UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd.,

plaintiffs,

- against -

Mongolia,

defendant.

Civil Action Number

17 CV 7436

PETITION TO VACATE ARBITRAL AWARD DECLINING TO EXERCISE ARBITRAL JURISDICTION AND COMPEL ARBITRATION

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Petitioners Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. (collectively, "**Petitioners**") respectfully petition this Court for an order: (1) vacating an arbitral award rendered by an ad hoc tribunal (the "**Tribunal**") on June 30, 2017 (the "**Award**"), which, among other things, declined to exercise jurisdiction over the Petitioners' claims that Mongolia had expropriated their investments without compensation in violation of the bilateral investment treaty (the "**BIT**" or the "**Treaty**") between Mongolia and the People's Republic of China ("**PRC**"); and (2) directing the parties to submit to arbitration Petitioners' claims under the BIT.

PRELIMINARY STATEMENT

Petitioners are three companies organized under the laws of the PRC, which invested in a joint venture with a Mongolian company to develop an iron ore mine in Mongolia. Petitioners bring this petition because, when Mongolia unlawfully expropriated their investment and they sought recourse through arbitration pursuant to the BIT, the Tribunal erroneously declined to exercise jurisdiction. It determined that the question of whether an expropriation had occurred was not arbitrable. The Tribunal interpreted the Treaty, the purpose of which was to provide incentives for investment from the PRC into Mongolia, to require that the national courts of Mongolia first declare that other arms of the government of Mongolia had expropriated the assets of Chinese investors; only then could there be

arbitration, and the only arbitrable question would be the amount of compensation for the taking.

Because the Treaty does not explicitly assign the question of arbitrability to the Tribunal, this Court exercises *de novo* review of the Tribunal's decision to decline jurisdiction over the expropriation claims. It is well settled that, unless the relevant arbitration agreement (whether a contract or a treaty) clearly and unmistakably commits the question of an arbitral tribunal's jurisdiction to that tribunal, the arbitrability of a claim is a matter of law for a court to determine independently, without deference to the arbitrators' decision.

Here, the question of whether Mongolia expropriated Petitioners' investment must be submitted to arbitration. The contrary result reached by the Tribunal makes little sense. Among the central purposes of BITs is to afford to investors the certainty of access to an impartial tribunal *other than* the national courts of one of the contracting states. The Award deprives Petitioners of one of the essential benefits to which they were entitled. For that reason, together with the texts of the relevant treaties, the clear majority of other tribunals have reached the contrary conclusion under similar BITs. Indeed, every other tribunal to address this question under PRC BITs has rejected the narrow interpretation adopted by this Tribunal.

It is for this Court to determine whether, under the BIT at issue, Petitioners are entitled to have their expropriation claim decided by arbitration. Because the Tribunal erroneously determined that the consideration of expropriation was

outside its jurisdiction, leaving that question to the government of the very state that Petitioners contend committed the expropriation, Petitioners seek an order from this court vacating the Award and compelling Mongolia to proceed to arbitration of their claims.

STATEMENT OF FACTS

The underlying facts of the dispute are complex—the Award takes 153 pages to *decline* to exercise jurisdiction over the essential question. Fortunately, they are largely irrelevant to this petition. A great deal more detail is contained in the Award, attached to the Declaration of Michael A. Granne, dated September 28, 2017 (the "**Granne Decl.**") as Exhibit A, and in the Petitioners' request for arbitration (the "**RFA**"), attached to the Granne Declaration as Exhibit B. All references to exhibits are to the exhibits to the Granne Declaration.

BLT LLC, a Mongolian company, held a license to exploit certain iron ore deposits located in Mongolia (the "**939A License**"). At the time this license was obtained, the price of iron ore was low and there was little interest in commercial development. *See* Ex. B at ¶ 7. In 2002, the Petitioners formed a joint venture with BLT LLC called Tumturei Ltd ("**Tumturei**") to commercially develop these deposits, collectively owning 70% of Tumturei. *See id.* at ¶ 10. The 939A License was duly transferred from BLT LLC to Tumturei in 2005. *See id.* at ¶ 10. Iron ore production commenced at the beginning of 2006, s*ee id.* at ¶ 15, and exports to the PRC began, *see id.* at ¶ 17.

In 2006, a new government took power in Mongolia. *See id.* at ¶ 15. Significantly, with the then-higher price of iron ore, the new Mongolian government began efforts to find a way to take back their now-valuable mining concession. *See* Ex. B at ¶¶ 16 – 21. Among other things, the executive director of Tumturei was jailed for about two weeks, ostensibly on charges related to tax evasion. *See id.* at ¶ 20. Mongolia ultimately revoked the license on a variety of grounds, none of which have merit, determining that it properly belonged to a state-owned enterprise called the Darkhan Metallurgical Plant ("**Darkhan**"). *See id.* at ¶¶ 22 – 44. BLT LLC and Tumturei were unable to obtain relief through proceedings in Mongolia, *see id.* at ¶ 45, and Tumturei's executive director continued to suffer from official harassment. *See id.* at ¶ 46.

On February 12, 2010, the Petitioners served their RFA pursuant to the operative BIT — the *Agreement Between the Government of the Mongolian People's Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments* signed on 26 August 1991, available at http://tfs.mofcom.gov.cn/aarticle/h/at/201002/20100206778627.html

An ad hoc tribunal was duly constituted, and the Permanent Court of Arbitration was selected to administer the proceedings. A detailed summary of the procedural history of the arbitration may be found in the Award. *See* Ex. A at ¶¶ 7 – 88. The Award was rendered on June 30, 2017. *See id.* at p. 153.

The Tribunal concluded (correctly) that the Petitioners are investors entitled to invoke the protections of the Treaty. *See id.* at ¶¶ 404 – 22. However, the Tribunal erroneously concluded that it lacked jurisdiction over the fundamental question of whether Mongolia had expropriated Petitioners' investment. Instead, according to the Tribunal, it could have jurisdiction only if Mongolia *admitted* that it had expropriated the investment (for example, by a declaration from its courts to that effect); in that theoretical event, the Tribunal would have jurisdiction only to resolve any controversy over the amount of compensation Mongolia should pay. *See id.* at ¶¶ 423 – 76.

Petitioners have therefore commenced this proceeding, pursuant to the FAA, to vacate this erroneous decision and compel Mongolia to arbitrate its claims under the Treaty.

ARGUMENT

I. This Court Has Jurisdiction Over This Petition

The FSIA governs whether Mongolia, a foreign sovereign, is subject to suit in the courts of the United States. 28 U.S.C. § 1330(a) provides that:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605 – 1607 of this title or under any applicable international agreement.

Subject matter jurisdiction therefore exists so long as Mongolia is not entitled to immunity under sections 1605 – 1607 of the FSIA.

Two separate provisions of the FSIA permit this Court to exercise jurisdiction over Mongolia. First, 28 U.S.C. § 1605(a)(6) provides in relevant part that Mongolia is not immune from suit in any case

> in which the action is brought, either *to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship*, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, *or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States* . . . .

28 U.S.C.A. § 1605(a)(6) (emphasis added). In a BIT, the two states make an offer to each other's nationals to arbitrate disputes. An investor accepts the offer by commencing arbitration. *See Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) ("Unlike the more typical scenario where the agreement to arbitrate is contained in an agreement between the parties to the arbitration, here the BIT merely creates a framework through which foreign investors, such as Chevron, can initiate arbitration against parties to the Treaty. In the end, however, this proves to be a distinction without a difference, since Ecuador, by signing the BIT, and Chevron, by consenting to arbitration, have created a separate binding agreement to arbitrate."); Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. – Foreign Investment L.J. 232 (1995). The initial terms of the arbitration agreement between

Petitioners and Mongolia were set out in Article 8 of the BIT and were augmented by, *inter alia*, the agreement that New York would be the place of arbitration, *see Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, Permanent Court of Arbitration, Permanent Court of Arbitration, Procedural Order No. 1 (November 2, 2010), Granne Decl., Ex. C at ¶¶ 27-28.

Second, 28 U.S.C. § 1605(a)(1) permits this court to exercise jurisdiction in any case "in which the foreign state has waived its immunity either explicitly or by implication." As the Second Circuit has observed, the House Report that accompanied FISA specifically listed three examples of an implied waiver—one of which is agreeing to arbitrate in another country. *See Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993) (citing H.R. Rep. No. 1487, 94th Cong., 2d Sess., 18 (1976), reprinted in 1976 U.S.S.C.A.N. 6604, 6617). When a foreign sovereign agrees to arbitration in the United States, it implicitly waives immunity from the jurisdiction of United States courts. *Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd.*, 689 F. Supp. 2d 1340, 1351 (S.D.N.Y. 1988); *see also Blue Ridge Investments LLC v. Argentina*, 735 F.3d 72, 83-85 (2d Cir. 2013) (applying both implied waiver and arbitration FSIA exceptions). At the outset of the arbitral proceeding, the parties and the Tribunal discussed where the legal seat of arbitration should be and Mongolia consented to New York as the seat. *See* Ex. C at ¶¶ 27-28. Jurisdiction is therefore proper in this Court.

II. This Court Reviews *De Novo* the Question Whether Petitioners' Claims Are Arbitrable

This Court has the power to vacate an arbitral award rendered in New York pursuant to § 10 of the FAA, 9 U.S.C. § 10. Review of arbitral awards *on the merits* under the FAA is normally deferential. The situation is entirely different, however, when it comes to the question whether the dispute is arbitrable in the first place – the question at hand here. "'Question[ ] of arbitrability' is a term of art covering … disagreements about whether an arbitration clause … applies to a particular type of controversy." *Schneider v. Thailand*, 688 F.3d 68, 71 (2d Cir. 2012) (citations omitted). Here, the question is whether the arbitration clause in Article 8(3) of the BIT applies to a particular type of controversy – namely a dispute over whether an expropriation has occurred. It is thus a "question of arbitrability."

Courts must decide questions of arbitrability "independently" and without deference to the arbitrators, unless there is "clear and unmistakable evidence" that the parties agreed to submit the question of arbitrability to the arbitrators. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995). There is no such evidence here.

The language that governs the establishment and procedures of the tribunal is found in Article 8 of the BIT. It provides for an *ad hoc* tribunal, *see* Ex. C at Art. 8(3), without a single reference to the power of that panel to decide arbitrability, despite several paragraphs dedicated to the makeup and procedures that the tribunal must follow, *see id.* at Art. 8(4) – (9). The presumption of an "independent"

judicial determination of that question, therefore, is not overcome. *See Kaplan*, 514 U.S. at 943-44.

The Treaty in this case is distinguishable from many other BITs, which do commit the question of arbitrability to the arbitrators. They do so, typically, by incorporating arbitration rules that themselves explicitly give the arbitrators authority to determine their own jurisdiction. *See BG Group PLC v. Argentina*, 134 S. Ct. 1198, 1210 (2014) (treaty permitting arbitration pursuant to rules of the International Centre for Settlement of Investment Disputes ("**ICSID**") or UNCITRAL); 2012 United States Model Bilateral Investment Treaty, art. 24(3), *available at* https://www.state.gov/documents/organization/ 188371.pdf (ICSID and UNCITRAL rules). The PRC and Mongolia had many options to choose from, had they wanted to commit the question of arbitrability to the arbitrators; they chose not to. Having left unmentioned the question of arbitrability, this Court reviews the Award *de novo* with regards to findings related to arbitrability.

III. Petitioners' Claims Are Arbitrable under Article 8(3) of the Treaty

Dispute-resolution provisions giving the investor access to arbitration are a "critical element" of modern BITs. *BG Grp.*, 134 S. Ct. at 1206 (quoting K. Vandevelde, Bilateral Investment Treaties: History, Policy & Interpretation 430–432 (2010)). The Tribunal's decision to refuse jurisdiction effectively wrote that critical element out of the Mongolia-PRC Treaty.

Article 8 of the Treaty provides for settlement of disputes between either of the sovereign signatories (*i.e.*, Mongolia or the PRC) and an investor who is a national of the other sovereign. Its text is typical of BITs concluded with various states by the PRC during the period when the Mongolia-PRC BIT was concluded. The Tribunal in this case adopted an extremely narrow construction, in which the only matter that is arbitrable is the amount of compensation for an expropriation. According to the Tribunal, only the allegedly offending state itself can determine whether it expropriated property; if it denies having done so, the independent tribunal established by the BIT can never come into existence. *See* Ex. A at ¶¶ 435 – 54. Thus, an investor is left in the perverse position that only if the state's executive or legislature admits that it has expropriated the investment, or if the state's own courts can be persuaded so to declare, can that investor then proceed to international arbitration.

This interpretation defeats the purpose of investor-state arbitration and deprives the investor of much of the benefit of the Treaty – a Treaty intended to provide security to investors so as to entice them to invest in the host state, whose courts the investor may (quite reasonably) not trust to be evenhanded in an dispute with a foreign investor. The conclusion of other tribunals and courts, which have held that such arbitration clauses give tribunals jurisdiction to determine, *inter alia*, whether an expropriation has occurred and whether it was effected legally, is therefore the correct one.

Article 8(3) provides for arbitration if "a dispute involving the amount of compensation for expropriation cannot be settled" through negotiations. As this is an international treaty, it is interpreted according to rules set out in the Vienna Convention on the Law of Treaties (the "**Vienna Convention**"), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679, to which both Mongolia and the PRC are party (although the United States is not). Fortunately, we are not left to review the Vienna Convention without guidance; there are several international judicial and arbitral decisions applying the Vienna Convention to other treaties that similarly provide for arbitration of disputes "involving," "relating to," or "concerning" the amount of compensation. The majority of these decisions concerning the scope of such provisions have held that the scope of arbitration may include the question whether an expropriation has occurred.

These cases include those that interpret other BITs concluded by the PRC. Indeed, in *Tza Yap Shum v. Republic of Peru*, the tribunal interpreted a BIT that contains the same operative language. The tribunal found that a narrow interpretation of "involving the amount of compensation" would "invalidate" the arbitration clause. Thus, the host state's consent to arbitration would be illusory, because the investor could not actually have access to arbitration clause unless the host state agreed to allow it. *See Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, at ¶ 148, *available at* https://www.italaw.com/sites/default/files/case-documents/ita0880.pdf (Spanish original). This finding makes eminent sense as it would undermine a central purpose of any BIT to so invalidate the arbitration clause. Leaving the

availability of arbitration in the host state's hands, after a dispute has arisen, would exacerbate the "central concern of investors who are averse to allowing the host State to act as judge and party in measuring the monetary extent of its own liability." *Renta 4 S.V.S.A. et al v. Russian Federation*, SCC Case No. V 024/2007, Award on Preliminary Objections, ¶ 33 (2009), *available at* https://www.italaw.com/sites/default/files/case-documents/ita0714.pdf; *see also* Separate Opinion of Hon. Charles N. Brower, *available at* https://www.italaw.com/sites/default/files/case-documents/ita0715.pdf (concurring in part and dissenting in part). The decision of the *Tza Yap Shum* tribunal was upheld by an annulment committee, which is the body that reviews applications to vacate awards in the ICSID system. *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, 12 February 2015, *available at* https://www.italaw.com/sites/default/files/case-documents/italaw4371.pdf (English original).

The other case concerning the same language as the Treaty in this case – the "involving" formulation – reached the same conclusion and was upheld in national court. The arbitrators concluded that the clause made the existence of an expropriation arbitrable. *See Sanum Investments Ltd. v. Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, ¶ 342 (Dec. 13, 2013), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw3322.pdf. A first-instance court in Singapore disagreed, but the Court of Appeal of Singapore reinstated the arbitrators' decision. *Sanum Investments Limited v. Lao People's Democratic Republic*, [2016] SGCA 57, ¶ 147. Thus, where

PRC BITs are concerned, it appears that all three tribunals (other than the Tribunal in this case) preferred the broader interpretation; the ICSID annulment (reviewing) committee did so as well; and so did the Singapore appellate court. This Tribunal is thus an outlier with regard to PRC BITs, its only companion being the Singaporean judge whose decision was reversed on appeal.

An even more recent award further supports a broad interpretation of the BIT's language. In the PRC-Yemen BIT, under which the parties consented to arbitrate "any dispute relating to the amount of compensation for expropriation," the tribunal found that, in the context of the BIT as a whole, a narrow interpretation limiting arbitral jurisdiction to the amount of damages alone would contradict the treaty's object and purpose. *See Beijing Urban Construction Grp. Co. v. Yemen*, ICSID Case No. ARB/14/30, ¶¶ 78-87 (2017), *available at* www.italaw.com/sites/default/files/case-documents/italaw8968.pdf. This was apparent to the tribunal because the host state could unilaterally eliminate the investor's option to go to arbitration, simply by contesting any element of the underlying question of whether an expropriation had actually occurred. The tribunal therefore held that it had jurisdiction to determine the ultimate question of the existence of an expropriation. *See id.* at ¶¶ 78-87.

In other related contexts, similarly broad conclusions have been reached. In *EMV v. Czech Republic*, the tribunal decided that, under a dispute-resolution clause providing that in a treaty providing for arbitration for disputes "concerning compensation due by virtue of Article 3 paragraphs (1) and (3) [pertaining to

expropriation]," the questions of whether and how an expropriation had occurred were arbitrable. The Czech Republic sought to vacate the award in the English courts – which upheld the award (and its inherent decision on arbitrability), saying:

> The word 'concerning', however, is broad. The word is not linked to any particular aspect of 'compensation'. 'Concerning' is similar to other common expressions in arbitration clauses, for example 'relating to' and 'arising out of'. Its ordinary meaning is to include every aspect of its subject: in this case 'compensation due by virtue of Paragraphs (1) and (3) of Article 3'. As a matter of ordinary meaning this covers issues of entitlement as well as quantification.

Czech Republic v. European Media Ventures SA [2007] EWHC 2851, ¶ 44 (English Comm'l Court).[1] The same holds true for "involving," at used in Article 8(3) of the Treaty in the instant case.

In light of the plain language of the BIT, and the wealth of judicial and arbitral authority and undeniable policy considerations in favor of the broad interpretation of the relevant language, this Court should vacate the Award and hold that Article 8(3) supports the arbitrability of questions of whether expropriation occurred.

[1] While there are occasional decisions going the other way, in the context of Russian and Eastern European treaties, *see, e.g., Berschader v. Russian Federation* (SCC Case No 080/2004) Award, 21 April 2006, *available at* https://www.italaw.com/sites/default/files/case-documents/ita0079_0.pdf; *RosInvest UK Ltd v. Russian Federation* (SCC Case No V 079) Award on Jurisdiction, 5 October 2007, *available at* https://www.italaw.com/sites/ default/files/case-documents/ita0719.pdf, the weight of authority, however, favors the broader interpretation of clauses of this nature and the policy rationale, too, argues for breadth; the narrow interpretation essentially deprives the clauses of any practical significance.

REQUEST FOR AN ORAL HEARING

This petition raises important issues concerning the interests of foreign nationals and a foreign state; therefore, Petitioners respectfully request that the Court schedule oral argument on this petition.

CONCLUSION

For all of the foregoing reasons, the Award should be vacated and the parties compelled to arbitrate Petitioners' claims.

Dated: September 28, 2017
New York, NY

Respectfully Submitted,

/s/ S. Christopher Provenzano_______

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd., plaintiffs, - against - Mongolia, defendant.	Civil Action Number 17 CV 7436 **DECLARATION OF MICHAEL A. GRANNE**

Michael A. Granne, pursuant to 28 U.S.C. § 1746, declares and states as follows:

1. I am an attorney admitted to practice before this Court and a partner of the law firm, Provenzano Granne & Bader LLP, counsel for Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. (collectively, the "**Petitioners**").

2. I submit this declaration on behalf of the Petitioners in support of the Petitioners' Petition to Vacate Arbitration Award, dated September 28, 2017.

3. Attached as Exhibit A to this declaration is a true and correct copy of *Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, Permanent Court of Arbitration, Award (June 30, 2017)].

4. Attached as Exhibit B to this declaration is a true and correct copy of *Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, Permanent Court of Arbitration, Request for Arbitration (February 10, 2010).

5. Attached as Exhibit C to this declaration is a true and correct copy of *Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, Permanent Court of Arbitration, Permanent Court of Arbitration, Procedural Order No. 1 (November 2, 2010).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 28, 2017 in New York, NY.

/s/ Michael A. Granne

Michael A. Granne

EXHIBIT A

PCA CASE Nº 2010-20

**IN THE MATTER OF
AN ARBITRATION PURSUANT TO THE AGREEMENT BETWEEN
THE GOVERNMENT OF THE MONGOLIAN PEOPLE'S REPUBLIC AND
THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA
CONCERNING THE ENCOURAGEMENT AND
RECIPROCAL PROTECTION OF INVESTMENTS
SIGNED ON 26 AUGUST 1991**

- between -

**(1) CHINA HEILONGJIANG INTERNATIONAL ECONOMIC &
TECHNICAL COOPERATIVE CORP.,
(2) BEIJING SHOUGANG MINING
INVESTMENT COMPANY LIMITED, AND
(3) QINHUANGDAOSHI QINLONG
INTERNATIONAL INDUSTRIAL CO. LTD.**

(the "Claimants")

- and -

MONGOLIA

(the "Respondent", and together with Claimants, the "Parties")

AWARD

Arbitral Tribunal

Judge Peter Tomka (President)
Dr. Yas Banifatemi
Mr. Mark Clodfelter

Registry

The Permanent Court of Arbitration

30 June 2017

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LIST OF DEFINED TERMS

939A Licence	A mining licence over the deposit of iron ore at Tumurtei in Khuder *soum* of Selenge *aimag*
1990-1992 Report	Report on the Findings of the Detailed Exploration completed at Tumurtei Iron Deposit and Prospecting and Evaluation completed at the Khust-Uuul Iron Ore Occurrences from 1990 to 1992
1994 Minerals Law	Minerals Law of Mongolia 1994 (30 September 1994; in force on 1 January 1995)
1997 Implementation Law	Law of Mongolia on Implementation of the Minerals Law (1 July 1997; in force on 1 July 1997)
1997 Minerals Law	Minerals Law of Mongolia 1997 (5 June 1997; in force on 1 July 1997)
1998 Minerals Programme	The Minerals Programme adopted by the Government of Mongolia on 12 August 1998 through Resolution No. 144
2001 Licensing Law	Law of Mongolia on Licensing (1 February 2001; in force on 1 January 2002)
2002 Law on Land	Law of Mongolia on Land (7 June 2002; in force on 1 January 2003)
2004 Explosives Law	Law of Mongolia on Control of Explosives and their Circulation (6 May 2004; in force on 1 January 2005)
2006 Minerals Law	Minerals Law of Mongolia 2006 (8 July 2006; in force on 26 August 2006)
Mr. Bayartsogt	Mr. Bayartsogt Luuzandamba
Beijing Shougang	Beijing Shougang Mining Investment Company Ltd
BLT	BLT LLC
China Heilongjiang	China Heilongjiang International Economic & Technical Cooperative Corp
Claimants	China Heilongjiang, Beijing Shougang and Qinlong
Co-arbitrators	Dr. Banifatemi and Mr. Clodfelter.
Darkhan	Darkhan Metallurgical Plant
Erdenes	Erdenes MGL
Mr. Erdenetsog	Mr. Erdenetsog D.
EXIMM	EXIMM LLC

Feasibility Study	A study submitted to the Mongolian government in 1997 by BLT in support of its application for a mining licence describes the Tumurtei deposit
Mr. Ganbold	Mr. Ganbold T.
Mr. Ganjuurjav	Mr. Ganjuurjav S.
Government	Mongolia, the Respondent
Mr. Khurts	Mr. Ch. Khurts
Minutes	The Minutes of the Meeting of the Geological, Scientific and Technical Council at the Ministry of Energy, Geology, and Mining on July 21, 1994.
Mr. Li	Mr. Li Xiaoming
MRPAM	Mineral Resources and Petroleum Authority
Mr. Natsagdorj	Mr. Natsagdorj Luvsandash
Mr. Nergui	Mr. Nergui B
Objection to the Rejoinder	Claimants' Objections to the Rejoinder dated 17 January 2013
PCA	Permanent Court of Arbitration
PRC	Peoples' Republic of China
Qinlong	Qinhuangdaoshi Qinlong International Industrial Co. Ltd
Request for Discontinuance	Respondent's request to the co-arbitrators to discontinue proceedings dated 5 August 2013
Request to call L. Tuya	Respondent's request of 25 January 2013 that the Tribunal order the presence of L. Tuya as a witness.
Resolution No. 160	Resolution No. 160 of the Council of Ministers of the People's Republic of Mongolia passed on April 14, 1990
Respondent	Mongolia, the Government
Mr. Shagdar	Mr. Shagdar B.
SSIA	State Specialized Inspection Agency
Steel Plant	Metallurgical plant complex in Darkhan
Subsoil Law	Law on Subsoil of the Mongolian People's Republic (in force on 1 July 1989)

T-30 Certificate	Certificate of Special Permission of Deposit Mining No. T-30, issued on 21 June 1997
Treaty	Agreement between the Government of the Mongolian People's Republic and the Government of the PRC concerning the Encouragement and Reciprocal Protection of Investments signed on 26 August 1991
Tumurtei Khuder	Tumurtei Khuder LLC
Ms. Tuya	Ms. L. Tuya, Bayartsogt's wife and founder of BLT

I. INTRODUCTION

A. THE PARTIES

1. The claimants in this arbitration are: (1) China Heilongjiang International Economic & Technical Cooperative Corp ("**China Heilongjiang**"), (2) Beijing Shougang Mining Investment Company Ltd ("**Beijing Shougang**"), and (3) Qinhuangdaoshi Qinlong International Industrial Co. Ltd ("**Qinlong**") (together, the "**Claimants**"). China Heilongjiang and Beijing Shougang are State-owned corporations established in accordance with the laws of the Peoples' Republic of China (the "**PRC**"). Qinlong is a limited liability company, also established in accordance with the laws of the PRC.

2. The Claimants are represented in these proceedings by Mr. Peter Turner QC of Freshfields Bruckhaus Deringer LLP, 2 rue Paul Cézanne, Paris 75008, France; by Messrs. John Choong and Jonathan Wong of Freshfields Bruckhaus Deringer LLP, 11th Floor, Two Exchange Square, Hong Kong; and by Ms. Belinda McRae of 20 Essex Street Chambers, 20 Essex St., London, WC2R 3AL, United Kingdom.

3. The respondent in this arbitration is the Government of Mongolia (the "**Government**," "**Mongolia**," or the "**Respondent**").

4. The Respondent is represented in these proceedings by Mr. Gungaa Bayasgalan, State Secretary, Ministry of Justice, Government Building 5, Ulaanbaatar 210646, Mongolia; and by Mr. Michael D. Nolan, Ms. Elitza Popova-Talty, and Mr. Kamel Aitelaj of Milbank, Tweed, Hadley & McCloy LLP, 1850 K St NW # 1100, Washington D.C. 20006, United States.

B. BACKGROUND OF THE DISPUTE

5. A dispute has arisen between the Claimants and the Respondent in respect of which the Claimants have commenced arbitration pursuant to the *Agreement between the Government of the Mongolian People's Republic and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments* signed on 26 August 1991 (the "**Treaty**").

6. The Parties' dispute concerns the alleged expropriation by Mongolia in breach of Article 4(1) of the Treaty of a mining licence (the "**939A Licence**") for the deposit of iron ore located at Tumurtei in Khuder *soum* (a district of the Selenge *aimag* (province)) in Mongolia. Prior to its alleged

expropriation, the 939A Licence was held by Tumurtei Khuder LLC ("**Tumurtei Khuder**"), a Mongolian corporation in which the Claimants held 70 percent ownership.

II. PROCEDURAL HISTORY

7. On 26 December 2006, Mr. Li Xiaoming wrote to Prime Minister of Mongolia, Mr. Miyeegombyn Enkhbold, with what the Claimants term a notice of dispute pursuant to Article 8 of the Treaty.[1]

8. On 9 October 2009, counsel for the Claimants provided the Respondent with further notice of the dispute by way of letter to the Prime Minister of Mongolia, Mr. Sanjaagiin Bayar, captioned "Dispute under the Agreement between the Government of the People's Republic of China (PRC) and the Government of the Mongolian People's Republic (Mongolia) concerning the Encouragement and Reciprocal Protection of Investments 1991 (the Treaty) and under the Foreign Investment Law of Mongolia adopted in 1993 and amended in 2002 (the Law)."

9. On 12 February 2010, the Claimants initiated these proceedings by way of a Request for Arbitration served upon Mongolia pursuant to the Treaty and the Foreign Investment Law of Mongolia. In their Request for Arbitration, the Claimants appointed Dr. Yas Banifatemi, a national of France and Iran, as arbitrator in accordance with Article 8(4) of the Treaty.

10. On 19 May 2010, the Respondent appointed Mr. Mark A. Clodfelter, a national of the United States of America, as arbitrator in this proceeding in accordance with Article 8(4) of the Treaty.

11. On 19 July 2010, the Claimants requested that Ms. Meg Kinnear, Secretary-General of the International Centre for the Settlement of Investment Disputes, act pursuant to Article 8(4) of the Treaty to appoint the President of the Tribunal.

12. On 10 August 2010, Ms. Kinnear appointed Mr. Donald Francis Donovan, a national of the United States of America, as Presiding Arbitrator.

13. On 22 September 2010, the Tribunal circulated an agenda for a procedural meeting to be held in New York on 1 October 2010. On 28 September 2010, the Tribunal wrote further to the Parties, addressing certain points on that agenda.

14. On 30 September 2010, the Parties wrote jointly to the Tribunal, addressing certain matters on the agenda for the procedural meeting.

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[1] Letter dated 26 December 2006 (**Exhibit C-2**).

15. On 1 October 2010, the Tribunal conducted a procedural meeting with the Parties in the offices of Debevoise & Plimpton LLP in New York.

16. On 2 November 2010, the Tribunal issued **Procedural Order No. 1**, concerning the organization of these proceedings. As recorded in Procedural Order No. 1, the Parties agreed that there would be no bifurcation of issues of jurisdiction from the merits and that, instead, the proceedings would be divided into two phases, the first covering jurisdiction and liability, the second, if necessary, quantum.

17. Also on 2 November 2010, the Tribunal wrote to the Permanent Court of Arbitration (the "**PCA**"), requesting that it act to administer the arbitration proceedings. On 3 November 2010, the PCA wrote to the Tribunal, accepting the portions of Procedural Order No. 1 relating to the administration of the arbitration.

18. On 22 November 2010, the Tribunal issued **Procedural Order No. 2**, concerning the Tribunal's remuneration.

19. On 1 March 2011, the Claimants filed their **Memorial**, accompanied by the witness statements of Mr. Bayartsogt Luuzandamba and Mr. Li Xiaoming. In the Memorial, the Claimants stated that "[t]he Claimants no longer pursue claims under other provisions of the Treaty [than Article 4(1)] or under the Foreign Investment Law of Mongolia."[2]

20. On 20 April 2011, the Claimants wrote to the Tribunal, informing it of the decision rendered on 13 April 2011 by the Inter-*soum* Court in Darkhan-Uul ordering that,

> Pursuant to the Article 69.1.5 of the Civil Procedure Code of Mongolia, "Darkhan Metallurgical Plant" State-owned Stock Company is prevented from violating the property rights to protection and preservation in terms of the mining equipment and buildings and facilities of Tumurtei Khuder LLC present at the Tumurtei deposit and from taking any actions at the area where these properties are present for such period until the date of the hearing on jurisdiction and liability, which is set to occur on 14-15 January 2013.
>
> Furthermore, without prejudice to the effect of the Judgment# 633 dated 26 January 2010 of the Inter-*soum* Court in Darkhan-Uul province, the "Darkhan Metallurgical Plant" State-owned Stock Company is obliged, whilst carrying out such activities as set out in the Minerals Law, including carrying out minerals exploration, prospecting, or mining activities on the Tumurtei Mine, devising plans for exploration or developmental activities, or carrying out surveys on the Tumurtei Mine etc., to keep accurate financial records and statements in compliance with the laws and to report the volume or quantity of the products sold accurately, until and during such period, and is prevented from transferring or pledging the license or any portion of the licensed site to others.

21. On 1 September 2011, the Respondent filed its **Counter-Memorial**, accompanied by the witness statements of Mr. Ganjuurjav S. and Mr. Shagdar B. In its Counter-Memorial, the Respondent

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[2] The Claimants' Memorial, para. 4.

objected to the jurisdiction of the Tribunal and submitted a counterclaim for damages for fraudulent misrepresentation.

22. On 3 October 2011, the Respondent submitted a set of 62 requests, outlined in a Redfern Schedule, for the production of documents from the Claimants.

23. On 30 November 2011, the Claimants submitted an **Answer to Respondent's Request for Production of Documents** by which they objected to each of Mongolia's requests.

24. On 23 December 2011, after further exchanges, the Tribunal requested that the Parties confer on the pending requests.

25. On 6 January 2012, the Tribunal convened a conference call during which the Parties updated the Tribunal on the status of the requests for the production of documents, and the Tribunal, while advising that it did not intend to indicate how it might finally rule, asked questions and made observations intended to assist the Parties to reach a resolution.

26. On 24 April 2012, having had no further advice from the Parties, the Tribunal requested confirmation that they had resolved all issues discussed on the 6 January conference call.

27. On 9 May 2012, the Parties advised that they wished to make simultaneous final submissions on the remaining document production issues on 16 May 2012. On that date, they each did so and provided a final Redfern Schedule.

28. On 22 June 2012, the Claimants filed their **Reply**, accompanied by the second witness statement of Mr. Li Xiaoming. In their Reply, the Claimants objected to the Tribunal's jurisdiction with respect to the Respondent's counterclaims.

29. On 3 July 2012, the Tribunal issued **Procedural Order No. 3**, deciding that the hearing would be held from 23 February 2013 through 1 March 2013 in Singapore.

30. On 31 August 2012, the Claimants wrote to the Tribunal, requesting it "to remind the parties that any award rendered by the Tribunal is final and binding and that the parties should not, directly or indirectly, take any steps that may undermine or affect the enforceability of the award." On 4 September 2012, the Respondent wrote to the Tribunal, objecting to the Claimants request. On 6 September 2012, the Claimants wrote further to the Tribunal in respect of their request.

31. On 1 October 2012, the Respondent submitted **Objections to Exhibits and Translations** in respect of certain aspects of the Claimants written submissions.

32. On 6 October 2012, the Tribunal issued **Procedural Order No. 4**, concerning the production of documents.

33. Also on 6 October 2012, the Tribunal issued **Procedural Order No. 5**, declining to issue the "reminder" requested by the Claimants in their letter of 31 August 2012.

34. On 14 December 2012, the Respondent filed its **Rejoinder**, accompanied by the witness statements of Mr. Ch. Khurts and Mr. Nergui B and the expert reports of Ms. Anthea Roberts, Ms. Natsagdorj Taivan, Ms. Tsevegjav Darijav, and Mr. R Zorigt.

35. On 7 January 2013, Mr. Donovan wrote to the Parties, disclosing that:

> Debevoise & Plimpton LLP has taken on the representation of a party to an investor-state arbitration arising under a treaty that includes a provision identical to Article 8(3) of the Agreement between the Government of the Mongolian People's Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments dated 26 August 1991.

Mr. Donovan further requested that, if this disclosure raised an issue of concern to any party, the Tribunal be notified by no later than 15 January 2013.

36. On the same day, Mr. Clodfelter wrote to the Parties, disclosing (a) that his firm, Foley Hoag LLP, had been retained under a treaty that, while it "does not have language resembling that of Article 8(3)," "supersedes a previous treaty between the same States that does have language like that of Article 8(3)," and (b) that a confidential award had been rendered in a previously disclosed case in which he represented the respondent under a treaty containing language similar to that in Article 8(3), as well as other, differing language, with respect to which some of the same issues had been raised that have been raised in the pleadings in this case.

37. On 16 January 2013, the Claimants wrote to the Tribunal to "confirm that they have no issues to raise in relation to the disclosures made in Mr. Donovan's letter dated 7 Jan 2013, and Mr. Clodfelter's letter dated 7 Jan 2013."

38. On 17 January 2013, the Claimants wrote to the Tribunal, objecting to "new arguments and evidence that have been included in the Respondent's Rejoinder" (the "**Objection to the Rejoinder**"). According to the Claimants, "the Respondent has used its second round of written pleadings as an opportunity to respond to the Claimants' Memorial," setting out arguments and evidence that were not raised in the Respondent's intervening Counter-Memorial.

39. On 23 January 2013, the Respondent wrote to the Tribunal in respect of Mr. Donovan's disclosure, stating that:

> after careful consideration of the circumstances in which we find ourselves, including certain information that become public about Debevoise's work as counsel following your January 7, 2013 disclosure, Mongolia does not think the steps outlined in your letter can adequately address the issues that have arisen in light of the Debevoise party representation.

The Respondent accordingly requested that Mr. Donovan resign as President of the Tribunal.

40. On 25 January 2013, the Respondent wrote to the Tribunal, rejecting the grounds of the Claimants' Objection to the Rejoinder. In its letter, the Respondent reviewed the issues raised by the Claimants point-by-point and concluded that, "the material submitted by Mongolia in its Rejoinder was responsive to new assertions and arguments made by the Claimants in its Reply, and to revisit arguments advanced by Mongolia in its Counter-Memorial."

41. Also on 25 January 2013, the Parties exchanged correspondence identifying the witnesses they wished to call for cross-examination. In its letter of that date, the Respondent also requested that the Tribunal order the presence of Ms. L. Tuya as a witness (the "**Request to call L. Tuya**"), notwithstanding that her testimony had not been presented by either side.

42. On 28 January 2013, the Claimants wrote to the Tribunal further regarding the disclosures made by Mr. Donovan and Mr. Clodfelter.

43. On 29 January 2013, the Claimants wrote to the Tribunal regarding the Respondent's Request to call L. Tuya, arguing that the Tribunal's procedural orders do not "extend to individuals who have not been proffered as 'witnesses' by the parties" and that the Parties "are not . . . entitled to request the appearance of an individual who has not given evidence in the proceedings."

44. On 6 February 2013, the Respondent wrote further in respect of the disclosure made by Mr. Donovan and requested the formal adjournment of the hearing.

45. Later on 6 February 2013, the Tribunal issued **Procedural Order No. 6**, adjourning without date the hearing scheduled to begin that month and designating the Secretary-General of ICSID to determine any challenges to arbitrators. On the same day, following the issue of Procedural Order No. 6, Mr. Donovan resigned as President of the Tribunal.

46. On 14 February 2013, Dr. Banifatemi and Mr. Clodfelter (the "**co-arbitrators**") wrote to the Parties, indicating that they "consider the same procedure to apply to the appointment of a replacement arbitrator as was applicable to the original appointment pursuant to Article 8(4) of the Agreement between the Government of the People's Republic of China and the Government of the Mongolian People's Republic concerning the Encouragement and Reciprocal Protection of Investments." The co-arbitrators further indicated that unless the Parties disagreed, they would "seek to reach agreement on the selection of a Chairman within the two-month period following

Mr. Donovan's resignation, failing which either of the Parties may invite the Secretary General of the International Centre for Settlement of Investment Disputes to make the appointment."

47. On 18 February 2013, the Respondent wrote further to the Claimants, reiterating its rejection of the Claimants' Objection to the Rejoinder and requesting, in the event the Claimants maintained their position, that they propose a schedule of further submissions to permit any additional arguments or evidence the Claimants wished to raise to be addressed by both Parties in writing.

48. On 8 April 2013, Dr. Banifatemi and Mr. Clodfelter wrote to inform the Parties that they had not been able to reach agreement on the selection of a new President.

49. On 5 August 2013, the Respondent wrote to the co-arbitrators, noting that six months had passed since the resignation of Mr. Donovan and requesting "[i]n light of Claimants' abandonment of their case, and/or their failure to proceed with their claims" that the co-arbitrators "enter an order providing for the discontinuance of this arbitration" (the "**Request for Discontinuance**").

50. On 7 August 2013, the co-arbitrators wrote to the Parties inviting the Claimants' comments in respect of the Respondent's Request for Discontinuance.

51. On 30 August 2013, Claimants wrote to the co-arbitrators, asserting that "[i]n no way could . . . [they] be said to have abandoned their case," and indicating that they intended "to invite the ICSID Secretary-General to proceed to appoint a replacement President."

52. On 5 and 6 September 2013 respectively, the Respondent and the Claimants exchanged correspondence regarding the Request for Discontinuance. The Parties confirmed that they would try to reach agreement on a replacement President of the Tribunal, and the Respondent reserved its rights with respect to its Request.

53. On 16 December 2013, the Parties jointly invited Judge Peter Tomka to act as Presiding Arbitrator. In the same correspondence, the Respondent reserved its right to ask the Tribunal to hear its Request before the hearing on jurisdiction and liability.

54. On 26 January 2014, Judge Tomka accepted the office of Presiding Arbitrator.

55. On 11 March 2014, the Tribunal invited the Respondent to clarify whether it maintained the Request for Discontinuance.

56. On 17 March 2014, the Respondent indicated that it maintained its Request and asked that the Tribunal order the Parties to undertake simultaneous submissions in respect thereof. On 20 March 2014, the Claimants wrote to the Tribunal regarding the form of such submissions.

57. On 21 March 2014, the Tribunal ordered the Parties to file successive submissions on the Respondent's Request, reserving 24 June 2014 for an in-person hearing.

58. On 3 April 2014, the Tribunal wrote to the Parties, requesting "[w]ithout prejudice to the decision that the Tribunal will take on the Request for Discontinuance" that the Parties reserve their availability during the week of 19-24 January 2015 for a hearing on the jurisdiction, claims, and counterclaims.

59. On 21 April 2014, the Respondent made a submission in respect of its Request for Discontinuance.

60. On 21 May 2014, the Claimants filed their Response to the Request for Discontinuance. Within their Response to the Request, the Claimants requested that the Tribunal vacate the in-person hearing.

61. On 27 May 2014, the Respondent wrote to the Tribunal, agreeing to vacate the in-person hearing and to the Tribunal determining the Request on the basis of the Parties' written submissions.

62. On 29 May 2014, the Tribunal informed the Parties that, in view of their respective correspondence, the in-person hearing on the Respondent's Request for Discontinuance was cancelled.

63. On 13 October 2014, the Tribunal issued **Procedural Order No. 7**, dismissing the Respondent's Request for Discontinuance and deferring all decisions regarding the costs of the Respondent's Request until a later date.

64. On 17 November 2014, the Claimants wrote to the Tribunal regarding the venue of the hearing, the scheduling of the pre-hearing teleconference, and a procedure for the Parties to introduce additional legal authorities in light of the extended time since the Parties' written submissions. The Claimants further recalled their Objection to the Rejoinder of 17 January 2013 and indicated that they "await the Tribunal's determination in this regard."

65. On 21 November 2014, the Respondent wrote to the Tribunal regarding the matter raised in the Claimants' letter of 17 November. With respect to the Objection to the Rejoinder, the Respondent recalled its letter of 25 January 2013 and submitted that "the material submitted by Mongolia in its Rejoinder was responsive to both new arguments and assertions in Claimants' Reply as well as to Claimants' responses to Mongolia's Counter-Memorial."

66. On 4 December 2014, the Tribunal issued **Procedural Order No. 8**, dismissing the Claimants' Objection to the Rejoinder.

67. On 17 December 2014, prior to a pre-hearing teleconference scheduled for that day, counsel for the Respondent wrote to the Tribunal disclosing a serious medical complication that would prevent counsel from participating in the scheduled January 2015 hearing.

68. Later on 17 December 2014, the Tribunal held a pre-hearing teleconference with the Parties, addressing both the Respondent's request for the postponement of the scheduled hearing dates and various procedural matters in relation to the organization of the hearing. Following the teleconference, the Tribunal wrote to the Parties, postponing the scheduled hearing dates.

69. On 19 December 2014, the Parties exchanged further correspondence concerning the postponement of the proceedings.

70. On 21 December 2014, the Tribunal wrote to the Parties, proposing 8-13 June 2015 as dates for the rescheduled hearing. On 26 January 2015, the Claimants wrote to the Tribunal, noting a conflict with the rescheduled hearing dates proposed by the Tribunal and enquiring regarding the possibility of hearing dates in July, August, or September 2015.

71. On 4 February 2015, the Tribunal wrote to the Parties, indicating that it could be available for a hearing on either 8-13 June 2015 or 14-19 September 2015. On 9 and 23 February 2015, the Parties wrote to the Tribunal concerning their preferred dates.

72. On 25 February 2015, the Tribunal wrote to the Parties, fixing 14-19 September 2015 as the dates for the hearing.

73. On 17 June 2015, the Tribunal wrote to the Parties, inviting the Respondent to confirm whether it maintained its Request to call L. Tuya (see paragraph 41 above).

74. On 1 July 2015, the Respondent wrote to the Tribunal withdrawing its Request to call L. Tuya.

75. On 27 July 2015, the Tribunal issued **Procedural Order No. 9**, concerning the organization of the hearing and certain procedural matters discussed with the Parties during the pre-hearing teleconference of 17 December 2014.

76. On 31 August 2015, the Parties made a simultaneous submission of additional documents, as anticipated in Procedural Order No. 9.

77. From 14 to 18 September 2015, the Tribunal convened a hearing at the Peace Palace in The Hague, the Netherlands. The following persons, in addition to the members of the Tribunal, attended the Hearing:

Claimants

Mr. Wang Yuanheng
Claimants' Representative

Mr. Peter Turner QC
Mr. John Choong
Mr. Jonathan Wong
Ms. Stephanie Mbonu
Freshfields Bruckhaus Deringer LLP

Ms. Belinda McRae
20 Essex St. Chambers

Mr. Batzaya
Non-testifying legal expert

Ms. Bayarmaa Dulam

Respondent

Mr. Choijantsan Narantuya
Mr. Zorigt E
The Government of Mongolia

Ambassador Davaadorj (15-18 September)
Ambassador of Mongolia to
Benelux in the European Union

Mr. Orgodol ("Orgoo") Sanjaansuren
Mr. Tserenbadam
Members of the Working Group

Mr. Michael Nolan
Mr. Kamel Aitelaj
Ms. Elitza Popova-Talty
Ms. Julianne Jaquith
Milbank, Tweed, Hadley & McCloy LLP

Mr. Ganzorig
Non-testifying legal expert

Fact Witnesses

Mr. Bayartsogt Luuzandamba
Mr. Li Xiaoming
Mr. Ganjuurjav S.
Mr. Shagdar B (by video-conference)
Mr. Ch. Khurts
Mr. Nergui B

Expert Witnesses

Ms. Natsagdorj Taivan
Ms. Tsevegjav Darijav

Registry

Mr. Garth Schofield
Permanent Court of Arbitration

Court Reporters

Ms. Diana Burden
Ms. Laurie Hendrix

Mongolian/English Interpreters

Ms. Bayarmaa Altannavch Murray
Ms. Unurmaa Janchiv
Ms. Mashbileg Maidrag

Chinese/English Interpreters

Ms. Lori Chen
Ms. Jane Ping Francis

78. On 17 September 2015, in the course of the hearing, the Tribunal provided the Parties with written questions, *inter alia*, inviting the Claimants, in light of their decision in their Memorial to not

pursue their claims under any other provisions than Article 4, paragraph 1, of the Treaty, "to clarify whether their statement at paragraph 75 of the Request for Arbitration stands and whether they continue to rely on the provisions of the BIT on the most-favored nation clause at Articles 3(2) and 9 of the BIT." In their closing presentation, counsel for the Claimants confirmed: "[w]e do not rely on that provision of the Treaty at all in making our jurisdictional case."[3]

79. On 7 December 2015, the Claimants wrote to the Tribunal informing it that the Claimants' witness, Mr. Bayartsogt, had been called in for questioning by Mongolia's Independent Authority Against Corruption. During this meeting, Mr. Bayartsogt was allegedly "presented with a Prosecutor's Order purporting to 'reassign' jurisdiction over the criminal investigation against [him] to the Department of Investigation of the Independent Authority against Corruption." The Claimants noted that they considered this to be irregular and requested the Tribunal to issue an Order restraining the Respondent from taking any "unwarranted steps" against Mr. Bayartsogt. The next day, the Tribunal wrote to the Parties, inviting the Respondent to provide its comments regarding the Claimants' request.

80. On 19 December 2015, the Parties each made submissions with respect to the costs incurred in the proceedings up to that date.

81. On 21 December 2015, the Respondent wrote to the Tribunal, requesting additional time to respond to the Claimants' letter of 7 December 2015.

82. On 22 December 2015, the Claimants submitted a corrected version of its costs submissions.

83. On 8 January 2016, the Respondent responded to the Claimants' letter of 7 December, objecting to the Claimants' request on the grounds that "the domestic criminal proceedings are proper exercise of Mongolia sovereign police powers and are independent and unrelated to Mr. Bayartsogt's involvement in the arbitration."

84. On 29 January and 19 February 2016, the Parties made further submissions regarding the Claimants' request of 7 December 2015.

85. On 3 May 2016, the Tribunal issued **Procedural Order No. 10** in respect of the Claimants' letter of 7 December, deciding as follows:

> a. the circumstances as they now present themselves to the Tribunal are not such as to require the exercise of its power to recommend provisional measures nor to issue any order necessary to the conduct of the proceedings;

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3 Hearing Transcript (Day 5, 18 September 2015), 763:8 to 764:7.

b. each Party has to bear its costs involved in relation to the Request for Provisional Measures.

86. On 11 October 2016, the Claimants wrote to the Tribunal, providing it with a copy of the recently issued judgment of the Singapore Court of Appeal in *Sanum Investments Limited and the Government of the Lao People's Democratic Republic*.

87. On 13 October 2016, the Respondent wrote to the Tribunal, indicating that it did not object to the introduction of the *Sanum* judgment and commenting on the relevance of that decision for the present proceedings.

88. On 19 October 2016, the Tribunal wrote to the Parties, taking note of the judgment by the Singapore Court of Appeal and admitting it into the record.[4]

III. THE FACTUAL RECORD

A. THE CORPORATE ENTITIES

89. Darkhan Metallurgical Plant ("**Darkhan**") is a Mongolian state-owned company, established on 15 April 1990 in furtherance of the Government's Resolution No. 160.[5] Since 1994, Darkhan has operated a steel plant in the vicinity of the city of Darkhan.

90. BLT LLC ("**BLT**") is a limited liability company established in Mongolia on 23 April 1996.[6] BLT was originally engaged in importing medication and foodstuffs from the PRC but amended its Certificate of Registration in August 1996 to include geology among its business activities.[7] BLT was the recipient first of the T-30 Certificate in respect of the Tumurtei deposit and subsequently, on 28 January 1998, of the 939A Licence at issue in these proceedings.[8] BLT transferred the 939A Licence to Tumurtei Khuder on 17 February 2005.[9]

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4 *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, [2016] SGCA 57 (designated as **Authority CLA-153**).

5 Certificate of State Registration No 18/191663 of Darkhan, 15 April 1990 (**Exhibit C-25**).

6 Certificate of State Registration No 25/5308 of BLT, 25 April 1996 (**Exhibit C-33**).

7 Witness Statement of Mr. Bayartsogt, paras. 19-21; Certificate of State Registration No 25/5308 of BLT, 25 April 1996 (**Exhibit C-33**).

8 Certificate of Mineral Mining Licence No 939A, 28 January 1998 (**Exhibit C-1**).

9 Co-operation Agreement between BLT and Tumurtei Khuder, 17 February 2005 (**Exhibit C-58**); Application of BLT for a Licence Transfer to the DGMC, 17 February 2005 (**Exhibit C-59**).

91. Tumurtei Khuder is a Mongolian corporation formed on 19 June 2002 as a joint venture between BLT and Qinlong.[10] As set out in detail below (see paragraphs 142 to 144), Qinlong originally held a 70 percent equity interest in Tumurtei Khuder (with BLT holding the remaining 30 percent) and subsequently transferred a portion of its interest in Tumurtei Khuder to China Heilongjiang and Beijing Shougang in or around January 2004.

92. Qinlong is a limited liability company incorporated in the PRC and engaged in the steel and iron-ore industries whose principal shareholder is Mr. Li Xiaoming.[11] Qinlong was established on 2 December 1997.[12] Qinlong acquired a 70 percent stake in Tumurtei Khuder at its formation on 19 June 2002.[13] Qinlong subsequently alleges it transferred a 41 percent stake of Tumurtei Khuder to China Heilongjiang and Beijing Shougang in or around January 2004.

93. China Heilongjiang is a state-owned enterprise of the PRC engaged in engineering work within and outside of China and the export of equipment and materials in relation to foreign development projects. China Heilongjiang was established on 3 August 1981 and was restructured and reincorporated on 6 June 1991.[14] According to the Claimants, China Heilongjiang acquired an 11 percent stake in Tumurtei Khuder from Qinlong in or around January 2004.[15]

94. Beijing Shougang is a limited liability company incorporated in the PRC and engaged in investment holding. Beijing Shougang was established on 1 December 2003[16] and is a wholly-owned subsidiary of Shougang Corporation, a state-owned enterprise under the direct supervision of the State Council of the PRC with revenue of over ¥130 billion.[17] Beijing Shougang acquired a 30 percent stake in Tumurtei Khuder from Qinlong on 8 January 2004.[18]

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10 Joint Venture Agreement, June 2002 (**Exhibit C-18**).

11 The Claimants' Memorial, para. 17-18; Business Licence of Qinlong, 2 December 1997 (**Exhibit C-16**).

12 Business Licence of Qinlong, 2 December 1997 (**Exhibit C-16**).

13 Joint Venture Agreement between BLT and Qinlong for the establishment of Tumurtei Khuder, 19 June 2002 (**Exhibit C-18**).

14 Business Licence of China Heilongjiang, 25 August 2005 (**Exhibit C-11**).

15 The Claimants' Memorial, para. 149.

16 Business Licence of Beijing Shougang (**Exhibit C-12**).

17 The Claimants' Memorial, paras. 14-15; Beijing Shougang Interim Report 2010 (**Exhibit C-13**).

18 Equity Transfer Agreement between Qinlong and Beijing Shougang, 8 January 2004 (**Exhibit C-56**).

B. DRAMATIS PERSONAE

95. The Claimants have provided the testimony of the following individuals with knowledge of the events giving rise to the Parties' dispute:

(a) Mr. Bayartsogt Luuzandamba ("**Mr. Bayartsogt**") is and has been the Executive Director of Tumurtei Khuder since its formation in 2002. Mr. Bayartsogt has also been the Executive Director of BLT since 2005.[19] Mr. Bayartsogt was previously the representative of Darkhan in Ulan Bator from April 1994 until approximately July 1996.[20] Between September 1988 and 1992, he had been a commercial attaché at the Embassy of Mongolia in Beijing. During that time he "developed contacts with a number of Chinese companies and businessmen."[21]

(b) Mr. Li Xiaoming ("**Mr. Li**") is the Chairman of Tumurtei Khuder and the majority shareholder of Qinlong.[22] Mr. Li was previously the Deputy Head of the Commodities Trading Department of China Heilongjiang between 1991 and 1996[23] and later acted as an informal facilitator and go-between in discussions between BLT and China Heilongjiang.

96. The Respondent has provided the testimony of the following individuals with knowledge of the events giving rise to the Parties' dispute:

(a) Mr. Ganjuurjav S. ("**Mr. Ganjuurjav**") was the General Director of Darkhan from 1990 to 1995 and its Deputy Director from 2001 to 2004. Between 2006 and 2009, Mr. Ganjuurjav was a consultant to the Director of Darkhan.[24]

(b) Mr. Ch. Khurts ("**Mr. Khurts**") is a former Member of the Parliament of Mongolia between 1992 and 1996, the Chairman of the Standing Committee on Environment and Agriculture and the head of the Working Group that drafted the 1994 Minerals Law.[25]

(c) Mr. Nergui B ("**Mr. Nergui**") has been a Director in the Ministry of Mining of Mongolia since October 2012. Mr. Nergui was previously a senior officer and Deputy Director for the Ministry of Industry and Trade, a Deputy Director for the Ministry of Minerals and

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19 Witness Statement of Mr. Bayartsogt, para. 1.

