment is."<sup>257</sup>

291. With respect to the "loss of control" criterion, Respondent replies that "[w]hatever specific indicia have been consulted by investment tribunals, the constant in all these decisions is that measures tantamount to expropriation must rise to the level of an interference *equivalent* to expropriation [...] a less complete deprivation does not qualify as expropriation."<sup>258</sup> [emphasis in the original] In this regard, Respondent argues that the WPT does not meet the test because:

(1) Claimants can still run a profitable business notwithstanding the WPT (in 2008, GEM is alleged to have generated USD 35 million even accounting for the WPT), which in any event has been amended in December 2008, raising the base price to USD 850;<sup>259</sup>

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<sup>255</sup> C. Reply, ¶¶449-460.

<sup>256</sup> R. Rejoinder, ¶¶227, 228.

<sup>257</sup> R. Rejoinder, ¶¶223-258.

<sup>258</sup> *Pope & Talbot Inc v Canada, Ad hoc-UNCITRAL*, Interim Award, June 26, 2000, R. Rejoinder, ¶230.

<sup>259</sup> R. Rejoinder, ¶¶231-232, 237, 239.

- (2) Claimants still have control over their investments and no *Pope & Talbot*<sup>260</sup> expropriation indicia are present in the circumstances.<sup>261</sup>
- (3) Claimants failed to show causation as GEM's financial statements (not in accordance with IFRS) present a distorted financial picture which makes it impossible to determine what impact the WPT really had on GEM.<sup>262</sup>

292. Regarding the partial expropriation, Respondent observes that this claim is ill-founded, the WPT not being expropriatory (see above) with respect to the entirety of Claimants' investments or, by necessary implication, parts thereof. Respondent further reiterates that Claimants failed to identify specific asset or property which did not constitute the entirety of their investment and that Claimants' arguments in relation to GEM's licenses or the returns on investments amount to a statement that a lesser effect in their investments should be viewed as partial expropriation, which statement is ill-founded in law.<sup>263</sup>

## 2. Permanency

293. Relying on *Wena Hotels*<sup>264</sup> and *Middle East*<sup>265</sup>, Claimants argue that temporary deprivations also qualify for a finding of expropriation.<sup>266</sup>

294. Respondent submits that the permanency of a measure is a relevant criterion in circumstances where the investor has never been deprived on its investment, as is the case with Claimants.<sup>267</sup>

## 3. Proportionality

295. Assuming that the funds generated by the WPT are used for some laudatory goal (as Respondent alleges), Claimants submit that such a fact would not legitimize an expropriation<sup>268</sup> and especially an expropriation without compensation.<sup>269</sup>

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<sup>260</sup> *Pope & Talbot Inc v Canada, Ad hoc-UNCITRAL, Interim Award, June 26, 2000, RA-60.*

<sup>261</sup> R. Rejoinder, ¶¶233-235.

<sup>262</sup> R. Rejoinder, ¶236.

<sup>263</sup> R. Rejoinder, ¶¶255-258.

<sup>264</sup> *Wena Hotels Ltd v. Arab Republic of Egypt, ICSID Case No ARB/98/4, Award, December 8, 2000, CA-36.*

<sup>265</sup> *Middle East Cement Shipping and Handling Co SA v. Egypt, ICSID Case No ARB/99/6, Award, April 12, 2002, CA-84.*

<sup>266</sup> C. Reply, ¶¶461-463.

<sup>267</sup> R. Rejoinder, ¶¶237-239.

<sup>268</sup> *Santa Elena, SA v. Costa Rica, ICSID Case No. ARB/ 96/1, Final Award, February. 17, 2000, CA-85.*

<sup>269</sup> C. Reply, ¶¶464-467.

### 5.2.1.3 Causation

296. As a general defense to Claimants' WPT-related claims (both Treatment and Expropriation Claims)<sup>270</sup>, Respondent argues in its Rejoinder <sup>271</sup> that "Claimants have not shown that it was the passage of the WPT [to the exclusion of other factors unrelated to Respondent] that caused the factual harm to GEM underlying Claimants' claims in this case." In Respondent's view, GEM's profitability has been significantly affected by factors other than the WPT:<sup>272</sup>

- (1) Claimants' assertion that GEM made no money in 2008 despite mining over USD 65 million in gold and paying no WPT or foreign worker fee calls into question GEM's accounting and operations;<sup>273</sup>
- (2) The hundreds of non arm-length's, related party transactions entered into after the passage of the WPT has affected the profitability of GEM;<sup>274</sup>
- (3) Claimants violated the Tribunal's orders by transferring assets out of Mongolia when the TRO was in force and then claiming that they had no assets to pay security;<sup>275</sup>
- (4) Claimants have made cash withdrawals from GEM's accounts of almost USD 18 million while the TRO and the OIM were in place;<sup>276</sup>
- (5) Claimants have taken steps to make GEM's costs appear higher than its actual costs and to prevent an examination by this Tribunal and Mongolia of GEM's costs.<sup>277</sup>

297. Claimants address some of the foregoing statements in Appendix 1 to its Reply and state that:

- (1) There is no evidence of tax fraud:<sup>278</sup> (1) prior to this arbitration, Mongolia repeatedly recognized GEM's tax compliance;<sup>279</sup> (2) Claimants' submissions of financial information to Mongolia were accurate;<sup>280</sup> (3) the inter-company loans

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<sup>270</sup> In its PHB, Respondent also raised this defense against the FWF-related claims.

<sup>271</sup> R. Rejoinder, ¶¶147-160.

<sup>272</sup> R. Rejoinder, ¶¶147-160, see also R. Rejoinder, ¶¶236, 247 specifically with respect to expropriation; see also R. PHB, ¶¶100-121.

<sup>273</sup> R. Rejoinder, ¶¶148-151.

<sup>274</sup> R. Rejoinder, ¶¶152-153.

<sup>275</sup> R. Rejoinder, ¶154.

<sup>276</sup> R. Rejoinder, ¶¶155-156.

<sup>277</sup> R. Rejoinder, ¶¶157-160.

<sup>278</sup> C. Reply, Annex 1, ¶¶18-41.

<sup>279</sup> C. Reply, Annex 1, ¶¶20-22.

<sup>280</sup> C. Reply, Annex 1, ¶¶23-25.

are not evidence of fraud;<sup>281</sup> (4) Mongolia's other accusation of fraud are unsubstantiated<sup>282</sup> and (5) Mongolia's claims of accounting irregularities contradict its claims of tax fraud;<sup>283</sup>

- (2) GEM's increase in costs in 2006-2007 was attributable to the WPT and increasing fuel prices;<sup>284</sup>
- (3) Claimants have not improperly "siphoned" money out of Mongolia.<sup>285</sup>

## 5.2.2 TRIBUNAL'S ANALYSIS

298. Actions by legislative assemblies are not beyond the reach of bilateral investment treaties. A State is not immune from claims by foreign investors in connection with legislation passed by its legislative body, unless a specific exemption is included in the relevant treaty.
299. On the other hand, the fact that a democratically elected legislature has passed legislation that may be considered as ill-conceived, counter-productive and excessively burdensome does not automatically allow to conclude that a breach of an investment treaty has occurred. If such were the case, the number of investment treaty claims would increase by a very large number. Legislative assemblies around the world spend a good part of their time amending substantive portions of existing laws in order to adjust them to changing times or to correct serious mistakes that were made at the time of their adoption. A claim for a breach under an investment treaty has to be proven by claimants under the specific rules established in that treaty.
300. The arguments raised by Claimants in the present instance have not convinced the Tribunal that the adoption of the WPT constituted a breach under Articles 2, 3 or 4 of the Treaty. The Tribunal will proceed to review the various arguments raised by Claimants in support of their claims.

### 5.2.2.1 Claimants' legitimate expectations

301. The first argument advanced is that the WPT violated Claimants' legitimate expectations. The Tribunal has dealt earlier with Respondent's defense in Section 4.5 to the effect that a stability agreement was required in order to challenge the WPT Law and indicated that the lack of a stability agreement does not strip Claimants of the protections available under the Treaty.

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<sup>281</sup> C. Reply, Annex 1, ¶¶27-34.

<sup>282</sup> C. Reply, Annex 1, ¶¶35-36.

<sup>283</sup> C. Reply, Annex 1, ¶¶37-41.

<sup>284</sup> C. Reply, Annex 1, ¶¶42-45; see also C. PHB, ¶¶42-43 and Appendixes A and B.

<sup>285</sup> Claimants further address the detrimental impact of the WPT, *inter alia*, in their Reply in the context of the expropriation claims. C. Reply, Annex 1, ¶¶46-48.

302. This being said, foreign investors are acutely aware that significant modification of taxation levels represents a serious risk, especially when investing in a country at an early stage of economic and institutional development. In many instances, they will obtain the appropriate guarantees in that regard in the form of, for example, stability agreements which limit or prohibit the possibility of tax increases. As a matter of fact, GEM attempted, although without success, to obtain such an agreement in 2001, a few years after Claimants' initial investment and, in 2002, Vostokneftegaz — a company controlled by Claimants — did secure a stability agreement on a certain number of taxes. In the absence of such a stability agreement in favor of GEM, Claimants have not succeeded in establishing that they had legitimate expectations that they would not be exposed to significant tax increases in the future.

#### **5.2.2.2 International standards**

303. As to the allegation that the WPT was contrary to international standards, Claimants have not established the existence of such standards. At best, they have succeeded in demonstrating that such legislation went beyond the taxation levels in application at the time in most countries of the world but, even in such a case, this is not enough to establish by itself breaches of FET under the Treaty. The fact that a particular country happens to have, at a particular time, the highest taxation level affecting a certain industry does not automatically mean that there has been a breach of a BIT. In support of their argument, Claimants rely on a press release issued by Mongolia in May 2008 when it proposed to abolish the WPT and to replace it with an increase in royalty payments. At that time, the Government stated that one of the purposes of the amendments was to harmonize "the royalty payments with the international standards". It is a big stretch to read into that statement an admission by Mongolia that it was previously breaching the international minimum standard of treatment under international law, when it was merely saying that it was attempting to align its taxation regime of mining companies with that of other countries.

#### **5.2.2.3 Lack of transparency**

304. The third argument is to the effect that the enactment and application of the WPT were non-transparent. In particular, it is said, the law was adopted in less than one week and no consultation took place with the industry. First of all, no evidence has been introduced to the effect that the Great Khural would have acted in contravention of any of its own rules in the adoption of the WPT Law. The short time it took to adopt the WPT Law and the alleged lack of consultation cannot either be used in support of an allegation of a breach of the Treaty. Legislative assemblies in all countries regularly adopt legislation within a very short time and, sometimes, without debates, especially if there is urgency and there is unanimity of views among parliamentarians. The recent worldwide economic crisis has led to such steps adopted by legislative assemblies in all kinds of democratic countries. In the present instance, Claimants themselves recognize that the legislation was debated in the Great Khural and that a significant number of its members, including members of the Government, were opposed to this legislative measure. No evidence has been introduced to the effect that, under the Mongolian Constitution or under the rules of the Great Khural, consultation with affected sectors or



meaningful analysis of the implications of proposed legislation is required before its adoption.

#### **5.2.2.4 Predictability of the business and legal framework**

305. The fourth argument under the FET standard is that the WPT altered the predictability of the business and legal framework because of its excessive burden. There is no doubt that the WPT represented a radical change in the taxation of the gold mining industry in Mongolia and that it had a severe negative impact upon the industry as a whole and upon GEM in particular. But this does not mean that the enactment of such legislation was contrary to the Treaty. An investor, without an agreement which limits or prohibits the possibility of tax increases,, should not be surprised to be hit with tax increases in subsequent years and such an event could not be considered as "unpredictable". Mongolia is far from being the only country in the world where dramatic unforeseen increases in the price of certain commodities has led to major changes in taxation regimes of those commodities. Before concluding that a particular taxation level alters "the predictability of the business and legal framework" of a country, an international arbitration tribunal will want to see a clear demonstration that, absent such an agreement, such increase in taxation constitutes a breach of an international obligation of that country. The Tribunal is of the view that Claimants have not succeeded in doing so in the present case.

#### **5.2.2.5 The non-impairment standard**

306. Claimants also argue that the WPT not only violated the FET standard but also the "non-impairment" standard contained in Article 3 of the Treaty. According to them, the WPT is discriminatory, arbitrary and unreasonable.
307. It has to be noted that the "non-impairment" standard does not provide a blanket protection for investors against any measure that might be adopted by the State. In support of a broad interpretation of that clause, Claimants invoke the MFN clause contained at Article 3(2) of the Treaty and make reference to other bilateral investments treaties signed by Mongolia which contain mentions of "unreasonable or discriminatory measures" or "unjustified or discriminatory measures". Claimants argue that it is now settled law that MFN clauses allow a claimant to invoke substantive provisions of other BITs signed by a State and they assert that the relevant protection guaranteed by other BITs to which Mongolia is a party confirm a broad interpretation of Article 3(1) so as to cover not only discriminatory, but also arbitrary and unreasonable measures.
308. Claimants' claim in this regard is based on an alleged cross-industry and cross-sectoral discrimination and on the alleged arbitrary and unreasonable character of the WPT. Even accepting the broad interpretation advanced by Claimants, the Tribunal cannot conclude that the WPT was discriminatory, arbitrary or unreasonable, for the reasons mentioned hereunder.

**5.2.2.5.1 Cross-sectoral discrimination and cross-industry discrimination**

309. The discrimination argument takes two forms: (i) the WPT should have equally applied to other sectors than the mining industry; and (ii) the WPT discriminates between gold and copper.
310. As to the first argument, the consolidated statutes of many countries are replete with fiscal legislation which, whether using tax breaks or direct subsidies, treats various industries differently from one another. In the specific case of Mongolia, Mongolian oil production represents a minor sector of the Mongolian economy. Mongolia is a net importer of oil.<sup>286</sup> And there is nothing in the Treaty or in international law which generally prohibits Mongolia from imposing a tax regime on gold mining which would be different from other industries. Under such circumstances, there is nothing permitting to reach the conclusion that the fact that the WPT Law does not apply to such industry constitutes illegal discrimination under the provisions of the Treaty. Many will argue that this is not wise economic policy but this does not mean it would constitute a breach of a BIT, particularly in the area of taxation, in respect of which States jealously guard their sovereign powers.
311. As to the second argument, Claimants allege that, by adopting a different taxation regime for copper, Respondent indulged into discrimination contrary to the Treaty. It is true that different tax regimes were enacted between copper and gold, even though they both attained, percentagewise, very significant tax increases; and it might have been wiser if the Great Khural had adopted similar legislation for both products. But this does not allow the Tribunal to jump to the conclusion that its failure to do so constitutes a breach of the Treaty.
312. In the Tribunal's view, Claimants' reliance on the *Occidental* case<sup>287</sup> in support of its two arguments is inapposite.
313. First of all, the national-treatment clause contained in that case has a different wording than the one found in Article 3(2) of the Treaty in the present case. Article II(1) of the U.S.-Ecuador BIT establishes the obligation to treat investments and associated activities "on a basis no less favorable than that accorded in like situations to investments or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable". The tribunal in that case, because of the use of the words "in like situations", differentiated the interpretation to be given to those words from the words "like products" used in the *WTO/GATT* which, the tribunal said, "necessarily relates to competitive and substitutable products". The Treaty in the present case contains no reference to either "like situations" or "like products", thus leaving the Tribunal to rely on the general provisions of the Vienna Convention.

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<sup>286</sup> R. Defense, ¶277.

<sup>287</sup> *Occidental Exploration and Production Company v. Ecuador*, Award, July 1, 2004, LCIA Case No UN 3467, IIC 202 2004.

314. Moreover, the *Occidental* case had to deal with the interpretation of VAT legislation of general application while the WPT Law deals specifically with two minerals: gold and copper.
315. The Tribunal is of the view that, before concluding to discrimination in the present case, the sectors covered should relate to competitive and substitutable products, an expression regularly used in *WTO/GATT* cases. In doing so, the Tribunal is aware of the differences between the Treaty and the one governing the WTO. It merely states that such a requirement is a reasonable one to apply when considering allegations of discrimination. There is nothing in the WPT Law which would lead the Tribunal to conclude that, by referring to such a standard, there is discrimination in the present instance either on the basis of a cross-industry (e.g. the petroleum industry) or a gold-copper comparison. As stated in the *Sempra* case:<sup>288</sup> "(t)here are quite naturally important differences between the various affected sectors, so it is not surprising that different solutions might have been or are being sought for each". The different treatment given in this case to gold and copper compared to other industries or between gold and copper cannot support a conclusion of discrimination under the Treaty.<sup>289</sup>
316. Moreover, even if the reference to competitive and substitutable products were not retained as a criterion, the different regimes applied to copper and gold would not justify the Tribunal to conclude to discriminatory treatment. Respondent has explained the distinction introduced as relating, for one part, to greater opportunities for tax evasion existing in the gold mining industry and, for another part, to a desire to see the proceeds from copper exports to be used for the building of a copper-processing plant in Mongolia permitting to add value to Mongolian copper production. In addition, as the Parties have pointed out, copper production in Mongolia was essentially in the hands of Erdenet, a company 51% controlled by the State of Mongolia and 49% by Russia.<sup>290</sup> The WPT may have been a poor instrument to achieve the objectives of the Great Khural and the Tribunal has no evidence to the effect that they were in fact achieved. It is not the role of the Tribunal to weigh the wisdom of legislation, but merely to assess whether such legislation breaches the Treaty. Claimants have not succeeded in demonstrating that this was an abusive or irrational decision and that it constituted discriminatory treatment.
317. The discrimination argument has also been raised by Claimants in relation with the stability agreement issued to Boroo Gold in 2000. This matter will be addressed separately below when dealing with that issue.

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<sup>288</sup> *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶319, this award was subsequently annulled but for reasons that had nothing-do with this pronouncement.

<sup>289</sup> *Champion Trading Company and Ameritrade International Inc v. Egypt*, Award, ICSID Case No. ARB/02/9, Award, October 27, 2006, ¶154, dealing with a BIT with words "like situations" identical to the *Occidental* case and where the tribunal concluded that: "(a)lthough both kinds of companies operate in the same industry and are subject to the same kind of rules, there is a significant difference between a company which opts to buy cotton from the Collection Centers at fixed prices and a company which opts to trade on the free market, whether or not the company is privately-owned or State-owned or whether the company is national or foreign."

<sup>290</sup> R. Defense, ¶274; C. Reply, ¶¶213-224.

318. Finally, Claimants argue that the WPT discriminates illegally against them because it disproportionately applies to GEM. Even accepting Claimants' statement that GEM's WPT payments might have represented up to 89-93% of Mongolia's total WPT income, despite the fact that GEM had never made up more than 25% of total gold production in that country, a major factor in that disproportion results from the fact that even if Boroo Gold's production represented in 2006 some 45% of that total,<sup>291</sup> it benefited from a stability agreement which exempted it from the WPT. Apart from this particular stability agreement, no evidence had been adduced by Claimants to the effect that the tax burden imposed upon GEM was different from the one applying to other gold producers in Mongolia under the WPT.

#### 5.2.2.5.2 Arbitrary and unreasonable measure

319. The alleged arbitrary and unreasonable characters of the WPT will be considered together. It has been established that Mongolia is a large producer of gold and that gold constitutes a very important source of revenue for its Government. It is not surprising that, when seeing the very large increases that occurred in the price of gold in 2005-2006, parliamentarians saw such an event as an opportunity for the State to share in the windfall gains which the gold producers appeared to get. Legislation to that effect was passed in spite of objections by the Government to some of its content; in fact, as early as in the Fall of 2006, the Government attempted twice, without success, to reduce the high level of taxation it contained. In November 2008, the Government succeeded in convincing the Great Khural to raise from USD 500 to USD 850 the threshold at which the additional taxes started to bite. There is substantial evidence to show that the WPT as passed in 2006 had a severe detrimental effect not only upon the industry but also upon Government's revenues.
320. Claimants have submitted evidence to the effect that, among others, the World Bank stated that the WPT legislation had been enacted against its advice<sup>292</sup>. For its part, Respondent submitted a report of the IMF making the following recommendation: "If the windfall tax is retained, it should apply only to a limited list of strategic projects for which the government may choose to take an equity interest; the rate should be reduced possibly to 55% or less, the base should be adjusted annually by the change in the US GDP deflator: and the tax should apply to all copper sales".<sup>293</sup>
321. It is clear that the WPT was generally considered excessive, including by some members of the Great Khural as well as of the Mongolian Government and, from the evidence submitted, it appears that Mongolia paid a heavy price fiscally and economically following the adoption of the WPT. But to conclude from this that it was arbitrary and unreasonable under the terms of the Treaty is a step that the Tribunal is not ready to take, especially when it comes to dealing with fiscal legislation which on its face is not

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<sup>291</sup> Claimants' Statement of Claim, ¶32.

<sup>292</sup> The World Bank, *Project Appraisal Document on a Proposed Grant/Credit in the amount of SDR 5.72 Million to Mongolia for a Mining Sector Institutional Strengthening Technical Assistance Project*, p. 36, May 28, 2008, CE-105.

<sup>293</sup> *The Fiscal Regime for the Mining Sector and the Development Fund*, IMF Fiscal Affairs Department Report, p. 10, February 10, 2007. RE-126.

targeting Claimants in particular or foreign investors in general. It has to be noted that, when the WPT was adopted, several other taxes affecting gold companies were reduced and that even the IMF was ready to endorse a 55% level of taxation, albeit in restricted circumstances.

#### 5.2.2.6 Duty to encourage investments and full protection and security

322. Claimants also argue that the WPT violates Article 2 of the Treaty, in that it undermines the previously stable and secure investment climate in Mongolia and that it discourages Russians investors to make investments in Mongolia, thereby failing to provide full legal protection to Claimants' investments.
323. Article 2(1) is an enunciation of the general commitment of each Contracting party to encourage investment and to guarantee "in accordance with its laws and regulations, full legal protection to investments". The case law and commentators generally agree that this standard imposes an obligation of vigilance and due diligence upon the government.<sup>294</sup> The *AAPL* case has approvingly quoted Professor Freeman's definition of due diligence:

"The "due diligence" is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."<sup>295</sup>

And in the *AMT* case, the tribunal explained:

"These treatments of protection and security of investment required by the provisions of the BIT of which *AMT* is beneficiary must be in conformity with its applicable national laws and must not be any less than those recognized by international law. For the Tribunal, this last requirement is fundamental for the determination of the responsibility of Zaire. It is thus an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law."<sup>296</sup>

324. The minimum standard of vigilance and care set by international law comprises a duty of prevention and a duty of repression. A well-established aspect of the international standard of treatment is that States must exercise "due diligence" to prevent wrongful injuries to the person or property of aliens within their territory, and, if they did not succeed, to exercise at least "due diligence" to punish such injuries.
325. If a State fails to use due diligence to prevent or punish such injuries, it is responsible for this omission and is liable for the ensuing damage. It should be emphasized that the

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<sup>294</sup> *American Manufacturing & Trading, Inc. (AMT) v. Democratic Republic of Congo* (before referred as Zaire) [hereinafter *AMT v. Congo*], ICSID Case No. ARB/93/1, Award, February 1, 1997; *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990, 30 ILM at 560.

<sup>295</sup> *AAPL, supra*, 30 I.L.M. at 6 12.

<sup>296</sup> *AMT v. Congo, supra*, 1997, 36 I.L.M. at 1549.

obligation to show "due diligence" does not mean that the State has to prevent any injury whatsoever. Rather, the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is "reasonable" or "due", depends in part on the circumstances.

326. The "legal protection" clause has been raised in a number of BIT cases and has sometime been interpreted, as a stand-alone clause; as aiming at the physical protection of persons or assets against illegal actions by third parties. Further, some BITs provide simply for "full physical protection and security" of investments.<sup>297</sup> However, in the present instance, the Treaty provides clearly for "full legal protection to investments of investors of the other Contracting Party."<sup>298</sup> There is therefore no reason to limit the protection guaranteed to mere physical protection.<sup>299</sup>
327. It should be noted, in any case, that in the present instance there is no claim of a negative action taken by third parties that the State is accused of not having prevented. Further, the Tribunal has not found, in relation to the WPT, any reason to conclude that there has been a breach of such a clause or of the fair and equitable treatment through actions of the State or its agents. As a result, whether it would refer to "an objective requirement of stability, certainty and foreseeability" as argued by Claimants or to "a subjective standard reduced to the protection of Claimants' specific expectations" as argued by Respondent, the Tribunal cannot conclude that there has been a violation of the "full legal protection" guaranteed by Article 2 of the Treaty.

#### 5.2.2.7 Customary international law

328. Claimants also argue that the WPT is contrary to customary international law; in particular, it would be against the public interest and inconsistent with the international minimum standards. The definition of public interest is one that varies considerably from one State to another and it is a subject of significant public debate within each State, specially when controversial legislation or regulation is proposed. This is more a subject for political debate than arbitral decisions; nowhere in the relevant Treaty is public interest listed as one of the factors to guide an arbitral tribunal in deciding whether a breach of it has occurred, except for the mention that an expropriation has to be shown to have been in the public interest, an issue which is addressed below.
329. Claimants also argue that the Treaty cannot provide for protections below the international minimum standard, especially in a case like this one where the Treaty contains a MFN clause incorporating the customary minimum standard that is available

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<sup>297</sup> The Netherlands-Romania BIT, Art. 3(1).

<sup>298</sup> Article 2.2.

<sup>299</sup> See, *Compânia de Aquas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007 ¶¶7.4.15-7.4.18; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006 ¶406; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/08, Award, February 6, 2007 ¶303; *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, November 3, 2008, ¶189; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, ¶729.

to the investors of any third country.<sup>300</sup> But nowhere do Claimants argue that such standard would be broader than those contained in the Treaty. The Tribunal having concluded that the WPT Law did not breach the Treaty, it goes by itself that the WPT Law is not contrary to the international minimum standard, that standard certainly not being broader than the FET protection, even applying the MFN clause.

### 5.2.2.8 Expropriation

330. Claimants finally argue that Mongolia has breached Article 4 of the Treaty by making Claimants' investments subject to measures with effects tantamount to nationalization or expropriation, or indirectly depriving Claimants of their investments without any compensation. According to Claimants, the WPT would be extraordinary, punitive in amount, arbitrary and discriminatory and not in the public interest.
331. In light of what has been said above, the WPT by itself cannot be considered an expropriatory measure. First of all, Claimants kept the ownership of GEM and continued to manage its operations after the adoption of the WPT and Mongolia has made it clear that the conservatory measures it implemented in December 2008 did not constitute a change of control or ownership. Even at the time of the Hearing, GEM's ownership and control had not changed.
332. As to the question whether the measures adopted by Mongolia were tantamount to expropriation, even though there was no loss of control of GEM, the Tribunal is of the view that this was not the case, in light of what has been said above. Claimants have attempted to demonstrate that the burden of the WPT was very heavy upon GEM. This may well have been the case and the Tribunal has received some evidence to the effect that a number of gold mines suspended or closed their activities after the adoption of the WPT and the World Bank, in its Project Appraisal Document mentioned above, noted that the WPT Law had "resulted in a significant drop in gold sales to the central bank and a cooling of investment interest"<sup>301</sup> but other mines not benefiting from a stability agreement still managed to continue their operations in spite of the application of the WPT. GEM itself took certain steps to avoid or reduce the impact of that tax; moreover the WPT high levels were substantially reduced in 2008 and legislation has been enacted to the effect that the tax itself will disappear in 2011.
333. First of all, the Tribunal notes that the quotation from *EnCana v. Ecuador* cited by Claimants does not go quite as far as they claim in the paragraph quoted above from their Statement of Claim. The Tribunal in that case said: "Only if a tax law is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised. In the present case, in any event, the denial of VAT refunds in the amount of 10% of transactions associated with oil production and export did not deny EnCana "in whole or significant part" the benefits of its investment."<sup>302</sup> It is clear

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<sup>300</sup> C. Reply, ¶341.

<sup>301</sup> The World Bank, *Project Appraisal Document on a Proposed Grant/Credit in the amount of SDR 5.72 Million to Mongolia for a Mining Sector Institutional Strengthening Technical Assistance Project*, May 28, 2008, p. 36, CE-105.

<sup>302</sup> *EnCana Corporation v. Ecuador*, LCIA Case No. UN3481, Award, February 3, 2006, ¶177.

that the *Encana* Tribunal did not conclude that, if a measure showed the characteristics it mentioned, this would automatically constitute "an unlawful deprivation," as alleged by Claimants. It might or it might not, depending on the circumstances of the case.

334. The Tribunal has carefully reviewed the written and oral expert evidence submitted by Mr. B.C. Kaczmarek, for Claimants, and by Mr. M. M. Mulligan, for Respondent, concerning the impact of the WPT on the financial viability of GEM. The opinions advanced by the first expert have been hotly contested by the second. But, even under his own analysis, Mr. Kaczmarek himself stated in his oral testimony<sup>303</sup> that "there would have been a slight profit" in 2006. He then added that, in his view, GEM could not have made a profit in 2007 because of alleged increased costs of operation. He refers to an average monthly spot price for gold of USD 697 but the effective price obtained by GEM is not the average one but the one at the various dates at which GEM actually sold its gold; without that specific information, it is not possible to determine whether GEM could or not have made a profit in 2007. Fortunately, that information has been provided by Claimants themselves<sup>304</sup> who indicate that, on November 7-8, 2007, GEM sold its gold mined since February 2007, when the price was USD 832 per ounce (until February, its gold had been deposited with MongolBank). According to Claimants, if they had paid the WPT and royalties, they would have ended the year with a loss of slightly less than USD 1 million, but the scenario presented by Mr. Paushok in that regard does not appear to include the value of the 1,010,046.29 grams of gold sold by GEM to MongolBank on December 24, 2007. Be that as it may, and even accepting GEM's cost figures for 2007 which were contested by Respondent, a loss of that size for one year is not a matter leading to the destruction of an ongoing enterprise, specially one with a long history of strong annual profits and a context of substantial increases in the price of gold in the subsequent years, as well as legislation enacting a much higher threshold of USD 850 from November 25, 2008 and legislation in August 2009 repealing the WPT, to be effective in 2011.
335. And, in his Second Report of November 28, 2008, Mr. Kaczmarek wrote: "In any event, the current turbulence in the financial and energy markets makes it difficult to ascertain, at present, whether or not GEM will be able to survive if the WPT is applied to it."<sup>305</sup> No reference is made to the fact that, on November 25, 2008, the Great Khural had amended the WPT increasing threshold to USD 850 and to the fact that, for most of 2008, the price of gold oscillated between USD 800 and USD 1000 an ounce.
336. In the Tribunal's view, the expert evidence submitted by Claimants does not support their thesis that the WPT constituted an expropriatory measure or a measure tantamount to expropriation.

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<sup>303</sup> D7:P139:L15.

<sup>304</sup> C. SC, ¶114.

<sup>305</sup> *Ibid.*, ¶70.



337. The Tribunal concluding that there has been no direct or indirect expropriation, the argument about public interest becomes irrelevant, since it is only in such circumstances that the Treaty addresses the issue of public interest.

#### 5.2.2.9 Causation

338. In light of the above, there is no need to address the causation defense raised by Respondent.

#### 5.2.2.10 Conclusion

339. In light of the foregoing, the Tribunal determines that the enactment and the enforcement of the WPT do not constitute a breach of Articles 2, 3 and 4 of the Treaty.

### 5.3. THE WPT PAID PRIOR TO DECEMBER 21, 2006

340. Among the claims based on the actions of its tax authorities that Mongolia's judiciary failed to redress, Claimants submit, as an independent claim, that Mongolia breached Articles 2 and 3 through the Mongolia's judiciary failure to order the reimbursement of the WPT paid prior to December 21, 2006. This claim is addressed below.

#### 5.3.1 ARGUMENTS OF THE PARTIES

341. On December 13, 2006, Mongolia's Constitutional Court ruled that Articles 4.1.4 and 6.2 of the WPT Law regarding the calculation of the reference price of gold was unconstitutional, as they referred to the price of gold on the London Metals Exchange which has no such reference price.
342. Following that decision, the Great Khural promptly amended the WPT Law, defining the reference price as a price determined daily by the Central Bank of Mongolia, thereby adopting the methodology applied by the Chief National Tax Administration of Mongolia with regard to the WPT before the decision of the Constitutional Court. This amendment came into effect on December 21, 2006.
343. In its Statement of Claim, Claimants articulate this head of claim as follows:

"274. [...] shortly after the imposition of the Windfall Profit Tax *[between June 2006 and December 2006]*,<sup>306</sup> GEM sold a part of its gold and those sales *[sic]* and paid MNT 611,927,045 (approx. USD 523,000) of Windfall Profit Tax. In December 2006, the Constitutional Court stated that a part of the original wording of the Windfall Profit Tax was unconstitutional<sup>307</sup> *[because it did not contain a proper reference for determining the price of gold]*. The Mongolian Parliament cured that deficiency by an amendment of the Windfall

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<sup>306</sup> C. Reply, ¶413.

