

**PCA Case No. 2011-09**

**An Arbitration under the Founding Agreement for the Creation of a Company with Limited Liability, the Energy Charter Treaty, the Foreign Investment Law of Mongolia and the Arbitration Rules of the United Nations Commission on International Trade Law, 2010**

**Khan Resources Inc.  
Khan Resources B.V.  
CAUC Holding Company Ltd.**

**v.**

**The Government of Mongolia  
MonAtom LLC**

**AWARD ON THE MERITS**

**Arbitral Tribunal**

**Dr. Bernard Hanotiau  
The Hon. L. Yves Fortier PC CC OC QC  
Professor David A. R. Williams QC, Presiding Arbitrator**

**Registry**

**Permanent Court of Arbitration**

**2 March 2015**

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## DEFINED TERMS

<b>1995 Minerals Law</b>	Minerals Law of Mongolia, 1 January 1995
<b>1997 Minerals Law</b>	Minerals Law of Mongolia, 5 June 1997
<b>2002 Civil Code</b>	Civil Code of Mongolia, 2002
<b>2006 Minerals Law</b>	Minerals Law of Mongolia, 30 October 2006
<b>2010 MOU</b>	Memorandum of Understanding between Khan Canada and MonAtom, 22 January 2010
<b>Additional Property</b>	Area registered under the Exploration License
<b>Administrative Appellate Court</b>	Appellate Court of the Administrative Chamber of the Supreme Court of Mongolia
<b>Administrative Court</b>	Capital City Administrative Court, Ulaanbataar, Mongolia
<b>Agreements</b>	The Founding Agreement and the Minerals Agreement
<b>April 2009 SSIA Report</b>	Report of the SSIA dated 21 April 2009
<b>ARMZ</b>	Atomredmetzoloto JSC
<b>CAUC</b>	Central Asian Uranium Company Ltd., a Mongolian company
<b>CAUC Holding</b>	CAUC Holding Company Ltd., a British Virgin Islands company
<b><i>Chorzów Factory</i></b>	Case concerning the Factory at <i>Chorzów</i> (Germany v. Poland), Jurisdiction, Judgment, 26 July 1927, P.C.I.J., Series A, No. 9
<b>Claimants (or Khan)</b>	CAUC Holding, Khan Canada and Khan Netherlands
<b>Claimants' Pre-Hearing Brief</b>	Claimants' Pre-Hearing Submission dated 14 October 2013
<b>Claimants' First Post-Hearing Brief</b>	Claimants' First Post-Hearing Submission dated 5 February 2014
<b>Claimants' Second Post-Hearing Brief</b>	Claimants' Second Post-Hearing Submission dated 11 April 2014

<b>Claimants' Submission on Costs</b>	Claimants' Submission on Costs dated 11 April 2014
<b>Company Law</b>	Law of Mongolia on Company, 1999
<b>Constitution</b>	Mongolian Constitution
<b>DCF</b>	Discounted cash flow
<b>CNNC</b>	China National Nuclear Corporation
<b>Decision on Jurisdiction</b>	Decision on Jurisdiction issued by the Tribunal on 25 July 2012
<b>Deposit No. 2</b>	Open pit mine located in the Mongolian province of Dornod
<b>Deposit No. 7</b>	Underground ore body located in the Mongolian province of Dornod
<b>DFS</b>	Definitive Feasibility Study of 4 May 2009
<b>Dornod Project</b>	Uranium exploration and extraction project pursued by CAUC in the Mongolian province of Dornod
<b>ECT (or Treaty)</b>	Energy Charter Treaty, 1994
<b>Erdene</b>	Mongol-Erdene, a Mongolian company
<b>Exploration License</b>	Mineral Resources and Petroleum Authority Certificate of Mineral Exploitation License 9282X
<b>Foreign Investment Law</b>	Foreign Investment Law of Mongolia, 1993
<b>Founding Agreement</b>	Founding Agreement for the Creation of Company with Limited Liability "CAUC", 6 June 1995
<b>Government (or Mongolia)</b>	The Government of Mongolia
<b>IAEA</b>	International Atomic Energy Agency
<b>ILC Articles</b>	Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, 2001
<b>July 2009 SSIA Report</b>	SSIA Report No. 08/01/1699 re: Temporary Suspension of Mineral Licenses, 10 July 2009

<b>Khan (or the Claimants)</b>	CAUC Holding, Khan Canada and Khan Netherlands
<b>Khan Bermuda</b>	Khan Resources Bermuda Ltd, a Bermudan company
<b>Khan Canada</b>	Khan Resources Inc., a Canadian company
<b>Khan Mongolia</b>	Khan Resources LLC., a Mongolian company
<b>Khan Netherlands</b>	Khan Resources B.V., a Dutch company
<b>LPCNEL</b>	Law on Procedure for Compliance with the Nuclear Energy Law, 16 July 2009
<b>Main Property</b>	Area covered by the Mining License
<b>Memorial</b>	Claimants' Memorial on the Merits and Quantum dated 7 December 2012
<b>Minerals Agreement</b>	Agreement on Development of Mineral Deposits in Eastern Aimak (Province) of Mongolia between WM Mining, Priargunsky, and Erdene, 3 June 1995
<b>Mining and Exploration Licenses</b>	The Mining License and the Exploration License
<b>Mining License</b>	Mineral Resources and Petroleum Authority Certificate of Mineral Exploitation License Number 237A
<b>MonAtom</b>	MonAtom LLC, a Mongolian company
<b>Mongolia (or the Government)</b>	The Government of Mongolia
<b>MRAM</b>	Mineral Resources Authority of Mongolia
<b>NEA</b>	Nuclear Energy Agency, Mongolia
<b>NEL</b>	Nuclear Energy Law of Mongolia, 2009
<b>Notice of Arbitration</b>	Claimants' Notice of Arbitration, 10 January 2010
<b>Order No. 120</b>	Order No. 120 on the Temporary Procedure on Re-Registration and Re-Issuance of the License for Radioactive Minerals
<b>Order No. 141</b>	Decree issued by the NEA on 8 October 2009

<b>PCA</b>	Permanent Court of Arbitration
<b>Parties</b>	The Claimants and the Respondents
<b>Permanent Invalidation Notices</b>	Notices 8/360 (issued by the NEA to CAUC on 9 April 2010) and 8/361 (issued by the NEA to Khan Mongolia on 9 April 2010)
<b>Priargunsky</b>	Priargunsky Production Mining and Chemical Enterprise, a Russian company
<b>QMP</b>	Quoted Market Price
<b>Rejoinder</b>	Respondents' Rejoinder on the Merits and Quantum dated 4 October 2013
<b>Reply</b>	Claimants' Reply on the Merits and Quantum dated 28 June 2013
<b>Respondents</b>	Mongolia and MonAtom
<b>Respondents' Pre-Hearing Brief</b>	Respondents' Pre-Hearing Submission dated 14 October 2013
<b>Respondents' First Post-Hearing Brief</b>	Respondents' First Post-Hearing Submission dated 5 February 2014
<b>Respondents' Second Post-Hearing Brief</b>	Respondents' Second Post-Hearing Submission dated 11 April 2014
<b>Respondents' Submission on Costs</b>	Respondents' Submission on Costs dated 11 April 2014
<b>Share Redistribution Agreement</b>	Agreement on CAUC's Share Redistribution, dated 12 December 1996
<b>SPC</b>	State Property Committee, Mongolia
<b>SSIA</b>	State Specialized Inspection Agency, Mongolia
<b>Statement of Defence</b>	Respondents' Statement of Defence on the Merits and Quantum dated 5 April 2013
<b>Suspension Notice</b>	Notice suspending the Mining License, issued by the MRAM on 10 July 2009
<b>Temporary Invalidation Notices</b>	Notices 447 (issued by the NEA to Khan Mongolia on 8 October 2009) and 448 (issued by the NEA to CAUC on 8 October 2009)

<b>Treaty (or ECT)</b>	Energy Charter Treaty, 1994
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, 2010
<b>Valuation Date</b>	1 July 2009, the date at which the Claimants' experts assessed the value of the Claimants' investment
<b>Western Prospector</b>	Western Prospector Group Ltd.
<b>WM Mining</b>	WM Mining Inc., a Colorado, United States company



## I. THE PARTIES AND THEIR REPRESENTATIVES

1. The Claimants in this arbitration are Khan Resources Inc., an entity incorporated in Canada (“**Khan Canada**”), Khan Resources B.V., an entity incorporated in the Netherlands (“**Khan Netherlands**”), and CAUC Holding Company Ltd, an entity incorporated in the British Virgin Islands (“**CAUC Holding**”) (collectively “**Khan**” or “**Claimants**”). The Claimants are represented by Mr. Ian A. Laird and Ms. Ashley Riveira of Crowell & Moring LLP, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2595, U.S.A.
2. The Respondents are the Government of Mongolia (“**Government**” or “**Mongolia**”) and MonAtom LLC, an entity incorporated in Mongolia (“**MonAtom**”) (collectively “**Respondents**”; collectively with the Claimants, “**Parties**”). The Respondents are represented by Messrs. Michael Davison, Laurent Gouiffès, Markus Burgstaller and Thomas Kendra of Hogan Lovells (Paris) LLP, 17, avenue Matignon, CS 30027, 75378 Paris Cedex 08, France.

## II. PROCEDURAL HISTORY

3. The Decision on Jurisdiction issued by the Tribunal in this matter on 25 July 2012 (“**Decision on Jurisdiction**”) recounts in detail the procedural history of this arbitration from its commencement up until the date on which it was issued. This part of the Award recalls the key procedural details from the early phase of the proceedings and summarizes developments since July 2012.

### A. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

4. By a notice of arbitration dated 10 January 2011 (“**Notice of Arbitration**”), the Claimants commenced these proceedings against the Respondents pursuant to Article 12 of the Founding Agreement for the Creation of a Company with Limited Liability “CAUC” (“**Founding Agreement**”),<sup>1</sup> Article 26 of the Energy Charter Treaty (“**ECT**” or “**Treaty**”), Article 25 of the Foreign Investment Law of Mongolia dated 10 May 1993 (“**Foreign Investment Law**”)<sup>2</sup> and Article 3 of the 2010 Arbitration Rules of the United Nations Commission on International Trade Law (“**UNCITRAL Rules**”).<sup>3</sup>
5. In its Notice of Arbitration, the Claimants appointed The Hon. L. Yves Fortier PC CC OQ QC as arbitrator. By letter dated 18 February 2011, the Respondents appointed Dr. Bernard Hanotiau as arbitrator. On 30 March 2011, the co-arbitrators appointed Professor David A. R. Williams QC as the presiding arbitrator.

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<sup>1</sup> Exhibit R-1/C-16A.

<sup>2</sup> Exhibit CLA-8/R-17.

<sup>3</sup> Notice of Arbitration, ¶¶ 12-13.

**B. BIFURCATION AND OTHER PROCEDURAL MATTERS**

6. On 13 July 2011, the Tribunal circulated for the Parties' comments draft Terms of Appointment and a draft Procedural Order No.1.
7. On 26 July 2011, following an exchange of correspondence between the Parties and a procedural telephone conference, the Tribunal circulated a finalized version of the Terms of Appointment to the Parties and issued Procedural Order No. 1.
8. Article 4 of the Terms of Appointment describes the applicable procedural rules as follows:
  - 4.1 In accordance with Article 26 of the Treaty and Article 12 of the Founding Agreement, the parties agree that the proceedings shall be conducted under the UNCITRAL Arbitration Rules 2010.
  - 4.2 For issues not dealt with in the UNCITRAL Arbitration Rules 2010, the Tribunal shall apply the rules that the Parties have agreed upon. In the absence of such agreement, the Tribunal shall apply the rules it deems appropriate.
9. The Terms of Appointment also reflect the Parties' choice of English as the language of arbitration, Paris as the place of arbitration and the Permanent Court of Arbitration ("PCA") as Registry.
10. Procedural Order No. 1 set forth, among other procedural matters, a timetable for submissions and a date for a hearing on bifurcation of the proceedings.
11. In accordance with Procedural Order No. 1, the Parties made submissions on bifurcation in the course of July, August and September 2011. The hearing on bifurcation was held on 19 September 2011 in Paris. The Parties each submitted a post-hearing brief on bifurcation on 26 September 2011.
12. On 4 October 2011, the Respondents informed the Tribunal, and the Claimants confirmed, that the Parties had reached agreement on the procedural issues that had been submitted for determination by the Tribunal during the hearing on bifurcation. More specifically, the Parties agreed "to having all of the [c]laims heard and resolved in a single, consolidated proceeding before this Tribunal" and "to having the Tribunal hear all of Respondents' remaining objections to jurisdiction in a separate jurisdictional phase, according to the schedule set forth in Section 3A of Procedural Order No. 1." The Tribunal endorsed and confirmed the Parties' agreement in Procedural Order No. 2, dated 6 October 2011.
13. On 24 October 2011, Maître Fortier disclosed that his law firm, Norton Rose OR, would, on 1 January 2012, merge with the firm Macleod Dixon, and that Macleod Dixon was acting for Atomredmetzoloto JSC ("ARMZ"), a company being sued in the courts of Ontario, Canada by Khan Canada. Maître Fortier informed the Parties that he had no knowledge with respect to this lawsuit and that he would resign from Norton Rose OR as of 31 December 2011. On the same

date, the Parties indicated that they had no objections to Maître Fortier's continued participation in these proceedings.

**C. PRELIMINARY PHASE ON JURISDICTION**

14. Between December 2011 and April 2012, the Claimants and the Respondents each filed two written submissions on jurisdiction.
15. On 11 May 2012, the Tribunal issued Procedural Order No. 3, which dealt with logistical and procedural matters for the hearing on jurisdiction and, in its Annex A, listed issues that the Tribunal suggested deserved particular attention at the hearing.
16. The hearing on jurisdiction was held at the ICC Hearing Center in Paris on 14 May 2012.
17. The Tribunal issued its Decision on Jurisdiction on 25 July 2012, in which it dismissed "all of the Respondents' objections to jurisdiction," found jurisdiction "over all of the Claimants' claims under the Founding Agreement and the [Treaty]," and reserved "for subsequent determination all questions concerning the merits, and all questions relating to the costs of and incidental to the jurisdictional phase of these proceedings, including the Parties' costs of legal representation."

**D. WRITTEN PROCEEDINGS ON THE MERITS AND QUANTUM**

18. By letter from the PCA dated 4 September 2012, the Tribunal amended the timetable for the merits phase of the proceedings at the Parties' joint request.
19. On 7 December 2012, the Claimants submitted their Memorial on the Merits and Quantum ("**Memorial**").
20. On 5 April 2013, the Respondents submitted their Statement of Defence on the Merits and Quantum ("**Statement of Defence**").
21. On 29 May 2013, the Claimants submitted for determination by the Tribunal their document production requests on which the Parties had not been able to reach agreement. The Respondents, in turn, submitted their outstanding document production requests to the Tribunal on 10 June 2013.
22. On 28 June 2013, the Claimants submitted their Reply on the Merits and Quantum ("**Reply**").
23. On 10 July 2013, the Tribunal issued Procedural Order No. 4, deciding the Parties' document production requests.
24. The Respondents submitted their Rejoinder on the Merits and Quantum ("**Rejoinder**") on 4 October 2013.

**E. HEARING ON THE MERITS AND QUANTUM**

25. Pursuant to Procedural Order No. 1, on 14 October 2013, the Claimants and the Respondents each filed a Pre-Hearing Brief (“**Claimants’ Pre-Hearing Brief**” and “**Respondents’ Pre-Hearing Brief**”).
26. After conferring, by e-mail dated 21 October 2013, the Parties submitted to the Tribunal a joint proposal concerning certain hearing logistics, including an agreed hearing schedule, and informed the Tribunal of outstanding areas of disagreement regarding procedural matters for the hearing. The e-mail included each Party’s notification of the witnesses it wished to cross-examine.
27. By letter dated 22 October 2013, the Respondents requested that one of their witnesses, Mr. Wallace Mays, whom the Claimants had not expressed a wish to cross-examine, be allowed to testify. By letter of the next day, the Claimants objected to the Respondents’ request and indicated that, should the Tribunal allow Mr. Mays to testify, the Claimants would want to file six new factual exhibits. The Respondents replied by letter dated 28 October 2013, re-iterating their application regarding Mr. Mays and objecting to the filing of the new exhibits.
28. A pre-hearing conference call was held on 31 October 2013 between the Parties and the Presiding Arbitrator. A complete transcript of the call and minutes summarizing key points were circulated to the Parties and the Tribunal.
29. On 8 November 2013, following a letter from the Respondents on 4 November 2013 and an e-mail response by the Claimants on the same date, the Tribunal refused the Respondents’ application for Mr. Mays to be called at the hearing and said that it would destroy the six documents that it had been provided with by the Claimants in connection thereof.
30. On the same date, at the request of the Presiding Arbitrator, the Parties submitted an updated hearing schedule agreed between them.
31. The hearing on merits and quantum was held at the ICC Hearing Center in Paris from 11 to 15 November 2013. Present at the hearing were:

Tribunal: Dr. Bernard Hanotiau  
The Hon. L.Yves Fortier PC CC OQ QC  
Professor David A. R. Williams QC

The Claimants: Mr. Ian A. Laird, Crowell & Moring LLP  
Mr. George D. Ruttinger, Crowell & Moring LLP  
Ms. Ashley R. Riveira, Crowell & Moring LLP  
Ms. Kassi D. Tallent, Crowell & Moring LLP  
Ms. Joanna G. Slott, Crowell & Moring LLP  
Ms. Staci Gellman, Crowell & Moring LLP  
Ms. Saranbayar Sed-Ochir, Khan Canada

Mr. James Doak, Khan Canada (fact witness)  
Mr. Grant Edey, Khan Canada (fact witness)  
Mr. Donald Arsenault (fact witness)  
Ms. Deborah Davis (fact witness)  
Dr. Galsan Jamsrandorj (fact witness)  
Mr. Tsogt Natsagdorj, Bona Lex LLC (expert witness)  
Mr. Kevin J. Carter, Raymond James Ltd. (expert witness)  
Dr. José Alberro, Berkeley Research Group, LLC (expert witness)

The Respondents: Mr. Laurent Gouiffès, Hogan Lovells LLP  
Mr. Thomas Kendra, Hogan Lovells LLP  
Mr. Markus Burgstaller, Hogan Lovells LLP  
Ms. Catherine Dunmore, Hogan Lovells LLP  
Mr. Jonathan Ketcheson, Hogan Lovells LLP  
Mr. Gauthier Vannieuwenhuysse, Hogan Lovells LLP  
Ms. Nominchimeg Odsuren, Hogan Lovells LLP  
Ms. Karen Seif, Hogan Lovells LLP  
Ms. Bayartsetseg, Mongolia  
Ms. Maitsetseg, Mongolia  
Mr. Tegshbayar, Mongolia  
Mr. Bilegsaikhan Janchiv, MonAtom (fact witness)  
Mr. Bailikhuu Dambachultem (fact witness)  
Mr. Munkhtamir Deleg (fact witness)  
Mr. Bayar Budragchaa, Economic & Legal Consultancy LLC (expert witness)  
Mr. Bernard J. Guarnera, Behre Dolbear International, Ltd. (expert witness)  
Mr. David H. Scriven, Behre Dolbear International, Ltd. (expert witness)  
Mr. John Lagerberg, PricewaterhouseCoopers LLP (expert witness)

Registry: Ms. Evgeniya Goriatcheva, PCA

32. A full transcript by court reporters Ms. Yvonne Vanvi and Mr. Frederick Weiss and an audio recording of the hearing were made available to the Tribunal and the Parties.

#### **F. POST-HEARING PROCEEDINGS**

33. On 9 December 2013, after having first circulated a draft to the Parties for their consideration, the Tribunal issued Procedural Order No. 5, providing, *inter alia*, a timetable for the filing of two rounds of short post-hearing submissions, submissions on costs and the joint submission by the Parties of an agreed chronology of main events and facts.
34. On 20 December 2013, the Parties, unable to agree upon a single chronology of main events and facts, submitted separate versions to the Tribunal.
35. On 31 December 2013, after having conferred, the Parties each submitted their respective changes to the transcript that had been agreed by the other Party.

36. Pursuant to Procedural Order No. 5, on 5 February 2014, the Parties each filed a first post-hearing brief (“**Claimants’ First Post-Hearing Brief**” and “**Respondents’ First Post-Hearing Brief**”).
37. By letter dated 27 February 2014, the Claimants requested permission from the Tribunal to submit an attachment to their second post-hearing submission to address what they alleged to be improper citations in the Respondents’ First Post-Hearing Brief. The Respondents objected to this request by letter dated 5 March 2014.
38. By letter from the PCA dated 11 March 2014, the Tribunal granted the Claimants’ request, specifying that each Party would be allowed to file an attachment to their second post-hearing submission to briefly address any alleged improper citations or misstatements in the other Party’s First Post-Hearing Brief.
39. Pursuant to Procedural Order No. 5, on 11 April 2014, the Parties each filed a second post-hearing brief (“**Claimants’ Second Post-Hearing Brief**” and “**Respondents’ Second Post-Hearing Brief**”) and a costs submission (“**Claimants’ Submission on Costs**” and “**Respondents’ Submission on Costs**”). In addition, the Claimants filed a Table of Respondents’ Improper Citations.
40. On 15 April 2014, the Respondents submitted a letter disputing the reasonableness of the Claimants’ reported costs.
41. On 8 May 2014, after having been invited by the Tribunal to do so, the Claimants responded to the Respondents’ letter of 15 April 2014, dismissing it as “frivolous and unsupported,” and maintaining their submission that the Respondents should bear the “full and reasonable costs” of this arbitration. The Respondents submitted a letter in response the next day (on 9 May 2014), requesting that the Tribunal order the Claimants “to disclose the fee arrangement between the Claimants and their Counsel in its entirety,” including details concerning its claimed “success fee.”
42. On 15 May 2014, the Presiding Arbitrator notified the Parties that, “should the Tribunal decide to make a costs award in favour of the Claimants, the Tribunal would require a full understanding of the success fee arrangement,” and he directed the Claimants to “provide either (i) the success fee arrangement or (ii) correspondence relating to the success fee that evidences the terms of the agreement” within seven days. On 30 May 2014, the Presiding Arbitrator acknowledged receipt of additional information from Claimants and another letter from Respondents, noting that “the Tribunal considers that it has sufficient information to make a costs determination, but will inform the parties if the need for further information arises in the future.”

### III. FACTUAL BACKGROUND

#### A. THE DORNOD PROJECT

43. From 1988, commencing under the communist Mongolian People's Republic, to 1995, the Russian state-owned company Priargunsky Production Mining and Chemical Enterprise ("**Priargunsky**") extracted uranium oxide from an open pit mine, known as Deposit No. 2 or Ore Body No. 2 ("**Deposit No. 2**"), located in Dornod, a province in northeast Mongolia.<sup>4</sup> Due to a shortage of funds and a drop in demand for uranium after the dissolution of the U.S.S.R. in 1991, the mine was shut down in mid-1995.<sup>5</sup>
44. Around the same time, Priargunsky and the Mongolian state-owned company Mongol-Erdene ("**Erdene**") formed, with the U.S. company WM Mining Inc. ("**WM Mining**"), a joint venture known as the Central Asian Uranium Company Ltd. ("**CAUC**"), in order to develop a uranium exploration and extraction project in Dornod ("**Dornod Project**").<sup>6</sup> WM Mining was wholly owned by Mr. Wallace Mays.<sup>7</sup>
45. The founders of CAUC executed the following three documents: (i) the Founding Agreement, (ii) the Agreement on Development of Mineral Deposits in Eastern Aimak (Province) of Mongolia between WM Mining, Priargunsky and Erdene ("**Minerals Agreement**") and (iii) the Charter of the Company with Limited liability "Central Asian Uranium Company of Mongolia" of the Mongolian-Russian-American Venture.<sup>8</sup> The Minerals Agreement also was signed by an authorized representative of the Mongolian Ministry of Energy, Geology, and Mining.<sup>9</sup> Pursuant to the Minerals Agreement, WM Mining was to contribute "monetary funds and the services related to locating and obtaining financing for the joint venture."<sup>10</sup>
46. Initially, each of the three parties held an equal 33.3 percent share of the joint venture. On 12 December 1996, the parties entered into the Agreement on CAUC's Share Redistribution ("**Share Redistribution Agreement**"), pursuant to which WM Mining's participation in CAUC was increased to 58 percent in consideration for an additional financial contribution to the joint venture.<sup>11</sup>

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<sup>4</sup> Respondents' Memorial on Jurisdiction, ¶ 13; Claimants' Counter-memorial on Jurisdiction, ¶¶ 36, 38; Hearing Transcript (jurisd.) 16:10-13; Memorial, ¶¶ 20-21; Statement of Defence, ¶ 18.

<sup>5</sup> Reply, ¶ 18.

<sup>6</sup> Memorial, ¶ 23; Statement of Defence, ¶ 22.

<sup>7</sup> Statement of Defence, ¶ 22.

<sup>8</sup> Memorial, ¶ 24; *see* Exhibits 16A, 17A, 18A.

<sup>9</sup> Exhibit C-17A.

<sup>10</sup> Exhibit C-17A (ss. 2.2-2.4); *see also* Memorial, ¶ 28; Statement of Defence, ¶¶ 24-25.

<sup>11</sup> Memorial, ¶ 29; Statement of Defence, ¶ 31, referring to Exhibit R-3.