20 Witness Statement of Mr. Bayartsogt, paras. 11-16.

21 Witness Statement of Mr. Bayartsogt, paras. 6-7.

22 Witness Statement of Mr. Li, para. 1

23 Witness Statement of Mr. Li, paras. 3-7.

24 Witness Statement of Mr. Ganjuurjav, para. 1.

25 Witness Statement of Mr. Khurts, para. 1.

Energy, and a senior officer for the National Development and Renovation Committee and the Ministry of Economic Development. In 2006, Mr. Nergui was a Senior Specialist in the Department of Geology and Mining Cadastre for the Ministry of Industry and Trade, in which capacity he was part of the Working Group formed to inspect and review the BLT's licence to the Tumurtei Deposit.

(d) Mr. Shagdar Batsuuri ("**Mr. Shagdar**") was the Director of Darkhan from 1995 until September 1996,[26] serving between the directorships of Mr. Ganjuurjav and Mr. Natsagdorj.

97. In addition to the individuals presented as witnesses in these proceedings, the following individuals were involved in the events giving rise to the Parties dispute:

(a) Ms. L. Tuya ("**Ms. Tuya**") is Mr. Bayartsogt's wife and the founder of BLT.

(b) Mr. Natsagdorj Luvsandash ("**Mr. Natsagdorj**") was the Executive Director of Darkhan from September 1996[27] until 2001[28] Mr. Natsagdorj is Ms. Tuya's brother and Mr. Bayartsogt's brother-in-law.[29]

(c) **Mr. Khuderbat** is a geologist and was an employee of Darkhan until 1996,[30] who had carried out a geological survey in 1990-1992.[31] Mr. Khuderbat was recruited by BLT and was involved in BLT's study of the Tumurtei Deposit and licence applications in 1996 and 1997.[32]

C. THE TUMURTEI DEPOSIT

98. "Mongolia has vast reserves of iron ore."[33] Rights with respect to the portion of those reserves known as the "Tumurtei deposit" are at the heart of this dispute.

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26 State Property Committee Resolution No. 2, dated 14 September 1996 (**Exhibit R-51**).

27 Witness Statement of Mr. Bayartsogt, 17; State Property Committee Resolution No. 2, 14 September 1996 (**Exhibit R-51**).

28 The Respondent's Counter-Memorial, para. 82.

29 Witness Statement of Mr. Bayartsogt, para. 17.

30 The Respondent's Counter-Memorial, para. 37.

31 Witness Statement of Mr. Bayartsogt, para. 28.

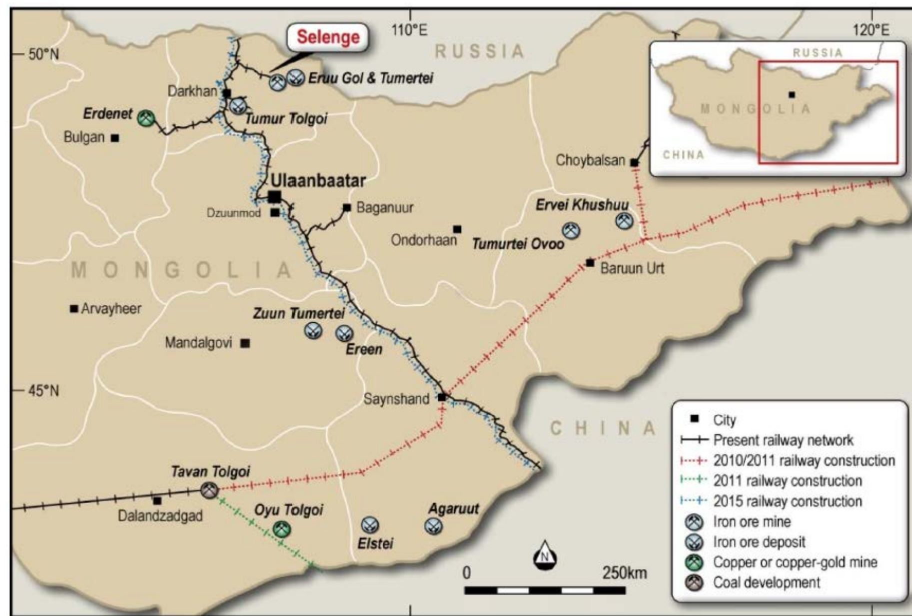
32 Witness Statement of Mr. Bayartsogt, paras. 24-28, 45.

33 The Claimants' Request for Arbitration, para. 7.

99. The feasibility study submitted to the Mongolian government in 1997 by BLT in support of its application for a mining licence (the "**Feasibility Study**") describes the Tumurtei deposit as follows:

> The Tumurtei iron deposit is conveniently located in a favorable location in terms of economy and infrastructure in the region of the Selenge *Aimag* at 95 km from the Dulaankhaan railway station, 130 km from Darkhan town, which is a major industrial center (with a metallurgical plant), and 8-10 km northwest of the 35 kV Khuder-Bugant high-voltage power transmission line.
>
> The topography of the area where the deposit is located is a little mountainous. The highest point lies 1100 to 1250m above the sea level, most of the area being covered with trees.
>
> Ore containing bodies of the Tumurtei iron deposit are mainly divided into two independent sections: "East" Section and "West" Section. These ore bodies are located at 2.0 to 2.5 km from each other.[34]

100. The location of the Tumurtei deposit in the north of Mongolia, adjacent to the Russian border, can be seen in the following map, included as Appendix II to the Claimants' Memorial:



(Source: Haranga Resources, December 2010 Quarterly Activities Report, 31 January 2011 (available at <http://www.haranga.com/pdfs/QuarterlyActivitiesReportDec10Quarter31Jan11.pdf>)

101. The Feasibility Study explains that local infrastructure strategically connects the Tumurtei iron deposit to important urban centres in Mongolia:

34 Feasibility Study (**Exhibit C-17**), p. 23.

> The Tumurtei iron deposit is connected to the city of Ulaanbaatar via railway and road that run through Darkhan town. Darkhan and Ulaanbaatar, 230 km apart, connect via railway and road. The railway station located closest to the deposit is Dulaankhaan Station lying at 100 km. It is 130 km to Darkhan, which is an industrial town. The road from Ulaanbaatar to Sukhbaatar runs by the deposit at 80 to 85 km.[35]

102. The Tumurtei deposit is one of Mongolia's largest iron ore deposits.[36]

D. MONGOLIA'S HISTORICAL ATTEMPTS TO DEVELOP ITS NATURAL RESOURCES

103. In 1924, the State now known as Mongolia declared itself the People's Republic of Mongolia. In the decades that followed, it maintained close political and economic ties with the Soviet Union[37] and effectively functioned as a "satellite of the Soviet Union."[38]

104. Mongolia's iron ore industry was relatively undeveloped during that period.[39] As the Feasibility Study notes, the Soviet Union "said it would supply Mongolia's demand for iron. As a result, an ore extracting and processing plant was not developed in Mongolia."[40]

105. Nevertheless, the Mongolian government did make efforts to study the Tumurtei iron ore deposit during the Soviet era.[41] The Claimants note that the Tumurtei deposit "has been studied since the 1940s."[42] The Feasibility Study describes preliminary exploration of the Tumurtei deposit by the Mongolian government in the 1970s.[43] In the early 1980s, a government study of the deposit confirmed exploitation of it to be economically viable.[44]

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35 Feasibility Study, p. 10 (**Exhibit C-17**).

36 Feasibility Study, p. 20 (**Exhibit C-17**).

37 U.S. State Department, Background Note, Mongolia, pp. 4-5 (**Exhibit R-1**).

38 The Claimants' Memorial, para. 105; The Respondent's Counter-Memorial, para. 8; U.S. State Department, Background Note, Mongolia (**Exhibit R-1**); Feasibility Study, p. 7 (**Exhibit C-17**); Richard Pomfret, 'Transition and Democracy in Mongolia' 52 EUROPE-ASIA STUD. 149, p. 2 (**Exhibit R-2**).

39 Letter from Darkhan Steel Company to the Ministry of Trade and Industry, 21 September 2006 (**Exhibit R-18**); Witness Statement of Mr. Ganjuurjav, 25 August 2011, para. 4; Feasibility Study (**Exhibit C-17**), p. 7; The Claimants' Memorial, para. 105; The Respondent's Counter-Memorial, para. 8.

40 Feasibility Study (**Exhibit C-17**), p. 7.

41 Letter from Darkhan Steel Company to the Ministry of Trade and Industry, 21 September 2006 (**Exhibit R-18**); Feasibility Study (**Exhibit C-17**), p. 7; The Claimants' Memorial, paras. 105 and 127; The Respondent's Counter-Memorial, para. 25.

42 2005-2006 Work Plan (**Exhibit C-23**), p. 1.

43 Feasibility Study (**Exhibit C-17**), p. 7.

44 Feasibility Study (**Exhibit C-17**), p. 7; Witness Statement of Mr. Ganjuurjav, 25 August 2011, para. 5.

106. Following the dissolution of the Soviet Union in 1991, Mongolia underwent a democratic revolution and transitioned to a market-based economy.[45] That transition took a toll on Mongolia's GDP and its ability to finance its own development.[46] Nevertheless, even in 1990, the Mongolian government envisaged the development of a ferrous metallurgical plant and an open cast iron ore mine.[47]

E. THE MONGOLIAN REGULATORY FRAMEWORK FOR MINING

107. In 1988, towards the end of the Soviet era, the Mongolian government passed the Law on Subsoil of the Mongolian People's Republic, which came into force on 1 July 1989 (the "**Subsoil Law**").[48] The Subsoil Law specified that the State owns the subsoil[49] and the subsoil could be used in the exploitation of minerals,[50] including by a non-state enterprise where legislation so provides.[51] Article 14 of the Subsoil Law addressed the issue of mining tenure in the following terms:

> **Grant of the mining tenure area for the purpose of exploitation of a mineral deposit**
>
> A state inspection body on mining shall grant a mining tenure area for the purpose of exploitation/development of a deposit of minerals other than widely distributed minerals.
>
> The Executive Administration of the People's Deputy Khural (Meeting) of the given *aimag* or city shall grant a mining tenure area for the purpose of exploitation of a deposit of a widely distributed mineral and shall register it with the state inspection body on mining. If a deposit of a widely distributed mineral covers the territories of 2 or more number of *aimags* or cities, the Executive Administration of the People's Deputy Khural of the *aimags* and cities involved shall jointly decide the matter regarding the issuance of the mining tenure area.
>
> The Procedure for the issuance of a mining tenure area shall apply to make change to the boundaries of a mining tenure area granted for the purpose of exploitation of a deposit.
>
> The Ministers' Council of the People's Republic of Mongolia shall set out the Procedure for the Issuance of a Mining Tenure Area for the purpose of Exploitation.

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45 U.S. State Department, Background Note, Mongolia (**Exhibit R-1**); Ole Bruun, Ole Odegaard, Mongolia in Transition, 1996 (**Exhibit R-5**); Eddy Lee, 'Initiating Transition in a Low Income Dualist Economy: The Case of Mongolia' 132 INT'L LAB. REV. 623 (1993) (**Exhibit R-6**); Jeffrey Sachs, 'Towards Economic Strategies for Rapid Growth in Mongolia,' Harvard Institute for International Development, September 1997 (**Exhibit R-7**); The Respondent's Counter-Memorial, para. 13; The Claimants' Memorial, para. 107.

46 Ole Bruun, Ole Odegaard, Mongolia in Transition, 1996 (**Exhibit R-5**); Eddy Lee, 'Initiating Transition in a Low Income Dualist Economy: The Case of Mongolia' 132 INT'L LAB. REV. 623 (1993) (**Exhibit R-6**); World Bank, 'World Bank Public Enterprise Review—Half Way Through Reforms,' ENTERPRISE REV., 4 November 1996 (**Exhibit C-28**), p. 38; The Respondent's Counter-Memorial, paras. 11-12; The Claimants' Memorial, paras. 129-30.

47 Resolution No 160 of 1990, 14 April 1990 (Unofficial English Translation) (**Authority CLA-4**, refiled as **Authority CLA-10**).

48 Law of Mongolia on Subsoil 1988 (29 November 1988; in force on 1 July 1989) (**Authority CLA-11**).

49 Subsoil Law, Art. 3 (**Authority CLA-11**).

50 Subsoil Law, Art. 10 (**Authority CLA-11**).

51 Subsoil Law, Art. 9 (**Authority CLA-11**).

> It shall be prohibited to exploit the mineral deposit beyond the boundaries of the mining tenure area.
>
> A mining claim for commonly distributed mineral deposits shall be granted by the Administration Office of the People's Deputy Khural of the city and registered at the Mining and Mineral Resources Authority. In the event of commonly distributed mineral deposits located in the territories of more than two *aimags* or towns, the issue of granting a mining claim shall be jointly decided by the administration offices of the respective People's Deputy Khural.
>
> The regulations on mining claims shall be duly observed when changing borders of mining claims granted for exploiting commonly distributed minerals. The Council of Ministers of the Mongolian People's Republic shall adopt the regulations on granting mining claims for mineral exploitation. It is prohibited to use the mineral deposits surpassing the borders of mining claims.[52]

108. The Parties disagree with respect to the regulatory procedures governing mining rights during this period and in particular whether mining rights could be conferred by Government resolution. According to the Claimants, the Subsoil Law "provided that licences for the mining of non-commonly distributed minerals, including iron ore, could only be granted by a special authority in charge of mining and mineral resources,"[53] and "the Council of Ministers . . . had no authority to grant mining licences."[54] In contrast, according to the Respondent's witness, "[b]ecause there was no Law on Minerals prior to 1994, the Government of Mongolia have regulated these issues by the approval of resolutions, which have had validity as a Law."[55]

109. In July 1990, Mongolia held its first democratic election and began a transition to a market economy. As part of this transition, the Mongolian parliament adopted a series of new legislation, including with respect to minerals, mining, and foreign investment.

110. On 10 May 1993, Mongolia adopted the Foreign Investment Law, which permitted foreign investors to invest in "all areas of production and all services" and in "all parts of the territory of Mongolia," except where prohibited by law.[56] The Foreign Investment Law also provided certain guarantees with respect to the treatment of foreign investments.

111. On 30 September 1994, Mongolia adopted the Minerals Law (the "**1994 Minerals Law**"), which came into force on 1 January 1995 "to regulate the exploration for and the mining of minerals and the protection of the environment in exploration areas and mining concessions within the territory

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52 Subsoil Law, Art. 14 (**Authority CLA-11**).

53 The Claimants' Memorial, para. 106.

54 The Claimants' Reply, para. 34.

55 Witness Statement of Mr. Khurts, para. 6.

56 Foreign Investment Law, Art. 4(1) (**Authority CLA-2**).

of Mongolia."[57] It thereby became part of the "legislation on minerals", which "is comprised of the Constitution, the Subsurface Law, this law, and other relevant legislation which is consistent with those laws."[58] Article 8 of the 1994 Minerals Law empowered the State central administrative body responsible for matters of geology and mining to grant mining licences in the following terms:

> **Article 8. Licence granting body**
>
> 1. The State central administrative body shall grant licences to explore for strategic and special minerals.
> 2. Governors of relevant *Aimags* and the capital city may grant licences to explore for common minerals only with the consent of the State central administrative body.
> 3. The following agencies may grant licences for mining mineral deposits:
>   1) the State central administrative body shall grant licences for mining deposits of strategic and special minerals;
>   2) Governors of *Aimags*, *Soums*, districts and the capital city shall, in accordance with paragraphs 4 and 5 of article 6 of this law, grant mining licences for deposits of common minerals.
> 4. The State central administrative body shall grant mining licences for common minerals which are to be used in porcelain and ceramic works, the production of fire-proof goods and mineral wadding or as raw materials for cement, metallurgical and glass industries, such use to be corroborated by exploration and research.
> 5. An occupier of land may use any common minerals which exist on the surface of land or which may be extracted by non-mining methods for household and other non-commercial purposes without a licence.[59]

112. Articles 28 and 46 of the 1994 Minerals Law govern the suspension and cancellation of exploration and mining licences in the following terms:

> **Article 28. Suspension of exploration work and cancellation of licences**
>
> 1. If an exploration licence holder commits any of the following breaches, the State central administrative body may decide to not to allow further exploration by suspending work for up to 90 days. Suspension may occur if the executor:
>   1) does not perform obligations to finance exploration work under the exploration agreement;
>   2) explores outside the permitted area;
>   3) mines without holding a mining licence for minerals;
>   4) causes conditions which may result in an industrial accident or endanger the health and life of workers;
>   5) does not fulfil planned arrangements for the restoration and protection of the environment or in other ways breaches environmental legislation.

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57 Minerals Law of Mongolia 1994, Art. 1 (30 September 1994; in force on 1 January 1995) (**Authority CLA-9**).

58 Minerals Law of Mongolia 1994, Art. 2(1) (30 September 1994; in force on 1 January 1995) (**Authority CLA-9**).

59 1994 Minerals Law, Art. 8 (**Authority CLA-9**).

2. If the licence holder does not remedy the situation during the period specified in paragraph 1 of this article or if the licence holder has been put into liquidation, become bankrupt or ceased to exist as a legal entity for other legal reasons, the licence-granting body may cancel the licence, and it shall not be responsible for any damage caused by that cancellation unless otherwise provided in the exploration work agreement.

3. The suspension of exploration work and cancellation of an exploration licence shall not release a licence holder from liability to fulfil any obligations remaining under the law or agreement or from paying compensation for damage caused by that licence holder.

4. Exploration licence holders may lodge an appeal against a decision to cancel a licence with the Court.

Article 46. Suspension of mining and cancellation of mining licences

1. Unless otherwise provided by law, licence-granting bodies and authorised inspection agencies may suspend mining in whole or in part, for any period as shall be reasonable to remedy the breaches in the following situations:

   1) in the circumstances provided in sub-paragraphs 4 and 5 of paragraph 1 of article 28 of this law;

   2) if fees, rent or taxes are not paid to central or local Government within the specified time without acceptable reason;

   3) if the basic technology specified in the project, feasibility study, mining or environmental management plan is deviated from.

2. If a lessee fails to rectify a breach referred to in paragraph 1 of this article within the specified time or goes into liquidation, is declared bankrupt, is placed in receivership or ceases to exist as a legal person, the licence-granting body may cancel the mining licence on its own initiative or at the lessee's request.

3. During any period of lawful suspension, a lessee shall not be exempt from any obligation to pay fees, rent or taxes payable pursuant to legislation or and the lease. [60]

113. On 30 March 1995, Mongolia adopted the Law on Environmental Protection, governing *inter alia*, environmental impact assessments.[61] The Government also issued Guidelines on Environmental Impact Assessments.[62]

114. On 5 June 1997, Mongolia adopted a revised Minerals Law (the "**1997 Minerals Law**").[63] The 1997 Minerals Law provided that mining licences would be issued for periods of 60 years, renewable once for 40 years.[64]

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60 1994 Minerals Law, Arts. 28, 46 (**Authority CLA-9**).

61 Law of Mongolia on Environmental Protection (30 March 1995; in force on 5 June 1995) (**Authority CLA-66**).

62 Procedure for Environmental Impact Assessment of Projects, Resolution No 121 of the Government of Mongolia, 29 June 1994 (**Authority CLA-67**).

63 1997 Minerals Law (**Authority RLA-84**).

64 1997 Minerals Law, Arts. 16(6), 18(8) (**Authority RLA-84**).

115. Article 47 on the 1997 Minerals Law provided for the revocation of licences in the following terms:

> **Article 47. Revocation of licenses**
>
> 1. The OGMC shall revoke any license, in accordance with this Article, if it determines that the license holder does not meet the requirements for maintaining eligibility to hold a license as specified in Chapter 3 of this law.
> 2. The OGMC, pursuant to a decision by the head of the OGMC, shall revoke a license on the following grounds:
>   1) that the license holder has lost its eligibility to hold a License in accordance with this law; or
>   2) that the license holder has failed to pay License Fees specified in Article 24 of this law in full or did not pay License Fee and penalty within the time specified in the paragraph 4 of this article; or /This subparagraph was amended by the Law of January 8, 1999/
>   3) that an exploration or mining area has been designated as a special needs land and the license holder has been fully compensated.
> 3. Immediately upon determining the existence of grounds for revocation of a license, the OGMC shall notify the license holder, and any license pledgee, in accordance with the procedures established by this law. The notice shall specifically indicate the grounds for revocation of the license.
> 4. Within thirty (30) days following the receipt of the notice specified in paragraph 3 of this Article, a license holder, or any license pledgee who paid the License Fee and the required penalty, may submit to the OGMC documentary evidence that the grounds for revocation of the license are not valid. /This subparagraph was amended by the Law of January 8, 1999/
> 5. Upon review and analysis of the documentary evidence submitted by the license holder, if the OGMC agrees that the grounds for revocation of the license are not valid, it shall withdraw its notice of revocation and notify the license holder accordingly.
> 6. If the OGMC determines that the documentary evidence submitted by the license holder does not establish invalidity of the grounds for revocation of the license, the head of the OGMC shall revoke the license and notify the license holder and license pledgee accordingly.
> 7. The holder or license pledgee shall have a right to file a complaint with the court within thirty (30) days following the date of issuance of the decision.
> 8. If the license holder or the license pledgee files a complaint with the court, no license shall be issued with respect the license area until a valid court ruling has been made.
> 9. The OGMC shall notify the professional inspection institution and the GMDA of the revocation of a license, and in case of revocation of a mining license, the OGMC shall notify the Ministry of Finance, and publish an official notice informing the public of the revocation. /This paragraph was amended by the Law of September 1, 2000/[65]

Article 52 of the 1997 Minerals Law further set out a schedule of fines for other violations of the law, culminating in the following steps:

65 1997 Minerals Law, Art. 47 (**Authority RLA-84**).

> Where a license holder continues to violate laws with respect to environmental protection, mine operation safety regulations, or the provisions of its environmental protection plan, the exploration and mining activities of such a holder be suspended for up to 60 days, and if such deficiencies are not eliminated within this period, the exploration activities of the license holder shall be terminated or, in the case of an operating mine, the mine shall be closed.[66]

116. In conjunction with the adoption of the 1997 Minerals Law, Mongolia also adopted the Law of Mongolia on Implementation of the Minerals Law (the "**1997 Implementation Law"**), addressing the interplay between the new legislation and existing licences. The 1997 Implementation Law provided in relevant part as follows:

> Article 1. All exploration and mining licenses issued before July 1, 1997 shall be re-registered within three months following the effective date of the Minerals Law.
>
> Article 2. The license holder, or the license holder's duly authorized representative, shall file the required re-registration documents with the Department of Geology and Mining Cadastre (DGMC) in accordance with Article 1 of this Law. The application for reregistration shall contain information with respect to the coordinates of the relevant exploration or mining area shown on official maps, the license certificate, and other relevant documents.
>
> [. . .]
>
> Article 6. If a license holder does not apply for re-registration pursuant to the Article 1 of this Law, or does not make the required payment pursuant to Article 5 of this Law, the license holder shall not have the rights and obligations referred to in Articles 40, 41 and 42 of the Minerals Law. In addition, the such holder's license shall be canceled and the license area will be available for licensing to other applicants.[67]

117. The 1997 Implementation Law also provided that "[i]n cases where a mineral deposit was discovered, and reserves determined, by exploration activities paid for from the State budget, the holder of the mining license with respect to such deposit shall pay back to the State the exploration costs previously incurred by the State, on a straight line basis, over the five (5) year period commencing as of the effective date of the Minerals Law."[68]

118. On 22 January 1998, Mongolia adopted a revised Law on Environmental Impact Assessments, which elaborated on the requirements of the prior guidelines on Environmental Impact Assessments and set out a schedule of fines for non-criminal violations of the law.[69]

119. On 12 August 1998, the Government of Mongolia adopted Resolution No. 144, adopting a Minerals Programme (the "**1998 Minerals Programme**") setting out general policy guidance in

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66 1997 Minerals Law, Art. 52(6) (**Authority RLA-84**).

67 Law of Mongolia on Implementation of the Minerals Law (1 July 1997; in force on 1 July 1997) (**Authority CLA-3**).

68 1997 Implementation Law, Art. 7 (**Authority CLA-3**).

69 Law of Mongolia on Environmental Impact Assessments, 22 January 1998 (**Authority CLA-6**).

the development of the minerals sector, including with respect to foreign investment and environmental protection.[70]

120. On 1 February 2001, Mongolia adopted a Law on Licensing (the "**2001 Licensing Law**").[71] Articles 13 and 14 of the 2001 Licensing Law provided generally for the suspension or revocation of a licence in the following terms:

> **Article 13. Suspending a license**
>
> 13.1. If the terms, timelines or requirements of a license have been breached, the licensing institution may suspend the license for up to three months upon the conclusion of a relevant inspection body.
>
> 13.2. The licensing institution shall inform the license holder and relevant tax department in writing within 3 days of such suspension.
>
> 13.3. The licensing institution shall stop the suspension of the license upon elimination of the circumstances, which have led to such suspension.
>
> **Article 14. Revoking a license**
>
> 14.1. The licensing institution shall revoke a license in the following cases:
>
> 14.1.1. if a license holder has applied so;
>
> 14.1.2. if the legal entity [license holder] has been dissolved;
>
> 14.1.3. if it is proven that false application documents have been submitted to receive the license;
>
> 14.1.4. if the terms and requirements of the license have been breached several times or have been egregiously breached;
>
> 14.1.5. if the demand to rectify reasons of the license suspension has not been met within the suspension period.
>
> 14.2. The licensing institution shall inform the license holder and relevant tax department of such revocation within 3 days after issuing such decision.[72]

Article 2 of the 2001 Licensing Law addressed the interaction of that law with other relevant legislation in the following terms:

> **Article 2. Other relevant legislation on Licensing**
>
> 2.1. Legislation on licensing shall consist of this Law, Civil Code and other legislative acts consistent with these laws.
>
> 2.2. If an international treaty to which Mongolia is a party is inconsistent with this Law, then the provisions of the international treaty shall prevail.

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70 Resolution No 144 of the Government of Mongolia (Minerals Programme), 12 August 1998 (**Authority CLA-68**).

71 Law of Mongolia on Licensing (1 February 2001; in force on 1 January 2002) (**Authority CLA-69**).

72 2001 Licensing Law, Arts. 13-14 (**Authority CLA-69**).

> 2.3. Licenses required for use of land and natural resources shall be governed by the Law of Land of Mongolia, the Law on Subsoil, the Law on Specially Protected Area, the Law on Natural Plants, the Hunting Law, the Law on Animals, the Forest Law and Water Law, the Law on Foreign Trade of Rare Animals and Plants and Products derived from thereof, and the Law of Mongolia on Minerals.[73]

121. On 7 June 2002, Mongolia adopted a revised Law on Land (the "**2002 Law on Land**").[74] Articles 33 and 40 of the 2002 Law on Land provided for the grant and revocation of land possession and usage rights in the following terms:

> **Article 33. Granting Land Possession Certificates**
>
> 33.1. The issue of granting land possession certificates to Mongolian citizens, companies and organizations shall be decided as follows:
>
> 33.1.1. In accordance with the general land management plans and the annual plans approved by the Citizens Representatives' Khurals of respective *aimags*, the capital city and districts, Governors of relevant levels shall make decisions to grant land into possession in compliance with provisions 29.1, 29.2 and 29.3 of this law, as well as to grant land for necessary utilization to state budgetary organizations.
>
> 33.1.2. Governors of corresponding level shall solve the issue of giving certificates for land possession to citizens, companies and organizations for purposes other than those referred to in provision 33.1.1 of this article, or land exceeding the size stipulated in provisions 29.1, 29.2 of this Law through a land auction or tendering process. Regulations for tendering or auctioning shall be set forth by the Government.
>
> 33.2. If the person who received the notification for the certificate payment upon resolution in accordance with provision 33.1.2 of this law, does not pay it within the time required, the right to possession of that land certificate shall be re-auctioned.
>
> 33.3. Any disputes related to decisions on land possession by certificate shall be settled in reference to provision 60.1.1 of this law.
>
> 33.4. It shall be prohibited to give into possession land other than that marked as available for possession in the land management plans of *aimags*, the capital city, *soums* and districts.
>
> [. . .]
>
> **Article 40. Termination of Certificate Possession Rights**
>
> 40.1. Governors of *aimags*, the capital city, *soums* and districts shall terminate certificates in the following circumstances:
>
> 40.1.1. if the certificate holder has consistently or seriously violated obligations set forth in the land legislation, and provisions and conditions of the land possession contract;
>
> 40.1.2. if conclusions of an authorized organization proved that the land has been used to detriment of human health, environment protection, and interests of national security;
>
> 40.1.3. if a certificate transferred from others is not registered, and a new contract is consequently not made;
>
> 40.1.4. if recommendations made upon the general environmental impact assessment are not implemented;

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73 2001 Licensing Law, Art. 2 (**Authority CLA-69**).

74 Law of Mongolia on Land (7 June 2002; in force on 1 January 2003) (**Authority CLA-94**).

40.1.5. if the certificate holder has not paid land fees payable according to the law, on time and in full;

40.1.6. if the land has not been used for the purposes set forth in the contract in subsequent two years' time without solid justification.

40.2. In case circumstances set forth in provision 40.1 of this law are proven, governors of *aimags*, the capital city, *soums* and districts shall issue an order terminating the certificate and notify of this the certificate holder or the person who has taken the certificate as collateral.

40.3. If the certificate holder or the person who has taken the certificate as a collateral considers the governor's decision illegitimate, he/she shall have the right to appeal to court within 10 working days after the date of the governor's order.

40.4. Governors of *aimags*, the capital city, *soums* or districts shall notify the state administrative organization in charge of land issues of their decision to terminate a certificate and shall have the changes made to the national registry.

40.5. If the certificate holder or the person who has taken the certificate as collateral appeals to court, a new land possession certificate for this land shall not be issued until the valid court decision is made.[75]

122. On 6 May 2004, Mongolia adopted a Law on Control of Explosives and their Circulation (the "**2004 Explosives Law**").[76] Article 11 of the 2004 Explosives Law supplemented the requirements of the 2001 Licensing Law with respect to explosives activities as follows:

[Article] 11. Requirements for explosive works

11.1 In addition to the provisions of paragraph 11 of the Law on special permits for business Activities [the 2001 Licensing Law] the following requirements shall be imposed:

11.1.1 to employ professional staff;

11.1.2 to ensure storage facilities with a guard squad for the explosives and related tools;[77]

123. On 8 July 2006, Mongolia adopted a further revised minerals law (the "**2006 Minerals Law**").[78] Article 5 of the 2006 Minerals Law addressed in the following terms the issue of State ownership or participation in mineral deposits of strategic importance or where the exploration of the deposit was funded by the State:

5.3 The percentage of the State share in a minerals deposit shall be established by an agreement on the exploitation of the deposit where State funded exploration was used to determine reserves.

75 2002 Law on Land, Arts. 33, 40.

76 Law of Mongolia on Control of Explosives and their Circulation (6 May 2004; in force on 1 January 2005) (**Authority CLA-75**).

77 2004 Explosives Law, Art. 11 (**Authority CLA-75**).

78 Minerals Law of Mongolia 2006 (8 July 2006; in force on 26 August 2006) (**Authority RLA-85**).

5.4 The State may participate up to 50% jointly with a private legal person in the exploitation of a minerals deposit of strategic importance where State funded exploration was used to determine proven reserves. The percentage of the State share shall be determined by an agreement on exploitation of the deposit considering the amount of investment made by the State.

5.5 The State may own up to 34% of the shares of an investment to be made by a license holder in a mineral deposit of strategic importance where proven reserves were determined through funding sources other than the State budget. The percentage of the State share shall be determined by an agreement on exploitation of the deposit considering the amount of investment made by the State.

5.6 A legal person holding a mining license for a mineral deposit of strategic importance shall sell no less than 10% of its shares through the Mongolian Stock Exchange.[79]

The 2006 Minerals Law also added the requirement that "[a] mining license for the area explored and the reserve determined through State budget funding shall be granted through tender."[80] Finally, the 2006 Minerals Law provided for the revocation of licenses as follows:

Article 56. Revocation of licenses

56.1. The State administrative agency shall revoke a license on the following grounds:

56.1.1. the license holder has failed to meet the requirements of Articles 7.2[81] and 31[82] of this law;

56.1.2. the license holder has failed to pay the license fees within the specified period;

56.1.3. an exploration or a mining area has been designated as special purpose territory and the license holder has been fully compensated;

56.1.4. the exploration expenditures of the particular year are lower than the minimum cost of exploration set forth in Article 33[83] of this law;

56.1.5. the State central administrative agency in charge of the environment has decided, based on a report of the local administrative bodies that the license holder had failed to fulfill its environmental reclamation duties.

56.2. Within five (5) business days following the determination that grounds for license revocation exist, the State administrative agency shall notify the license holder. The notice shall specifically indicate the grounds for the revocation of the license.

56.3. If the license holder disagrees with the grounds indicated in the notice as set forth in Article 56.2 of this law the license holder shall submit documentary evidence to the State administrative agency.

56.4. The State administrative agency shall review the documents as set forth in article 56.3 of this law and if it determines that the documentary evidence submitted by the license holder does not establish invalidity of the grounds for license revocation, the license shall be revoked and the license holder notified accordingly.

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79 2006 Minerals Law, Art. 5 (**Authority RLA-85**).

80 2006 Minerals Law, Art. 26.9 (**Authority RLA-85**).

81 Article 7.2 requires that a license holder be a "legal person duly formed and operating under the laws of Mongolia and a Mongolian taxpayer" throughout the duration of the license.

82 Article 31 of the 2006 Minerals Law relates to the payment of licensing fees and the minimum amounts that a license holder is required to expend on exploration in each year of the license.

83 Article 33 of the 2006 Minerals Law also relates to the minimum amounts that a license holder is required to expend on exploration in each year of the license.

56.5. As set forth in the Article 56.4 of this law, the license holder shall have a right to file a complaint with the court if it disagrees with the decision to revoke its license. The court shall not suspend the revocation decision as set forth in Article 46.1.3 of the Law On Administrative Procedure;

56.6. If the license holder has filed a complaint with the court, no license shall be issued in the license area until a valid court ruling has been made.

56.7. The State administrative agency shall notify the professional inspection agency if an exploration license is revoked and the State administrative agency in charge of taxation if a mining license is revoked and it shall be published in a daily newspaper.[84]

F. THE ESTABLISHMENT OF DARKHAN AND INITIAL EXPLORATION OF THE TUMURTEI DEPOSIT

124. On 14 April 1990, shortly prior to Mongolia's democratic transition, the Government of Mongolia adopted Resolution No. 160 concerning the establishment of a Steel Plant at Darkhan and the mining of the Tumurtei Deposit. As translated by the Claimants, Resolution No. 160 provides as follows:

> 1. THAT the Agreement made by and between "Mongol Impex" Corporation under the authority of the Ministry of the Economic Foreign Relations & Procurement and Itochu Corporation of Japan on the establishment of a Metallurgical Plant Complex in Darkhan with an annual capacity of 100.0 thousand tons of steel roll be deemed commendable.
> 2. THAT the State Commission for the Social and Economic Development be obliged to specify and implement the economic and social development plan so that an iron smelting and rolling mill plant of the Metallurgical Mill Plant Complex be built and presented into exploitation from 1990 to 1993 and a mill plant producing reduced iron from iron ore from 1993 to 1995.
> 3. THAT an ore extracting open-cast mine relying on the Tumurtei iron deposit be built by and before 1994 and the Mine and the Metallurgical Plant Complex be together reorganized into a Metallurgical Mill Plant Kombinat.
>
> [. . .][85]

The Respondent's translation of the same portions of Resolution No. 160 differs significantly and provides as follows:

> 1. To support the contract concluded between the "Mongolimpex" Society of the Ministry of Foreign Economic Relations and Procurement and the "Itochu" company of Japan on the construction of a 100.0 thousand tons of steel casting per year capacity plant compound in Darkhan city by way of a loan from the state of Japan.
> 2. To order the State Committee for Social and Economic Development to build the plant compound in 1990-1993 to produce ferrous steel casting and the plant workshop to deliver iron product from iron ore during 1993-1995, and to include this project into the economic and social development plan.
> 3. To establish an open mine to exploit the "Tumurtei" iron ore deposit by 1994 and to establish the mine and the ferrous metallurgical plant complex as "Ferrous Metallurgy Plant".

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[84] 2006 Minerals Law, Art. 56 (**Authority RLA-85**).

[85] Resolution No 160 of 1990, 14 April 1990 (**Authority CLA-10**).

[. . .][86]

125. Darkhan was incorporated on 15 April 1990, immediately following Resolution No. 160, and the steel plant (the "**Darkhan Plant**") commenced operation on 4 July 1994.[87] The Darkhan Plant was designed to produce steel from scrap metal or from reduced iron, *i.e.*, iron derived from the reduction of the oxidation state of iron oxide ore.

126. The Parties disagree as to whether or not Resolution No. 160 accorded Darkhan rights with respect to the Tumurtei deposit, and also on the extent to which the Tumurtei deposit was explored before BLT applied for a licence to explore and mine it. According to the Claimants, "Resolution 160 did not confer specific rights on any entity, much less on [Darkhan]"[88] and Darkhan "had not been carrying out work on the Tumurtei deposit for 'more than a decade' in 1995."[89] In contrast, according to the Respondent, "the Council of Ministers gave final approval on April 14, 1990 both to build a plant in Darkhan city and to assign the Tumurtei deposit to the newly-formed state company created to run the complex."[90] Thereafter, "Darkhan continued in 1991 to do exploration work at the Tumurtei iron ore deposit in order to prepare the area for mining and to establish the grade of iron ore it would have to process at the steel plant and separation facility."[91]

127. Notwithstanding the Parties' different understanding of events at the time, the record includes certain correspondence from Darkhan in 1991 (during the period when Mr. Ganjuurjav was General Director) concerning the Tumurtei deposit:

(a) On 18 March 1991, Darkhan wrote to the Geology Survey Expedition stating that:

> There is a need to select proper techniques and technologies based on research on attribution of iron ore at Tumurtein [*sic*] and Tumurtolgoi, near the Black Iron Combination, Darkhan City, as the production using iron ore and utilization of second shift of this factory is going to start in 1995. Therefore, please get 350 kg iron ore sample from each deposit that has medium chemical component and can be mined and used during the utilization based on agreement that is going to be established with your organization.[92]

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86 Resolution of the Council of Ministers of the People's Republic of Mongolia No. 160, dated April 14, 1990 (**Exhibit R-21**).

87 Act of the Government Commission to Hand Over the Metallurgical Factory in Darkhan City, 4 July 1994 (**Exhibit C-27**).

88 The Claimants' Reply, para. 34; *see also* Hearing Transcript (Day 1, 14 September 2015) 102:5 to 103:6.

89 The Claimants' Reply, para. 39.

90 The Respondent's Counter-Memorial, para. 29.

91 The Respondent's Counter-Memorial, para. 35.

92 Letter from Darkhan to Geology Survey, 18 March 1991 (**Exhibit R-31**).

(b) On 21 May 1991, Darkhan wrote to the Executive Administration, ADH, Darkhan City, stating that "[t]he mining of iron ore at Tumurtei shall start in 1995." [93]

(c) On 7 November 1991, Darkhan wrote to the "Mongol Impex" Union, seeking quotations from foreign suppliers for an iron separation plant, "which will be second plant of Black Iron Factory, Darkhan City, that separates iron ore, Tumurtei and Tumurtolgoi, using coal of Shariin Gol." Darkhan went on to specify that "[t]he capacity of the factory can be 75-150 ton and the separated product must be composed of more than 93% iron, competent to make good quality steel in electric arc oven, and can be used as substitute of residual iron and main row material."[94]

128. The Minutes of the Meeting of the Geological, Scientific and Technical Council at the Ministry of Energy, Geology, and Mining on 21 July 1994 (the "**Minutes**") [95] discussed a "Report on the Findings of the Detailed exploration completed at Tumurtei Iron Deposit and Prospecting and Evaluation completed at the Khust-Uuul Iron Ore Occurrences from 1990 to 1992", authored by "Khuderbat N. and Noostoi Ts" (the "**1990-1992 Report**"). The Minutes relate that "in March 1990, a detailed exploration and a prospecting-evaluation work were conducted at the Tumurtei iron deposit . . . in accordance with the proper methodologies" and "the deposit was prepared for extraction."[96] The Minutes further state:

> The report contains necessary information regarding geological formation, minerals distribution, shape and size of orebodies, mineralization, chemical constituents, technological aspects of ore, contents of trace minerals and contaminants, and mining technical condition and hydrogeological condition of the deposit, etc.[97]

129. According to the Feasibility Study subsequently submitted by BLT, "[t]he detailed exploration completed at the Tumurtei iron deposit was discussed at the meeting of the State Minerals Council of Mongolia dated 13 February 1995 and its resources were approved."[98]

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[93] Letter from Darkhan to Executive Administration, ADH, Darkhan City, 21 May 1991 (**Exhibit R-34**).

[94] Letter from Darkhan to Mongol Impex Union, 7 November, 1991 (**Exhibit R-28/R-60**).

[95] Meeting Minutes No. 80 of the Geological, Scientific and Technical Council at the Ministry of Energy, Geology and Mining, 21 July 1994 (**Exhibit C-24**).

[96] Meeting Minutes No. 80 of the Geological, Scientific and Technical Council at the Ministry of Energy, Geology and Mining, 21 July 1994, at p. 1 (**Exhibit C-24**).

[97] Meeting Minutes No. 80 of the Geological, Scientific and Technical Council at the Ministry of Energy, Geology and Mining, 21 July 1994, at p. 1 (**Exhibit C-24**).

[98] BLT, Feasibility Study of the Exploitation of the Tumurtei Deposit, March 1997, at p. 16 (**Exhibit C-17**).

130. The record also includes certain government resolutions and correspondence from Darkhan in 1995 and 1996 (during the period when Mr. Shagdar was General Director) concerning the Tumurtei deposit:

(a) On 3 February 1995, Darkhan wrote to the Mongolian National Development Authority, reporting on the deposit as follows:

> As stated in the order # 160, 1990, by the Minister's Counsel, PRoM (In old name), steel cast factory should be established in 1990-1993, resource survey of iron ore should be conducted in 1990-1992 and iron separation from ore factory shall be built starting from 1994. Corresponding to above order, the detailed survey at Tumurtei Iron Ore Deposit, located at north east, 130 km, from Darkhan, had done, and related research on possibilities to build Separated Iron Factory had conducted.
>
> There is necessity to supply Metallurgical Factory with enough row material by substituting residual iron with separated iron, as today's Mongolian condition is short of it.
>
> Capacity of the Separated Iron Factory have selected as 225000 ton and Mining capacity as 562500 ton. According to this option, total of 27.6 million USD exporting trade and 9.4 billion tugrug of profit shall be made by sparing from domestic use in case of Separated Iron Factory and Mining Plant establishment, and these conditions are formulating core foundation to build such factory immediately.
>
> The technical and economical basis for the Separated Iron Factory and Tumurtei Mining shall be developed based on foreign donation and credit, and related data and researches shall be submitted by our side. Mongolians shall contribute in making related conclusions and doing technical and economical calculation suited for Mongolian condition.[99]

(b) On 9 February 1995, Darkhan wrote to the Ministry of Environment, requesting climate, soil, and earthquake data in relation to the Tumurtei deposit as follows:

> The second shift factory and mining of our Combination are planned to build at industry region, Darkhan *soum,* Darkhan-Uul *aimag,* and Tumurtei Deposit, Khuder *soum,* Selenge *aimag* (north latitude 49o 41'00" and longitude 107o 19'30""), therefore, please, submit official information on climate, soil and earthquake of above places.
>
> Some necessary indications are attached.[100]

(c) On 6 May 1995, Darkhan wrote to the Mongolian National Development Authority, requesting "your suggestion after reviewing technical and economical preestimation of Tumurtei Deposit Mining and Separated Iron Factory."[101]

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99 Letter from Ganjuurjav (Darkhan) to Batsukh, Technology and Investment Policy Department, Mongolian National Development Authority, 3 February 1995 (**Exhibit R-41**).

100 Letter from Darkhan to Ministry of Environment, 9 February 1995 (**Exhibit R-37**).

101 Letter from Darkhan to Mongolian National Development Authority, 6 May 1995 (**Exhibit R-36**).

(d) In early 1996, the Government of Mongolia issued a Decree on Measures to be Taken to Improve the Capacity Utilization of the Darkhan Metallurgical Plant that discussed the Tumurtei deposit in the following terms:

> In order to exploit the capacity of the Darkhan Metallurgical Plant within a short timeframe, and to provide support in ensuring its normal production operations, IT IS RESOLVED to:
>
> [. . .]
>
> 8. Instruct the National Development Agency (Ch. Ulaan), the Ministry of Trade and Industry (Ts. Tsogt) and the Ministry of Energy, Geology and Mining (Jigjid) to take a set of measures in connection with building and commissioning the Direct-Reduced Iron Plant and the Tumurtei Open-Pit Mine between 1996 and 1998, in order to consistently supply the Metallurgical Plant with raw materials and increase the export revenue by using iron ore reserves of our country.
>
> 9. Instruct the Ministry of Finance (E. Byambajav), the National Development Agency (Ch. Ulaan), and the Ministry of Trade and Industry (Ts. Tsogt) to finance the funding sources required for developing technical and economic feasibility study reports and constructing the Tumurtei Open-Pit Mine and the Direct-Reduced Iron Plant from the State Budget as well as the loans and grant aids provided by foreign countries and international organizations.
>
> 10. Instruct the National Development Agency (Ch. Ulaan), the Ministry of Trade and Industry (Ts. Tsogt) and the Ministry of Infrastructure Development (Sandalkhaan) to develop and submit to the Government technical and economic feasibility study reports on the Tumurtei Open-Pit Mine and the Direct-Reduced Iron Plant along with the related infrastructure within the 2nd quarter of 1996.[102]

(e) On 2 February 1996, Darkhan wrote to the Governor of Selenge *aimag,* with the subject "Requesting Land", as follows:

> By the resolution # 160, April 1990, of Ministers' Counsel [*sic*] of People's Republic of Mongolia, resolved to establish Iron Ore Open Mining at Tumurtei Deposit located at Khuder *soum,* Selenge *aimag*.
>
> Consistent with this resolution, technical and technological research of the open mining and separated iron factory conducted during 1991-1993 and development of technical and economical basis is planned to start in 1996.
>
> Please, send your suggestion after reviewing technical and economical preestimation of Tumurtei Deposit Mining and Separated Iron Factory.
>
> Hence, please permit this land to our possession according to the Mongolian Law on Land, as it is necessary to form soil, water, climate and electricity supply.[103]

(f) On 3 April 1996, Darkhan wrote to the Ministry of Energy, Geology and Mining with the subject "Request on permission to possess Iron Ore Deposit land, Tumurtei", as follows:

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[102] Decree of the Government of Mongolia to Darkhan, 1996 (**Exhibit R-124**).

[103] Letter from Darkhan to Selenge Aimag Governor, 2 February 1996 (**Exhibit R-38/R-43**).

> Article 3 of resolution # 160, April 14, 1990, by Ministers' Counsel [*sic*] of People's Republic of Mongolia, on some activities to establish black metallic factory, stated that Bed-rock Mining Open Deposit should be established and further initiation of Black Metallic Factory Complex relying on Tumurtein [*sic*] Iron Ore Deposit would take place.
>
> Furthermore, make establishment draft of the Tumurtein [*sic*] bed-rock mining that includes drawing and project and submit them to the Government within first half of this year as stated in 8th meeting minutes of the Government meeting on 12th of February of this year.
>
> Based on above decision, our factory prepared technical and economical preanalyze for possession of Tumurtein [*sic*] Deposit and mining of bed-rock which is the row material for our factory. We approved drawing task of the Technical and Economical Indication that highlights above tasks and established agreement for its implementation with Mining Institute.
>
> Official approval of [] your department is crucial in solving investment for implementing this project and finalizing the Technical and Economical Indication, generated by the Mining Institute, in line with international standard level.[104]

(g) Also on 3 April 1996, Darkhan wrote again to the Governor of Selenge *aimag* with the subject "Requesting Land", as follows:

> In Article 3 of resolution # 160, 1990, on some activities to establish black metallic factory, approved by Ministers' Counsel [*sic*] of People's Republic of Mongolia, stated "Bed-rock Mining Open Deposit should be established within 1994 relying on Tumurtein [*sic*] Iron Ore Deposit and further initiation of Black Metallic Factory Complex would take place by reorganizing the mining and Black Metallic Factory Complex into Black Metallic Combination"
>
> In the 8th note of the Government on February 12 of this year, ruled related organizations to finalize technical and economical basis for Black Iron Factory Complex and submit it to the Government within first quarter of this year.
>
> In accordance with above ruling, the work to develop technical and economical basis of the open mining of tumurtei iron ore and separated iron factory in cooperation with Mining Institute have started.
>
> By this technical and economical basis, there is need to establish mining of tumurtei iron ore, separated iron factory, electric line, road, railway, village and other related constructions between Khuder and Eruu *soum* of your *aimag*.
>
> Hence, we ask you to permit land possession and make official decision of *Aimag's* Governor according to Mongolian Law on Land for the construction of above complex.
>
> Please, consider that this implementation of this project shall beneficially impact development of Selenge *aimag* and badget [*sic*] formation.[105]

(h) On 5 June 1996, Darkhan wrote further to the Ministry of Energy, Geology and Mining with the subject "Tumurtei Mining and Direct S[e]paration Factory's Technical and Economical Basis elaboration", as follows:

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[104] Letter from Darkhan to Ministry of Energy, Geology and Mining, 3 April 1996 (**Exhibit R-39**).

[105] Letter from Darkhan to Governor's Office of Selenge Aimag, 3 April 1996 (**Exhibit R-45**).

> Establishment of Separated Iron Factory, the second shift of the Metallurgical Combination, relying on Tumurtei Ore Deposit, mentioned numerously on Governments' resolution # 160, April 14, 1990, and 64th note of the Government's meeting, December 21, 1994. But, until today, this matter has been delayed because of unsolved financial issue.
>
> The issue of technological and economical basis of Tumurtei iron ore deposit and separated iron factory and investment expressed in first meeting protocol, Turkey-Mongolia Economy and Trade Joint Meeting, August 23, 1995, cooperation protocol, established between Ministry of Energy and Minerals, Turkey, and Ministry of Energy, Geology and Mining, Mongolia, October 25, 1994, and Memorandum of Understanding constituted by both ministries.
>
> Hence, I am asking you, as I had been head of Mongolian group of Joint Commission of the 2 governments, to make an offer to fund the development of technical and economical basis of Tumurtei iron ore deposit and separated iron factory to Turkish Government.
>
> Our Combination organized meeting to exchange ideas and conducted research.
>
> We are ready to give any required information related to the development of technical and economical basis and to receive Turkish delegators [*sic*] at our combination if they want to see the deposit in person.[106]

131. On 19 September 1996, Mr. Natsagdorj replaced Mr. Shagdar as General Director of Darkhan.[107]

G. BLT'S APPLICATION FOR A LICENCE TO MINE THE TUMURTEI DEPOSIT

132. BLT and Mr. Khuderbat used the 1990-1992 Report (see paragraph 128 above) to prepare the Feasibility Study, which the Parties agree formed part of BLT's application for a licence to mine the Tumurtei deposit. According to the Claimants' witness, Mr. Bayartsogt: "Gangold, Bayarkhuu and Khuderbat . . . visited the archives and reviewed various reports on behalf of BLT."[108] The Feasibility Study lists Mr. Khuderbat as among its authors.[109]

133. The Mongolian government granted BLT "special permission" to mine the Tumurtei deposit in 1997. On 21 June 1997, the Minister of Agriculture and Industry issued Order No. A/108 and a Certificate of Special Permission of Deposit Mining No. T-30 (the "**T-30 Certificate**") that Claimants assert gave BLT mining rights over the Tumurtei deposit.[110] The T-30 Certificate provided as follows:

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106 Letter from Darkhan to Minister for Energy, Geology and Mining, 5 June 1996 (**Exhibit R-40**).

107 State Property Committee Resolution No. 2, 14 September 1996 (**Exhibit R-51**).

108 Witness Statement of Mr. Bayartsogt, paras. 24-25.

109 BLT, Feasibility Study of the Exploitation of the Tumurtei Deposit, March 1997, at p. 1 (**Exhibit C-17**).

110 Order No. A/108 of the Minister of Agriculture and Industry, 21 June 1997 (**Exhibit C-39**); Certificate of Special Permission of Deposit Mining No. T-30 (**Exhibit C-40**).

> On the basis of Order # A/108 of the Minister of Agriculture and Industry of Mongolia, special permission for mining Tumurtei and Khust Uul iron deposits located in Khuder and Yuruu *Soums* in Selenge *Aimag* is issued to BLT LLC in Ulaanbaatar city for the period of . . . years.[111]

The portion of the form providing for the term of the certificate was not completed.

134. On 30 June 1997, the Minister of Agriculture and Industry issued Order No. A/121, suspending the T-30 Certificate.[112] According to the Claimants' witness, Mr. Bayartsogt:

> I was surprised at the suspension, since the T-30 Licence had just been issued to BLT. I made an appointment to see Minister Nyamsambuu and protested that the Minister should not suspend BLT's licence. However, the Minister said that this was a decision made by the Government and that BLT had no choice but to wait for more information.[113]

135. On 1 July 1997, the 1997 Minerals Law entered into force.[114] In accordance with the 1997 Implementation Law, BLT sought to re-register the T-30 Certificate under the 1997 Minerals Law on 18 August 1997.[115] BLT then wrote further to the government regarding the T-30 Certificate in September 1997 and January 1998.[116]

136. On 16 January 1998, the Ministry of Agriculture and Industry issued Order No. A/07, which voided the suspension of the T-30 Certificate by Order No. A/121 and provided that –

> the Chairman of the Mineral Resources Authority, Jargalsaikhan D., be permitted to re-register mining licenses over the Tumurtei and Khust-Uul deposits pursuant to Article 2, Article 3, Article 4, and Article 5 of the Law on Implementation, of the Minerals Law and issue the licenses to BLT LLC on the basis of Provision One and Provision Two of Order # A/108 of the Minister of Agriculture and Industry.[117] This renewed license is known as the "939A License."

137. Further to the Ministry's Order, BLT applied for a renewed licence on 19 January 1998,[118] and on 28 January 1998, the Department of Geology and Mining Department issued Licence No. 939A.[119]

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[111] Certificate of Special Permission of Deposit Mining No. T-30 (**Exhibit C-40**).

[112] Order No A/121 of the Minister of Agriculture and Industry, 30 June 1997 (**Exhibit C-41**).

[113] Witness Statement of Mr. Bayartsogt, para. 42.

[114] 1997 Minerals Law (**Authority RLA-84**).

[115] Application of BLT to the DGMC for the Re-registration of a Minerals Mining Licence, 18 August 1997 (**Exhibit C-43**).

[116] Letter from BLT to the Ministry of Agriculture and Industry, 16 September 1997 (**Exhibit C-185**); Letter from BLT to the Minerals Resources Authority, 12 January 1998 (**Exhibit C-44**); Letter from BLT to the Ministry of Agriculture and Industry, 13 January 1998 (**Exhibit C-45**).

[117] Order No. A/07 of the Minister of Agriculture and Industry dated 16 January 1998 (**Exhibit C-46**).

[118] Application of BLT to the Department of Geology and Mining Department, 19 January 1998 (**Exhibit C-47**).

[119] Certificate of Mineral Mining Licence No 939A, 28 January 1998 (**Exhibit C-1**).

H. BLT'S OPERATIONS AND THE FORMATION OF TUMURTEI KHUDER

138. On 20 July 1997, shortly after the suspension of the T-30 Certificate, BLT concluded an agreement with China Heilongjiang entitled "Contract on the Joint Development of the Tumurtei Iron-Ore Deposit."[120] Mr. Li was involved in the conclusion of this agreement and, according to his testimony, was an assistant to the General Manager of China Heilongjiang, and authorized by the company to conclude the agreement. The Parties disagree as to whether this was a binding agreement or an informal memorandum of understanding, but the record does not indicate that any activity was undertaken pursuant to the agreement.