<sup>307</sup> CE-80.

Profit Tax in December 2006<sup>308</sup>. This amendment, however, did not have retroactive effect.<sup>309</sup>

275. Consequently, GEM sought the return of the Windfall Profit Tax it had paid in accordance with the unconstitutional wording of the Windfall Profit Tax. On April 9, 2007, the court of first instance in the Chingeltey district upheld GEM's claim in its entirety.<sup>310</sup> On appeal, however, the Capital Court reversed the lower court's decision.<sup>311</sup> On November 8, 2007, the decision of the Capital Court was confirmed by the Supreme Court.<sup>312</sup>

276. Professor Temuulen Bataa explains that the decisions of the appellate court and the Supreme Court were so egregious as to constitute another denial of justice claim. The unconstitutionality of a part of the original wording had made it impossible for the Tax Authorities to validly levy the Windfall Profit Tax until the unconstitutional part was amended.<sup>313</sup> Hence, the court decisions denying GEM's claim were grossly erroneous.<sup>314</sup>

344. Claimants conclude that Mongolia committed a denial of justice, breaching its obligations to grant Claimants' investments fair and equitable treatment (due process)<sup>315</sup> and full legal protection.<sup>316</sup>
345. In its Rejoinder<sup>317</sup>, Respondent argues that the Constitutional Court's decision<sup>318</sup> merely suspended the application of the WPT from December 13, 2006. Thus, given that the relevant payment of the WPT occurred on October 2 and 17, 2006, the court's decision had no impact on the WPT paid before December 13, 2006.<sup>319</sup>

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<sup>308</sup> Paushok-II, ¶7; Temuulen-I, ¶44.

<sup>309</sup> Temuulen-I, ¶44.

<sup>310</sup> CE-66.

<sup>311</sup> CE-66.

<sup>312</sup> CE-67.

<sup>313</sup> Temuulen-I, ¶41.

<sup>314</sup> C. SC, ¶¶70-74, 274-277.

<sup>315</sup> Article 3 1 of the Treaty.

<sup>316</sup> Article 2 of the Treaty C. SC, ¶277; C. Reply, ¶¶413-414; C. PHB, ¶¶29, 69-71, 101.

<sup>317</sup> R. Rejoinder, ¶¶212-214.

<sup>318</sup> CE-80.

<sup>319</sup> R. Rejoinder, ¶213.

346. Furthermore, Respondent contends that GEM was able to determine the amount of the WPT to be paid and, thus, suffered no prejudice from the lack of reference to a valid source for determining the price of gold. In addition, Respondent's expert, Professor Mendsaikhan, suggests (and Respondent endorses) that the lack of reference to a valid source of the price of gold in the original wording of the WPT Law could have been remedied by teleological interpretation which would have led to the conclusion that the price of gold is to be determined according to the market price.<sup>320</sup>
347. In their Post-Hearing Brief<sup>321</sup>, Claimants point out that Professor Mendsaikhan admitted at the Hearing that the original wording of Articles 4.1.4 and 6.2 of the WPT Law did not include the word "market" at all<sup>322</sup> and that Professor Mendsaikhan's interpretation is contradicted by the decision of the Mongolian Constitutional Court.<sup>323</sup>

### **5.3.2 TRIBUNAL'S ANALYSIS**

348. GEM applied to the Mongolian courts to obtain the repayment of the WPT paid prior to the December 21, 2006 amendment but without success (save for the decision by the court of first instance in the Chingeltey district). There is nothing in the judicial decisions rendered by the Capital Court<sup>324</sup> and the Supreme Court<sup>325</sup> that would justify this Tribunal to make a finding of denial of justice regarding decisions which appear to have been taken with full respect of due process.
349. Claimants' claim concerning the WPT paid prior to December 21, 2006 is therefore dismissed.

## **5.4. ENACTMENT AND ENFORCEMENT OF FOREIGN WORKERS FEE AND IMPOSITION OF QUOTAS**

### **5.4.1 ARGUMENTS OF THE PARTIES**

350. The requirement to pay the Foreign Workers Fee is set forth in Article 43 of 2006 Minerals Law.<sup>326</sup>
351. The factual predicate of Claimants' FWF-related claims is the following:

"224. [...] GEM cannot realistically comply with the 10% quota because it relies on complex mining machinery and new gold mining technologies to conduct its business and Mongolian

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<sup>320</sup> R. Rejoinder, ¶214; Mendsaikhan, ¶47.

<sup>321</sup> C. PHB, ¶¶69-71.

<sup>322</sup> D7:P103:L4-6.

<sup>323</sup> CE-80; C. PHB, ¶¶70-71.

<sup>324</sup> CE-66.

<sup>325</sup> CE-67.

<sup>326</sup> CE-43.

universities and high schools cannot fully satisfy the need for qualified specialists. Thus, GEM must pay the extraordinary fee or hire unqualified Mongolian nationals and sustain a variety of unacceptable risks, such as risk accidents, damage to equipment, lower output, and increased production costs. Either way, the extraordinary fee impairs the operation of Claimants' investment.

225. Indeed, it appears that Mongolia's ultimate objective was to increase its fees revenues rather than a genuine attempt to foster the employment of Mongolian nationals. The lack of qualified labor in Mongolia is notorious. Fully aware of this, Mongolia enacted the new regulation with the understanding that the mining companies will simply have to pay the extraordinary fee. The timing of this dramatic change in the law confirms its improper purpose. Indeed, it was enacted within two months of the Windfall Profit Tax – during a time of increasing taxes and levies against gold-mining companies.[...].

226. [...] the extraordinary fee and the 10% quota only apply in the mining industry and apply to all professions within the industry – even to professions that are not industry-specific, such as electricians and truck drivers. This is significant because other industries are subject to more favorable treatment under the Law "On Export of Workforce and Import of Foreign Workforce Specialists"[...], adopted on April 12, 2001.

227. The Import of Workforce Specialists Law requires that businesses comply with an annual quota of foreign workers set by the Mongolian agency responsible for labor matters [...] and pay a fee of two times the minimum monthly salary for each foreign national. Before the introduction of the 2006 Minerals Law, GEM was subject to the Import of Workforce Specialists Law. The 2006 Minerals Law thus represented an alarming and unexpected departure from the legal and business framework in which GEM had been operating for nine years."<sup>327</sup>

352. Claimants argue<sup>328</sup> that the Foreign Workers Fee violates Articles 2 (full protection and security), 3 (1) and 3(2) of the Treaty because:

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<sup>327</sup> C. SC, ¶¶224-227, C. Reply, ¶¶344-345.

<sup>328</sup> C. SC, ¶¶224-237, C. Reply, ¶¶344-357.

(1) The Foreign Workers Fee and 10% Quota are arbitrary because they are excessive in amount (10 times the minimum monthly salary whereas a 2 times the minimum monthly salary would be sufficient to reach Respondent's objective, provided qualified Mongolian nationals are available) and impose a disproportionate burden as it is impossible for GEM to comply with the regulation and hire qualified Mongolian workforce.<sup>329</sup>

(2) The Foreign Workers Fee and 10% Quota are discriminatory because they apply in the mining sector only, regardless of the profession of the foreign worker. Mining industry employers' must pay a fee of 10 times the minimum monthly salary whereas all the other employers pay a fee of 2 times the minimum monthly salary.<sup>330</sup>

(3) The Foreign Workers Fee and 10% Quota were unpredictable and contrary to Claimants' legitimate expectations, which included Mongolia using "legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments."<sup>331</sup>

353. In Claimants' own words:

"Mongolia has breached Article 3 of the Treaty in connection with the introduction of the extraordinary fee for import of foreign workforce in excess of the 10% quota in the following ways:

- (a) Mongolia has breached its obligations under Article 3(1) to provide fair and equitable treatment to the Claimants' investment because the extraordinary fee for import of foreign workforce in excess of the 10% quota arbitrary and discriminatory (sic), unpredictably changed the business and legal framework for the Claimants' investment, and violated the Claimants' legitimate expectations.
- (b) Mongolia has breached its obligations under Article 3(1) not to impair the operation, management, maintenance, use, enjoyment, or disposal of the Claimants' investments by discriminatory, unreasonable or unjustified measures because the extraordinary fee for import of foreign workforce in excess of the 10% quota impairs the operation of the Claimants' investment is (sic) arbitrary and discriminatory; and

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<sup>329</sup> *LG&E v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award on Liability, October 3, 2006, C.S.C., ¶¶230-231, C. Reply, ¶346, C. PHB, ¶101.

<sup>330</sup> C. SC, ¶¶232-233, C. Reply, ¶347, C. PHB, ¶¶4, 101.

<sup>331</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003; C. SC, ¶¶234-236; C. Reply, ¶¶348-349, C. PHB, ¶101.

- (c) Mongolia has breached its obligations under Article 3(2) to grant the Claimants' investments treatment not less favorable than that granted to Mongolian investors and/or the nationals of any third state because the extraordinary fee for import of foreign workforce in excess of the 10% quota discriminates against the Claimants' investment in favor of Mongolian and foreign companies active outside of the mining sector."

<sup>332</sup>

354. Respondent asserts that such a legislative change was reasonably foreseeable in light of Article 34 of the 1997 Minerals Law stipulating that "*License holders shall employ citizens of Mongolia in their exploration and mining operations on a priority basis*" (which Claimants allegedly did not do). Thus, Claimants were on notice that Mongolia had a policy preference for the employment of Mongolian citizens in the mining industry and, therefore, the levying of foreign workers fees and the imposition of quotas do not constitute a breach of the fair and equitable treatment as it was not unexpected in light of mining companies' failure to give effect to Article 34 of the 1997 Minerals Law (i.e. Claimants lacked any legitimate expectation that Mongolia would not introduce such a measure). The foregoing reasoning is also invoked by Respondent to distinguish the *Tecmed* and *LG&E* cases referred to by Claimants.<sup>333</sup>
355. Respondent further states that the FWF and quotas are in line with the preamble of the Treaty (transfer of knowledge and technology) and that Mongolia pursues a valid objective of creating employment of the large population of local artisanal miners, who are largely unemployed.<sup>334</sup>
356. Claimants further argue that Article 34 of the 1997 Minerals Law is irrelevant as it did not provide for any fee in connection with the employment of foreign nationals<sup>335</sup> and point out that artisanal miners are not qualified for industrial mining (which explains why they are not employed by industrial mining companies such as GEM).<sup>336</sup> Finally, Claimants stress that Mongolia failed to join issue with respect to discrimination, despite the fact that this standard is specifically mentioned in the Treaty.<sup>337</sup>

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<sup>332</sup> C. SC, ¶237, C. Reply, ¶357.

<sup>333</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, CA-51, and *LG&E v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award on Liability, October 3, 2006, CA-58; R. Defense, ¶¶298-307; R. Rejoinder, ¶177; R. PHB, ¶155.

<sup>334</sup> R. Defense, ¶303.

<sup>335</sup> C. Reply, ¶352.

<sup>336</sup> C. Reply, ¶¶352-353.

<sup>337</sup> C. Reply, ¶355, C. PHB, ¶4.

357. In its Rejoinder,<sup>338</sup> Respondent contests Claimants' allegation regarding the lack of qualified workforce in Mongolia and asserts that GEM's inability to hire local workforce is due to its Russian language requirements for all the positions.<sup>339</sup>
358. In its Post-Hearing Brief,<sup>340</sup> Respondent takes the position that the arbitrary treatment claim fails because (i) a two times fee would have been insufficient to cause companies to hire Mongolian workers (as demonstrated by the fact that even after the enactment of the FWF, GEM did not increase its share of Mongolian workers) and (ii) the objective pursued by the FWF is appropriate as stated by Claimants' legal expert.<sup>341</sup>

#### 5.4.2 TRIBUNAL'S ANALYSIS

359. Claimants make two pleas in connection with the entry of foreign workers into Mongolia. The first has to do with the enactment and the application of the FWF. The second deals with the alleged refusal of Respondent to extend existing foreign work permits. This second matter will be dealt in the section of this Award dealing with claims concerning the events of December 2, 2008 and thereafter.
360. In this section, the Tribunal will address the claim concerning the enactment and the application of the 2006 Minerals Law<sup>342</sup> which provided that mining companies employing foreign citizens in excess of a 10% quota must pay a special monthly fee equal to ten times the minimum salary in Mongolia, while, under the previous law on the subject,<sup>343</sup> the payment was only two times the minimum monthly salary.
361. Claimants argue that the enactment and application of the FWF constituted breaches of Articles 2 and 3 of the Treaty. The Tribunal has noted that, in its Post-Hearing Brief, Claimants have not argued a breach of Article 2 in connection with the FWF. That argument could therefore be ignored but, in any event, bearing in mind the analysis already made by the Tribunal concerning the meaning of the protection granted under Article 2, it is clear that the Tribunal could not conclude that the enactment and application of the FWF could constitute a breach of Article 2 of the Treaty. The "full legal protection to investments" guaranteed by that Article could not prevent the adoption by the Great Khural of legislation like the 2006 Minerals Law and, in the absence of a stability agreement, could not prevent its application to Claimants.
362. As to its argument under Article 3, Claimants base it on the alleged lack of protection of their legitimate expectations, of transparency, of a stable and predictable regulatory framework, the discriminatory character of the FWF and its unreasonableness.

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<sup>338</sup> R. Rejoinder, ¶¶177-183.

<sup>339</sup> R. Rejoinder, ¶¶178-182, see also R. PHB, ¶156.

<sup>340</sup> R. PHB, ¶¶155-157.

<sup>341</sup> R. PHB, ¶157.

<sup>342</sup> 2006 Minerals Law, Art. 43, CE-3.

<sup>343</sup> Import of Workforce Specialists Law, April 12, 2001, CE-59.

363. The Tribunal is not convinced by the argument advanced by Claimants to the effect that it is impossible for GEM to limit the employment of foreign workers to 10% of its workforce, Mongolia not having the qualified personnel to meet its particular requirements. They say that, because of this, Claimants' business was negatively impacted in a significant way; according to them, at the end of 2007, the required payment in that respect amounted to about USD 500,000 a month.
364. First of all, it is not unheard of that States impose restrictions on the hiring of foreign workers; such restrictions can take various forms. By themselves, such restrictions, including a total ban on foreign workers, do not automatically constitute a breach of a BIT. The burden is upon the investor to prove that a particular provision of a BIT has been breached.
365. Secondly, in the present case, the particular challenged measure does not appear to be discriminatory or breaching the fair and equal treatment standard under Article 3 of the Treaty, in any of the forms alleged above by Claimants.
366. Claimants argue that it is discriminatory because it is limited to the mining industry. The Tribunal has already ruled that the WPT Law did not constitute a discriminatory measure simply because it imposed heavier taxation on the gold mining industry compared to copper mining or the whole mining industry and that there were reasonable explanations why a special tax regime could be imposed upon a particular business sector which would enjoy, at a particular time, large windfall gains. This may not be very wise public policy but it does not by itself make it a breach of a particular BIT. It is therefore all of the more the case when a law applies equally, like in this instance, to a whole industry: the mining industry. It may be true that the required qualifications for a truck driver in the mining industry may not be significantly different from those required for the same function in the rest of the economy. But such an issue is not generally the one considered by a State when it enacts specific legislation concerning the import of foreign workers. In the present instance, the mining sector is a strategic sector for Mongolia, representing a large part of its industrial activity and being the one which attracted most foreign workers. In such circumstances, it is quite understandable that the State wished to impose severe restrictions on the use of foreign workers, in order to foster the employment of nationals. GEM seems to have been the company that has suffered the most from the imposition of entry fees but there was nothing in the relevant legislation which implied, even in a minimal way, that it targeted GEM in particular. Moreover, Mongolia has succeeded in demonstrating that several other foreign mining companies, including gold mining ones, managed to achieve a much smaller percentage of foreign workers than GEM without appearing to suffer prejudice in their activities.
367. It does appear from the evidence that GEM preferred to run a large part of its operations with Russian workers, alleging the special nature of placer mining and the lack of qualified Mongolian personnel to fill the required functions. It may well be that some specialists might have been required to operate dredges and other major machinery and that Mongolia did not have enough qualified local workers for those functions but, still, that cannot explain the large percentage of foreign workers (essentially Russian)



employed by GEM compared to any other mining company in Mongolia. Mongolia has demonstrated before the Tribunal that its technical schools were producing a large number of graduates trained for the mining industry but Claimants have not shown that GEM made any special effort to increase its contingent of Mongolian employees.

368. The Tribunal has received unchallenged evidence from the Director of Mining of Mongolia, Mr. N. Batbayar<sup>344</sup> to the effect that Mongolia has five universities from which students graduate in mining and that, each year, hundreds of students graduate with a bachelor's or a master's degree in mining. In addition, vocational schools also teach mining to their students. M., Batbayar referred to his own experience as Operational Manager of a gold placer mining company (like GEM) for several years where all of the workers were Mongolian.<sup>345</sup> Mr. Batbayar also referred to other large foreign mining companies, like Ivanhoe and Boroo, which hire up to 95% Mongolian workers, while the best that could be achieved by GEM in 2007 was a proportion of about 50%.<sup>346</sup>
369. From the evidence submitted to the Tribunal, it would appear that GEM was of the view that the working language for most of the company's activities should be Russian<sup>347</sup> and that this resulted in the rejection of many candidates for employment who did not speak Russian. This may indeed have been GEM's decision but it should not have been surprised that Mongolia would have adopted legislation which would have created a strong incentive for the employment of its own nationals, even though they may not have been fluent in a foreign language. Mr. Batbayar also gave the example of another mining company (Ivanhoe) which did not require the knowledge of a foreign language by candidates before entry but which had courses for its employees to teach them English.<sup>348</sup>
370. Claimants also argue that, in breach of Article 3.1 of the Treaty, the adoption of the FWF and its implementation clashed with their legitimate expectations at the time of their investment, starting in 1996, when the law simply mentioned that mining companies should give priority to employment of Mongolians, without imposing any sanction. A related argument is also to the effect that such development was breaching Claimants' entitlement to a stable and predictable regulatory framework. The Workforce Specialists Law was enacted in 2001, and Claimants did not raise any objection to it. Claimants however add that they had no indication that the legal and business framework in which they operated would be changed as significantly as it was under the 2006 amendment to the Minerals Law. They also complain that the FWF is not really a fee to encourage the employment of local citizens but a disguised tax to raise revenues. But even if it were so, as indicated above, investors cannot legitimately expect that the taxation environment which they face at the time of their first investment will not be

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<sup>344</sup> Batbayar-II, ¶7.

<sup>345</sup> *Ibid.*, ¶8.

<sup>346</sup> Paushok-II, Annex 3.

<sup>347</sup> Annex A - Letter from Claimants to Respondent, May 8, 2008, RE-133 (requiring "Russian language skills: (a) basic understanding and speaking skills - for workmen (b) fluent - for engineers and technicians").

<sup>348</sup> *Ibid.*, ¶10.

substantially altered with the passage of time and the evolution of events. The proper way for an investor to protect itself in such circumstances is to ensure that it will benefit from a stability agreement covering taxation and other matters; absent such an agreement, the investor will face the much more difficult task of demonstrating that a breach of particular provision of a BIT has occurred. This, Claimants have not succeeded in doing.

371. As to Claimants' argument about the arbitrary and unreasonable character of the FWF, there is no sustainable evidence before the Tribunal that its enactment or application produced any such result. Nothing indicates that the FWF was not adopted by the Great Khural in conformity with its procedure or that, in its application, Respondent resorted to arbitrary or unreasonable measures. If, by that argument, Claimants attack the nature itself of the legislative measure, the Tribunal has already indicated above that it does not agree that such measure was in breach of the Treaty. As stated by Claimants' own legal expert, Professor Temuulen Bataa: "The objective of Article 43 of the above Law (the article of the Minerals Law imposing the FWF), that is to provide employment opportunities to Mongolian citizens, is appropriate".<sup>349</sup>
372. As to the argument that the FWF's objective was really to increase fees revenues rather than to foster the employment of Mongolian nationals, the Tribunal fails to see that, if even this was true, it would turn the FWF into a breach of the Treaty. The way for GEM to avoid or reduce those fees was to increase rapidly and significantly the number of its Mongolian employees, which it did, for instance, at two deposit sites, increasing local staff from about 26% in 2006 to 37% in 2008.<sup>350</sup> An alternative to an increase of the fees could have been for Mongolia to simply set a ceiling of 10% to the employment of foreign workers but this would have had even more dramatic consequences for GEM.

#### **5.4.3 CONCLUSION**

373. The enactment and application of the FWF were neither arbitrary, unreasonable, discriminatory, unpredictable or contrary to Claimants' legitimate expectations or to the maintenance of a stable and predictable regulatory framework. These actions did not constitute a breach of either Article 2 or Article 3 of the Treaty.
374. On the basis of all the above, Claimants' claims concerning the FWF are dismissed.

### **5.5. 2001 STABILITY AGREEMENT NEGOTIATIONS**

#### **5.5.1 RELEVANT FACTS**

375. As early as 1993, Mongolia's Foreign Investment Law made stability agreements available to foreign investors. Of particular relevance to the present case, Article 20 of

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<sup>349</sup> Temuulen-I, ¶24

<sup>350</sup> Ibragimova-III, ¶45.

1997 Minerals Law,<sup>351</sup> in force when Claimants made their investment in Mongolia, also provided for stability agreements for investments in the mining industry:

- "1. If a mining license holder undertakes to invest in its mining project in Mongolia no less than two (2) million US Dollars for the first five (5) years of the project, and if the mining license holder submits an application to enter into a stability agreement, then the Government of Mongolia, acting through the Minister of Finance, shall enter into such a stability agreement providing guarantees for a long term stable environment for such mining license holder.
2. The form of the stability agreement shall be approved by the Government and shall contain provisions regarding the stability of tax rates for a definite time period, the right of the license holder to export and sell its products at international market prices, a guarantee that the license holder may receive and dispose of hard currency income derived from such sales, and provisions with respect to the purpose, amount, and term of the license holder's investment.
3. Within twenty (20) business days following the receipt by the Minister of Finance of the application and draft of the stability agreement, the Minister shall determine whether or not further clarification is required. If the Minister determines that no further clarification is required, the Minister shall enter into the stability agreement with the applicant.
4. If the amount of the initial investment in the Mongolian mining project is no less than two (2) million US Dollars, the term of the stability agreement may be ten (10) years. If such investment is no less than twenty (20) million US Dollars, the term of the stability agreement may be fifteen (15) years."<sup>352</sup>

376. In relation to the foregoing provision, on November 12, 1997, the Government of Mongolia adopted a model stability agreement (the "**1997 Model Stability Agreement**")<sup>353</sup> as it appears from Mongolian Government Resolution No. 226.<sup>354</sup>

377. The main competitor of GEM in Mongolia was KOO Boroo Gold, a foreign-owned gold mining company. The relevancy of Boroo Gold's operations for this arbitration is limited

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<sup>351</sup> CE-10.

<sup>352</sup> R. Defense, ¶28.

<sup>353</sup> CE-120.

<sup>354</sup> C. Reply, ¶26.

to the issues related to the stability agreements executed between this company and Respondent.

378. On July 6, 1998, Boroo Gold and Mongolia entered into a stability agreement regarding Boroo Gold's exploitation of the "Boroo" gold deposit.<sup>355</sup>
379. Boroo Gold's original stability agreement generally corresponded to the 1997 Model Stability Agreement.<sup>356</sup>
380. On May 9, 2000, Boroo Gold and Mongolia entered into an amendment to the stability agreement that, according to Claimants, extended Boroo Gold's protection far beyond what was contemplated under the 1997 Model Stability Agreement.<sup>357</sup>
381. According to Claimants, clause 2.8 of the Boroo Amendment<sup>358</sup> expands the stability protection to all taxes applicable as of the date of the agreement and, thus, protects Boroo from the WPT.<sup>359</sup> Claimants note a discrepancy in the wording of the English and Mongolian versions of clause 2.8 and argue that the Mongolian version does not provide protection against new taxes, such as WPT, whereas the English version does.<sup>360</sup>
382. On May 3, 2001, GEM requested Mongolia to enter into a stability agreement and, as a preliminary matter, to be provided with a draft stability agreement.<sup>361</sup>
383. The above fact was initially disputed by Respondent which stated that "*Claimants did not apply for a stability agreement for their mining operations*".<sup>362</sup> This allegation proved to be inaccurate.
384. On May 17, 2001, Mongolia provided GEM with a draft stability agreement.<sup>363</sup>
385. On May 23, 2001, GEM submitted to Mongolia a reviewed draft stability agreement.<sup>364</sup>
386. GEM's draft stability agreement<sup>365</sup> provided for a freeze of the taxation regime applicable to GEM (including novel taxes) and set specific rates for all the 14 taxes then applicable to GEM.<sup>366</sup>

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<sup>355</sup> CE-119; C. Reply, ¶226.

<sup>356</sup> C. Reply, ¶226.

<sup>357</sup> CE-121; C. Reply, ¶226.

<sup>358</sup> CE-121.

<sup>359</sup> C Reply, ¶229.

<sup>360</sup> CE-123 for the English translation of the Mongolian version.

<sup>361</sup> Paushok Ex.-102; also CE-131.

<sup>362</sup> R. Defense, ¶¶39, 115 and 192 and Ganbat-II, ¶8.

<sup>363</sup> CE-126; also Paushok Ex.-103 and CE-127.

<sup>364</sup> CE-96, letter only without attachment.

<sup>365</sup> CE-215.

387. On June 5, 2001, the Minister of Industry and Trade confirmed the appointment of a Working Group, which included Mr. Tumendemberel and Mr. Ganbat who both testified at the Hearing, entrusted with the task of negotiating the stability agreement with GEM.<sup>367</sup>
388. According to GEM's contemporaneous correspondence,<sup>368</sup> "the Working Group set for the negotiation of the agreement explained that the stability agreement can only be entered into based on the approved form".
389. On June 23, 2001 and again on August 13, 2001, GEM asked the Ministry of Industry and Trade whether the terms of the Model Stability Agreement could be changed.<sup>369</sup>
390. According to Claimants, "Mongolian authorities were not willing to make any changes to the form stability agreement" and, thus, "no stability agreement has been signed".<sup>370</sup>
391. On March 24, 2002, the Mongolian Government adopted a new Model Stability Agreement.<sup>371</sup>
392. On March 26, 2002, Vostokneftegaz and Mongolia entered into a stability agreement.<sup>372</sup>
393. On January 20, 2005, Mongolia entered into a stability agreement with Dynam Investment Co. Ltd and Erin International Co. Ltd.<sup>373</sup>
394. On August 3, 2007, Mongolia and Boroo entered into another amendment to the stability agreement<sup>374</sup> whereby modifying the percentage of corporate taxes (decrease) and royalties (increase) payable by Boroo. According to Claimants, this amendment was negotiated in the context of Respondent's attempt to enforce the WPT against Boroo.<sup>375</sup>

## 5.5.2 ARGUMENTS OF THE PARTIES

### 5.5.2.1 Jurisdiction *ratione temporis* and related issues

395. A distinction has to be made between (i) the issues related to the stability agreements in the context of Respondent's defense to Claimants' Treaty claims and (ii) the issues related to the stability agreements in the context of Claimants' *positive claims* (these two

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<sup>366</sup> CE-131, CE-96, CE-215 section 2.3 and attachment.

<sup>367</sup> RE-163.

<sup>368</sup> CE-128 and CE-97.

<sup>369</sup> CE-97 and CE-128.

<sup>370</sup> Paushok-III, ¶3.

<sup>371</sup> CE-122.

<sup>372</sup> Paushok Ex.-101.

<sup>373</sup> Ganbat Ex.-2.

<sup>374</sup> CE-125.

<sup>375</sup> C. Reply, ¶¶232-236.

categories of issues remain however intertwined). For the avoidance of doubt, this section is concerned with the latter category of issues only, i.e. Claimants' positive claims regarding the negotiation of the stability agreement between GEM and Mongolia in 2001, including the consequences of this negotiation, if any, on the enforcement of the WPT in 2006 and thereafter.

396. Relying on *CME v. The Czech Republic*<sup>376</sup>, Claimants argue that Respondent has accepted the Tribunal's jurisdiction *ratione temporis* over the negotiation of the stability agreement, because it waived any objections by not raising them within the time limits under Article 21(3) of the UNCITRAL Arbitration rules.
397. Furthermore, according to Claimants, even in the absence of such a waiver, the scope of Mongolia's offer to arbitrate in Article 6 of the Treaty encompasses disputes arising after the entry into force of the Treaty but based on events predating the entry into force of the Treaty, such as the case of the dispute regarding the 2001 stability agreement negotiations, which dispute had not arisen prior to this arbitration.<sup>377</sup>
398. Respondent denies having waived the objection based on the lack of jurisdiction *ratione temporis* on the following grounds:
- (1) Mongolia could not have waived an objection to the jurisdiction *ratione temporis* as the claims related to the 2001 stability agreement negotiations have been raised in Claimants' Post-Hearing Brief for the first time<sup>378</sup> and there is no dispute with respect to the 2001 stability agreement negotiations;<sup>379</sup> and
  - (2) Pursuant to Article 20 of the UNCITRAL Arbitration Rules, no jurisdictional waiver is possible with respect to the amended claims.<sup>380</sup>
399. Furthermore, Respondent submits that it would be deprived of its right to rebut the 2001 stability agreement negotiations claim and, thus, of its fundamental right to be heard.<sup>381</sup>
400. With respect to the scope of the offer to arbitrate, Respondent, on the premise that Claimants' WPT-related claims constitute a continuation of their claims with regard to the 2001 stability agreement negotiations, objects *ratione temporis* to "Claimants' entire claims."<sup>382</sup> Implicitly, Respondent thus argues that Article 6 of the Treaty does not encompass disputes over the events predating the entry into force of the Treaty (even if such disputes themselves arise only after the entry into force of the Treaty).

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<sup>376</sup> *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, September 13, 2001, CA-47.

<sup>377</sup> C. SPHB, ¶¶23, 37.

<sup>378</sup> R. SPHB, ¶¶9-17.

<sup>379</sup> R. SPHB, ¶¶18-22.

<sup>380</sup> R. SPHB, ¶¶23-25.

<sup>381</sup> R. SPHB, ¶¶26-43.

<sup>382</sup> R. SPHB, ¶¶44-51.

### 5.5.2.2 Applicable law

401. Claimants submit that the substantive law applicable to Mongolia's conduct in the 2001 negotiations of a stability agreement with GEM is the Treaty as Article 9 thereof makes it substantively retroactive.<sup>383</sup>
402. In any event, Claimants argue, customary international law is also applicable to these claims. As to the standard of treatment applicable under customary international law, Claimants suggest that it is coextensive with the standards under investment treaties and, even if such was not the case, Mongolia's conduct in the 2001 negotiations violated any formulation of the minimum standard of treatment under international law (be it the *Neer* formulation or the more recent *Mondev/Waste Management* formulation).<sup>384</sup>
403. In Respondent's view, the Treaty cannot be provisionally applied (which also excludes any retroactive application). As far as the customary international law is concerned, Respondent suggests, provided jurisdiction is found to exist, to apply the so-called *Neer* standard. If the Treaty provisions were applicable, Respondent reiterates its arguments regarding the narrow interpretation of Article 3(1) of the Treaty (notwithstanding the MFN provision, which, according to Respondent, is not applicable to the FET regime). Finally, Respondent concludes that even if a different treatment standard were imported by means of the MFN, the 2001 stability agreement negotiations would not constitute a breach of the Treaty.<sup>385</sup>

### 5.5.2.3 Substantive claims

404. The Tribunal notes that Claimants' claims with respect to the 2001 Stability Agreement Negotiations stem from Respondent's defenses against the allegation that it unevenly enforces the WPT not collecting same from Boroo:

"14. **Third**, and perhaps most remarkable, Mongolia applies the Windfall Profit Tax in a discriminatory manner even among gold producers. The Windfall Profit Tax is not levied at all on Boroo Gold, the largest gold producer in Mongolia.<sup>386</sup> This bare, incontestable fact strips Mongolia of any argument that it enacted the Windfall Profit Tax in the public interest. It would not be credible to claim the purpose of the tax is to benefit the public interest while foregoing its largest potential source of revenue."<sup>387</sup>

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<sup>383</sup> C. SPHB, ¶¶40-44, 57.