47. In 2003, through a series of transactions, Khan Canada became the indirect holder of WM Mining's shares in CAUC. In July 1997, WM Mining had transferred its shares in CAUC to World Wide Mongolia Mining Inc, a British Virgin Islands company that was also wholly owned by Mr. Mays.<sup>12</sup> In October 2002 and January 2003, Mr. Mays incorporated Khan Canada and Khan Resources Bermuda Ltd ("**Khan Bermuda**"), respectively.<sup>13</sup> On 30 July 2003, Mr. Mays transferred his shares in World Wide Mongolia Mining Inc. to Khan Bermuda.<sup>14</sup> On 31 July 2003, all of Mr. Mays's shares in Khan Bermuda were transferred to Khan Canada.<sup>15</sup> Following Khan Canada's acquisition of World Wide Mongolia Mining Inc., the latter was renamed CAUC Holding on 28 April 2004.
48. As for Erdene's share in CAUC, it was successively transferred to the Mineral Resources Authority of Mongolia ("**MRAM**") on 27 November 2001, the State Property Committee of Mongolia ("**SPC**") on 28 March 2005, and MonAtom, a Mongolian company wholly owned and controlled by the SPC, in 2009.<sup>16</sup>
49. When this arbitration commenced in 2011, Priargunsky and MonAtom each held a 21 percent share in CAUC, while CAUC Holding, the wholly owned subsidiary of Khan Bermuda (itself the wholly owned subsidiary of Khan Canada), held the remaining 58 percent share in CAUC.
50. On 27 March 2003, Khan Canada established a separate subsidiary incorporated in Mongolia – Khan Resources LLC ("**Khan Mongolia**") – to help coordinate its activities in Mongolia.<sup>17</sup> Originally, all of the shares in Khan Mongolia were held by Khan Bermuda. On 5 September 2007, Khan Netherlands was incorporated for the purpose of holding Khan Mongolia. On 28 May 2008, the Foreign Investment and Trade Agency of Mongolia (the "**FIFTA**") issued a "Certificate of Foreign Incorporated Company" recording the transfer of 75 percent of the shares in Khan Mongolia to Khan Netherlands and indicating that the other 25 percent remained with Khan Bermuda.<sup>18</sup>
51. As background to their decision to invest in Mongolia, the Claimants allege that in recent years Mongolia's economy has become one of the "fastest growing in the world" due to its mineral wealth and a twenty-plus year campaign to attract foreign investment by creating "the

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<sup>12</sup> Claimants' Counter-memorial on Jurisdiction, ¶ 65; Claimants' Rejoinder on Jurisdiction, ¶ 22; Statement of Defence, ¶ 39, referring to Exhibit C-16C.

<sup>13</sup> Statement of Defence, ¶ 40, referring to Exhibits C-40, C-44.

<sup>14</sup> Statement of Defence, ¶ 41, referring to Exhibit R-41.

<sup>15</sup> Mr. May's shares in Khan Bermuda were transferred to Khan Canada in consideration for the issuance of shares in Khan Canada to another company owned by Mr. Mays, making Mr. Mays the largest (indirect) shareholder in Khan Canada with 42.31 percent of the shares. Statement of Defence, ¶ 42, referring to Exhibit C-46.

<sup>16</sup> Claimants' Counter-memorial on Jurisdiction, ¶¶ 56, 62, 68; Memorial, ¶ 30.

<sup>17</sup> Memorial, ¶ 40; Statement of Defence, ¶ 40.

<sup>18</sup> Counter-memorial, ¶¶ 123-124.



appearance of a positive investment environment by enacting laws and entering into contracts that, at least on their face, promise a high level of protection to foreign investors.”<sup>19</sup>

52. The Respondents explain that, after its transition into democracy in 1990, Mongolia spent considerable time and effort to encourage foreign investment, especially from countries other than Russia and China. In the uranium sector in particular, Mongolia wished to benefit from foreign capital and experience.<sup>20</sup>
53. According to Claimants, Khan “always had a champion within the Mongolian Government,”<sup>21</sup> citing assistance and praise received in 2007–2009 from various Mongolian state officials.<sup>22</sup> In light of these reassurances, Khan did not perceive any special “risk” associated with its investing in Mongolia.<sup>23</sup>

## **B. THE ACQUISITION OF THE MINING AND EXPLORATION LICENSES**

54. On 10 November 1998, the joint venture company CAUC obtained Mineral Exploitation License Number 237A (“**Mining License**”), which allowed CAUC to engage in the exploitation of radioactive mineral resources in an area of land covering both Deposit No. 2 and an underground mineral deposit known as Deposit No. 7 or Ore Body No. 7 (“**Deposit No. 7**”).<sup>24</sup>
55. On 12 September 2000, on CAUC’s application (aimed at tax and fee savings), the Mining License area was reduced to less than a third of its size.<sup>25</sup> The new Mining License area (the “**Main Property**”) excluded a segment of Deposit No. 7.
56. On 22 April 2005, Khan Mongolia acquired Mineral Exploitation License 9282X (“**Exploration License**,” collectively with the Mining License, the “**Mining and Exploration Licenses**”), covering the segment of Deposit No. 7 that had previously been excluded from the Mining License area (the “**Additional Property**”).<sup>26</sup>

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<sup>19</sup> Respondents’ Memorial on Jurisdiction, ¶¶ 11-19.

<sup>20</sup> Statement of Defence, ¶¶ 4, 20-21.

<sup>21</sup> Reply, ¶ 38.

<sup>22</sup> Reply, ¶¶ 38-42.

<sup>23</sup> Reply, ¶ 44.

<sup>24</sup> Respondents’ Memorial on Jurisdiction, ¶ 17, referring to Exhibit R-4; Claimants’ Counter-memorial on Jurisdiction, ¶¶ 115-116; Statement of Defence, ¶ 29.

<sup>25</sup> Memorial, ¶ 44; Statement of Defence, ¶ 44.

<sup>26</sup> Memorial, ¶ 47, referring to Exhibit C-76. The Claimants refer to the area covered by the reduced Mining License as the “Main Property” and the area covered by the Exploration License as the “Additional Property,” while the Respondents refer to the reduced Mining License area as the “CAUC Property” and the Exploration License area as the “Khan Property.” The Tribunal adopts the Claimants’ terminology for clarity, without prejudice to either Party’s arguments regarding the alleged unity of the Mining License and the Exploration Licenses. The Tribunal notes that, while agreeing on the facts regarding Khan Mongolia’s acquisition of the Exploration License, the Parties narrate the details differently. According to the Claimants,

**C. THE CLAIMANTS' INTENTIONS REGARDING THE DORNOD PROJECT**

57. The Claimants allege that they were committed to bringing the Dornod Project into production and were “ideally situated” to help Mongolia develop its uranium resources.<sup>27</sup> In their First Post-Hearing Brief, they state that Khan “reasonably expected to bring the Dornod Project into operation in collaboration with Mongolia.”<sup>28</sup> They gathered an experienced board of directors and management team and hired highly qualified employees.<sup>29</sup> They recount investing over USD 50 million.<sup>30</sup> Furthermore, Khan independently verified the existence and extent of uranium reserves at the Dornod site by conducting a diamond drilling program and filing a technical report that complied with Canadian (and international) regulatory criteria.<sup>31</sup>
58. In 2006–2007, Khan secured financing for the Dornod Project, including approximately USD 14 million in seed money from private investors, USD 6.3 million in an initial public offering on the Toronto Stock Exchange and USD 25 million in a follow-on offering.<sup>32</sup> These funds were devoted to the development of the Dornod Project.<sup>33</sup>

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the exclusion of a segment of Deposit No. 7 from the reduced Mining License area was due to a surveying error. Following discovery of this error, the MRAM issued a decision to restore the Mining License to its original size and coordinates. However, in the intervening time, licenses had been issued over a portion of this area to other parties that successfully challenged the MRAM's decision before the Capital City Administrative Court of Mongolia. Memorial, ¶¶ 44-45. Given the joint venture's lack of capital, Khan took it upon itself to purchase the Exploration License from Western Prospector Group Ltd. for “the ultimate benefit of the Project.” Memorial, ¶¶ 46-47. The Respondents emphasize that Khan Canada first entered into an agreement with Western Prospector in accordance with which Western Prospector would transfer to Khan Canada the portion of its exploration license covering the Additional Property and that only then did Western Prospector obtain the Exploration License. Statement of Defence, ¶¶ 46-47. The Respondents also note that the other CAUC shareholders were not informed of Khan Mongolia's acquisition of the Exploration License. Statement of Defence, ¶ 48.

<sup>27</sup> Reply, ¶ 37.

<sup>28</sup> Claimants' First Post-Hearing Brief, p. 10. The Claimants provide the following reasons for this expectation: The Dornod Project already had a history of development; Mongolia's actions in entering into and performing the Agreements over a period of years demonstrated its commitment to further developing the Dornod Project with the assistance of a foreign investor; Mongolia's actions in the years leading up to Khan's investment further demonstrated that it welcomed foreign mining investment, including in particular Canadian investment; Mongolia accepted Khan as a “new investor” in the Dornod Project and the CAUC joint venture after its prior partner proved unable to advance the project; shortly after Khan's investment, the MRAM agreed that the area now covered by the Exploration License should be reunified with the area covered by CAUC's Mining License, expressly citing to the Minerals Agreement as the basis for its action; Khan was subsequently able to acquire the Exploration License from a third party, thus enabling the joint venture parties to achieve commercial production from Deposit No. 7; Khan significantly advanced the Dornod Project towards production by hiring highly qualified professionals, carrying out comprehensive studies, and raising financing for the project; and Khan maintained positive relations with the Government during the course of its investment in the Dornod Project, and Mongolia consistently acted in support of that project in the exercise of its public authority. *See* Claimants' First Post-Hearing Brief, pp. 10-11. *See also* Claimants' Second Post-Hearing Brief, p. 9.

<sup>29</sup> Reply, ¶¶ 32-34.

<sup>30</sup> Reply, ¶ 32.

<sup>31</sup> Memorial, ¶¶ 59, 67, referring to Exhibit C-25.

<sup>32</sup> Memorial, ¶ 52.

<sup>33</sup> Memorial, ¶ 53.

59. After obtaining these funds, Khan continued its drilling program, complemented by a magnetometer and gravity survey, and conducted three studies providing an extensive analysis of, among others, the resources and reserves at the site and the costs and methodologies required to exploit the mine in an economically feasible manner.<sup>34</sup>
60. The last of these studies was the Definitive Feasibility Study of 4 May 2009 (“DFS”), which estimated the capital cost for constructing the mining and surface facilities to be in excess of USD 330 million, with a rate of return of the Dornod Project, after taxes, at 29 percent. The DFS also “conservatively” estimated the Dornod Project’s net value at USD 276 million.<sup>35</sup>
61. In addition, Khan retained and funded expert firms to conduct environmental and social assessments, and devoted funds to infrastructure construction in Mongolia.<sup>36</sup>
62. With regard to the Respondents’ allegation that the Claimants’ exploration work reproduced exploration surveys carried out when Priargunsky operated the Dornod site, the Claimants “readily acknowledge that significant exploration data was developed by Priargunsky before 1995,” but explain that the data was not verifiable or reproducible because “the underlying exploration material (*e.g.*, the drill core) was destroyed when Priargunsky abandoned the site.” Thus, over 8,000 metres of additional drilling were performed to verify and expand upon Priargunsky’s data.
63. Moreover, according to the Claimants, Priargunsky had neither conducted social and environmental impact assessments, nor developed mining plans or engineered processing and support facilities.<sup>37</sup> Furthermore, the Claimants dispute the Respondents’ allegation that the Claimants did not share the results of their studies with Mongolia, submitting that had Khan’s studies duplicated Priargunsky’s work, there would have been no need for Khan to share the results with Mongolia.<sup>38</sup> The Claimants add that Khan shared its studies with Mongolia.<sup>39</sup>
64. The Claimants also aver that Mongolia knew and accepted that Khan Canada was the ultimate owner and controller of the majority share in CAUC, as well as the ultimate source of financing of the Dornod Project. For instance, on 22 September 2005, the SPC issued a resolution proposing to offer Khan Canada its 21 percent interest in CAUC, thus recognizing, as Claimants argue, that Khan Canada was a “potential source of immediate and substantial cash”

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<sup>34</sup> Memorial, ¶¶ 69, 72-73, 77, 79. The studies are the “Scoping Study” (2006), the “Pre-Feasibility Study” (August 2007) and the “Definitive Feasibility Study” (May 2009).

<sup>35</sup> Memorial, ¶ 80.

<sup>36</sup> Memorial, ¶¶ 78-79, referring to First Arsenault Statement, ¶ 55, Second Edey Statement, ¶ 33, Exhibits C-50, C-62, C-157.

<sup>37</sup> Claimants’ Rejoinder on Jurisdiction, ¶¶ 30-31.

<sup>38</sup> Claimants’ Rejoinder on Jurisdiction, ¶ 32.

<sup>39</sup> Claimants’ Counter-memorial on Jurisdiction, ¶¶ 87-100; Claimants’ Rejoinder on Jurisdiction, ¶ 33, referring to Exhibits C-64, C-65.

and was “the party to deal with on matters relating to CAUC.”<sup>40</sup>

65. Regarding the Respondents’ argument that Khan could not have expected to bring the Dornod Project to production as it needed to obtain additional approvals from Mongolia before the commencement of mine operations, the Claimants emphasize that “Mongolia was obliged by the mandatory terms of Mongolian public laws (as well as by its contractual duty of good faith) to grant such approvals.”<sup>41</sup> Its related argument on the issue of the conversion of the Exploration License into a mining license is discussed in Section V(B) below.
66. In contrast, the Respondents allege that “Khan never intended to take this project forward into operation,” but, rather, was focused on maximizing the value of Khan Canada in order to sell off its interests at a profit.<sup>42</sup> They argue that, when Khan became a partner in CAUC, its main priorities were its Mongolian gold properties, which it did not develop, but proceeded to sell for a profit.<sup>43</sup> The Respondents contend that Khan did not have the capability to develop the mining project on its own,<sup>44</sup> noting that “Khan has never taken a project into production” and reiterating that it “would not have taken this one forward.”<sup>45</sup> The Respondents further contend that the market conditions during this time were unfavourable to the Dornod Project.<sup>46</sup>
67. The Respondents emphasize that in the seventeen-year existence of CAUC, there have been no mining activities at the Dornod site,<sup>47</sup> with the possible exception of a few holes having been drilled.<sup>48</sup> They note that “Khan’s only tangible activity was to obtain information in Russia regarding the mineral reserves.”<sup>49</sup>
68. While acknowledging that Khan carried out drilling programs, updated its evaluation of the Dornod deposit reserves and completed various feasibility reports, the Respondents emphasize that Khan Canada would notify the results of its activities to its shareholders in “an attempt to boost its share price” on the Toronto Stock Exchange, but consistently fail to inform its partners in CAUC<sup>50</sup> or the Mongolian authorities.<sup>51</sup> They submit that from 2002 to 2007 there was no communication between the CAUC joint venture partners, as not a single management

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<sup>40</sup> Claimants’ Counter-memorial on Jurisdiction, ¶¶ 103-104; Claimants’ Rejoinder on Jurisdiction, ¶ 27.

<sup>41</sup> Claimants’ Second Post-Hearing Brief, p. 9.

<sup>42</sup> Statement of Defence, ¶ 14; Transcript (12 November 2013), 276:19 to 277:8.

<sup>43</sup> Rejoinder, ¶¶ 34-37, referring to Exhibits R-80 to R-82.

<sup>44</sup> Transcript (12 November 2013), 279:22 to 280:8.

<sup>45</sup> Respondents’ Second Post-Hearing Brief, ¶ 41.

<sup>46</sup> Respondents’ Second Post-Hearing Brief, ¶ 41, referring to Transcript (15 November 2013), 806:20-21 and 796:10-13.

<sup>47</sup> Reply, ¶ 18.

<sup>48</sup> Respondents’ First Post-Hearing Brief, ¶ 11, referring to Exhibit R-67 (p. 2).

<sup>49</sup> Respondents’ First Post-Hearing Brief, ¶ 12.

<sup>50</sup> Statement of Defence, ¶¶ 51-53, 56, 67, 68; Rejoinder, ¶¶ 38-39.

<sup>51</sup> Respondents’ First Post-Hearing Brief, ¶¶ 12-13.

committee meeting was held during that period.<sup>52</sup> Nor were any independent audits of CAUC conducted until September 2007.<sup>53</sup>

69. Further, the Respondents note that, already in 2006, Khan Canada was preparing for a takeover by adopting an amended shareholders' rights plan "to ensure the fair treatment of shareholders in connection with any take-over offer for the Corporation."<sup>54</sup>
70. They submit that, as of July 2009, the actual production of the uranium mine was at least three years away,<sup>55</sup> as the Claimants had secured neither a strategic partner for the development of the project nor an off-take agreement, pursuant to which the bulk of the financing was to be obtained.<sup>56</sup> They state that "[t]he reality is that the Claimants were not capable of raising the necessary capital,"<sup>57</sup> and conclude that "Khan had neither the internal capital necessary nor the stature necessary to raise capital, to take the properties into production."<sup>58</sup>

**D. MONGOLIA'S INVESTIGATION OF CAUC AND KHAN MONGOLIA'S ACTIVITIES AND THE INVALIDATION OF THE MINING AND EXPLORATION LICENSES**

71. In April 2005, and, again, in May 2006, the State Specialized Inspection Agency of Mongolia ("SSIA") inspected the Dornod site, reporting several violations of Mongolian law, including breaches of the Radiation Protection and Safety Law.<sup>59</sup>
72. On 6 February 2007, Mongolia designated the Dornod mineral deposits as being "of strategic importance" pursuant to the Minerals Law of 30 October 2006 ("**2006 Minerals Law**").<sup>60</sup>
73. On 14 September 2007, Khan applied to convert the Exploration License into a mining license.<sup>61</sup> On 27 November 2007, the Mongolian Mineral Resource and Petroleum Activity Authority (the predecessor of the MRAM) informed Khan that the decision on its application would be deferred until the Mongolian Minerals Council had reviewed the Dornod reserve estimates registered in the State Integrated Registry.<sup>62</sup>
74. According to the Respondents, at a meeting in December 2007, Mr. Erdenejamiyan Erdenebileg, a legal counsel at Erdene who had scrutinized the contractual underpinning of

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<sup>52</sup> Statement of Defence, ¶ 54.

<sup>53</sup> Rejoinder, ¶ 49.

<sup>54</sup> Statement of Defence, ¶ 66; Rejoinder, ¶ 40, referring to Exhibit R-49; Transcript (12 November 2013), 277:9 to 279:3.

<sup>55</sup> Transcript (12 November 2013), 284:24 to 286:6.

<sup>56</sup> Transcript (12 November 2013), 289:7-18.

<sup>57</sup> Respondents' Second Post-Hearing Brief, ¶ 45.

<sup>58</sup> Respondents' Second Post-Hearing Brief, ¶ 46, referring to Transcript (15 November 2013), 789:3-6.

<sup>59</sup> Statement of Defence, ¶¶ 57-64, referring to Exhibits R-8, R-47, R-48; Rejoinder, ¶¶ 53-58.

<sup>60</sup> Exhibit C-160.

<sup>61</sup> Memorial, ¶ 105, referring to Exhibit C-241; Statement of Defence, ¶ 82.

<sup>62</sup> Memorial, ¶ 106, referring to Exhibit C-162.

CAUC in contemplation of the transfer of the SPC's interest to Erdene, informed Mr. Enkhbayar, Khan's legal representative in Mongolia, of several breaches by Khan of the Minerals Agreement, the Founding Agreement and the Share Redistribution Agreement.<sup>63</sup>

75. The Respondents argue that the Claimants breached their obligations to the joint venture, as follows: Khan breached Articles 1.2, 1.3 and 5.1 of the Minerals Agreement by taking six years to prepare a definitive feasibility study whereas it was obliged to conduct two feasibility studies within the year;<sup>64</sup> Khan breached the Share Redistribution Agreement by not having provided a loan of USD 30-35 million, which was the condition for the increased shareholding in the joint venture;<sup>65</sup> and Khan breached Article 16.2 of the Minerals Agreement, which stated that production should not be suspended by longer than two years, by not carrying out the production of yellowcake (the final product of uranium mining) for the two years following its acquisition of an interest in the joint venture in July 2003.<sup>66</sup>
76. On 29 August 2008, on the basis of the results of its drilling program, Khan filed for the registration by the Minerals Council of a re-estimation of the Dornod mineral reserves.<sup>67</sup> In October 2009, a "Team of Experts" was appointed to review Khan's application and, in December 2009, this team submitted a report to the Minerals Council.<sup>68</sup> The Claimants contend that this report recommended the registration of Khan's re-estimation of the reserves, while the Respondents note that it identified "a number of deficiencies and missing information."<sup>69</sup>
77. Between 15 and 21 April 2009, the SSIA again inspected the Dornod site.<sup>70</sup> On 10 July 2009, the SSIA issued a report ("**July 2009 SSIA Report**") that raised several alleged violations of Mongolian law.<sup>71</sup> The Respondents also allege that, before the July 2009 SSIA Report, the SSIA had already issued a report in April of that same year ("**April 2009 SSIA Report**"), which described violations of Mongolian law, including the 2006 Minerals Law.<sup>72</sup>

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<sup>63</sup> Rejoinder, ¶¶ 64-67.

<sup>64</sup> Respondents' First Post-Hearing Brief, ¶ 8, referring to Exhibits C-16A (art. 2.2), C-17A (arts. 1.3 and 16.2); Respondents' First Post-Hearing Brief, ¶ 18, referring to Exhibit C-17A.

<sup>65</sup> Respondents' First Post-Hearing Brief, ¶ 19, referring to Exhibit R-3, ¶ 9.

<sup>66</sup> Respondents' First Post-Hearing Brief, ¶ 20, referring to Exhibit C-17A; Transcript (12 November 2013), 355:2 to 357:3.

<sup>67</sup> Memorial, ¶¶ 94, 96, referring to Exhibit C-64; Statement of Defence, ¶ 83.

<sup>68</sup> Memorial, ¶¶ 100-101, referring to Exhibits C-134, C-135.

<sup>69</sup> Memorial, ¶ 101; Statement of Defence, ¶ 84.

<sup>70</sup> Memorial, ¶ 118; Statement of Defence, ¶ 87; Respondents' First Post-Hearing Brief, ¶ 26.

<sup>71</sup> Exhibit R-9.

<sup>72</sup> Specifically, the SSIA reported violations of (i) Article 19.2.3 of the 2006 Minerals Law, due to an overlap between the Exploration License area and the protected Yakhi Lake reserve; (ii) Article 33.1 of the Law on Special Protected Areas, due to the storage of radioactive materials in a protected area; (iii) Article 45.1 of the Subsoil Law and Article 5.6 of the 2006 Minerals Law, relating to the trading of shares and the publication of information regarding Mongolian mineral reserves on the Toronto Stock Exchange; (iv) Article 5.4 of the 2006 Minerals Law, due to a failure to "enter into a mining agreement with the MRAM,"

78. In respect of the 2009 SSIA inspection, the Claimants allege that “the SSIA inspectors were instructed to concoct as many violations as possible,”<sup>73</sup> and stress that the July 2009 SSIA Report was issued to the MRAM, and not to CAUC, such that the Claimants first saw it only when the MRAM forwarded it to them two weeks after the Mining and Exploration Licenses were suspended.<sup>74</sup> The Claimants add that they had not seen the April 2009 SSIA Report before the Respondents filed it in this arbitration.<sup>75</sup>
79. On 10 July 2009, the MRAM informed CAUC of the suspension of the Mining License for a period of three months due to the results of the 2009 SSIA inspection (“**Suspension Notice**”), and, in the Respondents’ view, Khan’s failure to remedy the alleged legal violations.<sup>76</sup>
80. In September 2009, CAUC challenged the temporary suspension of the Mining License before the Capital City Administrative Court (“**Administrative Court**”).<sup>77</sup> However, the parties reached a settlement, which was recognized by the Administrative Court on 12 January 2010.<sup>78</sup>
81. On 15 August 2009, Mongolia enacted the Nuclear Energy Law of Mongolia (“**NEL**”) and the Law on Procedures for Compliance with the NEL (“**LPCNEL**”), which, *inter alia*, created a Nuclear Energy Agency (“**NEA**”) and provided that Mongolia was to take ownership, without compensation, of “no less than 51 percent of stake in the joint company, where exploration and determination of [uranium] reserve have been conducted with state budget.”<sup>79</sup>
82. On 8 October 2009, the NEA issued Order No. 141, suspending 149 uranium exploration and mining licenses including the Mining and Exploration Licenses, pending their re-registration under the NEL (“**Order No. 141**”).<sup>80</sup> The NEA confirmed the effect of Order No. 141 on the Exploration and Mining Licenses by issuing its Notices Nos. 447 and 448 to CAUC and Khan Mongolia, respectively (“**Temporary Invalidation Notices**”).<sup>81</sup>
83. On 22 January 2010, Khan Canada and MonAtom signed a Memorandum of Understanding (“**2010 MOU**”), providing for the re-registration of the Mining and Exploration Licenses in exchange for CAUC accepting the NEL’s 51 percent ownership requirement, free of charge, and settling the then ongoing Administrative Court case relating to the July 2009 suspension of

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and (v) the Radiation Protection and Safety Law, as had previously been noted during the 2005 and 2006 SSIA inspections. Statement of Defence, ¶¶ 88-93, referring to Exhibit R-62.

<sup>73</sup> Memorial, ¶ 119, quoting First Arsenault Statement, ¶ 77.

<sup>74</sup> Memorial, ¶¶ 123-125; *see* Exhibit C-164.

<sup>75</sup> Reply, ¶ 265-266, referring to Second Arsenault Statement, ¶ 12, Davis Statement, ¶ 76.

<sup>76</sup> Memorial, ¶ 122; Statement of Defence, ¶ 96.

<sup>77</sup> Memorial, ¶ 129; Statement of Defence, ¶ 113.

<sup>78</sup> Memorial, ¶ 129; Statement of Defence, ¶ 113.

<sup>79</sup> Exhibit RL-11 (arts. 5.2, 5.3); *see also* Memorial, ¶ 132, referring to Exhibits RL-11, CLA-142; Statement of Defence, ¶ 100.

<sup>80</sup> *See* Exhibit R-12. The list of suspended licenses is found in the Annex to Order No. 141.