139. On 2 December 1997, Mr. Li incorporated Qinlong, and on 1 June 1998, BLT and Qinlong concluded an "Agreement on the Joint Development of Mongolia Tumurtei Iron Ore."[121] According to the Claimants, "[a]lthough the parties did not ultimately carry out activities under the 1998 JVA, Qinlong financed preparatory works for the mine in the years that followed."[122]

140. On 15 June 1998, BLT concluded a second agreement with China Heilongjiang,[123] again with no activity in fact being undertaken. According to the Claimants' witness, Mr. Bayartsogt, BLT's agreements with China Heilongjiang at this point "were all in the nature of co-operation agreements, and were effectively superseded by later agreements, as the project progressed further."[124]

141. On 18 June 2002, BLT, MCS Holding LLC and Boroo Mining LLC concluded a consortium agreement, pursuant to which the "Mongolian Shareholder [in the Joint Venture Company] shall be the Consortium . . . and representation of the Mongolian Party (Consortium shall be exercised under the name of BLT LLC."[125]

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[120] Contract on the Joint Development of the Tumurtei Iron-Ore Deposit between BLT and China Heilongjiang, 20 July 1997 (**Exhibit C-48**).

[121] Agreement on the Joint Development of Mongolia Tumurtei Iron Ore between BLT and Qinlong, 1 June 1998 (**Exhibit C-49**).

[122] The Claimants' Memorial, para. 144.

[123] Agreement on the Joint Development of Mongolia Tumurtei Iron-Ore Deposit between Mongolia Ulaanbaatar "BLT" Corporation and China Heilongjiang, 15 June 1998 (**Exhibit C-184**).

[124] Witness Statement of Mr. Bayartsogt, para. 55.

[125] *See* Partnership Agreement between the Shareholders of Tumurtei Khuder (English, Chinese, and Mongolian originals), para. 2, 23 December 2004 (**Exhibit C-19**).

142. On the next day, 19 June 2002, BLT and Qinlong concluded a second joint venture agreement to establish Tumurtei Khuder.[126] Tumurtei Khuder was then incorporated on 26 July 2002, with BLT holding 30 percent ownership and Qinlong the remaining 70 percent.[127]

143. Between 2002 and 2004 BLT, Qinlong, and Tumurtei Khuder carried out a limited number of activities with respect to the deposit, including the following:

(a) On 11 October 2002, Tumurtei Khuder was issued a licence for road construction.[128]

(b) On 14 October 2002, the Governor of Selenge *aimag* issued BLT with land rights for the area of the Tumurtei deposit.[129]

(c) On 20 March 2003, Tumurtei Khuder concluded a contract with China Qinhuangdao Mingcheng Engineering Co. Ltd for the construction of a road to the Tumurtei deposit.[130]

(d) At some point in 2003, Tumurtei Khuder also prepared a Detailed Environmental Impact Assessment Report.[131]

(e) On 28 January 2004, Qinlong entered into a contract with Huihua International Trading Co., Ltd for the purchase of mining equipment.[132]

(f) On 30 April 2004, Tumurtei Khuder entered into a series of fuel supply agreements.[133]

(g) On 5 October 2004, the Governor of Yuruu *soum* granted Tumurtei Khuder the right to use conventional minerals for road construction.[134]

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126 Joint Venture Agreement between BLT and Qinlong for the establishment of Tumurtei Khuder, 19 June 2002 (**Exhibit C-18**).

127 Order No A-615 of the Foreign Investment and Foreign Trade Agency of Mongolia, 26 July 2002 (**Exhibit C-54**); Certificate of Foreign Incorporated Company No 02-214 of Tumurtei Khuder, 26 July 2002 (**Exhibit C-6**).

128 Special Licence No 42 for the Construction and Repair of an Auto Road and Road Facilities, 11 October 2002 (**Exhibit C-124**).

129 Order No 373 of the Governor of Selenge aimag, 14 October 2002 (**Exhibit C-51**).

130 Agreement between Tumurtei Khuder and China Qinhuangdao Mingcheng Engineering Co. Ltd, 20 March 2003 (**Exhibit C-69**).

131 Tumurtei Khuder, Detailed Environmental Impact Assessment Report, 2003 (**Exhibit C-86**).

132 Contract between Qinlong and Zhangjiagang Free Trade Zone Huihua International Trading Co., Ltd (for the purchase of mining equipment), 28 January 2004 (**Exhibit C-70**).

133 Fuel Supply Agreement between Tumurtei Khuder and MTDOil LLC, 30 April 2004 (**Exhibit C-71**); Fuel Supply Agreement between Tumurtei Khuder and MTKhU-Oil LLC, 30 April 2004 (**Exhibit C-72**); Fuel Supply Agreement between Tumurtei Khuder and MTBOil LLC, 30 April 2004 (**Exhibit C-73**).

134 Order No 107 of the Governor of Yuruu soum, 5 October 2004 (**Exhibit C-126**).

144. On 8 January 2004, Qinlong agreed to transfer a 30 percent interest in Tumurtei Khuder to Beijing Shougang.[135] According to the Claimants, Qinlong transferred an 11 percent interest in Tumurtei Khuder to China Heilongjiang at around the same time (leaving Qinlong with 29 percent ownership).[136] On 23 December 2004, BLT endorsed the transfer and the shareholders concluded a partnership agreement on their respective rights.[137] On 18 March 2005, the Mongolian State Registration Service registered Beijing Shougang and China Heilongjiang as foreign investors in Tumurtei Khuder.[138] Thereafter, the Chairman of the Foreign Investment and Foreign Trade Agency of Mongolia approved Beijing Shougang and China Heilongjiang as shareholders in Tumurtei Khuder on 16 May 2005[139] and reissued Tumurtei Khuder's Certificate of Foreign Incorporated Company on 15 June 2005.[140]

145. On 17 February 2005, BLT concluded a cooperation agreement with Tumurtei Khuder and applied to the Department of Geology and Mining Cadastre to transfer the 939A Licence to Tumurtei Khuder. [141] On 7 March 2005, the Mineral Resources and Petroleum Authority notified Tumurtei Khuder it had approved that transfer.[142]

146. On 12 January 2005, Tumurtei Khuder entered into cooperation agreements with the Governors of Selenge *aimag* and Khuder, Shaamar, and Yuruu *soums*.[143] Thereafter, in 2005:

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135 Letter of Intent between Qinlong and Beijing Shougang, December 2003 (**Exhibit C-57**); Equity Transfer Agreement between Qinlong and Beijing Shougang, 8 January 2004 (**Exhibit C-56**).

136 The Claimants' Memorial, para. 149.

137 Partnership Agreement between the Shareholders of Tumurtei Khuder, 23 December 2004 (**Exhibit C-19**).

138 State Registration Certificate No. 23/1296 of Tumurtei Khuder dated 5 August 2002 (**Exhibit C-63**), p. 2; The Claimants' Memorial, 151.

139 Order No A-470 of the Foreign Investment and Foreign Trade Agency of Mongolia dated 16 May 2005 (**Exhibit C-64**).

140 Certificate of Foreign Incorporated Company No 02-214 of Tumurtei Khuder dated 16 June 2005 (**Exhibit C-7**).

141 Co-operation Agreement between BLT and Tumurtei Khuder, 17 February 2005 (**Exhibit C-58**); Application of BLT for a Licence Transfer to the DGMC, 17 February 2005 (**Exhibit C-59**); Letter from BLT to the Mineral Resources and Petroleum Authority, 17 February 2005 (**Exhibit C-61**).

142 Letter from the Mineral Resources and Petroleum Authority to Tumurtei Khuder dated 7 March 2005 (**Exhibit C-62**).

143 Collaboration Agreement between Tumurtei Khuder and the Governor of Selenge aimag, 12 January 2005 (**Exhibit C-82**); Collaboration Agreement between Tumurtei Khuder and the Governor of Khuder soum, 12 January 2005 (**Exhibit C-83**); Collaboration Agreement between Tumurtei Khuder and the Governor of Shaamar soum, Undated (**Exhibit C-84**); Collaboration Agreement between Tumurtei Khuder and the Governor of Yuruu soum, 12 January 2005 (**Exhibit C-85**).

(a) Over the course of 2005 Tumurtei Khuder and BLT received a series of land possession grants from the governors of Khuder, Javkhlant, and Shaamar *soums*.[144]

(b) On 2 May 2005, BLT concluded a contract with the Mineral Resources and Petroleum Authority on the "Recovery of the Costs and Expenses of the Exploration Programmes Financed Out of the State Budget."[145]

(c) On 24 May 2005, Tumurtei Khuder concluded a loan agreement in the amount of ¥200 million with the Export-Import Bank of China, with the consent of the Mongolian government.[146]

(d) On 5 October 2005, Qinlong entered into a contract with Qinhuangdao Engineering and Research Institute for Metallurgical Industry MMI to prepare a "Preliminary Design of the Mongolia Tumurtei Iron Mine Mining and Dressing Project."[147]

(e) On 6 October 2005, Tumurtei Khuder adopted its "2005-2006 Mining Plan for the Tumurtei Iron-Ore Deposit."[148]

(f) At some point in the course of 2005, Tumurtei Khuder prepared an additional environmental impact assessment and an environmental protection plan.[149]

(g) On 16 December 2005, Tumurtei Khuder applied for a blasting permit.[150]

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144 Order No 4 of the Governor of Khuder soum, 18 January 2005 (**Exhibit C-127**); Order No 5 of the Governor of Khuder soum, 18 January 2005 (**Exhibit C-128**); Order No 27 of the Governor of Khuder soum, 3 March 2005 (**Exhibit C-129**); Order No 20 of the Governor of Javkhlant soum, 4 March 2005 (**Exhibit C-130**); Order No 105 of the Governor of Shaamar soum, 18 May 2005 (**Exhibit C-131**); Order No 177 of the Governor of Shaamar soum, 26 October 2005 (**Exhibit C-132**); Order No 85 of the Governor of Khuder soum, 1 December 2005 (**Exhibit C-133**); Order No 55 of the Governor of Khuder soum, 15 May 2006 (**Exhibit C-134**).

145 Contract on the Recovery of the Costs and Expenses of the Exploration Programmes Financed Out of the State Budget between the Mineral Resources and Petroleum Authority and BLT, 2 May 2005 (**Exhibit C-187**).

146 Memorandum of Understanding between Mongolia and China on the Provision of Concessional Loan, 24 May 2005 (**Exhibit C-139**); Loan Agreement between Tumurtei Khuder and the Export-Import Bank of China, 24 May 2005 (**Exhibit C-140**).

147 Agreement between Qinlong and Qinhuangdao Engineering and Research Institute for Metallurgical Industry MMI, 5 October 2005 (**Exhibit C-74**).

148 Tumurtei Khuder, The 2005-2006 Mining Plan for the Tumurtei Iron-Ore Deposit, 6 October 2005 (**Exhibit C-23**).

149 Tumurtei Khuder, The Detailed Environmental Impact Assessment Report of the Tumurtei Iron-Ore Deposit (Additional Clarification), 2005 (**Exhibit C-87**); Tumurtei Khuder, Environmental Protection Plan for the Open-Pit Mining of the Tumurtei Iron Deposit Located in Khuder soum, Selenge aimag, 2005 (**Exhibit C-88**).

150 Application of Tumurtei Khuder to the Ministry of Industry and Trade, 16 December 2005 (**Exhibit C-144**).

147. On 4 October 2005, BLT wrote to the Ministry of Finance, reporting on the work that had been done as follows:

> In recent years, we have elaborated research and economic survey for exploiting the deposits and completed the project of the factory and plan of building the town. By implementing this project we can exploit 1.5 million tons of iron ore concentrate from open-pit mine annually and export 800 thousand tons of iron pellets. If we use the project capacity fully, we can achieve to make 70 billion tugrugs of sales annually. The reserve of the deposit is 232 million tons which will be exploited for 60 years for the capacity of the project. If we continue to conduct the comprehensive exploration in the area, the reserve may be increased up to 3-4 times.
>
> At present, the investment of totally around 15 billion tugrugs of was made for settling construction, machines, equipment, exploration works, project documents, road and railway and power generation, and it will reach 150 billion tugrugs.
>
> We obtained the license to build a 96-kilometer-railway from Dulaankhaan (Yeroo railway station) to the deposit by Government Resolution of 194 of 2003. Accordingly, we have finished the railway truss and road construction. We also obtained the licenses to build the road from *aimag* and *soums*. This year we have started extension work of Dulaankhaan railway with cooperation of Ulaanbaatar railway with budget of approximately 60 million tugrugs. We are also going to start the road building from November. This road will have 5 crossroads that will cross territories of five *soums* such as Shaamar, Javkhlant, Yeroo and Khuder of Selenge *aimag* with the distance of 24.5 kilometers. Main transportation will be from Tumurtei deposit. However, it will also transport 100 thousand tons of local transportation a year.
>
> When building railways of Sukhbaatar- Zamiin Uud and Darkhan-Erdenet, common minerals used for the dams were provided free of charge. Therefore, we requested the local meeting to discount or release from the payment of common minerals for 96 kilometer-railway dam. If our request is accepted positively, the transportation fee will be same as Ulaanbaatar railway tariff.
>
> Our company built a new 50-kilometer road to Tumurtei deposit and renovated a 70 kilometer road to Dulaankhaan. Therefore, any issues related to road are completely decided. We have spent for road development around 480 million tugrugs.
>
> We also finally settled the electricity by connecting with Sukhbaatar-Khuder 35KW line. We spent 120 million tugrugs for this project. In future, we are planning to connect with Darkhan-Bugant's 110KW line and Galuut-Khuder line of the Russian Federation. This will be reliable connection of electricity. The demand of annual usage of electricity will be around 17 million kWhs.
>
> Moreover, we have been doing exploration work for increasing hydrogeology and iron ore reserves. We spent 2500 million tugrugs for this work.
>
> The relevant professional organizations of the People's Republic of China are completing the railway and plant projects with Mongolia.[151]

148. In December 2005, the Chairman of Production, Infrastructure, and Environmental Policy Coordination Department of the Administrative Office of Selenge granted Tumurtei Khuder permission to mine the Tumurtei deposit.[152]

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[151] Letter from BLT to Minister of Finance, 4 October 2005 (**Exhibit C-191**).

[152] Letter from the Governor's Administrative Office of Selenge *aimag* to the Governor of Khuder *soum* dated 27 December 2005 (**Exhibit C-90**).

149. In 2006, Tumurtei Khuder concluded a number of agreements on the operation of the mine that are set out in the record as follows:

(a) On 2 January 2006, Tumurtei Khuder concluded a Cooperation Agreement with Khustai Yuruu LLC.[153]

(b) On 22 March 2006, Tumurtei Khuder concluded a Contract for the Purchase of Explosives and Blasting Agents with Ilch Tulsh LLC.[154]

(c) On 17 April 2006, Tumurtei Khuder concluded a Contract to Provide Security Services with Khar Luu LLC.[155]

(d) On 28 April 2006, Tumurtei Khuder concluded an Insurance Policy Agreement with Mongolian Insurance Group Co.[156]

(e) On 9 May 2006, Tumurtei Khuder concluded a Contract to Sell and Purchase Explosives and Detonators with Blast LLC.[157]

(f) On 29 May 2006, Tumurtei Khuder concluded a Contract to Prepare an Environmental Impact Assessment with Eco Natur LLC.[158]

(g) On 2 June 2006, Tumurtei Khuder concluded a Contract to Construct, Repair and Maintain the Road from Dulaankhan to the Tumurtei Deposit with Mongolian Highway Co., Ltd.[159]

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[153] Contract for Co-operation between Tumurtei Khuder and Khustai Yuruu LLC, 2 January 2006 (**Exhibit C-65**).

[154] Contract for the Purchase of Explosives and Blasting Agents between Tumurtei Khuder and Ilch Tulsh LLC, 22 March 2006 (**Exhibit C-65**).

[155] Contract to Provide Security Services between Tumurtei Khuder and Khar Luu LLC, 17 April 2006 (**Exhibit C-77**)

[156] Insurance Policy Agreement between Tumurtei Khuder and Mongolian Insurance Group Co., 28 April 2006 (**Exhibit C-78**).

[157] Contract to Sell and Purchase Explosives and Detonators between Tumurtei Khuder and Blast LLC, 9 May 2006 (**Exhibit C-79**).

[158] Contract to Prepare an Environmental Impact Assessment between Tumurtei Khuder and Eco Natur LLC, 29 May 2006 (**Exhibit C-80**).

[159] Contract to Construct, Repair and Maintain the Road from Dulaankhan to the Tumurtei Deposit between Tumurtei Khuder and Mongolian Highway Co., Ltd, 2 June 2006 (**Exhibit C-81**).

(h) On 5 June 2006, Tumurtei Khuder concluded a Contract on the Recovery of the Costs and Expenses of Exploration Programs Financed out of the State Budget with the Mineral Resources and Petroleum Authority.[160]

I. THE REVOCATION OF TUMURTEI KHUDER'S LICENCE

150. In early 2001, Mr. Natsagdorj was replaced as General Director of Darkhan by Mr. Erdenetsog D. ("**Erdenetsog**").[161]

151. On 13 April 2001, following Mr. Erdenetsog's assumption of the directorship, Darkhan wrote to the Mineral Resources Authority of the Ministry of Trade and Industry, complaining of the issuance of the 939A Licence to BLT and requesting that the licence be terminated. Darkhan's letter provided as follows:

> Paragraph Two of Resolution # 160 of the Ministers' Council of the People's Republic of Mongolia states, "That . . . an iron smelting and rolling mill plant of the Metallurgical Mill Plant Complex be built and presented into exploitation from 1990 to 1993 and a mill plant producing reduced iron from iron ore from 1993 to 1995", and Paragraph Three further states, "an ore extracting open-cast mine relying on the Tumurtei iron deposit be built by and before the end of 1994 and the Mine and the Metallurgical Plant Complex be together reorganized into a Metallurgical Mill Plant Kombinat."
>
> With the purpose of enforcing the above provisions, the Plant assigned funds, made efforts, engaged what is currently known as "Almaz" Company to complete a detailed exploration and resource estimation, and safeguarded the samples and other results under its control, protected by a watchman.
>
> The Plant had laboratory and semi-industrial experimental tests completed by Davy McKay of the UK, Mannes Demag and Lurgi of Germany, Kiwasaki of Japan, Simmko of India, and Hyprorud of the Russian Federation /Leningrad/ to evaluate whether the Tumurtei and Tumurtolgoi deposits would qualify for direct reduction and they were able to draw certain conclusions.
>
> An international bid was announced with respect to the establishment of the direct reduction plant and the above-mentioned corporations and companies submitted their quotes.
>
> However, the Department of Geology and Mining Cadastre issued licenses over DMP's Tumurtei, Bayangol, and Khust-Uul iron deposits to "BLT" LLC and the Tumurtolgoi deposit to "Khar-Morit" LLC in 1997 allowing these companies to exploit the deposits for the period of 100 years free of charge.
>
> Mongolia is now running out of scrap iron resources and we have been planning to engage in extraction and processing of iron ore. However, the prospects of the Plant have become vague and the Plant is soon to have to cease its operation because the above-mentioned iron deposits have gone to the control of private companies.
>
> The above-mentioned companies, which have obtained the licenses, have failed to carry out any mining operations during the course of 3 to 4 years.

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[160] Contract on the Recovery of the Costs and Expenses of Exploration Programs Financed out of the State Budget between the Mineral Resources and Petroleum Authority and Tumurtei Khuder 5 June 2006 (**Exhibit C-9**).

[161] *See* The Respondent's Counter-Memorial, para. 82.

> The right to the use of subsoil can now be terminated on the ground that "there is an unavoidable necessity to retrieve the subsoil for the State or public purposes" as provided for in Article 1.3, Chapter One of the Law of Mongolia on Subsoil and on the ground of failure to "commence mining operations within 3 years following the issuance of subsoil" as set out in Article 2.1.
>
> Therefore, we hereby request you to reconsider the licenses issued to "BLT" LLC and "Khar Morit" LLC under these provisions of the law for the purpose of improving the prospects of the only metallurgical plant in Mongolia, and to give us a reply to assist us with our business.[162]

152. On 8 May 2001, Darkhan also wrote to the Mongolian Metallurgists' Association, notifying them that the private companies holding the licence to the Tumurtei deposit had not commenced work and seeking the Association's assistance in protecting Darkhan's interests.[163]

153. On 22 May 2001, the Department of Geology and Mining Cadastre responded to Darkhan as follows:

> [. . .]
>
> No letters, applications, or requests applying for licenses of exploration or mining over the deposits in the Tumurtei and Khustai areas in the territory of Khuder *Soum,* Selenge *Aimag* had been submitted to the Mineral Resources Authority or its Department of Geology and Mining Cadastre by Darkhan Metallurgical Plant /State-owned Enterprise/ in Darkhan-Uul *Aimag* before the abovementioned licenses were thus issued. The license holders – NGB Spectrum LLC and BLT LLC – haven't lost their rights to possession of these licenses and Licenses 2914X, 939X, and 940X are still valid.
>
> In your letter to our Department, you request us to reconsider our decision, under which the abovementioned licenses were issued, while referring to the specific grounds for terminating the right to use the subsoil on the basis of Article 21 of the Law on Subsoil.
>
> 1. The Law on State and Local Properties states that it is the sovereignty of the Government to make a decision to expropriate items of other's ownership into state ownership or submit to the Parliament to expropriate items of other's ownership into state ownership and that the right to such decision rests with the Parliament only.
>
>   According to the provisions of this law, the right to expropriation of other's licensed areas for State purposes is granted to the Parliament and the Government. However, no resolutions or decisions of the Parliament or the Government regarding any unavoidable necessity to retrieve licensed areas for exploration or mining activities or iron deposits in Darkhan-Uul and Selenge *Aimags*, for State purposes have been received by the Mineral Resources Authority or its Cadastre Division. Nor have any such resolutions or decisions of local self governance bodies or local administration regarding any unavoidable necessity to retrieve subsoil for the public purposes been received.

162 Letter from DMP to the Mineral Resources Authority, 13 April 2001 (**Exhibit C-92/R-29**).

163 Letter from Darkhan to Metallurgists Association, May 8, 2001 (**Exhibit R-48**).

> 2. It has been 3 years since BLT LLC, holder of Mining Licenses # 939A and 940A, obtained these licenses from the Department of Geology and Mining Cadastre. In the meantime, no letters, acts or formal demands of any state body or specialized inspection body, or recommendations, conclusions, or notifications of local administrative bodies setting out justifiable grounds or evidences regarding BLT LLC's failure to carry out mining operations or failure to conduct proper and efficient activities in accordance with the terms and conditions and procedures set out in the law have been received by us. Therefore, it is deemed that it is not possible for the Department of Geology and Mining Cadastre to terminate the rights of the license holders under Article 21 of the Law on Subsoil on the grounds of alleged failure to use the subsoil within 3 years following the issuance or on the grounds of unavoidable necessity to retrieve the subsoil for the State or public purposes.[164]

154. Thereafter, on 7 February 2002, Darkhan wrote to the Ministry of Trade and Industry providing further documents in relation to Resolution No. 160 and the Tumurtei deposit, and requesting that the Ministry "assist our effort to operate at the Tumurtein [*sic*] Deposit by nullifying the Mining Licenses, #939A and #940A, allowed to the 'BLT' LLC by the Cadastre Division."[165]

155. On 14 March 2002, the Governor of Khuder *soum* adopted Darkhan's position on the Tumurtei deposit and wrote to the Governor of Selenge *aimag,* requesting that a proposal to transfer the 939A Licence to Darkhan be presented to the relevant authorities.[166] The Governor of Selenge *aimag* proceeded to advance this request with the Chairman of the Mineral Resources Authority and the Chief of the Cabinet Secretariat.[167]

156. Thereafter, the record includes no evidence of efforts to revoke the 939A Licence until 2005. In October 2005, the Government revoked the licence over the nearby Tumurtolgoi iron ore deposit and transferred it to Darkhan.[168]

157. On 24 April 2005, the Specialised Inspection Department of Selenge *aimag* wrote to Tumurtei Khuder, outlining their conclusions on Tumurtei Khuder's operations to date. The report provided as follows:

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164 Letter from the DGMC to DMP, 22 May 2001 (**Exhibit C-93/R-49**).

165 Letter from Darkhan to Ministry of Trade and Industry, 7 February 2002 (**Exhibit R-32/R-63**).

166 Letter from Governor of Khuder Soum to Governor of Selenge Aimag, 14 March 2002 (**Exhibit R-62**).

167 Letter from R. Nyamsuren to Governor of Selenge Aimag, 15 March 2002 (**Exhibit R-42**); Letter from R. Nyamsuren to N. Jargalsaikhan, Chairman of Mineral Resources Authority, 15 March 2002 (**Exhibit R-56**); Letter from the Selenge Aimag Governor to the Mineral Authority, 15 March 2002 (**Exhibit R-59**).

168 The Claimants' Memorial, para. 166; Otgonjargal, "Iron Deposit 'Comes Back' to the Mongolians", Ardiin Erkh (People's Rights), 28 October 2005 (**Exhibit C-94**); Bolor, "Lost Wealth returned to Mongolia", Unuudur, 28 October 2005 (**Exhibit C-95**).

Pursuant to the guideline provided by the Chairman of the Specialized Inspection Department of the province, a working group led by Batbold, Chairman of the Taxation Department of the province, and accompanied by Turtogtokh D., state inspector of environment, geology, and mining, and Davaadorj, specialist at the Governor's Administrative Office of the province, inspected on 05 April 2006 and drew conclusions on the operations of Tumurtei Khuder Co., Ltd being engaged in development of Tumurtei deposit and Khustai Yuruu Co., Ltd being engaged in development of Khustai deposit.

One. About Tumurtei Co., Ltd and Khustai Yuruu Co., Ltd

BTL Co., Ltd with Director Bayartsogt was incorporated in 1997, obtained mining license over Tumurtei area in Khuder sub-province and Khustai area in Yuruu sub-province, and started implementing a project in 2001 at Tumurtei in Khuder sub-province, within which iron ore is to be processed to make pellets. Within the project, an auto road and a railway were projected to be built from Tumurtei to Dulaankhaan. As of today, a high tension power transmission line from Bugant in Yuruu sub-province to Tumurtei, a two-storey construction for the administration and a hotel, and a 45km improved road stretching from Tumurtei to Yuruu have been built.

However, the foundation of the processing plant at Tumurtei, the major work to be undertaken within the project, has not been laid out, the construction of the railway has not been commenced, and everything except the study on alignment has been slow. Besides, it was evident from the exploitation of iron ore that it is profitable for the Company to export ore to a foreign country without undertaking any processing work. BTL Co., Ltd incorporated Khustai Yuruu Co., Ltd in 2003 relying on Khustai iron deposit in Yuruu sub-province and exported 28000 tons of ore in 2003 and 80000 tons in 2004. While failing to register the business entity with the province and the local area, it incorporated Tumurtei Khuder Co., Ltd in addition to Khustai Yuruu and thus exported, in the absence of documents, 166400 tons of ore in 2005 in total. In Quarter 1 of 2006, as they reported themselves (the quarries on-site suggest even more), they extracted 34100 tons of ore as of 05 April 2006 and transported it to the People's Republic of China without entering into Stability Agreement as required under the Minerals Law.

Two. Breaches discovered during the Inspection

1. Engaging in exploitation while failing to pay land fees is in breach of Article 3.1.8, Article 7.1, and Article 27.2 of the Land Law of Mongolia.

2. The failure to cause to set the marks of the boundaries of the mine area is in breach of Article 27.1 of the Minerals Law.

3. (They) operated in the absence of resource estimation report within which the resources of the mining are to be estimated, feasibility study, or survey plan.

4. (They) failed to deliver environmental impact assessment and environmental protection plan to the province, sub-province, and inspection departments and engaged in exploitation without obtaining permission or authorization from relevant authorities. These are in violation of Article 30.4.6 and Article 30.4.7 of the Minerals Law.

5. Provisions regarding the obligations of the persons engaged in mineral exploitation and ownership with respect to environmental protection have not been fulfilled. This is in violation of Article 30.2.3 of the Minerals Law /operation in the absence of environmental analysis program/ and Article 31.2.3.

6. The Company failed to submit a report, in which it must specify the volume of ore loaded quarterly for sales, volume of ore extracted, justification for estimation of sales value, and the total amount of payment, to the Inspection Department of Geology and Mining, which is in breach of Article 38.5 of the Minerals Law.

7. Khustai Yuruu Co., Ltd and Tumurtei Khuder Co., Ltd infringed Article 38.2.1 of the Law on Establishment of Royalty Fee when they set the royalty fee in 2005 /instead of setting the price of ore per ton on the basis of the market value of the given month or internationally accepted principle, they set the value of US$30.5, which is a value lower than the world market value/.

Three. CONCLUSION

1. Although Tumurtei Khuder Co., Ltd has environmental impact assessment of 2005, the Company did not have environmental analysis program or environmental protection plan of 2006 and performed unsatisfactorily with respect to preparation of documents.

2. Tumurtei Khuder Co., Ltd failed to have workplace conclusions drawn by the relevant inspectors at the Specialized Inspection Department of the province for its newly installed equipment and machineries and failed to obtain permission from the Governor's Administrative Office or local sub-province.

3. It is hereby concluded that the ore mining activities at Khustai and Tumurtei should be recommenced after Tumurtei Khuder Co., Ltd and Khustai Yuruu Co., Ltd remedy the breaches of numerous provisions stated above, settle the outstanding amount and compensation of royalty fee imposed on the Companies under acts, and export ore under agreements made with the Ministry of Finance of Mongolia, not under agreements made by and between the two companies involved.[169]

158. From 12-14 May 2006, an "Intergovernmental Working Group" carried out an inspection of the iron ore export operations Khustai Yuruu and Tumurtei Khuder and produced a report. The available portion of the report appears to principally focus on labour conditions and describes a visit only to the Khustai Yuruu mine (also partially owned by BLT through a separate corporate structure) in the following terms:

> The main purpose of the inspection was to investigate the accuracy of the information regarding a substantial amount of iron ore being exported to the People's Republic of China and to clarify if the permission for mining, a feasibility study, a detailed environmental assessment, and other relevant permissions and documents are prepared in accordance with the laws.
>
> The working group members first inspected the situation of iron ore being exported from Dulaankhan station to China via railway. State customs inspectors are assigned to the station one at a time every week to scrutinize the iron ore being transported and complete the customs clearance process. Approximately 34 railway carriages of iron ore is exported per day, each of the carriages loaded with approximately 61 tons. For about this year, export loading took place from 16 January to 15 March, and after a temporary pause, from 21 April to date. This year, 1189 railway carriages or 72529 tons of iron ore had been exported by the time we started the inspection on 13 May. Freight Handling Section Officer Nagvachimbee says that a railway expansion was being carried out to increase the export loading capacity from 01 June to achieve a capacity of up to 100 railway carriages per day.
>
> Regarding customs fees, US$5 is charged for the clearance documents for each carriage and US$7 per hour for service fees. No other fees or charges are collected. Ulaanbaatar Railway charges MNT1 168 500 for transportation fees per train to get to Erlian, China. No other taxes or fees are collected by Mongolia. This is because there is no legal provision that prohibits or requires any type of special permission to export iron ore to China. This is due to a 'loophole in the legislation'. Put differently, one needs a takeoff agreement and a conclusion issued by the Customs Central Laboratory in order to export iron ore, but not any sort of permission. There is a lot of unemployment in Dulaankhan village and the residents have negative feelings about the current situation where a substantial amount of iron ore is being exported.

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[169] Letter from the Specialised Inspection Department of Selenge aimag to Tumurtei Khuder, 24 April 2006 (**Exhibit C-107**).

At present, over 50 heavy duty trucks haul iron ore each day over a distance of 100 km and most of the drivers are Chinese people, who are paid a salary that is 5 times higher than that of a Mongolian driver, according to the drivers.

The working group then headed to the centre of Yuruu *Soum,* where information regarding the investment made by the Company to the locality and the Company's business activities was collected.

According to the *soum* Governor Ganbold S., considerable investment was made to the local area by the Mine of BLT LLC and its Chinese partner and job positions were created. So far, MNT130.0 million has been invested for the construction of a hospital building, which was, at that time, incomplete and halted due to a lack of funds, and as a result, the hospital is now in operation. Additionally, repairs were done at MNT25.5 million to the building of the local police office, which was burnt, to restore it into exploitation. A contract was made to establish a factory for assembling small size tractors in the *soum,* but it did not happen.

Instead, 30 small size tractors made in China were leased to local residents. Over 30 local residents were given jobs; however, their working conditions are quite poor, no employment agreements were entered into, and the Chinese employers discharge them any time they want.

So that more local people were hired, the local administration required that no Chinese drivers were allowed, and more Mongolian drivers were provided with employment. However, the fulfillment of this requirement is inadequate. Additionally, waste is dumped from the permitted exploitation site. This pollutes the environment and is in breach of the law. The Company holds an exploration license over 200 thousand hectares in the *soum.* The local Citizens' Representative Meeting intends to safeguard most of the area under special protection and is preparing a petition to the Mineral Resources and Petroleum Authority to annul the license.

No other taxes are collected at the local level. A royalty fee is paid to the State fund in Selenge *Aimag*.

The working group then visited the Khustai Yuruu mine located in Yuruu *Soum.* The mine was first opened in 2004 and 35.0 thousand tons of ore was extracted in 2004, 165.0 thousand tons in 2005, and 20.0 tons in 2006. At present, there is no loading taking place. No permit was in place at the Mine. According to the Chinese manager, every document is kept at the head office in Dulaankhan. One of the serious breaches discovered here is the fact that blasting is carried out without any permit. At present, 13 tons of explosives are kept at the mine, regarding which, Amgalanbayar B., specialist of the State Specialized Inspection Agency, and Bat-Amgalan, the state inspector of the environment in Yuruu *Soum,* have contained and issued an act.

Currently, 59 Mongolians and 27 Chinese employees are working here. No employment agreement is in place, the Chinese chief of the mine dismisses Mongolian workers arbitrarily at any time, and no permit is in place. On the basis of these facts, the mine operation is now suspended temporarily for the period until the breaches are remedied and the machineries are sealed in accordance with the applicable regulations.

(Translator's Note: presumably, a page is missing here.)

2. /unreadable/

3. To comply with the applicable Mongolian laws in terms of the permitted number of employees from Mongolia and China;

4. To advise the Mineral Resources and Petroleum Authority to resolve the issue regarding the increase of the exploitation area within the applicable laws;

5. To annul mining license # 8888A issued to Montai Mines LLC charge liability to the persons at fault, and to cause to pay compensation;

6. To make Bayangol deposit a 100% government-owned deposit and develop and implement a project to exploit the deposit together with the Khust-Uul and Tumurtei deposits in a complex way;[170]

159. On 16 May 2006, the new General Director of Darkhan, Ganbold T. ("**Ganbold**") wrote to the Great State Khural (the Parliament of Mongolia), requesting support for the proposal to transfer the licence to the Tumurtei deposit to Darkhan.[171]

160. On 25 May and 2 June 2006, Darkhan wrote to the State Investigation Office and the General Prosecutor's Office, requesting a criminal investigation into the circumstances of BLT's acquisition of the licence to the Tumurtei deposit.[172]

161. From 8 to 11 June 2006, a "Sub-Working Group" was sent "to examine the operations of the license holders over the 'Tumurtei Khuder', 'Khust-Uul' and 'Bayangol' Iron Deposits located in the territories of Yuruu and Khuder *Soums* of Selenge *Aimag,* prepare recommendations, and explore the dispute between the local residents and the license holders of the above-mentioned deposits."[173] The Sub-Working Group's report was principally focused on explosives operations at the Khustai Yuruu mine and provided as follows:

> The main purposes of the inspection were to examine the information regarding the unauthorized access to the explosives warehouse located at Khustai Mountain, which was locked during the previous inspection on 12 May 2005 by the deputy chairman of the MRPAM Gankhuyag Ts. and state inspector at the State Specialized Inspection Agency Amgalanbayar Ts., and the subsequent unauthorized blasting works and to check the works done as a follow-up to the previous inspection.
>
> The Mine of Khustai Yuruu LLC extracted 35 thousand tons of ore in 2004, 165 thousand tons in 2005, and 78 thousand tons in 2006 as of 13 May 2006, whereas the Mine of Tumurtei Khuder LLC extracted 35 thousand tons of ore in 2004 and 165 thousand tons in 2005. Four excavators, one loader, and two bulldozers are in operation at the Mine. A total of 35 dump trucks are used in internal and external haulage at the mines of Khustai Yuruu LLC and Tumurtei Khuder LLC interchangeably.
>
> Khustai Yuruu LLC and Tumurtei Khuder LLC have transported approximately 2074 tons of ore a day or around 41480 tons in 20 days from Dulaankhan railway station to the PRC since the previous inspection.
>
> While engaging in ore haulage with heavy duty (20 tons capacity) trucks from the iron deposit to the railway station, they damaged 6 km of the paved road built in Dulaankhan village. As a result, the road is no longer in a good shape for continued exploitation. The residents of the village started a civil movement and are fighting to get the road repaired.

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170 Report of Inspection by the Inter-Governmental Working Group led by the Deputy Minister of Environment on iron deposits of Khustai Yuruu and Tumurtei Khuder located in Yuruu and Khuder soum in Selenge aimag, 16 May 2006 (**Exhibit C-102**).

171 Letter from Darkhan to State Great Khural, 16 May 2006 (**Exhibit R-52**).

172 Letter from DMP to the State Investigation Office, 25 May 2006 (**Exhibit C-98**); Letter from DMP to the State General Prosecutor's Office, 2 June 2006 (**Exhibit C-99**).

173 Order No 79 of the Minister of Industry and Trade, 7 June 2006 (**Exhibit C-103**).

The authorities of the above-mentioned two companies were absent during the inspection; as a result, we were unable to access the documents pertaining to the operations of the mine.

Khustai Yuruu LLC operates over 216 hectares of the Khust Uul mining site referred under license # 940A issued to BLT LLC in 1998 with 29 Chinese and 61 Mongolian employees who work 11 hours a day with a one hour lunch break. Khustai Yuruu LLC is a Mongolian-Chinese joint venture company with 30% investment made by BLT LLC of Mongolia and 70% investment by Qinhuangdao Mincheng Construction Engineering LLC.

The breaches discovered with Khustai Yuruu LLC and Tumurtei Khuder LLC were that the Companies did not have in place any mining work plans, drilling and blasting procedures, records for the explosives warehouse, or any records of the deposit & withdrawal of explosives. Nor are employees given any safety instructions. It was discovered that they took explosives and detonators from the explosives warehouse, which was locked by the state inspector of the SSIA, and carried out blasting works at the mines of Khustai Yuruu LLC and Tumurtei Khuder LLC on two occasions each.

While carrying out drilling work at the mine site of Khustai Yuruu LLC without any permission from the state inspector, senior driller Baatarkhuu was injured when the drill rig fell down and was taken to a hospital in Ulaanbaatar city. However, it appears that the procedures for industrial accidents were not applied. The fire extinguishers in the warehouse were not charged; nor were they certified.

Tumurtei Khuder LLC operates over 1180 hectares of mining site referred under License # 939A issued in 1998 with 35 Chinese and 57 Mongolian employees, who work 11 hours a day with a one hour lunch break. Four excavators, one loader, and two bulldozers operate at the Mine site.

There are 2 two-storey buildings designed for residency and office use, 2 containers for storage of spare parts, and one repair and maintenance shop built at the mining site of the Bayangol iron deposit referred under license # 8888A held by Montai Mines LLC. A canal is dug to separate one side of the mining area. No production activities have been commenced at the deposit.

The working group photos and videos documented the breaches discovered during the inspection. To avoid repetition, the measures and actions specified in the report of the previous inspection group are not mentioned here.

The working group hereby draws the following conclusions.

1. Khustai Yuruu LLC opened the explosives warehouse, which was locked by a state inspector, and without permission, carried out unauthorized blasting works on two occasions, and extracted iron ore. Therefore, Amgalanbayar Ts., a member of the working group and state inspector of the SSIA, put seals on the explosives warehouse and 5 items of machinery and equipment, including an ore crusher, an excavator, a loader, and a bulldozer and suspended the operations of the mine temporarily.

2. Article 2.5.1 of the Law on Control of Explosives, Blasting Items, and their Circulation, which states, "The premises and warehouses for the manufacture and storage of explosives, blasting agents, and detonators shall have a safety zone, identified by the means of calculation" was breached.

3. The following provisions of the Law on Control of Explosives, Blasting Items, and their Circulation were violated: Article 11.1.2, which states, ". . . shall have blasting agents and detonators specifically designed for the purpose of blasting, special purpose vehicles, and security enhanced explosives warehouse", Article 14.1 "Explosives, blasting agents, and detonators shall be kept in a standard warehouse specifically designed for the purpose", Article 14.2 "Business entities shall keep accounting records of explosives, blasting agents, and detonators in accordance with the General Rule for Blasting Works Safety Operations by clearly stating deposits, withdrawals, and the remaining balance and shall carry out inventory quarterly ", and Article 14.4 "Provincial or capital city governor shall identify the physical location for the place of manufacture or storage of explosives, blasting agents, and detonators."

4. Khustai Yuruu LLC failed to transport explosives, blasting agents, and detonators in vehicles specifically designed for the purpose. This is in violation of the Technical Standard for Transportation of Dangerous Goods /MNS 4978:2000/ and the General Rule for Blasting Works Safety Operations.[174]

162. On 15 June 2006, the State Specialized Inspection Agency wrote to Tumurtei Khuder,

> Pursuant to the guidelines approved by the Chairman of the State Specialized Inspection Agency, the operations of your Mine engaged in ore extraction at the iron deposit located in the territory of Khuder *Soum* in Selenge *Aimag* were inspected on 15 June 2006 with respect to the status of enforcement of the Law on Environmental Protection, Minerals Law, Water Law, Land Law, Law on Subsoil, and other laws and regulations. The following breaches were discovered during the inspection:
>
> - The unsatisfactory preparation of documents by the business entity, which must be present at the Mine facility, is in breach of the provision of Article 39.4 of the Minerals Law.
> - The unsatisfactory quality of the Mining Work Plan in terms of preparation and the failure to launch the implementation of the Environmental Protection Plan and Environmental Analysis Program are in breach of the provisions of Article 30 of the Minerals Law and Article 6 of the Law on Environmental Impact Assessment.
> - The lack of clarity of in [*sic*] certain sections despite the availability of the Mining Work Plan is in breach of the provision of Article 20.1.6 of the Minerals Law.
> - The unsatisfactory performance of the license holder's obligations with respect to environmental protection is in breach of the provisions of Article 31 of the Law on Environmental Protection and Article 30 of the Minerals Law.
> - The failure to make contracts on Land Use and Water Use and the failure to carry out analysis on water are in breach of the provisions of Article 45 of the Land Law and Article 25, Article 26, and Article 27 of the Water Law.
> - The failure to refer the industrial and domestic facilities of the Mine for commissioning to the State Commission is in breach of the provision of Article 15 of the Law on Construction.
> - The failure to operate an internal control laboratory within the plant is in breach of the provision of Article 31.2 of the Law on Environmental Protection.
> - The absence of a weighing machine to weigh ore loaded from the plant is in breach of Article 34.2 of the Law on Environmental Protection and Article 19.4 of the Law on Ensuring Unified Metering System.
> - The leaking of ore along the road from the plant to Dulaankhan is in breach of the provision of Article 32.1.4 of the Law on Subsoil.
> - The failure of the minerals license holder to make a Stability Agreement as required under the prescribed procedures is in breach of the provision of Article 20 of the Minerals Law.
> - The failure to make a contract relying on the market price for product export is in breach of the provision of Article 38.2.1 of the Minerals Law.
>
> As a result, US-2 seals were put on the ore crushing plant and the mine operations were suspended temporarily with respect to License # 939A on the basis of the provisions of Article 27.1.3 of the Law on Environmental Protection, Article 52.1.6 of the Minerals Law, and Article 10.9.7 of the Law on State Inspection.

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[174] Report of the Working Group assigned to inspect the operations of licence-holders of iron deposits located in Selenge aimag and to prepare recommendations, 12 June 2006 (**Exhibit C-105**).

> Failure to implement the Act will result in measures set out in the Licensing Law and the Law on State Inspection.[175]

163. On 20 June 2006, Darkhan applied to the City Administrative Court, setting out its view that "[t]here is sound ground to consider Mr. L. Natsagdorj intentionally failed to re-register the license by misusing own official position for his personal interest which caused nullification of the license and obtained it into his possession rendered by his sister" and requesting that the Court "invalidate the license allowed illegally to 'BLT' LLC and decide license holder's right of our Plant in accordance with law."[176]

164. On 21 June 2006, the Ministry of Trade and Industry responded to Darkhan's request to the Parliament (see paragraph 159 above) as follows:

> We have reviewed your request addressed to the Prime Minister of Mongolia
>
> In accordance with Resolution #160 issued by (former) Ministers' Council of People's Republic of Mongolia in 1990, iron ore deposits of Tumurtei, Bayangol and Tumurtolgoi were issued to ownership of Darkhan Metallurgical Plant.
>
> However, the above iron ore deposits (Tumurtei, Bayangol and Tumurtolgoi) were lost their ownership status and economic values due to wrong actions of some then-officials who abused their power for their personal interests, as it appears.
>
> Thus, it is required to take relevant measures in order to stop and regulate such illegal actions which seriously violated laws and regulations.
>
> To solve the issue, the Ministry did reflect amendments in the revised version of Minerals Law which has been discussed by the Cabinet meeting and submitted to the Parliament.
>
> Under this law, certain provisions have been included in the law bill draft to legalize the state policy and directions on deposits where exploration work has been conducted at the expense of the State budget and so have their resources been determined accordingly.
>
> Issues related with cluster deposits in Darkhan-Selenge region, such as Tumurtei, Bayangol and Tumurtolgoi's iron ore deposits, will apply to this upcoming revised law, if enacted.[177]

165. On 22 June 2006, Darkhan wrote to the State Property Committee, reiterating its position on the Tumurtei deposit and the 939A Licence.[178]

166. On 3 July 2006, the State Specialized Inspection Agency wrote to Tumurtei Khuder, lifting the suspension it had imposed on 15 June. The Agency noted as follows:

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175 Letter from the SSIA to Tumurtei Khuder, 15 June 2006 (**Exhibit C-108**).

176 Darkhan Pleading to the City Administrative Court, 20 June 2006 (**Exhibit R-27**).

177 Letter from the Ministry of Trade and Industry to Darkhan, 21 June 2006 (**Exhibit R-50**).

178 Letter from DMP to the State Property Committee, 22 June 2006 (**Exhibit C-100**).

> Since the Act [suspending mining operations] was issued, some actions have been taken: the Contract on Land Use and the Contract on Water Use were made, and the relevant fees were paid; a contract was made to run an internal inspection laboratory; a renewed contract on product export was made; ore poured out along the road on the way to Dulaankhan was cleared away; designs and plans of the plant were developed in Mongolian; and the camp plan was reviewed by the Specialized Inspection Department in Selenge *Aimag*.
>
> Therefore, on the basis of Article 27.1.3 of the Law on Environmental Protection, Article 52.1.6 of the Minerals Law, and Article 10.9.7 of the Law on State Inspection, we hereby permit you to remove US-2 seals, put on ore crusher present at the mining site referred under License # 940 in the presence of the environmental inspector in Khuder *Soum* for the purpose of reference of the condition of the equipment, and restart your production.[179]

167. On 20 July 2006, Tumurtei Khuder reacted to what it considered to be Darkhan's misstatements regarding the Tumurtei deposit and wrote to Darkhan, offering to supply it with iron ore (in an unreduced form not then useable in the Darkhan Plant). Darkhan refused the offer.[180]

168. On 26 July 2006, the Department of Geology and Mining Cadastre wrote to Tumurtei Khuder, suspending its licence for a period of three months on the basis of the State Specialized Inspection Agency's action of 15 June, notwithstanding the Agency's further correspondence of 3 July.[181]

169. On 3 August 2006, a further Sub-Working Group was established –

> with the task of organizing follow-up measures in relation to the complaints filed to Parliament Speaker Nyamdorj Ts. and Prime Minister Enkhbold M. by Darkhan Metallurgical Plant and "Cement Shokhoi" Stock Company in Khutul and others on the matter of the issuing of explorations and mining licenses, for the purpose of conducting inspections over deposits, on which the above-mentioned plants were established, and with the task of preparing recommendations.[182]

170. On 4 August 2006, the State Property Committee wrote to the Department of Geology and Mining Cadastre requesting the revocation of the 939A License in the following terms:

> During the handover of the position of the executive director of Darkhan Metallurgical Plant State-Owned Stock Company, it was discovered that the Tumurtei iron deposit, on which the Plant was established, is no longer in the structure of the Plant. When we looked into the matter, we established that it is decreed in Provision Two of Resolution # 160 of 1990 of the Ministers' Council of the People's Republic of Mongolia (as formerly known) "That . . . an iron smelting and rolling mill plant of the Metallurgical Mill Plant Complex be built and presented for exploitation from 1990 to 1993 and a mill plant producing reduced iron from iron ore from 1993 to 1995", and in Provision Three "That an ore extracting open-cast mine relying on the Tumurtei iron deposit be built by and before 1994 and the Mine and the Metallurgical Plant Complex be together reorganized into a Metallurgical Mill Plant Combination".

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179 Letter from the SSIA to Tumurtei Khuder, 3 July 2006 (**Exhibit C-109**).

180 Letter from Tumurtei Khuder to DMP, 20 July 2006 (**Exhibit C-112**); Maral, "Metallurgical Plant refused to receive 45 tons of ores", Daily News, 24 July 2006 (**Exhibit C-113**).

181 Resolution No 718 of the DGMC, 26 July 2006 (**Exhibit C-110**); Letter from the Mineral Resources and Petroleum Authority to Tumurtei Khuder, 26 July 2006 (**Exhibit C-111**).

182 Order No 141 of the State Secretary of the Ministry of Industry and Trade, 3 August 2006 (**Exhibit C-104**).

> With the purpose of enforcing the above resolution of the Ministers' Council of the People's Republic of Mongolia, the Plant assigned funds, made efforts, hired Almaz Company for a completed detailed exploration and resource estimation, and safeguarded samples and other results.
>
> Nevertheless, it appears that your Division illegally transferred the licenses over this deposit (939A and 940A) to a Mongolian-Chinese joint private company called "BLT" LLC on 26 January 1998. Although some authorities of Darkhan Metallurgical Plant repeatedly submitted letters of request to the relevant institutions to revoke the illegally issued licenses, no specific decision was made to date other than saying that the license could not be terminated in accordance with Article 24 of the Law on Subsoil and that Natsagdorj, ex Director of the Plant, was being investigated under a criminal case.
>
> By failing to inform DMP when it issued the above-mentioned licenses (939A and 940A) to the said "BLT" LLC, your Division has seriously violated the applicable provisions of the Law on State and Local Property, Minerals Law, and Law on Licensing.
>
> To be precise, this is in breach of the provisions of specific laws as detailed below:
>
>> Law on State and Local Property: Article 4.1 "Those that are designated as property of all People and intended for public use in the Constitution and in other laws shall be considered state property for public use." Article 4.2 ". . . subsoil and its resources";
>>
>> Law on Licensing: Article 9.1.1 "ensuring national security and defense", Article 9.1.2, "creating a favorable environment for business", Article 9.1.3 "ensuring transparency", and Article 11.1.6 "seek opinion of provincial or capital city governor";
>>
>> Minerals Law: Article 5.1 "Mineral resources naturally occurring in Mongolia on the earth's surface, in subsoil, or natural water are the property of the state.", Article 16.1 "Upon satisfying the prerequisites set out in Chapter 4 of this law, a license holder shall conduct its operations in accordance with its management and marketing principles. . .", and Article 22, Article 23, Article 24, and Article 25 of Chapter 3.
>
> As a result, 'the eligibility requirement for holding a license set forth in Chapter 3 of this law is not met', as set out in Article 47.1.
>
> For that reason, we hereby request you to revoke 939A and 940A licenses illegally issued to a Mongolian–Chinese private company, so-called BLT LLC, in accordance with Article 47.2.1 and Article 47.2.2 of the Minerals Law and to enable Darkhan Metallurgical Plant State-Owned Stock Company to run regular operations, which will suit the national interest.[183]

171. On 5 August 2006, the State Specialized Inspection Agency wrote twice to Tumurtei Khuder, noting the absence of "a license for the use of explosives and blasting items, which must be kept in the mine facility of a business entity" and requiring that Tumurtei Khuder "1. To submit relevant information to the State Specialized Inspection Agency by and before 15 August 2006 for inspection; 2. To obtain a license for the use of explosives".[184]

172. On 14 August 2006, the Sub-Working Group established on 4 August delivered its report, noting in relevant part as follows:

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183 Letter from the State Property Committee to the DGMC, 4 August 2006 (**Exhibit C-114**).

184 Letter from the SSIA to Tumurtei Khuder, 5 August 2006 (**Exhibit C-115**); Letter from the SSIA to Tumurtei Khuder, 5 August 2006 (**Exhibit C-116**).

The working group inspected the operations of Khustai Yuruu LLC and Tumurtei Khuder LLC at the iron deposits located in Yuruu and Khuder *Soums* in Selenge *Aimag* and the Khutul II limestone deposit of Erel LLC located in Orkhon sub-*Aimag* in Selenge *Aimag* from 04 August to 20 August 2006.

The inspections were carried out within the context of the Minerals Law, the Law on Control of Explosives, Blasting Items, and their Circulation, the Law on Environmental Impact Assessment, the Law on Licensing, and the Law on State Inspection and the status of enforcement of the above laws was checked.

According to the guidelines provided for the inspections, the following areas of the operations of the business entities were inspected:

1. On-site examination of the geographic coordinates of the deposits;
2. Exploration and/or exploitation processes and results;
3. On-site examination of the fulfillment and status of the exploration plan and mining plan;
4. On-site examination of environmental restoration work in process;
5. Opinions of and comments from local residents and local administrative organization[s];
6. Status of production and trade of mining commodities;
7. Status of storage, preservation, transportation, and use of explosives, detonators, and blasting items;
8. Status of issuance of exploration or mining licenses;
9. Changes made in the exploration and mining licenses and the status of the payment of fees.

[. . .]

When the Darkhan Metallurgical Plant was established under Resolution # 160 of the Ministers' Council /as formerly known/, it was established relying on the Tumurtei and Bayangol iron deposits. However, the Plant is about to cease to function due to a lack of raw material resources. Although Darkhan Metallurgical Plant and Cement Shohoi Stock Company in Khutul have repeatedly submitted letters to the MRPAM since 2001, no followup measures have been taken.

BLT LLC, the founder of Khustai Yuruu LLC and Tumurtei Khuder LLC, currently holds exploration and mining licenses for iron ore in 9 *soums* in Selenge *Aimag,* including Yuruu, Khuder, Javkhlant, Altanbulag, Shaamar, Orkhon, Zuunburen, Tsagaannuur, and Tushig.

Four excavators, one loader, and two bulldozers are in operation at the Mine of Khustai Yuruu LLC. A total of 35 dump trucks are used for internal and external haulage by Khustai Yuruu LLC and Tumurtei Khuder LLC interchangeably.

Khustai Yuruu LLC operates over 216 hectares of the Khust Uul mining area referred to under license # 940A, which was issued to BLT LLC in 1998, which has 29 Chinese and 61 Mongolian employees working 11 hours a day with one-hour lunch break. Khustai Yuruu LLC is a Mongolian-Chinese joint venture company with a 30% investment from BLT LLC of Mongolia and a 70% investment from Qinhuangdao Mincheng Construction Engineering Co., Ltd. 25 citizens of the People's Republic of China are working on the buildings under construction at the mine site. Among them, 11 had permission to work in Mongolia. Eight of them were authorized to work for Tumurtei Khuder LLC only. The documents for the other employees, are, according to them, kept by the management, which is the same excuse they used during the previous inspection.