<sup>384</sup> C. SPHB, ¶¶45-55.

<sup>385</sup> R. SPHB, ¶¶54-79.

<sup>386</sup> Centerra "Comments on Boroo Stability Agreement and Mongolian Windfall Profits Tax Law" published at Business Network in May 2006, CE-57; see also Paushok-II, ¶44.

<sup>387</sup> C. SC, ¶14.

405. In defense to the above claim, Respondent replied that the WPT is not enforced against Boroo because the latter entered into a stability agreement and that such a stability agreement was available to GEM but the latter did not apply for it:

"115. The Windfall Profits Tax was aimed at capturing some of the historic and unexpected rise of gold price for developmental purposes in Mongolia. The Windfall Profits Tax was not aimed at Russian investors. The Windfall Profits Tax in fact was not just applicable to foreign investors, but to all mining companies. To the extent a foreign investor was "singled out", such as Boroo Gold, this because the investor, unlike Mr. Paushok, made an investment at the minimal level required to apply for a stability agreement. Claimants had the same opportunity to obtain a stability agreement but choose to make an investment too small to qualify for one and did not even apply."<sup>388</sup> [emphasis added]

and concludes:

"281 To conclude, Claimants' discrimination argument fails. Fundamentally, Claimants compare themselves to reasonable investors that entered into a stability agreement in order to make out disparate treatment. This comparison is exactly improper."<sup>389</sup> [emphasis added]

406. As mentioned in Section 4.5 above, Respondent initially heavily relied on the allegation that Claimants did not apply for a stability agreement and, in later submissions, insisted that they failed to commit the required amount of investment, stressing that if GEM had obtained such a readily available (at a low USD 2 million threshold) stability agreement, it would have been exempt from the WPT (and the FWF)<sup>390</sup> ["*Stability agreements were readily available to mining investors*"] and that GEM's "failure to apply for a stability agreement destroys the reasonable expectations, which is fatal to Claimants' Treaty claims."<sup>391</sup>
407. Relying on the facts brought to light by Respondent's statements regarding the stability agreement-related events of 2001 and its argument that such a stability agreement would have protected Claimants both from the WPT and the FWF, Claimants articulate the following claims.
408. Claimants submit that the failure to make available to GEM a stability agreement comparable to the one it granted to Boroo and the ensuing uneven enforcement of the WPT constitute a violation of Articles 2(1), 2(2), 3(1) and 3(2) of the Treaty as well as of

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<sup>388</sup> R. Defense, ¶115.

<sup>389</sup> R. Defense, ¶281.

<sup>390</sup> R. Defense, ¶¶298, 299; Defense, ¶¶28-31, 115, 176, 271, 272; see also R. PHB, ¶63.

<sup>391</sup> R. Defense, ¶¶175, 255.



the customary minimum standard of treatment. More specifically, Claimants argue as follows:

"(1) Mongolia's failure to make available to GEM a stability agreement comparable to the one it granted to a Canadian investment, Boroo Gold, and the ensuing enforcement of the WPT against GEM but not against Boroo Gold discriminates between GEM and Boroo Gold, which constitute a violation of the fair and equitable treatment and the non-impairment standards provided for in Article 3(1) of the Treaty.<sup>392</sup>

With respect to the discrimination, Claimants are of the view that "Mongolia's refusal to offer GEM a stability agreement comparable to the stability agreement it had concluded a year earlier with Boroo Gold could not be unintentional" and this fact establishes Mongolia's discriminatory intent, if such is required. According to Claimants however, such a discriminatory intent is not required to establish discrimination.<sup>393</sup>

(2) Mongolia failed to grant the "Claimants' investments treatment not less favorable than that granted to investors from any third country because Mongolia does not enforce the WPT against Canadian owned Boroo Gold and because it offered Boroo Gold a stability agreement more advantageous than the stability agreement it offered to GEM", which constitutes a violation of Article 3(2) of the Treaty.<sup>394</sup>

(3) Mongolia's dealing with GEM's application for a stability agreement and related negotiations were not transparent, reasonable and in good faith as Mongolia (i) offered GEM the standard stability agreement which would not have protected GEM against the WPT and (ii) failed to disclose that it had concluded a stability agreement with Boroo Gold which provided protection from new taxes and, thus, the WPT, the whole in violation of the fair and equitable treatment and the non-impairment standards provided for in Article 3(1) of the Treaty.<sup>395</sup>

(4) "The application of the WPT is non-transparent and unforeseeable because it is not levied against Boroo Gold based on a provision of Boroo Gold's stability agreement that has not been offered to GEM and that most likely violates Mongolian law", the

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<sup>392</sup> C. SC, ¶14; C. Reply, ¶¶224-244, 343c and 343d; C. PHB, ¶101, al. 1.

<sup>393</sup> C. Reply, ¶¶247-249.

<sup>394</sup> C. Reply, ¶343f.

<sup>395</sup> C. Reply, ¶¶274, 279, 322, 324, 343c, 343 d; C. PHB, ¶100, al. 2 and 6, ¶101, al. 3.

whole contrary to the obligation to encourage Russian investments and to provide full legal security respectively set forth in Articles 2(1) and 2(2) of the Treaty.<sup>396</sup>

(5) "[T]he customary minimum standard of treatment (being often found to be coextensive with the standards of treatment under investment treaties", the violations of Articles 3(1), 3(2) and 2 described above also constitute violations of the customary minimum standard of treatment.<sup>397</sup>

409. Respondent answers Claimants' stability agreement related claims as follows:

"(1) Respondent argues that the discrimination claim fails because:

(1.1.) Claimants do not allege having been denied a benefit on account of their Russian nationality but rather that a benefit granted to a Canadian investor (Boroo Gold) was not granted to them. Such a claim falls under Article 3(2) of the Treaty (Most-Favoured-Nation provision) and not under the scope of a discrimination claim under Article 3(1) of the Treaty (fair and equitable treatment and non-impairment). Pursuant to the terms of the Treaty, the MFN provision does not apply to agreements relating to tax and, thus, does not apply to stability agreements.<sup>398</sup>

(1.2.) Even if Claimants could invoke the MFN provision, the discrimination claim fails because Boroo Gold committed to make future investments whereas GEM "refused to commit to make any prospective investments at all" (as required by the 1997 Mineral Laws). In Respondent's words, Claimants "themselves caused the negotiations to fail, and cannot prove that they could never have achieved an equally broad stability agreement to the one negotiated by Boroo Gold had they made such promises of future investments."<sup>399</sup>

(1.3.) Both Mongolian and English versions of the 2000 Boroo Gold Stability Agreement Amendment protected Boroo Gold from the WPT and this amendment is lawful.<sup>400</sup>

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<sup>396</sup> C. Reply, ¶¶331, 343b.

<sup>397</sup> C. Reply, ¶¶339, 343g.

<sup>398</sup> R. Rejoinder, ¶¶128, 129.

<sup>399</sup> R. Rejoinder, ¶¶128, 131-135, R. PHB, ¶¶67-70, 132.

<sup>400</sup> R. Rejoinder, ¶¶136-146.

In its Post-Hearing Brief, Respondent adopts a different position and suggests, by reference to the 1997 Mineral Laws, that stability agreements always protected investors against the imposition of new taxes even in the absence of a provision to that effect in a given stability agreement.<sup>401</sup>

(1.4.) Claimants' Article 2 claims are duplicative of those based on Article 3(1) of the Treaty. Further, the WPT does not interfere with a legal protection as "Claimants had none with regard to such a tax having chosen not to enter into a stability agreement". Therefore, there is no breach of Article 2 of the Treaty.<sup>402</sup>

(2) Respondent denies having negotiated in bad faith and having been unreasonable in the context of its dealing with GEM's application for a stability agreement:

"102. [...] Claimants also raise, improperly in the "Reply", a new issue with regard to unreasonable treatment not part of the Statement of Claim, alleging that Mongolia's refusal to grant GEM a stability agreement was unreasonable. [...] Claimants cannot complain of unreasonable conduct by Mongolia, considering that GEM's application was not in keeping with Mongolian law as set out above. [...] Thus, the claim itself is frivolous in light of the Russian-Mongolian BIT, as well as the facts of the case."<sup>403</sup>

(3) Respondent denies having breached the fair and equitable treatment obligation by acting in a non-transparent fashion when dealing with GEM's application for a stability agreement. On this issue, Respondent's argument unfolds as follows:

(3.1.) GEM was not granted a stability agreement because it proposed a draft agreement whereby it sought to rely on past investments rather than committing to make future investments. As the 1997 Minerals Law requires a prospective investment (rather than a retrospective one), GEM was not entitled to receive a stability agreement;<sup>404</sup>

(3.2.) "Mongolia has agreed and would agree to changes to the 1997 Model Stability Agreement" and the fact that there existed

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<sup>401</sup> R. PHB, ¶¶64-66.

<sup>402</sup> R. Rejoinder, ¶¶171-172.

<sup>403</sup> R. Rejoinder, ¶102.

<sup>404</sup> R. Rejoinder, ¶42; R. PHB, ¶¶67-70.

stability agreements "different than the model form was notorious in and out of Mongolia";<sup>405</sup>

(3.3.) Claimants' comparison to the stability agreement achieved by Boroo Gold is inappropriate as the latter committed to make future investments whereas GEM refused to do so;<sup>406</sup>

(4) Without specifically addressing the issue of the allegedly uneven application of the WPT and those related to the negotiation of the stability agreement, Respondent submits that the minimum standard of treatment is not part of customary international law.<sup>407</sup>

### 5.5.3 TRIBUNAL'S ANALYSIS

410. The availability of stability agreements was included in the 1997 Minerals Law; in order to qualify, a mining investor had to undertake to invest at least USD 2 million. Moreover, an amendment of 2001 to the General Tax Law confirmed the recognition by Mongolia that the provisions of a stability agreement would apply consistently regardless of the provisions of tax legislation enacted after the conclusion of such an agreement.<sup>408</sup> Stability agreements were matters of negotiation between an investor and representatives of the Government of Mongolia on a case-by-case basis.
411. The Parties are in agreement that no stability agreement was executed. There is considerable dispute however as to whether GEM committed to future investments and as to whether Respondent acted in good faith and transparently while considering such application if it took place. The facts and the arguments of the Parties have been summarized above in this Award.
412. The Tribunal has carefully reviewed the arguments raised by the Parties in their Supplemental Post-Hearing Briefs as well as all the evidence and arguments previously adduced by the Parties relating to the 2001 negotiations about a stability agreement ("**the Negotiations**"). It will now address the key questions raised by the Parties as follows:
- (1) Was the claim regarding the Negotiations properly brought before the Tribunal and has Respondent waived its right to raise objections on the basis of lack of jurisdiction *ratione temporis*?
  - (2) What is the *ratione temporis* scope of the Tribunal's adjudicative jurisdiction?
  - (3) If the Negotiations are outside of the Tribunal's jurisdiction, does the doctrine of continuing acts and composite acts nonetheless allow the Tribunal to adjudicate

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<sup>405</sup> R. Rejoinder, ¶¶43-45; R. PHB, ¶132.

<sup>406</sup> R. Rejoinder, ¶46.

<sup>407</sup> R. Rejoinder, ¶173-176.

<sup>408</sup> General Tax Law, Art. 2.5, RE-88.

on the 2001 facts, together with the 2006 and subsequent events (regarding the uneven enforcement of the WPT)?

413. In answering those questions, the Tribunal is aware that, in Procedural Order No. 1, the Parties agreed that the applicable law was the Treaty, Mongolian law and public international law.

**5.5.3.2 Was the claim regarding the Negotiations properly brought before the Tribunal and has Respondent waived its right to raise objections on the basis of lack of jurisdiction *ratione temporis*?**

414. The issue of discrimination in favor of Boroo Gold was raised in Claimants' Statement of Claim<sup>409</sup>. The thrust of their argument however was not to the effect that the alleged refusal by Mongolia to grant GEM a stability agreement was a breach of the Treaty but that "the application of the Windfall Profit Tax is discriminatory *even among gold producers*"<sup>410</sup> and that "it discriminates between GEM and Boroo Gold because the Windfall Profit Tax is not enforced against Boroo Gold."<sup>411</sup> In its request for relief<sup>412</sup>, it seeks, among other things, declarations by the Tribunal that Mongolia breached Article 3 of the Treaty by "failing to grant Claimants' investments fair and equal treatment" and "by applying discriminatory, unreasonable and unjustified measures that impaired the operation, management, maintenance, use, enjoyment and/or disposal of Claimants' investments". No reference is made to customary international law or to the Negotiations.
415. Respondent's Defense responded to Claimants' claims that it had violated the Treaty after its entry into force through its conduct relating to the WPT, the FWF, and the SCSA. In particular, it argued that, because GEM did not apply for a stability agreement (a statement later proven erroneous and abandoned by Respondent), Claimants were not entitled to the broad protections from changes in tax laws that they claimed.<sup>413</sup>
416. In their Reply, Claimants argued strenuously that Respondent was wrong in pleading that Claimants were not entitled to Treaty protection because GEM had not applied for a stability agreement; in their view, their failure to obtain a stability agreement could not be an objection to their claims for breach of the Treaty in connection with the WPT, the FWF and the SCSA. They maintained that the WPT discriminated between producers of gold and producers of copper and that Mongolia's enforcement of the WPT discriminated between GEM and its main competitor, Boroo Gold. In that particular regard, they argued that Respondent had not made available to GEM a stability agreement comparable to the one offered to Boroo Gold and, secondly, that it had

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<sup>409</sup> C. SC, ¶¶194-196.

<sup>410</sup> C. SC, ¶194.

<sup>411</sup> C. SC, ¶196.

<sup>412</sup> C. SC, ¶303.

<sup>413</sup> R. Defense, ¶¶179-182.

refused to consider Claimants' arguments about the illegality of the WPT under the Treaty, even though it had agreed not to levy the WPT against Boroo Gold.<sup>414</sup>

417. An important element for the consideration of the Tribunal is the conclusion of Claimants.<sup>415</sup> Summarizing their position, Claimants state in particular:

"[...] Mongolia has done nothing to rebut Claimants' assertion that it breached Articles 2 and 4 of the Treaty and the customary minimum standard of treatment in connection with the adoption and uneven enforcement of the WPT in the following ways: [emphasis added] [...]

(f) Mongolia has breached its duty under Article 3(2) to grant the Claimants' investments treatment no less favorable than that granted to investors from any third country because Mongolia does not enforce the WPT against Canadian-owned Boroo Gold, the largest producer in Mongolia, and because it offered Boroo Gold a stability agreement much more advantageous than the stability agreement it offered to GEM [emphasis added]; and

(g) Mongolia has breached the customary minimum standard of treatment by any and all of its conduct described above."

418. Witness testimony and arguments concerning the Negotiations were presented to the Tribunal by both sides at the time of the Hearing. The Tribunal has noted, in particular, the statement of Counsel for Claimants, in their opening statement,<sup>416</sup> where after having discussed the issue of stability agreements, it is said:

"So our discrimination claim stands. Boroo was offered a stability agreement that GEM was not aware it could get, either due to unequal treatment or the Government's non-transparency regarding what protections were available to the investor, Mongolia has breached the Treaty. It cannot say that claimants do not have treaty protections against taxes because they did not enter into a stability agreement that they did not know they could seek." [emphasis added]

419. In their Post-Hearing Brief, Claimants referred to alleged breaches in connection with the Negotiations, but this was for alleged violations under Article 3.1 of the Treaty only.<sup>417</sup> A reference to customary international law is summarily made in footnote 139 of that Brief and it is mentioned in connection with violations of Article 4 of the Treaty. The conclusion of their Post-Hearing Brief reads as follows:

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<sup>414</sup> C. Reply, ¶244.

<sup>415</sup> *Ibid.*, ¶343.

<sup>416</sup> D1:P6:L7-14.

<sup>417</sup> C. PHB, ¶¶100-101.

"As shown in Claimants' submissions and at the Hearing, Mongolia has repeatedly violated the Treaty. The Tribunal should hold Mongolia liable for those violations and proceed to the damages phase of this arbitration.

Finally, in the Conclusion of their Supplemental Post-Hearing Brief in answer to the two questions raised by the Tribunal, Claimants submitted the following arguments:

- (a) The Tribunal has jurisdiction *ratione temporis* over Claimants' claims that Mongolia breached the Treaty after its entry-into-force through its conduct relating the WPT, the FWF and may consider Mongolia's conduct to determine the validity of Mongolia's defenses based on the allegation that GEM did not obtain a stability agreement.
- (b) The Tribunal has jurisdiction *ratione temporis* over Claimants' claims that Mongolia's conduct in negotiations for a stability agreement with GEM in 2001 is itself a breach of international law because:
  - (i) Mongolia has accepted the Tribunal's jurisdiction *ratione temporis* because it waived any objections by not raising them within the time limits under Article 21(3) of the UNCITRAL Arbitration Rules; and
  - (ii) Even if, *arguendo*, Mongolia had not waived any objections to the Tribunal's jurisdiction *ratione temporis*, the scope of Mongolia's offer to arbitrate in Article 6 of the Treaty encompasses disputes based on events that pre-date the entry-into-force of the Treaty;
- (c) The substantive law applicable to Claimants' claims in (b) above is the Treaty and customary international law because Article 9 makes it substantively retroactive; and
- (d) Even if Article 9 does not provide for substantive retroactivity, the substantive law applicable to the claims in b) above is customary international law."

420. In its Supplemental Post-Hearing Brief, Respondent argued, in particular, that it could not have waived an objection *ratione temporis*, as the Negotiations claim had only been made in untimely fashion in Claimants' Post-Hearing Brief; moreover, it said, the Treaty could not be applied retroactively and, even if customary international law were to be applied to the Negotiations issue, such a claim would fail.

421. The Tribunal is of the view that Claimants did submit in their Reply a claim based on the refusal of Mongolia to grant GEM a stability agreement similar to the one granted to

Boroo Gold. That claim however was purely based upon the provisions of the Treaty. The Tribunal notes that, in ¶343 (g) of the Reply quoted above, there is a claim that, by the same conduct, Mongolia breached the "customary minimum standard of treatment by any and all of its conduct described above". But paragraph (g) comes under the general heading which reads: "Mongolia has done nothing to rebut Claimants' asserting that it breached Articles 2 and 4 of the Treaty and the customary minimum standard of treatment in connection with the adoption and uneven enforcement of the WPT" [emphasis added]. It is therefore clear that the claim has to do with the enforcement of the WPT and not with the Negotiations.

422. Whatever claims were made by Claimants in connection with the Negotiations, whether in their Reply, in their oral pleadings or in their Post-Hearing Brief, those claims were essentially based on provisions of the Treaty and, even when there was a reference to customary international law,<sup>418</sup> it was made in reference to the WPT.
423. Claimants argue however that Respondent has waived its right to object on the basis of jurisdiction *ratione temporis*.
424. First of all, the Tribunal disagrees with Claimants' argument that Respondent has waived to raise objections on the basis of jurisdiction *ratione temporis*, because it failed to raise them within the time limits set under Article 21(3) of the UNCITRAL Rules which states:

"A plea that the Tribunal does not have jurisdiction shall be raised not later than in the statement of defense or, with respect to a counter-claim, in the reply to the counter-claim."

425. Respondent could not raise an objection to a claim that could not have been identified by reading either the Notice of Arbitration or the Statement of Claim. The issue of the Negotiations was first raised by Respondent in its Statement of Defense when it alleged that the failure to apply for and obtain a stability agreement precluded the possibility of a claim in connection with the WPT, thereby tying the issue of the Negotiations to the WPT. It is only in its Reply that Claimants made reference to the Negotiations with enough specificity to allow at least a suspicion that a claim was being made in that regard, albeit still allegedly under the authority of the Treaty and in connection with the WPT. Claimants also said that the violations of Articles 3(1), 3(2) and 2 of the Treaty constituted violations of the customary standard of treatment, that standard being "often found to be coextensive with the standards of treatment under investment treaties."<sup>419</sup> Respondent could then have raised a jurisdictional objection to the claim; however, instead, Respondent engaged into a debate with Claimants as to whether an application for a stability agreement had been made, what were the terms of such an agreement that Claimants and Respondent were willing to consider and what were the reasons for the non-conclusion of a stability agreement in 2001. That debate carried on right into the Hearing and the Post-Hearing Briefs. Respondent thereby fully joined issue with

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<sup>418</sup> C. Reply, ¶¶339, 343g.

<sup>419</sup> *Ibid.*, ¶339, 343g.



Claimants on this subject and, in the Tribunal's view, it waived its rights to raise an objection *ratione temporis* concerning the Negotiations issue in so far as the application of the Treaty and customary international law were concerned, in connection with the adoption and enforcement of the WPT.

426. Secondly, if Respondent waived its right to raise objections, it could waive it only in connection with the claim as made by Claimants. It could not waive its right to challenge a claim which had not even been made. As demonstrated above, the claim made by Claimants in that regard during the whole process was only based on the Treaty or "the customary standard of treatment in connection with the adoption and uneven enforcement of the WPT." The fact that Claimants added, under the general heading of ¶343 of their Reply a sub-paragraph (g) stating that "Mongolia has breached the customary minimum of standard of treatment by any and all of its conduct above", cannot change the fact that the claim is made in connection with the WPT, and not in connection with the Negotiations.
427. In the present instance, there has been no consent by Respondent to expand their waiver to a claim that was not even made during the course of the proceedings but only raised as a separate claim under customary international law in Claimants' Post-Hearing Submission of November 30, 2009. Claimants' claim concerning the Negotiations of 2001 themselves is therefore improper, as being untimely. A party cannot spring upon another party what amounts to a new claim at the time of a post-hearing brief, and even less at the time of a supplemental post-hearing brief.

### 5.5.3.3 What is the *ratione temporis* scope of the Tribunal's adjudicative jurisdiction?

428. As stated in the *Impregilo* case, "care must be taken to distinguish between (1) the jurisdiction *ratione temporis* of an ICSID tribunal and (2) the applicability *ratione temporis* of the substantive obligations contained in a BIT."<sup>420</sup> Therefore, the Tribunal will consider separately the issue of the retroactive application of the substantive obligations of the Treaty and the issue of the temporal application of the disputes resolution provision.

#### A - The temporal application of the substantive obligations of the Treaty.

429. As to the first issue, the Treaty contains no specific provision concerning the possible retrospective application of its provisions to breaches which might have occurred before it came into effect. The only part of the Treaty which mentions the issue of timing is the first paragraph of Article 9 which reads:

"The present Agreement shall apply to investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party since January 1, 1949, in accordance with

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<sup>420</sup> *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶309.

the laws and regulations of the Contracting Party in whose territory they have been made."

430. No reasonable reading of that Article could lead to the conclusion that the substantive law provisions of the Treaty would apply to alleged breaches which would have occurred since January 1, 1949. What it says is simply that the benefits of the Treaty would not be limited to investments made after the entry into force of the Treaty on February 26, 2006, but that investments made since 1949, even though there was no applicable BIT at the time the investments were made, could call upon the provisions of the Treaty from the time of its coming into effect, even if no additional investments had been made after that date. In no case, however, does this mean that investors could claim damages retrospectively on the basis of breaches that would have arisen prior to that date, unless some other provisions of the Treaty would indicate that this was the clear intention of the Contracting Parties. The Tribunal fails to find any such indication in the Treaty.

431. First of all, the whole Treaty is drafted on a prospective basis. The Preamble clearly talks about the future:

"Having as their objective to create favorable conditions for investments of investors of one of the Contracting Party in the territory of the other Contracting Party;

Recognizing that encouragement and reciprocal protection of such investments will promote development of mutually beneficial trade [...]"[emphasis added]

432. And the Treaty's substantive Articles pursue as such:

"Article 2:

1. Each Contracting Party shall encourage investors of the Contracting Parties to make investments in its territory and permit such investments in accordance with its laws and regulations. [...]

Article 3

1. Each Contracting Party shall, in its territory, accord investments of investors and activities associated with investments. [...]

2. The treatment, mentioned under paragraph 1 of this Article, shall not be less favorable than [...]

3. Each Contracting Party shall have the right to maintain and introduce [...]

4. Most favored nation treatment [...] shall not extend to privileges [...]

#### Article 4

Investments of investors of one of the Contracting Parties [...] shall not be nationalized [...]"

433. While it is recognized that the word "shall", in the English language, has also an imperative and categorical character, the thrust of the Treaty is prospective and does not provide for claims arising before the entry into force of the Treaty.

434. Secondly, this interpretation is fully in line with the principle of non-retroactivity enshrined in Article 28 of the Vienna Convention on the Law of Treaties where it is said:

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

435. In its 1966 Commentary to the Draft Articles of the Law of Treaties, the International Law Commission stated:

"There is nothing to prevent the parties from giving a treaty, or some of its provisions, retroactive effect if they think fit. It is essentially a question of their intention. The general rule however is that a treaty is not to be treated as intended to have retroactive effects unless such an intention is expressed in the treaty or was clearly to be implied from its terms."<sup>421</sup>

436. Reference is also made to Article 30 (1) of the Vienna Convention which provides that:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

437. That interpretation of retroactivity has been confirmed in numerous arbitral decisions. For instance, the ICSID tribunal in *Impregilo S.p.A. v. Islamic Republic of Pakistan*, stated:

"[...] such language — and the absence of specific provision for retroactivity — infers that disputes that may have arisen before the entry into force of the BIT are not covered."<sup>422</sup>

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<sup>421</sup> Yearbook of the International Law Commission, 1966 Vol. II, p. 211.

<sup>422</sup> *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, ¶300.

438. The language referred to in that case ("any dispute arising between a Contracting Party and the investors of the other") is very similar to the one in the present case ("Disputes between one of the Contracting Parties and investor of the other Contracting Party, arising in connection with realization of investments").
439. And the *Impregilo* tribunal adds:
- "In this respect, it is to be noted that Article 1(1) of the BIT does not give the substantive provisions of the Treaty any retrospective effect".<sup>423</sup>
440. The same conclusion applies in the present case, when analyzing Article 9 of the Treaty. The only real difference between Article 1(1) of the Italy-Pakistan BIT and Article 9 of the Treaty is that, in the first case, the coverage date for investments starts in 1954 and, in the second case, in 1949.
441. Among others, the following decisions of tribunals go in the same direction: *M.C.I Power Group LC and New Turbine Inc. v. Republic of Ecuador*<sup>424</sup>, *Generation Ukraine v. Ukraine*<sup>425</sup> and *Kardassopoulos v. Georgia*<sup>426</sup>, *Chevron v. Ecuador*<sup>427</sup>, *Feldman v. Mexico*<sup>428</sup> and *Mondev International Ltd v. United States*.<sup>429</sup> It has to be noted however that those last two cases are under NAFTA which, at Article 1117 (1) (a) limits a tribunal's jurisdiction to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA.
442. Article 9 of the Treaty declares that investments made by investors from one of the Contracting Party into the other Contracting Party since January 1, 1949 are covered by the Treaty. The Tribunal has no hesitation in concluding that, in the present case, the ordinary meaning to be given to the terms of the BIT is simply to the effect that such investments can claim all the substantive benefits of the Treaty from the date of its entry into force but not before. The Tribunal therefore concludes that nothing in the Treaty supports a retrospective application of its substantive provisions.

#### **B - The temporal application of the disputes resolution provision of the Treaty.**

443. This leaves for consideration the second issue of the temporal application of the disputes provision of the Treaty (Article 6) which, in the relevant paragraph, reads as follows:

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<sup>423</sup> *Ibid.*, ¶310.

<sup>424</sup> *M.C.I. Power Group L.C. and New Turbine Inc. v. Ecuador*, ICSID Case ARB/03/6, Award, July 31, 2007, ¶¶59-68.

<sup>425</sup> *Generation Ukraine v. Ukraine*, ICSID Case ARB/00/9, Award, September 13, 2003, ¶¶11.2-11.3.

<sup>426</sup> *Kardassopoulos v. Georgia*, ICSID Case ARB/05/18, Decision on Jurisdiction, July 6, 2007, ¶255.

<sup>427</sup> *Chevron Corporation (USA) and Texaco Corporation (USA) v. Ecuador*, UNCITRAL arbitration, Interim Award, December 1, 2008, ¶282.

<sup>428</sup> *Feldman v. Mexico*, ICSID Case ARB (AF) 99/1, Award and Separate Opinion, December 16, 2002.

<sup>429</sup> *Mondev International Ltd v. United States*, ICSID Case ARB (AF) 99/2, Award, October 11, 2002.

"Disputes between one of the Contracting Parties and an investor of the other Contracting Party, arising in connection with the realization of investments, including disputes concerning the amount, terms or method of compensation of payment of the compensation, shall, whenever possible, be settled through negotiations."

444. Claimants argue that Article 6 of the Treaty grants the Tribunal jurisdiction over disputes which arose prior to the entry into force of the Treaty as well as those which arose after the entry into force of the Treaty but are based on events predating such event. According to them a double exclusion clause (excluding not only disputes that arose prior to the entry into force of the Treaty but also disputes over facts or situations existing prior to such entry into force) "would be required to exclude the Tribunal's jurisdiction over the claims about the Negotiations because they constitute a dispute arising after the entry into force of the Treaty but based on prior events."<sup>430</sup> In support of their position, Claimants quote two ICSID decisions on annulment: *Vivendi v. Argentina (Compañía de Aguas del Aconquija S.A. v. Argentine Republic)*<sup>431</sup> and *Lucchetti v. Peru (Industria Nacional de Alimentos Peru, S.A. v. The Republic of Peru)*.<sup>432</sup>
445. First of all, the first quote mentioned by Claimants merely makes the innocuous statement in the present circumstances that:

"[...] the requirements for arbitral jurisdiction in Article 8 (*of the relevant treaty in that case*) do not necessitate that the Claimant allege a breach of the BIT itself: It is sufficient that the dispute relate to an investment made under the BIT."<sup>433</sup>

446. As to the *Lucchetti* case, Claimants refer to the following quote:

"While in the BIT an exception is made for disputes that arose prior to its entry into force ("single exclusion"), the exception in other treaties covers not only disputes that arose prior to the entry into force of the treaty but also disputes over facts or situations that occurred prior to its entry into force ("double exclusion"). This means that on this point the exception in the BIT is a narrow one in comparison with other treaties.

[...] Where there is a double exclusion clause, jurisdiction can be denied even if the dispute arose after the entry into force of the

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<sup>430</sup> C. SPHB, ¶37.

<sup>431</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ICSID Case No. ARB/97/3, Decision on Annulment, August 20, 2007.

<sup>432</sup> *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007.

<sup>433</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, August 20, 2007, ¶55.

treaty, provided that it related to events occurring prior to its entry into force." <sup>434</sup>

447. The Tribunal notes that, in that case, the Annulment Committee was dealing with a clause significantly different from Article 9 of the Treaty applicable to the present case. Art. 2 of the Chile-Peru BIT provided:

"This Treaty shall apply to investments made before or after its entry into force by investors of one Contracting Party, in accordance with the legal provision of the other Contracting Party and in the latter's territory. It shall not, however, apply to differences or disputes that arose prior to its entry-into-force."

448. The Annulment Committee was called upon to interpret the meaning of a clause containing a single exclusion and it went on to discuss the differences between single and double exclusion clauses. In the end, it concluded that a double exclusion clause would be required to exclude not only disputes which arose before the entry into force of the Chile-Peru BIT but also disputes arising after such entry into force and relating to prior actions or omissions.

449. Be that as it may, Article 6 of the Treaty in the present case contains no single or double exclusion clause and the Tribunal has to reach a conclusion, on the basis of that specific Article and of the Vienna Convention, as to whether the Tribunal has jurisdiction to rule on a dispute which has arisen after the entry into force of the Treaty but which is based on events which occurred well before it.

450. On that issue, some controversy still seems to exist.

451. For instance, in the *Generation Ukraine* case, the tribunal had to consider an expropriation claim. It considered that the claimant had made an investment recognized by the relevant BIT, even though the transactions relating to that investment occurred before the entry into force of the BIT, which had a clause similar to Article 9 in the present case. It concluded however that the tribunal could only have jurisdiction over a cause of action based on one of the BIT standards of protection which had arisen after the entry into force of the BIT. Then it added the following:

"It is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law. The Tribunal does not, however, have general jurisdiction over causes of action based on the obligations of states in customary international law.

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<sup>434</sup> *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, ¶¶94-95.