<sup>81</sup> Memorial, ¶ 133, referring to Exhibits C-2, C-3; Statement of Defence, ¶ 101.

the Mining License.<sup>82</sup> According to the Claimants, the 2010 MOU contained the principal terms for a new joint venture agreement, operator agreement and investor agreement.<sup>83</sup> By declaration dated 29 January 2010, the NEA refused to implement it.<sup>84</sup> Nevertheless, the Claimants allege that Mr. Sodnom Enkbakht, the then Director of the NEA, had confirmed Mongolia's agreement with the 2010 MOU's terms in earlier discussions.<sup>85</sup>

84. In March 2010, an SSIA "Inspection Group" composed of officials of the SSIA, the SPC, the NEA and MonAtom conducted another inspection of the Dornod site. In a report dated 15 March 2010, the inspectors found that neither CAUC nor Khan Mongolia had remedied the violations of Mongolian law identified in 2009, and listed further alleged breaches of the Founding Agreement, the Minerals Agreement and the NEL,<sup>86</sup> relating specifically to the financing and pre-emption rights set out in the Founding Agreement and the Minerals Agreement (collectively, "**Agreements**") that were allegedly violated when Khan acquired its interest in CAUC in 2003.<sup>87</sup> On 9 April 2010, the NEA issued notices to CAUC and Khan Mongolia, respectively, invalidating the Mining and Exploration Licenses ("**Permanent Invalidation Notices**").<sup>88</sup>
85. On 15 and 23 April 2010, Khan Mongolia and CAUC each commenced proceedings against the NEA before the Administrative Court to challenge the Temporary Invalidation Notices and the Permanent Invalidation Notices.<sup>89</sup>
86. On 19 July 2010, in the proceedings initiated by CAUC, the Administrative Court rendered a decision concerning the Mining License, stating that its invalidation was "clearly not lawful."<sup>90</sup>
87. Similarly, on 2 August 2010, in the proceedings initiated by Khan Mongolia, the Administrative Court rendered a decision concerning the Exploration License, stating that its April 2010 invalidation was "clearly invalid."<sup>91</sup>
88. The NEA appealed the Administrative Court's decision in the case involving CAUC before the Appellate Court of the Administrative Chamber of the Supreme Court of Mongolia ("**Administrative Appellate Court**"), which rendered a decision on 13 October 2010. The

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<sup>82</sup> Memorial, ¶ 133, referring to Exhibits C-2, C-3; Statement of Defence, ¶ 101; Transcript (12 November 2013), 382:14 to 383:21.

<sup>83</sup> Claimants' Second Post-Hearing Brief, p. 10.

<sup>84</sup> Memorial, ¶ 140, referring to Exhibit C-92; Statement of Defence, ¶ 101, referring to Exhibit R-12.

<sup>85</sup> Memorial, ¶ 140.

<sup>86</sup> Memorial, ¶ 144, referring to Exhibit C-94; Statement of Defence, ¶¶ 105-106.

<sup>87</sup> Respondents' First Post-Hearing Brief, ¶ 43.

<sup>88</sup> Memorial, ¶ 146, referring to Exhibits C-5, C-6.

<sup>89</sup> Memorial, ¶ 148.

<sup>90</sup> Claimants' Counter-memorial on Jurisdiction, ¶ 164, quoting Exhibit R-25.

<sup>91</sup> Claimants' Counter-memorial on Jurisdiction, ¶ 163, quoting Exhibit C-13/R-26.



Parties hold different views as to the effect of this decision, as described in Section V(E) below.<sup>92</sup>

89. The Parties agree that the Mining and Exploration Licenses were not re-issued after the purported April 2010 invalidation. On 11 November 2010, in a declaration published in the Mongolian press, the NEA stated that “the renewal of special permits by [CAUC and Khan Mongolia] [was] not a possibility.”<sup>93</sup> On 15 December 2012, the NEA issued notices to CAUC and Khan Mongolia respectively, reiterating that the Mining and Exploration Licenses would not be re-registered.<sup>94</sup>
90. Khan maintained the Dornod site on a care and maintenance basis until 2012, when it “decided to minimize its losses and to vacate the mine site.”<sup>95</sup> Khan was subsequently delisted from the Toronto Stock Exchange as no longer possessing a “property of merit” and, in April 2012, was listed on the Canadian National Stock Exchange.<sup>96</sup>

**E. THE ALLEGED MONGOLIAN-RUSSIAN PARTNERSHIP TO EXPLOIT THE DORNOD PROJECT**

91. The Parties disagree as to whether the inspections, license suspensions and license invalidations to which Khan was subjected in 2009 and 2010 were intended to expel Khan from CAUC to allow for a strictly Mongolian-Russian joint venture to develop Mongolia’s uranium projects in the Dornod region.<sup>97</sup>
92. According to the Claimants, it is “only in the light of the prior agreement by the Russia-Mongolia joint venture to exclude Khan from the Dornod Project that the arbitrary, erratic and often self-contradictory behaviour of the Government throughout the course of 2009-2010 can be explained.”<sup>98</sup> More specifically, “Mongolia’s decision to oust Khan from Dornod had everything to do with its relationship with Russia and the formation of a new joint venture between MonAtom and RosAtom.”<sup>99</sup>
93. The Claimants allege that Russia and Mongolia became interested in developing the Dornod Project to the exclusion of Khan after Khan had demonstrated its value by: (i) communicating

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<sup>92</sup> Rejoinder, ¶¶ 99-100, referring to Exhibit C-14.

<sup>93</sup> Memorial, ¶ 150, quoting Exhibit C-7.

<sup>94</sup> Memorial, ¶ 151, referring to Exhibits C-8, C-9.

<sup>95</sup> Memorial, ¶ 167; Statement of Defence, ¶ 119. In this context, the Respondents contend that Khan failed to comply with Mongolian mine closing procedures. Statement of Defence, ¶¶ 120-122. In response, the Claimants note that, prior to vacating the site, they conducted a thorough site inspection to ensure that no potential hazards remained, and explain that a full mine closure process was unnecessary as the mine had never been opened. Memorial, ¶ 167.

<sup>96</sup> Memorial, ¶ 169, referring to Second Edey Statement, ¶ 81, Exhibit C-228.

<sup>97</sup> Claimants’ Counter-memorial on Jurisdiction, ¶ 130.

<sup>98</sup> Memorial, ¶ 116.

<sup>99</sup> Claimants’ First Post-Hearing Brief, p. 9.

its August 2007 Pre-Feasibility Study, which highly valued the joint venture,<sup>100</sup> (ii) briefing Mr. S. Bayar, then Prime Minister of Mongolia, and Mr. Kiryenko, General Director of RosAtom, the Russian state nuclear agency and ultimate owner of Priargunsky, at the Dornod site on 26 May 2008,<sup>101</sup> (iii) submitting its reserve re-registration application in August 2008<sup>102</sup> and (iv) announcing on 11 March 2009 that the DFS established the economic feasibility of the Dornod Project.<sup>103</sup>

94. They further allege that it was following an announcement in January 2009 by representatives of Mongolia and RosAtom that they planned to create a Mongolian-Russian joint venture for the “development of uranium deposits”<sup>104</sup> that Mongolia undertook related administrative actions against Khan, which culminated in the invalidation of the Mining and Exploration Licenses and the NEA’s refusal to reinstate them.<sup>105</sup> Furthermore, during a visit by the then Russian President Dmitry Medvedev to Mongolia in August 2009, the press reported that Russia and Mongolia had agreed that their joint venture would specifically “focus on the Dornod deposit.”<sup>106</sup>
95. As the most compelling evidence of collusion between Mongolia and Russia, the Claimants refer to a 3 March 2010 letter from RosAtom in which it thanks the NEA for rejecting the 2010 MOU and informs it of RosAtom’s failure to enact a hostile takeover of Khan Canada.<sup>107</sup> The Claimants note that the Respondents do not address this “smoking gun.”<sup>108</sup> They also refer to a statement made by the Chairman of the SPC on 7 October 2010 (which he later retracted) that Russian pressure accounted for the ousting of Khan from the Dornod Project.<sup>109</sup>
96. Finally, the Claimants note that, following news that the Mining and Exploration Licenses would not be renewed, RosAtom publicly announced that a Russian-Mongolian joint venture would soon be established.<sup>110</sup>
97. The Respondents strongly reject the Claimants’ allegations, asserting that while discussions occurred between the Mongolian and Russian Governments on “a general level,” these were not aimed at ousting Khan from the Dornod Project. In fact, the agreements contemplated would

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<sup>100</sup> Reply, ¶ 336, referring to Exhibits C-60 (Table 12.1), C-122 (discussing PFS), C-356.

<sup>101</sup> Reply, ¶ 337, referring to Exhibit C-54, 9; Exhibits C-442, C-443, C-478.

<sup>102</sup> Reply, ¶ 338, referring to Exhibit C-64.

<sup>103</sup> Reply, ¶¶ 342, 344, referring to Exhibit C-57.

<sup>104</sup> Reply, ¶¶ 341-344, referring to Exhibits C-79, C-181.

<sup>105</sup> Reply, ¶ 365. The relevant series of events are detailed at Reply, ¶¶ 348-353.

<sup>106</sup> Memorial, ¶ 114, quoting Exhibit C-80.

<sup>107</sup> Reply, ¶¶ 355-359, referring to Exhibits C-4, C-289, C-205; Claimants’ Second Post-Hearing Brief, p. 7.

<sup>108</sup> Claimants’ Second Post-Hearing Brief, p. 7.

<sup>109</sup> Reply, ¶ 363, referring to Exhibits C-98, C-499.

<sup>110</sup> Reply, ¶ 364, referring to Exhibit C-83 (p. 1).

protect the rights of third parties, including Khan.<sup>111</sup> The Respondents clarify that, at the May 2008 meeting between governmental representatives of Russia and Mongolia, there was not any mention of Khan being ousted from the joint venture.<sup>112</sup>

98. The Respondents emphasize that Mongolia has not granted licenses for the areas previously covered by the invalidated Mining and Exploration Licenses,<sup>113</sup> and note that these properties remain undeveloped, contrary to the commercial interests of Mongolia.<sup>114</sup> They also indicate that, to date, no strictly Mongolian-Russian joint venture has been formed.<sup>115</sup>

#### IV. LEGAL PROVISIONS RELEVANT TO THE DISPUTE

99. The relevant provisions of Mongolian law are as follows:

Article 8 of the Foreign Investment Law: Legal guarantees for foreign investment<sup>116</sup>

- (1) Foreign investment within the territory of Mongolia shall enjoy the legal protection guaranteed by the Constitution, this law and other legislation, consistent with those laws and international treaties to which Mongolia is a party.
- (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.

Article 9 of the Foreign Investment Law: Conditions for foreign investors<sup>117</sup>

Mongolia shall accord to foreign investors favorable conditions not less than those accorded to Mongolian investors, in respect of the possession, use, and disposal of their investments.

Article 5 of the Mongolian Constitution (“Constitution”)<sup>118</sup>

1. Mongolia has an economy based on different forms of property and answering both universal trends of world economic development and national specifics.
2. The State shall recognize all forms of both public and private property and shall protect the rights of the owner by law.
3. The State may restrict the rights of the owner only on the basis of the Constitution [ . . . ]

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<sup>111</sup> Statement of Defence, ¶¶ 333-338.

<sup>112</sup> Statement of Defence, ¶ 335, referring to First Bailikhuu Statement, ¶¶ 19-20.

<sup>113</sup> Statement of Defence, ¶ 339.

<sup>114</sup> Statement of Defence, ¶ 340.

<sup>115</sup> Respondents’ First Post-Hearing Brief, ¶ 36.

<sup>116</sup> Exhibit CLA-8 (art. 8).

<sup>117</sup> Exhibit CLA-8 (art. 9).

<sup>118</sup> Memorial, ¶ 212, referring to Exhibit CLA-26 (art. 5).

Article 6.4 of the Constitution<sup>119</sup>

The State has the right to hold landowners responsible regarding the manner the land is used, to exchange or take it over with compensation on the grounds of special public need, or confiscate the land if it is used in a manner adverse to the health of the population, the interests of environmental protection, or national security.

Article 16.3 of the Constitution<sup>120</sup>

The citizens of Mongolia enjoy the following rights and freedoms: [ . . . ]

(3) The right to fair acquisition, possession, ownership and inheritance of movable and immovable property. Illegal confiscation and requisitioning of the private property of citizens are prohibited. If the State and its bodies appropriate private property on the basis of exclusive public need, they may only do so with due compensation and payment.

Article 13 of the Civil Code of Mongolia, 2002 (“2002 Civil Code”)<sup>121</sup>

1) Participants to civil legal relationships shall fairly exercise and fulfill their rights and duties stipulated by law or contracts.

2) Participants to civil legal relationships may exercise in their free will any rights and duties which are not prohibited or directly regulated by law.

3) Participants to civil legal relationships are prohibited from undertaking activities harmful to others, limiting freedom of market relations without grounds, and illegally taking advantage of legitimate advantages while enjoying their own rights or fulfilling their duties. Otherwise, they shall bear responsibilities stipulated by law.

Article 101 of the 2002 Civil Code<sup>122</sup>

Owners shall be entitled to freely possess, use, dispose of their ownership subjects at own discretion and protect them from any encroachment, without breaking the other parties’ rights guaranteed by law or agreement and within the limits determined by law.

Article 103 of the 2002 Civil Code<sup>123</sup>

Ownership rights shall only be restricted under the grounds specified in law.

Article 81.2 of the 1999 Law of Mongolia on Company (“Company Law”)<sup>124</sup>

A governing person of a company must [ . . . ] act in good faith and in the company’s interest.

Article 82.1 of the Company Law<sup>125</sup>

A governing person of a company shall be personally liable for any loss caused to the company, its shareholders and creditors, if such person intentionally commits any of the following unlawful acts:

[ . . . ]

5) violates the principles stated in Article 81.2 [ . . . ]

100. The relevant provisions of the ECT are as follows:

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<sup>119</sup> Exhibit CLA-26 (art. 6.4).

<sup>120</sup> Exhibit CLA-26 (art. 16.3).

<sup>121</sup> Exhibit CLA-117 (art. 13).

<sup>122</sup> Exhibit CLA-117 (art. 101).

<sup>123</sup> Exhibit CLA-117 (art. 103).

<sup>124</sup> Exhibit CLA-46 (art. 81.2).

<sup>125</sup> Exhibit CLA-46 (art. 82.1).

Article 10<sup>126</sup>

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

[. . .]

(7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

[. . .]

(12) Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.

Article 13<sup>127</sup>

(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such Expropriation is:

- (a) for a purpose which is in the public interest;
- (b) not discriminatory;
- (c) carried out under due process of law; and
- (d) accompanied by payment of prompt, adequate and effective compensation.

[. . .]

(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through ownership of shares.

**V. THE PARTIES' ARGUMENTS ON LIABILITY**

101. The Claimants contend that the Respondents (and Mongolia, in particular) unlawfully deprived the Claimants of both their investment, in the form of the Mining and Exploration Licenses, and their contractual rights under the Agreements. The Claimants also bring claims against the Respondents for the breach of the duties of good faith and loyalty in relation to the Parties' joint venture and for treatment in contravention of Mongolian and international law.

102. The Claimants identify the following factual bases for their claims:

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<sup>126</sup> Exhibit CLA-53 (art. 10).

<sup>127</sup> Exhibit CLA-53 (art. 13).

- (i) the temporary suspension of the Mining License on 10 July 2009;
  - (ii) the enactment of the NEL and the LPCNEL and the subsequent invalidation of the Mining and Exploration Licenses;
  - (iii) the alleged refusal of Mongolia to comply with the decisions of its administrative courts, which required it to reinstate the Mining and Exploration Licenses; and
  - (iv) the wrongful undermining of the Claimants' business reputation through the media.<sup>128</sup>
103. The Respondents dispute the Claimants' interpretation of events and deny being liable for any of the actions taken.
104. Underlying the general framework of the Claimants' claims as summarized above are separate claims brought by the individual Claimants pursuant to different arbitration agreements and invoking different legal standards.
105. Khan Canada and CAUC Holding bring claims against Mongolia and MonAtom pursuant to the arbitration agreement in Article 12 of the Founding Agreement for the deprivation of their rights in relation to the Mining License and the Agreements, as well as for the Respondents' failure to act in good faith for the advancement of the joint venture. They bring their claims on the following bases:
- (i) Article 3.6 of the Founding Agreement, which states that "[p]roperty of the Company [CAUC] will not be subject to requisition or confiscation;"
  - (ii) Article 8.1 of the Foreign Investment Law, which entitles foreign investment in Mongolia to legal protection;
  - (iii) Articles 8.2 and 8.3 of the Foreign Investment Law, which prohibits the unlawful expropriation of foreign investment within the territory of Mongolia;
  - (iv) Article 9 of the Foreign Investment Law, which obliges Mongolia to accord foreign investors treatment no less favourable than the treatment accorded to Mongolian investors;
  - (v) the duty of good faith as reflected in Article 13 of the 2002 Civil Code;
  - (vi) the duty of loyalty as reflected in Article 83 of the Company Law; and
  - (vii) the international minimum standard of treatment of aliens under customary international law (against Mongolia only).<sup>129</sup>
106. In turn, Khan Netherlands brings claims against Mongolia pursuant to Article 26 of the ECT for the deprivation of its rights under the Exploration License, as well as for Mongolia's failure to act in good faith for the advancement of the joint venture. The Respondents submit that the claims brought under the ECT must be limited to those relating to the indirect interest of Khan Netherlands in the Additional Property, in the form of its 75 percent ownership of Khan

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<sup>128</sup> Memorial, ¶¶ 277-278 (emphasis omitted).

<sup>129</sup> See structure of Claimants' Pre-Hearing Brief.

Mongolia, the holder of the Exploration License.<sup>130</sup> Khan Netherlands brings its claims on the following bases:

- (i) Article 13 of the ECT;
- (ii) the umbrella clause set out in Article 10.1 of the ECT, in relation to Mongolia's obligations under the Foreign Investment Law; and
- (iii) the fair and equitable treatment obligation set out in Article 10.1 of the ECT.<sup>131</sup>

107. The Claimants also contend that the Tribunal must apply the international minimum standard as an independent basis for its decision on those issues to which Mongolian law applies if it finds that the Constitution does not require Mongolia to uphold this standard or if the protection offered by Mongolian law falls below it.<sup>132</sup>

108. While the Parties do not dispute the framework under which the Claimants bring their claims, they disagree regarding the interaction of these different legal standards in application to these proceedings as well as the nature of the investment in question, with specific regard to the alleged unity of investment comprising the Mining and Exploration Licenses. Subsequent sections discuss these issues as well as the Parties' other arguments on the merits.

#### **A. PRELIMINARY ARGUMENTS ON THE APPLICABLE LEGAL STANDARDS**

##### *The Claimants' position*

109. The Claimants submit that the legal standards that apply to the claims of Khan Canada and CAUC Holding, on the one hand, and those of Khan Netherlands, on the other hand, are "closely intertwined at every level of the analysis."<sup>133</sup> The Claimants also submit that Mongolian law was intended to coincide with international law, which means that the latter should assist in the interpretation of the former.<sup>134</sup>

The corresponding provisions of the ECT and the Foreign Investment Law are substantially identical.

110. The Claimants contend that the corresponding provisions of the ECT and the Foreign Investment Law are substantially identical.<sup>135</sup> For example, Article 13 of the ECT (that allows expropriations only if they are in the public interest, not discriminatory, carried out under due process of law, and accompanied by compensation)<sup>136</sup> is "substantially identical" to Articles 8.2 and 8.3 of the Foreign Investment Law (with Article 8.2 prohibiting unlawful expropriation and

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<sup>130</sup> Statement of Defence, ¶ 308.

<sup>131</sup> See structure of Claimants' Pre-Hearing Brief.

<sup>132</sup> Claimants' Pre-Hearing Brief, ¶ 42; Claimants' First Post-Hearing Brief, p. 9.

<sup>133</sup> Memorial, ¶ 193.

<sup>134</sup> Memorial, ¶¶ 272-276, referring to First Tsogt Report, ¶ 11, Exhibits CLA-136 (Foreword), CLA-122 (emphasis added).

Article 8.3 stating that investments may be expropriated only for the public interest in accordance with due process of law on a non-discriminatory basis, and on payment of compensation).<sup>137</sup>

111. With respect to their claims concerning their treatment and that of their investments, the Claimants raise a number of points. First, they note that Khan Netherlands invokes the umbrella clause in Article 10.1 of the ECT to raise claims for breaches of the Foreign Investment Law, which Khan Canada and CAUC Holding raise directly.<sup>138</sup> Second, the Claimants contend that Article 10.7 of the ECT, which obliges the State to accord the covered investments “treatment no less favourable” than that extended to domestic investors as well as other foreign investors<sup>139</sup> is substantially identical to Article 9 of the Foreign Investment Law, which requires Mongolia to accord foreign investors “favorable conditions not less than those accorded to Mongolian investors.”<sup>140</sup> The Claimants submit that the duty of loyalty<sup>141</sup> and the duty of good faith<sup>142</sup> under Mongolian law provide for the same treatment. Third, the Claimants argue that the fair and equitable treatment standard in Article 10.1 of the ECT<sup>143</sup> is also provided for under Mongolian law in the form of the duties of good faith<sup>144</sup> and loyalty.<sup>145</sup> Fourth, the Claimants argue that the guarantee in Article 10.1 of the ECT against the impairment of qualifying investments via unreasonable or discriminatory measures<sup>146</sup> expresses the negative aspect of the fair and equitable treatment obligation,<sup>147</sup> and has an effect equivalent to Article 8.1 of the Foreign Investment Law, which guarantees foreign investments “legal protection guaranteed by the Constitution, this law and other legislation, consistent with those laws and [Mongolian] international treaties.”<sup>148</sup> Lastly, the Claimants contend that the guarantee in the ECT that covered investments be accorded treatment no less favourable than that required by international law<sup>149</sup> obliges the State to comply with the international minimum standard,<sup>150</sup> a

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<sup>135</sup> Claimants’ First Post-Hearing Brief, p. 8.

<sup>136</sup> Memorial, ¶ 211, referring to Exhibit CLA-53 (art. 13).

<sup>137</sup> Memorial, ¶¶ 215-217, referring to Exhibit CLA-8 (arts. 8.2, 8.3); Second Tsogt Report, ¶¶ 63-75.

<sup>138</sup> Memorial, ¶ 223.

<sup>139</sup> Memorial, ¶¶ 221, 226, referring to Exhibit CLA-53 (art. 10.7).

<sup>140</sup> Memorial, ¶¶ 224-225, referring to Exhibit CLA-9 (art. 9).

<sup>141</sup> Memorial, ¶ 226, referring to Exhibit CLA-46 (arts. 81.2, 82.1.5).

<sup>142</sup> Memorial, ¶ 226, referring to Exhibit CLA-117 (art. 13).

<sup>143</sup> Memorial, ¶ 221, referring to Exhibit CLA-53 (art. 10.1).

<sup>144</sup> Memorial, ¶¶ 228-229, referring to Exhibit CLA-117 (art. 13).

<sup>145</sup> Memorial, ¶¶ 230-231, referring to Exhibit CLA-46 (arts. 81.2, 82.1.5).

<sup>146</sup> Memorial, ¶ 221, referring to Exhibit CLA-53 (art. 10.1).

<sup>147</sup> Memorial, ¶ 232, referring to Exhibit CLA-178 (¶ 259).

<sup>148</sup> Memorial, ¶¶ 234-237, referring to Exhibits CLA-8 (art. 8.1), CLA-26A (arts. 1.2, 46.2); Second Tsogt Report, ¶¶ 84, 228-246.

<sup>149</sup> Memorial, ¶ 221, referring to Exhibit CLA-53 (art. 10.1).

<sup>150</sup> Memorial, ¶ 238, referring to Exhibit CLA-178 (¶ 253).



requirement that Mongolian law also imposes.<sup>151</sup> The Claimants thus submit that the guarantee in Article 10.12 of the ECT that the domestic law of the State provide effective means for the assertion of claims and the enforcement of rights related to the covered investments<sup>152</sup> can be subsumed under the guarantee against the denial of justice,<sup>153</sup> and forms part of the international minimum standard.<sup>154</sup>

The failure by Mongolia to abide by the sovereign commitments it assumed under the Agreements will amount to a breach of the civil obligations it owes its joint venture partners.

112. The Claimants submit that Mongolian law allows the State to participate in civil legal relations and thereby be bound by Mongolian civil law.<sup>155</sup> The Minerals Law of 1 January 1995 (“**1995 Minerals Law**”), which governs the Minerals Agreement, authorizes the State to both license the right to mine mineral deposits and invest in mineral mining.<sup>156</sup> As Mongolia undertook the latter activity through its execution of the Founding Agreement and its participation in the CAUC joint venture, a civil relationship was created between the State and its partners in CAUC,<sup>157</sup> making Mongolia a participant in a civil legal relationship.<sup>158</sup>
113. In the context of this civil relationship, Mongolia assumed sovereign commitments in the Agreements<sup>159</sup> pursuant to Article 12 of the 1995 Minerals Law, which authorizes the Government to determine the terms applicable to State participation in a mining venture.<sup>160</sup> Because the obligations assumed by the State in the Agreements conform to the relevant Mongolian legislation, the Claimants contend that they are valid and enforceable.<sup>161</sup> In practical terms, this means that, for matters specifically regulated by the Agreements, the terms of the Agreements prevail over generally applicable public law (save the Constitution); whereas for matters not specifically regulated by the Agreements but nonetheless connected to their subject matter, Mongolia is bound by the civil duties of good faith and loyalty not to frustrate the underlying purpose of the Agreements, inasmuch as the civil obligation of the State exists

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<sup>151</sup> Memorial, ¶ 239, referring to Exhibit CLA-26 (art. 10.1); Second Tsogt Report, ¶¶ 97-98.

<sup>152</sup> Memorial, ¶ 221, referring to Exhibit CLA-53 (art. 10.12).