The following breaches were discovered during the inspection, which was conducted in accordance with the guidelines provided:

1. With respect to the on-site examination of the geographic coordinates of the deposits:

While checking the coordinates of the deposit at the Department of Geology and Mining Cadastre of the MRPAM, we discovered that the coordinates were changed only on the basis of the Act on Marking of Corner Coordinates when the original coordinates of 939A and 940A licenses were found to be different from those specified in the current licenses. New licenses must therefore be obtained. The mining area under License #1993A falls under the jurisdiction of Orkhom *Soum,* Selenge *Aimag*. However, on the certificate of the License, it says Saikhan *Soum.*

Article 27.1 of the Minerals Law states, 'a mining license holder shall put corner coordinate marks in the mining area in accordance with the technical specifications established by a Specialized inspection body within 90 business days from the license registration.' In violation of this provision, Erel LLC put the corner coordinate marks on 06 to 07 May 2000.

2. With respect to exploration or exploitation work processes and results:

   Prospecting-assessment work has been completed by Khustai Yuruu LLC. However, it is discovered that no preliminary and detailed exploration works were completed and that the Company developed the feasibility study and mining plan on the basis of the prospecting-assessment work and was engaged in exploitation of the Khust Uul deposit.

   During the inspection, it was revealed that the above companies do not follow the mining plan in their operations.

   Erel LLC had the feasibility study of the Khutul II deposit completed by the School of Mining of the Technical University in 2000. This is in violation of Article 39.4.1 of the Minerals Law, which requires the feasibility study for mining of a deposit to be completed within 60 days from the date of the license being issued.

3. With respect to the on-site examination of the status and fulfillment of the exploration work plan and mining plan:

   Khustai Yuruu LLC and Tumurtei Khuder LLC failed to submit their [previous] years' exploration work plans to the MRPAM. This is in violation of the applicable provision[s] of the Minerals Law. Khustai Yuruu LLC prepared its mining plan for 2006 and had it approved while Tumurtei Khuder LLC prepared its mining plan for 2005 and 2006 and had them approved. The 2004 report of Khustai Yuruu LLC on iron ore extraction was submitted to the Mining Department; however, it failed to submit the 2005 report to the MRPAM. This is in violation of Article 39 of the Minerals Law. Another shortcoming that is discovered was that the State Specialized Inspection Agency and the MRPAM approved the mining plan without actually having reviewed it.

4. With respect to the on-site examination of the environmental restoration work in process:

   The road repair and maintenance work undertaken by Khustai Yuruu LLC and Tumurtei Khuder LLC is found to be unsatisfactory and the dust which results, adversely impacts the employees' health and residential condition and pollutes the agricultural field.

   During the on-site inspection of the status of environmental restoration activities undertaken by Khustai Yuruu LLC on the Khust Uul deposit, it was discovered that no annual plan for environmental protection is in place and nothing is done in this regard. This is in violation of the applicable provision[s] of the Law on Environmental Assessment.

   Although Khustai Yuruu LLC and Tumurtei Khuder LLC engaged Omego Eco LLC in 2003 and Shinechlel Eco LLC in 2004 to carry out detailed environmental assessments over the Khust Uul and Tumurtei deposits respectively, no on-site environmental restoration took place. Although Tumurtei Khuder LLC and Khustai Yuruu LLC stated in their Report on the Environmental Impact Assessment that they would beneficiate the iron ore, they are still exporting it to the People's Republic of China in the form of ore. This is in violation of the Law on the Environmental Impact Assessments.

5. With respect to the opinions of and comments from local residents and local administrative organization[s]:

During the inspection conducted in June 2006 pursuant to Directive # 38 and Directive # 39 of the Prime Minister of Mongolia involving representatives of the civil movements, a meeting was held with the deputy governor of the *soum,* chairman of the Citizens' Representative Meeting, the environmental inspector, and the tax inspector to listen to their opinions and comments. The deputy governor of the *soum* and the chairman of the Citizens' Representative Meeting said that the authorities of Khustai Yuruu LLC were leading local investors.

Although we tried to see the local authorities and officials concerned, no one was available. We were given some excuses for their being unavailable. According to these excuses, "they went to a resort" or "they went to see someone off". When we listened to the comments and opinions of the local residents and Company employees, they said that Chinese nationals with no identification documents and permission to work, who have visa-related infringes, are hired, salary rates for Mongolian employees are low, minimum standard requirements for hygiene, labour safety, and safety operations are not satisfied, no employment contracts were entered into, little consideration is given to employees' social welfare issues, and employees are dismissed for accusations as for taking part in a movement. These breaches constitute violations of applicable provisions of the Labour Code of Mongolia. During the inspection, the Chinese company authorities were not present; as a result, we were unable to see any employment contracts. Therefore, there is no ground to believe that the violations of the Labour Code revealed during the earlier inspection have been remedied.

6. With respect to the status of production and trade of mining commodities:

   Khustai Yuruu LLC extracted 35.0 thousand tons of ore in 2004, 165 thousand tons in 2005, and . . . thousand tons as of 04 August 2006 and exported . . . thousand tons to the PRC. With the absence of an approved mining plan, it extracted . . . thousand tons of ore in 2004 and 2005, which was based on laboratory test results and sales / purchase contracts, and sold at a rate lower than that of the world market, all of which are in violation of the applicable provisions of the Minerals Law.

7. With respect to the status of storage, preservation, transportation, and expenditure of explosives, detonators, and blasting items:

   With the absence of a license for blasting activities, it carried out blasting works in 2004, 2005, and 2006, which is in violation of the applicable provisions of the Law on Control of Explosives, Blasting Items, and their Circulation and Article 15.10.4 of the Law on Licensing.

   Yuruu sub-*Aimag* governor Ganbold, Environmental inspector Bat-Amgalan, and the authorities of the Mine opened the explosives warehouse located in Khustai Mountain, which was sealed and closed down by the state inspector of the State Specialized Inspection Agency Amgalanbayar Ts. et al. during the inspection on 12 May 2006, without permission and carried out blasting activities. This is in violation of Article 10.9.6 of the Law on State Inspections.

   No drilling and blasting procedures, accounting records for the explosives warehouse and/or explosives were in place. Employees are not given any safety instructions; fire distinguishers in the warehouse are not charged; nor were they certified. This is in violation of the provisions of the General Rule for BlastingWorks Safety Operations.

   While carrying out drilling work without the permission of the state inspector, who temporarily suspended the operations of the mine, senior driller Baatarkhuu got injured and was taken to a hospital in Ulaanbaatar city. The procedure for industrial accidents was not issued, which is in violation of the Labour Code.

8. With respect to the status of the issuance of exploration or mining licenses:

When we inspected the materials available at the Department of Geology and Mining Cadastre of the MRPAM to check the status of the issuance of exploration and exploitation licenses granted to Khustai Yuruu LLC, license # 940A over the Khust Uul deposit was issued to BLT LLC on 28 January 1998 and similarly, license # 939A over the Tumurtei deposit was issued to Tumurtei Khuder LLC on 28 January 1998. Moreover, license # 6567X over the Tumurtei deposit was issued on 18 November 2003, License # 6654X on 12 December 2003, 24 licenses numbered 6814 through 6837 on 27 January 2004, and # 7499X and 7500X on 17 May 2004.

9. With respect to changes made in exploration and mining licenses and the status of the payment of fees:

[. . .]

Regarding license # 939A over the Tumurtei iron deposit held by Tumurtei Khuder LLC:

Original corner coordinates specified in license # 939A issued on 28 January 1998 were as follows:

[. . .]

- A prospecting-evaluation program costing USD7.1 thousand was completed at the expense of the state budget on the Khustai Uul iron deposit to estimate its iron resources. However, Khustai Uul LLC breached Article 7 of the Law on Implementation of the Minerals Law by failing to recover the costs for the above program.
- Erel LLC failed to run specific activities after obtaining the license over the Khutul II limestone deposit through the transfer and thus violated Article 21.2.1 of the Law on Subsoil, which states, "The failure to exploit the subsoil within 3 years shall lead to the termination of the right to use the subsoil."
- Khustai Uul LLC and Erel LLC violated Article 41.2.1 of the Law on Subsoil, which requires full geological surveys of the subsoil to be completed.
- Khustai Yuruu LLC carried out mining activities on the mining area licensed for BLT LLC, which is in violation of Article 11.2 of the Minerals Law, which states, "No person shall engage in exploitation of minerals covered by this law within the territory of Mongolia without a valid mining license."
- The above-mentioned 3 companies failed to comply with Article 30.1 of the Minerals Law, which states, "An environmental protection plan shall be prepared by the mining license holder in accordance with the applicable laws promptly before or after obtaining a mining license."
- Tumurtei Khuder LLC and Khustai Yuruu LLC were engaged in blasting activities without a license, which is in violation of Article 15.10.4 of the Law on Licensing and Article 11 of the Law on Control of Explosives, Blasting Items, and their Circulation.
- Although Tumurtei Khuder LLC and Khustai Yuruu LLC stated in their Report on the Environmental Impact Assessment that they would beneficiate the iron ore, they are still exporting it to the PRC in the form of ore. This is in violation of the Law on Environmental Impact Assessment.

We recommend that the Minister of Industry and Trade terminates the Minerals Mining License # 940A held by and issued to BLT LLC and Minerals Mining License # 939A held by and issued to Tumurtei Khuder LLC by the Department of Geology and Mining Cadastre in 1998, as well as Minerals Mining License # 1993A held by and issued to Erel LLC in 1999, pursuant to Article 47 of the Minerals Law due to their operations in violation of the abovementioned laws in effect in Mongolia.[185]

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[185] Report of the Working Group assigned to inspect the operations of licence-holders of iron deposits located in Selenge aimag and to prepare recommendations, 14 August 2006 (**Exhibit C-106**).

173. On 15 August 2006, the Ministry of Trade and Industry ordered the Customs Office to prohibit any further export of iron ore through the railway.[186]

174. On 21 August 2006, the State Specialized Inspection Agency wrote to Tumurtei Khuder to lift its action of 5 August, noting as follows:

> By entering into a Contract on Blasting Work with Blast LLC to hire it for blasting and drilling after the Act was issued, the Company appears to have remedied the breaches set out in Act # 25/475-549.
>
> Therefore, we hereby invalidate State Inspector's Act # 25/475-549 dated 08 August 2006 and permit the removal of 4 of the US-2 seals put on the mobile unit of the ore crusher and 4 of the tires of the ZL-50 loaders.[187]

175. On 30 August 2006, the Ministry of Trade and Industry wrote to the Department of Geology Mining Cadastre with the subject "Inspection Result", as follows:

> To deal with the complaints filed by some individual citizens and organizations to the Parliament speaker of Mongolia Nyamdorj Ts., the Prime Minister Enkhbold M., the Chairman of the Government Secretariat and a Minister of Mongolia Batbold S., and the Minister of Industry and Trade, with respect to the Tumurtei and Khust-Uul iron deposits and the Khutul-2 limestone deposit, four working groups were formed and sent to the deposits at considerable expenses to carry out investigations pursuant to Letter of Assignment of Tasks # 3 of the Government of Mongolia from 2006 and Directive # 38 and Directive # 39 of the Prime Minister of Mongolia from 2006. These working groups, consisting of the representations from the relevant ministries, agencies, and civil society organizations, were formed with the purpose of investigating the instances of granting of the explorations and mining licenses over some major deposits; mining work plans; environmental reclamation works; use, storage, and protection of explosives and blasting agents. A number of breaches have been discovered during these investigations as the consolidated conclusions of the working groups suggest. Upon examining the unified findings of those working groups, several violations were revealed.
>
> The following violations were detected in the operation of "Tumurtei Khuder" LLC, "Khustai Yuruu" LLC and "Erel" LLC during the inspection:
>
> - While it was resolved by Government Resolution No.160 dated 1990 designating the Tumurtei, Tumurtolgoi, Bayangol and Khustai mountain iron ore deposits when building the "Metallurgical Plant" in Darkhan city and the Khutul-I and Khutul-II limestone deposits when building the "Khutul-Cement" lime plants as their raw material bases, "Tumurtei Khuder" LLC, "Khustai Yuruu" LLC and "Erel" LLC acquired the licenses of the above mentioned deposits for the above mentioned plants in violation of the Government Resolution No.10,
> - Detailed exploration work to determine the Tumurtei Iron Ore Deposit reserve was carried out by the state budget between 1990-1994, at an expense of 62.6 million togrogs, however, "Tumurtei Khuder" LLC failed to make the repayment and violated Article 7, "Law on Implementation of the Minerals Law",
> - Prospecting and assessment work at an expense of US$7,100 on the state budget to estimate the Khustai mountain iron ore deposit reserve , however, "Khustai-Yuruu" LLC failed to make the repayment and violated Article 7, "Law on Implementation of the Minerals Law",

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[186] Letter from the Ministry of Industry and Trade to the Customs Office in Selenge aimag, 15 August 2006 (**Exhibit C-101**).

[187] Letter from the SSIA to Tumurtei Khuder, 21 August 2006 (**Exhibit C-117**).

- "Erel" LLC violated the provision 2.1, Article 21 of "Law on Subsoil" which provides that the "right to mine subsoil is void if the mining is not started for 3 years after the subsoil was issued" by not conducting certain activities after it acquired the license for the Khutul-II limestone deposit,
- "Khustai-Yuruu" LLC and "Erel" LLC respectively violated the provision 2.1, Article 41 of "Law on Subsoil" on completing full geological research of the subsoil,
- By conducting activities in the area with the "BLT" LLC special license, "Khustai-Yuruu" LLC is violating Section 2, Article 11 of the "Minerals Law" which provides that "No person shall conduct mining of minerals covered by this law within the territory of Mongolia without a valid mining license.",
- The above mentioned three companies failed to implement and therefore violated Section 1, Article 30 of the "Minerals Law" which provides that "An environmental impact assessment and an environmental protection plan shall be prepared by a mining license holder in accordance with applicable laws as soon as possible before or after receiving a mining license.",
- "Tumurtei Khuder" LLC and "Khustai-Yuruu" LLC respectively violated Section 10.4, Article 15, of the "Licensing Law" and Article 11 of the "Law on Control of Explosives, Blasting Items and their Circulation" by conducting explosive works without a special license to conduct explosive works,
- Even though in the "Environmental Impact Assessment Reports" of "Tumurtei Khuder" LLC and "Khustai-Yuruu" LLC it was mentioned that the iron ore shall be concentrated, these companies have repeatedly violated the "Law on Environmental Impact Assessments" by exporting iron ore to China.

The working group has issued a recommendation that the Minerals Mining License No. 940A issued by the Department of Geology and Mining Cadastre to "BLT" LLC in 1998, Minerals Mining License No.939A issued to "Tumurtei Khuder" LLC in 1998 and Minerals Mining License No. 1993A issued to "Erel" LLC in 1999 should be revoked under Article 47, "Minerals Law" as those companies are conducting activities which violate the current laws of Mongolia.

Thus, we inform you to take measures under the provisions of the relevant laws and report to us the results.[188]

176. On 8 September 2006, the Department of Geology Mining Cadastre issued Resolution No. 902, nullifying the 939A Licence in the following terms:

> On the basis of an official letter No.2/2296 dated August 30, 2006 from the Ministry of Industry and Trade of Mongolia and Article 14.1.4 of the Law on Licenses of Business Operations,
>
> THIS IS TO DECREE,
>
> 1. TO nullify the mining licenses No.1993A of Erel LLC, No.939A of Tumurtei Khuder LLC and No.940A of BLT LLC for serious and/or repeated violations of the license conditions.
> 2. TO order Cadastre Registration and Accounting Department (Mr.Altanbaatar) and Cadastre Cartography and Legal Departmant (Mr.Ganbold) to make amendments to the license and cartography registry upon the issuance of this decree and to give official notice thereof to the Environment, Geology and Mining Monitoring Office of the State Inspection Agency and other relevant organizations.[189]

[188] Letter from the Ministry of Industry and Trade to the DGMC, 30 August 2006 (**Exhibit C-122**).

[189] Resolution No 902 of the DGMC, 8 September 2006 Resolution No 902 of the DGMC (**Exhibit C-123**).

Tumurtei Khuder was notified of the nullification on 13 September 2006.[190]

J. TUMURTEI KHUDER'S CHALLENGE TO THE REVOCATION AND THE ALLOCATION OF THE LICENCE TO DARKHAN

177. On 14 September 2006, BLT and Tumurtei Khuder initiated a challenge to the revocation of the 939A Licence in the Mongolian courts.[191]

178. On 5 and 16 October 2006, Darkhan wrote to the Department of Geology and Mining Cadastre and to the Mineral Resources and Petroleum Authority, seeking the licence to the Tumurtei deposit.[192]

179. On 29 November 2006, the Capital City Administrative Court denied the BLT and Tumurtei Khuder's challenge.[193] The Court reasoned in relevant part as follows:

> [. . .]
>
> After receiving license # 939A, "Tumurtei khuder" LLC initiated mining within deposit and since January of 2006, it started export of iron ore to China.
>
> In 2006, by the Decree #39 of Prime Minister of Mongolia, task force for studying and inspecting activities of license holders of "Tumurtei", "Khust mountain", "Bayangol", "Khutul" deposits, and dispute between license holders and local residents. By the decision of Minister for Industry and Trade, task force visited above mentioned deposits for 3 times on May, June and August of 2006 and produced report respectfully.
>
> Task force consists of relevant state authorities, inspection officials and representatives of civil society.
>
> During this study and inspection, task force revealed continues and material breach of Minerals law, Transitional law on effecting Minerals law, law on Subsoil, Law on Environmental assessment, law on Control of circulation of explosive materials by "BLT" LLC and "Tumurtei khuder" LLC.
>
> This includes:
>
> 1. Although license #939A and 940A were issued to "BLT" LLC in January of 1998, it did not use the deposit until 2003. Therefore it resulted in violation of Article 21.2 of law on Subsoil stating that "if subsoil was not used for 3 years since its allocation, then right to use the subsoil can be terminated" which was proven by statements of parties to dispute and other written evidences;

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[190] Letter from the DGMC to Tumurtei Khuder, 13 September 2006 (**Exhibit C-121**).

[191] Joint Statement of Claim of BLT and Tumurtei Khuder to the Capital City Administrative Court, 14 September 2006 (**Exhibit C-166**).

[192] Application of DMP to the DGMC, 5 October 2006 (**Exhibit C-151**); Letter from Darkhan to the Chairman of Mineral Resources and Petroleum Authority, 16 October 2006 (**Exhibit R-54**).

[193] *BLT and Tumurtei Khuder v. DGMC*, Decision No. 196, 29 November 2006 (**Exhibit R-64**).

2. On 3rd of December, 1997, the Government of Mongolia approved "Regulation on reestablishing amount of explorations expenses conducted from state budget and repayment of it to state budget" by Resolution #234. "BLT" LLC concluded agreement to repay explorations expenses for "Khust mountain" deposit equaling 7.1 thousand in USD and agreed to repay it within 2nd of May, 2005. But it was repaid in 11th of August, 2005. Even though it could be seen as non responsiveness of license issuer on this matter, on the other hand it violated Article 7 of Transitional law of effecting Minerals law calling for repayment within 5 years from effecting Minerals law. For "Tumurtei" deposit, on 5th of June, 2006, "Tumurtei khuder" agreed to pay repayment equaling 667522 in USD within 5 years. "Tumurtei khuder" only paid 37761 in USD as initial tranche of repayment. It also rules violation of above mentioned provision. In other words, "BLT" LLC supposed to pay all repayments within 1st of July, 2002.

3. "Khustai Eroo" LLC initiated its mining activities in "Khust mountain" deposit of "BLT" LLC, without any license, resulting violation of Article 11.2 of Minerals law of 1997 stating that "its prohibited to mine without license within territory of Mongolia". It's been proven by statement of claimant at court and other written evidences.

4. Per Customs statistic provided on 9th of November 2006 of General customs administration, "BLT" LLC exported 17372195 kg iron ore to China in 2004 and "Tumurtei khuder" LLC exported 162390280 kg of iron ore to China since January of 2006. It contradicts with claimant's goal to building eco-friendly plant and materially violated Article 16.3 of Minerals law of 1997, stating that "license holder can sale minerals extracted from its deposit after fulfilling obligations referred in Chapter 4 of this law".

5. Both companies had environmental impact assessment. But none of them [rehabilitated] used area. Therefore it violates Article 30.1 of Minerals law stating "license holder shall implement environmental impact assessment plan"

6. Since its operation, both "Khustai eroo" LLC and "Tumurtei khuder" LLC used explosives without any licenses. It violates Article 15.10.4 of law on Licensing (use of explosives must be licensed) and Article 12.1 of law on Controlling circulation of explosive materials stating "entity referred in Article 15.10.4 of law on Licensing shall use explosives respectfully". In addition to this, "Tumurtei khuder" LLC and "Khustai eroo" LLC both broke twice into sealed storage containing explosives, which were sealed by of [*sic*] State inspector and used explosives, violating Article 2.1.5, 12.1.2, 14.1 14.2 and 14.4 of law on Controlling circulation of explosive materials.

Claimant and its advocates are raising grounds to repealing administrative decision #902, which includes use of non applicable ad generally regulated law (law on Licensing) while there are more detailed and applicable law (Minerals law) were existing. In addition to this claimant raises issue over inclusion of official letter from the Ministry of Industry and Trade as legal basis of issuing above mentioned decision, which certainly brought this decision to fall under article 9.1.7 of law on Administrative procedure.

Article 1.1 of law on Licensing stated that "The purpose of this law is to issue license, suspending and revoking such license in respect of business activities requiring specific knowledge or specialty or activities that may harm public interest, health of population, environment and national security of the country". Article 14.1 of law on Licensing stated that "License issuer will revoke the license on following grounds" and Article 14.1.4 stated that "continuous and/or material breach of license requirement". It's clear that claimant continuously and materially breached requirements and conditions of the license. Therefore use of relevant provisions of law on Licensing by OMA in issuing decision #902 to revoke license is justified. In other words, relations regarding to mining is regulated by Minerals law, however some activity of license holder shall be regulated by law on Licensing on limited basis.

> In addition to this hereby, the court concluded that reference ad us e of official letter from the Ministry of Industry and Trade shall not constitute violation as it summarized all unlawful conduct of the claimant. Therefore decision #902 of OMA is legally binding and in consistence with relevant legislations.[194]

BLT and Tumurtei Khuder appealed this decision as far as the Supreme Court of Mongolia, without success.[195]

180. On 12 February 2007, Darkhan made a renewed application to the Department of Geology and Mining Cadastre, seeking the licence to the Tumurtei deposit.[196]

181. On 30 April 2007, another company, EXIMM LLC ("**EXIMM**"), filed suit in the Capital City Administrative Court, seeking to compel the government to conduct a tender for the licence to the Tumurtei deposit, in keeping with the 2006 Minerals Law.[197] After EXIMM's application was dismissed on procedural grounds, EXIMM recommenced its case on 5 September 2007.[198]

182. On 2 November 2007, the Capital City Administrative Court issued an order in EXIMM's suit, "suspend[ing] the act of resolving the applications of Darkhan Metallurgical Plant State Owned Stock Company for the mining licenses, with registration numbers 18799A and 18800A, until the issuance of the judgment."[199] On the same day, the Department of Geology and Mining Cadastre issued Order No. 2358, directing that the licence to the Tumurtei deposit be issued to Darkhan.[200] Thereafter, the Capital City Administrative Court issued a further order on 14 November 2007, suspending the Department's action.[201]

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194 *BLT and Tumurtei Khuder v. DGMC*, Decision No. 196, 29 November 2006 (**Exhibit R-64**).

195 *BLT and Tumurtei Khuder v. The DGMC* (Decision No 32) (Chamber for Hearing of Administrative Cases of the Supreme Court of Mongolia) 13 February 2007 (**Authority CLA-87**); *BLT and Tumurtei Khuder v. The DGMC* (Decision No 63) (Supervisory Court of the Supreme Court of Mongolia), 19 June 2007 (**Authority CLA-88**); and Letter from the Chief Justice of the Supreme Court of Mongolia to Tumurtei Khuder, 21 August 2007 (**Exhibit C-67**).

196 Receipt No N18800A for the registration of DMP's application to the DGMC, 15 February 2007 (**Exhibit C-153**).

197 Statement of Claim of EXIMM LLC to the Capital City Administrative Court, 30 April 2007 (**Exhibit C-155**).

198 Statement of Claim of EXIMM LLC to the Capital City Administrative Court, 5 September 2007 (**Exhibit C-157**).

199 *EXIMM LLC v. The DGMC* (Court Order No 870) (Capital City Administrative Court), 2 November 2007 (**Authority CLA-82**).

200 Resolution No 2358 of the DGMC, 2 November 2007 (**Exhibit C-158**).

201 *EXIMM LLC v. The DGMC* (Court Order No 898) (Capital City Administrative Court) 14 November 2007 (**Authority CLA-83**).

183. On 6 February 2007, the Parliament of Mongolia issued resolution No. 27, including the Tumurtei deposit on the list of strategically important mineral deposits.[202] On 28 February 2007, the State-owned company Erdenes MGL ("**Erdenes**") applied for a licence to the Tumurtei deposit, which was granted the following day.[203]

184. On 12 May 2008, the Supervisory Court of the Supreme Court of Mongolia upheld the dismissal (given in the first instance on 10 January 2008) of EXIMM's claim on the grounds that, as the licence to the Tumurtei deposit had been held by Darkhan in the first instance, there was no need to conduct a tender.[204] Thereafter, Darkhan entered into a management agreement with the Ministry of Trade and Industry, and on 27 June 2008, the licence to the Tumurtei deposit was transferred from Erdenes to Darkhan.[205]

185. After the licence to the Tumurtei deposit was transferred to Darkhan, Tumurtei Khuder filed suit, arguing that the Government had failed to conduct the necessary tender when the licence was transferred from Erdenes to Darkhan.[206] On 2 April 2009, the Capital City Administrative Court ruled that the transfer did not give rise to obligation to tender.[207] Tumurtei Khuder's appeal was also unsuccessful.[208]

186. At the same time, Tumurtei Khuder filed suit against Darkhan in the Inter-*soum* Court of Darkhan *aimag* on 18 August 2008, arguing that it was the owner of the stockpile of ore at the mine. Tumurtei Khuder received an order on 26 January 2010, restraining Darkhan from disposing of the ore pending resolution of the case.[209]

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202 Resolution No 27 of the Parliament of Mongolia on the Inclusion of Specific Deposits into Strategic Deposit List, 6 February 2007 (**Authority CLA-84**).

203 Application of Erdenes MGL to the DGMC, 28 February 2008 (**Exhibit C-159**); Resolution No 63 of the Mineral Resources and Petroleum Authority, 28 February 2008 (**Exhibit C-160**); Resolution No 280 of the DGMC, 29 February 2008 (**Exhibit C-161**).

204 *EXIMM LLC v. The DGMC* (Decision no 63) (Supervisory Court of the Supreme Court of Mongolia), 12 May 2008 (**Authority CLA-85**).

205 Management Agreement between the Ministry of Industry and Trade and DMP on the Exploitation of the State-Owned Iron-Ore Deposits in the Darkhan Area, 19 June 2008 (**Exhibit C-162**); Resolution No 315 of the Mineral Resources and Petroleum Authority, 27 June 2008 (**Exhibit C-163**); Resolution No 996 of the DGMC, 27 June 2008 (**Exhibit C-164**).

206 Statement of Claim of Tumurtei Khuder to the Capital City Administrative Court, 24 October 2008 (**Exhibit C-169**).

207 Tumurtei Khuder v. The DGMC (Decision No 129) (Capital City Administrative Court), 2 April 2009 (**Authority CLA-90**).

208 Appeal of Tumurtei Khuder to the Chamber for Hearing Appeals of Administrative Cases of the Supreme Court of Mongolia, 7 May 2009 (**Exhibit C-170**).

209 Statement of Claim of Tumurtei Khuder to the Inter-soum Court in Darkhan-Uul aimag, 18 August 2008 (**Exhibit C-171**); Statement of Claim of Tumurtei Khuder to the Inter-soum Court in Darkhan-Uul aimag,

187. Tumurtei Khuder also filed suit against Darkhan in the Inter-*soum* Court of Selenge *aimag* on 28 August 2008, seeking a declaration that Tumurtei Khuder had exclusive land use rights in the deposit area. The claim was dismissed for lack of standing as Darkhan had not yet applied for land use rights.[210]

188. In December 2008, the Citizens Representative Khural moved to revoke Tumurtei Khuder's land use rights. Tumurtei Khuder sued the Khural in the Administrative Court of Selenge *aimag* and was unsuccessful, as was its appeal.[211]

189. On 29 April 2009, the Governor of Khuder *soum* granted Darkhan land use rights over the Tumurtei deposit.[212] Tumurtei Khuder then sued to annul this decision and was unsuccessful.[213]

190. On 12 February 2010, the Claimants commenced these proceedings with their Request for Arbitration.

IV. THE PARTIES' CHARACTERIZATION OF DISPUTED FACTS

A. THE EXTENT OF DARKHAN'S EXPLORATION OF AND RIGHTS TO THE TUMURTEI DEPOSIT

The Claimants' Position

191. The Claimants consider Darkhan's alleged rights to the Tumurtei deposit invalid[214] and Darkhan's exploration of the Tumurtei deposit to have been limited in scope.[215]

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19 January 2010 (**Exhibit C-172**); Court Order No 633 (Inter-soum Court in Darkhan-Uul aimag), 26 January 2010 (**Authority CLA-91**).

210 Statement of Claim of Tumurtei Khuder to the Inter-soum Court in Selenge aimag, 20 August 2008 (**Exhibit C-173**); *Tumurtei Khuder v. DMP* (Decision No 312) (Inter-soum Court in the Selenge aimag), 25 November 2008 (**Authority CLA-92**).

211 Resolution No 5 of the Citizens' Representative Khural in Khuder soum, 29 December 2008 (**Exhibit C-174**); Statement of Claim of Tumurtei Khuder to the Administrative Court in Selenge aimag, 23 December 2009 (**Exhibit C-175**); *Tumurtei Khuder v. The Citizens' Representative Khural in Khuder soum*, Selenge aimag (Decision No 80) (Chamber for Hearing Appeals of Administrative Cases of the Supreme Court of Mongolia), 9 February 2010 (**Authority CLA-93**).

212 Resolution No 51 of the Governor of Khuder soum, 29 April 2009 (**Exhibit C-176**); Resolution No 52 of the Governor of Khuder soum, 29 April 2009 (**Exhibit C-177**).

213 Statement of Claim of Tumurtei Khuder to the Administrative Court in Selenge aimag, 19 March 2009 (**Exhibit C-178**); Tumurtei Khuder v. The Governor of Khuder soum (Decision No 4) (Administrative Court of Selenge aimag) 12 May 2009 (**Authority CLA-95**).

214 The Claimants' Request for Arbitration, para. 25-27.

215 The Claimants' Memorial, para. 128-129.

192. The Claimants recall that pursuant to Resolution No. 160, which envisaged the establishment of ferrous metallurgical factory and iron-ore plant, the Mongolian government incorporated a ferrous metallurgical factory in Darkhan in April 1990.[216] The Claimants depict Darkhan's operations as dysfunctional:

> DMP [Darkhan] experienced financial difficulties even before production could commence at the scrap-metal plant. It lacked sufficient working capital and by 1996 was struggling to pay the salaries of its employees despite the Government's support. In addition, DMP was unable to operate at full capacity due to a shortage of scrap metal required for the plant's operations. DMP became such a heavy burden on the state budget that the Mongolian government asked the World Bank to carry out a viability study for the plant's future operation. The outcome of the study was a World Bank loan of MNT 1.7 billion to the Mongolian state and a recommendation that Mongolia restructure DMP.[217]

193. The Claimants reject the notion that Resolution No. 160 granted Darkhan rights to mine the Tumurtei deposit:[218] "Resolution 160 did not grant mining rights over the Tumurtei deposit."[219] Rather, the Claimants consider that Resolution No. 160 established the government's intention to build a ferrous metallurgical factory in Darkhan and an open-cast mine at Tumurtei.[220] The Claimants point to the language used in the 1998 Minerals Programme, which the Claimants consider to indicate "the Government's understanding at the relevant time that DMP [Darkhan] did not hold mining rights over the Tumurtei deposit."[221]

194. In fact, the Claimants consider that Resolution No. 160 could not have granted mining rights to Darkhan because the Council of Ministers was not empowered to issue mining licences over iron ore deposits.[222] In any event, the Claimants argue, Darkhan did not comply with the 1997 Implementation law, which required holders of all existing mining licences to re-register their licences for their licence to remain valid.[223]

The Respondent's Position

195. The Respondent ascribes a different significance to Resolution No. 160:

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216 The Claimants' Memorial, para. 128.

217 The Claimants' Memorial, para. 129.

218 The Claimants' Memorial, para. 192.

219 The Claimants' Memorial, para. 193; *see also* Hearing Transcript (Day 1, 14 September 2015) 102:5 to 103:6.

220 The Claimants' Memorial, para. 193.

221 The Claimants' Memorial, para. 198; Resolution No 144 of the Government of Mongolia (Minerals Programme), 12 August 1998, para. 2.2(h) (**Authority CLA-68**).

222 The Claimants' Memorial, para. 195.

223 The Claimants' Memorial, para. 196.

> After prospecting was concluded, the Council of Ministers gave final approval on April 14, 1990 both to build a plant in Darkhan city and to assign the Tumurtei deposit to the newly-formed state company created to run the complex. . . . The resolution set up two phases . . . a first phase to build the steel plant, which was completed in 1994, and a second phase to exploit the Tumurtei iron ore.[224]

The Respondent emphasizes the significance of Resolution No. 160 in the context of Mongolia's historical effort to develop Tumurtei deposit "as part of an integrated State enterprise."[225] The Respondent notes that Mongolia's plans regarding the development of the deposit "spanned multiple years beyond 1997."[226]

196. Rather than generically describing the Mongolian government's intentions as regard the Tumurtei deposit, the Respondent considers that Resolution No. 160 granted exploitation rights to Darkhan. The Respondent notes that, unlike western economies at that time, Mongolia granted rights to natural resources by means of government resolutions and not licences; thus the Mongolia Council of Ministers was competent to act.[227] The Respondent traces Darkhan's legal right to begin mining the Tumurtei deposit to "approval by Mongolia's Council of Ministers on February 13, 1995."[228] The Respondent claims Darkhan "secured the necessary land grants from the regional government units to proceeding with building the mine" in early 1996.[229]

197. The Respondent also describes the scale of Darkhan's activities during that period differently:

> At the same time it was discussing plans to build a metallurgical plant with Itochu and Mitsubishi, Darkhan Steel Company's ("Darkhan") predecessor was conducting further prospecting and exploration at Tumurtei. A detailed map was drawn up of the Western parts of the deposit in 1986 to 1989. Additional prospecting and exploration was conducted in 1988-1989. The results from this exploratory work were presented to the Minerals Council.[230]

198. After the Council of Ministers had passed Resolution No. 160, the Respondent claims Darkhan: "further refined techniques for mining operations;"[231] planned to build an iron-ore separation facility as "part of the second phase of the plan set out in Resolution No. 160, *i.e.* the exploration of iron ore from the Tumurtei iron ore mine;"[232] entertained bids to provide technology for mining

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224 The Respondent's Counter-Memorial, paras. 29-30.

225 Hearing Transcript (Day 1, 14 September 2015) 126:7 to 129:17.

226 Hearing Transcript (Day 1, 14 September 2015) 135:9 to 135:20; *see also* Decree of the Government of Mongolia to Darkhan, 1996 (**Exhibit R-124**).

227 Hearing Transcript (Day 1, 14 September 2015) 131:6 to 132:21.

228 The Respondent's Counter-Memorial, para. 39.

229 The Respondent's Counter-Memorial, para. 44.

230 The Respondent's Counter-Memorial, para. 28; *see also* Hearing Transcript (Day 1, 14 September 2015) 135:21 to 138:8.

231 The Respondent's Counter-Memorial, para. 32.

232 The Respondent's Counter-Memorial, para. 33.

operations at Tumurtei and the separation factory;[233] and "continued in 1991 to do exploration work at the Tumurtei iron ore deposit in order to prepare the area for mining and to establish the grade of iron ore it would have to process at the steel plant and separation facility."[234]

199. Quoting from Minutes of the Meeting of the Geological, Scientific and Technical Council at the Ministry of Energy, Geology and Mining taken in 1994, the Respondent describes the 1990-1992 Study completed by Darkhan as a "detailed exploration and a prospecting-evaluation work."[235] The 1990-1992 Study evidences what the Respondent describes as "a decade's worth of work."[236] The Respondent also describes a later feasibility study completed by Darkhan, which was "circulated for comment and review in February 1996."[237]

B. THE 1997 FEASIBILITY STUDY AND BLT'S ACQUISITION OF A LICENCE TO MINE THE TUMURTEI DEPOSIT

The Claimants' Position

200. The Claimants describe the genesis of the 1997 Feasibility Study as follows:

> Under the 1994 Minerals Law, then in force, one of the main requirements for obtaining a mining licence was to prepare an acceptable feasibility study for developing the deposits, which was to be submitted to the Ministry of Agriculture and Industry. Bayartsogt understood from government officials that BLT could improve its chances of receiving the licences by addressing DMP's [Darkhan's] need for raw materials in its feasibility study. BLT thus commissioned external consultants in 1996 to prepare what became the 1997 Feasibility Study, which accorded with the requirements of the 1994 Minerals Law and the wishes of the Mongolian government to help DMP. The 1997 Feasibility Study was submitted to the Ministry of Agriculture and Industry in April 1997.[238]

201. The Claimants contend that they "consulted materials available at the archives of the Central Geological Laboratory, including a geological survey Khuderbat had himself prepared in 1990-1992"[239] to produce the 1997 Feasibility Study.

202. The Claimants describe the 1997 Feasibility Study's content in the following terms:

233 The Respondent's Counter-Memorial, para. 34.

234 The Respondent's Counter-Memorial, para. 35.

235 The Respondent's Counter-Memorial, para. 38.

236 The Respondent's Counter-Memorial, para. 40.

237 The Respondent's Counter-Memorial, para. 43.

238 The Claimants' Memorial, para. 133.

239 The Claimants' Reply, para. 58; *see also* Witness Statement of Mr. Bayartsogt, paras. 25-28.

> [The 1997 Feasibility Study] set out BLT's then plans for the development of the areas, including an analysis of the iron ore that was to be found in the deposits and proposals for processing and selling it. The 1997 Feasibility Study was a comprehensive plan that set out the need for infrastructure development to exploit the deposits and ship the iron ore to market, as well as the processing work that was to be carried out. . . . [T]he 1997 Feasibility Study set out BLT's intention to process the ore by means of electro-magnetic separation.[240]

203. The Claimants note that while the 1997 Feasibility Study assessed options for supplying raw materials to Darkhan, it "envisaged that the plant would export the bulk of its production to China and Russia."[241]

204. The 1997 Feasibility Study formed part of the Claimants' application for a licence to mine the Tumurtei deposit.[242] According to the Claimants, the Minister of Agriculture and Industry granted BLT that licence through Order No. 4b/1261 on 8 May 1997.[243] The Claimants recall that the Governor of Selenge *aimag* granted BLT land-use rights over the "relevant mining areas" at Tumurtei on 9 May 1997.[244] On 10 May 1997, the Governor of Khuder *soum* issued Order No. 41, granting the *soum's* permission to BLT to develop the Tumurtei mine[245] and on 21 June 1997, the Minister of Agriculture and Industry granted BLT special permission to mine the Tumurtei deposit through Order No. A/108 and the T-30 Certificate.[246]

205. The Claimants recall that "almost immediately thereafter . . . on 30 June 1997, the Minister of Agriculture and Industry suspended the T-30 Licence without providing any justification."[247] Nevertheless, BLT "decided to re-register its licence" in accordance with the 1997 Implementation Law, which required "all licence-holders to re-register their licences"[248] and on 19 January 1998, "the DGMC granted the 939A Licence to BLT."[249]

206. The Claimants vigorously contest the claim that BLT obtained the 939A Licence through corruption, fraud, and misrepresentation.[250]

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240 The Claimants' Memorial, para. 22.

241 The Claimants' Memorial, para. 134.

242 The Claimants' Memorial, para. 135.

243 The Claimants' Memorial, para. 135.

244 The Claimants' Memorial, para. 136.

245 The Claimants' Memorial, para. 136.

246 The Claimants' Memorial, para. 137.

247 The Claimants' Memorial, para. 138.

248 The Claimants' Memorial, para. 139.

249 The Claimants' Memorial, para. 141.

250 The Claimants' Reply, Sub-sections II(E)-(F).

The Respondent's Position

207. The Respondent submits that the Claimants obtained their licence to exploit the Tumurtei deposit through corruption, fraud, and misrepresentation.[251] The Respondent alleges that the Claimants took the material from the 1990-1992 Report by theft and misrepresented it as their own work in the 1997 Feasibility Study.[252]

208. The Respondent claims that BLT, Mr. Natsagdorj and Mr. Bayartsogt were involved in "wrongful actions" and "corruption" regarding "key iron deposits."[253] For example, the Respondent claims Mr. Bayartsogt "had access to nearly all internal reports generated by Darkhan about the deposit" and failed to complete the tasks that Darkhan set out for him with respect to the deposit,[254] preferring instead to collaborate with Mr. Natsagdorj and Mr. Li "to secure mining opportunities in Mongolia."[255] Similarly, the Respondent recalls that Mr. Natsagdorj:

> stopped the actions that would have been required for Darkhan to retain the Tumurtei license, as well as taking active steps to divert Darkhan's rights for the Tumurtei mine to BLT. Natsegdorj failed to re-register Darkhan's mining rights under the 1997 Minerals Law. Natsegdorj made sure that Darkhan's feasibility study and the materials from which it had been generated were given to BLT. Natsegdorj allowed Darkhan's land rights to the Tumurtei deposit, as well as to the access roads to the deposit, to be cancelled.[256]

209. The Respondent also claims that BLT and Mr. Bayartsogt corrupted Mr. Khuderbat, who Darkhan had entrusted to collect and analyse confidential geological information for Darkhan's own feasibility study. The Respondent states,

> Khuderbat failed to deposit the final copy of his report with Darkhan. Darkhan Director Ganjuurjav tasked Bayartsog[t] with retrieving the document from Khuderbat – with no success. Instead, Khuderbat gave the document to Bayartsog[t]'s company, BLT[257] . . . the Claimants paid off Khuderbat to obtain Darkhan's proprietary geological studies, which were later included in the 1997 feasibility study. Claimants used bid document submitted to Darkhan, and removed from Darkhan's archives during Natsegdorj's tenure, as materials for the technical parts of the 1997 Feasibility Study.[258]

210. The Respondent supports its claim of theft with the assertion that only Darkhan had the right to survey the deposit before the publication of the 1997 Feasibility Study so BLT could not have

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[251] The Respondent's Counter-Memorial, Sub-sections II(E)-(H).

[252] The Respondent's Counter-Memorial, paras. 69-70, 75.

[253] The Respondent's Counter-Memorial, paras. 46, 49-51.

[254] The Respondent's Counter-Memorial, para. 46.

[255] The Respondent's Counter-Memorial, para. 51.

[256] The Respondent's Counter-Memorial, para. 54.

[257] The Respondent's Counter-Memorial, para. 58.

[258] The Respondent's Counter-Memorial, para. 63; *see also* The Respondent's Counter-Memorial, paras. 64-67.

authored the study alone.[259] The Respondent contends that the funds the Claimants said they spent on the 1997 Feasibility Study were in fact used to corrupt Darkhan staff. Additionally, the Respondent reports that information from a further set of confidential documents containing "specific technological information about to mine the Tumurtei deposit" and belonging to Darkhan appeared in BLT's 1997 Feasibility Study.[260] The Respondent also notes, "Mongolian officials brought charges against Nats[a]gdorj, Bayartsog[t] and Tuya in 2005 for embezzlement and other charges for the theft of the license from DMP [Darkhan]."[261]

211. The Respondent points to what it characterizes as a series of misrepresentations in the 1997 Feasibility Report. For example, it notes that the 1997 Feasibility Study misrepresented BLT's sources of funding,[262] its experience in mining,[263] the timeline of BLT's operations[264], the intent to supply Darkhan with raw materials,[265] and the intended use of the iron ore.[266] The Respondent concludes,

> Claimants' false representations are critical because the grant of the license to BLT was dependent upon approval of the feasibility study . . . The license therefore was issued on false pretenses and on the basis of purposeful concealment and affirmative misrepresentation by the Claimants.[267]

C. BLT / TUMURTEI KHUDER'S DEVELOPMENT OF THE TUMURTEI DEPOSIT

The Claimants' Position

212. The Claimants estimate their investment in the Tumurtei deposit was worth approximately USD 30 million by the end of the 2005.[268] The Claimants allege their direct investment was through their shareholding in Tumurtei Khuder but that they "also directly invested in equipment and other

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259 The Respondent's Counter-Memorial, paras. 59-61.

260 The Respondent's Counter-Memorial, paras. 68-70.

261 The Respondent's Counter-Memorial, para. 135; *see also* The Respondent's Counter-Memorial, paras. 136-137.

262 The Respondent's Counter-Memorial, paras. 73-74; *see also* Hearing Transcript (Day 5, 18 September 2015), 813:17 to 814:5.

263 The Respondent's Counter-Memorial, paras. 75-76; *see also* Hearing Transcript (Day 1, 14 September 2015) 144:18 to 145:17.

264 Hearing Transcript (Day 1, 14 September 2015) 149:19 to 150:2; *see also* Hearing Transcript (Day 5, 18 September 2015), 813:5 to 813:10.

265 Hearing Transcript (Day 1, 14 September 2015) 146:8 to 149:9.

266 The Respondent's Counter-Memorial, para. 79.

267 The Respondent's Counter-Memorial, para. 83.

268 Witness Statement of Mr. Li, para. 27; The Claimants' Memorial, para. 156.

materials, hired employees and—sometimes directly and at other times through Tumurtei Khuder—entered into contracts necessary for their investment operations."[269]

213. The Claimants describe Qinlong's purchase of "all the necessary mining equipment," "establishment of a production line," and study and survey of the Tumurtei deposit.[270]

214. The Claimants also assert that they contributed to Mongolia's development to fulfil their obligations under Mongolian law. In particular, they claim to have constructed: 48 km of dirt roads, a 10km aerial power line, a railway line extension, residential apartments, a hotel and an office building for employees, a hospital, a local clubhouse, a sewing factory, a police station, schools, and street lights.[271]

215. In terms of iron ore production before the revocation of the 939A Licence, the Claimants note that "Tumurtei Khuder began, as of mid-2005, to commit more resources to the mine and to move necessary personnel over from the Khustai mine"[272] and by "late 2005, major progress had been made."[273] According to the Claimants, "[i]n 2006, until the revocation of its licence in September of that year, Tumurtei Khuder mined 461.1 thousand tonnes of iron ore to make 322.7 thousand tonnes of processed iron ore, 180 thousand tonnes of which it had exported."[274] The Claimants also note, with reference to the 2005-2006 work plan that "Tumurtei Khuder had plans to expand its investment activities by building further processing facilities that would include a beneficiation plant (meaning in this context a plant for the electro-magnetic separation of the iron ore), an agglomeration workshop and potentially a reduced-iron plant or a steel-smelting plant."[275]

The Respondent's Position

216. The Respondent values the Claimants' investment at a fraction of the Claimants' figure.[276] According to the Respondents, the Claimants' "'investments'" and the amounts the Claimants purported to pay for them "are not corroborated by documentary evidence."[277]

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[269] The Claimants' Memorial, para. 152.

[270] The Claimants' Memorial, para. 153.

[271] The Claimants' Memorial, para. 154.

[272] The Claimants' Memorial, para. 157.

[273] The Claimants' Memorial, para. 158.

[274] The Claimants' Memorial, para. 161.

[275] The Claimants' Memorial, para. 161.

[276] The Respondent's Counter-Memorial, paras. 112-126.

[277] The Respondent's Counter-Memorial, para. 112.

217. The Respondent avers that the Claimants "at best added to dirt road,"[278] producing pictures of a dirt road not "surfaced with asphalt gravel."[279] The Respondent also produces pictures to support its claim that the structures the Claimants say they built are "worth essentially nothing and certainly not worth multiple millions of dollars."[280] Rather, it claims "a simple look at these 'auxillary structures' shows they could not have cost US$3 million—or anything even close to that;"[281] "storage sheds do not cost $3,142,125 to build in Mongolia."[282] The Respondents also regard it as significant that the Claimants "do not state the residential apartment, hotel and office building have anything to do with Tumurtei,"[283] and may well have been located at another mine.

D. THE CRIMINAL INVESTIGATION OF MR. NATSAGDORJ AND MR. BAYARTSOGT

The Claimants' Position

218. According to the Claimants:

(a) "In 2006, at the request of DMP (the very party that directly benefited from the revocation of the 939A Licence), the State General Prosecutor of Mongolia (Mongolia's Prosecutor) started a criminal investigation against Natsagdorj and Bayartsogt."[284]

(b) "The investigation focused on whether the alleged failure to re-register the licence that DMP would have been granted by Resolution 160 constituted embezzlement on the part of Natsagdorj and Bayartsogt pursuant to Article 150 of Mongolia's Criminal Code. (Mongolia's Prosecutor did not bring any charges on the basis of theft or fraud.)"[285]

(c) "On 18 July 2011, after five years of investigations, Mongolia's Prosecutor decided to drop the charges against Natsagdorj and Bayartsogt because the allegations made against them had not been proved."[286]

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278 The Respondent's Counter-Memorial, para. 115.

279 The Respondent's Counter-Memorial, para. 116.

280 The Respondent's Counter-Memorial, para. 119.

281 The Respondent's Counter-Memorial, para. 122.

282 The Respondent's Counter-Memorial, para. 125.

283 The Respondent's Counter-Memorial, para. 120.

284 The Claimants' Reply, para. 52.

285 The Claimants' Reply, para. 52.

286 The Claimants' Reply, para. 52.

(d) "Two and a half years after the dismissal of the prosecution for want of evidence, magically there is a review of that decision by an individual called Dorligjav, who was the senior prosecutor and who has now become the Minister of Justice of Mongolia and it says, oh, no, wrong decision. . . . He says the findings [have] been fully asserted and proven."[287]

The Respondent's position:

219. According to the Respondent, "Mongolia prosecuted this violation of its criminal law until Bayartsog[t], Tuya and Natsegdorj fled the country. This wrongdoing is also a basis for the revocation of the Tumurtei license."[288]

220. Additionally, the Respondent submits that "the irregular nature of the dismissal by the prosecutor Enkhbat is suspicious, and for that reason cannot be credited."[289] In explanation, the Respondent notes that

(a) the case was dismissed on the same day that the file was received by the prosecutor;[290]

(b) the file encompassed eight binders of documents, or approximately 2,000 pages, that the prosecutor cannot realistically have reviewed as required by the Criminal Procedural Code of Mongolia;[291]

(c) the dismissal did not contain reasons;[292]

(d) the case was dismissed during a period in which it was suspended—and therefore not eligible for dismissal—because the subjects of the investigation had left Mongolia;[293] and

(e) Enkhbat was dismissed as prosecutor shortly thereafter.[294]

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287 Hearing Tr. (Day 1, 14 September 2015), 120:20 to 121:8.

288 The Respondent's Counter-Memorial, para. 160.

289 Hearing Tr. (Day 1, 14 September 2015), 176:24 to 177:2.

290 Hearing Tr. (Day 1, 14 September 2015), 177:3-8.

291 Hearing Tr. (Day 1, 14 September 2015), 177:8-24.

292 Hearing Tr. (Day 1, 14 September 2015), 177:19-23.

293 Hearing Tr. (Day 1, 14 September 2015), 177:25 to 178:9.

294 Hearing Tr. (Day 1, 14 September 2015), 178:9-10.

221. According to the Respondent, the investigation was subsequently reopened because the dismissal was improper, as the defendants had left the jurisdiction, such that the statute of limitations could not have run.[295]

V. RELIEF REQUESTED

The Claimants' Request

222. In their Request for Arbitration, the Claimants request the following relief:

> 87. The Claimants respectfully request the Arbitral Tribunal to:
>
> (a) Find that Mongolia is in breach of its obligations under the Treaty and the FIL by having unlawfully expropriated the Claimants' investment, having failed to accord them fair and equitable treatment and having failed to protect them;
>
> As a consequence,
>
> (b) Order Mongolia to compensate the Claimants for their losses as set out in paragraph 55 above, through the payment of damages; or
>
> In the alternative,
>
> (c) Order the restitution by Mongolia of the 939A Licence to Tumurtei Ltd, as well as damages in an amount to be later determined;
>
> In any event,
>
> (d) Order Mongolia to pay interest to the Claimants on any damages awarded, at such rates and for such periods as to be determined later in these proceedings; and
>
> (e) Order that Mongolia pay all of the costs and expenses incurred by the Claimants in relation to these proceedings, including the fees and expenses of the members of the Arbitral Tribunal, the administrative fees of the arbitral institution, the fees and expenses of any experts appointed by the Arbitral Tribunal and the Claimants, the fees and expenses of the Claimants' legal representation, the internal costs expended by the Claimants, and interest, on a full indemnity basis.
>
> 88. The Claimants respectfully reserve the right to amend and/or supplement their claim, including this request for relief, as they may consider necessary or appropriate.[296]

223. In their Memorial, the Claimants request the following relief:

> 286. On the basis of the foregoing, the Claimants respectfully request that the Arbitral Tribunal:
>
> - **Declare** that the Arbitral Tribunal has jurisdiction *ratione personae* and *ratione materiae* over the Claimants' claims as set out in this Memorial;
> - **Declare** that the Respondent is in breach of Article 4 of the Treaty in that it unlawfully expropriated the Claimants' investments;
>
> As a consequence,

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[295] Hearing Tr. (Day 1, 14 September 2015), 178:11-24.

[296] The Claimants' Request for Arbitration, paras. 87-88.

> - **Order** that the Respondent give back the 939A Licence to Tumurtei Khuder; and
> - **Order** that the Respondent pay compensation for any losses that are not made good by restitution, in an amount to be determined at a later stage of these proceedings;
>
> In the alternative,
>
> - **Order** that the Respondent pay full compensation for the losses suffered by the Claimants, in an amount to be determined at a later stage in these proceedings;
>
> In any event,
>
> - **Order** the Respondent to pay all of the costs and expenses incurred by the Claimants, including, but not limited to, the Arbitral Tribunal's fees and expenses, the fees and expenses of the Claimants' counsel, and interest, on a full indemnity basis.
>
> 287. The Claimants reserve the right to supplement and amend the above preliminary prayer for relief in their subsequent pleadings, at appropriate stages in the proceedings and pursuant to the Arbitral Tribunal's directions.[297]

224. In their Reply, the Claimants request the following relief:

> On the basis of the foregoing, the Claimants respectfully request that the Arbitral Tribunal:
>
> - **Declare** that the Arbitral Tribunal has jurisdiction *ratione personae* and *ratione materiae* over the Claimants' claims as set out in the Memorial and this Reply;
> - **Declare** that the Respondent is in breach of Article 4 of the Treaty in that it unlawfully expropriated the Claimants' investments;
> - **Dismiss** the Respondent's defences and counterclaims in their entirety;
>
> As a consequence,
>
> - **Order** that the Respondent give back the 939A Licence to Tumurtei Khuder; and
> - **Order** that the Respondent pay compensation for any losses that are not made good by restitution, in an amount to be determined at a later stage of these proceedings;
>
> In the alternative,
>
> - **Order** that the Respondent pay full compensation for the losses suffered by the Claimants, in an amount to be determined at a later stage in these proceedings
>
> In any event,
>
> - **Order** the Respondent to pay all of the costs and expenses incurred by the Claimants, including, but not limited to, the Arbitral Tribunal's fees and expenses, the fees and expenses of the Claimants' counsel, and interest, on a full indemnity basis.[298]

The Respondent's Request

225. In its Counter-Memorial, the Respondent requests damages for fraudulent misrepresentation in excess of USD 100 million.[299]

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[297] The Claimants' Memorial, paras. 286-287.