In conclusion, the Tribunal's jurisdiction *ratione temporis* is limited to alleged expropriatory acts which occurred after 16 November 1996. (*the date of entry into force of the BIT*).<sup>435</sup>

Article VI(1) of the Ukraine-USA BIT defines the word "dispute" as:

[...] a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

It may be noted that item (c) of that Article can be read as limiting claims to breaches of right conferred by that BIT, but it is to be noted that the items in that Article are not mentioned as cumulative restrictions but as alternatives and that no such restriction applies to the first two items. Moreover, the Tribunal, in the quotations mentioned above, makes no mention of that item as being a basis for its conclusion.

452. In that particular case, the Tribunal arrived at the conclusion that each of the alleged acts of expropriation occurred after the entry into force of the BIT but decided on the merits to reject the Claimants' claims.

453. In another case,<sup>436</sup> the arbitral tribunal reached a similar conclusion. The debate in that case had to do with the application of the BIT between Ecuador and the United States to disputes arising prior to its entry into force; this situation is somewhat different from the present case where the dispute is alleged to have arisen after the entry into force of the Treaty but would relate to events having occurred before such entry into force. Nonetheless, the views of the tribunal are relevant to the present case.

454. In the *M.C.I.* case, the BIT, at Article XII, had a clause similar to Article 9 of the Treaty to the effect that :

"(*The BIT*) shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter."

455. And Article VI(4) of the BIT provided, similarly to Article 6 of the Treaty, that:

"Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration [...]."

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<sup>435</sup> *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No ARB/00/09, Award, September 16, 2003, ¶¶11.3-11.4.

<sup>436</sup> *M.C.I. Power Group L.C. and New Turbine Inc. v. Ecuador*, ICSID Case ARB/03/6, Award, July 31, 2007.

456. The claimants in that case argued strenuously both before the arbitral tribunal and the *ad hoc* committee that the BIT contained no implicit limitation by the Contracting Parties on their consent to ICSID jurisdiction to disputes arising after the BIT came into force.
457. According to them, "the Contracting Parties agreed to submit to binding arbitration "any" investment dispute unmodified by the express temporal restrictions that appear in other BITs."<sup>437</sup>
458. For its part, Ecuador argued that the tribunal had "no jurisdiction over this dispute because the test of application of Article 28 of the Convention and Article XII of the BIT is not whether a dispute arose before the BIT entered into force or continued thereafter but whether the facts or acts which gave rise to the dispute were committed and completed before the treaty entered into force or thereafter."<sup>438</sup>
459. The arbitral tribunal allowed the objections of Ecuador in respect of the non-retroactivity of the BIT, exercised its competence over Ecuador's alleged violations of the BIT by acts or omissions subsequent to the entry into force of the BIT and rejected the claimants' claims on the merits.
460. The following quotations from the award are particularly relevant:

"The Tribunal notes that because of the fact that the BIT applies to investments existing at the time of its entry into force, the temporal effects of its clauses are not modified."<sup>439</sup>

The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force. Any dispute arising prior to that date will not be capable of being submitted to the dispute resolution system established by the BIT. The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties.<sup>440</sup>

The Tribunal observes that prior dispute may evolve into a new dispute, but the fact that this new dispute has arisen does not change the effects of the non-retroactivity of the BIT with respect to the dispute prior to its entry into force. Prior disputes that continue after the entry into force of the BIT are not covered by the BIT.<sup>441</sup>

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<sup>437</sup> *M.C.I. Power Group L.C. and New Turbine Inc. v. Ecuador*, ICSID Case ARB/03/6, Decision on Annulment, October 19, 2009, ¶28.

<sup>438</sup> *Ibid.*, ¶33.

<sup>439</sup> *M.C.I. Power Group L.C. and New Turbine Inc. v. Ecuador*, ICSID Case ARB/03/6, Award, July 31, 2007, ¶59.

<sup>440</sup> *Ibid.*, ¶61.

<sup>441</sup> *Ibid.*, ¶66.



The Tribunal observes that the existence of a breach of a norm of customary international law before a BIT enters into force does not give one a right to have recourse to the BIT's arbitral jurisdiction. A case in point is the *Mondev v. United States of America* case in which the tribunal pointed out the difference between a claim made under a Treaty and a diplomatic protection claim for conduct contrary to customary law."<sup>442</sup>

461. The present Tribunal notes that the *Mondev* case was under the provisions of the NAFTA Treaty which limit the jurisdiction of arbitral tribunals to the matters specifically mentioned in that Treaty.
462. As to the *ad hoc* Committee, without pronouncing on the correctness of the tribunal's reasoning, it concluded that "the Applicants have not shown that the Tribunal manifestly exceeded its powers by failing to exercise its jurisdiction over the accounts receivable."<sup>443</sup>
463. On the other hand, a somewhat different analysis appears to have been made in the *Chevron* case,<sup>444</sup> which contains a definition of "dispute" practically identical to the one found in the *Generation Ukraine* case. In that case, the tribunal concluded that the dispute had arisen and that "the Claimants based their claims on post-BIT conduct and commenced the arbitration after entry into force of the BIT" and proceeded to render a decision on that basis. Nonetheless, the tribunal discussed more broadly the issue of jurisdiction over disputes. Like in the present case, while there was a temporal restriction concerning "investments", there was no such reference as to "disputes". In the circumstances, the tribunal expressed the view that "(t)hus, the BIT covers any dispute as long as it is a dispute arising out of or relating to "investment existing at the time of entry into force". In support of its opinion, the tribunal quoted, in particular, the ILC Commentary of Sir Arthur Watts, who wrote: "This is not to give retroactive effect to the agreement because, by using the word "disputes" without any qualification, the parties are to be understood as accepting jurisdiction with respect to all disputes existing after the entry into force of the agreement."
464. Reference is often made to the *Mavrommatis* case<sup>445</sup> decided by the Permanent Court of International Justice and dealing with Protocol XII to the Treaty of Lausanne. In that case, the United Kingdom pleaded, *inter alia*, that the acts complained of occurred before the Treaty had come into force. The Court ruled that the Treaty applied retroactively to breaches that occurred before that event. It said in particular:

"The Court is of the opinion that, in case of doubt, jurisdiction based on an international agreement embraces all disputes

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<sup>442</sup> *Ibid.*, ¶96.

<sup>443</sup> *M.C.I. Power Group L.C. and New Turbine Inc. v. Ecuador*, ICSID Case ARB/03/6, Decision on Annulment, ¶57.

<sup>444</sup> *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, UNCITRAL Award, December 1, 2008, ¶¶263-271.

<sup>445</sup> *Mavrommatis Palestine Concessions*, P.C.I.J. Reports, (1924) Series A, No.2.

referred to it after its establishment. [...] The reservations made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction."<sup>446</sup>

However, it is important to note that, in that case, the very nature of the Protocol, if it was to have real substance, required retroactive application. As the Court said:

"An essential characteristic therefore of Protocol XII is that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses of the Protocol for the protection of the rights recognized therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection."<sup>447</sup>

465. In the subsequent case of *Ambatielos*,<sup>448</sup> the International Court of Justice adopted a somewhat different line. It rejected Greece's contention that under a Treaty of 1926 it was entitled to present a claim based on acts which had taken place in 1922 and 1923. The Court stated in particular:

"To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier."<sup>449</sup>

466. It is worth noting that those cases pre-dated the adoption of the Vienna Convention. In its Third Report on the Law of Treaties, Sir Humphrey Waldock had this to say on the issue on the retroactive application of dispute resolution clauses:

"[...] when a jurisdictional clause is found not in a treaty of arbitration or judicial settlement but attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle does operate indirectly to limit *ratione temporis* the application of the jurisdictional clause. The reason is that the "disputes" with which the clause is concerned are *ex*

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<sup>446</sup> *Ibid.*, ¶35.

<sup>447</sup> *Ibid.*, ¶34.

<sup>448</sup> *Greece v. United Kingdom*, 1952, *I.C.J. Reports*, p. 28.

<sup>449</sup> *Ibid.*, p. 40.

*hypothesi* limited to "disputes" regarding the interpretation and application of the substantive provisions of the treaty which [...] do not normally extend to matters occurring before the treaty came into force. In short, the disputes clause will only cover pre-treaty occurrences in exceptional cases, like Protocol XII to the Treaty of Lausanne [...]"

467. The Tribunal is of the view that the wording of Article 6 of the Treaty should not be interpreted as granting it jurisdiction concerning disputes which arose after the entry into force but which are based on actions that have occurred before such entry into force, except for the particular situation of continuing or composite acts. Such conclusion applies not only concerning the substantive provisions of the Treaty but also as to resort to customary international law. Even in a situation where, in a particular dispute, the State concerned would have waived objections to jurisdiction, there is a question as to whether an arbitral tribunal could exercise such jurisdiction, as noted in the *Generation Ukraine* case, the matter becoming one to be addressed as a diplomatic protection claim or as an ordinary commercial dispute to be resolved under private law before the appropriate judiciary. Obviously, the situation would be read differently in situations where the tribunal is given specific jurisdiction to deal with disputes relating to events preceding a treaty, like in the case of the U.S.-Iran Claims Tribunal which was called upon to address only such disputes.<sup>450</sup>
468. The Treaty has to be read "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", to quote Article 31 of the Vienna Convention. While it is true that there is no temporal restriction to the word "disputes" in Article 6 of the Treaty, this is no reason to give that Article an extensive interpretation which takes it well beyond the general scope of the Treaty. In entering into it, the Contracting Parties entitled investments by investors of the other Contracting Party made after 1949 and before the entry into force of the Treaty to claim the same protection as that granted to investments made subsequent to its entry into force. By providing that disputes could be resolved by arbitration, after an attempt at negotiations, the Contracting Parties empowered arbitral tribunals to consider disputes which would come within the ambit of the Treaty, including the application of general international law. But it is a far stretch to conclude, unless there is a clear provision to that effect, that a tribunal would have been granted jurisdiction to rule on events going as far back as 1949. The Contracting Parties cannot be assumed to have allowed a situation whereby an investor could, after the entry into force of the Treaty, simply manufacture a dispute with a Contracting Party concerning events which would have occurred, say in 1955, and an arbitral tribunal would have jurisdiction to rule on such events. Such an interpretation appears to the Tribunal to be far beyond what could have been the intention of the Contracting States when they entered into the Treaty. Article 28 of the Vienna Convention (already quoted) referring to the intention of the contracting parties makes no distinction between the provisions of a treaty dealing with substantive rights and those dealing with procedural rights.

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<sup>450</sup> Sir Humphrey Waldock, Third Report on the Law of Treaties, in Special Rapporteur, Law of Treaties, II Yearbook of the International Law Commission (1964), UN Doc. A/CN.4/167 and Add. 1-3, p. 11.

469. In the present instance, from the limited and often conflicting evidence submitted by the Parties (most of it at the Hearing itself), the Tribunal can see that negotiations took place during 2001 between GEM and Respondent concerning the possibility for GEM to obtain a stability agreement on taxation. Those negotiations did not lead to an agreement and GEM did not pursue the matter or raise the absence of an agreement to the level of a dispute before the initiation of the present arbitration. Between the failure of the Negotiations and the enactment of the WPT in 2006, neither Claimants nor GEM took any specific action in that regard.
470. Claimants have argued, previous to their Post-Hearing Brief that, among other things, the WPT constituted a discriminatory action because it treated GEM differently from Boroo Gold which benefited from a stability agreement reached before the entry into force of the Treaty. The Tribunal has to decide whether that alleged discrimination in terms of the WPT treatment was in contravention of the Treaty and of Article 42 of the Washington Convention, and not whether the failure of Mongolia to grant GEM a stability agreement in 2001 itself constituted an impermissible discriminatory treatment. The Boroo agreement existed before the entry into force of the Treaty and the Tribunal has no jurisdiction to consider the consequences of the failure of the Parties to conclude a stability agreement in 2001, unless Claimants can demonstrate that such is covered by the doctrine of continuous or composite acts.
471. However, for the purpose of completeness of its analysis and bearing in mind the different views among arbitral decisions and legal authorities on the subject and the fact that, at the request of the Tribunal, the Parties have extensively discussed the issue, the Tribunal wishes to proceed with an analysis of Claimants' claim, assuming that it could have jurisdiction to consider a dispute arising after the entry into force of the Treaty but relating to facts or events anterior to the Treaty. In that case, it is clear from the above comments that only customary international law, and not the substantive provisions of the Treaty, could apply.

**C - Even in the absence of a limitation *ratione temporis*, the Tribunal would not have found a breach of customary international law.**

472. On the basis of the facts submitted, the Tribunal has concluded that an application for a stabilization agreement did take place. A letter from GEM to the Mongolian Ministry of Finance and Economy<sup>451</sup> made such a request on May 3, 2001 and, on May 23, 2001, in another letter<sup>452</sup> GEM repeated the same request. That letter noted in particular that the approved model agreement guaranteed stability of taxation only with respect to certain taxes not covering all of the taxes applicable to the gold mining industry. Although such letters were produced only at the time of Claimants' Reply, their existence was not contested by Respondent.
473. On May 17, 2001, the Ministry of Finance and Economy responded to the first letter by providing a form stability agreement covering only five specific types of taxes,

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<sup>451</sup> CE-131.

<sup>452</sup> CE-96.

consistent with the model stability agreement.<sup>453</sup> Claimants recognize that that form would not have covered a new tax such as the WPT. During the course of discussions which lasted several months, GEM expressly asked that the stability agreement fix all taxes payable by GEM. In its letter of June 23, 2001,<sup>454</sup> it stated that "[...] The agreement should provide for the stability of tax regime existing as of the date of the stability agreement, covering 15 taxes, and to fix not only the tax rates for each tax, but also concessions available for each tax under the applicable tax laws that are in effect at the date of the stability agreement." In addition, GEM requested that any future reduction in taxes or new tax concessions subsequent to the stability agreement be passed on to GEM.

474. It is to be noted that such an exchange of letter took place roughly one year after a foreign-owned gold producer in Mongolia obtained an amendment to its own stability agreement granting it full protection against any future tax increases in exchange for a significant commitment of future investment.<sup>455</sup> At no time was GEM made aware of the May 9, 2000 amendment to Boroo Gold's stability agreement which went beyond the 1997 Model Stability Agreement.<sup>456</sup> Respondent has established however that the terms of that Agreement were reported in the specialized press in 2000 and also appeared in the 2002 SEC filing of Cameco Corp., the Canadian company indirectly controlling Boroo Gold at the time.<sup>457</sup> Claimants challenge the validity of the Boroo Gold stability agreement and argue, at the same time, that they were the subject of unfair and unequal treatment by not being able to benefit from the same generous agreement as Boroo Gold. For its part, Mongolia argues that Article 20 of the 1997 Minerals Law entailed an obligation to protect parties to stability agreement against the imposition of new taxes such as the WPT and that, if GEM had signed a stability agreement, it would have been entitled to benefit from that provision.<sup>458</sup>
475. The validity of the Boroo Gold agreement is not a matter that is coming under the jurisdiction of this Tribunal and therefore will not be addressed here. However, again assuming that the Tribunal would have jurisdiction over disputes concerning events preceding the entry into force of the Treaty, the argument about unfair treatment would be one that could be properly raised, the question being whether Boroo Gold and GEM were in similar situations.
476. As mentioned before, Boroo Gold committed to substantial investment in the future. Claimants argue that, prior to their application, they had made much larger investments than Boroo Gold before its own application. But the argument is misplaced; stability agreements generally look to the future. They represent a commitment by a State not to raise taxes affecting a particular investor in exchange for forward-looking commitments

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<sup>453</sup> CE-126.

<sup>454</sup> CE-128.

<sup>455</sup> CE-121.

<sup>456</sup> CE-121.

<sup>457</sup> Cameco Corp. Annual Report of Foreign Private Issuer for 12/31/02, p. 53, RE-108.

<sup>458</sup> R. PHB, ¶66; D5: P135:L2-4; D6:P6:L24-P7:L8.

(essentially financial) which will bring significant economic development benefits to that State. Claimants have not been able to show any stability agreement between an investor and Mongolia which would grant the relevant tax benefits as a reward for past investments and Mongolia stated that there are no such stability agreements. Claimants argue that Article 9 of the Treaty protects past investments. The Tribunal does not disagree with this interpretation of the Treaty but this is quite different from saying that stability agreements must retroactively reward investors for past investments; no such provision can be read into the Treaty and, unless an investor can point to a specific provision in that regard in the local legislation (and this clearly was not the case in Mongolia), it is a matter of policy for a State to decide if it wishes to enter into such agreements.

477. Respondent argues that GEM was not willing to commit to future investments, even to the tune of the minimum USD 2 million required under the law.<sup>459</sup> For their part, Claimants argue that the "Working Group set up for the negotiations of this agreement explained that the stability agreement can only be entered into based on the approved form."<sup>460</sup>
478. First, did Claimants ever commit to future investments, like Boroo Gold did? In its letters of May 3, and August 13, 2001, GEM stated that: "As our investment program has been developed for a long period extending into the future [...]"<sup>461</sup> and "As our company has already invested significant funds in Mongolia and is planning further investments [...]"<sup>462</sup> It would therefore appear that GEM was considering investment in the future and did not rely only on its past investments, in its application for a stability agreement, but, by themselves, those statements are merely of a general nature and could not be considered to represent a commitment to future investment.
479. The letter of May 23, 2001 from GEM to the Minister of Finance and Economy refers to a draft stability agreement attached in two copies but such an attachment was not produced at the same time as the letter itself.<sup>463</sup>
480. As already mentioned, the content of the Negotiations has been the subject of considerable debate between the Parties. At first, Respondent claimed in its Defense that, if GEM was not exempt from the WPT, it was because it had not requested a stability agreement. In their Reply, Claimants stated that, after having requested from Respondent the production of documents relating to such a request and being told that none existed in its files, it proceeded to make a further search for documents. The Claimants produced a number of documents which they succeeded in retrieving from a box found at GEM headquarters. As mentioned above, the letter of May 23, 2001 was

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<sup>459</sup> Tumendemberel's testimony, D5:P131:L2-7.

<sup>460</sup> Letters of June 23, 2001, CE-128, and of August 13, 2001, CE-97, from GEM to the Minister of Industry and Trade and others.

<sup>461</sup> CE-131.

<sup>462</sup> CE-97.

<sup>463</sup> CE-96.

produced without its attachment and the Tribunal has received no evidence to the effect that the draft stability agreement designated as CE-215 was ever sent to and received by Respondent. In its Statement of Defense, Respondent argued that GEM had not been willing to commit to future investments.<sup>464</sup> In a letter to Respondent in November 2008 (not produced before the Tribunal but not contested by Respondent), Claimants transmitted to it a draft stability agreement dated "June 2001" (subsequently identified as CE-215 when submitted to the Tribunal at the Hearing) which would allegedly have constituted the attachment to the letter of May 23, 2001 sent to the Minister of Finance. Claimants produced at the Hearing that draft stability agreement. That document is much more specific than the previous letters. In particular, it does contain a commitment to a minimum investment of USD 5 million over the subsequent five years and provides for a firm engagement by Mongolia to "maintaining the taxation existing as of the date of this agreement." At the Hearing,<sup>465</sup> Counsel for Claimants stated that "this document was provided to Mongolia with other stability agreements that were found in a box at GEM headquarters. The documents in the box were not organized - they're 7 or 8 years old - but we pulled down all the documents we could find and the second paragraph it says "please find attached to this letter a draft stability agreement." [...] It is a draft stability agreement that we indicated in our response letter to Mongolia's Counsel which we sent on December 10th that we believe could be the attachment to this because it was the only other draft stability agreement we found in the box of documents. But we could not say with 100% certainty because it was not actually affixed to the letter." Counsel for Respondent argued that there was no evidence that the document in question was actually sent to Respondent at any time. The Tribunal accepted its production, subject to whatever evidentiary value could be derived from it.

481. In his Witness Statement of 17 February 2009, Mr. N. Tumendemberel, who was State Secretary at the Ministry of Finance when GEM asked for the possibility of a stability agreement, stated the following: "After receiving a draft stability agreement from GEM, we established a Working Group to consider this request. [...] I was directed by the Minister to lead the that would consider this request. The Working Group closely reviewed the application and draft stability agreement from GEM."<sup>466</sup> He claims that the refused to approve the GEM proposal because "[...] GEM would not first agree to invest additional money into Mongolia".<sup>467</sup> He noted that "GEM wanted to use past investments as the basis for this agreement"<sup>468</sup> and added that there were also "problems with the value of the equipment that GEM officials wanted to use as an investment."<sup>469</sup> He also challenged Mr. Paushok's assertion that the Working Group would not agree to a stability agreement because GEM wanted to add some more specific taxes to the agreement. In his view, "[t]he issue of extra taxes was not the basis for this decision" and,

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<sup>464</sup> R. Defense, ¶39.

<sup>465</sup> D1:P7:L1-P9:L6.

<sup>466</sup> Tumendemberel, ¶3.

<sup>467</sup> Tumendemberel, ¶10.

<sup>468</sup> Tumendemberel, ¶4.

<sup>469</sup> Tumendemberel, ¶6.

in any event, the 2001 amendment to the General Taxation Law assured protection against all tax increases subsequent to a stability agreement.<sup>470</sup>

482. The other witness which discussed stability agreements was Mr. B. Ganbat, who is Director General of the Legal Department of the Ministry of Finance and who has been in the employment of that Department since 1995. In his testimony, he asserted that the Mining Law of Mongolia could not grant stability agreements for past investments. Like Mr. Tumendemberel, he was a member of the Working Group responsible for reviewing GEM's request for a stability agreement. Somewhat surprisingly, he also stated in his oral pleading that, while preparing his Witness Statement, the only document he found in searching the Ministry's file on GEM's application for a stability agreement was a copy of the Government order creating the Working Group,<sup>471</sup> although he corrected himself shortly after<sup>472</sup> by saying that the file did not contain the text of any stability agreement but that "there was correspondence and there was letters sent from the GEM to the Ministry of Finance regarding the stability agreement issue"; yet at the same time, he reaffirmed that he had not found copy of a letter dated May 17, 2001 and signed by the Deputy Minister of Finance acknowledging receipt of GEM's letter proposing negotiations for a stability agreement. He added that,<sup>473</sup> although he was acquainted with the 1997 model stability agreement,<sup>474</sup> he had never come across a draft stability agreement either in the form of CE-127 or CE-215, until they were shown to him at the Hearing. He had stated in his Second Witness Statement of 22 September 2008 that "Claimants have not submitted request for stability agreement under the 1997 Mining Law or the 2006 amendment."<sup>475</sup>
483. As for Claimants, Mr. V. Paushok, in his Third Witness Statement of 28 March 2008, states that he "applied for a stability agreement not only in respect of KOO Vostokneftegaz (Vostokneftegaz) but in respect of Koo Golden East Mongolia (GEM)."<sup>476</sup> He produces, in the case of the first company, a copy of the Stability Agreement of March 26, 2002 between that company and the Government of Mongolia,<sup>477</sup> and, in support of the second, the letter of May 3, 2001 to the Ministry of Finance and Economics.<sup>478</sup> He then contends that no agreement was signed between GEM and Respondent because the Mongolian authorities were not willing to make any change to

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<sup>470</sup> Tumendemberel, ¶8.

<sup>471</sup> RE-163; D5:P10:L7-10.

<sup>472</sup> D5:P18:L5-12.

<sup>473</sup> D5:P19:L21-P20:L10.

<sup>474</sup> CE-120.

<sup>475</sup> Ganbat-II, ¶8.

<sup>476</sup> CE-¶2.

<sup>477</sup> Paushok Ex.-101.

<sup>478</sup> CE-131.



the model stability agreement, stability being "only guaranteed with regard to some of the existing taxes as at the time of the agreement."<sup>479</sup>

484. During his examination by Counsel for each side, no question was raised about the draft stability agreements allegedly exchanged between the Parties.<sup>480</sup> Respondent concentrated instead on the 2002 Vostokneftgaz Stability Agreement which was obtained by Claimants. The model agreement for the mining industry states that the rate of corporate income tax, VAT and gasoline and diesel fuel taxes shall remain fixed at the rates in effect at the time when the agreement is executed. In addition, equipment and heavy machinery which are imported are exempt from customs duty and VAT and the VAT on goods, works and services which are exported is set at zero.<sup>481</sup> The agreement reached concerning Vostokneftgaz provide for more generous treatment than the model agreement. That agreement which extended over a period of 15 years provided that the company would pay no corporate income tax in its first five years of production, and would benefit from a 50% discount from the rate in the next following five years. In addition, the company was granted lower tax and excise rates on gasoline and diesel fuel than provided in the model agreement. Finally, the company was granted the same exemptions as in the model agreement on imports and exports. In exchange, the company committed to a USD 50 million investment over the first three years of the agreement. According to Mr. B. Ganbat's testimony, Vostokneftgaz failed to make the required investments in 2006 and 2007 and is in breach of the agreement. None of this was contested by Claimants.
485. The Tribunal is confronted with conflicting statements from the Parties and with evidence that leaves room for speculation.
486. In the case of CE-215 in particular, not a word has come from witnesses for Claimants about its existence or its authenticity and Counsel for Claimants have themselves stated that they could not confirm that that document was in fact transmitted to the Mongolian authorities. However, it seems established at least that Respondent transmitted to GEM a draft stability agreement dated June 19, 2001<sup>482</sup> which was a filled-in form agreement, and covered exemptions of five specific types of taxes, consistent with the applicable model stability agreement, in exchange for a commitment by GEM to invest USD 1 million a year over the next five years. The fact is that no agreement was ever signed. GEM could have been satisfied with the concessions offered by Respondent and taken its chances on future negotiations about further investment but it decided otherwise, as it was entitled to do.
487. The question then is: Was Mongolia obligated to reach with GEM an agreement on the same terms as the one concluded with Boroo Gold, on May 9, 2000? The Tribunal does not believe that this was the case.

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<sup>479</sup> Paushok-III, ¶34.

<sup>480</sup> CE-127 and CE-215.

<sup>481</sup> CE-122, ¶¶2.2-2.4.

<sup>482</sup> CE-127.

488. First of all, there is a certain element of administrative discretion in the negotiation of such agreements; the concessions granted by a government will very much depend on the size of the investment contemplated. In the case of Boroo Gold, if one ignores previous investments, as argued by Respondent, Boroo Gold committed to investing some USD 24 million, between July 2000 and July 2003 (USD 9 million in cash and USD 15 million in other forms). This is significantly superior to the USD 5 million over five years mentioned in CE-127.
489. Secondly, the arrival of Boroo Gold (it had arrived earlier but its investment represented only about USD 1 million by the time of the 2000 agreement), represented the arrival of a new player in gold mining, a sector considered strategic by Mongolia. In fact, Boroo Gold quickly became the largest gold producer in Mongolia (GEM being the second). It would be understandable that, in such circumstances, there would have been a strong incentive for Mongolia to make exceptional concessions in favor of Boroo Gold in return for a commitment to substantial investment over the following three years..
490. In light of the above, the Tribunal concludes that, even if it had been called upon to rule on the Negotiations, it would, in any event, have decided that the evidence submitted to it is not sufficient for the Tribunal to conclude that the actions of Respondent in that connection were of such a nature as to constitute a breach of customary international law, whether it be because of bad faith, discrimination or on any other ground.

**5.5.3.4 Does the doctrine of continuing acts and composite acts allow the Tribunal to adjudicate on the 2001 facts?**

491. Apart from cases where a treaty would provide for retrospective application, the only qualification to the principle of non-retroactivity has to do with the case of so-called continuing or composite acts.
492. Notably, in *Tecmed v. Mexico*,<sup>483</sup> the tribunal wrote:

"Conduct, acts or omissions of the Respondent which, though they happened before the entry into force [of the BIT] may be considered as constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction.

This is so, provided such conduct or acts, upon consummation or completion of their consummation after the entry into force of the Agreement constitute a breach of the Agreement, and particularly if the conduct, acts or omissions prior to December 18, 1996, could not reasonably have been fully assessed by the Claimant in their significance and effects when they took place, either because as the Agreement was not in force they could not be considered

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<sup>483</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, p. 22.

within the framework of a possible claim under its provisions or because it was not possible to assess them within the general context of conduct attributable to the Respondent in connection with the investment, the key point of which led to violations of the Agreement following its entry into force."

493. Similarly, in *Société Générale v. Dominican Republic*,<sup>484</sup> the tribunal expressed the situation in these words:

"The Tribunal accordingly concludes that to the extent that on the consideration of the merits an act is proved to have originated before the critical date but continues as such to be in existence after that date, amounting to a breach of a Treaty obligation in force at the time it occurs, it will come within the Tribunal's jurisdiction. This will also be the case if the series of acts results in the aggregate that such a breach of an obligation in force at the time the accumulation culminates after the critical date."

494. It must be noted however that such situations are far from opening the door to retrospective application of treaty provisions, when the treaty itself does not provide for it. The *Société Générale* tribunal took great care to clarify that situation:<sup>485</sup>

87. The Tribunal is persuaded, however, that there might be situations in which the continuing nature of the acts and events questioned could result in a breach as a result of acts commencing before the critical date but which only become legally characterized as a wrongful act in violation of an international obligation when such an obligation had come into existence after the effective date of the treaty. The tribunals in *MCI, Feldman* and *Mondev*, while not accepting jurisdiction over acts and events preceding the date of entry into force of the treaty, nevertheless did not exclude the consideration of prior acts for "purposes of understanding the background, the causes, or scope of the violations of the BIT that occurred after the entry into force" or the relevance of prior events to breaches taking place after the treaty's entry into force.

88. In such a case, the act is indeed continuous but its legal materialization as a breach occurs when the Treaty has come into force and the investor qualifies under its requirements. [...] [emphasis added]

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<sup>484</sup> *Société Générale v. Dominican Republic*, Award on Preliminary Objections, September 19, 2008, UNCITRAL, LCIA Case No. UN7927.

<sup>485</sup> *Ibid.*, ¶¶87-92.

[...]

90. It follows that the Tribunal must be satisfied that there could be a breach of obligations under the Treaty for jurisdiction over treaty violations to be established, and this again can only happen once the obligation has come into force. The actual determination of which acts specifically meet the continuing requirement is a matter for the merits because it is only then that it can be decided which acts amount to breaches and when this took place. At the jurisdictional stage only the principle can be identified.
91. The same reasoning applies to composite acts. While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation, when the treaty obligation will have come into force. This is what normally will happen in situations in which creeping or indirect expropriation is found, and could also be the case with a denial of justice as a result of undue delays in judging a case by a municipal court. As noted in Article 15 of the Articles on State Responsibility, the series of actions or omissions must be defined in the aggregate as wrongful and when taken together it "is sufficient to constitute the wrongful act". But of course the latter determination can only be made when the obligation is in force. [emphasis added]
92. In situations of this kind, the preceding acts might be relevant as factual background to the violation that takes place after the critical date, and this is the meaning that the cases discussed above will have in considering that factual background and its relevance to explain later breaches. As the Respondent has rightly recalled, this explains why in *Tecmed*, while often believed to have assumed jurisdiction over acts preceding the treaty, this was only to the effect that such acts represented "converging action towards the same result". In such a situation, the obligations of the treaty will not be applied retroactively but only to acts that will be the final result of that convergence and which take place when the treaty has come into force. [emphasis added]

495. Articles 14-15 of the ILC Articles on State Responsibility and the Commentary to those Articles formulate the same principles.

496. In its Commentary to Article 14 (2) , the ILC states about continuing acts:

"[...], a continuing wrongful act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation, provided that the State is bound by the international obligation during that period."<sup>486</sup>

497. Discussing Article 15 dealing with composite acts, the Commentary states, in particular:

"[...] The State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter, the "first" of the action or omissions of the series for the purposes of State responsibility will be the first occurring after the obligation came into existence."<sup>487</sup>

498. In the present case, the Tribunal is of the view that the Negotiations cannot be seen as a continuing act. Those Negotiations were a discrete event in the course of the relations between GEM and Respondent which lasted for a few months during 2001. There is no evidence that GEM raised the issue again at any time between 2001 and 2006, although there was nothing preventing it from doing so and in spite of the fact that one of Claimants' subsidiary (Vostokneftegaz) did conclude a stability agreement with Respondent one year later, in 2002. In fact, GEM later opted for a different strategy in its attempts to avoid having to pay the WPT: the Safe Custody/Sale and Purchase of Precious Metal Agreement with MongolBank.