<sup>153</sup> Memorial, ¶ 240, Exhibit CLA-17 (¶ 391).

<sup>154</sup> Memorial, ¶ 240, Exhibit CLA-179.

<sup>155</sup> Memorial, ¶ 195, referring to Second Tsogt Report, ¶¶ 193-194, 198; Exhibit CLA-117 (art. 545).

<sup>156</sup> Memorial, ¶ 196, referring to Exhibits C-16A (art. 16.1), C-17A (Preamble and art. 10), CLA-117 (art. 1.3), RL-50 (art. 5.2); Decision on Jurisdiction, ¶ 347; Second Tsogt Report, ¶¶ 203, 206.

<sup>157</sup> Memorial, ¶ 199, referring to Exhibit C-16A (art. 2.1); Second Tsogt Report, ¶¶ 201-202. *See also* Reply, ¶ 67.

<sup>158</sup> Memorial, ¶¶ 197-198, referring to Exhibit RL-50 (arts. 5.2, 12.1, 12.3); Second Tsogt Report, ¶ 206. *See also* Reply, ¶ 67.

<sup>159</sup> Memorial, ¶ 201, referring to Exhibits C-16A (arts. 3.6, 5.3), C-17A (arts. 1.1, 2, 4.3, 7, 13), C-18A (art. 4.3).

<sup>160</sup> Memorial, ¶ 202, referring to Second Tsogt Report, ¶¶ 211-212.

<sup>161</sup> Memorial, ¶ 202, referring to Second Tsogt Report, ¶¶ 212-213.

alongside the laws governing its administrative conduct.<sup>162</sup> This means, therefore, that the failure by Mongolia to abide by its sovereign commitments under the Agreements will amount to a breach of the civil obligations it owes its joint venture partners.<sup>163</sup>

114. The Claimants reject the Respondents' argument that actions taken by Mongolia in its sovereign capacity somehow shield Mongolia from civil liability. They contend that civil obligations are defined not by the capacity in which an obligor performs an obligation but by the subject-matter of the obligation, its voluntary assumption and performance, the parity between the parties in the contractual setting, and the legal protection of the rights of each party to demand performance from the other.<sup>164</sup>
115. Relatedly, in response to the Respondents' argument that the 2002 Civil Code does not apply to the Agreements because they create a relationship of administrative subordination, the Claimants contend that Mongolia does not automatically become a party to a "relationship based on administrative subordination" upon its exercise of sovereign powers.<sup>165</sup> As previously stated, the Claimants clarify that the relationship between the parties to the Agreements does not depend on the use of governmental powers, but, rather, on the voluntary assumption by the Government of civil commitments that entail the use of sovereign powers.<sup>166</sup>

The Mining and Exploration Licenses are property under Mongolian law.

116. The Claimants reject the Respondents' corollary argument that the alleged non-application of the 2002 Civil Code to relationships of administrative subordination means that the Mining and Exploration Licenses are not property. They also reject the Respondents' argument that the licenses cannot be transferred or pledged freely and are not, therefore, property. As a preliminary matter, the Claimants stress that, were this not the case, the current Minerals Law would not require the State to compensate the holder of a minerals license who is impeded in its ability to carry out its authorized exploration or mining activities by the State's establishment of a special protected area.<sup>167</sup>
117. As regards the specific issue of whether the licenses can be transferred or pledged, the Claimants note that Article 49 of the 2006 Minerals Law allows minerals licenses to be

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<sup>162</sup> Memorial, ¶ 203, referring to Second Tsogt Report, ¶¶ 213-216.

<sup>163</sup> Memorial, ¶ 204. On this note, the Claimants state that the determination of the scope of the relevant civil obligation is dependent on (i) whether the obligation properly overrode the applicable public law; (ii) if public law was applicable, whether it permitted an alternative action less prejudicial to the Agreements; and (iii) if it did not, whether the application of the public law was proper and equitable. Memorial, ¶¶ 205-206, referring to Exhibit CLA-136 (art. 13.1).

<sup>164</sup> Reply, ¶¶ 73-74, referring to Exhibit CLA-117 (arts. 1.1, 1.20); Third Tsogt Report, ¶ 9.

<sup>165</sup> Claimants' Reply, ¶ 75.

<sup>166</sup> Claimants' First Post-Hearing Brief, p. 14.

<sup>167</sup> Claimants' First Post-Hearing Brief, pp. 1-2.

transferred and Articles 51 and 52 of the 2006 Minerals Law contemplate the pledging of these licenses.<sup>168</sup> The Claimants also reject the Respondents' reliance on the Mongolian Supreme Court decision in *Gobi Shoo LLC v. Mongolrudprom* as evidence that minerals licenses cannot be pledged; they clarify that this decision dealt with the applicability of the 2002 Civil Code provisions on tangible property to the pledging of mineral licenses, but said nothing about whether rights conferred under licenses could constitute intangible property for the licenseholder.<sup>169</sup>

Administrative law is relevant to the Claimants' claims under Mongolian and international law.

118. While acknowledging that the arbitration clauses in the Founding Agreement and the ECT preclude claims based on Mongolian administrative law *per se*, the Claimants nevertheless contend that Mongolian administrative law forms the factual predicate for their claims under Mongolian civil law and international law.<sup>170</sup> The Claimants also contend that the issue of whether Mongolia has properly applied its administrative law is relevant to the resolution of the claims brought under the ECT, which requires the State to apply its laws fairly, transparently and in accordance with due process of law,<sup>171</sup> and to the claims brought under the Foreign Investment Law, which requires the State to properly apply its laws relating to foreign investment and to follow due process of law.<sup>172</sup>

International law is relevant to the interpretation and application of the Founding Agreement.

119. As regards the claims brought by Khan Canada and CAUC Holding, the Claimants submit that the parties to the Founding Agreement must be deemed to have consented to the application of international law given the broad wording of the arbitration agreement in Article 12, that the Minerals Agreement is an international investment agreement and that international public policy requires the application of international principles.<sup>173</sup> In response to the Respondents' contention that the international law claims brought by the Claimants under the Founding Agreement are limited to those concerning the infringement of the Claimants' direct rights as CAUC shareholders,<sup>174</sup> the Claimants note that their only potentially derivative claims are for Mongolia's breach of its duties of good faith and loyalty to CAUC, which have been deemed by the Tribunal to fall within the scope of Article 12 of the Founding Agreement.<sup>175</sup> The

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<sup>168</sup> Reply, ¶¶ 75-77, referring to Third Tsogt Report, ¶ 67; Second Tsogt Report, ¶¶ 63, 71-75; 194, n. 35; Third Tsogt Report, ¶ 173; Claimants' Second Post-Hearing Brief, p. 2.

<sup>169</sup> Claimants' First Post-Hearing Brief, p. 2.

<sup>170</sup> Memorial, ¶ 194, referring to Exhibit CLA-53 (art. 26.6); Second Tsogt Report, ¶¶ 192-202.

<sup>171</sup> Memorial, ¶ 207.

<sup>172</sup> Memorial, ¶ 208, referring to Exhibit CLA-8 (arts. 8.1, 8.3).

<sup>173</sup> Memorial, ¶¶ 250-269.

<sup>174</sup> Reply, ¶ 55.

<sup>175</sup> Reply, ¶ 57, referring to Decision on Jurisdiction, ¶ 378.

Claimants clarify that their claims concern the illegal interference with their contractual rights under the Agreements,<sup>176</sup> which are valid legal entitlements under Mongolian law<sup>177</sup> and subject to protection under international law as property rights.<sup>178</sup>

120. The Claimants contend that the claims brought by Khan Netherlands must be resolved according to international law, in accordance with the ECT and customs and principles of international law, and note that international law should also serve gap-filling and interpretative functions.<sup>179</sup>

*The Respondents' position*

121. The Respondents emphasize the difference between the legal standards applicable to the claims of Khan Canada and CAUC Holding, on the one hand, and the claims of Khan Netherlands, on the other hand. They also reject the view that Mongolian law and international law are similar.

The Foreign Investment Law and the ECT do not have similar effect.

122. As regards the Claimants' claims for breaches of Mongolian law, the Respondents contend that the effects of the relevant Foreign Investment Law provisions are different from the corresponding ECT provisions, primarily because a Mongolian court would interpret the provisions of the Foreign Investment Law in the context of the Mongolian legal system.<sup>180</sup> The Respondents further contend that the Tribunal's interpretation and application of Mongolian law should not be conducted in light of "general principles of international law" but should, rather, accord to how domestic law would be interpreted and applied in Mongolia.<sup>181</sup>

The Mining and Exploration Licenses do not constitute "property" under the 2002 Civil Code and Mongolian law.

123. The Respondents clarify that the 2002 Civil Code, which is the source of the obligation of good faith, and the Company Law, which is the source of the duty of loyalty, do not apply to actions of the State taken in the exercise of its sovereign authority.<sup>182</sup> Specifically, the Respondents argue that Article 1.2 of the Civil Code of Mongolia, 1994 and Article 1.3 of the 2002 Civil Code exclude the application of this Code to relationships based on administrative subordination, such as the one in the present case, where Mongolia suspended and terminated

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<sup>176</sup> Reply, ¶ 58, referring to Memorial, ¶¶ 170, 176-177.

<sup>177</sup> Reply, ¶ 61, referring to Second Tsogt Report, ¶¶ 192-216, Third Tsogt Report, ¶¶ 11-22.

<sup>178</sup> Reply, ¶ 60, referring to Exhibits CLA-165 (¶ 304), CLA-177 (¶ 387), CLA-204 (¶ 240), CLA-205 (¶ 136), CLA-213 (¶ 98).

<sup>179</sup> Memorial, ¶¶ 242-244, referring to Claimants' Rejoinder on Jurisdiction, ¶¶ 116-119; Exhibits CLA-17 (art. 31), CLA-53 (arts. 10.1, 26.6).

<sup>180</sup> Statement of Defence, ¶ 157, referring to First Bayar Report, ¶ 118.

<sup>181</sup> Statement of Defence, ¶ 136.

<sup>182</sup> Statement of Defence, ¶¶ 296-297, referring to First Bayar Report, ¶ 116.

the licenses in the exercise of its administrative power.<sup>183</sup> Mining licenses, moreover, create precisely this kind of relationship between the Government and the license-holders.<sup>184</sup> And secondly, the Respondents contend that the 2002 Civil Code establishes a special regime with respect to the transfer of ownership and pledge, while mining and exploration licenses cannot be freely pledged or transferred.<sup>185</sup>

124. The Respondents refer to the decision of the Mongolian Supreme Court in *Gobi Shoo LLC v. Mongolrudprom* which states that “a mining license, however, is possessed but not owned by any entity, and therefore there is no legal ground to consider such mining license to be a property right which is transferable to the ownership of others.”<sup>186</sup>

The 2002 Civil Code is of limited relevance to the Claimants’ claims, as are the Agreements themselves.

125. The Respondents argue that the 2002 Civil Code does not apply to matters that are not specifically regulated by the Agreements, although it is otherwise applicable to them.<sup>187</sup> Matters external to the Agreements include the protection of the environment and the termination and suspension of licenses.<sup>188</sup> Moreover, the Respondents contend that the relevance of the Agreements itself to the Claimants’ claims is limited because the invalidation of the Mining and Exploration Licenses are not regulated by the Agreement, and are, therefore, governed by Mongolian law.<sup>189</sup> The Respondents reject the Claimants’ contention that the terms of the Agreements can override generally applicable public law,<sup>190</sup> citing three reasons: (i) Article 12.2 of the Minerals Agreement provides for the participation of the Government in the mining operation not in its sovereign capacity but in its civil capacity, which means that Mongolia is free to enact legislation affecting the Agreements;<sup>191</sup> (ii) the Agreements explicitly refer to the application of Mongolian law,<sup>192</sup> and (iii) Mongolian law does not authorize the terms of the Agreements to override inconsistent public law.<sup>193</sup>

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<sup>183</sup> Rejoinder, ¶¶ 169-171, referring to Exhibit CLA-117 (art. 1.3); Second Bayar Report, ¶ 35; Third Tsogt Report, ¶ 75.

<sup>184</sup> Statement of Defence, ¶ 159, referring to First Bayar Report, ¶¶ 39-40. *See also* Rejoinder, ¶¶ 186-188, referring to Exhibit CLA-117 (art. 1.3); Second Bayar Report, ¶ 32.

<sup>185</sup> Rejoinder, ¶¶ 184-185, referring to Second Bayar Report, ¶ 39.

<sup>186</sup> Claimants’ Second Post-Hearing Brief, ¶ 12, referring to Exhibit RL-173 (p. 1); Transcript (14 November 2013), 658:5-18.

<sup>187</sup> Rejoinder, ¶ 167.

<sup>188</sup> Rejoinder, ¶ 168, referring to Exhibit C-16A.

<sup>189</sup> Rejoinder, ¶ 155, referring to Second Bayar Report, ¶ 17.

<sup>190</sup> Statement of Defence, ¶ 142, referring to Second Tsogt Report, ¶ 213.

<sup>191</sup> Statement of Defence, ¶ 143, referring to First Bayar Report, ¶ 20.

<sup>192</sup> Statement of Defence, ¶ 143, referring to First Bayar Report, ¶ 20.

<sup>193</sup> Statement of Defence, ¶ 145, referring to First Bayar Report, ¶ 24.

126. The Respondents also argue that Erdene was not authorized to make “sovereign promises” in the Founding Agreement, which means that such “sovereign promises” (if found to exist, which is denied) are void.<sup>194</sup>

The Mining and Exploration Licenses were terminated pursuant to administrative law, over which the Tribunal has no jurisdiction.

127. The Respondents argue that the Mining and Exploration Licenses were terminated on the basis of Mongolian administrative law,<sup>195</sup> and emphasize that the Tribunal does not have the jurisdiction to review the decisions of the Mongolian authorities and courts.<sup>196</sup>

Only customary international law is relevant for claims brought under the Founding Agreement.

128. As regards the Claimants’ claims for breach of international law brought under the Founding Agreement, the Respondents submit that the claims brought by Khan Canada and CAUC Holding under the Founding Agreement are limited to customary international law.

Mongolian law is relevant to Khan Netherlands’ claims under the ECT.

129. While acknowledging that international law applies to Khan Netherlands’ claims under the ECT, the Respondents contend that Mongolian law also applies to these claims.<sup>197</sup> They contend that international law mandates a *renvoi* to domestic law for the determination of the scope of the relevant investment.<sup>198</sup> In this case, this means that Mongolian law determines issues related to the registration, suspension, invalidation and re-registration of the Mining and Exploration Licenses under the ECT, inasmuch as these licenses were created under and are subject to Mongolian law.<sup>199</sup> To hold otherwise would be to insulate the Claimants from the requirement of complying with Mongolian law.<sup>200</sup>

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<sup>194</sup> See Rejoinder, ¶ 154, referring to Exhibit C-16A (art. 12.1(i)). See also Rejoinder, ¶ 151-153, referring to First Bayar Report, ¶¶ 17-21; Second Bayar Report, ¶¶ 24, 28; Exhibit RL-50 (art. 12.3); Claimants’ Second Post-Hearing Brief, ¶¶ 9-10.

<sup>195</sup> Statement of Defence, ¶ 135, referring to Memorial, ¶ 194.

<sup>196</sup> Statement of Defence, ¶ 135, referring to Exhibit CLA-112 (¶ 20.33 (stating that “[t]his Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently.”)).

<sup>197</sup> Statement of Defence, ¶¶ 138-139, referring to Exhibits RL-89 (¶ 72), RL-90 (¶ 76), RL-91 (¶ 184).

<sup>198</sup> Statement of Defence, ¶ 140, referring to Exhibit RL-96 (¶ 348).

<sup>199</sup> Statement of Defence, ¶ 141.

<sup>200</sup> Statement of Defence, ¶ 141.

## B. THE ALLEGED UNITY OF INVESTMENTS

### *The Claimants' position*

130. While the Mineral License and the Exploration License can each be considered an investment in its own right,<sup>201</sup> the Claimants submit that there really is only one investment at issue in this case: “the mining and development of the Dornod Project, including principally Deposit No. 7, by the CAUC joint venture.”<sup>202</sup> The Claimants reason that “uranium could not be economically mined and produced from Deposit No. 7 by virtue of the rights conferred under either of the Licenses alone.”<sup>203</sup> Accordingly, they contend that the impairment of rights conferred under either license equates to a breach of the obligations owed to the holders of both Licenses – that is, to all the Claimants.<sup>204</sup>
131. First, the Claimants argue that the Agreements themselves envisage this unity of investment. Thus, in the Minerals Agreement, Mongolia “guarantee[d] in compliance with the Mineral Law of Mongolia [the] issuance of a license permitting development of [Deposit No. 2] and [Deposit No. 7],” and “contribute[d] the right to utilize [Deposit No. 7]” to CAUC once the economic viability of the deposit was shown.<sup>205</sup> Consequently, the original Mining License covered the entirety of Deposits Nos. 2 and 7, and was intended to continue to cover these deposits even after its size was reduced at CAUC’s request in 1998. The Exploration License was acquired by the Claimants only as a result of an inadvertent surveying error that excluded a segment of Deposit No. 7 from the area of the Mining License.<sup>206</sup>
132. While they financed the acquisition of the Exploration License themselves, the Claimants stress that their intention was always to use the Additional Property to benefit the Dornod Project as a whole.<sup>207</sup> In this respect, the Claimants note that the Respondents contradict themselves when they insist, on the one hand, that the Mining and Exploration Licenses are entirely unconnected and, on the other hand, that Khan Canada had acquired the Exploration License for its own benefit and at the expense of the joint venture.<sup>208</sup> The Claimants contend that all joint venture partners were not only aware of the acquisition of the Exploration License but also openly

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<sup>201</sup> Memorial, ¶¶ 170-175.

<sup>202</sup> Memorial, ¶ 177.

<sup>203</sup> Claimants’ First Post-Hearing Brief, p. 9.

<sup>204</sup> Memorial, ¶ 188.

<sup>205</sup> Memorial, ¶ 176, referring to Exhibit C-17A (arts. 1.1, 5.4).

<sup>206</sup> Memorial, ¶ 178, referring to Exhibits C-74, CLA-193 (¶ 4.16).

<sup>207</sup> Reply, ¶ 243, referring to Decision on Jurisdiction, ¶ 337.

<sup>208</sup> Reply, ¶ 237.

recognized and jointly acknowledged that the planned merger of the Exploration License with the Mining License was necessary for the economic viability of the Dornod Project.<sup>209</sup>

133. Second, the Claimants argue that Khan Canada had a right under the Agreements to the reunification of the Mining and Exploration Licenses. Article 38.5 of the 1995 Minerals Law (under which the Mineral License was issued) allows a mineral license holder to request changes to the concession boundary in response to changes in the deposit size<sup>210</sup> and Article 40 of the Minerals Law of 5 June 1997 (“**1997 Minerals Law**”) (under which the Exploration License was issued) allows a license holder to transfer the license.<sup>211</sup> The Claimants contend that Mongolia’s duties of good faith and loyalty toward its partners in CAUC required Mongolia to apply the minerals laws in furtherance of the purpose of the CAUC joint venture.<sup>212</sup>
134. Third, the Claimants allege that they attempted to convert the Exploration License into a mining license in the fastest possible time.<sup>213</sup> When the Exploration License was invalidated by the MRAM in August 2007 on the basis that Khan had not converted it into a mining license,<sup>214</sup> Khan immediately wrote to the MRAM explaining that it was in the process of registering the Dornod reserves, which was a prerequisite for the conversion of the Exploration License to a mining license.<sup>215</sup> The Claimants allege that MRAM Chairman Luvsanvandan Bold clarified, via a public statement on 10 September 2007, that the exploration licenses that had been invalidated the previous month (including Khan’s) would remain valid, as long as their license-holders converted them to mining licenses.<sup>216</sup> Khan therefore submitted an application for conversion on 14 September 2007.<sup>217</sup> In a meeting with Khan representatives on 17 September 2007, Chairman Bold explained that the conversion of the Exploration License was being delayed due to the designation of the Dornod deposit as “of strategic importance.”<sup>218</sup> On 27 November 2007, the MRAM instructed Khan to wait until the Minerals Council had reached a decision on the registration of the Dornod deposit reserves before attempting to convert the

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<sup>209</sup> Reply, ¶¶ 239-241, referring to Decision on Jurisdiction, ¶¶ 337, 339; Second Arsenault Statement, ¶¶ 67, referring to Exhibits C-378, C-379. *See also* Reply, ¶ 242, referring to Exhibits C-4 (¶ 68), C-32 (p. 2), C-39 (p. 3), C-122, C-291, C-357, C-378, C-380; Davis Statement, ¶¶ 42-43, 59; Respondents’ Post-Bifurcation Hearing Submission, ¶ 42.

<sup>210</sup> Memorial, ¶ 181, referring to Exhibit RL-50 (art. 38.5); Second Tsogt Report, ¶ 220.

<sup>211</sup> Memorial, ¶ 181, referring to Exhibit CLA-140 (art. 40.1); Second Tsogt Report, ¶ 221.

<sup>212</sup> Memorial, ¶¶ 182-186, referring to Second Tsogt Report, ¶ 227; Exhibit C-17A (art. 5.4).

<sup>213</sup> Reply, ¶ 323.

<sup>214</sup> Reply, ¶ 324, referring to Exhibit C-284, Second Arsenault Statement, ¶ 93.

<sup>215</sup> Reply, ¶ 325, referring to Exhibit C-387, Second Arsenault Statement, ¶ 93.

<sup>216</sup> Reply, ¶ 326, referring to Exhibit C-387, Second Arsenault Statement, ¶ 93.

<sup>217</sup> Reply, ¶ 327, referring to Exhibit C-241, Second Arsenault Statement, ¶ 95.

<sup>218</sup> Reply, ¶ 327, referring to Exhibit C-380, Second Arsenault Statement, ¶ 96.



Exploration License into a mining license.<sup>219</sup> The Claimants conclude by noting that Khan had met all of the legal requirements to obtain mining rights over the Additional Property and that “Mongolia later used these delays in its administrative process to justify its failure to ever consider Khan’s application to convert the Exploration License to a mining license.”<sup>220</sup>

135. Finally, the Claimants submit that, when the NEA cancelled its Exploration License, Khan Mongolia as the holder of an exploration license<sup>221</sup> had a vested right to a mining license.<sup>222</sup> The Claimants add that the MRAM has no discretion in considering applications for conversion, as the 2006 Minerals Law both enumerates the requirements for obtaining a mining license and lists all possible decisions on an application and their bases.<sup>223</sup> They also note that, because Khan Mongolia had met all the legal requirements to obtain mining rights over the Additional Property, Khan was justified in its expectation that a mining license would be issued for it.<sup>224</sup>

136. The Claimants clarify that they did not submit a written formal proposal for the merger of the licenses and explain that “they would not logically have done so until the Government approved their application to convert the Exploration License into a mining license.”<sup>225</sup>

*The Respondents’ position*

137. The Respondents reject the Claimants’ argument regarding the alleged unity of the Mining and Exploration Licenses, and submit that “it is an undisputable fact that no agreement [for the reunification of the Mining and Exploration Licenses] was ever made or even proposed.”<sup>226</sup>

138. The Respondents stress that the Additional Property was excluded from the scope of the Mining License due to CAUC Holding’s own decision to reduce the Mining License area, and refer to the confirmation of this decision in 2004 by the Administrative Court.<sup>227</sup>

139. Further, the Respondents contend that the Claimants sought to acquire the Exploration License for their benefit alone. They argue that, even in the face of the Respondents’ requests for information regarding the area that was excluded from the Mining License,<sup>228</sup> the Claimants did

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<sup>219</sup> Reply, ¶ 328, referring to Exhibit C-162.

<sup>220</sup> Reply, ¶ 330.

<sup>221</sup> Reply, ¶ 146, referring to Third Tsogt Report, ¶ 131.

<sup>222</sup> Reply, ¶ 147.

<sup>223</sup> Reply, ¶ 145, referring to Claimants’ Second Post-Hearing Brief, p. 10; Third Tsogt Report, ¶¶ 122-123; Exhibit CLA-118 (art. 25).

<sup>224</sup> Claimants’ Second Post-Hearing Brief, p. 10.

<sup>225</sup> Claimants’ Second Post-Hearing Brief, p. 6.

<sup>226</sup> Respondents’ First Post-Hearing Brief, ¶ 15; Respondents’ Second Post-Hearing Brief, ¶ 13, referring to Transcript (12 November 2013), 242:22 to 243:2.

<sup>227</sup> Statement of Defence, ¶¶ 166, 168, referring to Exhibit C-73.

<sup>228</sup> Statement of Defence, ¶¶ 174-175, referring to Exhibits R-51, R-53.

not inform the SPC or Priargunsky of (i) the surveying error that allegedly led to the exclusion of a segment of Deposit No. 7 from the Mining License area, (ii) the necessity of acquiring mining rights over the excluded area in order to ensure the economic viability of CAUC or (iii) the Claimants' plan to acquire the Exploration License.<sup>229</sup>

140. Moreover, the Respondents argue, Khan Mongolia treated the Exploration License as separate from the Mining License, and did not seek to have the two licenses merged.<sup>230</sup> To illustrate this argument, the Respondents refer to the Claimants' draft proposals for an updated joint venture agreement that describe the area of the joint venture as the area covered by the Mining License, without any reference to the Exploration License or the Additional Property.<sup>231</sup> The Respondents note that there were no further draft proposals for an updated joint venture agreement and, ultimately, no joint venture agreement.<sup>232</sup> They also refer to a publication by Khan dated 4 February 2008 for the Toronto Stock Exchange that mentions the joint venture only with regard to the Mining License, and not the Exploration License.<sup>233</sup>
141. The Respondents further argue that Khan required mining licenses over both the Main Property and the Additional Property in order for the Dornod Project to be profitable, and stress that, while Khan had a Mining License over the Main Property, it had only an Exploration License over the Additional Property, which was in any event due to expire in February 2011.<sup>234</sup> In practical terms, this means that Khan would have had to first convert its Exploration License into a mining license, before it could be merged with the existing Mining License.<sup>235</sup>
142. Yet, the Respondents submit, Khan was not entitled to the conversion of the Exploration License into a mining license.<sup>236</sup> Mongolian law does not grant the owner of an exploration license the automatic right to convert that license into a mining license,<sup>237</sup> but instead conditions this conversion on the meeting of several requirements and the approval of the Mongolian authorities.<sup>238</sup> Khan's 14 September 2007 application for the conversion of the Exploration License into a mining license lacked certain requirements listed in Article 25 of the

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<sup>229</sup> Statement of Defence, ¶ 173.