[298] The Claimants' Reply, para. 218,

[299] The Respondent's Counter-Memorial, para. 293.

VI. THE PARTIES' ARGUMENTS

A. THE TRIBUNAL'S JURISDICTION AND APPLICABLE LAW

1. Jurisdiction *Ratione Personae*

226. The pertinent part of Article 1(2) of the Treaty defines "investors", in respect of the People's Republic of China, as:

> (a) Natural persons who have nationality of the People's Republic of China;
>
> (b) Economic entities established in accordance with the laws of the People's Republic of China and domiciled in the territory of the People's Republic of China.[300]

227. The Claimants assert that they are "qualifying investors" under Article 1(2) of the Treaty because they are each "economic entities" that are "established and domiciled in the territory of the PRC in accordance with the PRC's laws."[301]

2. Jurisdiction *Ratione Materiae*

228. Article 1(1) of the Treaty defines "investments" as "every kind of asset invested by investors of one Contracting State in accordance with the laws and regulations of the other Contracting State in the territory of the Latter." The definition of "investments" in Article 1(1) of the Treaty specifically includes "shares, stock and debentures of companies" and "concessions conferred by law, including concessions to search for or exploit natural resources."

229. The Claimants consider they have made a qualifying investment under Article 1(1) of the Treaty. They assert they have made a "direct investment" in the shares of Tumurtei Khuder's registered share capital.[302] The Claimants also consider that they made a qualifying "indirect investment" because the 939A Licence gave Tumurtei Khuder the right to exploit the Tumurtei mine and the Claimants are shareholders in Tumurtei Khuder. According to the Claimants, "[t]he Treaty expressly provides for the protection of indirect investments consisting of an 'interest in the property' of companies."[303]

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300 A complete copy of the Treaty text can be found at **Authority CLA-1**.

301 The Claimants' Memorial, para. 53.

302 The Claimants' Memorial, para. 55.

303 The Claimants' Memorial, para. 56.

3. Applicable Law

230. Article 8(7) of the Treaty requires that the Tribunal adjudicate in accordance with Mongolian law, including its rules on conflict of laws, the provisions of the Treaty, and "the generally recognized principle [*sic*] of international law accepted by both Contracting States."

B. THE RESPONDENT'S PRELIMINARY OBJECTIONS

231. The Respondent has objected to the jurisdiction of the Tribunal on a series of grounds, as follows:

(a) that the Claimants' investment was procured by theft, embezzlement, and fraud;

(b) that Mongolia's consent to arbitration set out in Article 8(3) of the Treaty does not extend to the subject matter of the Claimants' claims;

(c) that Beijing Shougang and China Heilongjiang are not investors because they cannot be classified as "economic entities" under Article 1(2) of the Treaty as a matter of Chinese treaty practice;

(d) that the Claimants have not made a qualifying investment, insofar as they have not incurred investment risk;

(e) that the Claimants ask the Tribunal to make a manifest error of law in requesting restitution on the basis of customary international law;

(f) that the Claimants elected to submit the same dispute to the Mongolian courts and therefore cannot now have recourse to international arbitration, referring to Article 8(3) of the Treaty as containing a fork-in-the-road clause.

232. The Respondent also objects to the admissibility of the Claimants' claims on the grounds that the Claimants come to the Tribunal with "unclean" hands and that principles of fairness and equity and *ex injuria jus non oritur ius* require the Tribunal to dismiss the Claimants' claims.

1. Objections to the Tribunal's Jurisdiction

(a) *Theft, Embezzlement and Fraud in the Procurement of the Claimants' Investment*

The Respondent's Position

233. The Respondent objects to the Tribunal's jurisdiction on the grounds that the Claimants' investment was procured by theft, embezzlement, and fraud.

234. According to the Respondent, for an investment to qualify under Article 1(1) of the Treaty, it must be made "in accordance with the laws and regulations of the other Contracting State."[304] The Respondent relies on *Inceysa Vallisoletane, SL v. El Salvador* to support the proposition that "disputes that arise from an investment made illegally are outside the consent granted by the parties."[305] Citing *Gustav Hamester v. Ghana*, the Respondent also asserts that illegality precludes jurisdiction even where the language on legality in the relevant treaty is limited.[306] The Respondent asserts that the consequences of the Claimants' theft, embezzlement, and fraud are that: (a) the Treaty does not protect the Claimants' investment; and (b) the Claimants do not have a valid interest in what they assert is their investment.

235. Mongolian criminal law prohibits "embezzlement, conspiracy to commit embezzlement and concealment of embezzlement"; "the acquisition of property by fraud, conspiracy to commit fraud, and concealment of fraud"; and "the theft, destruction, damage or concealment of a business entity's or organization's documents."[307] Citing the UN Convention Against Corruption and the municipal law of the PRC and the United States, the Respondent argues that embezzlement "also violates fundamental principles of law of civilized nations."[308]

236. The Respondent alleges that Mr. Natsagdorj, the former director of Darkhan, "fraudulently diverted" the right to mine the Tumurtei deposit, granted under Resolution No. 160 of 1990, from Darkhan to the Claimants.[309] The Respondent claims that Mr. Natsagdorj:

(a) "diverted the intellectual property about the Tumurtei deposit, including Darkhan's feasibility study, tender documents and geological data, to BLT";[310]

(b) "cancelled Darkhan's land rights to the Tumurtei deposit as well as access roads to the deposit";[311] and

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304 Treaty, Art. 1(1).

305 The Respondent's Counter-Memorial, para. 147; quoting *Inceysa Vallisoletane, SL v. El Salvador*, ICSID Case No ARB/03/26, Award of 2 August 2006, para. 207 (**Authority RLA-5**).

306 The Respondent's Counter-Memorial, para. 149; *Gustav F W Hamester GmbH & Co KG v. Ghana*, Award, ICSID Case No ARB/07/24, 10 June 2010, para. 135 (**Authority RLA-7**).

307 The Respondent's Counter-Memorial, para. 150; s*ee also* Mongolian Criminal Code, Arts. 148, 150, 234.2, & 247 (**Authority RLA-8**).

308 The Respondent's Counter-Memorial, para. 154.

309 The Respondent's Counter-Memorial, para. 156.

310 The Respondent's Counter-Memorial, para. 157; Hearing Transcript (Day 1, 14 September 2015) 151:3 to 157:15; Hearing Transcript (Day 5, 18 September 2015), 815:5 to 816:13.

311 The Respondent's Counter-Memorial, para. 157.

(c) "failed to register Darkhan's right to the deposit under the 1997 Minerals Law."[312]

237. The Respondent asserts that such actions were "presumptively fraudulent" because the Claimants did not compensate Darkhan for the loss of its mining licence, for its intellectual property, or for the release of its land rights for the surface land above the Tumurtei deposit.[313] The Respondent considers that such actions were also actually fraudulent because they were "financed by bribing Darkhan's former employees,"[314] specifically Mr. Khuderbat, who the Claimants paid for his feasibility study. According to the Respondent, it was for those reasons that criminal proceedings were brought against Mr. Bayartsogt, Ms. Tuya, and Mr. Natsagdorj in Mongolia and that the Claimants' mining licence was revoked.[315] The Respondent adds that although the criminal case against Mr. Bayartsogt, Ms. Tuya, and Mr. Natsagdorj was dismissed, this decision was subsequently found to be illegal and groundless by general prosecutor.[316] The Respondent claims that fraud was also the reason that the transaction documents establishing the Tumurtei Khuder joint venture contained no representations or warranties about legality[317] and that the Claimants paid comparatively little for their shares in Tumurtei Khuder.[318]

238. The Respondent also denies that the similarities between the feasibility studies of BLT and DMP can be explained by publicly available geological data in the archives. The Respondent points to the identical information regarding production facilities and collaboration with Japanese companies in the BLT feasibility study and in Darkhan's earlier documents and in Resolution No. 160.[319]

239. As a matter of law, the Respondent argues that the difficulty in definitively proving corruption has led investment arbitration tribunals to adopt a burden shifting approach, rather than to require a high standard of proof. Relying on *Asian Agricultural Products. Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka*,[320] *Rockwell International Systems, Inc. v. Government of the*

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[312] The Respondent's Counter-Memorial, para. 157; Hearing Transcript (Day 1, 14 September 2015) 157:16 to 161:2.

[313] The Respondent's Counter-Memorial, para. 158.

[314] The Respondent's Counter-Memorial, para. 159.

[315] The Respondent's Counter-Memorial, para. 160.

[316] Hearing Transcript (Day 1, 14 September 2015) 176:20 to 178:2; Prosecutor's Order or Resolution No. 1 by Mongolia State General Prosecutor's Office, 6 January 2014 (**Exhibit R-133**).

[317] The Respondent's Counter-Memorial, paras. 101-111, 162.

[318] The Respondent's Counter-Memorial, para. 163.

[319] Hearing Transcript (Day 5, 18 September 2015), 819:16 to 823:22.

[320] *Asian Agricultural Products. Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990 (**Authority CLA-25/RLA-98**).

Islamic Republic of Iran,[321] and *ICC Case No. 6497*,[322] the Respondent submits that the Tribunal "may reverse the burden if the facts show difficulty in procuring evidence and once *prima facie* evidence or reasonable inferences exist to support the corruption claim."[323] The Respondent distinguishes the higher standard applied by the Tribunal in *EDF (Services) Ltd. v. Romania*[324] as having been necessitated by the involvement of officials at the highest level of the Romanian government.[325]

240. According to the Respondent, "[t]he incongruity of the Claimants' payments, Darkhan's failure to protect and retain its license, and BLT's bid 'out of nowhere' that mimicked Darkhan's precise technical and financial—including the dates of the feasibility study—all point to underlying corruption in this transaction."[326] Accordingly, the Respondent argues that "[t]he operative question for the Tribunal . . . is not whether Respondent's have [*sic*] proven that the 939A License was illegally procured, but whether it has presented *prima facie* evidence of the truth of this submission."[327]

241. The Respondent also asserts that the Claimants' alleged embezzlement invalidates the validity of the Claimants' ownership interest in the Tumurtei mining licence such that they do not have a qualifying investment that would permit jurisdiction over the Claimants' claims.[328] The Respondent relies on *Anderson v. Costa Rica*[329] for the proposition that "an asset could not be an investment when its very ownership was prohibited by law"[330] and argues that the Claimants do not legally own the Tumurtei mining licence through BLT because that licence was procured by fraud, embezzlement, and theft.

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321 *Rockwell International Systems, Inc. v. Government of the Islamic Republic of Iran*, Award No. 438-430-1 of 5 September 1989, 23 Iran-US Cl. Trib. Rep. 150, 188.

322 Final Award in *Case No. 6497 of 1994 in* Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 1999 - Volume XXIV*, p. 72 (**Authority RLA-99**).

323 The Respondent's Rejoinder, para. 149; *see also* Hearing Transcript (Day 1, 14 September 2015) 172:16 to 173:9

324 *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009 (**Authority RLA-96**).

325 The Respondent's Rejoinder, para. 150.

326 The Respondent's Rejoinder, para. 154; *see also* Hearing Transcript (Day 1, 14 September 2015) 151:24 to 155:14.

327 The Respondent's Rejoinder, para. 143.

328 The Respondent's Counter-Memorial, para. 164-168; *see also* Hearing Transcript (Day 1, 14 September 2015) 174:12 to 175:14.

329 *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award of 10 May 2010, para. 57 (**Authority RLA-13**).

330 The Respondent's Counter-Memorial, para. 167.

242. In addition to obtaining the "opportunity to bid for the licence . . . through embezzlement,"[331] the Respondent submits that the Claimants made fraudulent misrepresentations to the Mongolian authorities to procure the Tumurtei mining licence.[332] The Respondent details misrepresentations about the "financial capabilities"[333] of BLT, BLT's "project experience,"[334] the "true identity of its joint venture partners,"[335] the short timeline of BLT's operations,[336] and BLT's intention to supply Darkhan with raw materials[337] and to purchase Japanese and Western technology.[338] The Respondent reiterates that the participation of China Heilongjiang was neither known nor welcomed by Mongolia[339] and that all three Claimants failed to register as foreign investors until 2005.[340]

243. The Respondent submits that the Claimants cannot insulate themselves from the alleged wrongful conduct of BLT due to business ties among Mr. Li, Qinlong, and China Heilongjiang that predate the grant of the license;[341] China Heilongjiang's willingness to concede more than a half of the profits in exchange for BLT's promise to register the company;[342] and finally, the absence of any evidence of due diligence regarding the license.[343]

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331 The Respondent's Counter-Memorial, para. 165.

332 The Respondent's Counter-Memorial, para. 169; *see also* Hearing Transcript (Day 5, 18 September 2015) 875:4 to 875:14.

333 The Respondent's Counter-Memorial, para. 170.

334 The Respondent's Counter-Memorial, para. 171; Hearing Transcript (Day 1, 14 September 2015) 144:18 to 145:17.

335 The Respondent's Counter-Memorial, para. 172; *see also* Hearing Transcript (Day 5, 18 September 2015), 813:17 to 814:16.

336 Hearing Transcript (Day 1, 14 September 2015) 149:19 to 151:2; Hearing Transcript (Day 5, 18 September 2015), 813:5 to 813:10.

337 The Respondent's Counter-Memorial, para. 173; Hearing Transcript (Day 1, 14 September 2015) 146:8 to 149:9.

338 The Respondent's Counter-Memorial, paras. 176-180; Hearing Transcript (Day 5, 18 September 2015), 814:17-24.

339 Hearing Transcript (Day 1, 14 September 2015) 140:9 to 141:14.

340 Hearing Transcript (Day 1, 14 September 2015) 168:16 to 170:11.

341 Hearing Transcript (Day 1, 14 September 2015) 162:5 to 165:7.

342 Hearing Transcript (Day 1, 14 September 2015) 167:5 to 168:15; Contract on the Joint Development of the Tumurtei Iron-Ore Deposit between BLT and China Heilongjiang, 20 July 1997 (**Exhibit C-48**).

343 Hearing Transcript (Day 1, 14 September 2015) 165:18 to 166:17.

244. Comparing this case to the facts in *Inceysa v. El Salvador*,[344] the Respondent argues that the Tribunal should deny jurisdiction on the basis of the Claimants' alleged misrepresentations.[345] The Respondent submits that BLT's "fraudulent promises"[346] to the Mongolian authorities concerning the transfer of technology to Mongolia are both material and "an independent basis on which the Tribunal should deny jurisdiction."[347] Relying on the award in *Plama v. Bulgaria*,[348] the Respondent also asserts that the Claimants had a duty to disclose to the Mongolian State the change in the ownership structure of BLT and that failing to so do was a material misrepresentation.[349]

The Claimants' Position

245. The Claimants submit that the Respondent "has not proved any of its assertions."[350] The Claimants note that the Mongolian authorities have not brought charges against Mr. Bayartsogt and Mr. Natsagdorj, despite investigating them for five years and, in any case, allegations were made not against the Claimants, but against individuals and BLT.[351] The Claimants describe the absence of representations and warranties in share transfer agreements as "probative of nothing"[352] and claim that Mongolia "has not produced any evidence with respect to its theft and fraud allegations."[353] In sum, the Claimants submit that the Respondent has not discharged its burden of proof in making allegations of theft, fraud, and embezzlement and is impermissibly asking the Tribunal to infer fraud, theft, and embezzlement from scant evidence.

246. In the Claimants' view, "[t]he Respondent is effectively asking the Tribunal to infer fraud from (a) the Claimants' not having submitted documents cited in the 1997 Feasibility Study and records of the communications between BLT, Mr. Bayartsogt and Li Xiaoming before 1997; and (b) the

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344 *Inceysa Vallisoletane, SL v. El Salvador*, ICSID Case No ARB/03/26, Award of 2 August 2006, para. 236 (**Authority RLA-5**).

345 The Respondent's Counter-Memorial, para. 169.

346 The Respondent's Counter-Memorial, para. 180.

347 The Respondent's Counter-Memorial, para. 180.

348 *Plama Consortium Ltd v. Bulgaria*, ICSID Case No ARB/03/24, Award of 27 August 2008, para. 145 (**Authority RLA-19**).

349 The Respondent's Counter-Memorial, para. 175.

350 The Claimants' Reply, para. 90.

351 The Claimants' Reply, paras. 90, 95; *see also* Hearing Transcript (Day 5, 18 September 2015) 749:16 to 750:17, referring to cross-examination of Ms. Taivan, Hearing Transcript (Day 4, 17 September 2015) 698:19 to 702:20, 728:4 to 728:7.

352 The Claimants' Reply, para. 92.

353 The Claimants' Reply, para. 93; *see also* Hearing Transcript (Day 1, 14 September 2015) 74:24 to 75:20

absence of representations and warranties in relation to the legality of the 939A Licence in certain share transfer agreements."[354] The Claimants consider that this amounts to "an impermissible shifting of the burden of proof."[355]

247. The Claimants contend that the Respondent's claim of fraud and theft "fails on the law."[356] The Claimants refer to *EDF v. Romania*[357] and *African Holding Company v. Congo*[358] and note that "there is general consensus" that a high standard of proof of corruption should be applied.[359] In the Claimants' view, *Anderson v. Costa Rica* is entirely distinguishable from the present circumstances, as the claimants in that case had been found guilty of an offence. Here, the Mongolian authorities have dropped all charges against the Claimants. The Claimants also submit that Order No. 1 of 2014 is not in accordance with Mongolia's Criminal Procedure Law, and in any case, only a court can ascertain guilt or innocence under Mongolian law.[360]

248. The Claimants further rely on the cross-examination of Mr. Ganjuurjav[361] and Mr. Shagdar,[362] as well as on the witness statement of Mr. Khurts,[363] all of whom testified that there were several copies of DMP's Feasibility study, some of which, according to Mr. Ganjuurjav, might still be in the government archives.[364] The Claimants also note that, according to Mr. Shagdar, the document that was allegedly stolen was only a first stage document, not a full Feasibility Study, and in any case, geological information about the deposit would be the same.[365] The Claimants submit that

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[354] The Claimants' Reply, para. 92.

[355] The Claimants' Reply, para. 92.

[356] The Claimants' Reply, para. 94.

[357] *EDF (Services) Ltd v. Romania*, ICSID Case No ARB/05/13, Award of 8 October 2009, para. 221 (**Authority RLA-96**).

[358] *African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo*, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité de 29 July 2008, para. 55 (**Authority CLA-152**).

[359] Hearing Transcript (Day 1, 14 September 2015) 75:21 to 79:2.

[360] Hearing Transcript (Day 5, 18 September 2015) 759:19 to 761:22; cross-examination of Ms. Taivan, Hearing Transcript (Day 4, 17 September 2015) 710:13 to 710:17.

[361] Cross-examination of Mr. Ganjuurjav, Hearing Transcript (Day 3, 18 September 2015) 463:6 to 464:6*, see also* Witness Statement of Mr. Ganjuurjav's, para. 26.

[362] Cross-examination of Mr. Shagdar, Hearing Transcript (Day 3, 18 September 2015) 426:22 to 427:1.

[363] Witness statement of Mr. Khurts, para. 9

[364] Questions by the Arbitral Tribunal to Mr. Ganjuurjav, Hearing Transcript (Day 3, 18 September 2015) 494:1 to 494:16.

[365] Cross-examination of Mr. Shagdar, Hearing Transcript (Day 3, 18 September 2015) 422:20 to 423:8; 427:19 to 427:23.

Mongolia failed to provide convincing evidence with regard to theft of DMP's Feasibility Study.[366]

249. The Claimants also contest the Respondent's allegations of fraudulent misrepresentation. According to the Claimants, the Respondent has not established that any inaccuracies in the Feasibility Study were fraudulent, and has "not established the . . . core element of (fraudulent) misrepresentation, namely reliance,"[367] as well as intent to deceive.[368] The Claimants submit that "[a]s the competent authority had no discretion to refuse to grant a licence because of the particulars of a feasibility study, it could not on any view have relied on those particulars in its decision to grant the licence."[369]

250. The Claimants further object to the Respondent's reasoning that fraudulent misrepresentation justifies expropriation, claiming that the Respondent has failed to cite "any provision of Mongolian law that would allow revocation of a mining licence under such circumstances."[370] In fact, under the 1994 Minerals Law, fraudulent misrepresentation is not a ground for revocation of a licence and "false information and records" only give rise to the payment of a fine.[371] In this respect, the Claimants consider the Respondent's reliance on *Gustav Hamester v. Ghana, Inceysa v. El Salvador* and *Plama v. Bulgaria* as misplaced.[372] They emphasise that the tribunals in those cases required strong proof of allegations of fraudulent misrepresentation, not "'inferences'"[373] and assert the Respondent has not discharged that burden.

251. Even if a fraudulent misrepresentation in the Feasibility Study were established, the Claimants consider that the Respondent should be precluded on relying on it where:

(a) "these misrepresentations were not relied upon by the Mongolian authorities when revoking the 939A Licence";[374]

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366 Hearing Transcript (Day 5, 18 September 2015) 751:17 to 756:1.

367 The Claimants' Reply, para. 98.

368 Hearing Transcript (Day 5, 18 September 2015) 756:21 to 757:24, referring to cross-examination of Ms. Darijav, Hearing Transcript (Day 3, 18 September 2015) 562:21 to 562:23, 563:6 to 563:13.

369 The Claimants' Reply, para. 100.

370 The Claimants' Reply, para. 96.

371 The Claimants' Reply, paras. 101-102.

372 The Claimants' Reply, para. 103-106.

373 The Claimants' Reply, para. 103.

374 The Claimants' Reply, para. 107.

(b) "the Chinese investors were invited by the Mongolian government to invest in the Tumurtei mine and their investment in Tumurtei Khuder was approved (as the incorporation of Tumurtei Khuder had been)";[375]

(c) "the competent authorities approved the transfer of the 939A Licence from BLT to Tumurtei Khuder";[376] and

(d) "the Mongolian authorities were kept informed of and ratified the work plans submitted by Tumurtei Khuder before it commenced the exploitation of the Tumurtei deposit, all of which showed how the plans to mine the Tumurtei deposit had developed since the 1997 Feasibility Study."[377]

(b) *Whether the Treaty Provides Jurisdiction to Determine Liability for Alleged Expropriation*

252. Article 8 of the Treaty provides in relevant part as follows:

> 1. Any dispute between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> 2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.
>
> 3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article.
>
> [. . .]

The Respondent's Position

253. The Respondent objects to the jurisdiction of the Tribunal on the grounds that Mongolia's consent to arbitration set out in Article 8(3) of the Treaty does not extend to the subject matter of the Claimants' claims.

254. According to the Respondent, the language of Article 8(3) of the Treaty "expressly limits the scope of arbitration to disputes over questions of quantum, with questions of liability to be

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375 The Claimants' Reply, para. 107.

376 The Claimants' Reply, para. 107.

377 The Claimants' Reply, para. 107.

resolved by competent courts in the host state."[378] In the Respondent's view, "Article 8(3) on its face is an exceptional provision," and the "ordinary jurisdiction provision in the BIT is not Article 8(3) but Article 8(2)," referring to the competent courts of the host State.[379]

255. In interpreting the text of the Treaty, the Respondent focuses on the reference in Article 8(3) to a "dispute" and recalls the consistent line of jurisprudence from *Mavrommatis Palestine Concessions*[380] to *Peace Treaties with Bulgaria, Hungary and Romania*,[381] to recent investment arbitrations regarding the meaning of the term "dispute" in international law. According to the Respondent, in interpreting Article 8(3), "[t]he appropriate test is not whether Claimants' *claims* involve the amount of compensation, but whether *the dispute between the parties* involves the amount of compensation."[382] Because the Claimants have sought restitution of the Tumurtei licence and have not pled monetary compensation, the Respondent submits that the "Claimants do not—and, indeed, cannot—assert that the parties are in a *dispute* involving the amount of compensation."[383] In any case, according to the Respondent, the language of the Treaty has priority over general rules of international law, and thus a restitution claim falls outside of the scope of Article 8(3).[384] The Respondent also objects to the Claimants' focus on the word "involving" and submits that all the words of the article 8(3) should be taken into account and, in particular, the crucial words "amount of compensation for".[385]

256. In the Respondent's view, rather than address the text of Article 8(3), the Claimants "attempt to rely upon a teleological construction of the BIT by reference to the *EMV. v. Czech Republic*, *Renta*, and *Tza Yap* awards."[386] The Respondent considers this unsuccessful as "[a]ll three cases address different treaties that use materially different language."[387] In particular, the Respondent notes that the Czech–Belgium/Luxembourg and Russia–Spain treaties on which the *EMV* and

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378 The Respondent's Rejoinder, para. 156; *see also* Hearing Transcript (Day 1, 14 September 2015) 182:11 to 186:11.

379 The Respondent's Counter-Memorial, paras. 192, 195.

380 *Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment of 30 August 1924, P.C.I.J. (Ser. A) No. 2*, at p. 11 (**Authority RLA-103**).

381 *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950 (first phase), 1950 I.C.J. Reports*, p. 65 at p. 74 (**Authority RLA-104**).

382 The Respondent's Rejoinder, para. 179 (*emphasis in original*).

383 The Respondent's Rejoinder, para. 177 (*emphasis in original*).

384 Hearing Transcript (Day 1, 14 September 2015) 199:2 to 200:4.

385 Hearing Transcript (Day 1, 14 September 2015) 183:10 to 186:17; *see also* Hearing Transcript (Day 5, 18 September 2015) 889:17 to 894:2.

386 The Respondent's Counter-Memorial, para. 211.

387 The Respondent's Counter-Memorial, para. 210; *see also* Hearing Transcript (Day 1, 14 September 2015) 197:11 to 197:19

Renta decisions were based include more general references to the articles of those treaties concerning expropriation.[388] Additionally, unlike the Treaty, the treaties at issue in *EMV* and *Renta* lack "a provision vesting jurisdiction in local courts."[389] The Respondent also takes issue with the depth of reasoning in these awards and the reliance on the words "'involving' or 'concerning' to the exclusion of the remaining text of the clause."[390] Transposed to the China–Mongolia treaty, the Respondent submits that this would amount to "the imposition of some goal these tribunals deemed desirable, *i.e.*, more arbitration, and found reflected in the preambles of the respective treaties."[391] The Respondent notes that the view of the tribunal in *Sanum v. Laos*, on which the Claimants rely, is inconsistent with the Vienna Convention and was rejected by the High Court of Singapore.[392]

257. To the extent that other arbitral decisions may be instructive, the Respondent notes that the "Claimants' proposed interpretation is at odds with a number of awards concluding that a narrow consent clause may not be unduly expanded."[393] In this respect, the Respondent relies on *Austrian Airlines v. Slovakia*,[394] *Telenor v. Hungary*,[395] *Berschader v. Russia*,[396] *ST-AD v. Bulgaria*[397] and *RosInvest v. Russian Federation*[398] and submits that the language of the arbitration clause in Article 8(3) of the Treaty is sufficiently similar to the language of the arbitration clauses in the treaties at issue in those cases for the Tribunal to reach a similar result.[399]

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388 The Respondent's Counter-Memorial, para. 212.

389 The Respondent's Rejoinder, paras. 213, 216.

390 The Respondent's Counter-Memorial, para. 211.

391 The Respondent's Counter-Memorial, para. 211.

392 Hearing Transcript (Day 1, 14 September 2015) 197:19 to 197:21. The Tribunal, however, notes that subsequently, and after the closing of the hearing in this case, the High Court's decision in *Sanum* was reversed by the Court of Appeal of Singapore. See paragraph 88 above.

393 The Respondent's Rejoinder, para. 249.

394 *Austrian Airlines v. Slovak Republic*, UNCITRAL, Award of 9 October 2009 (**Authority CLA-43**).

395 *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006 (**Authority CLA-113**).

396 *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award of 21 April 2006 (**Authority CLA-41**).

397 *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, Award on Jurisdiction of 18 July 2013 (**Authority RLA-199**); Hearing Transcript (Day 1, 14 September 2015) 197:5 to 197:10.

398 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction of 1 October 2007 (**Authority CLA-42**).

399 The Respondent's Rejoinder, paras. 249-265.

258. For the Respondent, the Claimants' "expansive" interpretation would deprive the restrictive language of Article 8(3) of meaning.[400] The Respondent argues, however, that this would not be the case with a more restrictive reading. In particular, the Respondent emphasizes that Article 4 of the Treaty, concerning expropriation, refers to the "proclamation" of an expropriation. According to the Respondent, "[a]s a matter of Mongolian law, a 'proclaimed' expropriation is an expropriation pursuant to the 'Law on State and Local Properties'."[401] Similar provisions exist in Chinese law, such that "[t]he provision therefore has a precise scope as matter of both Mongolian and Chinese law."[402] Article 8 thus does not universally require investors to go first to the local courts and then to arbitration as "investors whose property has been the subject of an expropriation declaration or similar legal decree would be able to bring a dispute over the amount of quantum."[403]

259. Similarly, the Respondent argues that the fork-in-the-road provisions in Article 8(3) would not prevent an investor from pursuing liability for an expropriation before the local courts and quantum before an arbitral tribunal. The Respondent notes the Claimants' own emphasis on the importance of identity of parties, cause of action, and object in arguing that Tumurtei Khuder's many lawsuits in the Mongolian courts should not deprive the Tribunal of jurisdiction and submits that "claims under liability and quantum constitute different disputes."[404] In addition, the Respondent submits that a claimant has an option to bring an administrative claim for declaration of expropriation.[405] The Respondent considers that the tribunal in *Tza Yap Shum* failed to consider established fork-in-the-road jurisprudence and accepted an unqualified and unsupported presumption that an "investor cannot resort to international arbitration after reliance on domestic courts."[406]

260. In the Respondent's view, "[t]he object and purpose of the Treaty also support a finding against jurisdiction."[407] The Respondent considers the Claimants place excessive weight on the Treaty's preamble, but argues in any event that "when the Treaty was signed, sovereignty was an issue of

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400 The Respondent's Rejoinder, paras. 182-184.

401 The Respondent's Counter-Memorial, para. 201.

402 The Respondent's Counter-Memorial, para. 201.

403 The Respondent's Rejoinder, para. 187; *see also* Hearing Transcript (Day 1, 14 September 2015) 187:8 to 188:7

404 The Respondent's Rejoinder, para. 192.

405 Hearing Transcript (Day 1, 14 September 2015) 189:4 to 190:7

406 The Respondent's Rejoinder, para. 196.

407 The Respondent's Rejoinder, para. 203; *see also* Hearing Transcript (Day 1, 14 September 2015) 190:8 to 198:7

extreme importance to both Mongolia . . . and China," a fact that is reflected in the preamble.[408] The Respondent also notes that "scholarship on Chinese BITs identifies that their preambles should not be interpreted to support a one-sided, pro-investor presumption"[409]

261. Stepping beyond the text and context of the Treaty and applying Article 32 of the Vienna Convention on the Law of Treaties, the Respondent asserts that three supplementary means of interpretation support Mongolia's interpretation of Article 8(3) of the Treaty:

(a) First, early Chinese investment treaty policy and past practice in the conclusion of investment treaties show an "unwillingness to submit questions of liability to international arbitration."[410] The Respondent in particular emphasizes China's reservation with respect to the ICSID Convention.[411] Indeed, the Respondent argues, "[l]imited consents to arbitration were the norm in Chinese BITs at the time the China-Mongolia BIT [was] concluded" and "[p]rior Chinese treaty practice confirms the intention on the part of the People's Republic of China to limit the scope of the jurisdictional undertakings."[412] This can be seen even in the academic writings of Claimants' own counsel, who previously supported the view that it was typical to restrict the right to arbitration to "the amount of compensation payable on expropriation (but not the initial question of whether an expropriation had taken place)" in treaties concluded by the PRC before the end of the 1990s.[413]

(b) Second, more recent Chinese investment practice *does* entrust issues of liability to international arbitration and, as a result, more recent treaties contain language that differs in significant respects to that in the Treaty.[414]

(c) Finally, the preambular language of the Treaty is less protective of investor interests than other investment treaties to which the PRC or Mongolia are party.[415]

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408 The Respondent's Rejoinder, paras. 210-211.

409 The Respondent's Rejoinder, para. 217; *see also* Hearing Transcript (Day 1, 14 September 2015) 196:3 to 196:21.

410 The Respondent's Rejoinder, para. 227; *see also* The Respondent's Rejoinder, paras. 230-237; Hearing Transcript (Day 1, 14 September 2015) 193:14 to 195:5.

411 Hearing Transcript (Day 1, 14 September 2015) 193:18 to 193:25.

412 The Respondent's Counter-Memorial, para. 219.

413 The Respondent's Rejoinder, para. 164.

414 The Respondent's Rejoinder, paras. 228, 238-241; *see also* Hearing Transcript (Day 1, 14 September 2015) 195:6 to 196:2

415 The Respondent's Rejoinder, paras. 229, 242-248; *see also* Hearing Transcript (Day 1, 14 September 2015) 190:19 to 191:14.

The Claimants' Position

262. The Claimants submit that –

> the ordinary meaning of Article 8(3) in the context of the Treaty and in the light of its object and purpose can only be construed to the effect that the Arbitral Tribunal has jurisdiction over disputes involving the existence and lawfulness of the expropriation of the Claimants' investments, as well as the reparation to be granted to the Claimants.[416]

263. The Claimants rely on four authorities in elucidating the ordinary meaning of Article 8(3):

(a) In *EMV v. Czech Republic*,[417] the High Court of England and Wales in reviewing the tribunal's decision accepted that the jurisdictional reference to "any dispute" "concerning compensation" extended to determining the existence of an entitlement to compensation.[418]

(b) In *Renta v. Russia*,[419] the tribunal held that the existence of an obligation to pay compensation was an "evident predicate to any amount being 'due'" and thus within the scope of the arbitration clause.[420]

(c) In *Sanum Investments Limited v. Laos,*[421] the tribunal held that the term "to involve" is inclusive rather than exclusive and, while admitting that other readings are possible, supported the wider interpretation as more consistent with the other provisions of the BIT.[422]

(d) Finally, in *Tza Yap Shum v. Peru*,[423] with a jurisdictional clause functionally identical to Article 8(3), the tribunal "held that the word 'involving' must not be understood as restricting the tribunal's jurisdiction to the determination of the amount of compensation.[424]

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416 The Claimants' Memorial, para. 61; *see also* Hearing Transcript (Day 1, 14 September 2015) 45:15 to 45:24.

417 *Czech Republic v. European Media Ventures SA*, [2007] EWHC 2851 (Comm) at para. 44 (**Authority CLA-37**).

418 The Claimants' Memorial, paras. 64-65; *see also* Hearing Transcript (Day 1, 14 September 2015) 53:16 to 54:21.

419 *Renta 4 S.V.S.A, et. al. v. The Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objection of 20 March 2009, para. 33 (**Authority CLA-36**).

420 The Claimants' Memorial, paras. 66-67; *see also* Hearing Transcript (Day 1, September 2015) 52:4 to 53:15.

421 *Sanum Investments Limited v. Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction of 13 December 2013 (**Authority CLA-148**).

422 Hearing Transcript (Day 1, 14 September 2015) 47:18 to 48:13.

423 *Tza Yap Shum v. The Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, para. 151 (**Authority CLA-32**).

424 The Claimants' Memorial, para. 68.

The Claimants insist that the decisions in *Tza Yap Shum*, *EMV,* and *Renta* are relevant because the treaty provisions in those cases were either "identical" or similar to Article 8(3) the Treaty and consider that the Respondent struggles to meaningfully distinguish the relevant text.[425] The Claimants emphasize that although the *Sanum Investments* award was initially set aside by the High Court of Singapore, the "Court of Appeal reversed Judicial Commissioner Leow's earlier decision and found that the tribunal in the Sanum case had subject-matter jurisdiction over Sanum's claims under Article 8(3) of the China-Laos BIT, which is substantially similar to Article 8(3) of the China-Mongolia BIT."[426]

264. The Claimants also submit that this result is supported by the context of Article 8(3) and the operation of the fork-in-the-road provision in that paragraph. According to the Claimants:

> (i) if Article 8 were read as suggesting that only local courts are competent to rule over the existence of expropriation; and
>
> (ii) since establishing the existence of an expropriation must necessarily occur before any determination of reparation;
>
> (iii) it would follow that once the investor had submitted a dispute as to the existence of an expropriation to the local courts, he would – by operation of the fork-in-the-road clause – be barred from later submitting the issue of quantification to an arbitral tribunal.[427]

The Claimants also disagree that Article 4(2) provides for an option to circumvent the fork-in-the-road provision, arguing that there can be no proclamation of expropriation in cases of indirect expropriation.[428]

265. The Claimants likewise consider that "Article 8(3) of the Treaty must be read to provide tribunals with the jurisdiction to decide the existence and lawfulness of an expropriation in order for the interpretation of that provision to remain consistent with the Treaty's object and purpose of protecting investment."[429] According to the Claimants, the Treaty's object and purpose is "to encourage foreign investments by providing meaningful protection to foreign investors."[430] The Claimants disagree with the Respondent that preservation of sovereignty is the object and purpose of the Treaty.[431] The Claimants also note that the protective purpose of investment treaties was

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425 The Claimants' Reply, paras. 140-141.

426 Letter from the Claimants dated 11 October 2016. The decision was admitted to the record of these proceedings as Authority CLA-153. See paragraph 88 above.

427 The Claimants' Memorial, para. 70; *see also* Hearing Transcript (Day 1, 14 September 2015) 63:12 to 68:18

428 Hearing Transcript (Day 1, 14 September 2015) 67:1 to 68:18; Hearing Transcript (Day 5, 18 September 2015), 794:13 to 796:3.

429 The Claimants' Memorial, para. 73; *see also* Hearing Transcript (Day 1, 14 September 2015) 55:5 to 55:25.

430 The Claimants' Memorial, para. 72.

431 The Claimants' Reply, para. 148.

recognised in *Czech Republic v. EMV*, *Renta*, *Tza Yap Shum* and in *SGS v. Philippines*.[432] For the Claimants, such a protective purpose mandates broad international arbitral jurisdiction on the existence and lawfulness of expropriation, as well as on compensation for expropriation.[433] The Claimants submit that to adopt a more restrictive interpretation of Article 8(3) of the Treaty "would lead to an untenable conclusion—namely that the investor could never actually have access to arbitration,"[434] which would deny foreign investors meaningful protection.[435]

266. The Claimants submit that their interpretation of Article 8(3) is the only effective interpretation. Thus, the Claimants provide that in the situation where the host State has a right to unilaterally declare the existence and lawfulness of expropriation, substantive provisions of Article 4(1) of the BIT are futile.[436] Further, the Claimants submit that the Tribunal cannot determine quantum without looking at liability,[437] because the Tribunal needs "to know specifically what and how the expropriation or dispossession took place."[438]

267. Finally, the Claimants submit that China's practice with respect to other treaties is irrelevant. In the Claimants' view, "according to Article 31(3)(b) of the Vienna Convention, the 'subsequent practice in the application of the treaty' must be one which 'establishes the agreement of the parties regarding its interpretation.'"[439] The Claimants also consider that Mongolia has not presented any evidence on its own policy.[440]

268. The Claimants acknowledge the existence of a line of arbitral decisions suggesting another view as to jurisdiction, but argue that "those cases can either be distinguished from the present one or are, in the Claimants' submission, wrong as a matter of treaty interpretation, and should therefore not be considered authoritative in that respect."[441] Specifically, the Claimants argue that:

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[432] The Claimants' Memorial, paras. 73-75; Hearing Transcript (Day 1, 14 September 2015) 56:1 to 58:12.

[433] The Claimants' Memorial, para. 77.

[434] The Claimants' Memorial, 71, *quoting Tza Yap Shum v. Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, paras. 154, 157 (**Authority CLA-32**).

[435] The Claimants' Memorial, para. 77.

[436] Hearing Transcript (Day 1, 14 September 2015) 58:13 to 59:19.

[437] Hearing Transcript (Day 1, 14 September 2015) 59:20 to 62:12.

[438] *European Media Ventures SA v. The Czech Republic*, UNCITRAL, Award on Jurisdiction. 15 May 2007, at para. 58 (**Authority CLA-35**)

[439] The Claimants' Reply, para. 149.

[440] Hearing Transcript (Day 1, 14 September 2015) 69:22 to 71:19.

[441] The Claimants' Memorial, para. 82.

(a) The decision in *Berschader v. Russia* should not be followed because the tribunal's reasoning was driven by considerations of the treaty parties' subsequent practice in other treaties, contrary to the approach required by the Vienna Convention.[442]

(b) The decision in *RosInvest v. Russia* should not be followed because –

> the RosInvest tribunal analysed the applicable dispute-resolution clause in the light of the ordinary meaning of its words but failed to analyse it in the light of its main purpose of giving effective protection to foreign investors, when such purpose had precisely led the contracting states to enter into a treaty for the reciprocal protection of investments. The tribunal also failed to apply the principle of effective interpretation by preventing the investor from seeking relief in the event of unlawful expropriation.[443]

(c) Finally, the decision in *Austrian Airlines v. Slovakia* "is distinguishable from the instant case as the Austria-Slovakia BIT contained two separate clauses for claims over 'the legitimacy of the expropriation' and for claims over 'the amount of the compensation and the conditions of payment'."[444] Only the latter of these two separate disputes clauses provided for arbitration. The Claimants submit that the *ST-AD* decision is very similar to *Austrian Airlines*.[445]

(c) *Qualifying Investor / Role of Chinese Government*

The Respondent's Position

269. The Respondent objects to the Tribunal's jurisdiction on the grounds that Beijing Shougang and China Heilongjiang are not investors because they cannot be classified as "economic entities" under Article 1(2) of the Treaty.[446]

270. The Respondent submits that the meaning of the term "economic entities" "must be resolved by reference to both Chinese treaty practice and to international investment jurisprudence,"[447] which it contends would exclude Beijing Shougang and China Heilongjiang.[448] According to the Respondent, "the formulation must be read narrowly."[449] Other Chinese treaties include express

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[442] The Claimants' Memorial, paras. 83-85.

[443] The Claimants' Memorial, para. 86.

[444] The Claimants' Memorial, para. 87; *see also* Hearing Transcript (Day 5, 18 September 2015), 798:6 to 799:11.

[445] Hearing Transcript (Day 5, 18 September 2015), 799:12 to 800:18.

[446] The Respondent's Counter-Memorial, para. 183

[447] The Respondent's Counter-Memorial, para. 183.

[448] The Respondent's Counter-Memorial, para. 185.

[449] The Respondent's Counter-Memorial, para. 184.

references to "governmental institutions", "public organizations", and "public and semi-public entities" as qualifying investors. For the Respondent, "[t]he inclusion of such a broader provision in a different BIT to which China is a party reflects an understanding that such entities would not qualify as an 'economic' entity pursuant to the BIT."[450] The Respondent also argues that the Claimants do not conform to the ordinary meaning of "economic", being neither "commercial" nor "profitable."[451]

271. The Respondent also argues that, in any event, Beijing Shougang and China Heilongjiang do not qualify as investors under the Treaty because they are "quasi-instrumentalities of the Chinese government."[452] Relying on a functional test to distinguish a State from a non-State actor,[453] the Respondent asserts that "Beijing Shougang and China Heilongjiang act under the direct control of the Chinese government, and are under express instruction to invest abroad in order to serve China's foreign policy goals."[454] To support its claim that Beijing Shougang's investments are "a function of Chinese direction and control,"[455] the Respondent relies on the Claimants' description of the parent company of Beijing Shougang, Shougang Corporation, as "'under the direct supervision of the State Council of the PRC'."[456] With respect to China Heilongjiang, the Respondent points to the fact that the company's "primary scope of operation" includes the "contracting of foreign-aided economic and technology projects and export of the materials and equipment required," reflecting in its view "the specific intent of China to rely on China Heilongjiang to invest abroad," as with Shougang Corporation.[457] The Respondent cites as support academic analysis of Chinese State involvement in state-owned steel enterprises[458] and the parallels between the decision of Beijing Shougang and China Heilongjiang to invest in Mongolia and the Chinese government's policies on investment in mineral resources abroad.[459] The Respondent further submits that sales of ore below market price are an indication that the

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450 The Respondent's Counter-Memorial, para. 184.

451 The Respondent's Rejoinder, paras. 312-313.

452 The Respondent's Counter-Memorial, para. 186; *see also* Hearing Transcript (Day 1, 14 September 2015) 200:13 to 207:9.

453 The Respondent's Counter-Memorial, para. 186.

454 The Respondent's Rejoinder, para. 293.

455 The Respondent's Rejoinder, para. 299.

456 The Respondent's Rejoinder, para. 295, *quoting* The Claimants' Memorial, para. 15.

457 The Respondent's Rejoinder, para. 300.

458 The Respondent's Rejoinder, paras. 298, 307-308.

459 The Respondent's Rejoinder, paras. 302-303; *see also* Hearing Transcript (Day 1, 14 September 2015) 200:13 to 207:9; Hearing Transcript (Day 5, 18 September 2015) 835:25 to 844:3, referring to cross-examination of Mr. Li, Hearing Transcript (Day 2, 15 September 2015) 304:4 to 304:20.

Claimants were not motivated by profit as an ordinary economic entity would be.[460] The Respondent reiterates that Mongolia did not invite Chinese investors, rather it was the PRC that was interested in the Tumurtei deposit.[461]

272. The Respondent argues that Qinlong, which is not government-owned, similarly did not operate as an entity having the requisite "separateness" implied in the term "economic entity".[462] The Respondent cites the fact that Mr. Li had represented China Heilongjiang in the signing of a number of agreements relating to the Tumurtei deposit, that the licence was not transferred to Tumurtei Khuder until approximately three years after Qinlong first signed the joint venture agreement, and that Mr. Li could not explain the unavailability of a copy of the agreement transferring Tumurtei Khuder shares from Qinlong to China Heilongjiang.[463] The Respondent also points to a series of "oddities" regarding various agreements between the participants in the project over time[464] and questions whether BLT itself had any actual existence "apart from wrongful acquisition of interests," including an initial agreement that accorded BLT a 51 percent interest in what was projected to be a USD 680 million investment by China Heilongjiang.[465] The Respondent also cites the fact that Mr. Li himself claimed to have been assigned by the leadership of the Chinese Ministry of Commerce to resolve issues relating to the exploitation of the deposit.[466] Finally, the Respondent cites the general unfamiliarity of the Claimants' witnesses with the underlying pleadings in the arbitration.[467]

273. The Respondent also argues that the Claimants failed to provide any evidence they are shareholders of Tumurtei Khuder or that Tumurtei Khuder ever issued shares or received any payment for the shares.[468] The Respondent points to "odd" contractual arrangements between BLT and the Claimants, the absence of evidence regarding BLT's economic activity prior to

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460 Hearing Transcript (Day 1, 14 September 2015) 203:9 to 204:14.

461 Hearing Transcript (Day 5, 18 September 2015) 838:21 to 840:20; Brief of the Ministry of Foreign Affairs, Jiang Zemin (**Authority C-135**).

462 Hearing Transcript (Day 5, 18 September 2015) 827:19-25.

463 Hearing Transcript (Day 5, 18 September 2015) 828:1-20.

464 Hearing Transcript (Day 5, 18 September 2015) 828:21 to 831:10.

465 Hearing Transcript (Day 5, 18 September 2015) 831:11 to 832:15 and 833:10-20.

466 Hearing Transcript (Day 5, 18 September 2015) 881:4-19; Letter from Li Xiaoming to the Prime Minister of Mongolia, 26 December 2006 (**Exhibit C-2**).

467 Hearing Transcript (Day 5, 18 September 2015) 832:16 to 833:9.

468 Hearing Transcript (Day 5, 18 September 2015) 824:17 to 828:20, referring to the questions of the Arbitral Tribunal to Mr. Li. Hearing Transcript (Day 2, 15 September 2015) 332:15 to 332:16.

obtaining the 939A Licence, and BLT's lack of a foreign currency bank account prior to August 1996.[469]

The Claimants' Position

274. The Claimants dismiss the Respondent's interpretation of Article 1(2)(b) of the Treaty as doing "violence" to the Treaty's text.[470] Crucially, the Claimants emphasize, there is no restriction in the text of the Treaty excluding State-owned enterprises from qualifying as investors.[471] The Claimants add that all the required consents and approvals required under Mongolian law were obtained.[472]

275. In the Claimants' view, the Respondent attempts to draw meaning from the "random selection . . . of two differently-worded BITs concluded by China with third states."[473] The Claimants consider this "probative of nothing"[474] and contrary to Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which requires that "subsequent practice" establish "the agreement of the parties" regarding the interpretation of a treaty, such that evidence of Chinese practice alone is insufficient.[475]

276. The Claimants similarly discount the Respondent's attempt to draw meaning from the circumstances of the adoption of the ICSID Convention. The Claimants both recall that the ICSID Convention has no application in these proceedings and submit that the Respondent's interpretation is, in any event, incorrect.[476] The Claimants rely on the observations of Aaron Broches, who played a key role in establishing the ICSID, and Professor Christoph Schreuer for the proposition that a "government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or discharging an essentially governmental function."[477] The Claimants deny that China Heilongjiang and Beijing

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469 Hearing Transcript (Day 5, 18 September 2015) 828:21 to 834:18, referring to cross-examination of Mr. Bayartsogt Hearing Transcript (Day 2, 15 September 2015) 264:8 to 264:11.

470 The Claimants' Reply, para. 110.

471 The Claimants' Reply, para. 109; *see also* Hearing Transcript (Day 1, 14 September 2015) 80:15 to 82:18.

472 Hearing Transcript (Day 5, 18 September 2015) 802:9 to 803:19,

473 The Claimants' Reply, para. 111.

474 The Claimants' Reply, para. 111.

475 The Claimants' Reply, para. 111.

476 The Claimants' Reply, para. 113.

477 The Claimants' Reply, para. 114, *quoting* A. Broches, *as reproduced in* C.H. Schreuer, *The ICSID Convention – A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd ed. 2009) at p. 161 (**Authority CLA-110**).

Shougang are "agencies" of the Chinese government or exercise "any element of governmental authority."[478]

(d) *Qualifying Investment / Investment Risk in the Claimants' Investment*

The Respondent's Position

277. The Respondent objects to the Tribunal's jurisdiction on the grounds that the Claimants have not made a qualifying investment, insofar as they have not incurred investment risk.

278. Relying on *Romak v. Uzbekistan*,[479] *Pantechniki v. Albania*,[480] *Phoenix Action v. Czech Republic*,[481] *Fakes v. Turkey*,[482] and *Globex v. Ukraine*,[483] the Respondent argues that investment risk is inherent to the meaning of the term "investment."[484] On the basis of *Romak,* the Respondent defines investment risk as a "situation in which an investor cannot be sure of a return on his investment, and may not know the amount he will end up spending."[485]

279. The Respondent further defines investment risk in opposition to "policy risk": "the former concerns a likelihood of profitability, and the latter concerns a likelihood of accruing benefit to the State."[486] The Respondent considers this dichotomy as "supported by the context and object and purpose of the Mongolia-China BIT."[487] It points to the Treaty's preambular reference to "mutual respect for sovereignty", which it describes as "a marker of the recognition by China of the rights to decolonization and self-determination of the Mongolian people," following an initially fraught post-colonial relationship between Mongolia and China.[488] For the Respondent,

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478 The Claimants' Reply, para. 117.

479 *Romak SA v. Uzbekistan*, PCA Case No AA280, Award of 26 November 2009, para. 207 (**Authority RLA-27**).

480 *Pantechniki SA Contractors and Engineers v. Albania*, ICSID Case No. ARB/07/21, Award of 28 July 2009, para. 46 (**Authority RLA-28**).

481 *Phoenix Action Ltd v. Czech Republic*, ICSID Case No ARB/06/5, Award of 9 April 2009, para. 116 (**Authority RLA-29**).

482 *Fakes v. Turkey*, ICSID Case No ARB/07/20, Award of 12 July 2010, para. 110 (**Authority RLA-30**).

483 *Global Trading Resource Corp and Globex International, Inc v. Ukraine*, ICSID Case No ARB/09/11, Award of 23 November 2010, para. 56 (**Authority RLA-31**).

484 The Respondent's Counter-Memorial, paras. 224-227.

485 The Respondent's Counter-Memorial, para. 225, *quoting Romak SA v. Uzbekistan*, PCA Case No AA280, Award of 26 November 2009, para. 230 (**Authority RLA-27**).

486 The Respondent's Rejoinder, para. 320.

487 The Respondent's Counter-Memorial, para. 229.

488 The Respondent's Counter-Memorial, para. 229.

the object and purpose of the Treaty was to promote investment while preserving Mongolia's sovereignty.

280. As "instrumentalities"[489] of the Chinese government, the Claimants' risk is "state policy risk," which is not—in the Respondent's view—an "investment risk" because it is not commercial.[490] The Respondent asserts that the Claimants' sale of unprocessed iron ore below market prices "comports with . . . directives to place strategic considerations above profitability."[491] The Respondent reasons that China's investment in Mongolia was "motivated by politics and state policy" that constituted "interference in the internal affairs" of Mongolia and that, as such, it "is not an investment capable of protection under the BIT."[492]

281. The Respondent also submits that the Claimants did not make any contribution to Mongolia's economic development. The Respondent supports this statement by referring to the failure of the Claimants to follow their representations in the feasibility study; their use of open-pit mining, which according to the Respondent entails only the extraction of resources; the Claimants' harmful strategy of high-grade mining; below-market sales of ore; and the failure to pay fees and taxes to Mongolia.[493] The Respondent adds that the Claimants' expenses were minimal and "were only intended to benefit themselves."[494]

The Claimants' Position

282. The Claimants submit that their investment comprises their shares in Tumurtei Khuder and their indirect interest in the 939A Licence and that those interests fall within the definition of "investment" in Article 1(1) of the Treaty.[495] The Claimants argue that the ordinary meaning of Article 1(1) is clear, such that recourse to supplementary means of interpretation is not supported by the Vienna Convention on the Law of Treaties.[496]

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[489] The Respondent's Counter-Memorial, para. 186.

[490] The Respondent's Counter-Memorial, para. 228.

[491] The Respondent's Rejoinder, para. 322.

[492] The Respondent's Counter-Memorial, para. 233.

[493] Hearing Transcript (Day 1, 14 September 2015) 207:24 to 210:11.

[494] Hearing Transcript (Day 1, 14 September 2015) 210:12 to 213:1; *see also* Hearing Transcript (Day 5, 18 September 2015) 882:17 to 888:7, referring to examination of Mr. Nergui, Hearing transcript (Day 2, 15 September 2015) 390:18-21; 392:19-21.

[495] The Claimants' Reply, paras. 120, 123.

[496] The Claimants' Reply, paras. 123-126.

283. The Claimants consider the Respondent's distinction between "state policy risk" and "investment risk" to be "completely artificial" and without legal basis.[497] In the Claimants' view, the Respondent's reliance on arbitral decisions based on the requirements of the ICSID Convention is inapposite because the ICSID Convention and its particular provision on investment do not apply.[498] According to the Claimants, the only non-ICSID decision advanced by the Respondent—*Romak*—is an outlier and distinguishable by its "very different factual predicate," involving only a one-off contract for the sale of wheat.[499] The Claimants also submit that the "*Salini* Criteria" and the requirement of investment risk identified therein "are not universally accepted and need to be applied with the utmost care."[500] The Claimants recall the observation in *Biwater v. Tanzania*[501] that "the five criteria set forth in the *Salini* case 'are not fixed or mandatory as a matter of law.'"[502]

284. In any event, the Claimants consider that they undertook investment risk. According to the Claimants, "shareholdings in a mining company and concessions over natural resources carry with them the inherent risk that no return (or no sufficient return) be received on the investment made."[503] The Claimants also disagree that open pit mining did not contribute to the economic development of Mongolia. The Claimants note that they have spent money, paid tax and royalties, and in any case that the value of investment will be addressed in the next phase of proceedings.[504]

(e) *Manifest Error of Law*

The Respondent's Position

285. The Respondent objects to the Tribunal's jurisdiction on the grounds that the Claimants ask the Tribunal to make a manifest error of law when they request restitution on the basis of customary international law.[505] According to the Respondent, "the treaty has expressly displaced custom and

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497 The Claimants' Reply, paras. 122, 126; *see also* Hearing Transcript (Day 1, 14 September 2015) 82:19 to 83:14.