499. The Tribunal is equally of the view that the Negotiations are not part of composite acts. As noted in the *Société Générale* case, this argument is usually raised in the context of allegations of creeping or indirect expropriation or of denial of justice. The evidence presented by the Parties on the subject of the Negotiations cannot support a conclusion that the failure to arrive at the signing of a stability agreement in 2001 was part of a series of actions by Respondent which, taken together, would lead the Tribunal to the conclusion that there has been a breach of the Treaty on the basis of composite acts. This is even more so in a context where nothing special affecting GEM occurred between 2001 and 2006, when the WPT was adopted by the Great Khural, a measure that the Tribunal has concluded was not in breach of the Treaty. Contrary to the situation in the *Tecmed*

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<sup>486</sup> Crawford J., *The International Law Commission's Articles on State Responsibility*, Cambridge University Press, 2002, p. 136, ¶3.

<sup>487</sup> Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary, 2001, p. 59.

case, the Tribunal cannot see in the present case a series of acts representing "converging action towards the same result."<sup>488</sup>

500. Those 2001 events cannot qualify as continuing or composite acts or omissions leading to breaches of the Treaty after the entry into force of the Treaty, some five years later.

#### **5.5.4 CONCLUSION**

501. In light of the above, the Tribunal therefore rejects, first of all, the argument of Respondent to the effect that the absence of a stability agreement prevents Claimants from making a claim in connection with the enactment and the enforcement of the WPT; the Tribunal equally rejects Claimants' argument to the effect that Respondent would have waived objection to jurisdiction in connection with their separate claim that the Tribunal would have the authority to hear a claim concerning the 2001 Negotiations themselves. Apart from the issue of continuing or composite acts discussed above, the Tribunal has no jurisdiction to rule on the Negotiations that took place in 2001; and, even assuming that it would have had jurisdiction, the Tribunal would not have found a breach of customary international law in connection with the Negotiations. Finally, the Tribunal has concluded that the Negotiations did not constitute continuing or composite acts.

### **5.6. THE SAFE CUSTODY AND SALE AGREEMENT**

#### **5.6.1 ARGUMENTS OF THE PARTIES**

##### **5.6.1.1 Claimants' standing, exhaustion of local remedies and the alleged illegality of the SCSA**

502. Claimants argue that Respondent violated Articles 2, 3 and, in some cases, 4 of the Treaty through its conduct regarding the SCSA because:

- (A) In the first half of 2007, MongolBank recorded the gold deposited by GEM as sold and owned by Mongolia, exported it, and provided for its refinement without GEM's knowledge and permission, the whole in violation of Clause 4 of the SCSA, which provides that ownership to the deposited gold shall pass to MongolBank only upon delivery of a Metal Sale Letter on or before December 25, 2007.<sup>489</sup>

Claimants also submit that the foregoing amounts not only to a violation of the [imported] umbrella clause but also to the violation of the FET, non-impairment and full legal protection and security standards.<sup>490</sup>

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<sup>488</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶62.

<sup>489</sup> C. SC, ¶¶238-247; C. Reply, ¶¶361-381.

<sup>490</sup> C. Reply, ¶381.

- (B) MongolBank "purchased" 1.9 Tons of GEM's chemically pure gold (i.e. the Remaining Gold) even though GEM required the return of that Remaining Gold, the whole in violation of the SCSA and Mongolian law;<sup>491</sup>

Claimants also submit that the foregoing amounts not only to a violation of the [imported] umbrella clause but also to the violation of the FET, non-impairment, full legal protection and security<sup>492</sup> and non-expropriation standards.<sup>493</sup>

- (C) Tax authorities taxed GEM's deliveries of gold for safekeeping with MongolBank as sales (the First Tax Assessment) and that interpretation was upheld by Mongolian courts, namely the Capital Administrative Court<sup>494</sup> and the Supreme Court of Mongolia,<sup>495</sup> which amounts to a denial of justice.<sup>496</sup>

Under a separate heading, Claimants add that Respondent breached Article 4 of the Treaty because the First Tax Assessment (regarding the gold deposited with MongolBank) is expropriatory (even if the WPT itself is not) as it was imposed in contravention of Mongolian law.<sup>497</sup>

- (D) Alternatively, assuming that the Mongolian courts' interpretation is correct (i.e. MongolBank became the owner of the deposited gold upon its delivery by operation of the Law on Treasury and the Law on Central Bank), (i) MongolBank entered into an impermissible agreement (an agreement it could not perform in accordance with its terms) with GEM and (ii) MongolBank failed to perform its contractual obligations relating to its commitment to be GEM's tax agent, which amounts to a violation of the umbrella clause, FET and full legal protection and security standards.<sup>498</sup>

503. Respondent raises lack of jurisdiction *ratione personae* as Claimants are not parties to the SCSA and only GEM, which is not and could not be a party to these arbitral proceedings, has standing with regard to the contractual claims concerning the SCSA. Thus, "Claimants are not the proper claimant even were there an umbrella clause in the Treaty".<sup>499</sup>

504. Claimants respond that the foregoing objection is unfounded as (i) all their claims relating to the SCSA are Treaty claims (rather than contract claims); (ii) Claimants'

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<sup>491</sup> C. SC, ¶¶248-254; C. Reply, ¶¶382-385.

<sup>492</sup> C. Reply, ¶385.

<sup>493</sup> C. SC, ¶¶299-302; C. Reply, ¶¶492-495.

<sup>494</sup> CE-17.

<sup>495</sup> CE-68.

<sup>496</sup> C. SC., ¶¶258-268; C. Reply, ¶¶396-406, C. PHB, ¶¶72-76.

<sup>497</sup> C. SC., ¶¶296-298; C. Reply, ¶¶489-490.

<sup>498</sup> C. SC, ¶¶269-273; C. Reply, ¶¶408-412.

<sup>499</sup> R. Rejoinder, ¶¶260-262; R. PHB, ¶136.

claims under the umbrella clause are Treaty claims despite the fact that they are based on conduct that also violates the SCSA; (iii) the umbrella clause does not require that the obligation "with regard to investments" be between the host State and the investor.<sup>500</sup>

505. Respondent further raises lack of jurisdiction *ratione materiae* and argues that Claimants do not have standing with regard to the contractual claims against MongolBank due to the lack of exhaustion of local contractual remedies by GEM as required by the forum selection clause, i.e. Claimants failed to cause GEM to sue MongolBank for the return of the gold before local courts and proceeded with this arbitration before the expiration of the SCSA.<sup>501</sup>
506. Respondent further adds that the specific wording of the dispute resolution clause (Article 9) required the parties to seize the local courts with a request to remedy the lack of a provision regulating the return of the gold and that Claimants have no claim unless a Mongolian court modifies the SCSA, adding a provision which would impose on MongolBank the obligation to return the gold. Failing such a modification, MongolBank could not have violated the SCSA by failing to return the gold to GEM.<sup>502</sup>
507. Claimants argue that the Tribunal has jurisdiction to decide, in accordance with Mongolian law, whether MongolBank breached the SCSA in order to address Claimants' Treaty claims arising under the umbrella clause and so, notwithstanding the forum selection clause in favor of Mongolian courts.<sup>503</sup> Claimants further point out that the Treaty does not impose the requirement to exhaust domestic remedies.<sup>504</sup>
508. Claimants also submit that Respondent's "gap theory" fails as, under Mongolian law, matters not expressly addressed in an agreement are regulated by the provisions of generally applicable Mongolian legislation, including the Mongolian Civil Code and "a gap is only said to arise if the matter cannot be addressed even by application of those provisions." Moreover, the "gap theory" would be inapplicable to claim (a) as the SCSA specifies when MongolBank becomes the owner of the deposited gold.<sup>505</sup> In any event, Mongolian courts, namely the Capital Administrative Court<sup>506</sup> and the Supreme Court of Mongolia,<sup>507</sup> had decided the issue of the ownership of the Gold (and thus, by necessary implication, the issue of GEM's right to have the Remaining Gold returned) prior to December 25, 2007 by stating that GEM sold the Gold upon delivery to MongolBank.<sup>508</sup>

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<sup>500</sup> C. Rejoinder, ¶¶90-95.

<sup>501</sup> R. Defense, ¶¶220-224; R. Rejoinder, ¶¶263-264; R. PHB, ¶137.

<sup>502</sup> R. Defense, ¶¶225-228; R. Rejoinder, ¶264.

<sup>503</sup> C. Reply, ¶¶374, 525-531; C. Rejoinder, ¶¶97-101.

<sup>504</sup> C. Reply, ¶526.

<sup>505</sup> C. Reply, ¶¶375-377.

<sup>506</sup> CE-17.

<sup>507</sup> CE-68.

<sup>508</sup> C. Reply, ¶¶390-394.



509. In addition, Respondent asserts that Claimants do not have standing to bring claims with respect to the First Tax Assessment because the SCSA is illegal as it had been entered into for the sole purpose of tax evasion.<sup>509</sup>
510. With respect to the alleged illegality of the SCSA, Claimants note that (i) the SCSA is not illegal; (ii) even if the SCSA were illegal, Mongolia is estopped from raising this objection as its tax authorities, courts and central bank treated the SCSA as legal; (iii) any potential illegality of the SCSA would not rise to the level of a violation of fundamental legal principles of Mongolia and (iv) Mongolia does not meet the standard of irrefutable proof with respect to its allegations of illegality.<sup>510</sup>

#### **5.6.1.2 Nature of the SCSA and Mongolia's liability for the actions of MongolBank**

511. Respondent submits that the SCSA cannot give rise to a Treaty claim as it was an agreement *jure gestionis*, i.e. the SCSA is a transaction commercial in nature and as such cannot give rise to state responsibility (contrary to an act *jure imperii*).<sup>511</sup>
512. Relying on *Eureko BV v. Poland*<sup>512</sup>, Claimants respond that the distinction between acts *jure gestionis* and *jure imperii* does not apply with respect to the claims raised under an umbrella clause.<sup>513</sup>
513. Regardless of the foregoing argument, Claimants submit that MongolBank is an organ of the Mongolian state within the meaning of Article 4(1) of the International Law Commission's 2001 Articles on State Responsibility, and its conduct is attributable to Mongolia. Further, the acts of MongolBank constitute acts *jure imperii* for which Mongolia can be held liable.<sup>514</sup>

#### **5.6.1.3 MFN and umbrella clauses**

514. Respondent points out that the Treaty contains no umbrella clause.<sup>515</sup> However, Claimants invoke the MFN clause in Article 3(2) of the Treaty in order to import an umbrella clause from other BITs to which Mongolia is a party:
2. The treatment mentioned under paragraph 1 of this Article, shall not be less favorable than treatment accorded to investments and activities associated with investments of its own investors or investors of any third State.

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<sup>509</sup> R. Defense, ¶¶229-232.

<sup>510</sup> C. Reply, ¶¶532-549.

<sup>511</sup> R. Defense, ¶240; R. PHB, ¶¶133-134.

<sup>512</sup> *Eureko B.V. v. Poland*, *ad hoc* arbitration, Partial Award, August 19, 2005, CA-79.

<sup>513</sup> C. Reply, ¶379.

<sup>514</sup> C. Reply, ¶¶365, 380; C. PHB, ¶¶95-98.

<sup>515</sup> R. Defense, ¶¶340-343, R. Rejoinder, ¶185.

515. Claimants make reference, in particular, to the U.S.-Mongolia Treaty<sup>516</sup> which contains the following umbrella clause (Article II, 2(c)):

"Each Party shall observe any obligation it may have entered into with regard to investments."

516. Claimants also invoke the benefit of Article 2(3) of the Denmark-Mongolia BIT and Article 2(2) of the U.K.-Mongolia BIT, which contain similar wording.

517. Respondent argues that Claimants cannot introduce an umbrella clause imported from another treaty because the MFN clause is narrow in scope, being limited to the "operation and disposal of investment" (and, thus, does not extend to the use and enjoyment of same) as per Article 3 (1) of the Treaty.<sup>517</sup>

518. Furthermore, Respondent is of the view that an "MFN clause cannot import an entirely new protection into the Treaty" such as an umbrella clause which creates "a new kind of protection in BITs by transforming non-actionable contractual breaches by state instrumentalities into Treaty violations."<sup>518</sup>.

519. Echoing its argument regarding Mongolia's liability for the alleged breaches of the SCSA, Respondent also states that even if an umbrella clause could have been imported into the Treaty, it would still be of no avail to Claimants as an umbrella clause provides no protection against acts *jure gestionis* (as opposed to acts *jure imperii*) such as those of MongolBank.<sup>519</sup>

#### 5.6.1.4 Substantive claims

520. In sum, Claimants argue that Mongolia violated Articles 2 and 3 of the Treaty because: Claim (a): MongolBank recorded the gold deposited by GEM as owned by Mongolia, exported it, and provided for its refinement without GEM's knowledge and permission; Claim (b): MongolBank "purchased" 1.9 tons of GEM's chemically pure gold even though GEM required return of that gold; Claim (c): the tax authorities taxed GEM's deliveries of gold for safekeeping with MongolBank as sales, an interpretation sustained by Mongolian Courts; subsidiarily, Claim (d): MongolBank entered into an impermissible agreement with GEM.

521. In relation to Claim (b) and (c), Claimants also argue that Respondent breached Article 4 of the Treaty because MongolBank expropriated (by refusing to return) the Remaining Gold and because the First Tax Assessment (regarding the gold deposited with MongolBank) is expropriatory (even if the WPT itself is not).<sup>520</sup>

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<sup>516</sup> U.S.- Mongolia Treaty, CE-51.

<sup>517</sup> R. Defense, ¶¶340-341; R. Rejoinder, ¶¶185-186.

<sup>518</sup> R. PHB, ¶139.

<sup>519</sup> R. Rejoinder, ¶187.

<sup>520</sup> C. SC, ¶¶296-298, 299-302; C. Reply, ¶¶489-495.

522. Respondent argues that Articles 2, 3 and 4 of the Treaty have not been breached as the SCSA was performed by MongolBank according to its terms and the tax consequences of the SCSA had been correctly assessed by the tax authorities and Mongolian courts. Respondent's position rests on the following assertions:<sup>521</sup>
- (1) Claimants sought to evade taxes by formality in denial of the economic substance of the transaction.<sup>522</sup>
  - (2) The SCSA is an innominate contract with the purpose of achieving a complex sale transaction.<sup>523</sup>
  - (3) The refining and storage of the gold outside of Mongolia did not violate the SCSA.<sup>524</sup>
  - (4) GEM did not have the right to demand the return of [purchase back] the Remaining Gold from MongolBank.<sup>525</sup>
  - (5) Tax authorities and Mongolian courts correctly concluded that the transaction contemplated by the SCSA met all the criteria of International Accounting Standard 18 and, thus, constituted a taxable event subject to the WPT and other taxes<sup>526</sup>. Respondent further adds that tax authorities did not rely on MongolBank's recording of the gold as having been sold to it for the purpose of the First Tax Assessment.<sup>527</sup>
  - (6) MongolBank had a duty to withhold taxes in its quality of GEM's tax agent (otherwise GEM would have incurred penalties and interest for late payment),<sup>528</sup> except for prepayments.<sup>529</sup>
523. As a further defense, Respondent argues that Claimants' tax related SCSA claims must fail because (i) Claimants' complaints with regard to the judicial decisions of Mongolian courts with regard to the imposition of taxes on the pre-payment for gold delivered to MongolBank do not meet the requirements of a denial of justice claim; (ii) the judicial decisions at stake are correct as a matter of substance and (iii) Claimants do not allege any procedural improprieties.<sup>530</sup>

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<sup>521</sup> R. Defense, ¶¶138-150, ¶¶235-238; R. Rejoinder, ¶¶184-211; R. PHB, ¶¶140-142.

<sup>522</sup> R. Defense, ¶¶152-154, 244; R. Rejoinder, ¶¶188-190; R. PHB, ¶143.

<sup>523</sup> R. Rejoinder, ¶¶193-200.

<sup>524</sup> R. Rejoinder, ¶¶201-206.

<sup>525</sup> R. Defense, ¶¶138-143, 235-238; R. Rejoinder, ¶¶197-199.

<sup>526</sup> R. Defense, ¶¶144-149, R. Rejoinder, ¶¶207-211; R. PHB, ¶¶144-152.

<sup>527</sup> R. Defense, ¶¶144-147.

<sup>528</sup> R. Defense, ¶¶150, 237.

<sup>529</sup> R. PHB, ¶¶153-154.

<sup>530</sup> R. Defense, ¶¶241-244, R. Rejoinder, ¶¶188-189, 211.

524. With regard to Claimants' expropriation claim, Respondent raises the argument that the SCSA was performed according to its terms, that GEM received full contractual compensation for the deposited gold and had agreed that taxes due on the proceeds of sale be paid by MongolBank to the Mongolian treasury. It therefore concludes that no expropriation of GEM's gold had occurred.<sup>531</sup>

#### **5.6.2 TRIBUNAL'S ANALYSIS**

525. On July 19, 2006, GEM and MongolBank entered into the SCSA, which was amended by a Supplementary Agreement dated October 5, 2006, extending the duration of the Agreement until 25 December 2007.

526. The Tribunal will address first the nature of the SCSA and the alleged breach thereof by MongolBank, then the issue of jurisdiction and admissibility (Claims (a) and (b)) as well as the action of MongolBank entering into an allegedly impermissible agreement (Claim d), an argument raised by each Party; it will finally deal with the other claims raised by Claimants relating to the tax assessments made by the authorities and reviewed by the courts (Claim (c)).

##### **5.6.2.1 The nature of the SCSA and the alleged breach thereof by MongolBank**

527. The SCSA is a document the implementation of which led the Parties to very different interpretations. The Tribunal has benefited from the written and oral testimony contributions of two independent experts on Mongolian law, Professor Temuulen Bataa retained by Claimants and Professor Tumenjargal Mendsaikhan by Respondent. These two experts addressed a number of legal points, several of them dealing with the interpretation to be given to the SCSA. The facts concerning the SCSA are not really disputed between the Parties but they are strongly divided about the nature of the transaction, its legality and alleged breaches of its provisions.

528. Subsequently to the adoption of the WPT Law, the President of GEM who is also one of Claimants, Mr. Paushok, hoping that the measure would soon be amended or rescinded, developed a strategy whereby GEM would be in a position to avoid having to pay that tax immediately.<sup>532</sup> This implied delaying for as long as possible the moment when a transfer of ownership of the gold produced by GEM would occur and the payment of the WPT would have to be made. There is nothing wrong *per se* in pursuing such a strategy. The Tribunal knows no country where one is obligated to arrange its financial activities in such a way as to have to pay maximum taxes; every citizen has the right to plan its financial affairs so as to minimize the impact of taxation, as long as those arrangements respect the applicable law. On the other hand, in most countries, tax authorities frown on commercial activities the only purpose of which is to avoid paying taxes; accordingly, general anti-avoidance rules and specific legislative provisions have often been adopted to contain what could be perceived as artificial transactions and

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<sup>531</sup> R. Defense, ¶¶331-339; R. Rejoinder, ¶259.

<sup>532</sup> Paushok-II, ¶79.

collect taxes that would otherwise be owing. Mongolian tax authorities appear to be no exception to that practice.

529. Following its strategy, GEM entered into the SCSA with MongolBank "pursuant to Article 21, of Law of Mongolia On the Central Bank" which reads as follows:

"Article 21. Disposal and management of the State reserves of foreign currency

1. The Bank of Mongolia shall ensure prompt payment and security of those foreign currency reserves of the State which it disposes of and manages. Only after these obligations are fulfilled may the Bank of Mongolia conduct income earning operations using the foreign currency reserves of the State to invest in instruments tradable in the financial markets.

2. Foreign currency reserves of the State held by the Bank of Mongolia shall consist of the following assets:

1) Monetary gold held in foreign banks and with financial institutions;

2) Cash or non-cash convertible foreign currencies;

3) Bills of exchange and promissory notes, freely payable in convertible foreign currencies;

4) Any type of obligation issued or guaranteed by the Government or central bank of foreign countries or international financial institutions which is denominated and is to be paid in convertible foreign currencies; and

5) Other assets internationally recognized as foreign currency reserve.

3. When managing foreign currency reserves of the State the Bank of Mongolia may conduct operations to freely convert, purchase and sell the assets set out in paragraph 2 of this article.

4. The Bank of Mongolia shall ensure the stability of the tögrög when it purchases or sells foreign currencies and similar assets in exchange for the tögrög.

5. If foreign currency reserves of the State have declined below the level determined by the State Ikh Khural or if the Bank of Mongolia has established that it has become impossible to implement foreign currency policy and to promptly execute

foreign payments of the State, the Bank of Mongolia shall officially inform the Government and shall take pertinent measures jointly with the Government."

530. Under Article 1.1. of the SCSA, "(t)he Seller (GEM) agrees to deliver for safe custody and subsequently sell to the Bank within the time and in quantities set forth in the Agreement and the Bank agrees to keep in custody during the period designated by the Seller and to purchase from the Seller the gold bullion bars (hereinafter "**the Metal**") and to pay for the same the price, set forth in the Agreement.<sup>533</sup>

531. Article 1.2 then declares: "The Sale of the Metal shall be subject to the following terms and conditions:

1.2.1 Sale and delivery period: during six months through December 26, 2006 (By the Supplementary Agreement of October 5, 2006, this period was extended to 25 December 2007);

1.2.2 Sale date: any designated by the Seller during the sale period.

1.2.3 Sale item: chemically pure gold.

1.2.4 Amount of the Metal to be sold during the period set forth in section 1.2.1 hereof shall be determined based on the weight of each separate gold consignment delivered into custody, but the total amount shall be at least, 1,000,000 (One million) grams".

532. Under Article 1.2.5, the price of the Metal was to be calculated on the basis of the Metal price per ounce as set by MongolBank, "on the date the Seller delivers to the Bank a letter prepared in an arbitrary form designating the date as the Metal sale date and containing the request to sell the Metal to the Bank (hereinafter the "**Metal Sale Letter**")".

Other important features of the SCSA were as follows:

- (1) The Seller was obliged to deliver no less than 1 million grams (one metric ton) of gold to MongolBank within the period mentioned in 1.2.1. (Art. 2.1.1)
- (2) The Seller was obliged to issue the Sale Letter within the same period. (Art. 2.1.2)
- (3) MongolBank was obliged to ensure acceptance for safe custody in an amount of not less than 1 million grams. (Art. 2.2.1)

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<sup>533</sup> CE-12.

- (4) MongolBank was obliged to ensure the security of the metal delivered for safe custody from the moment of the acceptance of the metal into MongolBank's depository until its sale by the Seller. (Art. 2.2.2)
  - (5) MongolBank was obliged to issue a certificate confirming the amount of metal kept in safe custody on the Seller's request. (Art. 2.2.3)
  - (6) MongolBank had the right to accept gold in amount greater than provided under the SCSA. (Art. 2.4)
  - (7) During the metal sale period, the Seller must sell to MongolBank metal in the amount set forth in Art. 1.2.4 (at least 1 million grams) and MongolBank must accept the metal for safe custody and to purchase the metal upon delivery by the Seller of the Sale Letters. (Art. 3.1)
  - (8) The delivery and acceptance of the metal for safe custody was to be confirmed by the execution of two statements: the Metal Delivery and Acceptance Statement and the Metal Safe Custody Delivery and Acceptance Statement. (Art. 3.2)
  - (9) Risk of incidental loss would pass to MongolBank on delivery of the metal into safe custody but ownership would only pass on the delivery of a Sale Letter designating the sale date and of a Metal Sale Request and the execution of a Metal Sale Statement between the two parties. (Art. 4.1)
  - (10) MongolBank would pay 85% of the value of the metal deposited into safe custody on the date of delivery and that sum would be deducted from the actual purchase. The balance would be payable to or by the Seller, depending on the value of the metal at the time of sale. (Arts. 5.5 and 5.8)
  - (11) In cases not covered by the SCSA, the liability would be determined in accordance with Mongolian law. (Art. 6.5)
  - (12) If disputes could not be resolved by negotiations, they would be "resolved in court pursuant to the procedure established by the current Mongolian law". (Art. 9.2).
  - (13) Under Art. 1.2.5, the price of the Metal was to be calculated on the basis of the Metal price set by MongolBank on the date of delivery of a Metal Sale Letter.
533. There is agreement between the Parties that the SCSA is governed by Mongolian law and, in particular, the Mongolian Civil Code (the "MCC").
534. After analysis of the SCSA and of the opinions of the experts and having considered the arguments of the parties, the Tribunal has concluded that the SCSA is a mixed contract, or an "innominate" contract, as Prof. Mendsaikhan calls it.
535. In the Tribunal's opinion, the SCSA is first and foremost a safe custody contract associated with a sale contract subject to a suspensive condition.

536. First of all, Mr. Paushok, in his Second Witness testimony<sup>534</sup> and during his oral testimony, made no secret of the purpose of the transaction between GEM and MongolBank and it only made sense if it led to a postponement of the transfer of the title of ownership, thus avoiding paying the WPT immediately upon deposit with MongolBank. Article 3.6. of the SCSA makes it quite clear that ownership will be transferred "(w)ithin one business day from the receipt by the Bank of the Metal Sale Request."
537. Secondly, the text of the SCSA itself is worded in such terms that there are clearly two types of transactions envisaged: first, acts of deposit in safe custody and then orders to sell through the issuance of Sale Letters no later than December 25, 2007.
538. Respondent argues that all the risk was transferred to MongolBank and that, under Mongolian law, this constituted a sale. It bases its argument on Art. 4 of the SCSA transferring the risk of incidental loss to MongolBank. But, as Prof. Temuulen Bataa demonstrated, this is a typical characteristic of a safe deposit contract under the MCC.<sup>535</sup>
539. Respondent is however right in pointing out some elements of a transaction which bore little benefits to MongolBank. It was called upon to pay, upon delivery, 85% of the value of the gold at the time of delivery; then, it was assuming the risk of incidental loss; and all the while charging no interest or a fee for such storage.
540. While it is true that there appeared to be little in it for MongolBank, the SCSA was not totally devoid of potential benefits for it. First of all, the bank was protected from loss, through an obligation of GEM to pay the difference if at the time of sale, gold was at a price lower than the 85% amount MongolBank had already paid; on the other hand, MongolBank was assured of the ownership, at the time of sale, of at least 1 million grams, and possibly much more, that it could use to enlarge the gold reserves of Mongolia, with the possibility of selling that gold at profit subsequently, if the price of gold increased after December 25, 2007 (which it did substantially). Respondent itself argued in its Statement of Defense that the SCSA "served a public purpose, i.e. the increase of Mongolia's gold reserves".
541. GEM ceased to deposit gold with MongolBank after January 19, 2007 and, instead, resorted to loans from commercial banks against gold deposits as security, the loans not exceeding 80% of the secured obligations and with interest rates of 1.1% and 1.5% a month.
542. Be that as it may, the SCSA was the deal that was struck between two knowledgeable and independent parties, one of them being a major institution of the Mongolian State.
543. Two main questions have to be answered concerning the interpretation of the SCSA: 1- What amount of gold was GEM obligated to sell to MongolBank? 2- When was the transfer of ownership of the gold delivered under the SCSA going to occur?

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<sup>534</sup> Paushok-II, ¶79.

<sup>535</sup> Articles 56.5 and 492.1. of the MCC.



544. As to the first question, the SCSA could certainly have been drafted more clearly. The key provisions in the analysis of that contract are the following:

"Section 1.2.4: "amount of the Metal to be sold during the period set forth in Section 1.2.1 hereof shall be determined based on the weight of each separate gold consignment delivered, but the total amount shall be at least 1,000,000 (One Million) grams."

Section 2.1.1: (The Seller shall have an obligation) "to deliver to the Bank within the period of time set forth in section 1.2.1 hereof the Metal in the amount of not less than 1,000,000 (One Million) grams;"

Section 2.4: "The Bank may accept the Metal in the amount greater than provided under this Agreement"

Section 3.1: "During the Metal sale period (Section 1.2.1) the Seller shall sell to the Bank the Metal and the Bank shall accept the Metal for safe custody and to purchase the Metal as the Seller submits the Metal Sale Letters."

545. The Tribunal's reading of the SCSA and of the exchanges between MongolBank and GEM leads it to the conclusion that the obligation of GEM to sell the deposited gold extended to the whole of the gold deposited with MongolBank. This conclusion is reached both on the basis of the text of the SCSA and of the Parties' conduct during its implementation.

546. As to the text itself, the Tribunal has already indicated that it was not clear; nonetheless, the formulation and the spirit of the contract indicates that the more reasonable interpretation is one which leads to the above conclusion.

547. To begin with, Section 1.2.4 states that the "amount of the Metal to sold (...) shall be determined based on the weight of each separate gold consignment delivered into custody", the minimum required being 1 million grams. This minimum has to be interpreted as a provision in favor of MongolBank; it is quite understandable that MongolBank would not have wished to enter into such an agreement unless it would have been assured of getting a minimum of gold deposited and available for purchase. Section 2.4 sustains that interpretation; there would be little point in mentioning that the Bank could accept a greater amount of Metal, if it would have been under any obligation to accept more than 1 million grams. As to GEM, if it wished the provision to be in its favor, it would have been much simpler to provide simply that it would sell 1 million grams of Metal and rely on the right of MongolBank to buy a greater volume of gold, if it wished to do so.

548. It is also worthwhile to note that nothing in the SCSA deals with the possible return of the deposited gold. Claimants have argued that the provisions of the Mongolian Civil Code contains provisions concerning deposit contracts and that the parties to the SCSA (GEM and MongolBank) would have had to abide by them. This is no doubt correct; yet,

one would have thought that, if MongolBank could be obliged to return all the gold deposited above 1 million grams, there would have been some section of the SCSA dealing with this very important eventuality.

549. As to the conduct of the Parties, as has already been stated, there was no doubt as to the intention of GEM; it was to delay as long as possible and, if possible, to avoid completely the payment of the WPT, if the WPT was to be eventually repealed, an objective in no way reprehensible.<sup>536</sup> Its purpose was to postpone the sale, not to avoid it. For that purpose, it provided for the deposit of a large amount of gold with MongolBank, getting an advance payment of 85% of the value of that gold at the time of deposit, without any interest having to be paid on that amount.
550. As far as GEM is concerned, the Tribunal has received no evidence of a stand taken by GEM, before its letter of December 25, 2007 to MongolBank, to the effect that it was only required to sell 1 million grams. In fact, the evidence points in the other direction. Thus, on October 6, 2006, it wrote a letter<sup>537</sup> to the Head of the State Budget stating: "According to the Contract, the Company has an obligation to sell the saved bars to MongolBank. Sale has to be made in preferable price day, not exceeding the date of December 25, 2006, on the basis of the Company's written Metal Sale letter." It said that it had "an obligation to sell the saved bars" not merely an obligation to sell 1 million grams. According to the testimony of Mr. Kaczmarek, Claimants' financial expert, Claimants had, by that time, deposited about 1.8 million grams of gold.<sup>538</sup> The day before, the SCSA had been extended for another year, thus opening the possibility of a further increase in deposits. One is entitled to think that, in such circumstances, if GEM thought that it was not obligated to sell more than 1 million grams, it would have mentioned that important fact to the tax authorities which were enquiring about the situation. As to the condition attached in that letter (the requirement of a Metal Sale letter), it is not to be interpreted as an option for Claimants to sell only a total of 1 million grams. The Metal Sale letters could be sent at any time before the deadline to instruct MongolBank to sell the whole or part of the gold deposited, so that GEM could benefit from increases in the price of gold at a particular time or dispose of the gold promptly if the WPT had been eliminated or substantially decreased. GEM thus had considerable flexibility during the course of the SCSA to sell gold but this did not include the right, at the end of the SCSA, to have sold only a maximum of 1 million grams of gold.
551. In fact, it is only on December 24, 2007, the penultimate day to submit a Metal Sale letter, that GEM issued a Metal Sale letter for slightly over 1 million grams and, in a letter of December 25, 2007, asserted that it was entitled to ask for the return of the 1,910,978.91 grams deposited in excess of the minimum 1 million grams mentioned in the SCSA. For the first time on that occasion, it invoked Article 422 of Mongolia's Civil Code and

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<sup>536</sup> Claimants' Request for Interim Measures, ¶22: "Because Mr. Paushok had expected a swift abolition of the Windfall Tax (or, at a minimum, a substantial adjustment to the tax changes), it was decided that GEM should postpone the sale of gold."

<sup>537</sup> RE-57.

<sup>538</sup> Mr. Kaczmarek's testimony, D7:P146:L4.

indicated its willingness to return the related advance payments received and pay for the safe keeping services provided by MongolBank.