<sup>230</sup> Statement of Defence, ¶¶ 177-178; Transcript (12 November 2013), 242:22 to 243:3.

<sup>231</sup> Statement of Defence, ¶¶ 178, referring to Exhibit R-59, Transcript (11 November 2013), 233:3-8; Respondents' Second Post-Hearing Brief, ¶¶ 14-15, referring to Transcript (11 November 2013), 231:14 and 233:3-8.

<sup>232</sup> Transcript (12 November 2013) 306:9-19.

<sup>233</sup> Transcript (12 November 2013) 307:11 to 309:21, referring to Exhibit R-70.

<sup>234</sup> Respondents' Second Post-Hearing Brief, ¶ 39.

<sup>235</sup> Respondents' Second Post-Hearing Brief, ¶ 40.

<sup>236</sup> Statement of Defence, ¶ 181.

<sup>237</sup> Statement of Defence, ¶ 182.

<sup>238</sup> Statement of Defence, ¶¶ 184-186, referring to Exhibits R-71 (p. 26), C-50 (pp. 1-12).

2006 Minerals Law.<sup>239</sup> Because the conversion of the Exploration License into a mining license was conditional and not guaranteed,<sup>240</sup> the Respondents argue that the Exploration License “represents the interest of Khan Mongolia, and should be assessed at face value.”<sup>241</sup>

143. According to the Respondents, Khan also was not entitled to the merger of the Mining and Exploration Licenses.<sup>242</sup> Mongolian law does not recognize the concept of unifying an exploration license and a mining license, as the MRAM maintains discretion over the consolidation of adjoining licenses.<sup>243</sup> The merger of licenses is not addressed in the Minerals Agreement either, and, therefore, “[t]he reduction of the area covered by the Mining License held by CAUC entailed an equivalent reduction of the area covered by the Minerals Agreement.”<sup>244</sup> This is further supported by the fact that a “significant portion of the Exploration License area is outside the boundaries of the original Mining License.”<sup>245</sup>

### C. THE JULY 2009 TEMPORARY SUSPENSION OF THE MINING LICENSE

#### *The Claimants’ position*

144. In line with their overall argument that Mongolia’s conduct leading up to the permanent invalidation of the Mining and Exploration Licenses was wrongful,<sup>246</sup> the Claimants submit that the July 2009 temporary suspension of the Mining License by the MRAM was both an improper act under Mongolian law<sup>247</sup> and one of the pretexts for the eventual expropriation of the Mining and Exploration Licenses.<sup>248</sup> Specifically, the Claimants contend that the enactment of the NEL and the LPCNEL was connected to the temporary suspension of the Mining License (see paragraph 173 below).<sup>249</sup>
145. According to the Claimants, the violations of Mongolian law identified in the 2009 reports of the SSIA did not justify the suspension of the Mining License.<sup>250</sup> The Claimants further contend

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<sup>239</sup> Statement of Defence, ¶ 192, referring to First Bayar Report, ¶ 50. The Respondents note that art. 25 of the 2006 Minerals Law requires the holder of an exploration license that wishes to convert its exploration license into a mining license to submit (i) the Mineral Council’s minutes on the exploration work results, and a decision of the Government agency and (ii) an environmental impact assessment. Statement of Defence, ¶ 190, referring to Exhibit CLA-118 (art. 25); Respondents’ Second Post-Hearing Brief, ¶ 39, referring to Tsogt Third Report, ¶ 127, sec. 2.4.

<sup>240</sup> Statement of Defence, ¶¶ 195-196, referring to Exhibit RL-103, ¶¶ 197-199.

<sup>241</sup> Statement of Defence, ¶ 196.

<sup>242</sup> Statement of Defence, ¶ 181.

<sup>243</sup> Statement of Defence, ¶ 201, referring to First Bayar Report, ¶¶ 55-59.

<sup>244</sup> Statement of Defence, ¶ 198.

<sup>245</sup> Statement of Defence, ¶ 200.

<sup>246</sup> Memorial, ¶¶ 277-278.

<sup>247</sup> Memorial, ¶¶ 277-278.

<sup>248</sup> Memorial, ¶ 99.

<sup>249</sup> Memorial, ¶ 317, referring to Second Tsogt Report, ¶ 130; Exhibit C-224.

<sup>250</sup> Reply, ¶ 265, referring to Exhibit R-62.

that the SSIA inspections themselves were politically motivated and intended to manufacture violations on the part of the Claimants.<sup>251</sup>

146. With respect to Khan's alleged violation of Mongolian law through its failure to register the Dornod mineral reserves in Mongolia while publishing information thereon on the Toronto Stock Exchange, the Claimants submit that Khan Canada's actions on the Toronto Stock Exchange could not have violated Mongolian law, as Khan Canada was neither registered in Mongolia nor subject to the jurisdiction of the SSIA.<sup>252</sup>
147. Further, the Claimants argue that Mongolia was itself at fault for failing to register the Dornod mineral reserves, as the sole responsibility of the license holder is to submit reserve estimates to the competent authority, while the actual registering of the reserves falls to the State.<sup>253</sup> The Claimants contend that they exerted all efforts to have the Dornod reserves registered by the Minerals Council, but to no avail.<sup>254</sup> Specifically, while Khan submitted an application for the registration of a re-estimate of the Dornod reserves on 29 August 2008,<sup>255</sup> the relevant authorities delayed reviewing this application for over a year.<sup>256</sup> The Team of Experts that was finally appointed in October 2009 recommended that the Dornod deposits be registered in the State Integrated Registry<sup>257</sup> and proposed minor corrections,<sup>258</sup> to which Khan provided a comprehensive response on 19 January 2010.<sup>259</sup> The Claimants note that neither the Team of Experts nor the Minerals Council requested further revisions after this.<sup>260</sup> They submit that while it is "extremely rare" for the Minerals Council not to follow a recommendation from a Team of Experts,<sup>261</sup> in this case, the meeting of the Minerals Council to approve the Team of

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<sup>251</sup> Claimants' First Post-Hearing Brief, p. 4; Claimants' Second Post-Hearing Brief, p. 3.

<sup>252</sup> Reply, ¶ 310, referring to Exhibits R-62 (p. 5), C-84 (referring to Letter No. 07/07/09 from Khan Resources, Inc. to Mineral Resources Authority, dated 17 July 2009), C-111, C-474; Second Arsenault Statement, ¶¶ 138-140.

<sup>253</sup> Memorial, ¶ 288-294, referring to Exhibits CLA-126 (arts. 45.2, 48 (which instituted mineral reserve registration in Mongolia)), CLA-140 (art. 39.2.2), RL-50 (art. 27); Claimants' First Post-Hearing Brief, p. 4.

<sup>254</sup> Reply, ¶ 289, referring to Exhibit C-409.

<sup>255</sup> Memorial, ¶ 284, referring to First Jamsrandorj Statement, ¶ 29. *See also* Memorial, ¶ 92; Reply, ¶ 279, referring to Exhibit C-64; First Jamsmandorj Statement, ¶ 28; First Arsenault Statement, ¶ 59; Second Jamsrandorj Statement, ¶ 23.

<sup>256</sup> Memorial, ¶ 284, referring to First Arsenault Statement, ¶¶ 65-66, Exhibit C-38. *See also* Reply, ¶ 281, referring to Second Arsenault Statement (internal citations omitted); Exhibits C-129, C-130, C-472; First Arsenault Statement, ¶ 66; First Jamsrandorj Statement, ¶ 24.

<sup>257</sup> Reply, ¶ 284, referring to Exhibit C-137 (p. 13). *See also* Memorial, ¶ 285.

<sup>258</sup> Reply, ¶ 285, referring to Second Arsenault Statement, ¶ 109, Second Jamsrandorj Statement, ¶¶ 28-29.

<sup>259</sup> Reply, ¶ 286, referring to Exhibits C-250A to C-250D, C-250E (pp. 5, 7), C-250F; Second Jamsrandorj Statement, ¶ 30.

<sup>260</sup> Claimants' Second Post-Hearing Brief, p. 4, referring to Transcript (13 November 2013), 543:25 to 544:4 and 544:22-24.

<sup>261</sup> Memorial, ¶ 286, n. 511, referring to First Jamsrandorj Statement, ¶ 33.

Experts' recommendation was postponed shortly before its scheduled time,<sup>262</sup> never to be rescheduled.<sup>263</sup> Moreover, Khan's reserve re-estimate report was never rejected.<sup>264</sup>

148. The Claimants also contend that the Respondents' contention that the NEL rendered moot the issue of the registration of the Dornod reserves (which the Claimants reject) does not rebut Khan's argument that the Respondents refused to act with respect to the reserve re-estimate report and that the licenses were permanently invalidated on the basis of this non-registration.<sup>265</sup>
149. With regard to the other alleged breaches of Mongolian law, the Claimants argue: that SSIA and NEA inspectors had previously confirmed the safety of the drill core<sup>266</sup> and commended Khan's efforts to store it within the Yakhi Lake protected area,<sup>267</sup> that Mongolia itself issued the Exploration License without regard for the boundaries of the protected area and that, in any case, any overlap between the Exploration License area and the protected area is speculative;<sup>268</sup> and that Khan complied with the Radiation Protection and Safety Law and was in regular contact with the relevant agencies to ensure compliance with all applicable regulations.<sup>269</sup>
150. The Claimants specify that, in their letter to the SSIA of 22 April 2009 and during the meeting with the SSIA of the same date, they did not admit to having committed the violations listed in the 2009 SSIA inspection reports, but merely acknowledged the SSIA's opinion with regard to these alleged breaches of Mongolian law and expressed their willingness to cooperate with the SSIA and other relevant authorities.<sup>270</sup> They emphasize that all of the breaches or observed improprieties referred to in the SSIA reports were remedied.<sup>271</sup>
151. The Claimants note that the MRAM's Suspension Notice refers to Article 13.2 of the State Inspection Law and Articles 13.1 and 13.2 of the Licensing Law,<sup>272</sup> and argue that the former provision is irrelevant to license suspensions,<sup>273</sup> while the latter designates as the relevant inspection body not the SSIA, but the MRAM.<sup>274</sup> According to the Claimants, the MRAM would not have needed to investigate any alleged failure by CAUC to register the Dornod

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<sup>262</sup> Memorial, ¶ 286, referring to First Jamsrandorj Statement, ¶ 32, First Arsenault Statement, ¶ 69. *See also* Reply, ¶ 287, referring to Exhibits C-138 to C-140, Second Arsenault Statement, ¶ 112, Second Jamsrandorj Statement, ¶ 32.

<sup>263</sup> Reply, ¶ 288, referring to Exhibits C-138 to C-140; Memorial, ¶ 103.

<sup>264</sup> Claimants' Second Post-Hearing Brief, p. 4.

<sup>265</sup> Claimants' Second Post-Hearing Brief, p. 4.

<sup>266</sup> Reply, ¶ 304, referring to Exhibit C-414.

<sup>267</sup> Reply, ¶ 305-309, referring to Exhibits C-414, C-422.

<sup>268</sup> Reply, ¶¶ 299-300. The Claimants explain that the SPA boundary had been defined differently by different Government agencies. Reply, ¶¶ 294, referring to Exhibit R-62.

<sup>269</sup> Reply, ¶ 311, referring to Second Arsenault Statement, ¶¶ 141-145, 164.

<sup>270</sup> Reply, ¶ 314, referring to Statement of Defence, ¶ 95, Exhibit R-64, Second Arsenault Statement, ¶ 150.

<sup>271</sup> Transcript (13 November 2013), 503:12 to 505:11.

<sup>272</sup> Memorial, ¶ 296, referring to Exhibit R-10.

<sup>273</sup> Memorial, ¶ 297, referring to Exhibit CLA-147 (art. 13.2).

<sup>274</sup> Memorial, ¶¶ 297-299, referring to Exhibit CLA-139 (art. 13), Second Tsogt Report, ¶¶ 134, 154.

reserves when the license was suspended, since “it had been in regular contact with the company over the previous ten months about that very issue.”<sup>275</sup> The Claimants contend that the MRAM nevertheless “blindly relied” on the July 2009 SSIA Report in issuing its Suspension Notice, as demonstrated by the fact that both the report and the notices were issued on the same day.<sup>276</sup>

152. The Claimants add that they saw the April 2009 SSIA Report for the first time when the Respondents produced it in this arbitration,<sup>277</sup> and note that it is not signed by the SSIA inspectors nor representatives of either CAUC or Khan Mongolia.<sup>278</sup>

153. The Claimants lastly allege that they provided Mongolia with data and repeatedly requested meetings with the relevant officials in order to address concerns raised by the 2009 SSIA inspection,<sup>279</sup> but that their requests were ignored or rebuffed by Mongolia.<sup>280</sup>

*The Respondents' position*

154. The Respondents submit that the July 2009 suspension of the Mining License cannot amount to an expropriation, as it was a three-month suspension that, therefore, does not meet the expropriation requirement that the measure be permanent.<sup>281</sup> Nor can Mongolia's failure to register the Dornod reserves amount to an interference with property rights.<sup>282</sup> The Respondents argue that being unable to claim that the non-registration of the Dornod reserves and the suspension of the Mining License amount to an expropriation, the Claimants are constrained to characterize these acts as mere instances of the “entire chain of illegal administrative actions that ultimately resulted in the expropriation of Claimants' investment.”<sup>283</sup>

155. The Respondents further submit that the suspension of the Mining License was proper under Mongolian law, as it was motivated by the breaches of Mongolian law uncovered during the SSIA's inspection of the Dornod site in April 2009 and summarized in the April 2009 SSIA Report and July 2009 SSIA Report.<sup>284</sup>

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<sup>275</sup> Memorial, ¶ 299.

<sup>276</sup> Memorial, ¶ 300, referring to Exhibits R-9, R-10.

<sup>277</sup> Reply, ¶ 264, referring to Second Arsenault Statement, ¶ 120, Davis Statement, ¶ 76; Memorial, ¶ 121.

<sup>278</sup> Reply, ¶ 266.

<sup>279</sup> Reply, ¶¶ 316-317, referring to Exhibit C-409. See Reply, ¶¶ 317 n. 662 for full list of correspondence referred to.

<sup>280</sup> Reply, ¶ 318, referring to Second Arsenault Statement, ¶ 148.

<sup>281</sup> Statement of Defence, ¶¶ 231-232, referring to Exhibits CLA-167 (¶ 313), RL-105 (¶ 176(d)), RL-106 (¶ 348), CLA-195 (¶ 116), CLA-180 (¶ 193), R-10.

<sup>282</sup> Statement of Defence, ¶ 204, quoting Memorial, ¶ 288.

<sup>283</sup> Statement of Defence, ¶ 204, referring to Exhibit RL-104 (¶ 145).

<sup>284</sup> Statement of Defence, ¶ 218-219, referring to First Bayar Report, ¶¶ 65-67, Exhibits R-9, R-62.

156. The Respondents also defend the legitimacy of the SSIA's inspections. They dismiss the Claimants' argument that these inspections were brief and instead stress that such inspections lasted up to a week;<sup>285</sup> refer to the testimony of Mr. Munkhtamir, a senior SSIA inspector, who explained that the inspections were not politically motivated and that the inspectors had acted impartially;<sup>286</sup> and note that Ms. Davis, on whose testimony the Claimants rely for their argument that the inspections were atypical, was not present during either the 2009 or 2010 inspections.<sup>287</sup>
157. The Respondents argue that, most importantly, the Claimants violated Article 45 of the Subsoil Law<sup>288</sup> and Articles 25.1.5, 48.3 and 48.4 of the 2006 Minerals Law when they published information about the Dornod mineral reserves on the Toronto Stock Exchange in 2006, without first registering them in the State Integrated Registry or otherwise sharing information about them with either Mongolia or their partners in CAUC.<sup>289</sup> The Respondents state that "it is ironic" for the Claimants to argue in this arbitration that Mongolia should be held liable for not registering Khan's reserves, given that, by 2008, when Khan finally made its application for the registration of the Dornod reserves, it had already been in breach of Mongolian law for two years and that this application, therefore, was belated.<sup>290</sup>
158. The Respondents add that, with respect to Khan's 2008 application, Mongolia followed standard procedure. It appointed a Team of Experts,<sup>291</sup> which identified deficiencies and insufficiencies in Khan's application materials<sup>292</sup> and noted that the application contained little input from Khan, being based largely on data provided by Priargunsky.<sup>293</sup>
159. While Khan's application was being considered, the NEL, on the basis of which the NEA decided not to re-register the Mining and Exploration Licenses, took effect, making any decision on Khan's application for the registration of the Dornod reserves unnecessary.<sup>294</sup> In other words, "this process of registering the reserves became moot at that time as the [Mining

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<sup>285</sup> Respondents' Second Post-Hearing Brief, ¶ 30, referring to Exhibits R-9, C-409.

<sup>286</sup> Respondents' Second Post-Hearing Brief, ¶ 31, referring to Transcript (13 November 2013), 534:22-24 and 536:1-8.

<sup>287</sup> Respondents' Second Post-Hearing Brief, ¶ 32,

<sup>288</sup> Statement of Defence, 206, referring to Exhibit CLA-126 (arts. 45.1, 45.2); Respondents' Second Post-Hearing Brief, ¶ 18.

<sup>289</sup> Statement of Defence, ¶¶ 208, 210, 219, referring to Exhibits R-9, R-62, C-24, C-25, CL-118 (arts. 48.3, 48.4), CL-126 (arts. 45.1, 45.2).

<sup>290</sup> Statement of Defence, ¶ 211; Respondents' Second Post-Hearing Brief, ¶ 18.

<sup>291</sup> Statement of Defence, ¶ 211, referring to Exhibit C-135.

<sup>292</sup> Statement of Defence, ¶ 212; Respondents' Second Post-Hearing Brief, ¶ 21, referring to Transcript (13 November 2013), 548:10-14.

<sup>293</sup> Statement of Defence, ¶ 212, referring to First Bilegsaikhan Statement, ¶ 31.

<sup>294</sup> Statement of Defence, ¶ 213.

and Exploration] Licenses had to be re-registered under the new applicable regime.”<sup>295</sup> According to the Respondents, this meant that neither the Team of Experts nor the Minerals Council ever reviewed the accuracy of the updated reserve report.<sup>296</sup>

160. The Respondents further argue that the Claimants were in breach of: (i) Article 19.2.3 of the 2006 Minerals Law, due to an overlap between the Exploration License area and the protected Yakhi Lake reserve, (ii) Article 33.1 of the Law on Special Protected Areas, due to the storage of radioactive materials in the protected Yakhi Lake reserve,<sup>297</sup> (iii) Article 5.4 of the 2006 Minerals Law, due to a failure to “enter into a mining agreement with the MRAM,” and (iv) the Radiation Protection and Safety Law, despite having been previously notified of this violation during the SSIA inspections of 2005 and 2006.<sup>298</sup>
161. According to the Respondents, Khan itself admitted to having committed these breaches of Mongolian law, both in a letter to the SSIA dated 22 April 2009 and at a meeting with the SSIA of the same date during which Mr. Erdenebileg (representing CAUC) agreed to remedy these breaches.<sup>299</sup>
162. The Respondents also contend that the Suspension Notice issued by the MRAM complied with Articles 13.1 and 13.3 of the Licensing Law, which allow the three-month suspension of a license based on the evaluation of a specialized inspection authority.<sup>300</sup> They note that, in reaching its decision, the MRAM did not “blindly” rely on the conclusions of the SSIA, but rather had “ample” time to consider its findings, since three months elapsed between the submission of the April 2009 SSIA report to the MRAM and the issuance of the Suspension Notice in July 2009.<sup>301</sup> As for Article 13.2 of the State Inspection Law, it was cited in the Suspension Notice because it relates to the obligation of business entities to remedy their violations of the law.<sup>302</sup>
163. In response to the Claimants’ allegation that the April 2009 SSIA Report was never provided to CAUC, the Respondents note that the results of the SSIA inspection were discussed during the meeting of 22 April 2009, which was attended by representatives of both CAUC and Khan

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<sup>295</sup> Respondents’ First Post-Hearing Brief, ¶ 29.

<sup>296</sup> Respondents’ Second Post-Hearing Brief, ¶ 23.

<sup>297</sup> Statement of Defence, ¶ 220, referring to Exhibits R-9, R-62.

<sup>298</sup> Statement of Defence, ¶ 221, referring to Exhibit R-62. Among these alleged breaches was the alleged failure of Khan Mongolia to finalize its radioactive waste management programme, to provide its employees with radiation protective clothes or equipment, and to implement a practice on surface contamination control measurement.

<sup>299</sup> Statement of Defence, ¶¶ 222-223, referring to Exhibit R-63, First Munkhtamir Statement, ¶ 24, Exhibit R-64 (Respondents’ translation of Exhibit C-128).

<sup>300</sup> Statement of Defence, ¶ 226, referring to Memorial, ¶ 297.

<sup>301</sup> Statement of Defence, ¶ 227, referring to Memorial, ¶ 300, Exhibit R-62.

<sup>302</sup> Statement of Defence, ¶ 226, referring to Memorial, ¶ 297, Exhibit CLA-147 (art. 13.2).



Mongolia,<sup>303</sup> and that a copy of the July 2009 SSIA Report was provided to CAUC a week after it was requested.<sup>304</sup> Under Mongolian law, therefore, Khan was afforded a sufficient opportunity to present its position.<sup>305</sup>

**D. THE NEL, THE LPCNEL AND THE INVALIDATION OF THE MINING AND EXPLORATION LICENSES**

*The Claimants' position*

164. The Claimants submit that the enactment of the NEL and the LPCNEL confirmed Mongolia's intention to expropriate the Claimants' rights under the Mining and Exploration Licenses and the Agreements,<sup>306</sup> while the expropriation was consummated by the subsequent invalidation of the Mining and Exploration Licenses through the NEA's issuance of the Permanent Invalidation Notices and its subsequent refusal to re-register the licenses.<sup>307</sup>

*(i) The Enactment of the NEL and the LPCNEL*

165. The Claimants submit that the enactment of the NEL and the LPCNEL confirmed Mongolia's expropriatory intent because, had these laws been properly applied (which they were not), they would have infringed the Claimants' rights in the Mining and Exploration Licenses and the Agreements.

166. The Claimants highlight three problematic features of the NEL and the LPCNEL. First, Article 5.2 of the NEL required Mongolia to take ownership of "no less than 51 percent of stake in the joint company, where exploration and determination of [uranium] reserve have been conducted with state budget."<sup>308</sup> Second, the LPCNEL provided for the retroactive application of the NEL by giving the NEA significant discretion<sup>309</sup> to reject re-registration applications on the basis of violations of the NEL and providing that licenses that were not re-registered would be revoked.<sup>310</sup> Third, uranium licenses issued under the NEL would grant license holders limited rights as compared to uranium licenses previously issued in Mongolia.<sup>311</sup>

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<sup>303</sup> Statement of Defence, ¶ 228, referring to Exhibit R-63.

<sup>304</sup> Statement of Defence, ¶ 228, referring to Exhibit C-167.

<sup>305</sup> Statement of Defence, ¶ 228, referring to First Bayar Report, ¶ 72.

<sup>306</sup> Memorial, p. 113, title B.

<sup>307</sup> Memorial, p. 128, title C.

<sup>308</sup> Exhibit RL-11 (arts. 5.2, 5.3). *See also* Memorial, ¶ 132, referring to Exhibits RL-11, CLA-142; Statement of Defence, ¶ 100; Reply, ¶ 192, referring to Exhibit RL-11 (art. 5).

<sup>309</sup> Memorial, ¶ 314, referring to the Second Tsogt Report, ¶ 229, Exhibit CLA-142 (art. 2).

<sup>310</sup> Memorial, ¶ 314, referring to Exhibit CLA-142 (art. 4).

<sup>311</sup> Reply, ¶ 195, referring to Memorial, ¶¶ 308-309, Exhibit R-11 (arts. 15.1.6, 15.1.7, 18.4, 18.5, 24), Second Tsogt Report, ¶¶ 233-234. *See also* Memorial, ¶ 308.

167. The Claimants submit that the proper application of these features of the NEL and the LPCNEL to CAUC and Khan Mongolia would have effectively neutralized their property rights in the Mining and Exploration Licenses, because it could have led to the permanent invalidation of the Licenses based on the breach of requirements found in the NEL, an entirely new law, and because, had the licenses been re-issued under the NEL, they would nevertheless have granted CAUC and Khan Mongolia less favourable rights than did the Mining and Exploration CAUC and Khan Mongolia less favourable rights than did the Mining and Exploration Licenses.<sup>312</sup>
168. Thus, the proper application of the NEL and the LPCNEL to CAUC and Khan Mongolia would have amounted to an expropriation of the Claimants' property rights in the Mining and Exploration Licenses and their shareholding rights in CAUC and Khan Mongolia<sup>313</sup> in violation of Article 13 of the ECT, Mongolian rules on property protection, as reflected in Article 8.2 of the Foreign Investment Law and the Constitution, and the international minimum standard for the treatment of aliens.<sup>314</sup>
169. In support, the Claimants submit that "it is widely recognized that a State's general legislative measures are expropriatory where: (i) they are arbitrary, discriminatory, disproportionate or otherwise unfair; and (ii) they result in the effective neutralization of the foreign investor's property rights"<sup>315</sup> through the investor's loss of control over the investment.<sup>316</sup>
170. The Claimants argue that, in the present case, the application of the NEL and the LPCNEL to CAUC and Khan Mongolia would have been disproportionate, as these laws serve no discernible public purpose.<sup>317</sup> While the stated public policies of the NEL are the development of the radioactive minerals industry in an environmentally friendly way<sup>318</sup> and the encouragement of foreign investment,<sup>319</sup> the Claimants contend that most actual NEL provisions in fact concern the State ownership and licensing requirements.<sup>320</sup> The Claimants characterize the NEL's State ownership requirement, in particular, as an authorization of the "naked confiscation of property rights,"<sup>321</sup> and stress that the Respondents failed to identify the

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<sup>312</sup> Memorial, ¶ 328.