498 The Claimants' Reply, para. 127.

499 The Claimants' Reply, para. 133.

500 The Claimants' Reply, para. 128.

501 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award of 24 July 2008 at para. 312 (**Authority CLA-114**).

502 The Claimants' Reply, para. 129.

503 The Claimants' Reply, para. 134.

504 Hearing Transcript (Day 5, 18 September 2015) 803:20 to 805:22.

505 The Respondent's Counter-Memorial, para. 234.

provides that compensation is the only remedy available to an investor claiming in international arbitration."[506]

286. Relying on the decisions on annulment in *CMS v. Argentina*[507] and *Sempra v. Argentina*,[508] the Respondent submits that such an error could "open it up to a set aside of an award at the seat of the arbitration."[509]

The Claimants' Position

287. The Claimants contend that the authorities cited by the Respondent do not support the Respondent's position.[510] The Claimants reiterate that this is not an ICSID case and describe the *CMS* and *Sempra* decisions as "irrelevant to determining whether an award should be set aside under New York law."[511] The Claimants also insist that Article 8(3) of the Treaty is broad enough to give the Tribunal the authority to order restitution as compensation due for an expropriation and that Article 8(3) of the Treaty "does not displace customary international law."[512]

(f) *Fork in the Road / Recourse to the Mongolian Courts*

The Respondent's Position

288. The Respondent objects to the Tribunal's jurisdiction on the grounds that the Claimants elected to submit the same dispute to the Mongolian courts[513] and therefore "cannot get a second bite at the apple."[514]

289. The Respondent emphasizes that "[t]he revocation of the 939A license in these proceedings, according to Claimants, must be wrongful as a matter of Mongolian law in order to constitute an unlawful expropriation."[515] Otherwise, the Respondent argues, "if the challenged actions by

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506 The Respondent's Counter-Memorial, para. 234.

507 *CMS Gas Transmission Company v. Argentina*, ICSID Case No ARB/01/8; IIC 303 (2007), Decision on Application for Annulment, 21 August 2007, at paras. 130-132 (**Authority RLA-66**).

508 *Sempra Energy International v. Argentina*, ICSID Case No ARB/02/16; IIC 438 (2010), Decision on Argentina's Application for Annulment of the Award, 29 June 2010, paras. 188-219 (**Authority RLA-67**).

509 The Respondent's Counter-Memorial, paras. 235-237.

510 The Claimants' Reply, para. 151; *see also* Hearing Transcript (Day 1, 14 September 2015) 83:15 to 84:10.

511 The Claimants' Reply, para. 151.

512 The Claimants' Reply, para. 152.

513 The Respondent's Counter-Memorial, para. 238.

514 The Respondent's Counter-Memorial, para. 242.

515 The Respondent's Counter-Memorial, para. 239.

Mongolia are in keeping with Mongolian law, there is no expropriation but only Mongolia's exercise of its police powers to rectify fraud, embezzlement and other wrongdoing."[516]

290. In the Respondent's view, this is the same claim that Tumurtei Khuder "has argued and lost." Accordingly, the Respondent argues, the Claimants triggered the "fork-in-the-road" clause, and "[i]t is irrelevant that the claimant in the Mongolian court action was Tumurtei Khuder and not Claimants themselves."[517] Because the Claimants would not have had standing to challenge the license revocation in the courts directly, they "elected to press their claims with regard to the 939A license through Tumurtei Khuder."[518] In the Respondent's view, "Tumurtei Khuder is merely a shell for Claimants," and "Claimants themselves were active in the proceedings as the 'Chinese investors,' introducing evidence and advancing arguments that the Mongolian courts erred in its determinations."[519]

291. According to the Respondent, the revocation of the 939A License is also *res judicata*, or—as expressed by the Tribunal in *RSM v. Grenada*[520]—a matter barred from further consideration by collateral estoppel.[521] The Respondent also recalls the attention in *Pantechniki v. Albania*[522] on the "fundamental basis of claim" and whether "claimed entitlements have the same normative source."[523] Here, the Respondent argues, "the 'normative source' in both the Mongolian court proceedings and the present case is the same—the alleged expropriation of the 939A License," and the "Claimants themselves *repeatedly* relied on the China-Mongolia BIT in the Mongolia court proceedings as a basis upon which 'Tumurtei Khuder LLC shall be protected.'"[524]

The Claimants' Position

292. The Claimants submit that to trigger a "fork-in-the-road" provision, the claims brought before a domestic court and an international tribunal must be the same in regards to the "(a) identity of the

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516 The Respondent's Counter-Memorial, para. 239.

517 The Respondent's Counter-Memorial, para. 241.

518 The Respondent's Counter-Memorial, para. 241.

519 The Respondent's Rejoinder, para. 289.

520 *RSM Production Corp et. al. v. Grenada*, ICSID Case No ARB/10/6, Award of 7 December 2010, paras. 7.1.1-7.1.2 (**Authority RLA-68**).

521 The Respondent's Counter-Memorial, paras. 242-244.

522 *Pantechniki SA Contractors and Engineers v. Albania*, ICSID Case No. ARB/07/21, Award of 28 July 2009, para. 61 (**Authority RLA-28**).

523 The Respondent's Rejoinder, para. 291.

524 The Respondent's Rejoinder, para. 291 (*emphasis in original*).

parties; (b) identity of the cause of action; and (c) identity of object (or relief or subject-matter)."[525]

293. The Claimants consider that there is no identity between the applicant in the proceedings before the Mongolian administrative courts and the Claimants, because the municipal action was brought by Tumurtei Khuder, not the Claimants. The Claimants submit that arbitral tribunals have interpreted the identity of the parties requirement strictly.[526] The Claimants add that in any case they would not have standing in the Mongolian courts.[527]

294. The Claimants also contest any identity of cause of action because the claim brought before the Mongolian courts was made on the basis of "Mongolian law provisions dealing with revocation of a licence, not with expropriation."[528] The Claimants also reject the broader "fundamental basis" test set out in *Pantechniki* and expect that "that test would not be met in the instant case."[529]

295. The Claimants distinguish *RSM v. Grenada* on the grounds that it involved "exceptional circumstances" of abuse of process and parallel arbitrations under the ICSID Convention that were "substantially the same."[530] Instead, they contend that the weight of jurisprudence militates in favour of allowing a locally-incorporated company to "bring administrative proceedings without precluding the investor-shareholder from bringing a treaty claim."[531]

296. Finally, the Claimants note that, unlike Tumurtei Khuder, they are claiming damages as an alternative relief to restitution.[532]

2. Objections to the Admissibility of the Claimants' Claims

The Respondent's Position

297. The Respondent objects to the admissibility of the Claimants' claims on the grounds that these claims "cannot be advanced by the Claimants in good faith."[533] Specifically, the Respondent

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525 The Claimants' Reply, para. 154.

526 The Claimants' Reply, paras. 155-156.

527 Hearing Transcript (Day 1, 14 September 2015) 73:20 to 74:3

528 The Claimants' Reply, para. 157.

529 The Claimants' Reply, para. 157.

530 The Claimants' Reply, para. 158.

531 The Claimants' Reply, para. 158.

532 The Claimants' Reply, para. 159.

533 The Respondent's Counter-Memorial, para. 246.

alleges that the Claimants provided BLT with the funds to embezzle the 939A Licence and the Claimants made materially false representations about their intentions and capabilities.[534] The Respondent considers that the Claimants come to the Tribunal with "unclean" hands and that fundamental principles of fairness and equity and *ex injuria jus non oritur* require the Tribunal to dismiss the Claimants' claims.[535] For the Respondent, "[e]ven if the BIT would permit such claims to be brought, the Tribunal should refrain from examining the merits of such a claim."[536]

298. The Respondent also submits that the Claimants "illegally interfered with Mongolia's internal affairs."[537] The Respondent relies on the decision of the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua*[538] and argues that the principle of State sovereignty establishes certain fundamental societal choices as a reserved domain of the State.[539] In the Respondent's view, "Mongolia's express choice to develop heavy metallurgical industry in Darkhan using the iron ore at Tumurtei iron ore deposit in order to take significant steps towards self-sufficiency following a long quasi-colonial past is part of . . . such [a] systemic choice."[540] Accordingly, the Respondent submits that the Claimants' claims are "inadmissible by Claimants' prior political bad acts."[541]

The Claimants' Position

299. The Claimants object to the factual basis for the Respondent's objections to the admissibility of their claims[542] and submit that Mongolia has "demonstrated no basis on which the doctrine of 'clean hands' applies."[543]

300. According to the Claimants, "the three factual assertions on which the Respondent appears to rely to substantiate its *ex iniuria non oritur ius* argument . . . are unsupported by evidence."[544] Additionally, the Respondent argues, "given that Mongolia encouraged Chinese investment in

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534 The Respondent's Counter-Memorial, para. 247.

535 The Respondent's Rejoinder, para. 267; The Respondent's Counter-Memorial, para. 247.

536 The Respondent's Counter-Memorial, para. 246.

537 The Respondent's Counter-Memorial, para. 248.

538 *Case Concerning Military and Paramilitary Activates in and Against Nicaragua (Nicaragua v. US), Merits, Judgment, 1986 I.C.J. Reports* 14, at pp. 107-108, para. 205 (**Authority RLA-72**).

539 The Respondent's Counter-Memorial, para. 248.

540 The Respondent's Counter-Memorial, para. 248.

541 The Respondent's Counter-Memorial, para. 250.

542 The Claimants' Reply, para. 160.

543 The Claimants' Reply, para. 161.

544 The Claimants' Reply, para. 161.

general and consented to the Claimants' investment in Tumurtei Khuder in particular, its complaint against unwelcome Chinese participation in its mining sector is . . . unconvincing."[545]

301. The Claimants also reject the Respondent's allegation that they unlawfully interfered in Mongolia's internal affairs. The Claimants consider Mongolia's equation of its alleged self-sufficiency policy with the issues raised in the *Nicaragua* decision to be unavailing. According to the Claimants, the principle at issue in *Nicaragua* was limited to intervention by States, not State-backed economic interests. Moreover, the Claimants submit, "this principle was developed in the context of state intervention by force and cannot extend to the present case, in which Mongolia alleges interference in its affairs by way of alleged fraud by corporate entities. Indeed, the main element of the principle of non-intervention, that of coercion, is wholly lacking in the present case."[546]

C. THE MERITS OF THE CLAIMANTS' CLAIM OF UNLAWFUL EXPROPRIATION

302. Article 4 of the Treaty provides in relevant part:

> 1. Investments made by investors of one Contracting State shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting State, except for the need of social and public interests. The expropriation shall be carried out on a non-discriminatory basis in accordance with legal procedures and against compensation.
>
> 2. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.
>
> [. . .]

1. The Legal Standard under Article 4 of the Treaty

The Claimants' Position

303. According to the Claimants, Article 4(1) of the Treaty provides for protection against both direct and indirect expropriation. In the Claimants' words:

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545 The Claimants' Reply, para. 161.

546 The Claimants' Reply, para. 163.

> Article 4(1) of the Treaty endorses the well-accepted principle of customary international law that expropriation may occur either directly or indirectly. The former will occur through "an outright taking of property" or measures that affect the legal title to an investor's property, while the latter will manifest itself through acts depriving an investor of the use and enjoyment of its investment without affecting the formal title to the investment: such acts have "effect equivalent to nationalisation or expropriation."[547]

304. With respect to indirect expropriation, the Claimants submit that "[t]he accepted measure for determining whether the conduct of a state constitutes an expropriation is the extent of economic impact on the investment." The Claimants rely in this respect on –

(a) the reasoning in *Metalclad v. The United Mexican States* that "expropriation . . . includes . . . covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property";[548]

(b) the reasoning in *Tecmed v. The United Mexican States*, requiring the tribunal to determine whether an investor was "radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto—such as the incomes or benefits related to the [investment]—had ceased to exist";[549] and

(c) the reasoning in *RosInvest v. The Russian Federation* that "[a] measure constitutes an expropriation if it has the effect of a substantial deprivation of property forming all or a material part of the investment, and if the measure is attributable to Respondent" and that –

> the term "measures having effect equivalent to nationalisation or expropriation" covers indirect expropriation, but without dispensing with the requirement of a substantial or total deprivation of (i) the economic value of an investment . . . , (ii) fundamental ownership rights, or (iii) deprivation of legitimate investment-backed expectations. . . . the Tribunal should evaluate whether the "net effect" of the measure (or set of measures) is the same as an outright expropriation, *i.e.*, a substantial or total deprivation of the economic value of an asset.[550]

305. The Claimants further submit, relying on the same authorities, that "tribunals have also found it relevant that host state measures violated the legitimate expectations of the investor."[551]

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547 The Claimants' Memorial, para. 92.

548 *Metalclad Corporation v. The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award of 30 August 2000, para. 103 (**Authority CLA-55**).

549 *Técnicas Medioambientales Tecmed, SA v. The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award of 29 May 2003, para. 115 (**Authority CLA-28**).

550 *RosInvestCo UK Ltd v. The Russian Federation*, SCC Case No ARB V 079/2005, Final Award of 12 September 2010, paras. 623-624 (**Authority CLA-42**).

551 The Claimants' Memorial, para. 99.

306. The Claimants deny, however, that Article 4(2) of the Treaty (concerning compensation) is relevant, much less central, to the present dispute.[552] According to the Claimants, Article 4(2) "does not apply to *unlawful* expropriations, where reparation is governed exclusively by customary international law." [553]

307. The Claimants consider the Respondent's focus on Article 4(2) to be misplaced and, in any event, premature. Nevertheless, the Claimants argue that "[t]he Respondent's argument that an expropriation must be 'proclaimed' in accordance with the municipal law of the host state in order for Article 4(2) to be applicable is necessarily wrong," as this would effectively shield unlawful conduct from review.[554]

The Respondent's Position

308. In light of the jurisdictional restrictions in the Treaty, the Respondent considers the relevant provision to be Article 4(2), concerning compensation.[555] According to the Respondent, however, the "ordinary meaning of Article 4(2) requires that an expropriation have been 'proclaimed' for compensation to be due."[556]

309. Turning to the interpretation of Article 4(1), the Respondent submits that –

> Article 4(1), according to its plain meaning, has several elements that must be met for there to be liability. There must be an investment. The investment must have been made by investors of one Contracting State. There must have been a measure. This measure must have had an effect equivalent to nationalization or expropriation.
>
> Alternatively, there must have been a measure equivalent to nationalization or expropriation. This measure must not have been for the need of social or public interest, carried out on a non-discriminatory basis, in accordance with legal procedures and against compensation.[557]

310. The Respondent also submits that "findings that an investment was not invested in accordance with law cannot be expropriations for purposes of Article 4(1)."[558] In the Respondent's view, "[t]he determination whether something is an asset invested in accordance with law is a threshold requirement for the protections of the BIT to apply. To the extent that a determination has been

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552 The Claimants' Reply, para. 172.

553 The Claimants' Reply, para. 172 (*emphasis in original*).

554 The Claimants' Reply, para. 175.

555 The Respondent's Counter-Memorial, paras. 251-257.

556 The Respondent's Counter-Memorial, para. 252.

557 The Respondent's Counter-Memorial, paras. 259-260.

558 The Respondent's Counter-Memorial, para. 256.

made that an asset was not invested in accordance with law, that asset could not be expropriated because it is not an investment."[559]

2. The Application of Article 4(1) of the Treaty

The Claimants' Position

311. The Claimants submit that the Respondent has expropriated their investment in Mongolia in two ways:

(a) first, as a direct expropriation of their indirect interest in the "939A Licence which had been granted to BLT and then transferred to Tumurtei Khuder, and which qualifies both as 'an interest in the property of' Tumurtei Khuder under Article 1(b) of the Treaty and as a 'concession to . . . exploit natural resources' under Article 1(e) of the Treaty"; and

(b) second, as an indirect expropriation through devaluation of the Claimants' direct "shareholdings in Tumurtei Khuder, which qualify as an investment under Article 1(b) of the Treaty."[560]

312. The Claimants argue that expropriation may take different forms, including:

(a) "the formal taking of property rights (including intangible property rights)";

(b) "the deprivation, in whole or in substantial part, of the use or value of the investment"; or

(c) "the compulsory cessation of investment activities".[561]

313. The Claimants characterise the revocation of the 939A Licence as a direct, formal taking of property rights. Relying on *Kardassopoulos and Fuchs v. Georgia*,[562] the Claimants assert "Mongolia's taking of Tumurtei Khuder's licence resulted in an expropriation of the Claimants' investment by virtue of their interest in Tumurtei Khuder."[563]

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[559] The Respondent's Counter-Memorial, para. 256.

[560] The Claimants' Memorial, para. 252; *see also* The Claimants' Reply, para. 166.

[561] The Claimants' Memorial, para. 254.

[562] The Claimants' Memorial, para. 259; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case Nos ARB/05/18 and ARB/07/15) Award, 3 March 2010 (*Kardassopoulos and Fuchs v. Georgia*) (**Authority CLA-34**).

[563] The Claimants' Memorial, para. 259.

314. The Claimants also regard the revocation of the 939A Licence as an indirect expropriation in multiple ways:

> The 939A Licence . . . gave it [Tumurtei Khuder] the right to exploit the Tumurtei mine and sell its production, whether inside or outside Mongolia. This was the sole purpose of Tumurtei Khuder and indeed its sole activity, and the *conditio sine qua non* of the Claimants' investment. Without the 939A Licence, Tumurtei Khuder's shares, and thus the Claimants' investments, are now effectively valueless. Moreover, the revocation of the 939A Licence obviously prevents Tumurtei Khuder from fulfilling its corporate purpose, and leads to the definitive cessation of the Claimants' investment activities. The result of either is an indirect expropriation of those shares.[564]

315. The Claimants assert that the Respondent's revocation of the 939A Licence frustrated the Claimants' legitimate expectations for their investment,[565] namely that "Tumurtei Khuder (and BLT before it) held a valid licence to exploit the Tumurtei mine and market its production both domestically and abroad."[566] The Claimants submit that they invested in Mongolia in reliance upon those legitimate expectations and that these were confirmed by repeated assurances from the Government to BLT and Tumurtei Khuder, including the following:

- granting the original T-30 Licence to BLT under the 1994 Minerals Law and then confirming that right by re-registering it under the 1997 Minerals Law as the 939A Licence;
- approving the transfer of the 939A Licence from BLT to Tumurtei Khuder;
- issuing numerous approvals of land-use rights that affirmed first BLT's and then Tumurtei Khuder's rights under the 939A Licence;
- the signing by local governments of co-operation agreements with Tumurtei Khuder to improve local infrastructure and employ local workers;
- assisting the Claimants in securing financing from the Export-Import Bank of China through its statements of support for their investment;
- expressing support through the Ministry of Industry and Trade for FIFTA to approve Tumurtei Khuder as a foreign investment enterprise, which it did five days later;
- approving the Feasibility Study, EIAs, EPP and 2005-2006 Work Plan prepared over the life of the 939A Licence, which all clearly explained how BLT, and then Tumurtei Khuder, were planning to process and sell the iron ore;
- requiring Tumurtei Khuder to sign a repayment agreement to reimburse state funds expended on exploration operations in accordance with the 1997 Implementation Law; and
- lifting suspensions imposed on Tumurtei Khuder on the basis of alleged violations of the 1997 Minerals Law, the EIA Law, the Environmental Protection Law and the Law on Control of Explosives, once Tumurtei Khuder had taken remedial actions.[567]

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[564] The Claimants' Memorial, para. 258.

[565] The Claimants' Memorial, para. 261.

[566] The Claimants' Memorial, para. 260.

[567] The Claimants' Memorial, para. 260.

The Claimants consider that these alleged assurances gave rise to legitimate expectations on their part that were frustrated when the license was revoked.[568]

316. The Claimants deny that Mongolia's actions can be justified as legitimate regulatory activity. As a matter of law, the Claimants assert that "the so-called 'police power exception' is not absolute."[569] Rather, a measure can only fall within the exception if "it is non-discriminatory, *bona fide* and undertaken in the public interest."[570] On the basis of *ADC v. Hungary*,[571] the Claimants assert that the burden of demonstrating a public interest lies with the Respondent[572] and that the Respondent had failed to discharge its burden.[573]

317. In any event, the Claimants consider the revocation of the 939A Licence had no *bona fide* social and public purpose.[574] The Claimants submit that the revocation "was not based upon a finding of embezzlement,"[575] and point to the divergence between the stated grounds of revocation and the Respondent's present allegations of corruption. The Claimants note that both the notice of revocation and the court decision upholding it cited only breaches of: (a) Resolution No. 160, (b) Article 7 of the Implementation Law, (c) Article 30.1 of the 1997 Minerals Law, (d) Article 15.10(4) of the Licensing Law[576] and Article 11 on the Law of the Control of Explosives, and (e) the Law of Mongolia on Environmental Impact Assessments.[577] According to the Claimants, "not only have corruption charges never been brought in the context of the Tumurtei deposit, but such an allegation was never even made before the Respondent's Counter-Memorial."[578] The Claimants concede that Mr. Natsagdorj and Mr. Bayartsogt were investigated for embezzlement but contend that charges were withdrawn against them "after five years of investigations."[579]

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568 The Claimants' Memorial, para. 261.

569 The Claimants' Reply, para. 183.

570 The Claimants' Reply, para. 183.

571 *ADC Affiliate Ltd and ADC & ADMC Management Ltd v. Hungary* (ICSID Case No ARB/03/16) Award, 2 October 2006 (**Authority CLA-96**).

572 The Claimants' Memorial, para. 273.

573 The Claimants' Memorial, para. 277; *see also* Hearing Transcript (Day 1, 14 September 2015) 112:14 to 113:11.

574 The Claimants' Reply, para. 184.

575 The Claimants' Reply, para. 179.

576 Law of Mongolia on Licensing (1 February 2001; in force on 1 January 2002) (**Authority CLA-69**).

577 The Claimants' Reply, para. 43.

578 The Claimants' Reply, para. 180.

579 The Claimants' Reply, para. 179.

318. The Claimants also deny that Mongolian municipal court decisions are the proper focus of the Tribunal's attention. First, the Claimants note that they "do not base their expropriation claim on Tumurtei Khuder's failed legal challenge."[580] Rather, "Resolution 902 amounts to an unlawful expropriation in breach of Article 4(1) of the Treaty, entitling the Claimants to international-law remedies. The fact that Tumurtei Khuder sought domestic legal remedies in response to the revocation does not change the nature of the Claimants' claim."[581] The Claimants further clarify that they are not bringing a denial of justice claim; rather they argue that the decision of the court was wrong in substance and that the Tribunal should consider points of Mongolian law directly.[582]

319. In the Claimants' view, the question before the Tribunal is "purely a matter of international law."[583] While the Tribunal may look to Mongolian Law, including to determine whether the expropriation was "in compliance with legal procedures," this "does not mean that it is bound by the decisions of the Mongolian courts or that it has to defer to their judgment.[584] In the Claimants' view, "the revocation was not justified even as a matter of domestic law" (see paragraphs 328-372 below).[585] Nevertheless, the Claimants argue, "even if the revocation were capable of being justified under Mongolian law, this is not a defence to a claim of expropriation under the Treaty."[586]

320. Finally, the Claimants submit that the revocation of the 939A License was an unlawful expropriation. The Claimants recall that "[t]he Treaty prohibits any form of expropriation that is not (i) 'in accordance with legal procedures', (ii) in 'the need of social and public interests', and (iii) 'against compensation'."[587] According to the Claimants, Mongolia has failed to meet each of these elements:

(a) First, the Claimants argue that "Mongolia failed to follow its own legal procedures," insofar as it did not provide notice and as the alleged violations, even if true, warranted a fine,

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580 The Claimants' Reply, para. 187.

581 The Claimants' Reply, para. 187.

582 Hearing Transcript (Day 1, 14 September 2015) 88:2 to 96:12.

583 The Claimants' Reply, para. 190.

584 The Claimants' Reply, para. 191.

585 The Claimants' Reply, para. 198; *see also* Hearing Transcript (Day 1, 14 September 2015) 85:15 to 86:11; Hearing Transcript (Day 5, 18 September 2015) 770:13 to 770:25, referring to cross-examination of Ms. Darijav, Hearing Transcript (Day 4, 16 September 2015) 640 to 656.

586 The Claimants' Reply, para. 198.

587 The Claimants' Memorial, para. 270.

rather than the revocation of the license.[588] The Claimants submit that the relevant procedural rules are set out in article 56 of 2006 Minerals law and deny that article 14.1.4 of the Licensing Law applies. The Claimants further argue that even if it does apply, the required procedure of giving notice for each breach was not followed.[589]

(b) Second, the Claimants submit that Mongolia "bears the burden of demonstrating that its measures comply with the public-interest requirement of the Treaty."[590] However, "[t]he mere fact that the expropriatory measure affected a right over Mongolia's natural resources is not enough in and of itself,"[591] and "the facts show that giving a licence over the Tumurtei mine to DMP, a state-owned company, was the primary reason why Mongolia revoked the 939A Licence."[592]

(c) Third, the Claimants note that "Mongolia has not compensated the Claimants for the expropriation of their investments."[593]

The Respondent's Position

321. The Respondent submits that there was no expropriation and no grounds for the application of Article 4 of the Treaty, even if the Tribunal were to have jurisdiction to do so.

322. According to the Respondent, a State may deprive an investor of property in the valid exercise of its police powers, in which case no expropriation will have occurred. The Respondent recalls the discussion of police powers in *Chemtura Corporation v. Canada*,[594] *Saluka v. Czech Republic*,[595] *Methanex v. U.S.*,[596] and *Tecmed v. Mexico*,[597] and argues that measures to combat embezzlement

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588 The Claimants' Memorial, para. 271; *see also* Hearing Transcript (Day 1, 14 September 2015) 86:12 to 88:2; Hearing Transcript (Day 5, 18 September 2015) 765:2 to 765:1

589 Hearing Transcript (Day 5, 18 September 2015) 765:2 to 767:1, 769:4 to 770:12, referring to cross-examination of Ms. Darijav, Hearing Transcript (Day 3, 16 September 2015), 591:11 to 591:19, 589:21 to 590:20.

590 The Claimants' Memorial, para. 273.

591 The Claimants' Memorial, para. 274.

592 The Claimants' Memorial, para. 275

593 The Claimants' Memorial, para. 278.

594 *Chemtura Corporation v. Canada*, UNCITRAL, Award of 2 August 2010, para. 266 (**Authority RLA-73**).

595 *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para. 262 (**Authority RLA-74**).

596 *Methanex Corporation v. United States of America*, UNCITRAL, Award of 3 August 2005, para. 410 (**Authority RLA-75**).

597 *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 119 (**Authority RLA-76**).

are a direct exercise of police powers "as they are entirely premised upon public safety, security, morals and general welfare as is generally recognized around the world in international anti-corruption treaties."[598]

323. According to the Respondent, the revocation of the 939A Licence "was premised on a finding of theft, embezzlement and fraud by Natsegdorj, Bayartsog[t] and Tuya, who Claimants now admit to have bankrolled."[599] Moreover, the Respondent argues, the "Claimants' egregious and repeated illegal conduct served as the basis for the revocation of the 939A License":[600]

> [T]ime and again [Tumurtei Khuder] violated Mongolian law. It conducted unauthorized explosions, illegally shipped unprocessed ore to China at far below market prices, refused to build the iron-reduction plant as promised, and repeatedly breached its environmental impact assessment, to name a few violations.[601]

324. Against this background, the Respondent argues, the revocation of the 939A Licence responded to "the need of social and public interests" in Mongolia. In particular, the Respondent considers that the "Claimants' fraudulent misrepresentations caused harm to Mongolia in the form of loss of development of the mine and promised royalty and other tax revenues"[602] and that "Tumurtei Khuder's egregious and repeated violations reflect a systemic disregard for the Mongolian regulatory system at the expense of Mongolian public interest."[603] Accordingly, for the Respondent, "Mongolia's actions . . . fell entirely within the legitimate exercise of Mongolia's police powers."[604]

325. The Respondent also submits that, having "challenged the revocation of the 939A license unsuccessfully in Mongolian courts . . . the Mongolian court decisions must be a qualifying 'measure' for purposes of the expropriation provision" for the Claimants to succeed.[605] "The question of whether the revocation of the 939A Licenses was legitimate," the Respondent argues, "is a question of Mongolian law."[606] The Respondent observes that the Claimants have repeatedly contested the revocation of the license before the Mongolian courts and have repeatedly lost.[607]

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598 The Respondent's Counter-Memorial, para. 262.

599 The Respondent's Counter-Memorial, para. 263.

600 The Respondent's Rejoinder, para. 334.

601 The Respondent's Rejoinder, para. 328.

602 The Respondent's Counter-Memorial, para. 293.

603 The Respondent's Rejoinder, para. 329.

604 The Respondent's Counter-Memorial, para. 263; *see also* Hearing Transcript (Day 1, 14 September 2015) 213:2 to 220:12.

605 The Respondent's Counter-Memorial, para. 264.

606 The Respondent's Rejoinder, para. 342.

607 The Respondent's Rejoinder, paras. 346-348.

Against this background, the Respondent considers that, "[a]n international tribunal such as this one . . . does not sit as an appeal body of local law determinations, let alone of factual determinations made by the local courts,"[608] and "[t]he principal manner in which a court may violate an international obligation would be through a denial of justice."[609] However, "because Claimants do not allege any procedural failure by the Mongolian courts, and certainly none that would constitute an international legal wrong," the Respondent argues, "the court decisions cannot constitute an international legal wrong."[610] Outside the context of denial of justice, the Respondent considers that an extended line of jurisprudence—including the decisions in *S.D. Myers v. Canada*,[611] *Mondev v. United States*,[612] *Waste Management v. United Mexican States II*,[613] *Nykomb v. Latvia*,[614] and *Helnan Hotels v. Egypt*[615]—indicates that "the Tribunal should extend deference to the adjudications of the Mongolian courts regarding the revocation of the 939A License."[616]

326. Finally, the Respondent submits that no expropriation occurred because Mongolia did not deprive the Claimants of their investment vehicle permanently or in its entirety.[617] Relying on *Grand River v. United States of America*,[618] the Respondent argues that Article 4(1) "does not apply to measures having the effect of partial taking."[619] The Respondent considers that the ordinary

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[608] The Respondent's Counter-Memorial, para. 269.

[609] The Respondent's Counter-Memorial, para. 267.

[610] The Respondent's Counter-Memorial, para. 264.

[611] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award of 13 November 2000, para. 263 (**Authority RLA-78**).

[612] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, para. 126 (**Authority RLA-81**).

[613] *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, para. 130 n.84 (**Authority RLA-178**).

[614] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC Case No. 118/2001, Award of 16 December 2003, para. 55 (**Authority RLA-179**).

[615] *Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award of 3 July 2008, para. 106 (**Authority RLA-180**).

[616] The Respondent's Rejoinder, para. 349; *see also*, Hearing Transcript (Day 1, 14 September 2015) 220:13 to 221:10.

[617] The Respondent's Counter-Memorial, para. 279.

[618] *Grand River Enterprises Six Nations Ltd et al. v. United States of America,* ICSID Case No. ARB/10/5, Award of 12 January 2011, para. 147 (**Authority RLA-86**).

[619] The Respondent's Counter-Memorial, para. 281.

meaning of Article 4(1) supports that interpretation: the provision refers to "investments," not "an investment or some portion thereof."[620]

327. The Respondent argues that the facts of the revocation do not equate to permanent and complete deprivation of the Claimants' property. The Respondent points out that the "Claimants have not alleged to have been deprived of their shareholdings in Tumurtei Khuder."[621] The Respondent also submits that "[t]he bulk of the purported investments made by Claimants, namely Tumurtei Khuder's equipment, has not been taken at all. Rather, Claimants continue to use the very equipment they claim to have lost in this arbitration at other, neighbouring deposits. There is thus no relevant deprivation of an investment of a sufficient level to constitute an expropriation."[622]

3. The Lawfulness of the Revocation of the 939A License in Mongolian Law

328. The Parties' arguments on the application of Article 4 of the Treaty highlight their divergent views on the legality of revoking the 939A license as a matter of Mongolian law. The Parties also differ on the relevance of this consideration. In general terms, the Claimants consider that compliance with Mongolian law is not determinative of whether the requirements of the Treaty have been met, but are also convinced that the Government's actions were in violation of Mongolian law. In contrast, the Respondent considers the repeated occasions on which its actions were upheld by the Mongolian courts to be dispositive of Mongolian law, and also asserts that a violation of Mongolian law is a necessary predicate to any possible violation of the Treaty. In the absence of a violation of Mongolian law, the Respondent considers that the revocation was justified as an appropriate regulatory action.

329. The Parties' respective views on the various municipal law grounds advanced for the revocation of the 939A License are set out as follows.

(a) *Prior ownership of rights to the Tumurtei deposit pursuant to Resolution No. 160*

The Claimants' Position

330. According to the Claimants, "Resolution 160 did not grant mining rights over the Tumurtei deposit."[623] On the basis of the text of the Resolution, the Claimants submit, "one can see from

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[620] The Respondent's Counter-Memorial, para. 281, *quoting Grand River Enterprises Six Nations Ltd et al. v. United States of America,* ICSID Case No. ARB/10/5, Award of 12 January 2011, para. 147 (**Authority RLA-86**).

[621] The Respondent's Counter-Memorial, para. 280.

[622] The Respondent's Counter-Memorial, para. 282.

[623] The Claimants' Memorial, para. 193.

the wording of the third paragraph that, although Resolution 160 provided for the *establishment* of an open-cast mine at the Tumurtei site, it did not purport to *grant* any mining rights over the deposit."[624] The Resolution is rather a statement of intent. The Claimants also add that, in any case, DMP did not exist at that time.[625]

331. Moreover, in the Claimants' view:

> even if Resolution 160 had purported to grant mining rights over the Tumurtei deposit, there was no legal basis under Mongolian law for the resolution to have that effect: the 1988 Subsoil Law, which governed the granting of mining licences when Resolution 160 was passed, did not give the Council of Ministers the power to issue mining licences for iron-ore deposits. Rather, Article 14 of the 1988 Subsoil Law provided for a special authority in charge of mining and mineral resources to have exclusive competence to issue a mining licence over non-commonly distributed minerals such as iron ore.[626]

The Claimants conclude that "Resolution 160, . . . issued by the Council of Ministers, cannot have granted mining rights under Mongolian law as it then stood."[627]

332. In any event, the Claimants note that Darkhan did not re-register any rights that it may have had, as required by the 1997 Implementation Law,[628] and prior to its actions in 2006, "the Mongolian government repeatedly and voluntarily affirmed that Tumurtei Khuder (and BLT before it) was the rightful and lawful holder of the 939A Licence," pointing out that DMP was incorporated only on the day after Resolution 160.[629]

The Respondent's Position

333. According to the Respondent, BLT and Tumurtei Khuder acquired the 939A Licence in violation of Resolution No. 160 of 14 April 1990.

334. According to the Respondent, the Council of Ministers had authority to grant rights to the deposit by way of Resolution No. 160, characterising that body as the "highest executive and administrative agency of state administration" in Mongolia, authorised "to direct the work of the ministries, including adopting measures specifically addressing state and personal property

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624 The Claimants' Memorial, para. 194 (*emphasis in original*).

625 Hearing Transcript (Day 1, 14 September 2015) 100:10 to 100:13; Hearing Transcript (Day 5, 18 September 2015), 776:11 to 777:2,

626 The Claimants' Memorial, para. 195.

627 The Claimants' Memorial, para. 195; *see also* Hearing Transcript (Day 1, 14 September 2015) 99:21 to 100:9; Hearing Transcript (Day 5, 18 September 2015), 774:17 to 775:9, referring to cross-examination of Mr. Khurts, Hearing Transcript (Day 3, 16 September 2015) 518:7 to 518:12.

628 The Claimants' Memorial, para. 196.

629 The Claimants' Memorial, para. 205; *see also* Hearing Transcript (Day 1, 14 September 2015) 101:1 to 101:22.

rights."[630] The Respondent refers to the testimony of Mr. Khurts and clarifies that in the early 1990s Mongolia underwent a transition from planned to market economy, with the result that, after 1994, the Subsoil Law functioned together with new Minerals Law.[631] The Respondent further clarified that the procedure set in article 14 of the Subsoil Law refers only to obtaining rights for "mining tenure areas" and not mining rights.[632] The Respondent submits that prior to mid-1990s it was a common practice in Mongolia to grant mining rights through resolutions of the Council of Ministers in the absence of an authority responsible for issuing licences.[633]

335. The Respondent notes that Darkhan was established immediately after the passage of Resolution No. 160 and submits that this is evidence of the link between the Ferrous Metallurgy plant referenced in the resolution and Darkhan.[634] The Respondent also refers to the testimony of Mr. Shagdar and Mr. Ganjuurjav (the directors of Darkhan at the time), contemporaneous correspondence, and the findings of the Mongolian courts, and submits that "there was no confusion following Resolution 160 as to who owned and controlled the Tumurtei deposit."[635]

336. The Respondent concludes that, "[i]n the absence of any decree or other legal basis by which Claimants' [*sic*] can demonstrate that Darkhan's legal interest in the Tumurtei deposit was stripped away, there can only be one conclusion: Darkhan's interest was not taken away."[636] Rather, as Darkhan set out in its letter to the State Prosecutor's Office:

> Natsagdorj T. had intentionally failed to file an application for the reregistration of the mining license through abuse of his authority and position for the purpose of satisfying his private interests, and as a result the license of our Plant was made invalid and thus he took over Tumurtei Iron Ore Deposit with the help of his sister Tuya L. and his close friend Ganbat.[637]

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[630] The Respondent's Rejoinder, para. 395; *see also* Constitution (Fundamental Law) of the Mongolian People's Republic, Arts. 33, 37 (**Authority RLA-117**); Hearing Transcript (Day 5, 18 September 2015) 844:15 to 854:21.

[631] Hearing Transcript (Day 5, 18 September 2015) 845:12 to 848:16, referring to Mr. Khurts cross-examination, Hearing Transcript (Day 3, 16 September 2015) 521:24 to 522:15.

[632] Hearing Transcript (Day 5, 18 September 2015) 849:18 to 854:21, referring to Mr. Khurts cross-examination, Hearing Transcript (Day 3, 16 September 2015) 522:16 to 523:11.

[633] Hearing Transcript (Day 5, 18 September 2015) 849:18 to 850:10, referring to Mr. Khurts examination, Hearing Transcript (Day 3, 16 September 2015) 536:8 to 537:18; Hearing Transcript (Day 5, 18 September 2015) 848:17 to 849:17, referring to Ms. Darijav examination, Hearing Transcript (Day 3, 16 September 2015) 670:16 to 670:25.

[634] The Respondent's Rejoinder, para. 379.

[635] The Respondent's Rejoinder, para. 383.

[636] The Respondent's Rejoinder, para. 388.

[637] Letter from DMP to the State General Prosecutor's Office, 2 June 2006 (**Exhibit C-99**); The Respondent's Rejoinder, para. 389.

The Respondent emphasises the standard on which the license was revoked was one of civil liability,[638] and argues that the "Claimants misleadingly seek to project the Mongolian standard for criminal conduct upon the Tribunal."[639]

337. The Respondent further argues that BLT's conduct is relevant to the Claimants' claims because: (a) "the 939A Licence was revoked, *inter alia*, because it was illegally obtained"[640] and under Mongolian law, would be considered stolen, even when validly sold; and (b) "[t]here is a clear and strong relationship"[641] between the Claimants and BLT because, *inter alia*, BLT is a joint-venture partner of Tumurtei Khuder and Mr. Bayartsogt is one of two shareholders in BLT and a manager of Tumurtei Khuder.[642]

(b) ***Failure to repay the Government for exploration costs***

338. Article 7 of the 1997 Implementation Law provides:

> In cases where a mineral deposit was discovered, and reserves determined, by exploration activities paid for from the State budget, the holder of the mining licenses with respect to such deposit shall pay back to the State the exploration costs previously incurred by the State, on a straight line basis, over the five (5) year period commencing as of the effective date of the Minerals Law.

The Claimants' Position

339. The Claimants acknowledge that "Article 7 of the 1997 Implementation Law required that certain licence-holders reimburse the government for the costs of exploration works previously conducted with state funds on the sites subject to the licence in question."[643]

340. However, the Claimants note that Tumurtei Khuder entered into a repayment agreement on 5 June 2006 and argue that "it was standard practice in Mongolia for licence holders to repay under Resolution 234 only once they had received notification to enter into an agreement with the MRPAM, which would provide the draft agreement to be signed."[644] The Claimants also note that "the formula provided in Resolution 234 calculated exploration costs based on information that

[638] The Respondent's Rejoinder, para. 391.

[639] The Respondent's Rejoinder, para. 391.

[640] The Respondent's Rejoinder, para. 393.

[641] The Respondent's Rejoinder, para. 394.

[642] The Respondent's Rejoinder, para. 394.

[643] The Claimants' Memorial, para. 206.

[644] The Claimants' Memorial, para. 208; *see also* Hearing Transcript (Day 1, 14 September 2015) 103:14 to 103:24.

only the state had," such that "it would therefore have been impossible for Tumurtei Khuder to calculate its own repayment obligations."[645]

341. In any event, the Claimants submit that "[e]ven if Tumurtei Khuder were in breach of its repayment obligations under Article 7 of the 1997 Implementation Law, revocation of its licence would not have constituted a proper penalty."[646] Neither the 1997 Minerals Law, nor the 1997 Implementation Law, provides for such a penalty, and the 2006 Minerals Law sets out only a schedule of fines for late payments.[647]

The Respondent's Position

342. The Respondent submits that Tumurtei Khuder failed to remit timely payment for the exploration of the Tumurtei deposit undertaken by Mongolia between 1990 and 1994. According to the Respondent, this breached Article 7 of the 1997 Implementation Law[648] so egregiously as to merit revocation of 939A Licence under Article 14.1.4 of the Licensing Law.[649]

343. The Respondent maintains that the Claimants were obliged to remit payment by 1 July 2002, but only began to pay from June 2006.[650] The Respondent does not consider that the belated repayment agreement expunged the Claimants' payment obligations because the "Claimants did not seek to enter into any such agreement . . . before the deadline" and "made no effort" to request any necessary information from the Mongolian authorities before 1 July 2002.[651] The Respondent also notes that the repayment agreement did not include any "waiver that Mongolia will forego remedial measures pursuant to the Minerals Law and Licensing Law"[652] and that Tumurtei Khuder was unquestionably aware of the requirement as the Government had written previously to BLT concerning the Khust Uul deposit.

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645 The Claimants' Memorial, para. 208.

646 The Claimants' Memorial, para. 209.

647 The Claimants' Memorial, paras. 209-211; *see also* Hearing Transcript (Day 1, 14 September 2015) 103:25 to 104:9.

648 The Respondent's Rejoinder, para. 398.

649 The Respondent's Rejoinder, para. 397.

650 The Respondent's Rejoinder, paras. 396-397.

651 The Respondent's Rejoinder, para. 399.

652 The Respondent's Rejoinder, para. 400.

344. Ultimately, the Respondent argues, "that Tumurtei Khuder's failure to remit timely payment breached the Implementation Law was repeatedly affirmed by the Mongolian Courts,"[653] and "ignorance is not an excuse for its non-compliance with Mongolian law."[654]

(c) *Failure to implement the EIA and Environmental Protection Plan*

The Claimants' Position

345. The Claimants' submit that "in 2005 Tumurtei Khuder filed an EPP that provided a detailed plan, including an itemised monitoring programme, for minimising the environmental impact of its planned mining activities in accordance with the EIA it had prepared for the site."[655] In the Claimants' view, the Government cannot realistically have required Tumurtei Khuder to have completed the EPP more quickly, and in any event, the Government "approved without reservation the EPP."[656]

346. The Claimants also submit that "[e]ven if Tumurtei Khuder were late in filing its EPP, that would not have constituted a valid ground for revoking its licence."[657] The 1997 Minerals Law sets out a schedule of fines for violations of its environmental provisions, and provides "in the case of a continuous breach of environmental protection standards, the licence will be suspended for 60 days and the licence-holder given an opportunity to remedy the breach before the mine could be closed."[658] According to the Claimants, Tumurtei Khuder was never provided such notice.[659]

347. The Claimants also submit that there are no provisions in the Environmental Impact Assessment Law, or anywhere else, that prohibit export of iron ore to China.[660]

The Respondent's Position

348. The Respondent submits that "[i]n failing to implement the action steps in its environmental impact assessment and environmental protection plan, Claimants violated Article 30 of the 1997

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[653] The Respondent's Rejoinder, para. 398.

[654] The Respondent's Rejoinder, para. 401.

[655] The Claimants' Memorial, para. 217.

[656] The Claimants' Memorial, para. 219; *see also* Hearing Transcript (Day 1, 14 September 2015) 104:10 to 104:23.

[657] The Claimants' Memorial, para. 220; *see also* Hearing Transcript (Day 1, 14 September 2015) 105:16 to 106:8.

[658] The Claimants' Memorial, para. 221.

[659] The Claimants' Memorial, para. 222.

[660] Hearing Transcript (Day 5, 18 September 2015), 772:8 to 773:17.

Minerals Law."[661] As set out in a 30 August 2006 Letter from the Ministry of Trade and Industry on which the revocation was based, the violation was that Tumurtei Khuder "failed to *implement* and therefore violated Section 1, Article 30 of the Minerals Law," not the timing of the Environmental Protection Plan as suggested by the Claimants.[662]

349. According to the Respondent, "in its 2003 Environmental Impact Assessment, Tumurtei Khuder provided, in considerable detail, that it would beneficiate the ore extracted from the Tumurtei deposit."[663] Tumurtei Khuder also "guaranteed that it would take steps that no more than the 'permissible concentration' of dangerous pollutants would enter the environment, and that it would undertake restorative steps to improve the environment and control the impact of its pollution."[664]

350. In fact, the Respondent submits that "not only were no environmental restorative steps undertaken by Tumurtei Khuder, but . . . Tumurtei Khuder had failed to meet the terms of the 2003 EIA by exporting unbeneficiated iron ore to China without meaningful progress on the beneficiating plant."[665] As a result, according to the Respondent, "[t]he Licensing Law . . . expressly permits revocation of a license for continuous and/or material breach of that license's requirements—requirements that include obligations undertaken in the documents submitted in order to receive said license."[666]

(d) *Conducting explosives activities without required authorizations*

The Claimants' Position

351. According to the Claimants, Tumurtei Khuder had the necessary license to employ explosives. According to the Claimants:

(a) "On 26 January 2006, the Minister of Industry and Trade, the highest authority in Mongolia regarding the granting of blasting licences, issued an order allowing Tumurtei Khuder to carry out explosives activities for a period of three years."[667]

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661 The Respondent's Rejoinder, para. 404.

662 The Respondent's Rejoinder, para. 413 (*emphasis in original*).

663 The Respondent's Rejoinder, para. 405.

664 The Respondent's Rejoinder, para. 408.

665 The Respondent's Rejoinder, para. 409; *see also* Hearing Transcript (Day 5, 18 September 2015) 868:6 to 872:10, referring to Mr. Nergui examination (Day 2, 15 September 2015) 390:18 to 390:25

666 The Respondent's Rejoinder, para. 411.

667 The Claimants' Memorial, para. 225.

(b) "On 6 April 2006, some four months after Tumurtei Khuder's initial application, the SSIA finally issued a letter of permission (Certificate No 46) allowing Tumurtei Khuder to conduct explosives works until 31 December 2006."[668]

352. When this approval was questioned, however, "Tumurtei Khuder entered into a contract with BLAST LLC, which was authorised to perform explosives works, and which would perform them at the Tumurtei deposit."[669] Thereafter, the Claimants observe, "[t]he State Inspector responded on 21 August 2006 in a letter confirming that Tumurtei Khuder had remedied the alleged violations, thus invalidating the State Inspector's Act that suspended Tumurtei Khuder's explosives activities on 5 August 2006."[670]

353. In any event, the Claimants argue, "the appropriate penalty for violating Article 15.10(4) of the Licensing Law is the imposition of a fine, not revocation. Likewise, the appropriate penalty for violating Article 11 of the Law on Control of Explosives is a fine, not the revocation of the licence, whether the blasting licence or the mining licence."[671]

The Respondent's Position

354. The Respondent submits that "Tumurtei Khuder used explosives without a license, beginning in 2005 during which time it shipped extracted iron ore to China."[672]

355. The Respondent rejects the argument that Tumurtei Khuder did not begin mining activities until it received an explosives license in April 2006. Instead, the Respondent relies on the Selenge Aimag Audit Report of Tumurtei Khuder's activities and argues that "between January and March 2006, Tumurtei Khuder exported 1,750,000 tons of iron ore."[673] The Respondent also argues that "[i]n addition, Claimants were exporting, *without documentation*, significant amounts of iron ore to China in 2005."[674]

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668 The Claimants' Memorial, para. 226*; see also* Hearing Transcript (Day 1, 14 September 2015) 106:11 to 106:20.

669 The Claimants' Memorial, para. 227.

670 The Claimants' Memorial, para. 228; *see also* Hearing Transcript (Day 1, 14 September 2015) 106:21 to 107:5.

671 The Claimants' Memorial, para. 229*; see also* Hearing Transcript (Day 1, 14 September 2015) 107:5 to 107:9.

672 The Respondent's Rejoinder, para. 414.

673 The Respondent's Rejoinder, para. 416.

674 The Respondent's Rejoinder, para. 416 (*emphasis in original*).

356. Moreover, the Respondent submits that –

> Tumurtei Khuder *never* received a license "to do blasting activities" pursuant to Paragraph 15.10.4 of the Licensing Law. Rather, Tumurtei Khuder received an April 6, 2006 Certificate for Blasting Activity that permitted the use of explosives on the "Tumurtei iron deposit," but did not provide Tumurtei Khuder permission to use the explosives. . . .
>
> The certificate received by Tumurtei Khuder simply permits a licensed party to conduct explosives on that particular site.[675]

357. Further, the Respondent alleges that by failing to document its drilling and explosions in the Tumurtei area, Tumurtei Khuder violated Article 12.1 of the Law on Controlling Circulation of Explosive Materials.[676] And, on the basis of a Mongolian court decision, the Respondent alleges that Tumurtei Khuder LLC "broke twice into sealed storage containing explosives, which were sealed by of State inspector and used explosives, violating Article 2.1.5, 12.1.2, 14.1 14.2 and 14.4 of law on Controlling circulation of explosive materials."[677]

358. Acknowledging that Article 21 of the Explosives Law provides for pecuniary punishment, the Respondent argues that Article 14.1.4 of the Licensing Law also permits revocation of a licence "if the terms and requirements of the license have been breached several times or have been egregiously breached."[678]

(e) ***Illegally exporting ore below cost and without authorization***

The Claimants' Position

359. In the Claimants' view, "Mongolia's allegation lacks specificity and does not identify which provision of the 1998 EIA Law this alleged act supposedly violates."[679] The Claimants also consider it to be wrong on the facts, and submit as follows:

(a) "Tumurtei Khuder has always been open and transparent about its intention to export most of the iron ore it would extract at Tumurtei given the low domestic demand."[680]

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675 The Respondent's Rejoinder, paras. 421-422 (*emphasis in original*).

676 The Respondent's Rejoinder, para. 431.

677 The Respondent's Rejoinder, para. 428, *quoting BLT and Tumurtei Khuder v. DGMC*, Decision No. 196, Nov. 29, 2006 (**Exhibit R-64**).

678 The Respondent's Rejoinder, para. 434, *quoting* Licensing Law, Art. 14.1.4 (**Authority CLA-69**).

679 The Claimants' Memorial, para. 231.

680 The Claimants' Memorial, para. 232.

(b) According to Article 16(3) of the Minerals Law, exporting ore is lawful. The Claimants indicated their intention to export iron ore both in the feasibility study and in the working plan, both of which were approved by Mongolia.[681]

(c) "Mongolia's assertion that the iron ore Tumurtei Khuder exported to China was unprocessed is incorrect."[682] The iron ore from Tumurtei was processed by electro-magnetic separation, as anticipated in all relevant documents, and this fact was noted in the Selenge *aimag's* 2007 audit.[683]

(d) No documents advanced by the Respondent contain a promise to construct a reduced iron plant by a certain date or envisage such a plant as anything more than a possibility.[684]

360. The Claimants again submit that even if true, such a violation would not warrant the revocation of the 939A License. The 1998 Environmental Impact Assessment Law provides only for fines and, according to the Claimants' no conceivable violation was repeated or egregious within the meaning of the Licensing Law.[685]

The Respondent's Position

361. The Respondent submits that "Tumurtei Khuder violated the 1997 Minerals Law, *inter alia*, in its sale of ore to China at less than 40% of the IMF's international market price per metric ton."[686]

362. According to the Respondent, "Articles 38(1) and 38(2) of the 1997 Minerals Law provide that the sales value of exported products 'extracted from the mining claim . . . shall be the average monthly prices of the products, or similar products, based on regularly published international market prices or on recognized [principles of international trade].'"[687] The Respondent recalls that "the IMF's market price per metric ton in January 2006 was $77.35, whereas the Tumurtei Khuder's price per metric ton to China was only $30.50."[688] The Respondent also recalls that "Tumurtei Khuder's 2003 Environmental Impact Assessment provided in considerable detail, that

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681 Hearing Transcript (Day 1, 14 September 2015) 107:25 to 108:10.

682 The Claimants' Memorial, para. 233.

683 The Claimants' Memorial, para. 233.; 2007 Selenge aimag Report, p. 5 (**Exhibit C-91**); *see also* Hearing Transcript (Day 1, 14 September 2015) 108:11 to 109:14.

684 The Claimants' Memorial, para. 234.

685 The Claimants' Memorial, paras. 235-236; *see also* Hearing Transcript (Day 1, 14 September 2015) 109:15 to 109:19.

686 The Respondent's Rejoinder, para. 437.

687 The Respondent's Rejoinder, para. 439.

688 The Respondent's Rejoinder, para. 437.

it would beneficiate the ore extracted from the Tumurtei deposit," whereas in fact it exported significant quantities of unprocessed ore.[689]

363. Although export to the PRC may have been mentioned in Tumurtei Khuder's work plans and documents, the Respondent emphasizes that the "illegal conduct is not simply the shipment of ore to China, but its doing so in an undocumented fashion at a cost far below international market prices and without proper authorization."[690] As for the consequences of this, the Respondent submits that "the Tribunal should accept that revocation of a license pursuant to Mongolian law is informed by the Licensing Law" and that "Tumurtei Khuder's underpriced shipments of ore to China were a valid basis by which to revoke its license, and, by extension, valid under international law."[691]

(f) *Other grounds for revocation*

The Claimants' Position

364. The Claimants submit that it is "impermissible to introduce additional grounds in the Rejoinder some six years after the revocation." And in any case, according to the Claimants, the introduction of new grounds for the revocation of a license is not allowed under Mongolian law.[692]

365. The Claimants also clarify:

> [a]s to the first ground, as a matter of fact, BLT did not make any representation about its mining experience and as to the second, (a) BLT's licence was governed by the 1994 and then 1997 Minerals Law, not the Subsoil Law, and secondly, (b) as we have seen from the exhibit C-93, the government had itself rejected such an application on the part of DMP some years before.[693]

The Respondent's Position

366. The Respondent identifies two further legal bases for the revocation of the 939A Licence:

(a) misrepresentation of BLT's mining experience, in violation of the Licensing Law;[694] and

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689 The Respondent's Rejoinder, para. 441.