552. It is true that, during the course of 2007, GEM had initiated legal action in the United Kingdom concerning the export and refining of its gold by MongolBank (about which more is said later), but those steps had to do with the alleged premature assumption of ownership of the whole GEM's gold by MongolBank, not with the rights resulting from Metal Sale letters mentioned in the SCSA.
553. In addition, it is worthwhile noting that GEM made its last deposit of gold with MongolBank on January 19, 2007 while the SCSA had still some 11 months to run. Instead, it borrowed from commercial banks against deposit of gold and received in return only 80% of the value of that gold upon which it was paying large interest rates. It is hard to understand the rationale for such a decision, compared to the comparatively very generous terms under the SCSA, if GEM was of the view that it was only obligated to sell a minimum of 1 million grams under that contract.
554. On the other hand, the Tribunal also has to look at MongolBank's conduct during the implementation of the SCSA. In that regard, no evidence has been adduced demonstrating that, at any time, MongolBank interpreted that contract as meaning that GEM's was only required to sell 1 million grams of the gold deposited.
555. From the evidence submitted, it seems that the relations between GEM and MongolBank soured significantly during the latter part of 2007. On November 6 2007, MongolBank wrote a letter<sup>539</sup> in which it indicated its willingness "to deliver up and give back to you the gold refined to 999.9 fineness, of which we have repeatedly advised your company" and it added: "The agreement contains no stipulation as to the return of your company of the deposited physical gold and as no such provision exists, the issue of gold return and repayment of the pre-payment may not arise other than outside the contractual arrangements." That letter does not contain any recognition by MongolBank that it is entitled to the eventual ownership of only 1 million grams. Its offer related to the whole of the gold deposited and indicated clearly that such return would have to be resolved outside the contractual arrangements. For whatever reason, GEM did not accept this offer but instead, on November 8, 2007, it served notice of its intention to initiate the present proceedings and issued a Notice of Arbitration against Respondent on 30 November 2007. It waited until December 24, 2007 to issue its first Sale Letter for slightly over 1 million grams and claimed the return of the rest of the deposited gold, the following day.
556. As to the second question, the answer is clear. Section 1.2.1 states that the sale and delivery period is during six months through December 26, 2006 (subsequently extended to December 25, 2007) and then Section 4.1 reads (in part): "the ownership right to the Metal shall pass from the Seller to the Bank upon the Seller delivering to the Bank Metal Sale Letter designating the sale date and Metal Sale Request and execution of the Metal Sale Statement between the Seller and the Bank." As long as it had not

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<sup>539</sup> CE-25.

received a Sale Letter or the date of December 25, 2007 had not been reached, MongolBank was only a safe custodian and could not sell or take ownership of the metal deposited by GEM. The Letters of MongolBank's Head of Legal Department to the Executive Director of GEM on November 5 and December 25, 2007<sup>540</sup> are revealing in that regard. In the first letter, MongolBank, after stating that "we are prepared to deliver up and give back to you the gold refined to 999.9 fineness", asserts that: "(t)he fact that MongolBank held the gold accepted from your company in safe custody under the agreement, only means that MongolBank has performed its obligations under the agreement. As stipulated in the agreement, the title will transfer to MongolBank only upon delivery of a formal letter, indicating the metal sale date and the request for sale of the metal along with sale statement executed by both parties and, therefore, we believe that no dispute has yet arisen with regard to ownership." It is therefore clear that MongolBank itself recognized that until receipt of the appropriate Sale Letter or the date of December 25, 2007 had arrived, it was merely a custodian of the gold deposited by GEM. And it is only, on December 25, 2007, that it asserted that it was entitled to become the owner of the full 2,951,025.200 grams deposited.

557. Essentially, on the two questions addressed above, the Tribunal is asked to rule on a dispute concerning the proper interpretation of a contract (the SCSA). In addition to the above analysis, one could also query whether MongolBank could, at the end of the contract, seize ownership of the deposited gold or whether, instead, its only recourse was one for damages for contractual breach by GEM, under Section 6.1 of the SCSA which reads: "A Party, which failed to perform or properly perform its obligations under this Agreement, shall be held liable for compensating losses incurred by the other party as a result of such non-performance". Reference in that regard can also be made to Articles 101.1 and 106.1 of the Mongolian Civil Code. However, all these matters are in the nature of legitimate differences of views between the parties to the SCSA as to what is the right interpretation to be given to the Agreement; that Agreement specifically provides in its Article 9 the recourses available to them: Mongolian law and Mongolian courts. None of the above actions, even assuming that Respondent's interpretation was not the right one, can be considered of such a nature as to amount of breaches of the Treaty, whether it be under its Articles 2, 3 or 4.
558. However, the actions of MongolBank relating to the export, the refining and the opening abroad of an unallocated accounting which it deposited GEM's gold, before receiving any Metal Sale letter and well before December 25, 2007, deserve a different treatment. The Tribunal will address that question under section 5.6.2.2.2 of this Award, when it deals with the issue of Mongolia's liability for the acts of MongolBank.
559. The next question is whether Claimants can claim a breach of the Treaty through the effect of the umbrella clause. To answer that question, the Tribunal will now proceed to analyze the various issues raised by the Parties with regard to jurisdiction and admissibility.

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<sup>540</sup> CE-25 and CE-17.

### 5.6.2.2 Jurisdiction and admissibility

560. It is recognized by the Parties that Claimants not being direct parties to the agreement cannot base their claim on a contractual basis but by demonstrating that there has been a breach of the Treaty caused by the conduct of Respondent in connection with the SCSA.
561. The following questions raised by the Parties will be addressed: a) The MFN and the umbrella clauses; b) Mongolia's liability for the actions of MongolBank; c) the alleged violation of the Treaty by the tax authorities and d) the alleged denial of justice resulting from the court decisions concerning the Tax Assessment.

#### 5.6.2.2.1 MFN and umbrella clauses

562. Respondent points out correctly that the Treaty contains no umbrella clause. However, Claimants invoke the MFN clause in Article 3(2) of the Treaty:

"2. The treatment mentioned under paragraph 1 of this Article, shall not be less favorable than treatment accorded to investments and activities associated with investments of its own investors or investors of any third State."

563. Respondent argues, among other things, that Claimants cannot introduce an umbrella clause imported from another treaty, because of the limited guarantee provided under Article 3 (1):

1. Each Contracting Party shall, in its territory, accord investments of investors of the other Contracting Party and activities associated with investments fair and equitable treatment excluding the application of measures that might impair the operation and disposal with investments.

564. The question then is whether Article 3(2) of the Treaty is entitling Claimants to import an umbrella clause from other treaties.

565. The *Ambatielos* panel<sup>541</sup> stated in that regard that "the most-favored-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates". Historically, tribunals have tended to construe MFN clauses broadly and they have regularly accepted to import substantive rights into an investment treaty from treaties that the host State has signed with other countries. This broad interpretation has also led tribunals to allow the import of more favorable procedural rights.<sup>542</sup> There are however other cases which have adopted a more restrictive interpretation concerning

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<sup>541</sup> *Amabatielos Claim, Greece v. United Kingdom*, 12 RIAA 91, 107, 1956.

<sup>542</sup> *Mafezzini v. Kingdom of Spain*, Case No. ARB/97/7, Decision on Jurisdiction, January 25, 2000; see also *Gas Natural v. Argentina*, ICSID Case No. ARB/03110, Decision on Jurisdiction, June 17, 2005, ¶¶29, 49.

the import of procedural rights<sup>543</sup> but this issue need not be addressed in the present case, the question relating simply to the import of substantive rights.

566. In that regard, Claimants make reference, in particular, to the U.S.-Mongolia Treaty<sup>544</sup> which contains the following umbrella clause (Article II, 2(c):

"Each Party shall observe any obligation it may have entered into with regard to investments."

567. Claimants also invoke Article 2(3) of the Denmark-Mongolia BIT and Article 2(2) of the U.K.- Mongolia BIT, which contain similar wording.

568. The meaning and scope of an umbrella clause has been the subject of much discussion and debate in the legal literature and in arbitral awards, since the closely related in time but somewhat divergent conclusions of the arbitral tribunals in the *Société Générale de Surveillance S.S. v. Islamic Republic of Pakistan*<sup>545</sup> and *Société Générale de Surveillance S.A. v. Republic of the Philippines cases*.<sup>546</sup> The fundamental issue is whether an umbrella clause can cover a contractual breach if the contract is between an entity related to but distinct from the State and/or an entity distinct from the Investor.

569. A number of subsequent awards dealt with the interpretation to be given to umbrella clauses, the vast majority supporting the general direction established by the *Philippines* case but bringing useful clarifications.<sup>547</sup>

570. Claimants' arguments concerning the meaning and effect of an umbrella clause are however of purely academic interest in the present case. The Treaty is quite clear as to the interpretation to be given to the MFN clause contained in Article 3(2): the extension of substantive rights it allows only has to do with Article 3(1) which deals with fair and equitable treatment. If there exists any other BIT between Mongolia and another State which provides for a more generous provision relating to fair and equitable treatment, an investor under the Treaty is entitled to invoke it. But, such investor cannot use that

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<sup>543</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005; *Technicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/7/06, Decision on Jurisdiction and Competence, June 19, 2009.

<sup>544</sup> U.S.- Mongolia Treaty, CE-51.

<sup>545</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, August 6, 2003.

<sup>546</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004.

<sup>547</sup> *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004; *Eureko B. V. v. Poland*, *ad hoc* arbitration, Partial Award, August 19, 2005 ¶¶244-250; *Impregilo v. Pakistan* ICSID Case No. ARB/03/3; CA-112; *Noble Ventures v. Romania* ICSID Case No. ARB/01/11; *CMS v. Argentina* ICSID Case No. ARB/01/07; *Sempra v. Argentina*, ICSID Case No. ARB/02/16; this award was subsequently annulled by an *ad hoc* committee decision but for reasons unrelated to the interpretation of the umbrella clause, see *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Annulment Decision, June 29, 2010.

MFN clause to introduce into the Treaty completely new substantive rights, such as those granted under an umbrella clause.

571. This being said, a clause in a BIT whereby the definition of fair and equitable treatment would be written in broader terms than in the case of the Treaty would clearly be covered by the MFN clause contained in it. In that regard, the Tribunal notes that the Denmark-Mongolia BIT<sup>548</sup> quoted by Claimants is of particular relevance. It provides in its Article 3 (2) as follows:

"Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investment, fair and equitable treatment which in no case shall be less favourable than that accorded to its own investors or to investors of any third state, whichever of these standards is the more favourable."

572. This puts to rest Respondent's argument about the restrictive interpretation it wishes to apply to the words "fair and equitable treatment excluding the application of measures that might impair the operation of or disposal of investment" in Article 3(1) of the Treaty. That Article cannot have a more limited meaning than that found in Article 3(2) of the Denmark-Mongolia BIT.
573. The next step for the Tribunal is therefore to determine whether Mongolia has breached any article of the Treaty, including the broad application of the fair and equal treatment provision imported through the MFN clause, but not through the application of an umbrella clause which Claimants cannot invoke.

#### **5.6.2.2.2 Mongolia's liability for the acts of MongolBank**

574. In order to determine whether Mongolia bears any liability for MongolBank's actions, one must first consider its status under Mongolian law. The issue here is not about the nature of the SCSA itself but whether the disputed actions of MongolBank in the implementation of the SCSA were actions attributable to Mongolia and thereby might constitute breaches of the Treaty.
575. MongolBank has been established as the Central Bank (Bank of Mongolia) under a law of September 3, 1996. Under Article 3 of that law, MongolBank is to be "the competent organization authorized to implement State monetary policy" and it is defined as "a legal entity established by the State". Under Article 4, its main objective is described as "(to) promote balanced and sustained development of the national economy, through maintaining the stability of money, financial markets and the banking system." Its President is appointed by the State Khural (Article 26) to which he reports but the State Khural cannot interfere with the activities relating to the implementation of State monetary policy by MongolBank (Article 30). Article 31(2) provides specifically that "the Bank of Mongolia shall be independent from the Government."

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<sup>548</sup> CE-78.

576. It is in that legal context that the Tribunal must find whether MongolBank's actions are attributable to Respondent under the international law rules of attribution. For the purpose of this case, those rules are reflected particularly in Articles 4, 5 and 9 of the International Law Commission Articles on Responsibility of States for internationally wrongful acts ("ILC Articles"), which are generally considered as representing current customary international law.

577. Article 4 reads as:

"1. 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.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

578. Article 5 reads as:

"The conduct of a person entity which not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

579. And Article 9 reads as:

"The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

580. The distinction between organs of the State and other entities is of particular relevance in the determination of potential liability of the State. As stated in the Commentary to the ILC Articles, "It is irrelevant for the purposes of attribution that the conduct of a state organ may be classified as "commercial" or as *acta jure gestionis*. Of course, the breach by a State of a contract does not as such entail a breach of international law. [...] But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act."<sup>549</sup> That situation is different from the case of other entities exercising elements of governmental authority as described in Article 5 of the ILC

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<sup>549</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary, 2001, Report of the ILC on the work of its fifty-third session, p. 41.



Articles, where the liability of the State is engaged only if they act *jure imperii* and not *jure gestionis*.

581. The ILC Articles do not contain a definition of what constitutes an organ of the State and the Mongolian law is not very helpful in that regard either. The mention in Article 2 of the MongolBank Act that it is "a legal entity established by the State" and that it is "the competent authority authorized to implement monetary policy" is not sufficient to support a conclusion that it is not an organ but an entity of the type mentioned in Article 5 of the ILC. If this were the case, one would be left with a very narrow definition of organs of the State since most of the executive and judiciary functions of the State are fulfilled by legal entities established by the State and adopting and/or implementing public policy. The Tribunal has long debated whether MongolBank is an organ of the State of Mongolia.
582. According to one view, the fact that the Mongolian Parliament has created it as an institution independent of the Government does not *per se* make it lose its status as an organ of the State. In fact, it fulfills a major State function and the list of its responsibilities clearly demonstrates that it fulfills a role that only a State can fulfill: exclusive right to issue currency, formulation and implementation of monetary policy, acting as the Government's financial intermediary; supervising activities of other banks; holding and managing the State's reserves of foreign currencies.<sup>550</sup> As stated in the Commentary to the ILC Articles: "The reference to a "State organ" covers all the individual or collective activities which make up the organization of the State and act on its behalf."<sup>551</sup> Like other central banks in the world, MongolBank assumes part of the executive responsibility of the State; and, if one were to argue for a more limited definition of the executive power of the State, Mongolbank would still qualify as an organ of the State under the words "any other functions" mentioned in Article 4 of the ILC Articles.
583. Such role differentiates MongolBank from other institutions found, in other cases, not to be organs of the State. Thus, in *Jan de Nul N.V., Dredging International N.V. v. Arab Republic of Egypt*,<sup>552</sup> the Tribunal concluded that the Suez Canal Authority ("SCA") was not an organ of the State. Noting that the SCA was created to take over the management and utilization of the Suez Canal after its nationalization and recognizing that it could be said to carry out public activities, it relied on Articles 4, 5 and 6 of its constitutive law to conclude that it was not part of the Egyptian State. Article 4 states that the SCA is to be managed like "business enterprises without any commitment by the governmental systems and conditions". Article 5 provides that the SCA "shall have an independent budget that shall be in accordance with the rules adopted in business enterprises" and Article 6 states that the "SCA's funds are considered private funds". Another relevant case is that of *Bayindir Insaat Turizim Ticaret Ve Sanayi A.S. v. Islamic Republic of*

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<sup>550</sup> Article 5 of the Law on Central Bank.

<sup>551</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary, 2001, Report of the ILC on the work of its fifty-third session, p. 40.

<sup>552</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13 ICSID Case No. ARB/04/13, Award November 6, 2008, ¶162.

*Pakistan*.<sup>553</sup> In that case, the Tribunal had to decide whether the acts of the National Highway Authority of Pakistan ("NHA") allegedly in breach of a BIT were attributable to Pakistan. Having noted that the NHA had a distinct legal personality under the laws of Pakistan, it decided that "(b)ecause of its separate legal status, the Tribunal discards the possibility of treating NHA as a State organ under Article 4 of the ILC Articles." The simple fact that an institution has separate legal status does not allow one to conclude automatically that that institution is not an organ of the State; in order to reach such a conclusion, a tribunal has to engage in a broader analysis which includes the functions assigned to that entity. There is a huge difference to be found between public authorities established to operate and maintain a navigational canal or to construct and maintain highways and a central bank charged with the issuance of the currency and running the State's monetary policy.

584. According to that analysis, MongolBank being recognized as an organ of the State, the question whether MongolBank in entering into and implementing the SCSA acted *jure imperii* or *jure gestionis* would therefore become irrelevant in terms of the liability of the State.
585. According to another interpretation, MongolBank is not an organ of the State since Article 2 of the MongolBank Act specifies that it is established as "a legal entity" and, as such, it is exercising elements of governmental authority, as described in Article 5 of the ILC Articles. In support of that view, one can mention the *Genin* case<sup>554</sup> where the Bank of Estonia is described as "an agency of a Contracting State". The Tribunal concluded that Estonia was the appropriate respondent because the related BIT provided that the State was to be responsible for the activities of any state enterprise when it was exercising delegated governmental authority. However, that case does not definitely answer the question whether such a state enterprise was an organ of the State or a State entity; the legal notion of "agent" does not exist in the international law of State responsibility. The choice has to be between being an organ under Article 4 of the ILC Articles or an "entity empowered to use governmental authority" under Article 5. Another case more to the point however is an English court case involving the Bank of Nigeria, the charter of which was modeled on that of the Bank of England, and where the Court of Appeal, under the leadership of Lord Denning, reversing the decision of the judge of first instance, denied the Bank of Nigeria its plea of sovereign immunity in connection with an irrevocable letter of credit issued by the Bank in favor of the claimant for a sale of cement to an English company, for the purpose of building army barracks in Nigeria. The Court ruled that "the bank, which had been created as a separate legal entity with no clear expression of intent that it should have governmental status, was not an emanation, arm, alter ego or department of the State of Nigeria and was therefore

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<sup>553</sup>. *Bayindir Insaat Turizim Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶119.

<sup>554</sup> *Alex Genin, Eastern Credit Limited, Inc. et A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001, ¶327.

not entitled to immunity from suit."<sup>555</sup> The difficulty of making the distinction was pointed out by Lord Denning (and shared by his two colleagues) when he wrote:

"In these circumstances, I have found it difficult to decide whether or no the Central Bank of Nigeria should be considered in international law a department of the Federation of Nigeria, even though it is a separate legal entity. But, on the whole, I do not think it should be.

This conclusion would be enough to decide the case, but I find it so difficult that I prefer to rest my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department."

586. The Tribunal however does not need to decide the question whether MongolBank is or is not an organ of the State, since as will be shown below, even if it were merely an entity exercising governmental authority, at least some of the disputed actions in connection with GEM's gold were in any event actions *de jure imperii*.

587. While claiming that the SCSA is a purely commercial transaction, Respondent also argues that MongolBank entered into the SCSA within the exercise of its functions related to the management of Mongolia's foreign reserves.<sup>556</sup> Moreover, by proceeding to export and refine the gold deposited by GEM, and depositing it or its value in an unallocated account, MongolBank was clearly exercising specific powers granted to it under the Law on Central Bank and the Treasury Law. In that regard, a press release of MongolBank of August 24, 2007 states:<sup>557</sup>

"MongolBank implementing the Law on Central Bank (MongolBank) and the Law on Precious Metals and StoneFund and with the purposes of increasing the country's currency reserves purchases from gold producing business entities and individuals unrefined gold at the market price, published as of a certain date. [...] This gold, which according to the agreement made with KOO Golden East-Mongolia, will be definitely purchased by MongolBank, has been refined and placed abroad."

588. That press release was issued in answer to a statement by GEM that three tons of gold held in custody in MongolBank had disappeared. Such a view was repeated by MongolBank when, on November 19, 2007, it answered a previous letter of GEM of November 16, in the following terms:<sup>558</sup>

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<sup>555</sup> *Trendtex Trading Corporation v. Central Bank of Nigeria*, (1977) 2 W.L.R. 356.

<sup>556</sup> R. Rejoinder, ¶194 and fn. 374.

<sup>557</sup> Paushok Ex-81.

<sup>558</sup> CE-85.

"With the purpose of increasing state currency reserves MongolBank when purchasing business entities purified gold produced by them would calculate its pure weight according to common practice of the international financial markets and would make settlements for the value of the gold based on the markets price of the gold as of a particular day.

Given that MongolBank has an obligation to refine the purified gold purchased into the state currency reserves and place the same in the international financial markets pursuant to the most favourable arrangements, MongolBank refined 3.1 tons of your gold, being in possession of MongolBank in accordance with the law."

589. Furthermore, in its Statement of Defense, Respondent argued that the sale/purchase of the gold deposited by GEM "served a public purpose, i.e the increase of Mongolia's gold reserves."
590. A related decision by the Court of Appeal (England) involving GEM and the Bank of Nova Scotia and others <sup>559</sup> further supports the conclusion that MongolBank was in part acting *de jure imperii* in connection with the SCSA. That decision was referred to by each side.<sup>560</sup> In that case MongolBank was the third defendant, the second defendant being Scotia Capital (Europe) Limited. The appeal was only concerned with GEM's attempt to obtain information and documents from the Bank of Nova Scotia. Without entering into the details of the case, suffice to say that it was established that GEM's gold deposited with MongolBank was refined by a gold refiner outside Mongolia but that it was not clear where the refined gold was held physically after refining and by whom; pursuant to a contract with MongolBank, the Bank of Nova Scotia simply had an unallocated account in which a certain quantity of gold was credited to MongolBank's account, the bank not physically holding any gold for MongolBank. The Bank of Nova Scotia, in the English proceedings, refused to authorize the release of any information concerning its contract with MongolBank or who had refined and who had physical possession of the gold concerned, by invoking state immunity, in favor of MongolBank.
591. The Court first stated: "[...] the question is whether MongolBank entered into the contract (with the Bank of Nova Scotia) in the exercise of sovereign authority"<sup>561</sup> and it answered: "Th(e) evidence shows that the purpose of the transactions including the refining of the gold and the placing of a quantity of refined gold on the unallocated account of the bank was for the purposes of increasing Mongolia's currency reserves. In my judgment that was an exercise of sovereign authority within the meaning of the 1978 Act (State Immunity)"<sup>562</sup> It may be that, under English Law, the definition of State

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<sup>559</sup> *KOO Golden East Mongolia and Bank of Nova Scotia and others*, (2007) EWCA Civ 1443.

<sup>560</sup> *Paushok-II*, ¶102; R. Defense, ¶374; C. Reply, ¶¶646-647; CE-152; RIM, ¶31.

<sup>561</sup> *KOO Golden East Mongolia and Bank of Nova Scotia and others*, (2007) EWCA Civ 1443, ¶40.

<sup>562</sup> *Ibid.*, ¶42.

immunity has a different scope than under international law. But what is interesting for our purpose is that evidence upon which the Court of Appeal bases its decision is constituted of the 19 November 2007 letter of MongolBank to GEM and the press release of 24 August 2007, both quoted above. In addition, the refining of the gold abroad and the placing of it or its value in an unallocated account in the Bank of Nova Scotia are exactly the breaches alleged by Claimants in the present case.

592. The Tribunal therefore has no hesitation in concluding that MongolBank acted *de jure imperii*, if not in entering into the SCSA, at least when it exported GEM's gold for refining and deposited it or its value in an unallocated account in England "with the purposes of increasing the country's reserves." Those actions were *de jure imperii* and went beyond a mere contractual relationship. Therefore, even if MongolBank were not to be considered an organ of the State but merely an entity exercising elements of governmental authority, Claimants would be entitled to pursue their claim against Respondent in connection with the actions mentioned above.
593. The question which then remains is whether such actions by MongolBank constituted breaches of the Treaty. In the opinion of the Tribunal, they did so.
594. First, it is important to note that, in the first half of 2007, MongolBank recorded the gold deposited by GEM as sold and owned by Mongolia, exported it, and provided for its refinement without GEM's knowledge and permission, the whole in violation of Article 4 of the SCSA. It thereby, without any justification, seized ownership of GEM's gold when it had absolutely no right to do so.
595. Secondly, on the basis of the evidence before the Tribunal, MongolBank first tried to hide that fact and, for a significant period of time, misled Claimants who had legitimate expectations that they would retain full ownership of their gold until the issuance of Sale Letters or the termination of the SCSA.
596. In the opinion of the Tribunal, GEM was prematurely and without any right deprived of the continuing ownership of its deposited gold in breach of Article 3.1 of the Treaty which provides for "fair and equitable treatment excluding the application of measures that might impair the operation or disposal with investments", expanded through the MFN clause to include the text of the Denmark-Mongolia BIT.
597. It will be up to Claimants to prove what damages, if any, they suffered from such actions.

#### **5.6.2.2.3 Lack of standing**

598. Respondent contends that Claimants do not have standing to bring claims in connection with the SCSA because GEM did not exhaust the contractual remedies provided by the Agreement. But the right of an investor to claim under a BIT is a separate right from that of a company it controls to sue under the dispute resolution of a particular commercial contract and there is no obligation for such an investor to require that company to resort first to the dispute resolution procedure of its contract, before the investor can exercise its own rights available to it under the provisions of a BIT.

599. As to the further argument of Respondent, that Claimants had decided to proceed with international arbitration before the SCSA had expired and that, therefore, they had made claims before they were ripe, there is clear evidence that Claimants had, by the time of their Notice of Arbitration, become aware that MongolBank had proceeded to the transfer to the Treasury as if it were an owner of the gold deposited and to the export and refinement of that gold. Claimants had, by then, sufficient evidence to conclude that they had been deprived of the ownership of their gold, before the issuance of a Sale Letter, as prescribed in the SCSA.
600. A related argument of Respondent concerns the alleged *lacuna* in the SCSA because the Agreement was not express with regard to the question whether the gold delivered to MongolBank had to be returned at the end of the delivery period. The Tribunal fails to see how such a lacuna should prevent Claimants from exercising their rights. As Professor Temuulen Bataa has clearly indicated, the contract was governed by Mongolian law, and in particular its *Civil Code*, which clearly provides in its Article on void transactions:

"56.5 The parties to the transaction specified in Article 56.1 of this law (void transaction) shall be liable to mutually return all objects transferred by the transaction or pay the prices if it is not possible to do so."

Moreover, in its section on unjust enrichment entitled "Liability for acquisition of property without legal justification", Article 492.1 adds:

"The party that transferred property to the third party in the course of performing its obligations shall have the right to claim back that property in the following cases:

"492.1.1 if no liability arises between the recipient of the property and executor of the obligations, terms of the obligation or obligations becomes void."

As stated by Professor Temuulen Bataa:

"MongolBank and GEM had a mutual obligation to return those things or money, which they had received without proper legal basis, i.e. if no binding arrangement has arisen between the parties."<sup>563</sup>

601. The alleged lacuna did not leave a legal void; the general provisions of the Mongolian Civil Code continued to receive their full application.
602. As to the argument of Respondent that Claimants lack standing because their claims concern the use and enjoyment of the investment, rather than its operation and disposal,

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<sup>563</sup> Temuulen-I, ¶102.

meaning that they fall outside the ambit of the Treaty, the Tribunal has already ruled that the words "operation and disposal" should be given a broad meaning and could easily cover the words "use and enjoyment", both in terms of their normal meaning and through the application of the Denmark-Mongolia BIT in that connection, through the Treaty's MFN clause. In any event, in the present situation, if MongolBank inappropriately disposed of the gold deposited by GEM before the issuance of a Sale Letter, it is difficult to pretend that GEM had not lost the disposal of its gold.

#### 5.6.2.2.4 Impermissible nature of the SCSA (Claim (d))

603. The potentially illegal character of the SCSA has been raised rather gingerly by both Claimants and Respondent.
604. Claimants raise the matter subsidiarily as a matter to be addressed if the Tribunal finds that the Mongolian courts' interpretation is correct. As to Respondent, it also states that the SCSA was impermissible to MongolBank, as it was in violation of legislation governing it.<sup>564</sup> Respondent did not bring substantive evidence in support of its argument, but alleging the tax evasive character of the SCSA referred to the Capital's Administrative Court in its decision of October 11, 2007, which stated as a supplementary argument that:

"[...]Article 23.17 on the law "on Central Bank/Mongolbank" prohibits that Mongolbank "engage in any balance sheet or off-balance sheet transactions in support of economic activities of legal entities, individuals, other than those identified in the state budget and approved by the Great State Khural, permitted by the (*sic*) this law"; therefore, there is no legal basis on which Mongolbank could make prepayment in support of activities of individuals or business entities unless the gold was purchased. In that regard the submission that Mongolbank has not purchased the gold from KOO "Golden East-Mongolia" and still holds the same, having made the prepayment for the purchase, is no (*sic*) legally valid one."

605. The point is that, even if Respondent's argument were to be valid, it would not produce the results anticipated by Respondent. As demonstrated by Professor Temuulen Bataa, under the provisions of the Civil Code of Mongolia, the SCSA would be a transaction which would be null and void and the parties would have to be put back in the *status quo ante*.<sup>565</sup>
606. Moreover, supposing that the SCSA would not have been in conformity with the powers granted to MongolBank, this fact would not be sufficient to free Respondent from its liability under international law. This question was addressed in the case of *Southern*

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<sup>564</sup> R. Defense, ¶¶229-232.

<sup>565</sup> Articles 56.5 and 492.1.1 of the CCM.

*Pacific Properties (Middle East) Limited v. Egypt*<sup>566</sup> where the Tribunal ruled that, even though "certain acts of Egyptian officials [...] may be considered legally non-existent or null and void or susceptible to invalidation [...] they were cloaked with the mantle of governmental authorities and communicated as such to foreign investors who relied on them in making their investments".[...] Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities [...] and "created expectations protected by established principles of international law." A similar conclusion was reached in the case of *Ioannis Kardassopoulos v. Georgia* where in its Decision on Jurisdiction<sup>567</sup>, the Tribunal stated: "Respondent cannot simply avoid the legal effect of the representations and warranties set forth in the JVA and the Concession by arguing that they are contained in agreements which are void *ab initio* under Georgian law. [...] Claimant had every reason to believe that these agreements were in accordance with Georgian law, not only because they were entered into by Georgian State-owned entities, but also because their content was approved by Georgian government officials without objection as to their legality on the part of Georgia for many years thereafter."

607. In the present case, the Tribunal does not have evidence of approval of the SCSA by other authorities than those of MongolBank but whether MongolBank is considered an organ of the State or an entity exercising sovereign authority, GEM was in its right to assume that MongolBank was acting within the powers granted to it by the State. Moreover, it worth noting that, in spite of having been made aware of the SCSA at least since 2007, Respondent never took any action before its own courts to challenge the validity of that Agreement.
608. Whether or not the SCSA would have been impermissible under Mongolian law, this is not sufficient to make it impermissible under the Treaty and international law. Neither Party has made such a demonstration.
609. In light of the foregoing, the Tribunal dismisses all of Respondent's objections to jurisdiction and admissibility of the SCSA-related claims, except the one having to do with the import of an umbrella clause under the MFN clause of the Treaty and where it was found that the MFN clause could only have an application limited to the coverage of the fair and equal treatment provision contained in Article 3 of the Treaty. Furthermore, the foregoing analysis disposes of Claimants' Claim (d) which would have been dismissed.

#### **5.6.2.3 The alleged violation of the Treaty resulting from the Tax Assessment by the tax authorities (Claim (c))**

610. It is noteworthy that Claim (c), i.e. the claim related to the First Tax Assessment *per se* (independently of the validity of the WPT itself), includes two distinct claims: (1) a claim for violation of the Treaty by the First Tax Assessment and (2) a claim for denial of justice due to the failure of the Mongolian courts to quash the First Tax Assessment.

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<sup>566</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, May 20, 1992.

<sup>567</sup> *Kardassopoulos v. Georgia*, ICSID Case ARB/05/18, Decision on Jurisdiction, July 6, 2007, ¶¶189-194.



These two claims arise under non-contractual conduct and do not involve claims under the umbrella clause and they will be treated separately.