<sup>313</sup> Memorial, ¶ 318.

<sup>314</sup> Memorial, ¶ 331.

<sup>315</sup> Memorial, ¶ 319.

<sup>316</sup> Memorial, ¶¶ 320-321, referring to Exhibits CLA-172 (¶¶ 241 *et seq.*), CLA-180 (¶ 195), CLA-195 (¶ 122).

<sup>317</sup> Memorial, ¶ 322.

<sup>318</sup> Memorial, ¶ 322, referring to Exhibit CLA-149 (Attachment, art. 1.1).

<sup>319</sup> Reply, ¶ 194; Memorial, ¶ 310, referring to First Edey Witness Statement, ¶¶ 17-18.

<sup>320</sup> Memorial, ¶ 323, referring to Exhibit R-11 (arts. 5.2, 5.3, 24, 26, 29, 39, 40), Second Tsogt Report, ¶¶ 231-234, 242.

<sup>321</sup> Reply, ¶ 194.

public need driving such requirement or to justify why it exempts the State from an obligation of compensation.<sup>322</sup>

171. The Claimants further argue that, even if the NEL served *some* legitimate public purpose (which is denied), its retroactive application to license holders could not be justified as its policy goals could be achieved through less onerous means.<sup>323</sup>
172. The Claimants add that the enactment of the NEL and the LPCNEL was arbitrary and irrational, as it was undertaken without input from stakeholders and passed only two weeks before the Mongolian national summer holiday.<sup>324</sup> In particular, the Claimants allege that the earlier draft of the NEL that had been circulated to Khan representatives did not contain the provisions on State ownership and licensing,<sup>325</sup> which were “shoe-horned” into it.<sup>326</sup>
173. Lastly, the Claimants contend that the bad faith and discriminatory intent underlying the enactment of the NEL and the LPCNEL is supported by: (i) the fact that CAUC was the only company holding a mining license for radioactive minerals at the time these laws were enacted; (ii) the opposition of Mr. Enkhbat – the head of the NEA and its “reputed architect” – to Khan’s involvement in the Dornod Project; and (iii) the temporary suspension of the Mining License a mere six days prior to the enactment of these laws.<sup>327</sup> The Claimants also contend that the LPCNEL was targeted at two foreign companies, namely Khan and Western Prospector Group Ltd. (“**Western Prospector**”).<sup>328</sup> The Claimants also note that the Mongolian Prime Minister controlled both the NEA, which was created by the NEL, and the SSIA.<sup>329</sup> As regards the connection to the SSIA, “the agency that had first fabricated allegations against Khan,” the Claimants allege that the MRAM was unable to lift the suspension of the Mining License due to the SSIA’s failure to respond to the MRAM’s queries about Khan’s alleged violations of Mongolian law.<sup>330</sup>
174. The Claimants argue that the application of the LPCNEL would have violated Mongolian constitutional principles of property protection as reflected in Articles 8.2, 8.3, and 9 of the

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<sup>322</sup> Reply, ¶¶ 192-193, referring to Exhibit R-11 (art. 5); Memorial, ¶¶ 309-310.

<sup>323</sup> Memorial, ¶ 325, referring to Exhibit CLA-189 (¶ 195).

<sup>324</sup> Memorial, ¶ 326, referring to Exhibit CLA-156 (¶ 303); Claimants’ First Post-Hearing Brief, p. 5.

<sup>325</sup> Reply, ¶¶ 181-182, referring to Davis Statement, ¶¶ 89, 91 (quoting Exhibit C-315); Memorial, ¶ 311, referring to Second Edey Statement, ¶ 62.

<sup>326</sup> Reply, ¶¶ 184-186, referring to Davis Statement, ¶ 98, Second Edey Statement, ¶ 63, Davis Statement, ¶ 100, Exhibit C-214. *See also* Memorial, ¶ 311, referring to Second Edey Statement, ¶ 63; Claimants’ Second Post-Hearing Brief, p. 4.

<sup>327</sup> Memorial, ¶ 327.

<sup>328</sup> Claimants’ Second Post-Hearing Brief, p. 4.

<sup>329</sup> Memorial, ¶¶ 317, referring to Second Tsogt Report, ¶ 130; Exhibit C-224.

<sup>330</sup> Memorial, ¶¶ 316-317, referring to Exhibit C-233.

Foreign Investment Law.<sup>331</sup> According to the Claimants, such principles are violated “when application of a new public law completely *invalidates* a prior right without compensation,” even if such principles would not generally be violated by non-discriminatory public laws that affect property rights but do not go so far as “to detract from the[ir] essence.”<sup>332</sup> Here, the application of the LPCNEL would lead to the invalidation of a prior right without compensation in that this law “effectively requires the license holders to apply to obtain new rights, which are constituted under a completely different set of terms and conditions than the original ones.”<sup>333</sup>

175. In addition, the Claimants submit that the retroactive application of the NEA and the LPCNEL would have violated Article 3.6 of the Founding Agreement. According to the Claimants, Article 3.6. of the Founding Agreement, which provides that the “[p]roperty of the Company will not be the subject of requisition or confiscation,” allows Mongolia to confiscate CAUC property on the basis solely of the Constitution, and not generally applicable law,<sup>334</sup> thus offering broader protection than Article 13 of the ECT, Article 8.2 of the Foreign Investment Law and Article 16.3 of the Constitution.<sup>335</sup> The Constitution allows expropriation only if the license rights are used to the detriment of the population’s health, environmental interests or national security,<sup>336</sup> which is not the case here.<sup>337</sup> The Claimants emphasize that, due to the restrictive phrasing of Article 3.6 of the Founding Agreement, even if the NEL and the LPCNEL were based on public policy (which is denied), their application to CAUC would nevertheless be in violation of this provision.<sup>338</sup>
176. The Claimants also submit that the application of the NEL and the LPCNEL to CAUC and Khan Mongolia would have violated Mongolia’s duty of good faith (as set out in Article 13 of the 2002 Civil Code) and duty of loyalty (as set out in Article 83 of the Company Law) to its partners in the CAUC joint venture. In applying the NEL and the LPCNEL, Mongolia would effectively have used its sovereign power not in the best interest of CAUC, but rather to obtain a favourable commercial position *vis-à-vis* its partners in the joint venture.
177. The Claimants further submit that, not only would the application of the NEL and the LPCNEL to CAUC and Khan Mongolia have violated Mongolia’s obligations under the Agreements as a matter of Mongolian law, but such illegal interference with the Claimants’ contractual rights

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<sup>331</sup> Memorial, ¶ 329, referring to Second Tsogt Report, ¶¶ 102-112.

<sup>332</sup> Memorial, ¶ 329, referring to Second Tsogt Report, ¶¶ 102-112 (emphasis by the Claimants).

<sup>333</sup> Memorial, ¶ 329, referring to Second Tsogt Report, ¶¶ 102-112 (emphasis by the Claimants).

<sup>334</sup> Memorial, ¶ 218.

<sup>335</sup> Memorial, ¶ 219.

<sup>336</sup> Memorial, ¶ 335, referring to Exhibit C-16A (art. 3.6), Second Tsogt Report, ¶¶ 239-241.

<sup>337</sup> Memorial, ¶ 335, referring to Exhibit C-16A (art. 3.6), Second Tsogt Report, ¶¶ 239-241.

<sup>338</sup> Memorial, ¶ 335, referring to Second Tsogt Report, ¶ 241.

would also have constituted a violation of international law.<sup>339</sup> The Claimants contend that a State can be held internationally liable when it enacts legislation that infringes a foreign investor's rights that rest on a contract with the State into which the State has entered as "a Sovereign," as is the case here.<sup>340</sup>

(ii) *The Invalidity of the Mining and Exploration Licenses*

178. While taking issue with the content of the NEA and the LPCNEL, the Claimants note that these laws were not properly applied to them.<sup>341</sup> Nonetheless, the measures taken by Mongolia – in particular, the NEA's issuance of the Permanent Invalidation Notices and its subsequent refusal to re-register the Mining and Exploration Licenses under the NEL – realized Mongolia's intention to expropriate the Claimants' rights under the licenses and the Agreements. Specifically, Mongolia's invalidation of and refusal to reinstate the Mining and Exploration Licenses resulted in a total deprivation of these license rights, which, in turn, deprived Khan Resources of its contractual rights under the Agreements to participate in the production of uranium from the Dornod deposits.<sup>342</sup>
179. With regard to the improper application of the NEL and the LPCNEL, the Claimants submit that while the LPCNEL provided for the revocation of licenses that failed to be re-registered after the enactment of the NEL and the LPCNEL, it did not authorize the invalidation of licenses before the re-registration deadline of 15 November 2009.<sup>343</sup> Yet on 8 October 2009, the NEA issued Order No. 141, revoking all uranium licenses in Mongolia, and the Temporary Invalidation Notices, confirming the effect of Order No. 120 on the Temporary Procedure on Re-Registration and Re-Issuance of the License for Radioactive Minerals ("Order No. 120").<sup>344</sup>
180. As regards the Respondents' contention that Order No. 141 only had temporary effect and therefore could not amount to a permanent invalidation, the Claimants submit that this temporary measure was in fact given permanent effect by subsequent actions.<sup>345</sup>
181. In addition, the Claimants note that the Respondents did not follow the terms of Order No. 141 as regards the NEA's refusal to re-register the Mining and Exploration Licenses. Specifically,

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<sup>339</sup> Memorial, ¶ 337.

<sup>340</sup> Memorial, ¶¶ 338-340, referring to Exhibit CLA-156, Exhibit CLA-183 (¶ 134).

<sup>341</sup> Reply, ¶ 212, referring to Exhibit R-12.

<sup>342</sup> Claimants' First Post-Hearing Brief, p. 2.

<sup>343</sup> Memorial, ¶ 347, referring to Exhibit CLA-142 (arts. 1, 2, 4). *See also* Reply, ¶ 212.

<sup>344</sup> Memorial, ¶ 346, referring to Exhibits C-2, C-3. *See also* Reply, ¶¶ 214-216, referring to Exhibit R-12 (art. 2), Third Tsogt Report, ¶ 188, Exhibit CLA-142 (art. 2); Exhibit C-95 (attachment No. 1 of the Order No. 120, arts. 3, 4.1).

<sup>345</sup> Claimants' First Post-Hearing Brief, p. 2.

the Claimants stress that Order No. 141 was a temporary suspension whose terms required the re-registration of licenses pursuant to Order No. 120.<sup>346</sup>

182. As for the NEA's notices of 15 December 2010, the Claimants argue that the Notices did not constitute a decision not to re-register the licenses made in application of the NEL, as the Respondents now allege, and note that the Claimants did not in fact receive any decision on their applications for re-registration.<sup>347</sup> The Claimants stress that "there is actually no valid decision by an authorized agent of the Government of Mongolia anywhere in the record of this case that could justify the permanent invalidation of the licenses."<sup>348</sup> The Claimants submit that the procedure for consideration of license re-registration applications under the NEL was set out in Order No. 120<sup>349</sup> and point out that, rather than referring to the NEL, Order No. 141. or Order No. 120, the 15 December 2010 notices mention only the alleged violations of Mongolian law identified in the April 2009 SSIA Report, a requirement that may be taken to fall under the NEL but that only applies to licenses already issued under that law.<sup>350</sup> In other words, the Claimants stress, the provision under the NEL on repeated violations of Mongolian law deals not with the re-registration of licenses under the NEL but with the invalidation of licenses already registered therein.<sup>351</sup> It is with this argument that the Claimants address the Respondents' argument that Mongolia's failure to re-register the Mining and Exploration Licenses was justified by Article 26.1 of the NEL.<sup>352</sup>
183. The Claimants note that Letter No. 8/1033 from the NEA, on which they claim the Respondents repeatedly rely, evinces that the Claimants were treated differently from other companies that applied to have their licenses re-registered, in that the two licenses of CAUC and Khan Mongolia were, out of 165 other licenses, invalidated without the issuance of a decision on re-registration, while the other licenses were not re-registered on account of their failure to submit an application for re-registration.<sup>353</sup> The Claimants further note that the applications for re-

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<sup>346</sup> Claimants' First Post-Hearing Brief, p. 2, referring to Transcript (13 November 2013), 560:2 to 560:18, 633:7 to 636:11, 636:6-11.

<sup>347</sup> Reply, ¶¶ 219-220, referring to Exhibits C-8, C-9; Claimants' Pre-Hearing Brief, p. 5.

<sup>348</sup> Claimants' Second Post-Hearing Brief, pp. 4-5, referring to Transcript (11 November 2013), 99:5-9; Transcript (14 November 2013), 666:10-21, 667:11-18, 680:22 to 681:21.

<sup>349</sup> Reply, ¶ 221, referring to Exhibits R-12 (art. 2).

<sup>350</sup> Memorial, ¶ 351, referring to Exhibits C-5, C-6; Reply, ¶¶ 222-223, referring to Third Tsogt Report, ¶ 196; Claimants' First Post-Hearing Brief, pp. 7-8; Transcript (14 November 2013), 643:8 to 644:9.

<sup>351</sup> Memorial, ¶ 351, referring to Exhibits C-5, C-6; Reply, ¶¶ 222-223, referring to Third Tsogt Report, ¶ 196; Claimants' First Post-Hearing Brief, pp. 7-8; Transcript (14 November 2013), 643:8 to 644:9.

<sup>352</sup> Claimants' Second Post-Hearing Brief, p. 11.

<sup>353</sup> Claimants' First Post-Hearing Brief, p. 6, referring to Transcript (14 November 2013), 671:4 to 679:24; Claimants' Second Post-Hearing Brief, p. 7.

registration that were submitted by other license-holders resulted in the re-registration of these licenses within a matter of days.<sup>354</sup>

184. The Claimants argue, therefore, that the Permanent Invalidation Notices were intended to “invalidate the Mining and Exploration Licenses once and for all, no matter how frivolous the basis.”<sup>355</sup> According to the Claimants, this intention is made apparent by: (i) the content of the Temporary Invalidation Notices, which did not mention any violations of Mongolian law, (ii) the annulment of the effect of the 2009 SSIA reports via the January 2010 settlement agreement between CAUC and the MRAM, and (iii) the fact that the allegations of breaches of Mongolian law found in the 2009 SSIA reports were baseless (see paragraph 78 above).<sup>356</sup> The Claimants also point to official statements made by Government officials during this time, which they allege indicate that the fate of the licenses had already been decided during the pendency of the relevant administrative and judicial proceedings.<sup>357</sup>
185. The legal standards which, according to the Claimants, the Respondents breached in permanently invalidating the Mining and Exploration Licenses, are detailed below.

*(iii) Expropriation and Other Violations Relating to Property*

186. The Claimants first contend that, in permanently invalidating the Mining and Exploration Licenses, Mongolia breached Article 13 of the ECT, as well as the customary international law principle that prohibits expropriation without compensation.<sup>358</sup> First, the Claimants contend that the Mining and Exploration Licenses do constitute property. Second, the invalidation of the Mining and Exploration Licenses neutralized the Claimants’ investment in the Dornod Project.<sup>359</sup> Third, the invalidation of the Mining and Exploration Licenses was carried out without due process of law or payment of compensation, and was not based on any legitimate public interest.<sup>360</sup> Fourth, the issuance of the Permanent Invalidation Notices was arbitrary, as the decision-making process of the agency was based not on fact but prejudice.<sup>361</sup> Fifth, the invalidation of the Mining and Exploration Licenses was discriminatory, because the licenses of other business entities that complied with the NEL were reissued, while there is no basis to find that CAUC and Khan Mongolia did not comply with the NEL<sup>362</sup> and as CAUC and Khan

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<sup>354</sup> Claimants’ First Post-Hearing Brief, p. 6.

<sup>355</sup> Memorial, ¶ 352.

<sup>356</sup> Memorial, ¶ 352.

<sup>357</sup> Claimants’ First Post-Hearing Brief, p. 6.

<sup>358</sup> Memorial, ¶ 359.

<sup>359</sup> Memorial, ¶ 359, referring to Second Edey Statement, ¶ 80.

<sup>360</sup> Memorial, ¶ 360, referring to Exhibits C-13, C-14 (p. 3).

<sup>361</sup> Memorial, ¶ 361 (internal citations omitted).

<sup>362</sup> Memorial, ¶ 362.

Mongolia's license applications were more thorough than those of other companies.<sup>363</sup> Because the invalidation of the Mining and Exploration Licenses was the outcome of a campaign of conduct that aimed at depriving the Claimants of their participation in the Dornod Project, in order to make way for the Mongolian-Russian joint venture, the Claimants contend that this case is one of direct expropriation in violation of Article 13 of the ECT.<sup>364</sup>

187. Moreover, in reliance on the confirmation by the Mongolian administrative courts of the illegality of the invalidation of the Mining and Exploration Licenses (discussed in Part V(D) below), the Claimants contend that the NEA's issuance of the Permanent Invalidation Notices violated the constitutional principles of property protection as reflected in Articles 8.2 and 8.3 of the Foreign Investment Law.<sup>365</sup> The Claimants argue that the Government must follow due process of law when invalidating property rights (even when such invalidation is legally permissible), which the administrative courts found that Mongolia did not do in the present case.<sup>366</sup> The Claimants stress that the Tribunal should accept this finding of the Mongolian courts.<sup>367</sup> Specifically, the Claimants contend that Mongolia's permanent invalidation of and refusal to reinstate the Mining and Exploration Licenses amounted to a *khuraakh*, or a deprivation of property that is carried out as a penalty for breaches of law and not accompanied by compensation, which is prohibited by Article 8.2 of the Foreign Investment Law as well as Article 3.6 of the Founding Agreement.<sup>368</sup> This is especially in view of how the permanent invalidation of the licenses was not in accordance with the legal procedures for the implementation of the NEL.<sup>369</sup> The Claimants also note that the Respondents have not proven that Mongolia's permanent invalidation of the licenses could be considered a *daichlakh* as in Article 8.3 of the Foreign Investment Law, that is, an action that was necessary to protect an urgent public interest and is accompanied by compensation.<sup>370</sup>
188. The Claimants further submit that the invalidation of the Mining and Exploration Licenses violated Article 3.6 of the Founding Agreement, which prohibited Mongolia from confiscating CAUC's property unless required by the Constitution, as would have been the case if CAUC had used its license rights to harm population health, the environment, or national security (see paragraph 175 above). The Claimants argue that, in the present case, CAUC did no such thing,

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<sup>363</sup> Memorial, ¶ 365, referring to First Arsenault Statement, ¶ 89.

<sup>364</sup> Memorial, ¶¶ 366-367, referring to Exhibit CLA-177 (¶ 387).

<sup>365</sup> Memorial, ¶ 357, referring to the Second Tsogt Report, ¶¶ 69, 167, 176.

<sup>366</sup> Memorial, ¶ 358.

<sup>367</sup> Memorial, ¶ 358, referring to Exhibit CLA-176.

<sup>368</sup> Claimants' First Post-Hearing Brief, p. 3.

<sup>369</sup> Claimants' Second Post-Hearing Brief, p. 3, referring to Transcript (14 November 2013), 691:6-21.

<sup>370</sup> Claimants' Second Post-Hearing Brief, pp. 2-3.



as the NEA based the Permanent Invalidation Notices primarily on baseless allegations of violations of Mongolian law.

189. The Claimants also contend that Erdene could and did make a sovereign promise not to confiscate in Article 3.6 of the Founding Agreement. The Claimants refer to the Jurisdictional Award to argue that Erdene (predecessor of MonAtom) undertook obligations in both the Founding Agreement and the Minerals Agreement that only a sovereign state could fulfil. The Claimants also explain that State-owned entities operate on behalf of the State, which means that Mongolia, through Erdene, could make the sovereign promise not to confiscate the property of the joint venture. As regards Article 12.3 of the 1995 Minerals Law, on which basis the Founding Agreement was entered, the Claimants interpret this provision to mean that a State, as a commercial participant in a mining venture, will participate on an equal basis with other business partners and shall be subject to civil liability if it fails to meet its commercial commitments. According to the Claimants, therefore, Mongolia's failure to abide by its sovereign commitment as contained in Article 3.6 of the Founding Agreement amounts to a breach of the civil obligation owed to its joint venture partners, thereby triggering civil liability on its part (see paragraphs 112-115 above).

*(iv) Violation of Standards for the Treatment of the Claimants and their Investment*

190. The Claimants submit that Mongolia's permanent invalidation of the Mining and Exploration Licenses violated rules for the treatment of the Claimants and their investments.
191. First, the Claimants submit that the permanent invalidation of the Mining and Exploration Licenses violated Article 8.1 of the Foreign Investment Law, which requires investments to be afforded the "legal protection guaranteed by the Constitution, this law and other legislation, consistent with those laws and international treaties to which Mongolia is a party."<sup>371</sup>
192. Second, the Claimants submit that the permanent invalidation of the Mining and Exploration Licenses violated Mongolia's obligation under Article 10.1 of the ECT to accord Khan Netherlands' investment treatment no less favourable than that required by international law. According to the Claimants, the invalidation of the licenses was arbitrary, undertaken without the benefit of a rational decision-making process, and motivated by overt prejudice.<sup>372</sup>
193. Third, the Claimants contend that the invalidation of the Mining and Exploration Licenses breached Mongolia's obligation under Article 10.1 to provide the investments of Khan Netherlands with fair and equitable treatment, in that Mongolia used its sovereign authority to

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<sup>371</sup> Memorial, ¶ 370, referring to Exhibits C-8 (art. 8.1), CLA-138 (art. 4), CLA-26A (art. 46.2), Second Tsogt Report, ¶¶ 189, 191.

<sup>372</sup> Memorial, ¶ 375, referring to Exhibits CLA-53 (art. 10.1), C-102 (p. 3), CLA-122 (p. 446), CLA-196 (¶ 98).

benefit itself at the expense of the Claimants, rather than honouring its obligations under the Agreements.<sup>373</sup> The Claimants reject the contention that they cannot claim protection for what the Respondents characterize as an imprudent investment<sup>374</sup> by referring to the specific assurances made by Mongolia in its international investment agreement with the Claimants – the Minerals Agreement.<sup>375</sup>

194. Fourth, the Claimants submit that Mongolia violated its commitments under Article 9 of the Foreign Investment Law and Article 10.7 of the ECT to accord the relevant investors (all of the Claimants under the Foreign Investment Law, and Khan Netherlands under the ECT) treatment no less favourable than that accorded to Mongolian investors and their investments, because of the *prima facie* evidence that the NEA re-registered the radioactive minerals licenses of many other companies, despite Khan being in a better position to meet the legal requirements for the re-registration.
195. Fifth, the Claimants submit that Mongolia's breach of Articles 8.1 and 9 of the Foreign Investment Law also constitutes a breach of Article 10(1) of the ECT, as this provision states that the host State shall "observe any obligations it has entered into" with an investor.
196. Finally, the Claimants submit that Mongolia violated its obligations under the Agreements and Article 81.2 of the Company Law by failing to act in good faith towards its joint venture partners and in the best interests of CAUC. The Claimants further contend that, in light of its duty of loyalty, Mongolia was in fact obligated to use its sovereign powers to further the interests of the CAUC joint venture.

*The Respondents' position*

197. The Respondents contend that neither the enactment of the NEL and the LPCNEL nor the permanent invalidation of the Mining and Exploration Licenses breached any obligations owed by the Respondents to the Claimants or were enacted to target the Claimants specifically. Arguing that the Mining and Exploration Licenses were invalidated through the proper application of the NEL and the LPCNEL, the Respondents do not differentiate (as do the Claimants) between the effects of the potential and actual application of these laws.
198. The Respondents submit that Mongolia enacted the NEL and the LPCNEL in an exercise of its sovereignty in the uranium industry, which was both potentially profitable and potentially

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<sup>373</sup> Memorial, ¶ 377, referring to Exhibit CLA-53 (art. 10.1).

<sup>374</sup> Reply, ¶¶ 200-202, referring to Exhibits C-17A (arts. 1.1, 4.3, 11.1, 12.1, 12.2, 16.1), C-17C, CLA-46, (art. 81.2), C-117 (art. 13), C-16A (art. 3.6).

<sup>375</sup> Reply, ¶¶ 200-202, referring to Exhibits C-17A (arts. 1.1, 4.3, 11.1, 12.1, 12.2, 16.1), C-17C, CLA-46 (art. 81.2), C-117 (art. 13), C-16A (art. 3.6).

detrimental to the environment.<sup>376</sup> The Respondents contend that the application of the NEL served the public purpose of providing a comprehensive regulatory regime for the exploitation of radioactive materials and nuclear energy in a manner that adhered to both national and international standards and that ultimately protected human health and the environment.<sup>377</sup>

199. The Respondents argue that the NEL was passed in a transparent manner, given that: the International Atomic Energy Agency (“IAEA”) assisted in its drafting;<sup>378</sup> drafts were transmitted to Khan;<sup>379</sup> and a draft was published in the May 2009 edition of the Mongolian Mining Journal.<sup>380</sup>
200. The Respondents explain that the NEL and the LPCNEL required all uranium mining or exploration licenses to be re-registered.<sup>381</sup> By Order No. 141, the NEA ordered all such licenses to be invalidated in October 2009, pending their re-registration; in the Temporary Invalidation Notices, the NEA requested CAUC and Khan Mongolia to suspend the relevant activity pending re-registration of the Mining and Exploration Licenses.<sup>382</sup>
201. The Respondents characterize Order No. 141 as “a general measure which applied to all radioactive minerals mining and exploration license holders” and note that it provided the necessary guidance for the implementation of the LPCNEL.<sup>383</sup> The Respondents highlight that the validity of the decree was confirmed in the 13 October 2009 decision of the Administrative Appellate Court (see Part V(D) below), and stress that the Tribunal should not second-guess the decisions of Mongolian administrative courts.<sup>384</sup>
202. The Respondents reject the emphasis placed by the Claimants on the allegedly “retroactive” application of the NEL, and clarify that “[t]he NEL applied to existing license holders but applied to their activities prospectively.”<sup>385</sup> The Respondents note that the real question is whether this regulatory change breached any obligation that the Respondents owed the Claimants, and contend that this question should be answered in the negative.<sup>386</sup>

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<sup>376</sup> Statement of Defence, ¶¶ 241-243, referring to First Munkhtamir Statement, ¶¶ 16, 28, First Bailikhuu Report, ¶ 14.