690 The Respondent's Rejoinder, para. 445.

691 The Respondent's Rejoinder, paras. 446-447.

692 Hearing Transcript (Day 1, 14 September 2015) 110:2 to 110:11.

693 Hearing Transcript (Day 1, 14 September 2015) 110:11 to 110:19.

694 The Respondent's Rejoinder, paras. 449-451.

(b) BLT's failure to make use of the subsoil licence within three years of it being granted, in breach of Article 21.2 of the Subsoil Law.[695]

367. In respect of the first, the Respondent recalls a letter from BLT to the Ministry of Agriculture and Industry in which BLT asserted that it had started to "build a team of experts for the [mining] development project."[696] In fact, the Respondent argues "BLT was a livestock company run by an officer worked [*sic*] and shopkeeper. The only staff with mining experience were seconded Darkhan employees. This inexperience was not without consequence; indeed, it explains why BLT waited nearly five years to begin development."[697] According to the Respondent, under the 2006 Minerals Law, "[f]raudulent misrepresentation, as a violation of Mongolian law, is thus a permissible basis by which to revoke the 939A License."[698]

368. As to the second, the Respondent points out that "BLT breached the Subsoil Law by waiting over five years to begin mining activities."[699] The Respondent recalls the Mongolian Courts holding that Article 21.2 of the Subsoil Law authorises revocation of a subsoil licence if it has not been used for three years since its allocation.[700] In the Respondent's view, revocation of the 939A Licence was justified because the "failure to develop the Tumurtei deposit in a timely fashion caused harm to the Mongolian economy."[701]

(g) *The Provision of Notice*

The Claimants' Position

369. The Claimants submit that Mongolia did not give due notice of the existence of Tumurtei Khuder's alleged breaches under the 2006 Minerals Law or Licensing Law. Instead, the Claimants argue, "the DGMC proceeded directly to revoke the 939A Licence through Resolution 902, without giving prior notice to Tumurtei Khuder, thereby depriving it of the opportunity to establish that the grounds of revocation were unfounded or to remedy the alleged breaches."[702] The Claimants submit that, even if report of the Working Group can be regarded as a valid notice,

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[695] The Respondent's Rejoinder, paras. 452-456.

[696] The Respondent's Rejoinder, para. 449, *quoting* Letter from BLT to Ministry of Agriculture and Industry (**Exhibit C-183**).

[697] The Respondent's Rejoinder, para. 450.

[698] The Respondent's Rejoinder, para. 450.

[699] The Respondent's Rejoinder, para. 452.

[700] The Respondent's Rejoinder, para. 455; *BLT and Tumurtei Khuder v. DGMC* (**Exhibit C-64**).

[701] The Respondent's Counter-Memorial, paras. 128-130; The Respondent's Rejoinder, para. 456.

[702] The Claimants' Memorial, para. 271.

it was given to the Government and not to the licence holder, as required by Article 56 of the 2006 Minerals Law.[703] And, as confirmed by Mr. Nergui, the Working group only considered grounds related to mining operations and did not examine the issue of alleged fraud or non-repayment of state budget.[704] The Claimants also note that both the report of the Working Group and the letter of 30 August rely on Article 47 of the 1997 Minerals Law. According to the Claimants, this legislation was no longer applicable, but in any case the procedure set out there is the same as in the 2006 Minerals Law. [705]

370. The Claimants further argue that the criminal investigation into Mr. Bayartsogt and Mr. Natsagdorj's conduct "cannot have been an effective communication of notice, given that the prosecution was unrelated to the revocation."[706]

The Respondent's Position

371. The Respondent considers that the Claimants were given more than sufficient notice of the grounds for revocation of the 939A Licence. According to the Respondent, the relevant notice took the form of:

(a) The 24 April 2006 letter from the Specialized Inspection Department of the Selenge *aimag* to Tumurtei Khuder, "informing it of the results of a Working Group investigation into Tumurtei Khuder's operations" and identifying "no less than nine violations by Tumurtei Khuder of Mongolian law, including three violations that later informed the revocation of the 939A License." The Respondent submits that the letter is addressed to Mr. Bayartsogt as the Director of Tumurtei Khuder;[707]

(b) The 15 June 2006 letter from the Mongolian State Specialized Inspection Agency to Tumurtei Khuder, identifying "*eleven* independent breaches of Mongolian law, several of which were again invoked as the basis for the revocation of the 939A License";[708]

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[703] Hearing Transcript (Day 5, 18 September 2015) 765:24 to 766:3.

[704] Hearing Transcript (Day 5, 18 September 2015) 766:23 to 767:12, referring to cross-examination of Mr. Nergui, Hearing Transcript (Day 2, 15 September 2015) 382:8 to 382:11, 388:18 to 389:22.

[705] Hearing Transcript (Day 5, 18 September 2015) 768:8 to 768:21, referring to cross-examination of Ms. Darijav, Hearing Transcript (Day 3, 16 September 2015) 576:1 to 576:8.

[706] The Claimants' Reply, para. 198 n.314.

[707] The Respondent's Rejoinder, para. 364; Letter from the Specialised Inspection Department of Selenge aimag to Tumurtei Khuder (**Exhibit C-107**); *see also* Hearing Transcript (Day 5, 18 September 2015) 872:20 to 873:2.

[708] The Respondent's Rejoinder, para. 368 (*emphasis in original*); Letter from the SSIA to Tumurtei Khuder (with English translation) (**Exhibit C-108**).

(c) The 5 August 2006 letter from the State Specialized Inspection Agency to Tumurtei Khuder, noting that "during [the Agency's] inspection of the Tumurtei Iron Ore Deposit, it discovered Tumurtei Khuder to be using 'explosives, detonators, and blasting items' without any 'special permission'";[709] and

(d) The 14 August 2006 report of the Government Working Group, which "found Tumurtei Khuder responsible for a number of serious violations" and "whose findings led to the suspension of Tumurtei Khuder's operations."[710]

372. Taken together, the Respondent argues that "Mongolia satisfied the requirements of Article 56(2) of the Minerals Law in informing Tumurtei Khuder not once but several times of the breadth and severity of its violations of Mongolian law, and further giving Tumurtei Khuder as many opportunities to attempt to disprove the results of the investigative findings."[711]

4. Preclusion and Estoppel

The Claimants' Position

373. The Claimants submit that the Respondent is estopped from "relying on alleged violations it repeatedly affirmed did not exist or, alternatively, had been cured."[712] In particular, the Claimants assert that "Mongolia's grants of licences and authorisations and its approvals of legally-required documents preclude it from claiming now that Tumurtei Khuder was in breach of any laws or regulations or that Resolution 160 gave DMP [Darkhan] an enforceable right that is now opposable to Tumurtei Khuder."[713]

374. The Claimants rely on "a well-established principle of customary international law"[714] that "a state may not benefit from its own inconsistent statements or conduct to the detriment of a party that relied in good faith on such statements or conduct . . . a state may be precluded from denying the truth of a statement of fact it previously made."[715] The Claimants endorse conditions for a

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[709] The Respondent's Rejoinder, para. 369; Letter from the SSIA to Tumurtei Khuder (with English translation) (**Exhibit C-116**).

[710] The Respondent's Rejoinder, para. 370.

[711] The Respondent's Rejoinder, para. 372.

[712] The Claimants' Memorial, para. 263.

[713] The Claimants' Memorial, para. 36; *see also* Hearing Transcript (Day 1, 14 September 2015) 100:16 to 101:22; Hearing Transcript (Day 5, 18 September 2015), 777:3 to 782:23,

[714] The Claimants' Memorial, para. 101.

[715] The Claimants' Memorial, para. 101.

valid claim of preclusion set out in Professor D.W. Bowett's well-known article on the subject, namely:

(a) "[t]he meaning of the statement must be clear and unambiguous";

(b) "the statement or representation must be voluntary, unconditional and authorized"; and

(c) "[r]eliance in good faith upon the representation of one party by the other party to his detriment (or to the advantage of the party making the representation)."[716]

375. The Claimants also rely on treatment of preclusion in the *Shufeldt Case* to support their view. In that case, the arbitrator found preclusion to be "in keeping with the principles of international law"[717] and held that:

> the Guatemala Government having recognized the validity of the contract for six years and received all the benefits to which they were entitled under the contract and allowed Shufeldt to go on spending money on the concession, is precluded from denying its validity; even if the approval of the Legislature had not been given to it.[718]

376. On this basis, the Claimants argue that the Respondent's attempt to revoke the 939A Licence on the basis that it had been illegally granted to BLT was "unavailing as a matter of customary international law."[719] The Claimants further assert that:

> On any view, by entering into the Repayment Agreement, Mongolia waived any argument that Tumurtei Khuder was in breach of its repayment obligations under the 1997 Implementation Law. Mongolia is moreover precluded from arguing the contrary as a matter of international law, under which an act of any state organ is considered an act of the state itself. The MRPAM's repayment agreement with Tumurtei Khuder bound the Mongolian state, including state organs such as the DGMC. It follows that, to the extent that Mongolia argues that another state organ such as the DGMC could revoke the 939A Licence for non-payment despite the Repayment Agreement's existence, it is precluded from doing so as a matter of international law.[720]

377. In reply to the objections raised by the Respondent, the Claimants argue that "Mongolia's suggestion that the Claimants cannot plead estoppel against Mongolia without an express provision in the Treaty . . . is plainly wrong."[721] In the Claimants view, "Estoppel has been

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716 The Claimants' Memorial, para. 102, *quoting* D.W. Bowett, 'Estoppel Before International Tribunals and its Relation to Acquiescence' (1957) 33 *British Yearbook of International Law* 176 at pp. 176-193 (**Authority CLA-63**).

717 The Claimants' Memorial, para. 103, *quoting Shufeldt Claim (USA v. Guatemala*), Decision of Arbitrator, 24 July 1930, 2 RIAA 1083 at p. 1904 (**Authority CLA-64**).

718 *Shufeldt Claim (USA v. Guatemala*), Decision of Arbitrator, 24 July 1930, 2 RIAA 1083 at p. 1904 (**Authority CLA-64**).

719 The Claimants' Memorial, para. 179; *see also* The Claimants' Memorial, para. 190.

720 The Claimants' Memorial, para. 214.

721 The Claimants' Reply, para. 206.

recognised as a general principle of law applicable in the investment-law context" and need not be specifically set out in the Treaty.[722] Moreover, "Mongolia provides no explanation, let alone evidence," of its "argument that its acts were not voluntary, *i.e.* sufficiently clear and authoritative."[723] Ultimately, the Claimants conclude, with reference to the decision in *Desert Line v. Yemen*,[724] that –

> the Respondent is estopped from arguing, 15 years after the events, and having invited the Claimants to invest precisely in the Tumurtei deposit, that the 939A Licence was lawfully revoked because DMP had a pre-existing right.
>
> [. . .]
>
> the Claimants have relied on the Respondent's assurances and acceptance of their investments to their detriment, and that it is preposterous for the Respondent to allege that the 939A Licence was lawfully revoked on the basis of alleged misrepresentations made by BLT well before the Claimants were invited to invest in the country and in spite of the Mongolian government's having approved the Claimants' investments.[725]

The Respondent's Position

378. According to the Respondent, the "Claimants cannot benefit from any kind of preclusion or estoppel in this case."[726]

379. As an initial matter, the Respondent submits that "an investor cannot plead an estoppel against the state absent an express provision in the instrument of consent permitting it to do so."[727] In the Respondent's view, an "investor does not deal with the state as an equal," and "[t]here is therefore a fundamentally different quality to a state act vis-à-vis another state and vis-à-vis a private individual within the regulatory sphere of the host state."[728] The Respondent relies on U.S. Supreme Court jurisprudence excluding the application of estoppel in the regulatory context[729] and submits that in the investment context, estoppel would require a fair and equitable treatment claim for inconsistent statements to give rise to liability.[730]

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722 The Claimants' Reply, para. 206.

723 The Claimants' Reply, para. 207.

724 *Desert Line Projects LLC v. Yemen*, ICSID Case No ARB05/17, Award of 6 February 2008, para. 119 (**Authority RLA-6**).

725 The Claimants' Reply, paras. 209-210.

726 The Respondent's Counter-Memorial, para. 283.

727 The Respondent's Counter-Memorial, para. 284.

728 The Respondent's Counter-Memorial, para. 284; *see also* Hearing Transcript (Day 1, 14 September 2015) 223:7 to 223:18.

729 The Respondent's Counter-Memorial, para. 285; *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (**Authority RLA-87**); *Schwenker v. Hansen*, 450 U.S. 785 (1981) (**Authority RLA-89**).

730 The Respondent's Counter-Memorial, para. 286.

380. Moreover, the Respondent argues that even if the Claimants could plead estoppel or preclusion as a matter of law, "duress or fraud of any material kind will nullify the plea of estoppel."[731] Preclusion is excluded, in the Respondent's view, because with the embezzlement of the rights to the Tumurtei deposit, "there could be no 'reliance in good faith' by Claimants on any representation made by the Mongolian government."[732] In other words, the "Claimants . . . cannot rely in good faith on representations they know to be based on incomplete information due to their own fraudulent, criminal acts."[733] Relying on *World Duty Free v. Kenya*,[734] the Respondent concludes, "the state simply cannot be estopped from raising corruption when it has found out about it."[735]

D. THE RESPONDENT'S COUNTERCLAIMS

1. Jurisdiction over the Respondent's Counterclaims

The Claimants' Position

381. The Claimants object to the Tribunal's jurisdiction over Mongolia's counterclaims.[736] According to the Claimants, "[c]ounterclaims, like primary claims, must fall within the scope of the parties' consent to arbitration," and the Respondent's counterclaims do not fall within the bounds of Article 8(3) of the Treaty.[737]

382. As an initial matter, the Claimants consider that the Respondent's counterclaims do not fall within the scope of the Treaty because they arise under Mongolian law. Relying on *Paushok v. Mongolia*, the Claimants conclude that the Respondent's counterclaims,

> arise out of Mongolian . . . law and exclusively raise issues of noncompliance with Mongolian . . . law . . . All these issues squarely fall within the scope of the exclusive jurisdiction of Mongolian courts, are matters governed by Mongolian . . . 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

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731 The Respondent's Counter-Memorial, para.288, quoting D.W. Bowett, 'Estoppel Before International Tribunals and its Relation to Acquiescence' (1957) 33 *British Yearbook of International Law* 176 at p. 190 (**Authority CLA-63**).

732 The Respondent's Counter-Memorial, para. 291.

733 The Respondent's Counter-Memorial, para. 291; *see also* Hearing Transcript (Day 1, 14 September 2015) 221:17 to 223:6, 223:19 to 224:4.

734 *World Duty Free Company Ltd v. Kenya*, ICSID Case No ARB/00/7; IIC 277 (2006), Award, dated 25 September 2006 (**Authority RLA-94**), para. 184.

735 The Respondent's Counter-Memorial, para. 292.

736 The Claimants' Reply, para. 212; Hearing Transcript (Day 1, 14 September 2015) 114:5 to 114:6

737 The Claimants' Reply, para. 212.

justifying their joint consideration by an arbitral tribunal exclusively vested with jurisdiction under the BIT.[738]

383. Second, the Claimants assert that the Respondent has not satisfied "the jurisdictional threshold established by the *Saluka* tribunal: it has failed to demonstrate that its counterclaims have a 'close connection' with the primary claim in this dispute, namely the Claimants' treaty claim for expropriation."[739]

384. Third, relying on *Spyridon Roussalis v. Romania*,[740] *Amco v. Indonesia*[741] and *Saluka v. The Czech Republic*,[742] the Claimants contend that the Treaty "imposes no substantive obligations on investors that could form the subject of a counterclaim" and therefore, there is no "legal basis" for the Respondent's counterclaims.[743] The Claimants conclude that the counterclaims amount to "vague factual assertions,"[744] rather than substantive legal arguments.

385. Finally, the Claimants submit that, in any case, the counterclaims cannot "succeed if Mongolia's own jurisdictional arguments are accepted."[745]

The Respondent's Position

386. The Respondent objects to the Tribunal's jurisdiction generally, but argues that if the Tribunal were to find in favour of its jurisdiction, the Tribunal would also possesses jurisdiction to hear Mongolia's counterclaims.[746]

387. The Respondent considers the Tribunal's jurisdiction to hear its counterclaims to be a corollary of its jurisdiction under Article 8(3) of the Treaty. Adopting the Claimants' legal standard for jurisdiction over counterclaims, the Respondent argues that "legitimate counterclaims must have

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738 The Claimants' Reply, para. 212, *quoting Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 694 (**Authority CLA-140**).

739 The Claimants' Reply, para. 213; Hearing Transcript (Day 1, September 2015) 114: 7 to 114:13

740 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, para. 871 (**Authority CLA-139**).

741 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 10 May 1988, 89 I.L.R. 552.

742 *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, para. 61 (**Authority CLA-138**).

743 The Claimants' Reply, para. 214; *see also* Hearing Transcript (Day 1, 14 September 2015) 114:14 to 114:16

744 The Claimants' Reply, para. 215.

745 Hearing Transcript (Day 1, 14 September 2015) 114:3 to 114:6

746 The Respondent's Rejoinder, para. 460

a close connection with the primary claim to which it is a response."[747] The Respondent considers that its counterclaims are "directly connected" to the Claimants' expropriation claim[748] because "they are based on BLT's illegal acquisition of the 939A License, which was an express basis for the license revocation."[749]

388. Rejecting the Claimants' objections, the Respondent distinguishes the facts of *Saluka v. The Czech Republic* from the present case. The Respondent notes that "the counterclaims in the present dispute are in direct response to the misconduct that *inter alia* resulted in the revocation of the 939A Licence."[750] In other words, the claims and counterclaims arise out of the same facts. By contrast, the Respondent observes, the *Saluka* tribunal rejected jurisdiction over counterclaims "because they arose out of a separate agreement which contained its own mandatory arbitration provision."[751] To support the applicability of Mongolian law in this context, the Respondent also points to the *renvoi* to State law in Articles 8(7) and 4(2) of the Treaty.[752]

389. The Respondent further relies on Professor Reisman's dissent in *Spyridon Roussalis* for the proposition that rejection of jurisdiction over the counterclaims would produce "an ironic, if not absurd, outcome" insofar as Mongolia would be directed "to pursue its claims in its own courts where the very investor who had sought a forum outside the state apparatus is now constrained to become the defendant."[753] The Respondent also points out that tribunals, including the *Saluka* tribunal, have acknowledged that investment treaties confer jurisdiction over counterclaims.[754]

2. The Merits of the Respondent's Counterclaims

The Respondent's Position

390. The Respondent summarises its counterclaims as follows:

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747 The Respondent's Rejoinder, para. 464, *quoting Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia (UNCITRAL)* Award on Jurisdiction and Liability, 28 April 2011 (**Authority CLA-140**); *see also Saluka Investments BV v. The Czech Republic (UNCITRAL)* Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, para. 75 (**Authority CLA-138**).

748 The Respondent's Rejoinder, para. 461; Hearing Transcript (Day 1, 14 September 2015), 229:4 to 229:14

749 The Respondent's Rejoinder, para. 462.

750 The Respondent's Rejoinder, para. 465.

751 The Respondent's Rejoinder, para. 465.

752 The Respondent's Rejoinder, para. 457.

753 The Respondent's Rejoinder, para. 469, *quoting Spyridon Roussalis v. Romania*, Declaration of W. Michael Reisman, ICSID Case No. ARB/06/1, 28 November 2011 (**Authority RLA-184**).

754 The Respondent's Rejoinder, para. 468.

(a) "BLT's fraudulent conduct resulted in the procurement of mining rights that had belonged to Darkhan, thereby delaying the development of a processing plant of which there was great need in Mongolia";[755]

(b) "Once BLT had the mining rings, BLT waited more than five years to engage in mining activity, depriving Mongolia of much needed royalties and violating Mongolia's subsoil law in the process";[756]

(c) "BLT and Tumurtei Khuder further failed to adhere to its promised schedule for the development of a processing plant, requiring that even now Mongolia must enter into international arrangements to procure processed ore";[757]

(d) "Tumurtei Khuder's failure to sell unprocessed ore at international market prices, as required by Mongolian law, cost Mongolia many millions of US dollars."[758]

391. The Respondent argues that "the Claimants' fraudulent misrepresentations caused harm to Mongolia in the form of loss of development of the mine and promised royalty and other tax revenues."[759] The Respondent quantifies its loss as "in excess of US$100 million"[760] and, given the increased price of iron, considers that that loss is "substantially more."[761]

392. The Respondent submits that the high grading method used by Claimants while exploiting the deposit decreased its value, thereby causing damage to Mongolia.[762]

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[755] The Respondent's Rejoinder, para. 470; *see also* Hearing Transcript (Day 1, 14 September 2015) 229:15 to 229:23.

[756] The Respondent's Rejoinder, para. 470.

[757] The Respondent's Rejoinder, para. 470; *see also* Hearing Transcript (Day 1, 14 September 2015) 229:17 to 229:19.

[758] The Respondent's Rejoinder, para. 470; *see also* Hearing Transcript (Day 1, 14 September 2015) 229:11 to 229:16.

[759] The Respondent's Counter-Memorial, para. 293.

[760] The Respondent's Counter-Memorial, para. 293.

[761] The Respondent's Counter-Memorial, para. 293.

[762] Hearing Transcript (Day 1, 14 September 2015) 230:7 to 230:10.

The Claimants' Position

393. The Claimants argue that the Respondent's counterclaims should "fail on their merits as their factual basis is neither accurate nor proved."[763] The Claimants elaborate:

> Mongolia's counterclaims appear to rest on the damage supposedly caused to it by the Claimants' "embezzlement and fraud", along with "the very real damage [the] Claimants have done to Mongolia in fraudulently obtaining the licence." On the allegation of embezzlement, the "severe economic harm" done to Mongolia can only be imaginary, given that its own organ withdrew the embezzlement charges. There is not even a prima facie showing of harm done. As to the issue of fraud in the application for the T-30 Licence, as emphasised and explained above, Mongolia failed to provide cogent evidence to prove this serious allegation.[764]

394. The Claimants emphasize that BLT owns 66 licences, including the one over Khust-Uul, and thus the application for a licence over the Tumurtei deposit "out of 6,000 other licences available in Mongolia" cannot be evidence that the Tumurtei licence was acquired improperly. [765]

395. The Claimants also submit that Tribunal "should not take seriously" the review of the prosecutor's decision to dismiss the allegations for want of evidence, since the document was "conveniently" produced a week before the hearing, two and a half years after the prosecution was dismissed, and after the limitation period had expired.[766]

E. REMEDIES

1. General Principles

The Claimants' Position

396. According to the Claimants, "[i]n accordance with customary international law principles, the Claimants are entitled to full reparation for the harm caused by Mongolia's breach of its international obligations."[767] The Claimants recall that the content of such customary law principles was set out by the Permanent Court of International Justice in *Factory at Chorzów*,[768] such that:

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763 The Claimants' Reply, para. 216; *see also* Hearing Transcript (Day 1, 14 September 2015) 113:18 to 122:11.

764 The Claimants' Reply, para. 216.

765 Hearing Transcript (Day 1, 14 September 2015) 119:1 to 119:22.

766 Hearing Transcript (Day 1, 14 September 2015) 120:7 to 122:11.

767 The Claimants' Memorial, para. 280.

768 The Claimants' Memorial, para. 280; *Case Concerning the Factory at Chorzów (Germany v. Poland)* (Claim for Indemnity) (Merits) PCIJ Series A No 17 (1928) (**Authority CLA-99**).

> reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.[769]

397. In the present case, the Claimants argue that restitution of the 939A Licence is not materially impossible and far from being burdensome to the Respondent, would actually be beneficial to the Mongolian economy. The Claimants also argue that "since restitution alone will not suffice to provide full reparation,"[770] compensation should be awarded for "any losses that are not made good by restitution."[771]

398. In the alternative, the Claimants submit that they "will, in the second phase of these bifurcated proceedings, request full compensation for the losses they have suffered as a result of the expropriation of their investments."[772]

The Respondent's Position

399. The Respondent disputes the Claimants' claim to restitution on the grounds that "Claimants have not demonstrated why the appropriate remedy to the alleged failure of Mongolia to adhere to Article 56(2) of the Minerals Law would be the most extreme option available: to return the license outright. Claimants extend no support for this proposition, simply taking it for granted."[773]

400. The Respondent also argues that Article 4(2) BIT does not apply to the present dispute because the text of Article 4(2) requires that the expropriation be "proclaimed" and because Mongolia did not proclaim the expropriation, the requirements of Article 4(2) to pay compensation do not apply.[774]

2. Quantification

401. As set out in paragraph 38 of the Tribunal's Procedural Order No. 1: "The parties have agreed that the proceedings shall be divided into two phases, the first covering jurisdiction and liability, the second, if necessary, quantum."

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769 The Claimants' Memorial, para. 280.

770 The Claimants' Memorial, para. 284.

771 The Claimants' Memorial, para. 284.

772 The Claimants' Memorial, para. 285.

773 The Respondent's Rejoinder, para. 374.

774 The Respondent's Rejoinder, paras. 457-458.

VII. THE TRIBUNAL'S ANALYSIS

402. The Tribunal has given careful consideration to the Parties' detailed arguments as regards both its jurisdiction and the merits of the dispute, as well as the Respondent's counterclaims, and the complex factual circumstances that gave rise to the Parties' dispute. For the completeness of the record of the proceedings, the Tribunal has elected to preserve a full account of the Parties' claims and counterclaims (as recounted above) although, as will be apparent, the Tribunal's decision with respect to its jurisdiction prevents it from reaching any decision with respect to the merits of the Parties' claims and counterclaims.

403. In reaching this decision, the Tribunal begins its analysis with the consideration of its jurisdiction, in respect of which the Respondent has made a number of objections (see paragraphs 231 to 301 above). Although the Tribunal has set out the Respondent's objections above in the order in which they were presented, the Tribunal itself approaches the question of its jurisdiction in the manner it considers appropriate and does so beginning with its jurisdiction *ratione personae* and the Respondent's objection in this respect. Thereafter, the Tribunal will turn to the question of its jurisdiction *ratione materiae* and the Respondent's corresponding objections. In light, however, of the conclusion ultimately reached by the Tribunal with respect to Article 8(3) of the Treaty and the scope of Mongolia's consent to international arbitration (as set out below), the Tribunal finds it unnecessary to reach a decision regarding the Respondent's remaining objections.

A. JURISDICTION *RATIONE PERSONAE*

404. The Respondent objects to the Tribunal's jurisdiction *ratione personae* on the grounds that the Claimants do not qualify as investors under Article 1(2) of the Treaty (see paragraphs 269 to 276 above).

405. The Claimants in these proceedings are three Chinese companies. In order to qualify as protected investors of China under the Treaty, they must satisfy the three requirements set by its Article 1(2)(b), namely:

(a) they must be "economic entities";

(b) they must be "established in accordance with the laws" of the PRC; and

(c) they must be "domiciled in the territory" of the PRC.[775]

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[775] Treaty, Art. 1(2).

406. The Parties agree that the Claimants were established in accordance with the laws of the PRC and were, at all relevant times, domiciled in the territory of the PRC.

407. The Parties are in dispute, however, as to the question whether the Claimants can be regarded as "economic entities."

408. The Respondent acknowledges that "economic entit[y]" can refer to "private, commercial entities" or to "entities of any kind engaging in economic activities."[776] However, in its view, the determination of whether Beijing Shougang and China Heilongjiang are "economic entities" cannot be resolved by looking at the Treaty alone, and guidance should be found in the Chinese treaty practice, which includes a few treaties that expressly include public entities as covered investors, thus implying that public entities would otherwise not be regarded as "economic" entities.[777] In the Respondent's view, China Heilongjiang and Beijing Shougang are State-owned entities, not commercial entities. As such, they are not covered by the Treaty definition of "investor".[778] The Respondent also argues that the activities of Beijing Shougang and China Heilongjiang are not "economic" in nature[779] because they are "not motivated to make a profit in the sense that an economic entity would ordinarily be thought to be."[780] In addition, according to the Respondent, they do not function with "sufficient independence" from their owner, the Chinese State,[781] and are in fact "quasi-instrumentalities of the Chinese government"[782] "under the direct control of the Chinese government, and [] under express instruction to invest abroad in order to serve China's foreign policy goals."[783]

409. Similarly, Respondent argues that Qinlong, while having corporate form and not being owned by the Chinese government, did not operate as an entity having the requisite "separateness" implied in the term "economic entity,"[784] as shown *inter alia* by the role that Mr. Li, Qinlong's sole shareholder, played at various times on behalf of China Heilongjiang in the signing of a number

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776 The Respondent's Counter-Memorial, para. 183.

777 The Respondent's Counter-Memorial, para. 184.

778 The Respondent's Counter-Memorial, para. 185.

779 The Respondent's Rejoinder, para. 312.

780 Hearing Transcript (Day 1, 14 September 2015) 203:9 to 203:14; The Respondent's Rejoinder, para. 313.

781 Hearing Transcript (Day 1, 14 September 2015) 201:8 to 202:17.

782 The Respondent's Counter-Memorial, para. 186.

783 The Respondent's Rejoinder, para. 293; *see also* The Respondent's Rejoinder, paras. 293-302, 319.

784 Hearing Transcript (Day 5, 18 September 2015) 827:19-25.

of agreements relating to the Tumurtei deposit with "some striking oddities"[785] and on behalf of the Government of China.[786]

410. The Respondent also claims that the Claimants failed to provide any evidence of their shareholding in Tumurtei Khuder.[787]

411. The Tribunal is not convinced by the Respondent's submissions on these points.

412. *First*, the Tribunal has considered the terminology used at Article 1(2) of the Treaty. The Tribunal finds that the wording "economic entity", which characterizes protected legal persons in relation to both Mongolia and the PRC, is expressed in broad terms and does not distinguish on the basis of organizational type, business purpose, ownership, or control. In the Tribunal's view, therefore, there is no basis to read into Article 1(2) of the Treaty any restrictions pertaining to an investor's organization, business purpose, ownership, or control, where none appears to have been intended by the Treaty's drafters.

413. The Tribunal notes in this respect that, under Article 31(4) of the Vienna Convention on the Law of Treaties, a special meaning shall be assigned to a term only "if it is established that the parties so intended." There is no indication that the Treaty drafters intended to assign any special meaning to the term "economic entities". The notions of "separateness"[788] and "independence"[789] that the Respondent seeks to ascribe to the terms find no basis in the Treaty (or other evidence submitted by the Respondent), and the Respondent has not established that the PRC and Mongolia intended to assign a special—and limited—meaning to the broad terminology "economic entities".

414. The Respondent's case is not advanced by its exclusive reference to the PRC's treaty practice. As a matter of treaty interpretation, the Tribunal does not consider the limited examples cited of the PRC's unilateral treaty practice to be relevant to establishing the meaning assigned to the term "economic entities".[790] Under Article 31(3) of the Vienna Convention on the Law of Treaties, the Tribunal may take into account any subsequent practice in the application of the Treaty which would have established the agreement of the parties regarding its application. The Respondent,

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785 Hearing Transcript (Day 5, 18 September 2015) 828:1 to 832:15, 833:10-20.

786 Hearing Transcript (Day 5, 18 September 2015) 881:4-19; Letter from Li Xiaoming to the Prime Minister of Mongolia, 26 December 2006 (**Exhibit C-2**).

787 Hearing Transcript (Day 5, 18 September 2015) 824:17 to 828:20.

788 Hearing Transcript (Day 1, 14 September 2015) 200:20 to 201:7; (Day 5, 18 September 2015) 827:23.

789 Hearing Transcript (Day 1, 14 September 2015) 201:24 to 202:6.

790 The Respondent has also failed to show that the two treaties to which it refers are representative of China's treaty practice.

however, has not adduced evidence of any such agreements that would support its restrictive interpretation of Article 1(2) of the Treaty. Nor has it provided any support for the notion that the PRC's practice, as the Respondent has described it, is shared by or common to Mongolia's treaty practice.

415. The Tribunal concludes that the terms "economic entities" in Article 1(2) of the Treaty refer to any kind of legal entity engaging in economic or business activities.

416. In the circumstances of this case, it is clear that all three Claimants are companies which have engaged in economic activities to any extent necessary to qualify them as "economic entities" for the purposes of Article 1(2) of the Treaty.

417. The Tribunal further finds that the fact that the Chinese State directly or indirectly owns Beijing Shougang and China Heilongjiang has no relevance for the purpose of their qualification as "economic entities" under Article 1(2) of the Treaty.

418. *Second*, the Tribunal is not persuaded by the Respondent's additional argument that Beijing Shougang and China Heilongjiang acted as "quasi-instrumentalities of the Chinese government."[791] The Tribunal does not find any evidence in the record to support such a conclusion, or a conclusion that they acted under the Chinese Government's "express instruction to invest abroad in order to serve China's foreign policy goals."[792] Moreover, nothing in the roles played by Qinlong's controlling shareholder, Mr. Li, amount to a showing that Qinlong was under government control or instruction.

419. Nor is the Tribunal convinced by the Respondent's argument, advanced during the hearing, that because the "Claimants abandoned the preferred basis of claim in favour of sole reliance on a provision that is generally understood in Chinese BITs not to permit determination of whether expropriation has occurred," it would be "fair to conclude that asserting [fair and equitable treatment] and [most-favoured nation] arguments would have carried risks for the PRC with respect to its own treatment of foreign investors. An economic entity acting independent of the State would have no reason to drop arguments that it plainly believes it had available to it."[793] If anything, the evolution of the Chinese treaty practice since 1998 shows the PRC's more recent desire to expand the level of protection accorded both to foreign investors investing in the PRC and to Chinese investors investing in other countries. The Tribunal cannot, in this context, second-

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791 The Respondent's Counter-Memorial, para. 186.

792 The Respondent's Rejoinder, para. 293.

793 Hearing Transcript (Day 1, 14 September 2015) 181:4 to 181:14.

guess and read too much into disputing parties' strategic decisions as to which arguments should be put forward and which should be abandoned, in order to draw general conclusions on the meaning that is to be given to treaty terms.

420. *Finally*, in the Tribunal's view, the question whether the Claimants have proved to hold shares of Tumurtei Khuder or whether Tumurtei Khuder has ever issued shares or received any payment for the shares, is not relevant for the determination of whether the Claimants qualify as protected investors under the Treaty.

421. In any event, the Tribunal notes that, in the certificate of incorporation of Tumurtei Khuder, Mongolia itself has referred to the Claimants as "investors"[794] that "invested" in the company.[795] As explained above, in order to qualify as "investors" under the Treaty, the Claimants must fulfil the three requirements set out in Article 1(2) of the Treaty.[796] The Tribunal is satisfied that all three Claimants are economic entities established under the laws of the PRC and domiciled, at all relevant times, in the territory of the PRC. As such, they qualify as protected "investors" for the purposes of the Treaty.

422. The Respondent's objection to the Tribunal's jurisdiction *ratione personae* is accordingly dismissed.

B. JURISDICTION *RATIONE MATERIAE* – WHETHER THE TREATY PROVIDES JURISDICTION TO DETERMINE LIABILITY FOR ALLEGED EXPROPRIATION

423. The Respondent objects to the jurisdiction of the Tribunal on the grounds that Mongolia's consent to arbitration set out in Article 8(3) of the Treaty does not extend to the subject matter of the Claimants' claims (see paragraphs 252 to 268 above).

424. The Respondent's objection calls for the Tribunal to determine the scope of its jurisdiction *ratione materiae*. In order to accomplish this, the Tribunal must interpret paragraph 3 of Article 8 of the Treaty, the only provision which provides for the jurisdiction of an *ad hoc* arbitral tribunal. This provision reads as follows:

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[794] Order No A-470 of the Foreign Investment and Foreign Trade Agency of Mongolia, 16 May 2005 (**Exhibit C-64**).

[795] Certificate of Foreign Incorporated Company No. 02-214 of Tumurtei Khuder, 15 June 2005 (**Exhibit C-7**).

[796] See paragraph 405 above.

> If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an *ad hoc* tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in [ ] paragraph 2 of this Article.

425. The provision just quoted cannot be interpreted in isolation. According to the general rule of interpretation, as codified in Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties, "[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 light of its object and purpose."

426. The provision on the jurisdiction of an *ad hoc* arbitral tribunal forms part of Article 8 which is devoted to the settlement of disputes between an investor of one Contracting State and the other Contracting State. Article 8 consists of eight paragraphs. The first three paragraphs[797] concern the ways of settling such investment disputes, either amicably through negotiations (paragraph 1), through judicial proceedings in the competent court of the Contracting State accepting the investment (paragraph 2), or through international arbitration (paragraph 3). Paragraphs 4 to 8 concern the procedure for the constitution of an *ad hoc* arbitral tribunal, the procedural rules, the decision-making, the law to be applied by the tribunal, and costs. These paragraphs (4 to 8) are of no particular relevance for the scope of the Tribunal's jurisdiction *ratione materiae*.

427. The Tribunal, in its further analysis, will thus focus its attention on the first three paragraphs of Article 8. Paragraph 1 states that

> Any dispute between an investor of one Contraction State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

This provision thus circumscribes the types of disputes which may fall within the scope of the provisions on dispute settlement under Article 8 of the BIT. First, *ratione personae*, a dispute must involve either a Chinese investor and Mongolia, or a Mongolian investor and China. Such a dispute shall, *ratione materiae*, arise "in connection with an investment"; in other words, it must be an investment dispute.

428. What may fall within the category of investment disputes under the Treaty is to be ascertained having regard to its substantive provisions, in particular, Articles 3 to 5 and Article 9. Article 3 guarantees to investors fair and equitable treatment in respect of their investments, as well as the returns or activities associated therewith. Article 3 also guarantees the protection of such investments, returns, and activities in the territory of the State accepting the investment. This

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797 The text of these three paragraphs is reproduced in paragraph 252 above.

treatment and protection shall not be less favourable than that accorded to the investments, returns, or activities of investors of third States.

429. According to Article 4, paragraph 1, investments of investors of the other Contracting States shall not, in principle, be "nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation." These three categories are subsequently referred to in the Treaty by the term "expropriation." Expropriation is allowed only "for the need of social and public interest" and "shall be carried out on a non-discriminatory basis in accordance with legal procedures and against compensation." Paragraph 2 of that Article sets out parameters for the determination and payment of the compensation.

430. Article 5 of the Treaty guarantees the investors of one Contracting State the free transfer of their investments and returns held in the territory of the other Contracting State.

431. Pursuant to Article 9 of the Treaty, should the treatment of the investments in accordance with the law and regulations of the State accepting the investment be more favourable than the treatment provided for in the Treaty, the investors will be entitled to such more favourable treatment.

432. This broad category of investment disputes, in which an investor claims that the receiving State is in breach of one of its obligations under the Treaty, is thus subject to amicable settlement through negotiations. An attempt to settle amicably is a pre-condition for resort to the other procedures which may be available under either paragraph 2 (judicial procedures) or paragraph 3 (arbitral procedures) of Article 8.

433. Both procedures, judicial and arbitral, have in common that they must be preceded by a "cooling-off" period of six months. Paragraph 2 and paragraph 3 of Article 8 thus each establish a pre-condition for resort to judicial or arbitral procedures, which will be available only "[i]f the dispute cannot be settled through negotiations within six months"[798].

434. Here, however, the commonality of the two procedures comes to an end. The jurisdiction of the courts of the Contracting State which has accepted the investment is much broader. Any investment dispute between an investor and the Contracting State that is not settled amicably within six months can be brought before a court. This is because Article 8, paragraph 2, of the Treaty refers to "the dispute", which is defined in Article 8, paragraph 1, as "[a]ny dispute

[798] Treaty, Art. 8(2). Paragraph 3 specifies the same condition using a slightly different language: "If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in paragraph 1 of this Article."

between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State . . . ." Such a dispute can concern either the alleged failure to accord to investments, returns, or activities associated with such investments fair and equitable treatment or protection, as required by Article 3 of the Treaty, or the alleged expropriation and conditions under which a State can proceed to expropriation in accordance with Article 4 of the Treaty. It may pertain to the alleged failure to guarantee to investors free transfer of their investments and returns, as stipulated in Article 5 of the Treaty, or the alleged failure to provide the more favourable treatment in conformity with Article 9 of the Treaty.

435. In the view of the Tribunal, the jurisdiction of domestic courts under Article 8, paragraph 2, encompasses all disputes that may arise between an investor of one Contracting State and the other Contracting State concerning the latter's compliance with its obligations under the Treaty. This includes the Contracting State's obligation not to subject an investment to measures of expropriation, except for the need of social and public interests and while respecting the obligations of non-discrimination and paying appropriate compensation without unreasonable delay.

436. The jurisdiction of an *ad hoc* arbitral tribunal under Article 8, paragraph 3 of the Treaty, however, is, *ratione materiae,* much narrower and covers only "a dispute involving the amount of compensation for expropriation." While it remains for the Tribunal to determine the meaning of this phrase and thus the precise scope of its jurisdiction, there can be no doubt that disputes concerning the alleged failure of a State to comply with its obligations under Articles 3, 5, or 9 of the Treaty fall outside the jurisdiction of an *ad hoc* arbitral tribunal. The jurisdiction of a competent court of the Contracting State accepting the investment is exclusive as far as disputes regarding the performance of obligations under these three articles of the Treaty are concerned. The investor can submit such disputes only to a court of the Contracting State which has accepted the investment. It seems that the Claimants have realized this during the arbitral proceedings. Thus, while in their Request for Arbitration they asked the Tribunal to "find that Mongolia is in breach of its obligations under the Treaty . . . by having unlawfully expropriated the Claimants' investment, having failed to accord them *fair and equitable treatment* and having failed to *protect* them" (see paragraph 222 above, emphasis added), later in the Memorial and the Reply the claim of a failure to provide the fair and equitable treatment, as well as the protection, have been abandoned as the Claimants request the Tribunal to "declare that the Respondent is in breach of Article 4 of the Treaty in that it unlawfully expropriated the Claimants' investments" (see paragraphs 223 and 224 above).

437. For disputes involving the amount of compensation for expropriation, neither a court nor an *ad hoc* arbitral tribunal is given exclusive jurisdiction. The investor has a choice; he may submit such a dispute either to a competent court of the Contracting State accepting the investment pursuant to Article 8, paragraph 2 of the BIT, or to an *ad hoc* arbitral tribunal in accordance with paragraph 3 of Article 8. But once the investor has made its choice by submitting "a dispute involving the amount of compensation for expropriation" to a court, that choice is final and the jurisdiction of an *ad hoc* arbitral tribunal is barred. This legal consequence flows from the last sentence of paragraph 3 of Article 8 of the BIT which provides that "[t]he provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in [ ] paragraph 2 of this Article."

438. This brings the Tribunal to the critical issue of the interpretation of the first sentence of paragraph 3 of Article 8 and, in particular, the phrase "a dispute involving the amount of compensation for expropriation."

439. The Tribunal is of the view that the purpose of the words "involving the amount of compensation for expropriation" is to qualify a category of disputes which may fall within the jurisdiction of an *ad hoc* arbitral tribunal. The purpose of this phrase is thus to restrict the jurisdiction of an *ad hoc* arbitral tribunal to encompass only disputes which involve the amount of compensation for expropriation. While the ordinary meaning of the term "the amount of compensation for expropriation" does not seem to cause a difficulty, the same is not the case as far as the term "involving" is concerned. Does the term "involving" restrict the scope of that phrase only to disputes *about* the amount of compensation for expropriation and nothing else? Or does it cover all disputes which may arise in relation to expropriation, provided that the amount of compensation for expropriation is an element of such disputes? The Tribunal agrees with the view of the Court of Appeal of the Republic of Singapore in *Sanum*, which had to interpret an identical provision in the China-Laos BIT, that "the word 'involve' is certainly capable of supporting either of the Broad or Narrow Interpretations and to cavil over the possible definitions of the word 'involve' will not help us interpret Art 8(3) . . . Rather, the words in Art 8(3) can only be accurately, and more meaningfully, understood by considering the context of the provision."[799]

440. The Tribunal has already described[800] the dispute settlement provisions in Article 8 within which the phrase now under consideration is contained. These provisions are part of the context to be taken into account when interpreting the phrase "disputes involving the amount of compensation

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799 *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, [2016] SGCA 57, para. 126 (**Authority CLA-153**).

800 See paragraphs 426 to 435 above.

for expropriation." Part of that context[801] is also Article 4 of the Treaty which deals with expropriation. In the view of the Tribunal, the provisions of Article 8, paragraph 3 of the Treaty must be interpreted in the context both of paragraphs 1 and 2 of Article 8 and of Article 4.

441. At this juncture, it is useful to reproduce Article 4, paragraphs 1 and 2[802] of the Treaty, which read as follows:

> 1. Investments made by investors of one Contracting State shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting State, except for the need of social and public interests. The expropriation shall be carried out on a non-discriminatory basis in accordance with legal procedures and against compensation.
>
> 2. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.

442. As the Tribunal has noted, the terms "involving the *amount* of compensation for expropriation" qualify the dispute which may be submitted to an *ad hoc* arbitral tribunal. A dispute involving the amount of compensation is a dispute as to whether the sum to be paid by the State as a compensation "is equivalent to the value of the expropriated investments at the time when expropriation is proclaimed."[803]

443. The Tribunal notes that the phrase used in Article 8, paragraph 3 of the BIT is not "a dispute involving the compensation for expropriation" but "a dispute involving the *amount* of compensation for expropriation" (emphasis added). This, in the Tribunal's view, links the provision of Article 8, paragraph 3 with Article 4, paragraph 2 of the BIT.

444. The payment of compensation for expropriation is a primary obligation imposed by Article 4, paragraph 1 of the Treaty which, in its last sentence, provides that "[t]he expropriation shall be carried out on a non-discriminatory basis in accordance with legal procedures and *against compensation*" (emphasis added).

445. The phrase "a dispute involving the *amount* of compensation for expropriation" thus describes a particular category of disputes, namely disputes whether the compensation which is due under paragraph 1 of Article 4 of the BIT is "*equivalent to the value of the expropriated investments at*

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801 Article 31, paragraph 2, of the Vienna Convention confirms that the context for the purpose of interpretation of a treaty comprises also the text of the treaty, including its preamble and annexes.

802 Article 4 also contains paragraph 3 which concerns losses suffered by investors during a war, a state of national emergency, insurrection, riot or other similar events. It is of no particular relevance for the present purposes.

803 Treaty, Art. 4(2).

the time when expropriation is proclaimed," as prescribed by paragraph 2 of Article 4 of the BIT (emphasis added).

446. In the view of the Tribunal the term "involving" is a neutral one. It does not by itself enlarge nor restrict the category of disputes falling within the Tribunal's jurisdiction; nothing turns on it. The critical terms are rather the terms "the amount of compensation for expropriation."

447. The Tribunal is aware that some other arbitral tribunals and the Singapore Court of Appeal have reached a differing interpretation of similar provisions in other bilateral investment treaties. While many of these decisions have considered investment treaties involving other States that are materially different from the provisions of the Treaty, some have examined other treaties concluded by the PRC that are substantially similar.[804] These tribunals and the Court of Appeal have justified their conclusion principally on the grounds of *effet utile*. They, like the Claimants in this case, have taken the view that a narrow reading of the relevant treaty provisions would deprive them of any practical meaning.

448. With due respect, this Tribunal does not share this concern. In the Tribunal's view, paragraph 3 of Article 8 will still retain its legal effect. Arbitration before an *ad hoc* arbitral tribunal would be available in cases where an expropriation has been formally proclaimed and what is disputed is the amount to be paid by the State to the investor for its expropriated investment. In other words, arbitration will be available where the dispute is indeed limited to the amount of compensation for a proclaimed expropriation, the occurrence of which is not contested. While it may be the case that formally proclaimed expropriations are a less common event than measures having an effect equivalent to nationalisation or expropriation (which are also prohibited by Article 4 of the Treaty), the Tribunal cannot see that an arbitration provision that would nevertheless encompass an entire category of disputes can fairly be said to be lacking *effet utile*.

449. Arbitration before an *ad hoc* arbitral tribunal would be available in the case of both direct and indirect expropriation; in the latter case, if an investor were to seek a proclamation from the courts (or from any appropriate administrative body) that an expropriation had occurred, or were to seek through judicial proceedings to protect its investment against measures having (in its view) an effect equivalent to expropriation, while reserving the issue of compensation for an out-of-court procedure. The Tribunal does not see that the fork-in-the-road provisions of Article 8, paragraph 3, would deprive an *ad hoc* arbitral tribunal of jurisdiction where an investor, in the

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[804] *See, e.g.*, *Tza Yap Shum v. The Republic of Peru* (ICSID Case No ARB/07/6) Decision on Jurisdiction and Competence, 19 June 2009 (**Authority CLA-32**); *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, [2016] SGCA 57 (**Authority CLA-153**).

course of prior judicial proceedings, had expressly sought to reserve the question of compensation for a decision in arbitration.

450. The Tribunal is thus not of the view that an investor will be left without a meaningful opportunity to make use of the Treaty's provisions for arbitration before an *ad hoc* arbitral tribunal. Nor does the Tribunal see that an investor would be left without legal recourse for the protection of its investment in circumstances beyond the scope of the agreement to arbitrate in Article 8, paragraph 3. As emphasized above, the primary methods envisaged in the Treaty for the resolution of disputes are amicable settlement through negotiation and judicial proceedings in the courts of the Contracting State that accepted the investment, which are accorded general (broad, unrestricted) jurisdiction over any investment dispute ("any dispute between an investor of one Contracting State and the other Contracting State in connection with an investment") pursuant to the Treaty. The Tribunal does not see grounds, in particular in the context of a treaty in which arbitration was framed as an exception, for considering arbitration to be preferable to these methods. Nor can the Tribunal see that the absence of broader arbitration provisions leaves investors without legal recourse.

451. The Tribunal is similarly not convinced that taking into account the object and purpose of the Treaty in the course of interpretation would allow it to reach a different conclusion. The Tribunal notes that the Preamble, where usually the object and purpose of a treaty is set out, consists in this Treaty of just one single paragraph. Therein the two Contracting States express their desire "to encourage, protect and create favourable conditions for investment by investors of one Contracting State in the territory of the other Contracting State based on the principle of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation and friendly relations between both States." Nothing in the Preamble suggests that the two Contracting States intended to confer upon an arbitral tribunal to be constituted under Article 8 a broad jurisdiction over all issues arising in connection with a claimed expropriation. If such had been their intention, they could have simply referred, in Article 8, paragraph 3, either to a dispute relating to Article 4 of the Treaty or a dispute concerning expropriation. Such formulations would have provided a tribunal with jurisdiction over any issue concerning an alleged expropriation, including the amount of compensation for expropriation. Under international law, as the International Court of Justice stated, "[w]here jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation."[805] However, the

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[805] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 485, para. 48; similarly the Permanent Court of International Justice in *Case Concerning the Factory at Chorzow (Claim for Indemnity), Jurisdiction, Judgment of 26 July 1927, P.C.I.J. Reports, Série A9*, p. 4 at pp. 21-25.

Contracting States of the Treaty have carefully worded the text of Article 8, paragraph 3, as relating to "a dispute involving the amount of compensation for expropriation." Only this narrow issue falls within the jurisdiction of an arbitral tribunal while all disputes, including those involving the amount of compensation for expropriation, can be submitted to the competent court of the Contracting State accepting the investment. This is what the two States, Mongolia and China, agreed on in 1991 when they signed the Treaty. This arrangement should not be surprising as both States then had similar political and economic systems and did not have any reason to question the judicial system of the other Treaty Party and consequently to favour international arbitration for the settlement of investment disputes.

452. Accordingly, the Tribunal concludes that it lacks jurisdiction *ratione materiae* with respect to the Claimants' claim that "the Respondent is in breach of Article 4 of the Treaty in that in unlawfully expropriated the Claimants' investments."

453. Having reached this conclusion, the Tribunal need not deal with the remaining objections to jurisdiction advanced by the Respondent.

454. For the same reasons, the Tribunal lacks jurisdiction in relation to the Respondent's counterclaims.

VIII. COSTS

455. Pursuant to the Tribunal's request on 18 September 2015, the final day of the hearing, each Party provided the Tribunal with submissions concerning the costs it had incurred in these proceedings.

The Claimants' Position

456. In their costs submission, the Claimants request "a full award of their related costs and fees, in accordance with the Factory at Chorzów principle of full compensation."[806]

457. According to the Claimants, the Tribunal has the power to order costs pursuant to Article 8(5) of the Treaty, which provides that the Tribunal "shall determine its own procedure" and may "take as guidance" the rules of the International Centre for Settlement of Investment Disputes ("**ICSID**"). The Claimants take note of the Tribunal's instructions, in its Procedural Order No. 1, for the Parties to bring to the Tribunal's attention "such guidance from the ICSID Rules, the

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806 The Claimants' Costs Submission, para. 1.

UNCITRAL Rules, or other authorities they deem appropriate." The Claimants observe that both the ICSID and UNCITRAL Arbitration Rules grant the Tribunal discretion in the award of costs.

458. Drawing on precedents under the ICSID and UNCITRAL Rules, the Claimants argue that these provisions "afford the Tribunal broad discretion in deciding how to allocate the costs of the arbitration."[807] The Claimants submit, however, that the Tribunal should consider both "the extent to which each party has prevailed on its arguments" and "the conduct of each party in the arbitration," in particular "whether either party has 'needlessly prolonged' or 'obstructed' the proceedings."[808]

459. The Claimants submit that the costs should follow the event if the Tribunal determines that the Claimants will prevail on jurisdiction and the merits.[809] The Claimants also submit that tribunals are generally more likely to award costs "against a party that has needlessly prolonged and obstructed arbitral proceedings, for example by raising unmeritorious preliminary objections to jurisdiction or admissibility or by making overly burdensome document requests."[810]

460. In the event that the Claimants are not awarded full costs, they nevertheless request that they be awarded their costs in relation to the postponement of the hearing at the Respondent's request.[811]

The Respondent's Position

461. The Respondent submits that "Articles 38 and 40 of the UNCITRAL Rules, as well as general arbitral practice, provide the Tribunal with the authority to determine allowable costs, and the discretion to apportion such costs as between the Parties."[812]

462. The Respondent requests the Tribunal to award it its costs on the grounds that the Claimants have "failed to substantiate any investments allegedly made" and that the Respondent has established that the 939A Licence was "acquired by misrepresentation".[813] The Respondent further submits that the Claimants have exacerbated the costs of the proceedings, through their delay in

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807 The Claimants' Costs Submission, para. 9.

808 The Claimants' Costs Submission, para. 9.

809 The Claimants' Costs Submission, paras. 10-12.

810 The Claimants' Costs Submission, para. 13.

811 The Claimants' Costs Submission, paras. 30-37.

812 The Respondent's Costs Submissions, p. 1.

813 The Respondent's Costs Submissions, p. 4.

commencing the arbitration, through their delay in reconstituting the Tribunal following the resignation of the initial presiding arbitrator, and by taking extreme positions.[814]

The Tribunal's Considerations

463. The Tribunal notes that both sides have requested the award of their costs in these proceedings and have made submissions in respect of their costs incurred. Both sides have submitted that the Tribunal possesses the authority to award costs.

464. The Tribunal notes, however, that Article 8, paragraph 8 of the Treaty provides as follows:

> Each party to the dispute shall bear the cost of its appointed member of the tribunal and of its representation in the proceedings. The cost of the appointed Chairman and the remaining costs shall be borne in equal parts by the parties to the dispute.

465. Neither side has given consideration to this provision of the Treaty in the course of its costs submissions, but the Tribunal considers the Article to be binding upon it, notwithstanding the Treaty's recognition of the Tribunal's power to determine its own procedure.

466. Accordingly, each side shall bear the costs of its own legal representation in these proceedings and the Tribunal will apportion the costs of the arbitration in accordance with paragraph 8 of Article 8. In so doing, the Tribunal wishes to record that at no point in these proceedings has any member of the Tribunal considered him or herself to be anything less than fully independent and impartial with respect to the side to have made the appointment.

467. With respect to fixing the costs of the arbitration, the Parties have deposited with the PCA a total of US$1,030,000.00 (US$515,000.00 by the Claimants, US$515,000.00 by the Respondent) as an advance against the costs of arbitration in these proceedings.