611. In defense to this claim, Respondent alleges that the tax authorities were simply applying Mongolian tax law which incorporates the International Accounting Standards, and more particularly I.A.S. 18 and that there is no need to refer to any other legislation or treaty, or even the SCSA itself. As it says in its Rejoinder,<sup>568</sup> "(e)ven if it were true that both parties intended the contract to be one of safekeeping rather than sale, which is not true, the parties' intention regarding a contract is irrelevant to a tax authority's determination that the event is taxable."
612. It is important to note in that regard that, in spite of frequent references by Respondent in its briefs and oral statements to tax evasion, GEM was never prosecuted for tax evasion, as would have been possible under Mongolian law. For whatever reason, the tax authorities chose instead to have recourse to provision of Article 10 (1), (2) and (3) of the Mongolian General Law on Taxation and to Article 16.1 of the Law on Accounting which authorized a reference to the general anti-avoidance provision contained in I.A.S. 18.<sup>569</sup> As stated by Respondent, such practice is used in a very large number of countries. The question for the Tribunal is therefore whether the Mongolian tax authorities made proper use of I.A.S. 18 or breached the Treaty.
613. The most relevant section of the Statement of the Tax Inspector is the following one, entitled "Non-Compliance Discovered During Audit":

"As a result of the audit it was discovered that 11282,3 million tugriks were underreported, which represents violation of sections 1,2,3 of Article 10 of the General Tax Law and furthermore, given that section 16.1 of Law and Accounting, the prepayment received by this company of the gold satisfied the criteria for sales revenue recognition as defined in IAS 18, we have noted that provisions of Article 3.1.1, 8.1 and 8.2 of the Windfall Profit Tax Law and Article 38.1 of the Minerals Law were violated, due to which fact, in accordance with Article 28 of Law "On Control of taxation, Tax Payment and Tax Collection.

As a result, the Tax Inspector concluded that the 85% prepayment received by GEM for the gold it delivered was subject to payment under Articles 3.1.1 of the WPT Law as well as royalties, under Article 47.1 of the Minerals Law."

614. Article 10 (1), (2) and (3) of the General Tax Law reads as follows:

"A taxpayer shall have the following obligations:

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<sup>568</sup> R. Rejoinder, ¶188.

<sup>569</sup> Statement of the Tax Inspector No. 210906, August 7, 2007, CE-18.

- 1) To report one's taxable item and tax honestly and to pay taxes within the prescribed time limit;;
- 2) To provide the Tax Administration with corresponding calculations, reports and returns on imposed taxes and payment of taxes within the prescribed time limit;
- 3) To keep book-keeping records in compliance with regulations, balance sheets and reports on financial and economic operations."

615. As to Paragraph 14 of I.A.S. 18, it requires the satisfaction of five criteria in order to recognize sales revenue subject to taxation:

- 1) The company has transferred to the buyer the significant risks and rewards of ownership;
- 2) The company retains neither continuing managerial involvement to the degree usually associated with ownership nor effective control over the goods sold;
- 3) The amount of revenue can be measured reliably;
- 4) It is probable that economic benefits associated with the transaction will flow to the company; and
- 5) The costs incurred or to be incurred in respect of the transaction can be measured reliably.

616. As can be readily seen, Article 10 of the General Law on Taxation only imposes an obligation of a general character. What is important in the present case is to consider whether the tax authorities properly applied I.A.S. 18 which contains the criteria that could justify subjecting certain revenue to taxation. It is also important to note that all five conditions have to be met before the revenue can be considered subject to taxation ("Revenue from the sale of goods should be recognized when all the following conditions have been satisfied").

617. While recognizing considerable discretion granted to tax authorities in the interpretation of I.A.S. 18 in their pursuit of tax avoidance by taxpayers, those authorities still have, in the exercise of their discretion, to meet the conditions set by the legislation they apply.

618. In the present case, the Tribunal is not convinced that conditions 1) and 2) of I.A.S. 18 were satisfied. In particular, it does not appear correct to conclude that the enterprise had transferred to the buyer the significant risks and rewards of ownership of the goods. Paragraphs 5.7 and 5.8 of the SCSA spell out that the risks were equally shared between the parties. They read as follows: "If cash advance is less than the metal selling price estimated based on the formulas given in Para. 5.6, the Bank shall pay the difference to the seller within 3 days after the metal sold" and "If cash advance is more than the metal

selling price estimated based on the formula given in Para. 5.6, the seller shall pay the difference to the Bank within 5 days after the metal sold." What can be read from those paragraphs is that the risks and rewards of the SCSA were shared between the parties, GEM bearing the risk of having to return some of the 85% it received in the case of a lowering of the price of gold and MongolBank the risk of having to pay an additional amount in the case of the contrary event. As to the risk of incidental loss having to be borne by MongolBank, it has been demonstrated to the Tribunal that such risk was inherent in the case of safe custody under the Mongolian Civil Code and, in that regard, it can indeed be said that the risk had been transferred to the buyer.

619. However, these are matters of interpretation and the Tribunal has received no indication that the taxation authorities would have breached any of the conditions<sup>570</sup> of the fair and equitable treatment required by Article 3.1 of the Treaty in issuing the Statement of the State Tax Inspector No 21096 and the Tax Assessment pursuant to it. The Tax Assessment only applied to the 85% valued of the deposited gold, an amount which had been in the hands for quite some time.
620. On the basis of the above analysis of the nature of the SCSA, the Tribunal cannot conclude that the tax authorities erred, in their analysis of that Agreement and in the application of I.A.S. 18 to it, to such an extent that their action could be considered as breaches of the Treaty. Equally, MongolBank acted properly in paying the relevant taxes and fees applicable to the value of the gold it acquired at the end of the SCSA.
621. GEM was obviously in disagreement with the interpretation of I.A.S. 18 adopted by the tax authorities and it appealed their decision before the Mongolian courts, as was its right.

#### **5.6.2.4 The Court Decisions concerning the Tax Assessment (Claim (c))**

622. The fact that GEM has appealed without success before the Mongolian courts the decision of the tax authorities does not preclude the possibility of Claimants requesting this Tribunal to rule on those various decisions, under the provisions of the Treaty.
623. Two court decisions have to be examined in that regard: 1- the Capital's Administrative Court decision No. 254 of October 11, 2007<sup>571</sup> and 2- the Decision of the Cassation Instance of the Mongolian Supreme Court No. 249 of December 11, 2007.
624. According to Claimants, those decisions "were so manifestly unfair, clearly unjust, and grossly erroneous that they constitute a denial of justice, Accordingly, Mongolia breached Articles 2 and 3 of the Treaty because it breached the standards of fair and equitable treatment and full legal protection of Claimants' investment."<sup>572</sup>

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<sup>570</sup> See the analysis of the Tribunal earlier on that subject as well as the quotation from *Waste Management v. Mexico* cited by Claimants below.

<sup>571</sup> CE-19.

<sup>572</sup> C. SC, ¶268.

625. It is well established that the obligation to grant fair and equitable treatment also extends to the judiciary but it is also well established that arbitral tribunals have set the bar rather high before finding denial of justice as a BIT breach. Claimants themselves, citing rather ancient decisions, recognize this fact in their Statement of Claim when they write: "Numerous tribunals applying the customary standard of treatment held that the standard is violated by a court decision that does "clear and notorious injustice", constitutes a "gross and wrongful error" or is simply "so unfair (as) to constitute a denial of justice."<sup>573</sup> But they also quote<sup>574</sup> the more recent case of *Waste Management v. Mexico*<sup>575</sup> as follows: "Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."
626. After a review of the Mongolian court decisions concerned, the Tribunal cannot conclude that any of those decisions can be seen as so erroneous as to lead to a denial of justice or a manifest failure of justice in judicial proceedings.
627. At to the decision of the Capital's Administrative Court, after having made a summary of the views of the parties, it proceeds to an extensive analysis of the facts and the legislation applying to them, including the interpretation to be given to I.A.S. 18. The Court reaches a conclusion different from that of the Tribunal concerning the nature of the SCSA but this cannot be seen as denial of justice, unless some of the elements mentioned in the *Waste Management* or the other cases mentioned by Claimants were to be present. The Tribunal could find none of them.
628. Claimants have attached some importance to a declaration by the Court that the SCSA would have been an illegal transaction, if MongolBank had been a mere custodian. Claimants argue that, if that were the case, then the whole transaction would be null and void and, under the Mongolian Civil Code, the parties would have to be put in the *status quo ante*, MongolBank returning the gold received and GEM the 85% prepayment. However, it has to be noted that this is introduced by the Court as a supplementary reasoning but that it does not constitute the rationale for the decision. Furthermore, even if the Court had been wrong in its conclusion, this does not mean that this would constitute a denial of justice under the Treaty or international law.
629. As to the decision of the Supreme Court, Claimants state that it "upheld the decision of the Capital's Administrative Court without any detailed analysis"; it is difficult to see how this, by itself, could constitute a denial of justice. In any event, that description is an

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<sup>573</sup> C. SC, ¶256.

<sup>574</sup> C. SC, ¶255.

<sup>575</sup> *Waste Management, Inc. v. United Mexican States* (Number 2), ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶98.

unfair one, bearing in mind the general practice of appeal courts in civil law regimes. And, looking at the actual decision, one has to conclude that the Supreme Court gave serious consideration to the positions of each party. The judgment contains a solid summary of the views expressed by each party and by the State tax inspectors and concludes its findings as follows:

"As the court of first instance made a well-grounded conclusion on the basis of evidence contained in the case and refused to satisfy the claims of KOO Golden East Mongolia requiring to recognize unlawful and cancel Act No. 21096 dated August 7, 2007 of the state tax inspectors, the court feels that there are no grounds to satisfy the cassation appeal and cancel the decision of the court."

630. It then ends its decision by noting that the parties "will have the right to submit within 30 days from the date of receipt of the decision an appeal to the Administrative Case Panel of the Supreme Court". There is no evidence that any of the parties availed itself of that process.
631. The Tribunal cannot find in the two court cases considered any conduct even approaching the description contained in the *Waste Management* and other cases submitted by Claimants and quoted above. The claim relating to denial of justice it therefore denied.

#### **5.6.2.5 Conclusion on Claim (c)**

632. The Tribunal concludes that in issuing the Statement of the State Inspector No. 21096 and the Tax Assessment pursuant to it, Respondent did not breach any of the provisions of the Treaty.
633. In addition, the Tribunal is of the view that there has been no breach of the Treaty in the judicial process relating to those measures.

### **5.7. DELAY IN THE APPROVAL OF A BUMBAT PROJECT AND CONVERSION OF LICENCES ("NEW FACTS")**

#### **5.7.1 JURISDICTION**

##### **5.7.1.1 Arguments of the Parties**

634. Respondent asserts that the Tribunal does not have jurisdiction *ratione materiae* over Bumbat.<sup>576</sup>
635. Respondent contends that Bumbat is not a protected investment because Mr. Paushok's shareholding in Bumbat is indirect (75% of Bumbat's shares are owned by GEM and 25% thereof by Kifold Systems, a British Virgin Islands company owned by Mr. Paushok),

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<sup>576</sup> R. Rejoinder, ¶¶265-269.

whereas Article 1(b) of the Treaty limits the protected investments to those directly owned.<sup>577</sup>

636. Claimants, relying on *Siemens v. Argentina*<sup>578</sup> argue that the definition of investment in Article 1(b) of the Treaty is not limited to direct investments.<sup>579</sup>

#### 5.7.1.2 Tribunal's analysis

637. Bumbat is 75% owned by GEM and 25% owned by Kifold, which companies in turn are 100% owned by Mr. Paushok. Furthermore, Bumbat constitutes an asset belonging to GEM and Kifold (and ultimately to Mr. Paushok). Nothing in the Treaty limits claims by investors to direct investments. Claimants are entitled to register a claim concerning the treatment received by Bumbat from Respondent.

### 5.7.2 SUBSTANTIVE CLAIMS

#### 5.7.2.1 Arguments of the Parties

638. Claimants allege that Respondent retaliated against them for the initiation of this arbitration, *inter alia*, as follows:<sup>580</sup>

"(1) Initiation of a criminal investigation against Mr. Paushok seven days after the Notice of arbitration was filed;

(2) Arbitrary withholding of various approvals needed for the operations of GEM and KOO Bumbat (a company 75% owned by GEM) in Mongolia. With respect to Bumbat, Mongolia would have delayed for more than 5 months the approval of the project to mine gold from the Baga Hailaast placer deposit because of Claimants' statement that Bumbat's future payment of the WPT will depend on the decision of this Tribunal. With respect to GEM, Mongolia is alleged to have delayed or refused the conversion of several exploration licenses into mining licenses."

639. Claimants allege that the foregoing acts of Mongolia resulted in a significant shortfall in GEM's and Bumbat's gold production in 2008.<sup>581</sup>

640. Respondent denies the facts alleged by Claimants and generally states that the various approvals were delayed for reasons unrelated to this arbitration. For instance, the

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<sup>577</sup> R. Rejoinder, ¶¶266-268.

<sup>578</sup> *Siemens A.G. v. The Republic of Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, CA-52.

<sup>579</sup> C. Rejoinder, ¶¶102-112.

<sup>580</sup> C. Reply, ¶¶85-99, 415-421.

<sup>581</sup> C. Reply, ¶¶88, 415.

approval to mine gold from the Baga Hailaast placer deposit was allegedly refused because of the problems with Bumbat's feasibility study.<sup>582</sup>

641. Respondent further adds that Claimants' suffered no harm by reason of the alleged failure to issue timely approvals as they were able to mine from other deposits.<sup>583</sup>
642. Claimants reject the explanations provided by Respondent with respect to the delays in approvals, including the delay incurred with respect to the approval to mine gold from the Baga Hailaast placer deposit.<sup>584</sup> In turn, Respondent reiterates its version of the facts and the explanations provided for delays in approvals.<sup>585</sup>
643. Claimants argue that "Mongolia misused its regulatory powers in an orchestrated retaliation against [their] companies" and thus violated Articles 2 and 3 of the Treaty as well as the TRO and the OIM:<sup>586</sup>

"422. Any such misuse of a state's regulatory power by definition violates the standards of fair and equitable treatment, non-impairment and full legal security under Articles 2 and 3 of the Treaty. Retaliatory motivation makes Mongolia's conduct ipso facto arbitrary and unreasonable. Mongolian authorities' actions were non-transparent and unpredictable because Mongolian authorities failed to provide any justification for their refusals and delays.

423. In addition, Mongolian authorities' refusals and delays violated the Temporary Restraining Order and the Order on Interim Measures. Both the Temporary Restraining Order and the Order on Interim Measures required Mongolia not to aggravate the present dispute. Mongolia's retaliation has, by definition, aggravated the dispute and Mongolia thus violated the Temporary Restraining Order and the Order on Interim Measures."

644. Respondent generally denies the facts underlying the above claim and states that these acts do not amount to Treaty violations, without specifically joining issue with Claimants' legal arguments.

### 5.7.2.2 Tribunal's analysis

645. Claimants have submitted evidence in support of their allegations in the form of Witness Statements by Mr. Akatkin and Mr. Paushok.<sup>587</sup> While Mr. Paushok's comment on this

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<sup>582</sup> R. Rejoinder, ¶¶215-221.

<sup>583</sup> R. PHB, ¶166.

<sup>584</sup> R. PHB, ¶166.; C. Reply New Facts, ¶¶128-137.

<sup>585</sup> R. Rejoinder New Facts; R. PHB, ¶¶167-168.

<sup>586</sup> C. Reply, ¶¶421-423.

issue was a very short allegation that the approval of the feasibility studies (the "FS") was withheld because GEM protested the WPT, Mr. Akatkin provides more detailed analysis of the events. It appears from his evidence that, on June 13, 2008, a first meeting of the Special Board for Mineral Resources was held to review the feasibility study for the development of a deposit held by Bumbat. A subsequent meeting called for July 16 did not take place, because the notice had been sent on the same day and Bumbat's representatives could not be available. Another meeting was held on July 24, where the FS was considered. At that meeting, Mr. Ariunbayar, the first deputy chairman of the Scientific and Technical Council of the Administration for Mineral Resources and Oil would have declared: "I propose to dismiss (the FS) and give consideration to it when a confirmation of the payment of 68% tax will be formally sent to the Scientific and Technological Board for approval; in that case, the draft will be re-considered." Following representations by GEM to senior governmental authorities, another meeting was held on October 30 and the FS was approved on November 2, 2008.

646. Claimants argue that the delay was caused by the refusal of GEM to pay the WPT and by its challenges to it before the Mongolian courts. However, the statement of Mr. Ariunbayar quoted by Claimants does not exactly say that. It can be read as asking for an assurance from Bumbat that, if the FS were approved and production of gold would take place, Bumbat would pay the WPT. Taking into account the behavior of GEM, which controlled Bumbat, it is difficult to see that this would not be a legitimate question for the Government of Mongolia to raise.
647. Be that as it may, a delay of five months in the approval of feasibility studies in the mining sector in any country is not a surprising phenomenon and, in the end, the FS in question was approved. The Tribunal sees no reason to conclude, in the circumstances, to a breach of any provision of the Treaty or of international law. This was more a situation of conflicting views between an applicant and an administrative authority which, after representation to senior authorities and further meetings, was finally approved. If any damage was suffered, it would appear to come under the authority of Mongolian civil and administrative law with appropriate recourse to the local courts rather than a breach of the Treaty.
648. As to Claimants' allegation that a criminal investigation against Mr. Paushok would have been instigated by Mongolia as a retaliation against the initiation of this arbitration, no significant evidence in its support was introduced by Claimants. The fact that the investigation started seven days after the filing of the Notice of Arbitration cannot be considered as probative of the allegation.
649. The claim is therefore denied.

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<sup>587</sup> Akatkin-I, ¶¶36-44 and Akatkin-III, ¶¶55-56; Paushok III, ¶56.



## 5.8. EVENTS OF DECEMBER 2, 2008 AND THEREAFTER

### 5.8.1 ARGUMENTS OF THE PARTIES

#### 5.8.1.1 Facts

650. Claimants summarize the factual predicate of this claim as follows:

"13. On December 2, 2008, Mongolian authorities took a series of measures that paralyzed the operations of GEM and Claimants' other Mongolian companies, including VNGM, KOO Bumbat ("Bumbat"), KOO Yakhton ("Yakhton"), and KOO Vostok-Energo, a/k/a KOO East-Energo ("Vostok-Energo").

14. Chief among these measures was Mongolia freezing each company's bank accounts and its prohibition of any sale of GEM's and VNGM's assets, including the sale of any gold that GEM produced. As a result, GEM has been forced to discontinue its gold-mining and gold-processing activities. The number of GEM employees has plummeted from 939 people to 168. The charge of those 168 remaining employees is to physically protect GEM's assets and maintain a minimum operation at GEM's headquarters."<sup>588</sup>

651. Claimants further allege that the foregoing enforcement actions of Mongolia are in violation of Mongolian law and that notwithstanding this fact the Mongolian judiciary failed to protect GEM and other Claimants' companies.

652. Respondent submits that Claimants present a distorted version of the events which took place on December 2, 2008 and thereafter. Respondent further points out that its enforcement actions were lawful and reasonable in the circumstances, especially taking into account Claimants' stand with respect to the OIM and the events preceding December 2, 2008. The following paragraph presents the crux of Respondent's position:

"11. Reading Claimants' last paper in isolation, the Tribunal could understandably, but incorrectly, conclude that life began on December 2. The "Events of December 2, 2008", however, were the result of events that began before December 2 - i.e., Claimants' failure to abide the Tribunal's orders and post security as set out in the Order on Interim Measures and Procedural Order No. 4, as well as Claimants' violation of the TRO and OIM by transferring GEM's assets. Thus, although Claimants feign surprise and lack of notice, Claimants were forewarned both by Mongolia and the

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<sup>588</sup> C. Reply New Facts, ¶¶13-14.

Tribunal of a natural consequence of the continued breach by Claimants of the Tribunal's orders of protection in this case."<sup>589</sup>

### 5.8.1.2 Claims

653. Claimants argue that Mongolia's unlawful enforcement actions and the related failure of the Mongolian judiciary to provide any protection against these actions violate Articles 2, 3 and 4 of the Treaty.<sup>590</sup>

654. The violations of Article 3 of the Treaty are the following:

(1) Mongolia did not act in good faith;<sup>591</sup>

(2) Mongolia's enforcement and its purported judicial review did not respect due process and procedural propriety;<sup>592</sup>

(3) Mongolia's enforcement is disproportionate;<sup>593</sup>

(4) Mongolia's enforcement was discriminatory, arbitrary, and unreasonable;<sup>594</sup>

(5) Mongolia's refusal to extend existing foreign work permits was discriminatory, arbitrary, and unreasonable;<sup>595</sup> and

(6) The refusal to extend existing work permits was unpredictable and non-transparent.<sup>596</sup>

655. The violations of Article 2 of the Treaty are presented as follows:<sup>597</sup>

"120. Mongolia's obligation to grant full legal protection to Claimants' investment requires that the Mongolian judiciary be available to protect those investments. Mongolia's enforcement achieved exactly the opposite. Mongolia used the decisions of the Ulan Bator Administrative Tribunal and the Court Bailiff to paralyze the operations of GEM and Claimants' other Mongolian companies. When GEM was on the verge of obtaining protection against the illegal

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<sup>589</sup> R. Rejoinder New Facts, ¶¶5-62; see also R. PHB, ¶¶159-162.

<sup>590</sup> C. Reply New Facts, ¶¶98-127.

<sup>591</sup> C. Reply New Facts, ¶¶100-105.

<sup>592</sup> C. Reply New Facts, ¶¶106-110; C. PHB, ¶¶85-89.

<sup>593</sup> C. Reply New Facts, ¶¶111-112; C. PHB, ¶84.

<sup>594</sup> C. Reply New Facts, ¶¶113-115; C. PHB, ¶¶81-83.

<sup>595</sup> C. Reply New Facts, ¶¶116-118.

<sup>596</sup> C. Reply New Facts, ¶119.

<sup>597</sup> C. Reply New Facts, ¶120.

enforcement from Judge Zhavkhlan from the Sukhe-Batar District Court, Mongolia went to a different judge who cancelled the decision suspending the illegal enforcement. Mongolia's misuse of its court and enforcement procedures constitutes a violation of Mongolia's obligation to provide full legal protection under Article 2 of the Treaty."

656. Mongolia argues that its enforcement actions fully complied with the Tribunal's orders and Mongolian law and do not amount to violations of either Article 2 or Article 3 of the Treaty.<sup>598</sup>
657. Respondent further submits that, in any event, it did not breach Articles 2 and 3 of the Treaty because (i) it acted in good faith; (ii) proportionately; (iii) reasonably and (iv) in a non-discriminatory manner.<sup>599</sup> Respondent also claims having acted in full compliance with Mongolian law.<sup>600</sup>
658. With respect to their expropriation claim under Article 4 of the Treaty, Claimants submit that:<sup>601</sup>
- 121. Mongolia's enforcement measures forced GEM to cease its production activities because Mongolia froze its bank accounts, confiscated GEM's money deposited on those accounts and 12 kg of GEM's gold, and prevented GEM from selling any of its assets, including its gold production. In short, although GEM has not formally closed, it cannot engage in any business activities. Mongolia's conduct is a taking by any standard.
  - 122. The same is true of VNGM. Mongolia attached all of its assets, froze its bank accounts, and confiscated the money deposited thereon. Mongolia also froze the bank accounts and confiscated the deposits of Vostok-Energo, Bumbat and Yakhton.
659. According to Claimants, the foregoing actions do not satisfy any of the four requirements for a legal taking under Article 4 of the Treaty, namely (i) the deprivation is in the public interest; (ii) the deprivation is undertaken with due process; (iii) the deprivation is non-discriminatory; and (iv) there is payment of prompt, adequate, and effective compensation for the deprivation.<sup>602</sup>

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<sup>598</sup> R. Rejoinder New Facts, ¶¶40-55, 63-88.

<sup>599</sup> R. Rejoinder New Facts, ¶¶77-88.

<sup>600</sup> R. Rejoinder New Facts, ¶¶40-55; R. PHB, ¶¶163-165.

<sup>601</sup> C. Reply New Facts, ¶¶121, 122.

<sup>602</sup> C. Reply New Facts, ¶¶123-127.

660. Respondent opposes the expropriation claim and summarizes its argument as follows:

"89. Mongolia's enforcement actions also did not expropriate Claimants' investment. To begin with, Mongolia operated through liens and attachment orders and did not take Claimants' property. Claimants continue to be the de lege and de facto owner of Golden-East Mongolia. Further, Claimants still have the legal right to use their equipment. Finally, Mongolia's actions did not cause the detrimental effects on Golden East-Mongolia's ability to continue operating as a business. Claimants' unwillingness to agree to a reasonable right of audit of prior transaction by a third party administrator did. Claimants' expropriation case, therefore, is without legal or factual basis."<sup>603</sup>

## 5.8.2 TRIBUNAL'S ANALYSIS

### 5.8.2.1 Enforcement measures

661. The Tribunal first issued on March 23, 2008, a Temporary Restraining Order temporarily prohibiting Respondent from seizing or obtaining a lien on Claimants' assets. In its subsequent Order on Interim Measures of September 2, 2008, the Tribunal terminated the TRO and granted Claimants a suspension of any action by Respondent until December 2, 2008, provided Claimants would give a bank guarantee or deposit monthly in an escrow account a sum of USD 2 million up to a certain upper limit. By Procedural Order no. 4, the Tribunal granted Claimants until December 2, 2008, to implement the options provided for in the OIM. Claimants failed to provide any form of security and the OIM expired on December 2, 2008. Faced with such a situation, Respondent obtained an order from the Ulan Bator Administrative Tribunal authorizing Respondent to seize and put liens on Claimants' assets in Mongolia. All these actions have been more fully described above in the Section on Facts.
662. Various proceedings took place before the Mongolian courts and complaints were registered by Claimants at the Court Bailiff's Office. Upon review of the evidence submitted by the Parties, the Tribunal is of the view that none of Claimants' arguments can sustain their claims, under Articles 2, 3 or 4 of the Treaty.
663. First, the Tribunal has received no evidence that the courts acted in bad faith or without respect for due process. Respondent respected the TRO, the OIM and Procedural Order no. 4 while they were operative. Once the delay fixed by the Tribunal had expired without compliance by Claimants with the Tribunal's Orders and Procedural Order no. 4, it was absolutely legitimate for Respondent to try and protect its claims against GEM by obtaining from the Mongolian courts the authorization to seize assets and put liens on them.

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<sup>603</sup> R. Rejoinder New Facts, ¶89.

664. Secondly, with respect to the seizure of the assets of GEM (and VNGM) as well as of the bank accounts and the contents thereof of other companies of the group, Claimants allege that, despite the fact that the outstanding balance under the First Tax Assessment amounted only to MNT 4,685,300,000, the amounts seized in the accounts of GEM, VNGM, Bumbat, Yakhton, Vostok-Energo (amounting, in local currency, to MNT 289,524,81.4) as well as the book value of the seized GEM's assets (according to Claimants amounting to approximately MNT 62 billion)<sup>604</sup> largely exceeded the balance outstanding under the First Tax Assessment.
665. The Tribunal has further noted that the allegation that the Bailiff's office misrepresented the scope of the Court Order<sup>605</sup> and of the Writ of Execution<sup>606</sup> in its letter of December 8, 2008 to Zoos Bank<sup>607</sup> informing the latter that the Capital Administrative Court ordered the enforcement up to the amount of MNT 58,440,506,253 while the Court Order and the Writ do not mention any amount.<sup>608</sup>
666. Even if the book value of the seized assets largely exceeded the outstanding balance under the First Tax Assessment, as asserted by Claimants, at the time of the Court Bailiff's actions on December 2, 2008, the fact is that the Second Tax Assessment of December 10, 2007, for an amount of MNT 28,231,741,000 remained equally unpaid. Finally, it is worth noting that, on December 4, 2008, the Tax Office issued the Third Tax Assessment, claiming the payment of taxes and interest in the amount of some MNT 56,423,191,700 (USD 48 million). It stands to reason that, when the Bailiff's office made its representations to the Zoos Bank, it was aware that the Tax Office had issued, on December 4, 2008, a Third Tax Assessment in the total amount of MNT 56,423,191,700, which is an amount pretty close to the one mentioned in its letter to Zoos Bank.
667. While the Bailiff's office may have erred in some respects, GEM resorted to the various appeals opened to it under Mongolian law. The Department of Judicial Enforcement as well as the courts considered those appeals and ruled against Claimants. None of the actions reproached to those various authorities is of such significance as to constitute a breach of due process and procedural propriety, a denial of justice or abuse of process under international law.
668. Fourth, as to the argument that Mongolia's enforcement was discriminatory, arbitrary and unreasonable, the evidence presented by Claimants does not support such a conclusion.
669. Finally, the expropriation claim under Article 4 of the Treaty cannot be sustained on the basis of the evidence submitted. While Respondent's actions certainly severely handicapped GEM and VNGM activities, it did not take Claimants' property but

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<sup>604</sup> Ibragimova-IV, ¶33.

<sup>605</sup> Ibragimova Ex.-105.

<sup>606</sup> Ibragimova Ex.-106.

<sup>607</sup> Ibragimova Ex.-129.

<sup>608</sup> Ibragimova-IV, ¶33.

operated through liens and attachment orders. GEM and VNGM, as Claimants recognized themselves<sup>609</sup> still had the right to continue to use the attached assets. The Parties engaged into discussions on arrangements that could facilitate the continued operations of the companies concerned but no agreement was reached in that regard. Claimants' proposal for the provision of security was turned down by Respondent as totally inadequate and, in the Tribunal's view, it had good reason to do so. On the other hand, Claimants did not accept a proposal made by Respondent aimed at allowing operations to continue but which also contained some continuing controls by Respondent.

### 5.8.2.2 Extension of work permits

670. Regarding the change in Mongolia's policy regarding the extension of existing work permits, Claimants allege that the refusal to extend existing work permits was arbitrary because it lacked any basis under Mongolian law, since the Law on Export and Import of Foreign Workforce does not provide that the issuance of foreign work permits may be refused because the employee intends to work or works with a company that has outstanding foreign worker fee liabilities. In addition, such refusal would be discriminatory because it apparently applied only to GEM employees. Moreover, such refusal resulted from an unpredictable and non-transparent change of policy, Counsel for Respondent having stated in a letter of August 29, 2008, that Mongolia's policy "to refuse to grant foreign work permits for companies who have not paid fees associated with having those foreign workers [...] does not apply to requests to extend existing permits and/or reissue expired permits". Finally, the reversal of policy would not be related to any rational policy, the proof being that the net result of that reversal — "together with Mongolia's other actions"<sup>610</sup> — was that a large number of Mongolian workers lost their employment.
671. As to the first point raised by Claimants, it is far from obvious that, in order to refuse to extend a worker permit for any reason, there would need to be a specific provision in the law stating that it can be refused because his employer has refused or neglected to pay the FWF for other workers. Like in many other countries, the entry of a foreign worker into Mongolia or his continued presence is not a right but a privilege which can be subject to all kinds of restrictions and policy changes.
672. As to the second point, Claimants have not established that there existed other foreign firms in Mongolia which were granted worker permit extensions, in spite of the fact their employer refused or neglected to pay the WPT or the FWF. The allegation of discrimination therefore fails.
673. As to the third point, the fact that the policy of Mongolia may have changed between August 29 and December 2, 2008 does not indicate an unpredictable and non-transparent environment, taking into account the behavior of Claimants during that period when they refused to provide the security which had been ordered by the

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<sup>609</sup> C. Reply New Facts, ¶30.

<sup>610</sup> C. Reply New Facts, ¶118.

Tribunal and which lead to attachments with liens by Respondent on Claimants' assets on December 2.

674. As to the last point, the resort by Claimants to "Mongolia's other actions" in order to support its contention that the change in policy resulted in a large number of Mongolians losing their employment, it is just not good enough for the Tribunal to conclude that Mongolia's conduct in refusing to extend the work permits constituted an irrational decision.
675. This being said, the Tribunal rejects Respondent's argument concerning its restrictive interpretation of Article 3(1) of the Treaty to the effect that protection extends only to the operation and disposal of investment and not to its use and enjoyment. The Tribunal has already addressed this issue in this Award.

### **5.8.3 CONCLUSION**

676. In light of the above analysis, the Tribunal dismisses Claimants' claims concerning the events of December 2, 2008 and thereafter.

## **6. JURISDICTION AND ADMISSIBILITY OF THE COUNTERCLAIMS**

### **6.1. Arguments of the Parties**

677. Respondent, in its Post-Hearing Brief,<sup>611</sup> did not discuss its counterclaims but referred the Tribunal to its positions in that regard as stated in its Statement of Defense and its Rejoinder.
678. Respondent asserts seven counterclaims:
- (1) Claimants owe Windfall Profits Taxes they caused GEM to evade in violation of law;
  - (2) Claimants owe back Foreign Worker Fees they caused GEM to refuse;
  - (3) Claimants owe taxes, fees and levies they caused GEM to evade by illicit inter-group transfers, including non-arm's length transfers;
  - (4) Claimants have violated their obligations under their license agreements to extract gold in an efficient and effective manner, causing Mongolia a loss in tax revenue, loss of employment of Mongolian nationals and other benefits;
  - (5) Claimants violated their environmental obligations towards Mongolia;
  - (6) Claimants owe damages for gold smuggling; and
  - (7) Golden East failure to comply with Order from House of Lords.