<sup>377</sup> Rejoinder, ¶¶ 193-197, referring to Exhibit R-104; Second First Bailikhuu Report, ¶ 17, Exhibit R-11 (arts. 1.1, 4.1.4, 45-46 and Chapters 3, 5, 7).

<sup>378</sup> Statement of Defence, ¶ 245, referring to First Bailikhuu Report, ¶16. *See also* Rejoinder, ¶ 193.

<sup>379</sup> Statement of Defence, ¶ 246, referring to Exhibit C-69.

<sup>380</sup> Statement of Defence, ¶ 246, referring to Exhibit C-69; Respondents’ First Post-Hearing Brief, ¶ 38.

<sup>381</sup> Statement of Defence, ¶ 272, referring to Exhibit CL-142 (art. 2); Respondents’ First Post-Hearing Brief, ¶ 38.

<sup>382</sup> Statement of Defence, ¶ 273, referring to First Bayar Report, ¶ 78. *See also* Statement of Defence, ¶ 274, referring to Exhibits C-2, C-3; Transcript (12 November 2013), 253:14-17.

<sup>383</sup> Rejoinder, ¶ 191.

<sup>384</sup> Rejoinder, ¶ 203, referring to Exhibit C-14 (pp. 6-7).

<sup>385</sup> Rejoinder, ¶ 100.

<sup>386</sup> Rejoinder, ¶ 100.

203. Among the features of the NEL that are relevant to license-holders are the following: (i) the obligation to comply with the general requirements set out in Article 16.3, such as the requirement to abide by Mongolian legislation and relevant standards and to use technology that is not harmful to human health and the environment;<sup>387</sup> (ii) the NEA's discretion in view of Article 16.3.1 to base its decision on the re-registration of licenses partly on an applicant's history of compliance with Mongolian law;<sup>388</sup> (iii) the license-holder's obligation to comply with the conditions specified in Article 17.2, as applicable to licenses for exploring for radioactive materials;<sup>389</sup> and (iv) the obligation to comply with the conditions specified in Article 17.3, as applicable to the license for exploiting radioactive materials.<sup>390</sup>
204. The Respondents highlight that the Claimants are challenging provisions of the NEL that never applied to them, such as the State ownership requirement of Article 5.<sup>391</sup>
205. The Respondents allege that the implementation of the NEL triggered a further SSIA inspection,<sup>392</sup> which revealed that the breaches identified in the April 2009 SSIA Inspection Report had not yet been remedied.<sup>393</sup> Because the NEL requires license-holders to comply with Mongolian law, the Respondents note that the results of the SSIA inspection required the NEA to confirm the decision not to re-register the Mining and Exploration Licenses.<sup>394</sup> The Respondents also highlight the SSIA Inspections of 2005, 2006, 2009 and 2010, all of which had found that the Claimants had breached Mongolian law on several occasions.<sup>395</sup> The Respondents allege that the NEA's notices nos. 4/1401 and 4/1402 issued on 15 December 2010 clearly stated that the Mining and Exploration Licenses could not be re-registered because CAUC and Khan Mongolia had not satisfied the requirements of the NEL<sup>396</sup> and that these notices also recalled the administrative process regarding the re-registration of the licenses under the NEL.<sup>397</sup> The Respondents also note, specifically, that these notifications indicated that the Mining and Exploration Licenses could not be re-registered because of the repeated breaches by CAUC and Khan Mongolia of Mongolian law.<sup>398</sup> The Respondents further contend that the decision of the NEA complied with Articles 26.1 and 26.1.3 of the NEL, which required the revocation of licenses that did not comply with the terms and conditions of the

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<sup>387</sup> Statement of Defence, ¶ 275, referring to Exhibit R-11 (arts. 16.3.1, 16.3.2).

<sup>388</sup> Statement of Defence, ¶ 275, referring to First Bayar Report, ¶ 86.

<sup>389</sup> Statement of Defence, ¶ 276, referring to Exhibit R-11 (art.17.2).

<sup>390</sup> Statement of Defence, ¶ 276, referring to Exhibit R-11 (art.17.3).

<sup>391</sup> Rejoinder, ¶ 191.

<sup>392</sup> Statement of Defence, ¶ 277, referring to Exhibit C-94.

<sup>393</sup> Statement of Defence, ¶ 277, referring to Exhibit R-64 (Respondents' translation of Exhibit C-128).

<sup>394</sup> Statement of Defence, ¶ 286, referring to Exhibits C-5, C-6, First Bayar Report, ¶ 67.

<sup>395</sup> Respondents' First Post-Hearing Brief, ¶ 41.

<sup>396</sup> Rejoinder, ¶ 203, referring to Exhibit C-14 (pp. 6-7).

<sup>397</sup> Respondents' First Post-Hearing Brief, ¶ 46.

<sup>398</sup> Respondents' First Post-Hearing Brief, ¶ 47.

licenses.<sup>399</sup> They also highlight that Khan Mongolia and CAUC should have and could have, but did not, challenge these notifications before the Mongolian administrative courts.<sup>400</sup>

206. As regards the Claimants' reliance on the settlement by the MRAM of the dispute relating to the suspension of the Mining License, the Respondents note that the 2010 SSIA inspection, which revealed that some breaches had not been remedied and that others had been committed took place after the settlement.<sup>401</sup>

207. The Respondents' response to the Claimants' specific claims of breaches of Mongolian and international law is set out below.

(i) *Expropriation and Other Violations Related to Property*

208. The Respondents submit that Mongolia's application of the NEL and the LPCNEL to the Mining and Exploration Licenses does not amount to an expropriation under international law.

209. The Respondents argue that international law does not oblige States to compensate foreign investors for the enactment of non-discriminatory *bona fide* regulations that pursue a legitimate purpose.<sup>402</sup> The Respondents stress that Mongolia has the right of permanent sovereignty over its natural resources.<sup>403</sup> International law recognises the right of the State to regulate its energy sector<sup>404</sup> and thereby accords Mongolia significant discretion in how it regulates the exploitation of its mineral wealth.<sup>405</sup>

210. Moreover, observing that international law grants States significant latitude in how they define a public purpose,<sup>406</sup> the Respondents contend that the NEL promotes the public purpose of addressing the insufficiency of the legal framework regulating uranium mining.<sup>407</sup> According to the Respondents, the NEL was, in other words, specifically intended "to establish a legal framework in [the uranium industry] which could enable [Mongolia] to monitor its resources and reach its objectives in accordance with international practice and safety standards."<sup>408</sup>

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<sup>399</sup> Respondents' First Post-Hearing Brief, ¶ 48.

<sup>400</sup> Respondents' First Post-Hearing Brief, ¶ 49.

<sup>401</sup> Statement of Defence, ¶ 287, referring to Memorial, ¶ 350, Exhibit C-94.

<sup>402</sup> Statement of Defence, ¶¶ 250-251, referring to Exhibits CLA-187 (¶ 255), RL-104 (¶ 139). *See also* Rejoinder, ¶ 201.

<sup>403</sup> Statement of Defence, ¶¶ 236-237, referring to Exhibits RL-107, RL-108, RL-109, RL-110 (art. 1(2)), RL-111 (¶ 288). *See also* Statement of Defence, ¶ 240, referring to Exhibits CLA-26A (art. 6.2), RL-112, (pp. 278-279).

<sup>404</sup> Statement of Defence, ¶ 238, referring to Exhibit CLA-53, (art. 18) ¶¶ 1-2).

<sup>405</sup> Statement of Defence, ¶ 239, referring to Exhibit RL-107 (¶ 2), Exhibit CLA-89 (art. 31(3)(c)).

<sup>406</sup> Statement of Defence, ¶ 252, referring to the Memorial, ¶ 322, Exhibits RL-113 (¶ 10.3.34) (quotation omitted), RL-114 (p. 179).

<sup>407</sup> Statement of Defence, ¶ 253, referring to First Munkhtamir Statement, ¶ 16.

<sup>408</sup> Statement of Defence, ¶ 254, referring to First Bailikhuu Statement, ¶¶ 13, 15.

211. The Respondents then contend that both the NEL and LPCNEL were applied in a non-discriminatory manner. First, the NEL was intended not to oust Khan from the Dornod region but to attract investors from countries other than China and Russia.<sup>409</sup> Second, the NEL and LPCNEL applied in the same way to all uranium license-holders in Mongolia.<sup>410</sup> The non-discriminatory application of the NEL was confirmed by the 13 October 2009 decision of the Administrative Appellate Court.<sup>411</sup>
212. The Respondents note that the NEA did not treat CAUC or Khan Mongolia in a discriminatory manner, and highlight that 165 licenses were cancelled and 49 were not re-registered.<sup>412</sup> Moreover, six licenses were invalidated on the basis of Order No. 141.<sup>413</sup>
213. The Respondents also clarify that the NEL did not result in the permanent invalidation of minerals licenses, but only in their temporary invalidation, pending re-registration after the fulfilment of legitimate requirements.<sup>414</sup> Such a temporary invalidation cannot amount to an expropriation.<sup>415</sup>
214. The Respondents explain that the application of the NEL to existing license-holders was necessary in order to avoid a two-track system, in which different regulatory regimes would apply to license-holders, depending on whether such entities received their licenses before or after the enactment of the NEL.<sup>416</sup>
215. To address the Claimants' argument that an expropriation occurs whenever the rights of an investor are replaced by less favourable rights, the Respondents observe that an investor may be said to have less favourable rights whenever a State pursues the public interest through the enactment of legislation.<sup>417</sup>
216. The Respondents submit that the application of the NEL does not amount to a breach of property rights under Mongolian law, relying on the 13 December 2009 decision of the Mongolian Constitutional Court, which confirmed the constitutionality of the NEL provisions authorizing State ownership in mineral exploration works.<sup>418</sup> This decision referred to Article 6.2 of the Constitution, which assigns property rights over "the subsoil with its mineral

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<sup>409</sup> Statement of Defence, ¶ 256, referring to Memorial, ¶ 316, First Bailikhuu Statement, ¶ 16.

<sup>410</sup> Statement of Defence, ¶ 257, referring to Exhibit CLA-142 (arts. 1, 2).

<sup>411</sup> Statement of Defence, ¶ 258, referring to Exhibit C-14 (p. 6).

<sup>412</sup> Respondents' First Post-Hearing Brief, ¶ 32.

<sup>413</sup> Respondents' Second Post-Hearing Brief, ¶ 26, referring to Claimants' First Post-Hearing Brief, p. 6, Exhibit R-88.

<sup>414</sup> Statement of Defence, ¶ 259, referring to Memorial, ¶ 328.

<sup>415</sup> Statement of Defence, ¶ 259.

<sup>416</sup> Rejoinder, ¶ 201.

<sup>417</sup> Statement of Defence, ¶ 260, referring to Memorial, ¶ 328.

<sup>418</sup> Statement of Defence, ¶ 247, referring to Exhibit C-237.

resources” to the State,<sup>419</sup> and confirmed the competence of the State Great Khural to determine the requirements for and the percentage of State ownership in mineral exploration projects.<sup>420</sup> The Mongolian Constitutional Court also found that the NEL did not breach the principles of justice, equality and rule of law, as well as property rights “consistent with universal trends of world economic development,”<sup>421</sup> Mongolia’s obligation under Article 10.2 of the Constitution to fulfil its international treaty obligations,<sup>422</sup> or the provisions regarding expropriation under Mongolian constitutional law.<sup>423</sup>

217. The Respondents further submit that Mongolia did not breach Article 3.6 of the Founding Agreement. The Respondents explain that the Founding Agreement was entered into on the basis of Article 12 of the 1995 Minerals Law, and contend that this provision did not authorize Mongol Erdene to make the sovereign promise not to confiscate on behalf of Mongolia.<sup>424</sup>
218. If the Tribunal finds that Article 3.6 contains a sovereign promise, the Respondents make the alternative argument that this article is void under Mongolian law, because Mongolian law does not authorize the state-owned entity to exercise rights belonging to a State.
219. But even were Article 3.6 of the Founding Agreement found not to be void under Mongolian law, the Respondents contend that they did not breach this provision. Specifically, the Respondents note that Article 3.6 of the Founding Agreement prohibits “bituumjlekh” (freezing or sealing) and “khuraakh” (seizure of property by authority of law as penalty or sanctions for unlawful conduct). There was no “bituumjlekh” in this case, as the Mining License was invalidated on the basis of Order No. 141 and a decision made not to re-register it was made because CAUC did not comply with the requirements of the NEL for holding a license. As well, there was no “khuraakh” in this case because the Mining and Exploration Licenses do not constitute property under Mongolian law (see paragraphs 123-124 above) and were invalidated pursuant to a law that applied to all radioactive minerals license holders.

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<sup>419</sup> Statement of Defence, ¶ 248, referring to Exhibit C-237.

<sup>420</sup> Statement of Defence, ¶ 248, referring to Exhibit C-237.

<sup>421</sup> Statement of Defence, ¶ 248, referring to Exhibit C-237.

<sup>422</sup> Statement of Defence, ¶ 248.

<sup>423</sup> Statement of Defence, ¶ 248, referring to Exhibit C-237.

<sup>424</sup> Specifically, Article 12.3 of the 1995 Minerals Law states that “[t]he obligations of the Government in respect of its participation in the exploration for or mining of minerals shall be performed through a business entity with State participation, and in that case that entity shall have the same rights and obligations as other participating business entities.” Viewed in this light, Article 3.6 merely requires the parties to the Founding Agreement to treat the common property of CAUC with the same equal regard for the purpose of the joint venture. Statement of Defence, ¶ 294, citing First Bayar Report, ¶ 31. Article 3.6 also assigns the parties equal rights, meaning that Erdene could hold only those rights that the other parties to the joint venture had. That neither of the other entities (namely, Priargunsky and WM Mining) could make a sovereign promise is uncontested. The creation by the Founding Agreement of a civil legal relationship means, therefore, that Mongolia did not make a sovereign promise not to confiscate. Statement of Defence, ¶ 295.

220. The Respondents highlight the fact that the Founding and Minerals Agreements contain no promise of legal stability, which makes them subject to the evolving legal framework in Mongolia.

(ii) *Violation of Standards for the Treatment of the Claimants and their Investment*

221. The Respondents reject the Claimants' allegation that the revocation of the Exploration License breached the fair and equitable treatment standard provided in Article 10 of the ECT on the basis that the enactment of the NEL and LPCEL did not violate the legitimate expectations of the Claimants, if any.

222. The Respondents argue that the Claimants' allegation that Mongolia conspired to exclude Khan from the CAUC joint venture is unsupported by the factual record.<sup>425</sup> The Respondents also reject the Claimants' contention that Mongolia failed to act transparently in the implementation of the NEL, by stressing the assistance of the IAEA in the development of this law, the consultation with stakeholders, and the communication of various drafts of the NEL to Khan.<sup>426</sup> They highlight the current dormancy of the Dornod Project to show that the Respondents did not intend to develop the project for their own benefit.<sup>427</sup>

223. In connection with the Respondents' response to the Claimants' claims on property, the Respondents further argue that the regulatory authority of the State negates the expectation that the legal framework of the State is to be frozen for the entire investment period, absent a specific guarantee.<sup>428</sup> Neither the fair and equitable treatment standard nor the international minimum standard for the treatment of aliens prohibits a State from modifying its legal framework.<sup>429</sup>

224. The Respondents then contend that investment treaties do not insure against business risk, which should be considered by and is ultimately borne by the investor.<sup>430</sup> The Respondents note

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<sup>425</sup> Statement of Defence, ¶¶ 315-316.

<sup>426</sup> Statement of Defence, ¶¶ 315-316.

<sup>427</sup> Statement of Defence, ¶¶ 315-316.

<sup>428</sup> Statement of Defence, ¶ 260-261, referring to Exhibits RL-115 (¶ 103), RL-116 (vol. 1, section 712, comment g).

<sup>429</sup> Statement of Defence, ¶ 261, referring to Exhibit CLA-50 (¶¶ 335-338). The Respondents also highlight the recognition of other tribunals in investment treaty arbitrations of the likelihood that States in democratic transition like Mongolia will enact legislative changes. Statement of Defence, ¶ 262, referring to Exhibit CLA-172 (¶ 368).

<sup>430</sup> Statement of Defence, ¶ 263, referring to Exhibit RL-118 (¶ 178). The Respondents note that this business risk is always contextualized by the economic conditions and overall circumstances of a State. Statement of Defence, ¶¶ 264-265, referring to Exhibit RL-95 (¶¶ 65(b), 75). The Respondents also discuss and rely on *Bayindir v. Pakistan*, in particular, where the tribunal considered the fair and equitable treatment claim of Bayindir and found that Pakistan had not frustrated the legitimate expectations of Bayindir because it could not have ignored the volatile political conditions in Pakistan at the time it renewed the relevant contract. Statement of Defence, ¶¶ 266-268, referring to Exhibit RL-99 (¶¶ 192-193).



that Mongolia was undergoing rapid economic and legal changes during the execution of the Agreements and the issuance of the Exploration License, and they contend that this situation would have led any reasonable investor to expect an evolving legal framework in Mongolia.<sup>431</sup> The Respondents argue that this awareness on the part of Khan, as well as the legal significance of such awareness, negates the Claimants' argument that the enactment of the NEL and LPCNEL violated the Claimants' legitimate expectations and breached the fair and equitable treatment standard.<sup>432</sup>

225. The Respondents further reject the Claimants' argument that the invalidation of the Exploration License breached the guarantee in Article 10.1 of the ECT that Mongolia not subject the investment of Khan Netherlands to impairment by unreasonable or discriminatory measures,<sup>433</sup> which has been defined as "something done capriciously, without reason."<sup>434</sup> The Respondents stress that the actions of Mongolia were neither "capricious" nor "without reason."<sup>435</sup>
226. The Respondents reject the Claimants' claim of breach of Article 10.7 of the ECT, a claim which they characterize as "a discrimination claim [based on treatment to be provided to the new Russian-Mongolian joint venture] in the guise of a claim for breach of the MFN clause in Article 10.7 of the ECT."<sup>436</sup> The Respondents explain that Mongolia and Russia have signed an agreement that contemplates the formation of "a joint venture to exploit uranium resources in Mongolia,"<sup>437</sup> which has not yet been established, thereby rendering the Claimants' argument speculative.<sup>438</sup> In addition, the agreement between Russia and Mongolia foresees the participation of third parties and provides for the protection of existing rights.<sup>439</sup> In fact, Mongolia does not afford Russian investors more favourable treatment than Dutch investors, and is, therefore, not in breach of Article 10.7.<sup>440</sup>

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<sup>431</sup> Statement of Defence, ¶ 269. The Respondents contend that Khan was in fact aware of this situation by referring to its 2008 Annual Information Report which referred to "risks of political instability and changes in government policies, laws and regulations," "changes in regulations or shifts in political conditions," and "[the] regulatory environment [being] in a state of continuing change," among other similar references. Statement of Defence, ¶ 270, referring to Exhibit R-71 (pp. 23-24).

<sup>432</sup> Statement of Defence, ¶ 271.

<sup>433</sup> Statement of Defence, ¶ 309, referring to Memorial, ¶ 371.

<sup>434</sup> Statement of Defence, ¶ 309, referring to Exhibit RL-121 (¶ 197).

<sup>435</sup> As the Respondents argue, first, both the NEL and LPCNEL pursued the legitimate purpose of enabling Mongolia to take advantage of its radioactive mineral wealth through the modernisation of its regulatory regime. Second, the decision of the NEA not to re-register the Mining and Exploration License was based on serious and repeated breaches of Mongolian law. Third, the NEA revoked all existing uranium licenses pending their re-registration, such that the revocation of the Exploration License was not discriminatory. Statement of Defence, ¶ 310.

<sup>436</sup> Statement of Defence, ¶ 311, referring to Memorial, ¶¶ 226, 372-373.

<sup>437</sup> Statement of Defence, ¶ 312, referring to First Bailikhuu Report, ¶ 21.

<sup>438</sup> Statement of Defence, ¶ 312, referring to First Bailikhuu Report, ¶ 21.

<sup>439</sup> Statement of Defence, ¶ 312.

<sup>440</sup> Statement of Defence, ¶¶ 313-314, referring to Exhibit RL-122 (p. 206).

227. The Respondents reject the Claimants' contention that the Respondents breached their obligations of good faith and loyalty under the Company Law and 2002 Civil Code by contending that the 2002 Civil Code does not apply to relationships involving administrative subordination, which they allege is the case here (see paragraph 123). Because the 2002 Civil Code does not apply to the Mining and Exploration Licenses, the Respondents further contend that these licenses do not constitute "property" for the purposes of Mongolian law (see paragraphs 123-124). The Respondents also argue that the duty of loyalty applies only to MonAtom, as the Company Law imposes this duty only on those who have a 20 percent or greater shareholding in a company.<sup>441</sup> The Respondents contend, accordingly, that the duties of good faith and loyalty could not have obliged Mongolia to exercise its administrative discretion in favour of CAUC.<sup>442</sup>
228. But even were the 2002 Civil Code and Company Law to apply to Mongolia, the Respondents contend that neither of these "prevent[s] Mongolia from implementing a general, non-discriminatory measure that pursues a legitimate public interest, such as the NEL and Order No. 141"<sup>443</sup> and that Mongolia has not, therefore, breached the duty of good faith and loyalty under Mongolian law.
229. In response to the Claimants' allegation that the Respondents breached Article 8.1 of the Foreign Investment Law, which accords foreign investment the legal protection of the Constitution, the Foreign Investment Law and other legislation consistent with laws and international treaties<sup>444</sup> and guarantees foreign investors access to the Mongolian legal system for the enforcement of their rights,<sup>445</sup> the Respondents reiterate that the NEA's actions complied with Mongolian law and international law.<sup>446</sup>
230. As regards the Claimants' allegation that the Respondents breached Article 9 of the Foreign Investment Law, which obliges Mongolia to accord foreign investors conditions that are no less favourable than those accorded to Mongolian investors in respect of their investments, the Respondents note that the NEL and the LPCNEL applied to both Mongolian and non-Mongolian investors and that Order No. 141 also applied to all license-holders without distinction.

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<sup>441</sup> Statement of Defence, ¶ 300, referring to Exhibit CLA-46 (art. 81.6).

<sup>442</sup> Statement of Defence, ¶ 149, referring to Second Tsogt Report, ¶ 215, First Bayar Report, ¶¶ 116-117.

<sup>443</sup> Respondents' First Post-Hearing Brief, ¶ 59.

<sup>444</sup> Statement of Defence, ¶ 302, referring to Exhibit CLA-8 (art. 8.1).

<sup>445</sup> Statement of Defence, ¶ 303, referring to First Bayar Report, ¶ 120.

<sup>446</sup> Statement of Defence, ¶ 304.

**E. THE DECISIONS OF MONGOLIA'S ADMINISTRATIVE COURTS**

*The Claimants' position*

231. The Claimants allege that, in its Decision No. 325 of 19 July 2010 and Decision No. 340 of 2 August 2010, the Administrative Court found the Temporary Invalidation Notices and the Permanent Invalidation Notices to be void.<sup>447</sup> As regards Decision No. 340, the Claimants note that this decision was binding between the parties because the parties did not appeal it.<sup>448</sup>
232. In its Decision No. 374 of 13 October 2010, the Administrative Appellate Court confirmed the holding in Decision No. 325 in respect of the notices addressed to CAUC.<sup>449</sup> As regards Decision No. 374, the Claimants also clarified that the administrative appellate courts in Mongolia do not have the authority to issue binding interpretations of Mongolian law, which only the Mongolian Supreme Court can do, meaning that the decisions they issue determine the interpretations only between the parties to the judicial proceeding.<sup>450</sup> The Claimants also note that Decision No. 374 does not have an effect on the finality of Decision No. 340, as the claimants in these proceedings were different.<sup>451</sup> Because of this, the Claimants contend that Decision No. 374 had no effect on the validity of Order No. 141.<sup>452</sup>
233. According to the Claimants, the effect of these decisions was to make it as if the Claimants' licenses had never been invalidated.<sup>453</sup>
234. The Claimants submit that the NEA should have therefore considered CAUC and Khan Mongolia's applications for the re-registration of the Mining and Exploration Licenses and issued a decision conforming with the LPCNEL, Order No. 141 and Order No. 120.<sup>454</sup> Instead, the NEA continued to act as if the Permanent Invalidation Notices were administrative acts with legal effect<sup>455</sup> by issuing, first, on 11 November 2010, a declaration in the Mongolian press stating that the Mining and Exploration Licenses could not be reinstated and mentioning alleged legal violations related to these,<sup>456</sup> and then, on 10 December 2010, individual

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<sup>447</sup> Memorial, ¶ 148, referring to Exhibits C-13 (p. 7), R-25 (pp. 30-31).

<sup>448</sup> Transcript (13 November 2013), 558:20 to 559:12.

<sup>449</sup> Memorial, ¶ 149, referring to Exhibit C-14/R-27, Decision on Jurisdiction, ¶ 54.