468. The fees and expenses of Dr. Yas Banifatemi, the arbitrator appointed by the Claimants, amount respectively to US$216,440.00 and US$10,441.09. These amounts will be deducted from the Claimants' portion of the deposit held by the PCA.

469. The fees and expenses of Mr. Mark Clodfelter, the arbitrator appointed by the Respondent, amount respectively to US$300,270.00 and US$21,206.44. These amounts will be deducted from the Respondent's portion of the deposit held by the PCA.

470. The fees and expenses of Mr. Donald Donovan, the Presiding Arbitrator until his resignation on 6 February 2013 amount respectively to US$42,700.00 and US$742.78.

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814 The Respondent's Costs Submissions, pp. 5-6.

471. The fees of Judge Peter Tomka, the Presiding Arbitrator from 26 January 2014, amount to US$199,150.00.

472. Pursuant to the Tribunal's Procedural Order No. 1, the International Bureau of the PCA was designated to administer this arbitration. The PCA's fees for registry services amount to US$120,044.48.

473. Also pursuant to the Tribunal's Procedural Order No. 1, a tribunal secretary from the law firm of Debevoise & Plimpton LLP was appointed during the period in which Mr. Donovan served as Presiding Arbitrator. The fees of the tribunal secretary during this period amount to US$17,600.00.

474. Other tribunal costs in this arbitration, including court reporters, interpreters, hearing room equipment, bank charges, and all other expenses relating to the arbitration proceedings amount to US$97,544.99.

475. Based on the above figures, the fees of the appointed Chairmen, the fees of the PCA and tribunal secretary, and the remaining costs total US$477,782.25, which shall be deducted from the deposit in equal shares (US$238,891.13 for each side).

476. The unexpended balance of US$49,227.79 in the Claimants' portion of the deposit held by the PCA will be returned to the Claimants. The Respondent is requested to supplement its portion of the deposit held by the PCA with a payment to the PCA of US$45,367.57 within 30 days of the date of this Award.

* * *

IX. DISPOSITIF

477. For the reasons set out above, the Tribunal:

(a) *Rejects* the Respondent's objection to jurisdiction *ratione personae;*

(b) *Upholds* the Respondent's objection to jurisdiction *ratione materiae*;

(c) *Finds* that it has no jurisdiction to entertain the Claimants' claims;

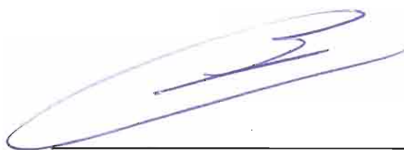
(d) *Finds* that it has no jurisdiction to entertain the Respondent's counter-claims;

(e) *Decides* that the Parties shall each bear their own costs of legal representation and shall bear the costs of the arbitration as set out above and in Article 8, paragraph 8 of the Treaty;

(f) *Orders* the Respondent to pay to the PCA, within 30 days from the date of this Award, US$45,367.57 as the outstanding fees and expenses of the arbitrator appointed by the Respondent, in accordance with Article 8, paragraph 8 of the Treaty.

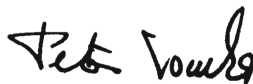
* * *

Done in New York, NY (the place of arbitration) on 30 June 2017,



Dr. Yas Banifatemi
Arbitrator

Mr. Mark Clodfelter
Arbitrator



Judge Peter Tomka
Presiding Arbitrator

EXHIBIT B

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE MONGOLIAN PEOPLE'S REPUBLIC AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS AND THE FOREIGN INVESTMENT LAW OF MONGOLIA

中国黑龙江国际经济技术合作公司
(CHINA HEILONGJIANG INTERNATIONAL ECONOMIC & TECHNICAL COOPERATIVE CORP.)
and
北京首钢矿业投资有限责任公司
(BEIJING SHOUGANG MINING INVESTMENT COMPANY LIMITED)
and
秦皇岛市秦龙国际实业有限公司
(QINHUANGDAOSHI QINLONG INTERNATIONAL INDUSTRIAL CO. LTD.)

CLAIMANTS

v.

MONGOLIA

RESPONDENT

REQUEST FOR ARBITRATION
12 February 2010

FRESHFIELDS BRUCKHAUS DERINGER

Freshfields Bruckhaus Deringer
11th Floor, Two Exchange Square
Hong Kong SAR

Freshfields Bruckhaus Deringer LLP
2 rue Paul Cézanne, 75008 Paris
France

I. INTRODUCTION

1. 中国黑龙江国际经济技术合作公司 (China Heilongjiang International Economic & Technical Cooperative Corp., ***Heilongjiang***), 北京首钢矿业投资有限责任公司 (Beijing Shougang Mining Investment Company Limited, ***Beijing Shougang***) and 秦皇岛市秦龙国际实业有限公司 (Qinhuangdaoshi Qinlong International Industrial Co. Ltd., ***Qinlong***) (collectively, the ***Claimants***), all of which have been established according to the laws of the People's Republic of China (the ***PRC***), hereby file a Request for Arbitration against Mongolia, in accordance with the *Agreement between the Government of the Mongolian People's Republic and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments* signed on 26 August 1991 (the ***Treaty***),[1] and the *Foreign Investment Law of Mongolia* (the ***FIL***).[2]

2. The Treaty and the FIL provide protection to PRC investors for investments made in Mongolia. The Claimants are qualifying PRC investors, which have made qualifying investments in Mongolia, including through their direct interests in a Mongolian company, Tumurtei Huder LLC (***Tumurtei Ltd***). Tumurtei Ltd was the lawful holder of a mining licence issued on 28 January 1998 (the ***939A Licence***),[3] over an iron ore deposit located in Tumurtei, Khuder sub-province, Selenge province, in Mongolia (the ***Tumurtei mine***). The 939A Licence was, however, revoked by Mongolia in September 2006, in breach of Mongolia's obligations under the Treaty and the FIL, thus depriving the Claimants of their investment. In accordance with the requirements of Article 8 of the Treaty, the Claimants sent a notice of dispute to the Mongolian government (the ***Government***) on 26 December 2006.[4] No written response was received, and despite continuing efforts to resolve the matter through negotiations, as well as a further letter from Freshfields Bruckhaus Deringer dated 9

[1] The Treaty, **Exhibit CL-1**.

[2] The FIL, **Exhibit CL-2**.

[3] The 939A Licence, **Exhibit C-1**.

[4] Copy of letter dated 26 December 2006, **Exhibit C-2**.

October 2009,[5] no settlement has been achieved in the six-month cooling-off period imposed by the Treaty, and indeed, in the past three years.

II. THE PARTIES

1. The Claimants

3. The Claimants in this arbitration are:

(a) Heilongjiang, a state-owned legal entity established in accordance with the laws of the PRC, whose address is No. 258 Xianfeng Road, Daowai District, Harbin, Heilongjiang Province, People's Republic of China;

(b) Beijing Shougang, a state-owned legal entity established in accordance with the laws of the PRC, whose registered office is at 36th Langshancun, west end of Liuniangfu Street, ShiJingShan district, Beijing, PR China;

(c) Qinlong, a limited liability company established in accordance with the laws of the PRC, whose address is No. 95 Hebei Dajie, Haigang District, Qinhuangdaoshi Municipality, People's Republic of China.[6]

4. The Claimants are represented in this arbitration by:[7]

Peter Yuen
John Choong
Freshfields Bruckhaus Deringer
11th Floor, Two Exchange Square
Hong Kong
Tel: +852 2846 3400
Fax: +852 2810 6192
Email: peter.yuen@freshfields.com
john.choong@freshfields.com

[5] Letter from Freshfields Bruckhaus Deringer dated 9 October 2009, **Exhibit C-3**.

[6] The business licences of the Claimants are at **Exhibit C-4**.

[7] See Powers of Attorney at **Exhibit C-5**.

Peter J Turner
Marie Stoyanov
Freshfields Bruckhaus Deringer LLP
2 rue Paul Cézanne
75008 Paris
France
Tel: +33 1 44 56 44 56
Fax: +33 1 78 42 54 27
Email: peter.turner@freshfields.com
marie.stoyanov@freshfields.com

5. All correspondence relating to this arbitration should be addressed to the above-mentioned counsel.

2. The Respondent

6. Mongolia is represented by:

HE Mr Sukhbaatar Batbold
Prime Minister
Government of Mongolia
Government Palace
Ulaanbaatar -12
Mongolia

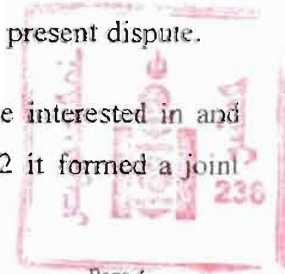
III. FACTUAL BACKGROUND

1. Investment in Tumurtei mine

7. Mongolia has vast reserves of iron ore. However, in the early and mid-1990s, there was little interest in obtaining governmental licences to develop such resources, given the depressed iron ore price of around USD20/tonne and the substantial capital investment required to develop the mines. Nevertheless, a Mongolian company, BLT LLC (***BLT***), saw the potential of investing in iron ore at such an early stage of Mongolia's development. After conducting feasibility studies, it applied for and was granted the licence for the Tumurtei mine on 21 June 1997.

8. Subsequently, a new Minerals Law (the ***Minerals Law 1997***) came into force. In January 1998, BLT was granted the 939A Licence pursuant to the new Law, with a validity period of 60 years. The 939A Licence is the subject of the present dispute.

9. After BLT had been granted the 939A Licence, Qinlong became interested in and contributed to the development of Tumurtei mine. In July 2002 it formed a joint



venture company with BLT, called Tumurtei Ltd, with Qinlong holding a 70% interest in Tumurtei Ltd.[8]

10. Two other PRC companies, Heilongjiang and Beijing Shougang, also joined as shareholders in Tumurtei Ltd, and the shareholding in Tumurtei Ltd became as follows:

    (a) Qinlong – 29%;

    (b) Beijing Shougang – 30%;

    (c) Heilongjiang – 11%; and

    (d) BLT – 30%.[9]

11. This is also the shareholding structure of Tumurtei Ltd today.

12. In March 2005, the 939A Licence was transferred from BLT to Tumurtei Ltd. This was approved by the Department of Geology and Mining Cadastre (***DGMC***) of the Mineral Resources and Petroleum Authority of Mongolia (***MRPAM***), and duly reflected on the licence itself.[10]

13. In the meantime, developmental activities for the mine were proceeding. Government approvals were obtained from government ministries, agencies and departments, as well as from the local provincial government in charge of land use.

14. In addition, the three PRC investors made various investments, including direct payments for expenditure related to the development of the mine, and procuring and transferring assets to Tumurtei Ltd. These investments were made in relation to preparatory works; pre-exploration (including geological) work; by way of contribution of mining ore equipment and road construction equipment; in the construction and improvement of roads leading to the mine; as well as in the development of the mine itself.

[8] Certificate of Foreign Incorporated Company, Exhibit C-6.

[9] Certificate of Foreign Incorporated Company, Exhibit C-7.

[10] Reflected as item number 10 in the First Appendix to the 939A Licence, Exhibit C-8.

15 As a result, by the beginning of 2006, Tumurtei Ltd was able to commence iron ore production. At that initial stage, its production line had an annual capacity of 1-2 million tonnes per year. By August 2006, Tumurtei Ltd had accumulated a net stockpile of about 500,000 tonnes of iron ore.

2. **Change in investment climate**

16. In the meantime, in the beginning of 2006, a new coalition government was formed, headed by the Mongolian People's Revolutionary Party. By that time, the price of iron ore had increased significantly, and there was increasing interest within some quarters of the Government in taking back the Tumurtei mine from Tumurtei Ltd.

17. By then, Tumurtei Ltd had also started exporting iron ore to the PRC. Shortly thereafter, the Government started investigations into these exports.

18. The investigations became more intrusive, and by May 2006, the Government had launched several investigations into different aspects of Tumurtei Ltd's mining activities. A number of these investigations were carried out by specially set up "working groups". As a result of these investigations, the Mongolian authorities ordered several suspensions of Tumurtei Ltd's mining rights.

19. Matters came to a head in August 2006. A final "working group" was formed (the ***Final Working Group***), pursuant to a direct instruction from the Prime Minister and from the Minister of Industry and Trade.

20. Then, on 17 August 2006, Tumurtei Ltd's executive director was summoned to a police station and arrested. He was jailed for about two weeks, purportedly on charges related to tax evasion.

21. After he was released from jail, Tumurtei Ltd's executive director arranged to meet with the Minister of Industry and Trade. He had heard rumours that the Government was planning to revoke the 939A Licence, and he wished to explain Tumurtei Ltd's position, and to obtain more details from the Minister. However, at the meeting, the Minister refused to listen to his explanations. Instead, the Minister said that a compromise was not possible, and that all levels of the Government were determined to take back the licence.

3. Revocation of 939A Licence

22. Shortly thereafter, on 8 September 2006, the 939A Licence was revoked. Formal notification of the revocation was provided by way of a letter dated 13 September 2006, from the DGMC (a department under the Ministry of Industry and Trade) to Tumurtei Ltd. The letter stated that because of supposedly serious violations of licence conditions, the 939A Licence had been revoked, based on instructions in a letter dated 30 August 2006 from the Ministry of Industry and Trade, and a decision of the chairman of the DGMC on 8 September 2006.

23. The above letters were not provided to Tumurtei Ltd at the time, and they were only obtained subsequently. The 30 August 2006 letter had been sent by the State Administration and Management Department of the Ministry of Industry and Trade to the DGMC, and set out the following purported breaches by Tumurtei Ltd, to try to justify the revocation of the 939A Licence:[11]

    (a) breach of Government resolution 160, made in 1990, which had supposedly granted a previous licence over the Tumurtei mine to a state-owned company;

    (b) failure to repay the state budget, in breach of Article 7 of the Law on Implementation of the Minerals Law 1997 (the ***Implementing Law 1997***);[12]

    (c) failure to prepare an environmental protection plan, contrary to Article 30.1 of the Minerals Law 1997;

    (d) conducting blasting works without any licences for blasting works, contrary to Article 15.10.4 of the Law of Mongolia on Licensing and Article 11 of the Law on Control of Explosives, Blasting Items and their Circulation; and

    (e) exporting non-processed iron ore to the PRC, contrary to the environmental impact assessment analysis prepared by Tumurtei Ltd which stated that processed iron ore would be produced, in violation of the Law on Environmental Impact Assessment.

24. None of these claims has merit, as will be briefly explained below.

[11] The 30 August 2006 letter, **Exhibit C-8**.

[12] The Implementing Law 1997, **Exhibit CL-3**

(i) Resolution 160/1990 is no longer applicable

25. According to what the Claimants later understood, this complaint was (a) that resolution 160 of 1990[13] granted a licence over the Tumurtei mine to Darkhan Metallurgical Plant (***Darkhan***), a state-owned company and (b) that it prevails over the 939A Licence. There is no basis for this complaint.

26. First, as a matter of construction, resolution 160 of 1990 does not purport to grant a licence over the Tumurtei mine to anyone.

27. Secondly, even if at the time, resolution 160 of 1990 had granted a licence over the Tumurtei mine to Darkhan, it has now lost its rights. Resolution 160 of 1990 was enacted in 1990. In 1994, a new Minerals Law was passed, and this was amended in 1997. As part of the 1997 amendments, the Implementing Law 1997 was issued in July 1997.[14] Article 1 of the Implementing Law 1997 provided that all mining licences issued before 1 July 1997 shall be re-registered within three months following the effective date of the Minerals Law 1997. Article 6 further provided that if a licence-holder did not apply for re-registration, the licence shall be cancelled and the licence area would be available for licensing to other applicants. Therefore, even if Darkhan had been granted a licence over the Tumurtei mine in 1990 (which is denied), it lost any such "licence", because it failed to re-register.

28. Thirdly, even if Darkhan retained a valid "licence" despite its failure to re-register, any such licence has been superseded by the 939A Licence. Resolution 160 of 1990 was enacted while Mongolia was still a communist state. Since then, a new Constitution and other new laws have been enacted. Mineral rights now fall within the purview of the Minerals Law. The 939A Licence was validly granted pursuant to the Minerals Law 1997, and in compliance with the new Constitution. Accordingly, even if conflicting rights were granted by resolution 160 of 1990 (which is denied), these have been superseded and are no longer valid.

13 Resolution 160 of 1990, Exhibit CL-4.

14 The Implementing Law 1997, Exhibit CL-3.

(ii) No delay in repaying the state budget

29. The second ground of revocation was an alleged failure by Tumurtei Ltd to repay the Mongolian state budget, in breach of Article 7 of the Implementing Law 1997.[15]

30. Leading up to the 1990s, Mongolia had incurred certain debts in carrying out survey works over prospective mines. To help repay these debts, Mongolia passed a law for such costs to be deemed attributable to licence-holders.

31. There was no basis for Mongolia to revoke the 939A Licence for non-payment of such costs. First, Tumurtei Ltd has never denied that monies were due. On the contrary, on 5 June 2006, an agreement was reached between Tumurtei Ltd and MRPAM,[16] for a five-year repayment plan (the ***Repayment Agreement***). At the time of the revocation, Tumurtei Ltd had paid all instalments that had fallen due.

32. Secondly, before the Repayment Agreement was entered into, it was unclear what sums were payable under the applicable laws. Tumurtei Ltd was able to begin payment only after a sum of USD667,522 was attributed to the Tumurtei mine.

33. Thirdly, even if Tumurtei Ltd was late in paying (which is denied), the Repayment Agreement clearly provides that the penalty for late payment is the payment of interest, not the revocation of Tumurtei Ltd's licence. Similarly, whereas Article 6 of the Implementing Law 1997 clearly states that failure to re-register or to pay licence fees will result in revocation of the licence, no similar penalty is stipulated for delay in repaying the state budget pursuant to Article 7.

(iii) Tumurtei Ltd prepared and submitted environmental plans

34. The third ground for revoking the 939A Licence was a purported failure by Tumurtei Ltd to submit an environmental protection plan in accordance with Article 30.1 of the Minerals Law 1997.[17]

35. This is incorrect, and an environmental protection plan was submitted. In any event, even if Article 30.1 had been breached (which is denied), Articles 26 and 52 of the

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15 The Implementing Law 1997, **Exhibit CL-3**.

16 The Repayment Agreement, **Exhibit C-9**.

17 The Minerals Law 1997, **Exhibit CL-5**.

Minerals Law 1997[18] provide that the sanction for a breach is the imposition of a penalty, not the revocation of Tumurtei Ltd's licence.

(iv) Proper licences were obtained for blasting works

36. The fourth ground was an alleged failure by Tumurtei Ltd to obtain requisite licences prior to conducting blasting (explosives) works. This ground even as set out in the 30 August 2006 letter is unspecified, and no proper details were provided on what precise licences were alleged not to have been obtained by Tumurtei Ltd.

37. In any event, blasting licences have been obtained by Tumurtei Ltd and even if not all licences had been obtained, this would not justify the revocation of Tumurtei Ltd's licence.

(v) No violation of the Law on Environmental Impact Assessments

38. The fifth and final ground was a purported violation of the Law on Environmental Impact Assessments 1998,[19] allegedly due to Tumurtei Ltd's exporting of non-processed iron ore to the PRC.

39. The basis for this ground is vague. However, it appears that Mongolia was alleging that Tumurtei Ltd was exporting non-processed iron ore to the PRC, instead of processed iron ore, contrary to the environmental impact assessment analysis prepared by Tumurtei Ltd.

40. This ground, too, is without foundation. The proposed process in the environmental impact assessment analysis involved processing the iron ore by crushing and physical separation using magnetic means; this was duly carried out before the iron ore was exported.

41. In addition, in relation to all the above alleged violations, under Article 56 of the Minerals Law 2006,[20] within five business days following a determination that grounds for licence revocation exist, the State administrative agency is obliged to notify the licence-holder, specifically indicating the grounds for the revocation of the licence. Tumurtei Ltd was not given the requisite notice, in breach of that provision.

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18 The Minerals Law 1997, **Exhibit CL-5**.

19 The Law on Environmental Impact Assessments 1998, **Exhibit CL-6**.

20 The Minerals Law 2006, **Exhibit CL-7**.

If notice had been given, Tumurtei Ltd would have been able to exercise its right under that provision of the Minerals Law to make submissions (including provision of documentary evidence) to the DGMC to review its determination that grounds existed for the revocation of its licence. The DGMC's failure to comply with this provision invalidates and nullifies its decision.

42. Furthermore, even if the above violations occurred (which is denied), the penalty imposed was contrary to Mongolian law, and disproportionate to the minor nature of the alleged breaches.

4. Transfer of licence to Darkhan

43. As noted above, one of the grounds for the revocation of the 939A Licence was that resolution 160 of 1990 had purportedly granted the Tumurtei mine to Darkhan. Given Darkhan's status as a state-owned company, its interest may help explain Mongolia's motive in unlawfully revoking the 939A Licence.

44. By 2005, the Claimants had become aware of Darkhan's interest in the Tumurtei mine. After the revocation, additional details were uncovered. It appears that both Darkhan and a number of senior government officials within Mongolia (including officials from Darkhan's parent, the State Property Agency of Mongolia) had been lobbying the Ministry of Industry and Trade for the 939A Licence to be revoked and granted to Darkhan. This occurred, even though it was improper for one government department to be putting pressure on another department to revoke a licence that had already been granted to a private company, in order to re-grant the licence to a state-owned company. Their plan eventually succeeded and, following revocation of the 939A Licence, the Tumurtei mine licence was indeed granted to Darkhan in June 2008.

5. Court proceedings and investigations

45. In September 2006, BLT and Tumurtei Ltd filed a claim with the Capital Administrative Court in Ulaanbaatar, seeking to cancel the revocation, on the basis that the plaintiffs had complied with Mongolian law and that the decision had been made with no prior consultation. Their challenge failed, and appeals all the way up to

the Supreme Court were also dismissed.[21] The PRC investors were not involved in these proceedings, but were hoping to resolve the dispute through negotiations.

46. A number of proceedings were also brought against Tumurtei Ltd's then-executive director. These included the tax investigation referred to above in which he was thrown in jail (charges were eventually dropped);[22] separate criminal investigations alleging a conspiracy, simply because the executive director had in the mid-1990s worked in Darkhan, and one of his relatives had been a director of Darkhan (even though there was little overlap in their time at Darkhan); and a further imprisonment of Tumurtei Ltd's former executive director in June 2007. He became increasingly concerned about his treatment and eventually had no choice but to leave the jurisdiction.

IV. MONGOLIA'S BREACHES OF ITS OBLIGATIONS

1. Mongolia is in breach of its obligation not to unlawfully expropriate the Claimants' investment

47. Article 4 of the Treaty provides in relevant parts that:

> 1. Investments made by investors of one Contracting State shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting State, except for the need of social and public interests. The expropriation shall be carried out on a non-discriminatory basis in accordance with legal procedures and against compensation.
>
> 2. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.[23]

48. Article 8 of the FIL similarly provides as follows:

> *Article 8. Legal guarantees for foreign investment*
>
> 1. Foreign investment within the territory of Mongolia shall enjoy the legal protection guaranteed by the Constitution, this law and other legislation which is consistent with those laws and as guaranteed by the international treaties to which Mongolia is a party.

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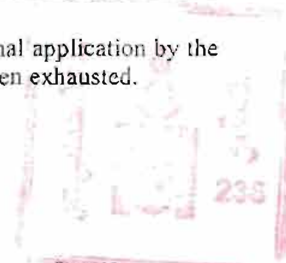
[21] On 21 August 2007, the Chief Justice of the Supreme Court of Mongolia rejected a final application by the plaintiffs, meaning that all avenues of appeal under the Mongolian court system had been exhausted.

[22] See para 20 above.

[23] The Treaty, Exhibit CL-1, Article 4(1) and 4(2)



> 2. Foreign investment within the territory of Mongolia shall not be unlawfully expropriated.
>
> 3. Investments of foreign investors may be expropriated only for public purposes or interests and only in accordance with due process of law on a non-discriminatory basis and on payment of full compensation.
>
> 4. Unless provided otherwise in any international treaties to which Mongolia is a party, the amount of compensation shall be determined by the value of the expropriated assets at the time of expropriation or public notice of expropriation. Such compensation shall be paid without delay.
>
> ....[24]

49. As a result of the measures set out above, and in particular, the taking of the 939A Licence, the Claimants have been unlawfully deprived of their investment, in breach of Article 4 of the Treaty, and Article 8 of the FIL.

50. Indeed, the revocation of the 939A Licence was not made for social or public interests. In addition, the measures taken were discriminatory, not carried out in accordance with legal procedures or due process of law, and no compensation (even partial) has been paid.

2. Mongolia has breached its obligation to accord fair and equitable treatment, and protection, to the Claimants' investment

51. Mongolia's actions as set out above also constitute a breach of its obligation under Article 3 of the Treaty, to accord the investment fair and equitable treatment, and protection.

52. Article 3 provides (relevantly), that,

> *Article 3*
>
> 1. Investments, returns and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State.
>
> ....[25]

[24] The FIL, Exhibit CL-2, Article 8; explanatory notes omitted.

[25] The Treaty, Exhibit CL-1, Article 3.

3. Breach of other provisions of FIL

53 Article 10.1 of the FIL sets out a number of additional rights and obligations of foreign investors Mongolia's actions as set out above constitute breaches of these rights.

Article 10. Rights and obligations of foreign investors

1. Foreign investors shall enjoy the following rights:

1) to possess, use, and dispose of their property including the repatriation of investments which contributed to the equity of a business entity with foreign investment;

2) to manage or to participate in managing a business entity with foreign investment;

3) to transfer their rights and obligations to other persons in accordance with the law;

4) remit the following income, profit and payments to abroad without any barriers:

(a) allotted stockholders income and share dividends;

(b) allotted income after property and securities' sale, transfer of property right to other party, completion of an investment agreement and liquidation of an entity;

(c) principal and interest of debt or other identical payments;

(d) compensation payment for confiscated property;

(e) other income gained under the legislation of Mongolia.

5) any other rights conferred by law.[26]

4. Most favoured nation clause

54. Both the Treaty and the FIL contain most favoured nation clauses,[27] and the Claimants reserve the right to invoke them to rely on more favourable provisions elsewhere.

[26] The FIL, **Exhibit CL-2**, Article 10.1; explanatory notes omitted.

[27] The Treaty, **Exhibit CL-1**, Article 3(2) and 9; the FIL, **Exhibit CL-2**, Article 9.

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V. THE CLAIMANTS' LOSS

55. The Claimants claim their loss of profits from their investment in Tumurtei Ltd which will be quantified in a later submission, and further or alternatively, their lost investment of about USD60 million.

VI. JURISDICTION

1. The Claimants are qualifying investors

56. The Treaty defines "investors" to mean,

> In respect of the People's Republic of China:
>
> ...
>
> (b) economic entities established in accordance with the laws of the People's Republic of China and domiciled in the territory of the People's Republic of China.[28]

57. The Claimants are economic entities falling within the terms of the above definition,[29] and therefore qualify as "investors" under the Treaty.

58. Similarly, the FIL defines a "foreign investor" to mean,

> a foreign legal person or individual (a foreign citizen or stateless person not residing permanently in Mongolia or a citizen of Mongolia permanently residing abroad) who invests in Mongolia.[30]

59. The Claimants are foreign legal persons within the terms of the above definition.

2. The Claimants have made a qualifying investment

60. Article 1(1) of the Treaty sets out a broad definition of "investments" as follows:

> For the purpose of this Agreement,
>
> 1. The term "investments" means every kind of asset invested by investors of one Contracting State in accordance with the laws and regulations of the other Contracting State in the territory of the Latter, including mainly:

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[28] The Treaty, **Exhibit CL-1**, Article 1(2).

[29] See Section II above.

[30] The FIL, **Exhibit CL-2**, Article 3.2.

(a) movable and immovable property and other property rights such as mortgages, pledges;

(b) shares, stocks and debentures of companies or interest in the property of such companies;

(c) a claim to money or to any performance having an economic value;

(d) copyrights, industrial property, know-how and technological process;

(e) concessions conferred by law, including concessions to search for or exploit natural resources.[31]

61. As explained in paragraph 10 above, the Claimants have the following shareholding interest in Tumurtei Ltd:

(a) Heilongjiang has an 11% direct interest;

(b) Beijing Shougang has a 30% direct interest; and

(c) Qinlong has a 29% direct interest.

62. In addition, as explained at paragraph 14 above, the Claimants made various investments in the Tumurtei mine.

63. Their investments therefore qualify as covered "investments" protected by the terms of the Treaty.

64. In the case of the FIL, "foreign investment" is defined to mean,

> every kind of tangible and intangible property which is invested in Mongolia by a foreign investor for the purpose of establishing a business entity with foreign investment within the territory of Mongolia or for the purpose of jointly operating with an existing business entity of Mongolia.[32]

65. As before, the Claimants' investment, including their investments and shares in Tumurtei Ltd, fall within the terms of the above definition.

3. The Arbitral Tribunal has jurisdiction over the dispute

66. The Arbitral Tribunal has jurisdiction over the Claimants' claims under both the Treaty and Mongolia's FIL.

[31] The Treaty, **Exhibit CL-1**, Article 1(1).

[32] The FIL, **Exhibit CL-2**, Article 3.1.

67. As far as the Treaty is concerned, its dispute resolution provisions are contained in Article 8, which provides, in relevant part, as follows:

> 1. Any dispute between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> 2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.
>
> 3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the (sic) procedure specified in the paragraph 2 of this Article.[33]

68. Article 8 on its true interpretation is not limited to an assessment of the compensation due for an expropriation but gives the Arbitral Tribunal jurisdiction to determine the existence of an expropriation under Article 4 of the Treaty and its lawfulness as well as any compensation due.

69. Any other interpretation would render the standard of protection under the Treaty purely formal and would thus defeat the purpose of the Treaty, namely to promote investment. Indeed, in order to assess the amount of compensation due, the Arbitral Tribunal has to have jurisdiction over the predicate on which its assessment is based, *i.e.* the existence and lawfulness of the expropriation itself.

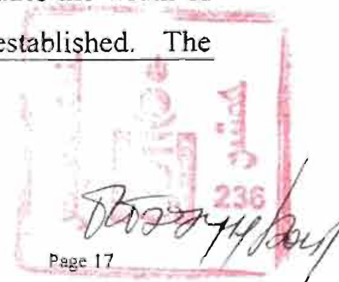
70. So far as the Claimants' claims for breach of the protections given under Article 3(1) of the Treaty are concerned, the Arbitral Tribunal has jurisdiction by virtue of Article 3(2), which provides as follows:

> The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments, returns and activities associated with such investments of investors of a third State.[34]

71. Article 3(2) guarantees Chinese investors a treatment no less favourable than that accorded by Mongolia to investors from third states. That this includes the width of the dispute resolution provisions in the basic treaty is now well established. The

[33] The Treaty, **Exhibit CL-1**, Article 8(1) to 8(3).

[34] The Treaty, **Exhibit CL-1**, Article 3(2).



Claimants are thus able to rely on the more favourable dispute resolution provisions in other treaties entered into by Mongolia. The Claimants point, by way of example, to the dispute resolution clause in the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Mongolian People's Republic for the Promotion and Protection of Investments (the ***Mongolia-UK BIT***), signed on 4 October 1991, in this regard, which provides:

> (1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of six months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.
>
> (2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
>
> (a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 in the event that the Mongolian People's Republic becomes a party to this Convention, and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or
>
> (b) an international arbitration or *ad hoc* arbitral tribunal to be appointed by special agreement or establishment under the Arbitration Rules of the United Nations Commission on International Trade Law.
>
> If after a period of six months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.
>
> (3) Nothing in this Article shall be construed to prevent the parties to the dispute from agreeing upon any other form of arbitration or procedure for settlement of their disputes which they consider appropriate.[35]

72. As any disputes relating to an investment can be submitted to international arbitration under the Mongolia-UK BIT, the Arbitral Tribunal thus has jurisdiction over the Claimants' claims under Article 3(1) of the Treaty.

[35] The Mongolia-UK BIT, Exhibit CL-8, Article 8 (footnotes omitted).

73. Furthermore, Article 9 of the Treaty allows the Claimants to rely on more favourable treatment given to investors by Mongolian laws and regulations. Article 9 provides as follows:

> If the treatment to be accorded by one Contracting State in accordance with its laws and regulations to investments or activities associated with such investments of investors of the other Contracting State is more favorable than the treatment provided for in this Agreement, the more favorable treatment shall be applicable.[36]

74. Mongolia's FIL, by its Article 25, allows investors with disputes with the State arising out of the protections given under the Law to bring claims either in the Mongolian courts or as "provided otherwise by international treaties to which Mongolia is a party ...".[37] As already set out above, Mongolia has entered into investment-protection treaties that provide for a full right of arbitration for any disputes arising from an investment. This right is not limited to investors from the state party to the treaty concerned.

75. The Claimants are thus entitled to rely on the wide dispute-resolution provisions of the Mongolia-UK BIT under Article 9 as well as Article 3(2).

76. Article 25 of the FIL also, of course, gives the Claimants the right to have their claims under the Law referred to international arbitration.

VII. CONSTITUTION OF THE ARBITRAL TRIBUNAL

77. Pursuant to Article 8(4) of the Treaty:

> 4. Such an arbitral tribunal shall be constituted for each individual case in the following way: each party to the dispute shall appoint an arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two Contracting States as Chairman. The first two arbitrators shall be appointed within two months of the written notice for arbitration by either party to the dispute to the other, and the Chairman be selected within four months. If within the period specified above, the tribunal has not been constituted, either party to the dispute may invite Secretary General of the International Center (sic) for Settlement of Investment Disputes to make the necessary appointments.[38]

[36] The Treaty, **Exhibit CL-1**, Article 9.

[37] The FIL, **Exhibit CL-2**, Article 25.

[38] The Treaty, **Exhibit CL-1**, Article 8(4).

78. In accordance therewith, the Claimants hereby appoint:

Dr Yas Banifatemi
Shearman & Sterling LLP
114 avenue des Champs Elysées
75008 Paris
Tel: +33 1 53 89 70 00
Fax: +33 1 53 89 70 70
Email: ybanifatemi@shearman.com,

as their party-appointed arbitrator.

79. To the best of the Claimants' knowledge and belief, Dr Banifatemi is impartial and independent of the parties to the dispute.

80. The Claimants further invite the Respondent to appoint its party-appointed arbitrator within a maximum of two months of this Request for Arbitration.

VIII. LAW APPLICABLE TO THE MERITS

81. Article 8(7) of the Treaty provides as follows:

> The tribunal shall adjudicate in accordance with the law of the Contracting State to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognized principle (sic) of international law accepted by both Contracting States.[39]

82. It is the Claimants' submission that although Mongolian law has a role to play in the adjudication of the Dispute, the Claimants' claims for breaches of the Treaty shall be determined in accordance with the Treaty itself and principles of customary international law. Moreover, in case of conflict, the latter two shall prevail over Mongolian law. Finally, any lacuna in Mongolian law shall be remedied by resorting to the Treaty and principles of customary international law.

IX. PROCEDURE

83. Article 8(5) of the Treaty provides:

3

[39] The Treaty, **Exhibit CL-1**, Article 8(7).

> The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Center (sic) for Settlement of Investment Disputes.[40]

84. Given the importance of the Dispute, the Claimants suggest that the arbitration be administered by either the International Centre for Settlement of Investment Disputes (***ICSID***) in accordance with the ICSID Arbitration (Additional Facility) Rules, or by the Permanent Court of Arbitration (***PCA***) in accordance with the United Nations Commission on International Trade Law Arbitration Rules. Both alternatives will further allow the parties and the Arbitral Tribunal to avoid any impression of impropriety as, instead of having each party paying the fees of its party-appointed arbitrator directly (as provided for under Article 8(8) of the Treaty), payments will be made through ICSID or the PCA. The Claimants are content to let the Arbitral Tribunal decide which of the two alternatives it prefers.

85. In the absence of any provision determining the seat of the arbitration, the Claimants submit that such a decision is to be left to the parties to the dispute and, failing agreement between the parties by the time the Arbitral Tribunal is constituted, the Tribunal itself.

86. In view of the location of the parties to the Dispute, and hence of the evidence (whether documentary or testimonial), the Claimants suggest that the seat of the arbitration be Singapore.

X. CLAIMANTS' REQUEST FOR RELIEF

87. The Claimants respectfully request the Arbitral Tribunal to:

    (a) Find that Mongolia is in breach of its obligations under the Treaty and the FIL by having unlawfully expropriated the Claimants' investment, having failed to accord them fair and equitable treatment and having failed to protect them;

    As a consequence,

    (b) Order Mongolia to compensate the Claimants for their losses as set out in paragraph 55 above, through the payment of damages; or

40 The Treaty, **Exhibit CL-1**, Article 8(5).

In the alternative,

(c) Order the restitution by Mongolia of the 939A Licence to Tumurtei Ltd, as well as damages in an amount to be later determined;

In any event,

(d) Order Mongolia to pay interest to the Claimants on any damages awarded, at such rates and for such periods as to be determined later in these proceedings; and

(e) Order that Mongolia pay all of the costs and expenses incurred by the Claimants in relation to these proceedings, including the fees and expenses of the members of the Arbitral Tribunal, the administrative fees of the arbitral institution, the fees and expenses of any experts appointed by the Arbitral Tribunal and the Claimants, the fees and expenses of the Claimants' legal representation, the internal costs expended by the Claimants, and interest, on a full indemnity basis.

88. The Claimants respectfully reserve the right to amend and/or supplement their claim, including this request for relief, as they may consider necessary or appropriate.

Respectfully submitted on this 12th day of February 2010.

For and on behalf of the Claimants
Counsel for the Claimants

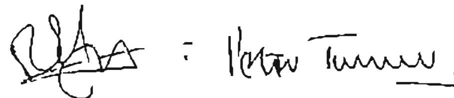


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EXHIBIT C

CHINA HEILONGJIANG INTERNATIONAL ECONOMIC &

TECHNICAL COOPERATIVE CORP., BEIJING SHOUGANG MINING

INVESTMENT COMPANY LIMITED, AND QINHUANGDAOSHI QINLONG

INTERNATIONAL INDUSTRIAL CO. LTD.

v.

MONGOLIA

PROCEDURAL ORDER NO. 1

2 November 2010

Procedural Order No. 1

WHEREAS, by their Request for Arbitration dated 12 February 2010, Claimants China Heilong International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Limited, and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. initiated this proceeding against Respondent Mongolia, asserting jurisdiction on the basis of the Agreement between the Government of the Mongolian People's Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments dated 26 August 1991 (the "Treaty"), with reference to the Foreign Investment Law of Mongolia and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Mongolian People's Republic for the Promotion and Protection of Investments dated 4 October 1991;

WHEREAS, by that Request, Claimants appointed Dr. Yas Banifatemi as Arbitrator in this proceeding;

WHEREAS, by letter dated 19 May 2010, Respondent appointed Mark A. Clodfelter, Esq., as Arbitrator in this proceeding;

WHEREAS, by letter dated 19 July 2010, Claimants requested that Meg Kinnear, Secretary-General of the International Centre for the Settlement of Investment Disputes, acting pursuant to Article 8(4) of the Treaty, appoint the President of the Tribunal;

WHEREAS, by letter dated 10 August 2010, Ms. Kinnear appointed Donald Francis Donovan, Esq., as President of the Tribunal;

WHEREAS, on 22 September 2010, the Tribunal circulated an agenda for a procedural meeting to be held in New York on 1 October 2010, and on 28 September 2010, addressed certain points on that agenda, and on 30 September 2010, received a joint communication from the parties addressing additional points on that agenda;

WHEREAS, on 1 October 2010, as scheduled, the Tribunal conducted a procedural meeting with the parties in the offices of Debevoise & Plimpton LLP in New York;

NOW, THEREFORE, the Tribunal issues this Procedural Order No. 1 reflecting the agreements reached during the procedural meeting and determining the issues left open as of the end of that meeting.

A. Constitution of the Tribunal

1. The parties confirmed that the Tribunal had been properly constituted under Article 8(4) of the Treaty.

B. Declarations by Tribunal Members

2. Each Member of the Tribunal stated that he or she was independent and impartial, and each advised that there were no circumstances of which he or she was aware that might raise justifiable doubts about his or her independence and impartiality.

3. Contact information for the Members of the Tribunal is attached to this Order as Appendix A.

C. Representatives of the Parties

4. Claimants are represented by Peter Turner, Marie Stoyanov, Francisco Abriani, and Ben Love of Freshfields Bruckhaus Deringer LLP, in Paris, and Peter Pokwong Yuen and John Choog of Freshfields Bruckhaus Deringer LLP, in Hong Kong. Claimants are also represented by Professor James Crawford of The Lauterpacht Centre for International Law, Cambridge University.

5. Respondent is represented by Michael D. Nolan, Frédéric G. Sourgens, and Edward Baldwin, of Milbank, Tweed, Hadley & McCloy LLP, in Washington D.C.; T. Altangere, Ministry of Justice and Home Affairs, Mongolia; and Gankhuyag Sodnom, Deputy Permanent Representative of Mongolia to the United Nations.

6. Contact information for the representatives of the parties is attached to this Order as Appendix B.

D. Administrative assistance of the PCA

7. With the parties' consent, the Tribunal appoints the International Bureau of the PCA as administrator of the proceeding. The Tribunal expects that in light of the appointment of a Secretary, the PCA's administrative assistance will consist only of the handling of the financial aspects of the proceeding and, possibly, assistance with hearings.

8. The PCA shall be sent electronic copies of all filings and correspondence by the party making the filing or sending the correspondence, and it will handle deposits in respect of advances on costs and disbursements. The Tribunal requests that, on behalf of both parties, Claimants file with the PCA their Request for Arbitration and the letters appointing Mr. Clodfelter and Mr. Donovan, respectively.

9. The PCA shall, if requested, make its hearing and meeting rooms in the Peace Palace in The Hague and elsewhere (Costa Rica, Singapore) available to the parties and the Tribunal at no charge. Costs of catering, court reporting, or other technical support associated with hearings or meetings at the Peace Palace or elsewhere shall be borne by the parties in equal shares.

10. Upon request, PCA staff shall carry out administrative tasks on behalf of the Tribunal, and shall bill their time in accordance with the PCA Schedule of Fees.

11. By Monday, 22 November 2010, the parties should advise whether they agree to (a) the listing of this case on the docket of the PCA and (b) the publication of decisions and awards in the case, either when rendered or upon conclusion.

12. The contact details of the PCA are set out on Appendix C to this Order.

E. Compensation of the Arbitrators

13. By its email dated 28 September 2010, the Tribunal proposed that its Members be compensated at a rate of US $700/hour for services as arbitrator rendered during the proceeding. By their joint communication of 30 September 2010, the parties advised that they "consider[ed] that given the reference to the ICSID arbitration rules in the Treaty, the arbitrators should be remunerated on the ICSID scale."

14. At the 1 October 2010 procedural meeting, the Tribunal advised the parties that it had proposed the rate set forth in the 28 September communication on the basis of consultation with Brooks Daly, Deputy Secretary-General of the Permanent Court of Arbitration, and Meg Kinnear, Secretary-General of the International Centre for the Settlement of Investment Disputes. Specifically, the Tribunal noted that Mr. Daly had advised that standard rates in ad hoc investment treaty arbitrations administered by the PCA ranged between €500 to €600 (excluding higher rates in one or two other proceedings that he did not consider representative), and that Ms. Kinnear had advised that the range of compensation for arbitrators in non-Convention arbitrations administered by ICSID, including those under the Additional Facility, ranged from US$500 to US$900. Accordingly, the Tribunal advised, its Members believed it appropriate to set compensation at a point in the middle of those ranges.

15. By its Article 8(5), the Treaty provides that "[t]he tribunal shall determine its own procedure." "However," Article 8(5) continues, "the Tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Centre for Settlement of Investment Disputes."

16. The Tribunal notes that by the terms of Article 8(5), it "may" take those Rules as "guidance." Further, as it suggested at the hearing, the Tribunal notes that the standards for compensation of Tribunal members in proceedings governed by the

ICSID Convention is found not in the Rules, but in the ICSID Administrative and Financial Regulations.

17. The Tribunal asked the parties to state their respective positions, in light of the language of Article 8(5), as to whether (a) the Tribunal had final authority to set its own compensation, or (b) the Tribunal would be bound by an agreement of the parties on that point. Claimants advised that, in their view, the Tribunal and the parties needed to come to an agreement as to compensation, failing which the Tribunal would have no obligation to serve. Respondent advised that, in its view, compensation was a component of procedure, and therefore the language of Article 8(5) conferred final authority on the Tribunal to set its own compensation. In turn, Claimants advised that in light of Respondent's position, they would consent to any compensation the Tribunal determined.

18 The Tribunal also asked whether the parties would consent to a request by the Tribunal that the PCA, whose administrative services it has been determined the Tribunal would employ, set the Tribunal's compensation, if the Tribunal determined to proceed in that manner. The parties advised that they would consent to that course.

19. In sum, Respondent acknowledges the Tribunal's authority to set its compensation, and in light of Respondent's position, Claimants consent to such compensation as the Tribunal may set. At the same time, the parties have advised that they would consent to a request by the Tribunal that the PCA set its Members' compensation.

20. In these circumstances, by a letter sent to the PCA simultaneously with the issuance of this Order, the Tribunal requests that the PCA recommend a rate at which the Tribunal should be compensated, which rate the Tribunal will adopt in setting its Members' compensation.

F. Appointment of Secretary

21. The parties concurred in the appointment of a Secretary by the Tribunal, who will be compensated at the rate of US$275/hour.

22. With the parties' consent, the Tribunal appoints Peter Kim, Esq., of Debevoise & Plimpton LLP, in New York, as its Secretary.

G. Advances on costs and payment of invoices

23. With the parties' consent, the Tribunal orders that by 30 November 2010, an advance on costs of US $40,000 each shall be deposited to the PCA account in accord with the instructions set out in Appendix C to this Order.

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24. The PCA will review the adequacy of the deposit from time to time and, at the request of the Tribunal, may invite the parties to make supplementary deposits in respect of advances on costs.

25. All payments to the Tribunal shall be made from the deposit, and the Members of the Tribunal shall submit periodic invoices in respect of their fees and expenses in no less than quarterly intervals. Fees and expenses of the PCA shall be paid in the same manner as the Tribunal's fees and expenses.

26. The PCA does not charge a fee for the holding of the deposit, but any transfer fees or other bank charges will be charged to the account. No interest will be paid on the deposit.

H. Seat of arbitration

27. Article 8 of the Treaty does not specify the juridical seat of the arbitration, and the parties agree that the Tribunal has authority to designate the seat. The Tribunal discussed the possible seats with the parties, and all parties expressed their understanding that judicial proceedings relating to the award could be filed in the seat. Claimants expressed a preference for Stockholm or Geneva as the seat, but indicated that they would consent to New York; Respondent expressed a preference for Singapore, but also indicated that it would consent to New York.

28. In these circumstances, the Tribunal designates New York, New York, U.S.A., as the juridical seat of the arbitration.

29. The Tribunal notes the parties' mutual expectation that Singapore will be the most efficient venue to hold evidentiary hearings, but it makes no final order on that point at this time.

I. Language of arbitration

30. The parties agree that the language of the arbitration shall be English.

J. Transcription of hearing

31. The parties agree that the hearing and any other meetings with the Tribunal shall be transcribed.

K. Communications

32. All communications with the Tribunal or other parties shall be made at the addresses indicated on Appendices A and B unless any party or Member of the Tribunal advises a change of address.

33. Prehearing submissions should be served as indicated in Section N below. Any other substantial submissions in support of or in opposition to an application for relief should be served in like manner. All routine notifications and communications should be served by email, and no copy need follow by facsimile, regular mail, or courier.

L. Delegation of power to fix time limits

34. The parties agree that the President, acting alone, shall have the power to grant short extensions to time limits, subject to such consultation with the other Members of the Tribunal as he deems appropriate.

M. Procedural rules

35. As noted, Article 8 of the Treaty authorizes the Tribunal to determine its own procedure, but at the same time provides that "the Tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Center for Settlement of Investment Disputes." Claimant has proposed that, to ensure certainty in the procedure, the Tribunal adopt the revised UNCITRAL Rules to govern the proceedings.

36. Especially given the statement in the Treaty that the Tribunal may, if it thinks it appropriate, refer to the ICSID Rules as guidance on questions of procedure, the Tribunal sees no reason at this time to adopt rules to govern the proceedings beyond the directions in this Order. It expects that should it be called upon to rule on any procedural issue, the parties will bring to its attention such guidance from the ICSID Rules, the UNCITRAL Rules, or other authorities as they deem appropriate.

37. This ruling is without prejudice to an application that, as to a specific issue or set of issues, the Tribunal specify in advance the rules or procedures that would govern that issue.

N. Prehearing submissions

38. The parties have agreed that the proceedings shall be divided into two phases, the first covering jurisdiction and liability, the second, if necessary, quantum.

39. The parties agreed at the hearing that Claimants' prehearing submissions shall be due four and a half months after the date of the hearing and Respondent's six months after that. Taking account of the overall schedule, the Tribunal fixes Tuesday, 1 March 2011 as the due date for Claimants and Thursday, 1 September 2011 as the due date for Respondent.

40. Claimants agreed to four and a half months after the date for final document production for their reply, and Respondent requested six months for its rejoinder.

Taking account of the schedule for document production we set below, and of the utility of completing the exchange of prehearing submissions by November 2012, we set the due date for Claimants' reply submissions at Friday, 8 June 2012 and for Respondents' rejoinder submissions at Friday, 16 November 2012. The parties should treat these deadlines as firm, with brief extensions that would not compromise the remaining schedule to be available by consent or for good cause shown.

41. Each round of prehearing submissions shall consist of a memorial and any witness statements, expert reports, exhibits, and authorities submitted in support. Subject to a request to allow a witness or expert briefly to supplement or summarize his or her testimony, the witness statements and expert reports will serve as the direct testimony of each witness and expert. The paragraphs of all memorials, witness statements, and expert reports shall be consecutively numbered.

42. Any witness statement subscribed by the witness in a language other than English shall be submitted in the original language with a translation into English.

43. There should be a single numbering sequence for all exhibits, whether submitted as attachments to a witness statement or independently. Respondent's exhibits should start at a number sufficiently high to ensure no overlap with Claimants'. A document already submitted and designated by one party should be referred to by that number by another party. Any document not in English shall be accompanied by a translation into English. An index to a party's exhibits, cumulative after the first submissions, with the exhibit number, date of the document, and brief description, should be submitted with each round of submissions.

44. The parties are encouraged to submit only core exhibits in hard copy, with a complete set of exhibits provided by CD. No inference shall be drawn, or argument heard, from a party's decision to include or not include a specific document in the core set initially submitted in hard copy.

O. Document production

45. Taking account of the parties' respective proposals set forth in their 30 September 2010 submission and the further discussion at the procedural meeting, the Tribunal directs that any requests for the disclosure of documents be made in the form of a Redfern schedule by Monday, 3 October 2011 and responses to any such requests by Wednesday, 30 November 2011.

46. At a time during the week of 5 December 2011 to be determined, the Tribunal will convene a conference call to address any issues that the Parties cannot resolve.

47. Uncontested disclosure of documents should commence as soon as practicable, proceed on a rolling basis, and be completed by Thursday, 22 December 2011.

48. By the same date, the Tribunal will rule on any contested issues.

49. Final production of documents should be completed by Friday, 3 February 2012.

50. In arguing its position on any dispute relating to document production, a party may refer to the IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010) to the extent the party believes appropriate, but those Rules will not bind the Tribunal.

51. The Tribunal considers that the general practice in international arbitration is that documents sought by the adverse party may be produced in the language in which they are found, and it therefore makes no order as to translation of documents at this time, except to state its understanding that any translations of responsive documents already prepared at the time of production in the ordinary course of business should also be considered responsive and be produced. Recognizing the potential burden of translation on both sides, however, the Tribunal urges the parties to discuss a protocol on translation, and the ruling in this order is without prejudice to any application that may be made once the requests for disclosure have been served. Any such application should be made by the date on which the responses to requests for disclosure are due.

P. Objections to exhibits or translations

52. On or before Monday, 1 October 2012, Claimants shall raise any objections as to the authenticity or completeness of any exhibit submitted with Respondent's initial prehearing submissions, and Respondent as to the authenticity or completeness of any exhibit submitted with Claimants' initial and reply prehearing submissions. On or before Friday, 21 December 2012, Claimants will raise any such objections to any exhibits submitted with Respondent's rejoinder submissions. Relevance objections shall be reserved for the hearing, but in making any such objection, the parties should keep firmly in mind the Tribunal's authority to assess weight.

53. By the same dates, the parties shall raise any objections to the translation of witness statements or exhibits, without prejudice to proposals of an alternative translation, for good cause shown, at a later time.

Q. Witnesses

54. On or before Wednesday, 5 December 2012, each side shall identify which of the other side's witnesses and experts they wish to be made available for cross-examination at the hearing. The sponsoring side shall be responsible for securing attendance of the witness.

55. On or before the same date, the parties shall advise of any witnesses who will testify in a language other than English and provide the name and credentials of the interpreter. The nonsponsoring party shall have the right to have a different interpreter present at the hearing.

R. Prehearing conference

56. At a time during the week of 10 December 2012 to be determined, the Tribunal shall convene a prehearing conference by telephone to settle all hearing procedures and logistics, including the time needed for the hearing, any request for opening arguments, the sequence and expected length of testimony of each witness to be called, the procedure for interpretation if any, sequestering of witnesses, the most efficient means of presenting exhibits, the use and exchange of demonstratives, and joint arrangements for a reporting service with LiveNote capability. The Tribunal requests the parties to confer on all such issues prior to that conference.

S. Hearing

57. The parties shall reserve the weeks of 14 and 21 January 2013 for a hearing on jurisdiction and liability. The location and precise schedule will be determined later.

58. A summary of the procedural schedule, including prehearing submissions, disclosure of documents, and the hearing, is attached to this Order as Appendix D.

T. Posthearing proceedings

59. Directions as to posthearing proceedings are reserved for the conclusion of the hearing.

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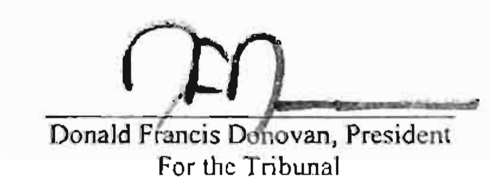
We will appreciate the parties' continued cooperation.

New York, New York
2 November 2010

Yas Banifatemi Mark A. Clodfelter



Donald Francis Donovan, President
For the Tribunal

Appendix A

The Tribunal

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Appendix B

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T. Altangere
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Appendix C

Permanent Court of Arbitration
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BIC: INGBNL2A
IBAN: NL75 INGB 002 028 6511
Name of beneficiary: Permanent Court of Arbitration
Reference: China Heilongjiang et al. v. Mongolia

Appendix D

Schedule of Arbitration

22 November 2010	Parties to advise position on listing of case on PCA docket and publication of decisions and awards
30 November 2010	Advance on costs
1 March 2011	Claimants' prehearing submissions
1 September 2011	Respondent's prehearing submissions
3 October 2011	Requests for disclosure of documents
30 November 2011	Responses to requests for disclosure of documents, including any application concerning translation of documents to be disclosed
During week of 5 December 2011	Conference call re document disclosure
22 December 2011	Uncontested disclosure completed
22 December 2011	Tribunal ruling on contested issues
3 February 2012	Final production of documents completed
8 June 2012	Reply submissions

1 October 2012	Objections to exhibits or translation of witness statements or exhibits from initial and reply submissions
16 November 2012	Rejoinder submissions
5 December 2012	Identification of witnesses and experts for crossexamination and of witnesses who will testify in language other than English
During week of 10 December 2012	Prehearing conference call
21 December 2012	Objections to exhibits or translation of witness statements or exhibits from rejoinder submissions
14-25 January 2013	Hearing on jurisdiction and liability
Directions reserved	Posthearing submissions