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<sup>611</sup> *Ibid.*, ¶169.

679. Claimants submit that (i) the Tribunal does not have jurisdiction to hear any of the seven counterclaims and (ii) all the seven counterclaims are undeveloped and poorly drafted to such an extent that they do not meet the basic pleading requirements in Articles 18(2) and 19(4) of the UNCITRAL Rules.<sup>612</sup>
680. With respect to Tribunal's jurisdiction, Claimants argue that:
- (1) Article 19(3) of the UNCITRAL Rules does not permit Mongolia's counterclaims as this provision limits the Tribunal's jurisdiction to counterclaims arising "out of the same contract";<sup>613</sup>
  - (2) The Tribunal lacks jurisdiction *ratione materiae* because Mongolia's counterclaims are not sufficiently connected to Claimants' claims as these counterclaims (i) arise under the municipal laws of Mongolia and England and (ii) arise from different occurrences than Claimants' claims.<sup>614</sup>
  - (3) The proper respondent to Mongolia's counterclaims is GEM.<sup>615</sup>
681. Respondent, relying on *Saluka*, argues that the Tribunal has jurisdiction to hear the counterclaims as they have a close connection to Claimants' claims.<sup>616</sup>
682. With respect to the standard of pleading, Claimants submit that:
- (1) Articles 18(2) and 19(4) require that each counterclaim be specific enough that Claimants can reply in their Statement of Defense against Counterclaims;<sup>617</sup> and
  - (2) Mongolia's statement of counterclaim does not allow Claimants to adequately reply in their Statement of Defense because Mongolia has failed to explain its legal arguments and propose evidentiary support.<sup>618</sup>
683. Respondent does not address the foregoing arguments.

## 6.2. TRIBUNAL'S ANALYSIS

684. The Tribunal is not of the view that Respondent has abandoned its counterclaims at the Hearing, Respondent at no time having withdrawn its counterclaims and having specifically referred to them in its Post-Hearing Brief.

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<sup>612</sup> C. Reply, ¶¶570-624; C. Rejoinder, ¶¶1, 8-9; C. PHB, ¶¶133-136.

<sup>613</sup> C. Reply, ¶¶577-583.

<sup>614</sup> C. Reply, ¶¶584-602.

<sup>615</sup> C. Reply, ¶¶603-605.

<sup>616</sup> R. Rejoinder, ¶¶283-288.

<sup>617</sup> C. Reply, ¶¶609-612.

<sup>618</sup> C. Reply, ¶¶613-624.



685. The first point to note is that the jurisdiction of the Tribunal rests on the Treaty and not on any contractual relationship between the Parties, even though in analyzing whether Treaty breaches have occurred it may be necessary to analyze whether contractual breaches have occurred and, if so, whether they are of such nature as to come under the ambit of the Treaty provisions.
686. Secondly, although GEM is omnipresent in the current dispute, it is not a party to the dispute and its obligations cannot be simply transposed into Treaty obligations of Claimants, if any. This is all the more the case when GEM breaches of law which may have taken place would constitute breaches of local legislation which contains its own remedies.
687. Thirdly, Art. 9(3) of the UNCITRAL Arbitration Rules states that "the Respondent may make a counterclaim arising out of the same contracts or rely on a claim arising out of the same contract for the purpose of a set off". It has to be noted that that Article sets the right to counterclaim in the context of a contractual relationship, which is not the situation in the present case where the relationship is based upon a treaty between two States. Can a State nonetheless invoke counterclaims, when an investor decides to initiate an arbitration under a bilateral investment treaty, even if that treaty contains no specific provision about counterclaims?
688. The question was addressed in *Saluka Investments BV v. The Czech Republic*<sup>619</sup>, which like this case, took place under the UNCITRAL Arbitration Rules and was initiated under the provisions of a 1991 bilateral investment treaty between the Netherlands and the (at the time) Czech and Slovak Republic. In the *Saluka* case, arguments raised by the parties were similar to those put forward by each side in this case. However, in *Saluka*, the tribunal had to make its decision in a preliminary Decision on Jurisdiction where the tribunal simply had "to be satisfied *prima facie* that the counterclaim as so presented is within the Tribunal's jurisdiction under the Treaty."<sup>620</sup> Nonetheless, the analysis made by the tribunal in that case is very relevant to this one.
689. It states in particular that "the jurisdiction conferred upon it (the tribunal) by Article 8, particularly when read with Article 19.3, 19.4 of the UNCITRAL Rules, is in principle wide enough to encompass counterclaims. The language of Article 8, in referring to "all disputes" is wide enough to include disputes giving rise to counterclaims, so long, of course, as other relevant requirements are also met."<sup>621</sup> Article 8 of the *Saluka* BIT is similar to Article 6 of the Treaty, the first one referring to "all Disputes" while the second refers to "disputes" and there is no reason to make a difference between the two. Later on, the tribunal mentions that "(i)n relation specifically to counterclaims, it is necessary that they must also satisfy those conditions which customarily govern the relationship between a counterclaim and the primary claim to which it is a response. In particular, a

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<sup>619</sup> *Saluka Investments BV v. The Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim, May 7, 2004.

<sup>620</sup> *Ibid.*, ¶36.

<sup>621</sup> *Ibid.*, ¶39.

legitimate counterclaim must have a close connection with the primary claim to which it is a response."<sup>622</sup> [emphasis added]

690. After having noted that there were no previous decisions on counterclaim in an arbitration involving both the UNCITRAL Rules and a bilateral investment treaty, the *Saluka* tribunal reviewed a few ICSID and Iran-US Claims Tribunal decisions dealing with the issue and concluded that it was "satisfied that those provisions (of the ICSID Rules and of Iran-US Claims Settlement Declaration), as interpreted and applied by the decision which have been referred to, reflect a general principle as to the nature of the close connection which a counterclaim must have with the primary claim if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim." Having concluded that Respondent was trying to bring a third party (Nomura) with which *Saluka* had a close relationship through a share purchase agreement, it concluded that it did not have jurisdiction to hear the counterclaims as there was not enough of a close connection between them and the primary claim to which it was a response.
691. It is worthwhile to note two quotations the *Saluka* tribunal cited approvingly. The first is from an author commenting on the Iran-US Claims Tribunal decisions:

"When claims are based on contracts the Tribunal has consistently held that it has no jurisdiction over counterclaims seeking Iranian taxes or social security premiums allegedly owed by the claimant and attributable to the performance of those contracts. The reason is that such counterclaims arise from provisions of Iranian law, not from the contracts. Even when the contracts contained clauses requiring the claimant to comply with Iranian tax and social security laws, it was the law, not the contract, that was the source of the obligations."<sup>623</sup>

692. The second is from *Amco Asia Corporation and others v. Republic of Indonesia*:

"The Tribunal believes that it is correct to distinguish between the rights and obligations that are applicable to legal or natural persons who are within the reach of a host State's jurisdiction, as a matter of general law, and rights and obligations that are applicable to an investor as a consequence of an investment agreement entered into with that host state. Legal disputes relating to the latter will fall under Article 25(1) of the Convention. Legal disputes concerning the former in principle fall to be decided by the appropriate procedures in the relevant jurisdiction

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<sup>622</sup> *Ibid.*, ¶61.

<sup>623</sup> *Ibid.*, ¶ 74; G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, Clarendon Press, 1996, p. 166.

unless the general law generates an investment dispute under the Convention."<sup>624</sup>

693. In considering whether the Tribunal has jurisdiction to consider the counterclaims, it must therefore decide whether there is a close connection between them and the primary claim from which they arose or whether the counterclaims are matters that are otherwise covered by the general law of Respondent.
694. Unlike the situation expressly covered by the wording of Article 19 (3) of the UNCITRAL Arbitration Rules, counterclaims (1), (2) and (3) filed in the present case (the "**Counterclaims**") do not arise out of an investment contract or other contract to which the foreign investors are a party and that the foreign investors would have breached. More importantly, the Counterclaims arise out of Mongolian public law and exclusively raise issues of non-compliance with Mongolian public law, including the tax laws of Mongolia. All these issues squarely fall within the scope of the exclusive jurisdiction of Mongolian courts, are matters governed by Mongolian public law, and cannot be considered as constituting an indivisible part of the Claimants' claims based on the BIT and international law or as creating a reasonable nexus between the Claimants' claims and the Counterclaims justifying their joint consideration by an arbitral tribunal exclusively vested with jurisdiction under the BIT.
695. Indeed, through the Counterclaims the Respondent seeks to extend the extraterritorial application and enforcement of its public laws, and in particular its tax laws, to individuals or entities not subject to and not having accepted to submit to Mongolian public law or its courts. Thus, if the Arbitral Tribunal extended its jurisdiction to the Counterclaims, it would be acquiescing to a possible exorbitant extension of Mongolia's legislative jurisdiction without any legal basis under international law to do so, since the generally accepted principle is the non-extraterritorial enforceability of national public laws and, specifically, of national tax laws. Were the Arbitral Tribunal to decide on the merits of the Counterclaims in favor of the Respondent, the ensuing arbitral award rendered in The Netherlands would be entitled to recognition and enforcement through the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in its members countries, including Russia, with the likely effect of advancing the enforcement of Mongolian tax laws by non-Mongolian courts in respect of non-Mongolian nationals beyond limitations on the extraterritorial application of Mongolian tax laws rooted in public international law. As expressed in the Iran-United States Claims Tribunal *Computer Sciences* award:

"Such a claim is essentially a request that this Tribunal enforce the tax laws of a sovereign state [...] It is a "universally accepted rule that public law may not be extraterritorially enforced". Tax laws are manifestation of *jus imperii* which may be exercised only within the borders of a state. In addition, revenue laws are typically enormously complex, so much so that their enforcement

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<sup>624</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, Resubmitted Case, Decision on Jurisdiction, 10 May 1988; *ICSID Reports*, vol. 132, p. 543.

is frequently assigned to specialized courts or administrative agencies. For those reasons, actions to enforce tax laws are universally limited to the domestic forum (.....) The Tribunal thus had no jurisdiction over the [tax claim]. "<sup>625</sup>

696. As to counterclaims nos. 4, 5 and 6, they cannot be seen as having a "close connection with the primary claim to which (they are) a response". Moreover, they are clearly matters which strictly concern GEM and they all relate to subjects being the object of Mongolian legislation and regulation. As to counterclaim no. 4, Respondent itself states that GEM did not obtain its licenses from the Government but bought them from third parties on the gray market.<sup>626</sup> No allegation was made by Respondent that licenses were issued to Claimants and no evidence to that effect was introduced. Similarly, no evidence was introduced by Respondent tying Claimants themselves to any of the breaches alleged in counterclaims nos. 5 and 6.
697. As to counterclaim no.7, this is also a matter that has no close connection with Claimants' claims. This counterclaim has to do with an application by GEM for an injunction against the Bank of Nova Scotia in connection with its holding of MongolBank's gold reserves. The application was rejected by the English Courts and the House of Lords ordered GEM to pay the Bank of Nova Scotia the cost of preparing the written objection and the cost of preparation for the Hearing. Respondent argues that GEM's failure to comply with the Order of the House of Lords exposes MongolBank to liability of the amount incurred.
698. The decision by the House of Lords is clearly *res inter alios partes* and Respondent has produced no evidence of liability actually incurred by it. The matter was not mentioned at the Hearing and no questions were asked about it from any of the witnesses.

#### **6.2.1 CONCLUSION**

699. The Tribunal has no jurisdiction over any of the counterclaims advanced by Respondent.

#### **7. DAMAGES**

700. The damages issue has been postponed to a second phase of the proceedings. It will be up to Claimants to register with the Tribunal any claim they may wish to assert in that regard, taking into account the decision of the Tribunal in this case.

#### **8. COSTS**

701. Claimants and Respondent should bear their own costs and should share equally in the costs of the arbitration, up to this stage.

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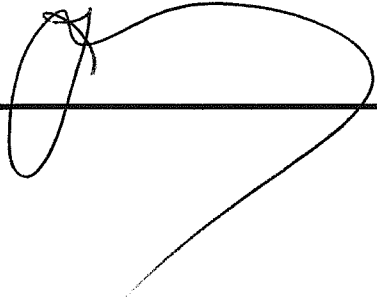
<sup>625</sup> *Computer Sciences Corporation and The Government of the Islamic Republic of Iran, et al.*, Award No. 221-65-1, April 16, 1986, 10 Iran-U.S. C.T.R. 269, pp. 55-56.

<sup>626</sup> R. Defense, ¶¶36-38.

**9. DECISION**

- (1) The Tribunal has jurisdiction over the claims submitted by Claimants subject to the Tribunal's findings regarding the stability agreement negotiations claim.
- (2) Claimants' claim concerning the Windfall Profit Tax Law is denied.
- (3) Claimants' claim concerning the foreign workers fee and the imposition of quotas is denied.
- (4) Claimants' claim concerning the stability agreement negotiations is denied.
- (5) Claimants' claim concerning the Safe Custody and Sale Agreement is partially accepted as follows: Respondent breached Article 3.1 of the Treaty in taking ownership of the Gold before 25 December 2007 and by exporting it abroad for refining and depositing it or its value in an unallocated account in England for the purpose of increasing the country's currency reserves. Claimants are entitled to claim damages, if any, they suffered from such action. The other claims of Claimants relating to the Safe Custody and Sale Agreement are denied.
- (6) Claimants' claim concerning the actions of the tax authorities in connection with the First Tax Assessment is denied.
- (7) Claimants' claim concerning the alleged failure of Mongolia's judiciary to redress the actions of the tax authorities is denied.
- (8) Claimants' claim concerning delay in the approval of a Bumbat project and conversion of licenses is denied.
- (9) All other claims of Claimants concerning denial of justice are denied.
- (10) Claimants' claims relating to the events of December 2 and thereafter are denied.
- (11) The Tribunal has no jurisdiction over the counterclaims raised by Respondent.
- (12) Taking into account the numerous proceedings which took place in this case and the fact that many of the claims, counterclaims and arguments by each side have been rejected the Tribunal, the Tribunal decides that the costs of this arbitration shall be borne equally between Claimants and Respondent. Each side shall bear its own costs.
- (13) Claimants shall inform Respondent and the Tribunal, within sixty days from the date of this Award, as to whether they intend to claim damages under paragraph 5 of this Decision.

Dr. Horacio A. GRIGERA NAÓN  
Arbitrator



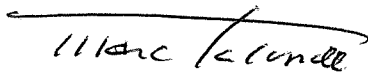
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Professor Brigitte STERN  
Arbitrator



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The Hon. Marc LALONDE  
President

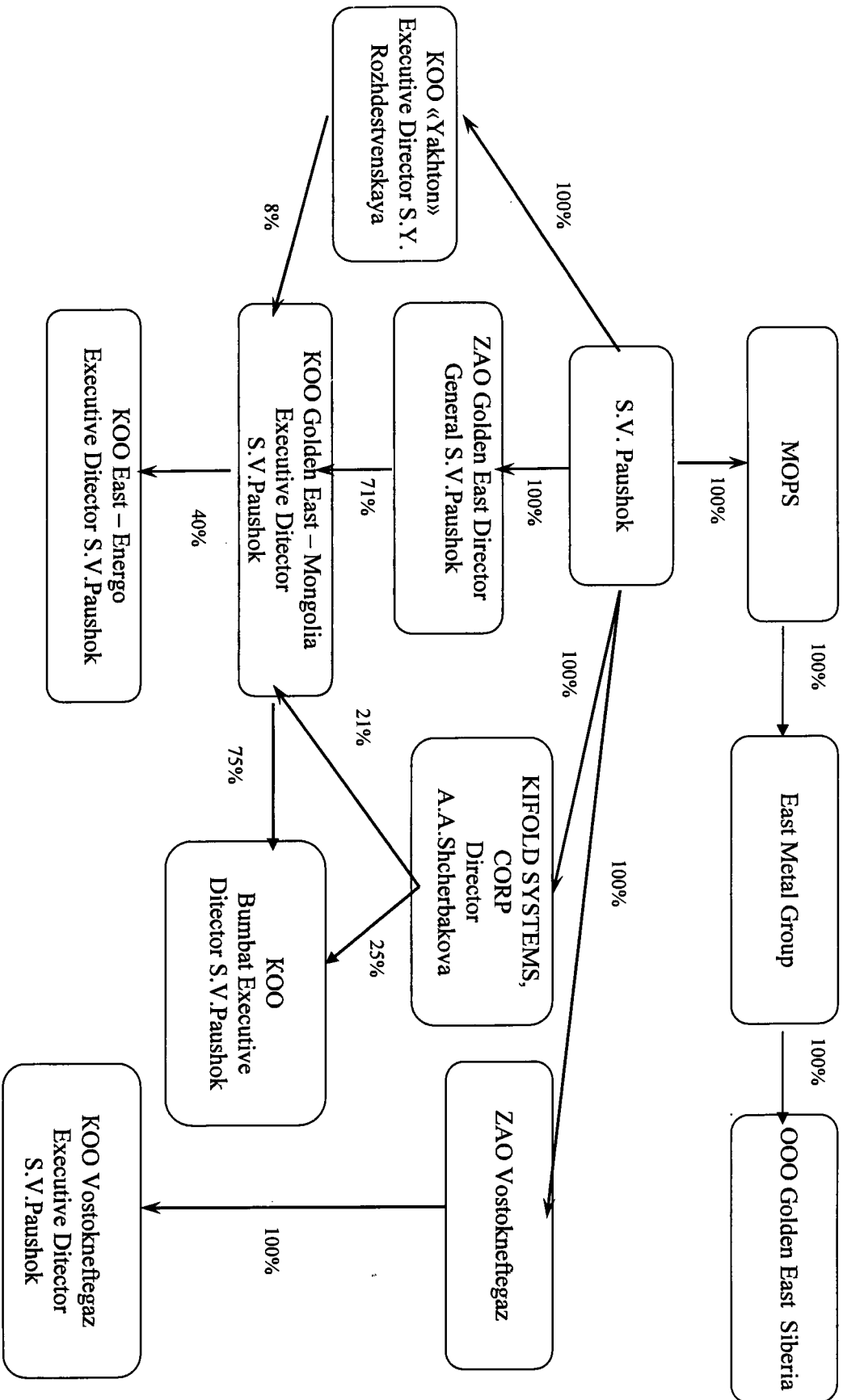


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The Hague

Date : ..... *28 April, 2011* .....

# Annex 1



**ANNEX 2 - TABLE OF WRITTEN SUBMISSIONS AND OTHER COMMUNICATIONS**

Party	SUBJECT MATTER					
	Initial Claim	Claim re: New Facts	Claim re: Dec. 2, 2008 events	Claim Jurisdiction	Counterclaim (CC)	Counterclaim Jurisdiction
C	Statement of claim					
R	Defense			Objections to jurisdiction	Counterclaim	
C	Reply	Statement of claim re: New Facts		Answer on Jurisdiction	Defense to Counterclaim	Objections to CC. Jurisdiction
R	Rejoinder	Defence re: New Facts		Reply on Jurisdiction	Reply on Counterclaim	Answer on CC. Jurisdiction
C				Rejoinder on Jurisdiction	Rejoinder on Counterclaim	[Reply on CC. Jurisdiction has not been filed, see PO 7]
C		Reply re: New Facts (see PO 7)	Statement of claim re: Dec. 2, 2008 events (see PO 7)			
R						[Rejoinder on CC. Jurisdiction has not been filed, see PO 7]
R		Rejoinder re: New Facts (see PO 7)	Defence re: Dec. 2, 2008 events (see PO 7)			
C/R	Post-Hearing Briefs					



Party	Additional Written Submissions and Communications on Various Subject Matters
C/R	Additional Post-Hearing Briefs on Jurisdiction and Applicable Law Regarding the Negotiations of a Stability Agreement in 2001 (requested by the Tribunal after the Hearing)
R	Submission Concerning New Facts Relating To Claimants' Activities In Mongolia
C	Response to Mongolia's Submission Concerning New Facts Relating To Claimants' Activities In Mongolia
R	Letter brief commenting on the Claimants' Response to Mongolia's Submission Concerning New Facts Relating To Claimants' Activities In Mongolia
C	Objection to the above letter brief
R	Letter regarding Mr. Paushok's bank operations
C	Response to Respondent's letter of November 24, 2010
R	Letter-brief commenting on certain press articles with respect to Mr. Paushok and his operations in Russia
C	Objection to the above letter brief

**ANNEX 3 - TABLE OF PROCEEDINGS AND WITNESS STATEMENTS**

<b>C/R/T</b>	<b>WRITTEN SUBMISSION OR OTHER COMMUNICATION, RELATED EXHIBITS AND AUTHORITIES</b>	<b>WITNESS STATEMENTS ("WS"), EXPERT REPORTS AND RELATED EXHIBITS</b>
C	Notice of Arbitration (November 30, 2007, CE 1 to 17)	none
C	Request for Interim Measures, including a TRO (March 14, 2008, CE 1 to CE 29 (different from the exhibits referred to in the NA), CA 1 to CA 19))	<b>First</b> WS of Sergei Paushok (12/03/2008, 38 pages)
T	Temporary Restraining Order (March 23, 2008)	n/a
R	Opposition to Request for Interim Measures (April 30, 2008, RE 1 to 12, RA 1 to 12)	<b>First</b> WS of B. Ganbat (Deputy Director of the Legal Department of the Ministry of Finance)(29/04/2008, 4 pages) Micon International Limited ( <b>undated</b> , 2 pages)
C	Reply on Interim Measures (May 30, 2008, CE 30 to 51, CA 20 to 36)	none
R	Rejoinder to Request for Interim Measures (June 30, 2008, RE 13 to 29, RA 13 to 23)	none

C/R/T	WRITTEN SUBMISSION OR OTHER COMMUNICATION, RELATED EXHIBITS AND AUTHORITIES	WITNESS STATEMENTS (“WS”), EXPERT REPORTS AND RELATED EXHIBITS
C	Statement of claim (June 27, 2008, 11 volumes, CE 52 to 92, CA 37 to 85)	<p><b>Second</b> WS of Sergei Paushok (23/06/2008, 34 pages, Paushok Ex.-1 to 100)</p> <p><b>First</b> WS of Yana Ibragimova (GEM’s Head of legal department)(23/06/2008, 9 pages, Ibragimova Ex.-1 to 58)</p> <p><b>First</b> WS of Marina Spirina (GEM’s Deputy executive director for finance and economy) (23/06/2008, 12 pages, Spirina Ex.-1 to 25)</p> <p><b>First</b> expert report of Professor Temuulen Bataa (23/06/2008, 34 pages, Temuulen Ex.-1 to 25)</p> <p><b>First</b> expert report of Brent Kaczmarek (Navigant Consulting, Inc.)(27/06/2008, 22 pages, NAV 1 to 8)</p>
CRT	Hearing on Interim Measures (July 8, 2008, CE 93 and RE 30)	n/a
T	Order on Interim Measures (September 2, 2008)	n/a
R	Defense, Objections to jurisdiction, Counterclaim (September 26, 2008, 3 volumes (exl. exhibits, only full size provided), RE 31 to	<p>Declaration of T. Altangerel (includes a declaration by Sanjaasuren Oyun)(23/09/2008, 2 pages altogether)</p> <p>Nyamtseren Batbayar (Director of the Mining Department of the Mineral Resources and Petroleum Authority of Mongolia)(23/09/2008, 7 pages)</p>

C/R/T	WRITTEN SUBMISSION OR OTHER COMMUNICATION, RELATED EXHIBITS AND AUTHORITIES	WITNESS STATEMENTS (“WS”), EXPERT REPORTS AND RELATED EXHIBITS
	93, RA 24 to 46)	<p><b>Second</b> WS of B. Ganbat (Deputy Director of the Legal Department of the Ministry of Finance)(22/09/2008, 4 pages)</p> <p><b>First</b> Expert Report of Michael M. Mulligan, CPA, CFE, JD (Capstone Advisory Group, LLC) (25/09/2008, 25 pages)</p> <p>Gungaa Bayasgalan (State Secretary of the Ministry of Justice and Home Affairs of Mongolia)(<b>undated</b>, 2 pages)</p>
C	Reply, Answer on Jurisdiction, Defense to Counterclaim, Objections to CC. Jurisdiction and Statement of claim re: New Facts (November 28, 2008, 11 volumes, CE 93 (wrong number) to 188, CA 66 to 120)	<p><b>Third</b> WS of Sergei Paushok (28/11/2008, 10 pages, Paushok Ex.-101 to 123)</p> <p><b>Second</b> WS of Marina Spirina (GEM’s Deputy executive director for finance and economy) (27/11/2008, 10 pages, Spirina Ex.-26 to 38)</p> <p><b>Second</b> WS of Yana Ibragimova (GEM’s Head of legal department)(27/11/2008, 2 pages, Ibragimova Ex.-59 to 69)</p> <p><b>First</b> WS of Vladimir Akatkin (GEM’s chief geologist)( 27/11/2008, 8 pages, Akatkin Ex.-1 to 40)</p> <p><b>Second</b> expert report of Brent Kaczmarek (Nivigant Consulting, Inc.)(28/11/2008, 23 pages, NAV 2, 9 to 15)</p> <p><b>Second</b> expert report of Professor Temuulen Bataa (24/11/2008, 15 pages, Temuulen Ex.-26 to 31)</p>

C/R/T	WRITTEN SUBMISSION OR OTHER COMMUNICATION, RELATED EXHIBITS AND AUTHORITIES	WITNESS STATEMENTS (“WS”), EXPERT REPORTS AND RELATED EXHIBITS
R	Rejoinder, Reply on Jurisdiction, Reply on Counterclaim, Answer on CC. Jurisdiction and Defence re: New Facts (February 20, 2009, 4 volumes, RE 94 to 149, RA 47 to 62)	Dr. Janusz Szyrmer (Senior Policy Advisor for the Economic Policy Reform and Competitiveness Project (EPRC), established by USAID)(15/02/2009, 4 pages)
		Jambalsuren Narantuya (First Secretary and Head of law section of Secretariat of State Great Khural)( <b>undated</b> , 2 pages, plus attachments)
		N. Tumendemberel (State Secretary for the Ministry of Finance from Aug 2000 to May 2003, currently Director of the Finance and Investment Department of the Ministry of Health, Mongolia)(17/02/2009, 4 pages)
		Erdenebold Jamiyansengee (Section Chief of the Division for Combating Economic Crime for the Criminal Police Department of Mongolia)(19/02/2009, 4 pages)
		Bolormaa Dorj (Governor of Zaamar soum, Tuv Province)(21/01/2009, 5 pages)
		L. Myagmarsuren (GEM’s Mongolian employee from August 1999 to December 2008)(20/02/2009, 4 pages)
		Dalaijamts Guushir (Advisor for the National Human Rights Commission of Mongolia)(16/02/2009, 5 pages)
		Chagnaadorj Gombo (Founder of NGO Ariun Suvarga)(18/02/2009, 3 pages)
		<b>Third</b> WS of B. Ganbat (Deputy Director of the Legal Department of the Ministry of Finance)(29/01/2009, 5 pages)
<b>Second</b> WS of Nyamtseren Batbayar (Director of the Mining Department of the Mineral Resources and Petroleum Authority of Mongolia)(27/01/2009, 8 pages)		

C/R/T	WRITTEN SUBMISSION OR OTHER COMMUNICATION, RELATED EXHIBITS AND AUTHORITIES	WITNESS STATEMENTS ("WS"), EXPERT REPORTS AND RELATED EXHIBITS
		<p>Expert Report of Tumenjargal Mendsaikhan (Head of the International Law Department at the Law School of the State University of Mongolia)(18/02/2009, 26 pages)</p> <p>Expert Report of Sakhiya Narantsetseg (Certified public accountant in Mongolia and a member of Mongolian Institute of Certified Public Accountants)(<b>undated</b>, 4 pages)</p> <p><b>Second</b> (rebuttal) Expert Report of Michael M Mulligan CPA, CFE, JD (Capstone Advisory Group, LLC) (19/02/2009, 17 pages)</p>
C	Rejoinder on Jurisdiction and Rejoinder on Counterclaim (March 13, 2009, 3 volumes, CE 189 to 192, CA 121 to 124)	<p><b>Third</b> WS of Yana Ibragimova (GEM's Head of legal department)(13/03/2009, 10 pages, Ibragimova Ex.-70 to 104)</p> <p><b>Second</b> WS of Marina Spirina (GEM's Deputy executive director for finance and economy) (12/03/2009, 7 pages, Spirina Ex.-39 to 69)</p> <p><b>Second</b> WS of Vladimir Akatkin (GEM's chief geologist)( (12/03/2009, 9 pages, Akatkin Ex.-41 to 70)</p>
C	Reply re: New Facts and Statement of claim re: Dec. 2, 2008 events (see PO 7)(March 27, 2009, 1 volume, CE 193 to 214)	<p><b>Third</b> WS of Vladimir Akatkin (GEM's chief geologist)( (26/03/2009, 4 pages)</p> <p><b>Forth</b> WS of Yana Ibragimova (GEM's Head of legal department)(27/03/2009, 10 pages, Ibragimova Ex.-105 to 167)</p>
R	Rejoinder re: New Facts and Defence re: Dec. 2, 2008	<b>Third</b> WS of Nyamtseren Batbayar (Director of the Mining Department of the Mineral Resources and Petroleum Authority of Mongolia)(15/04/2009, 2 pages, original in English)

<b>C/R/T</b>	<b>WRITTEN SUBMISSION OR OTHER COMMUNICATION, RELATED EXHIBITS AND AUTHORITIES</b>	<b>WITNESS STATEMENTS (“WS”), EXPERT REPORTS AND RELATED EXHIBITS</b>
	events (April 15, 2009, 1 volume, RE 150 to 160, RA “63” ( <i>Villiger</i> , not numbered))	B. Oyunchimeg (Court enforcement officer for the 123rd district of the Chingeltei district of Ulaanbaatar Bailiff’s office)(15/04/2009, 2 pages)
<b>CRT</b>	Hearing on Jurisdiction and Liability (April 23, 2009 to April 30, 2009, CE 215 to 217, RE 161 to 167)	Ganbat Ex.-1 to 4 (Third WS of B. Ganbat, par. 3.); “Mine deposit technical and economical feasibility criteria” (Second WS of Nyamtseren Batbayar, par. 4); Szyrmer Ex.-1 and Ibragimova Ex.- 133
<b>C/R</b>	Simultaneous Post-Hearing Briefs (June 12, 2009)	none
<b>C/R</b>	Additional Post-Hearing Briefs (November 30, 2009, CA 125 to 127, RE 168 to 176, RA 63 - 72)	none
<b>R</b>	Submission Concerning New Facts Relating To Claimants’ Activities In Mongolia (December 14, 2009, RE 177 to 182, RA 73)	none
<b>C</b>	Response to Mongolia’s Submission of December 14, 2009 (January 11, 2010, CE 218 to 224, CA 128)	none

<b>C/R/T</b>	<b>WRITTEN SUBMISSION OR OTHER COMMUNICATION, RELATED EXHIBITS AND AUTHORITIES</b>	<b>WITNESS STATEMENTS ("WS"), EXPERT REPORTS AND RELATED EXHIBITS</b>
<b>R</b>	Letter commenting on the Claimants' Response to Mongolia's Submission of December 14, 2009 (January 18, 2010, Exhibits A and B)	none
<b>C</b>	Objection to the Respondent's letter of January 18, 2010 (January 18, 2010)	none
<b>T</b>	Decision on the Respondent's Submission concerning New Facts relating to Claimants' Activities in Mongolia (February 15, 2010)	none
<b>R</b>	Letter regarding Mr. Paushok's bank operations (November 24, 2010, Exhibits 1 to 3)	none
<b>C</b>	Response to Respondent's letter of November 24, 2010 (November 25, 2010)	none



C/R/T	WRITTEN SUBMISSION OR OTHER COMMUNICATION, RELATED EXHIBITS AND AUTHORITIES	WITNESS STATEMENTS ("WS"), EXPERT REPORTS AND RELATED EXHIBITS
R	Letter commenting on certain press articles with respect to Mr. Paushok and his operations in Russia (January 19, 2011, Exhibits 1 to 2)	none
C	Objection to Respondent's communication of January 19, 2011 (January 20, 2011)	none
T	Decision on Respondent's communication of January 19, 2011 (January 24, 2011)	n/a
T	Award on Jurisdiction and Liability (April 28, 2011)	n/a