<sup>450</sup> Transcript (13 November 2013), 557:18 to 558:19.

<sup>451</sup> Transcript (13 November 2013), 559:13-24.

<sup>452</sup> Claimants' First Post-Hearing Brief, p. 8.

<sup>453</sup> Memorial, ¶ 386, referring to Second Tsogt Report, ¶¶ 181-183.

<sup>454</sup> Memorial, ¶¶ 387-388, referring to Exhibits C-13 (p. 6), R-25 (p. 12); Claimants' Second Post-Hearing Brief, p. 5.

<sup>455</sup> Memorial, ¶ 392, referring to Exhibits C-8, C-9, Second Tsogt Report, ¶ 184.

<sup>456</sup> Memorial, ¶¶ 389-390, referring to Exhibit C-7.

notifications to CAUC and Khan Mongolia, stating that their licenses had not been reinstated “since your company has not satisfied the conditions and requirements of the law.”<sup>457</sup>

235. The Claimants submit that, in failing to comply with the decisions of its courts, Mongolia violated: (i) Article 8.1 of the Foreign Investment Law (in which Mongolia committed to provide the Claimants with the full protection of its laws);<sup>458</sup> (ii) Article 10.12 of the ECT (in which Mongolia guaranteed that domestic law would provide investors with effective means for the enforcement of rights related to their investments);<sup>459</sup> and (iii) the customary international law minimum standard of treatment of aliens (under which a State’s failure to give effect to a judicial decision amounts to a denial of justice).<sup>460</sup>
236. In addition, Mongolia’s failure to comply with the decisions of its courts confirms the illegitimate intent behind the invalidation of the Mining and Exploration Licenses, thus compounding Mongolia’s breaches of Articles 10.1 and 13 of the ECT and its good faith and non-expropriation obligations under Mongolian and international law.<sup>461</sup>
237. The Claimants also point to Article 5 of the Mongolian Law on Administrative Procedure, which imposes liability on a body failing to comply with the acts of administrative courts, and Article 498.2 of the 2002 Civil Code, which imposes liability on the State or administrative body that employs a Government official who wrongfully causes damage to another party.<sup>462</sup>
238. In response to the Respondents’ emphasis on the Claimants not having raised the issue of re-registration of the Mining and Exploration Licenses with the Mongolian courts, the Claimants argue that the role of administrative courts is only to determine the validity of specific administrative acts, while it is the responsibility of administrative agencies such as the NEA to resolve petitions directed to them. The latter responsibility arises by virtue of law, not of any court decision.<sup>463</sup> Stated differently, the obligation of the NEA to consider and issue a “well-founded decision” on CAUC and Khan Mongolia’s license re-registration applications arose by virtue of the LPCNEL.<sup>464</sup>
239. As regards the Respondents’ emphasis on the Claimants not having challenged the NEA letters of 15 December 2010 before the Mongolian administrative courts, the Claimants note that the

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<sup>457</sup> Memorial, ¶ 391, referring to Exhibits C-8, C-9.

<sup>458</sup> Memorial, ¶ 393, referring to Second Tsogt Report, ¶ 191.

<sup>459</sup> Memorial, ¶ 394, referring to Exhibit CLA-53 (art. 10.12).

<sup>460</sup> Memorial, ¶ 394, referring to Exhibits CLA-53 (art. 10.12), CLA-161 (pp. 7-8).

<sup>461</sup> Memorial, ¶ 395, referring to Exhibit CLA-186 (¶ 249).

<sup>462</sup> Memorial, ¶ 396, referring to Second Tsogt Report, ¶ 185, Exhibit CLA-117 (art. 498.2).

<sup>463</sup> Reply, ¶¶ 233-234.

<sup>464</sup> Reply, ¶ 234.

availability of a domestic administrative challenge procedure does not affect the right of Khan to challenge a confiscatory action before an international tribunal.<sup>465</sup>

*The Respondents' position*

240. The Respondents submit that the decisions of the Mongolian administrative courts had no bearing on the NEA's decision not to register the Mining and Exploration Licenses under the NEL.<sup>466</sup>
241. The Respondents note that the decisions of the Administrative Court in Decision No. 325 and Decision No. 340 finding the notifications as regards the invalidation of the Mining and Exploration Licenses invalid were based on purely procedural grounds.<sup>467</sup>
242. First, the Administrative Appellate Court, in Decision No. 325, actually upheld the validity of Order No. 141, which revoked all uranium licenses in Mongolia pending their re-registration under the NEL.<sup>468</sup> The Court decided "to dismiss the claim having order No. 141 by the head of Nuclear Energy Agency in 2009 recognized as illegal and to make modifications to the resolution of first instance court."<sup>469</sup> After this decision, therefore, the Mining and Exploration Licenses remained invalidated pending their re-registration.<sup>470</sup>
243. Second, because in the proceedings before the Mongolian courts CAUC and Khan Mongolia did not claim that they had a right to the reinstatement of the Mining and Exploration Licenses,<sup>471</sup> the decisions of these courts could not have obliged the NEA to reinstate them.<sup>472</sup> And, in fact, the Administrative Court held that "in the future it shall be noted that this judicial decision does not have any restriction on the decision regarding re-registration of the Mining License No. 237A [ . . . ]," thus clarifying that its decision was unrelated to the NEA's decision on the re-registration.<sup>473</sup>
244. In not reinstating the Mining and Exploration Licenses, the NEA therefore did not ignore any decisions of the Mongolian courts. Moreover, the NEA's decision was justified, as Khan Mongolia and CAUC continued to violate Mongolian laws and regulations (as was noted during the March 2010 SSIA inspection).<sup>474</sup> In fact, in the administrative proceedings in

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<sup>465</sup> Claimants' Second Post-Hearing Brief, p. 8.

<sup>466</sup> Statement of Defence, ¶ 324.

<sup>467</sup> Respondents' First Post-Hearing Brief, ¶ 33.

<sup>468</sup> Statement of Defence, ¶¶ 304, 325, referring to Exhibits C-14 (p. 6), R-12, First Bayar Report, ¶ 122.

<sup>469</sup> Statement of Defence, ¶ 325, referring to Exhibit C-14 (p. 6).

<sup>470</sup> Statement of Defence, ¶ 326.

<sup>471</sup> Statement of Defence, ¶ 327, referring to Exhibit R-65.

<sup>472</sup> Statement of Defence, ¶ 329; Respondents' First Post-Hearing Brief, ¶ 33.

<sup>473</sup> Statement of Defence, ¶ 328, referring to Exhibit R-25 (p. 14).

<sup>474</sup> Statement of Defence, ¶¶ 330-331, referring to First Bayar Report, ¶¶ 112-113.

Mongolia, CAUC and Khan Mongolia did not challenge the grounds on which the NEA decided not to re-register their licenses.<sup>475</sup>

245. Accordingly, Mongolia did not violate Article 8.1 of the Foreign Investment Law and the Claimants cannot bring a claim for the denial of justice.<sup>476</sup> That Khan Mongolia and CAUC were able to commence proceedings before the Mongolian courts and were in fact successful in their challenges to the Temporary Invalidation Notices and the Permanent Invalidation Notices further proves that there was no breach of Article 8.1 of the Foreign Investment Law.<sup>477</sup>
246. Nor, in refusing to reinstate the Mining and Exploration Licenses, did the Respondents breach the international minimum standard for the treatment of aliens. According to the Respondents, this standard is breached by “treatment of an alien ... [that] amount[s] to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”<sup>478</sup> The Respondents first contend that, in the present case, the actions of Mongolia cannot be considered arbitrary. The NEL and the LPCNEL were valid exercises of Mongolia’s permanent sovereignty over its natural resources and pursued a legitimate purpose.<sup>479</sup> In addition, the NEA’s decision not to re-register the Mining and Exploration Licenses was taken after a series of actions involving site inspections and discussions with the Claimants.<sup>480</sup> Second, the due process offered by Mongolia to the Claimants satisfied the international minimum standard, in that the Claimants were afforded the opportunity to challenge the administrative decisions in the Mongolian courts (which they did, successfully in some instances).<sup>481</sup> The Respondents point out that it is the Claimants who chose not to challenge the NEA’s decision not to re-register the Mining and Exploration Licenses in the Mongolian courts.<sup>482</sup> Finally, Mongolia did not discriminate against either Khan Mongolia or CAUC, in that Order No. 141 applied to all uranium mining and exploration license-holders without discrimination.<sup>483</sup>

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<sup>475</sup> Statement of Defence, ¶ 332.

<sup>476</sup> Statement of Defence, ¶ 332.

<sup>477</sup> Statement of Defence, ¶ 304, referring to First Bayar Report, ¶ 122.

<sup>478</sup> Statement of Defence, ¶¶ 318-319, referring to Exhibits CLA-179 (¶ 4), RL-123 (¶ 616).

<sup>479</sup> Statement of Defence, ¶ 320.

<sup>480</sup> Statement of Defence, ¶ 320.

<sup>481</sup> Statement of Defence, ¶ 321.

<sup>482</sup> Statement of Defence, ¶ 321.

<sup>483</sup> Statement of Defence, ¶ 322, referring to Exhibits R-12, C-14.

**F. THE ALLEGED MANIPULATION OF THE MEDIA**

*The Claimants' position*

247. The Claimants contend that the public statements made by Mongolia about Khan – which they characterize as revealing the autocratic tendencies of the Government – not only evince that other conduct by Mongolia toward the Claimants has been arbitrary and discriminatory, but also constitute an instance of wrongful conduct.<sup>484</sup>
248. Specifically, the Claimants contend that some of the statements made by Government officials – such as: “[t]hese small Canadian companies intending to take activities in Mongolia have done cheating. We are watching the small Canadian companies through a loop. Provided they breach our law, we shall confiscate their licenses straight away”<sup>485</sup> and “[t]he management of Khan Resources is probably the li[a]rs”<sup>486</sup> – amount to illegal defamation, for which the administrative bodies that employ these officials, or the State, could be held liable pursuant to Article 498.2 of the 2002 Civil Code,<sup>487</sup> and for which the Claimants should, therefore, be able to claim damages.<sup>488</sup>
249. The Claimants note that the status of Khan Canada as a publicly traded company in Canada obliges it to publish information for the benefit of its shareholders and potential investors about material events that affect its investments in Mongolia, but argue that, contrary to the Respondents’ assertions, Khan Canada’s press releases are neutral and are not, in any case, adversely targeted toward the Respondents.<sup>489</sup>

*The Respondents' position*

250. The Respondents submit that, to the contrary, it is the Claimants that have exerted pressure on the Respondents by regularly releasing erroneous and biased updates regarding the present arbitration in the international media.<sup>490</sup> In fact, according to the Respondents, the Claimants have been making aggressive public declarations and false allegations against Mongolia since the latter announced its plan to enact a legal framework for its nuclear sector.<sup>491</sup>

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<sup>484</sup> Memorial, ¶ 398.

<sup>485</sup> Memorial, ¶ 400, referring to Exhibit C-102 (emphasis by the Claimants).

<sup>486</sup> Memorial, ¶ 400, referring to Exhibit C-106 (emphasis by the Claimants).

<sup>487</sup> Memorial, ¶ 399, referring to Exhibit CLA-117 (art. 498.2).

<sup>488</sup> Memorial, ¶ 400, referring to Exhibits C-100, C-101, C-102, C-70, C-106, C-224; Reply, ¶ 332, referring to Exhibits C-100, C-106, C-224, C-475, C-476, C-477, C-469, C-7.

<sup>489</sup> Reply, ¶ 331, referring to Exhibit C-208.

<sup>490</sup> Statement of Defence, ¶¶ 342-345, referring to Exhibits R-70, R-73, C-170; Statement of Defence, ¶ 345 n. 422, referring to Exhibit C-69.

<sup>491</sup> Statement of Defence, ¶ 344.

251. The Respondents argue that Mongolia has refrained from responding to these allegations publicly, and note that the Claimants' allegations to the contrary are based on interviews conducted with a single NEA representative, who responded to Khan's "incorrect" public statements only because he was confronted by them.<sup>492</sup>

## VI. THE PARTIES' ARGUMENTS ON DAMAGES

### A. STANDARD OF DAMAGES

#### *The Claimants' position*

252. The Claimants assert that their entitlement to damages is governed by the ECT, Mongolian law and customary international law.<sup>493</sup> The ECT directs the Tribunal to apply both the provisions of the ECT and the "applicable rules and principles of international law."<sup>494</sup> Similarly, while the Founding Agreement states that it is to be interpreted in accordance with Mongolian laws, the Constitution and 2002 Civil Code confirm that Mongolian law must be interpreted in accordance with international law.<sup>495</sup> Accordingly, any award of damages, whether under the ECT or Mongolian law, should adhere to the relevant norms and principles of international law.
253. The Claimants submit that compensation for damages under Mongolian law, whether with respect to breach of obligations arising under the Agreements, wrongful administrative acts or breach of civil obligations (such as those under the Foreign Investment Law and the Company Law), should aim to put the Claimants in the position they would have been in had the Agreements been properly performed and had the Mining and Exploration Licenses not been illegally invalidated.<sup>496</sup> The Claimants rely, in support, on Articles 227, 229, 497.1 and 498.2 of the 2002 Civil Code and Article 16.14 of the Constitution.<sup>497</sup>
254. As for the standard of compensation for Mongolia's illegal expropriation of the Claimants' investment in breach of the ECT, the Foreign Investment Law and the Founding Agreement, the Claimants submit that it is to be found in the general principles of damages under customary international law.<sup>498</sup> This is because neither the ECT nor Mongolian law provide a standard for assessing compensation for unlawful expropriation.<sup>499</sup>

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<sup>492</sup> Statement of Defence, ¶ 348, referring to Exhibit C-69 as an example.

<sup>493</sup> Memorial, ¶ 412.

<sup>494</sup> Memorial, ¶ 413, referring to Exhibit CLA-53 (arts. 26(6), 10(1)).

<sup>495</sup> Memorial, ¶ 414, referring to Exhibits C-16A (art. 12.1), CLA-26 (art. 10(1)), CLA-117 (art. 540.1).

<sup>496</sup> Memorial, ¶¶ 417-420; Claimants' First Post-Hearing Brief, p. 23.

<sup>497</sup> Memorial, ¶ 416, referring to Exhibits CLA-26 (art. 16.14), CLA-117 (art. 497.1); Claimants' Pre-Hearing Brief, ¶ 92.

<sup>498</sup> Memorial, ¶ 424.

<sup>499</sup> Memorial, ¶ 423.



255. The Claimants submit that the applicable customary international law standard of compensation for unlawful expropriation, set out in the *Case concerning the Factory at Chorzów* (“*Chorzów Factory*”) and confirmed by the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (“*ILC Articles*”), is that the Tribunal should aim to put the claimant in the position it would have been in had the investment not been expropriated.<sup>500</sup>
256. The Claimants argue that, by focusing on the Claimants’ interests at the time before the illegal conduct, rather than on the situation that would have existed “but for” the Government measures, the Respondents misapply the *Chorzów Factory* standard, ignore the impact of their own conduct, and are in fact applying the standard for lawful expropriation (set out, for example, in Article 13(1) of the ECT).<sup>501</sup>

*The Respondents’ position*

257. While the Respondents agree with the Claimants that the standard of compensation at customary international law is the *Chorzów Factory* principle that reparation must “reestablish the situation which would, in all probability, have existed if that act had not been committed,”<sup>502</sup> they submit that, in a correct application of this “but for” approach to the present case, the “appropriate compensation for a successful claimant is the sum of its investment.”<sup>503</sup> According to the Respondents, this standard is particularly appropriate where, as here, there are several variables between the situation existing at the time of the alleged breach and any ultimate future profits.<sup>504</sup>
258. In respect of Article 8.4 of the Foreign Investment Law, the Respondents argue that “any award should therefore value compensation on the basis of Khan’s expenditure,” determined as “the value of the expropriated assets at the time of expropriation.”<sup>505</sup> Mongolian courts have construed this provision as requiring an asset-based approach to damages calculation, which is

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<sup>500</sup> Memorial, ¶¶ 425-426, referring to *Case concerning the Factory at Chorzów* (Germany v. Poland), Jurisdiction, Judgment, 26 July 1927, P.C.I.J., Series A, No. 9, Exhibit CLA-173 (p. 47); Claimants’ Pre-Hearing Brief, ¶ 91; Claimants’ First Post-Hearing Brief, p. 23.

<sup>501</sup> Reply, ¶ 374.

<sup>502</sup> Statement of Defence, ¶ 353, referring to Exhibit CLA-173 (p. 47).

<sup>503</sup> Statement of Defence, ¶¶ 385, 387, referring to Exhibits CLA-182 (¶¶ 121-122), CLA-168 (p. 229), CLA-167 (¶¶ 425-426), RL-125 (¶ 125), Respondents’ Pre-Hearing Brief, ¶ 98.

<sup>504</sup> Statement of Defence, ¶¶ 388-389; Respondents’ First Post-Hearing Brief, ¶¶ 68-99.

<sup>505</sup> Statement of Defence, ¶¶ 393-394, 397, referring to Exhibit CLA-8 (art. 8.4 (stating “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”)); Rejoinder, ¶ 225.

supported by general principles of Mongolian civil liability that limit damages to the actual expenditure lost.<sup>506</sup>

## B. QUANTUM

### 1. Damages

#### *The Claimants' position*

259. The Claimants submit that the Respondents should be held liable for damages in the amount of **USD 255 million** (before interest, and not subject to Mongolian taxation).<sup>507</sup>
260. To assess the fair market value of the Claimants' investments, expert firms BRG and Raymond James applied the income-based approach and the market-based approach, respectively.<sup>508</sup> The Claimants emphasize that these two approaches have been described by commentators as complementary in their emphasis on earnings.<sup>509</sup> The Claimants then averaged the valuations produced by their experts.<sup>510</sup> At the Claimants' request, both experts assessed the value of the Claimants' investment as of 1 July 2009 ("**Valuation Date**").<sup>511</sup>
261. BRG applied the discounted cash flow ("**DCF**") method to arrive at a total of **USD 264.8 million** (before interest).<sup>512</sup> BRG "relied on several widely used sources of future prices, based upon actual long-term contracts for uranium, to arrive at \$65/lb" as an input for its DCF analysis.<sup>513</sup> The Claimants submit that the DCF method meets World Bank Guidelines for compensation<sup>514</sup> and has been widely used in investment arbitrations to determine the "but for" value of lost investments.<sup>515</sup> In the present case, the use of the DCF method is particularly apt in light of the fact that the Claimants would have been able to access funding to bring the Dornod Project into production.<sup>516</sup>
262. Raymond James applied a comparable companies approach and a comparable transactions approach to valuation and averaged the results of these analyses to conclude that the Claimants' investment had a fair market value as of the Valuation Date of **USD 245 million** (before

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<sup>506</sup> Statement of Defence, ¶¶ 395-397.

<sup>507</sup> Claimants' Second Post-Hearing Brief, p. 15.

<sup>508</sup> First Raymond James Report, p. 11; First BRG Report, ¶ 9.

<sup>509</sup> Memorial, ¶ 441, referring to Exhibit CLA-157, p. 15; Claimants' First Post-Hearing Brief, pp. 24-25.

<sup>510</sup> Memorial, ¶¶ 442, 445.

<sup>511</sup> Claimants' First Post-Hearing Brief, p. 23.

<sup>512</sup> Memorial, ¶ 443; Claimants' First Post-Hearing Brief, p. 25.

<sup>513</sup> Claimants' Second Post-Hearing Brief, p. 13.

<sup>514</sup> Claimants' Second Post-Hearing Brief, p. 12.

<sup>515</sup> Memorial, ¶ 437, referring to Exhibit CLA-162 (¶ 439); Claimants' Second Post-Hearing Brief, p. 12.

<sup>516</sup> Reply, ¶ 473; Claimants' Pre-Hearing Brief, ¶ 96.

interest).<sup>517</sup> Raymond James characterized the comparable companies/transactions analysis as “a relative valuation technique that is used to value a company by comparing that company’s valuation multiples to those of its peers,”<sup>518</sup> and asserted that its review of investment banking teams’ opinions on transactions “show[s] that comparable company analysis was cited as a valuation technique in almost every single case.”<sup>519</sup> The Claimants also note that Raymond James “only utilized public documents [. . .] that are subject to rigorous regulatory and legal standards” when performing this analysis.<sup>520</sup>

263. The Claimants argue that it is not appropriate to assess the value of their investment on the basis of the value of Khan Canada’s shares on the Valuation Date.<sup>521</sup> The value of a company can be assessed on the basis of the value of its shares if the shares in question are liquid and if the share price is analysed in a period in which it has not been negatively impacted by the Government measures in dispute.<sup>522</sup> In the present case, Government actions had already depressed Khan Canada’s share value to the point of illiquidity by the Valuation Date.<sup>523</sup> At the hearing, Raymond James explained that a market price methodology in this case is inappropriate in light of Government actions, as it is difficult to “separate any impact from a particular event from the general market, particularly if they are occurring around the same time period.”<sup>524</sup> The Claimants thus assert that “in the case of unlawful expropriation or other breaches, such as the breach of fair and equitable treatment, the correct approach permits a valuation that deviates from the time the asset was taken or interfered with, and permits a valuation at the time of the award.”<sup>525</sup> This is the basis for Raymond James’s use of comparables data that post-dated the Valuation Date.<sup>526</sup>
264. The Claimants reject the asset-based approach to valuation advocated by the Respondents.<sup>527</sup> An approach based on the costs incurred by the Claimants in furtherance of the investment is inappropriate,<sup>528</sup> because the Dornod Project was at the development stage. Neither international nor Mongolian law require compensation to be limited to the actual investment.<sup>529</sup>

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<sup>517</sup> Memorial, ¶ 451; Claimants’ First Post-Hearing Brief, pp. 29-30.

<sup>518</sup> Transcript (15 November 2013), 749:14-17.

<sup>519</sup> Transcript (15 November 2013), 750:9-12.

<sup>520</sup> Claimants’ Second Post-Hearing Brief, p. 14.

<sup>521</sup> Reply, ¶ 428.

<sup>522</sup> Reply, ¶ 429.

<sup>523</sup> Reply, ¶ 430; Claimants’ Pre-Hearing Brief, ¶ 110.

<sup>524</sup> Transcript (15 November 2013), 765:25 to 766:4.

<sup>525</sup> Reply, ¶ 477.

<sup>526</sup> Reply, ¶ 477.

<sup>527</sup> Reply, ¶ 400.

<sup>528</sup> Reply, ¶¶ 402-409; Claimants’ Pre-Hearing Brief, ¶ 93.

<sup>529</sup> Reply, ¶¶ 410-418.

As for the Claimants' estimate of costs expended on the Dornod Project,<sup>530</sup> Mr. Edey's evaluation of USD 50 million is conservative and consistent with the Claimants' prior statements.<sup>531</sup> The evaluation is based on audited financial statements, which represents the most widely accepted evidence of expenditures linked to investments.<sup>532</sup>

265. The Claimants note that many of the allegedly "insurmountable obstacles" they faced in putting the mine into production were due to Mongolia's unlawful conduct,<sup>533</sup> and that the Claimants would have been able to obtain necessary financing, "[g]iven the substantial uranium reserves reflected in the DFS."<sup>534</sup> Moreover, the risks cited by the Respondents as offsetting any value of the investment were both common to mining projects and surmountable in light of the conclusion reached in the Respondents' valuation expert Behre Dolbear's report that such risks could be addressed by adding only one year to the production schedule.<sup>535</sup> According to BRG, Behre Dolbear's report also "double counts risk [by applying] a totally subjective adjustment parameter it calls the chance of success."<sup>536</sup> The Dornod properties had numerous characteristics that made them highly attractive to investors: evidence of the deposit's quality by virtue of its Soviet mining history, previous Mongolian approval of the reserves, consistent registration of the reserves in Mongolia, and the State's designation of the reserves as of "strategic importance."<sup>537</sup> Attempted takeovers by ARMZ and China National Nuclear Corporation ("CNNC") in 2009–2010 demonstrate as well that the Claimants' investment exceeded the "zero value" asserted by the Respondents.<sup>538</sup>

*The Respondents' position*

266. The Respondents submit that, should the Tribunal find the Respondents liable for breaches of any obligations, the Claimants are nevertheless not entitled to damages, as the Claimants, in all probability, could not have brought the Dornod Project into production.<sup>539</sup>
267. Should the Tribunal determine that damages are due to the Claimants, these damages should be limited to the amount that the Claimants actually invested in the Dornod Project – that is, **USD 16.7 million.**<sup>540</sup>

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<sup>530</sup> Reply, ¶ 421.

<sup>531</sup> Reply, ¶¶ 422, 425, 427.

<sup>532</sup> Claimants' Pre-Hearing Brief, ¶ 94.

<sup>533</sup> Claimants' Second Post-Hearing Brief, pp. 13, 15.

<sup>534</sup> Claimants' Second Post-Hearing Brief, p. 14.

<sup>535</sup> Reply, ¶¶ 394-397, citing First Behre Dolbear Report, ¶¶ 34-35; Claimants' First Post-Hearing Brief, pp. 26-27.

<sup>536</sup> Transcript (15 November 2013), 774:21-25.

<sup>537</sup> Reply, ¶ 392, referring to Exhibits CLA-118 (arts. 4.1.8, 8), C-160.

<sup>538</sup> Reply, ¶ 379.

<sup>539</sup> Statement of Defence, ¶¶ 356-381; Rejoinder, ¶¶ 222-244; Respondents' Pre-Hearing Brief, ¶ 97.

268. In this respect, the Respondents argue that the Claimants have exaggerated the amount they claim to have invested by including: amounts made by Mr. Mays and other predecessors in interest; USD 1.7 million for foreign exchange losses that were not realized; USD 11.1 million for stock-based compensation for management; USD 11.9 million for general corporate expenses (even though Khan pursued other projects); USD 1.6 for a failed attempt to acquire Western Prospector;<sup>541</sup> and legal fees and settlements arising from litigation unrelated to the Dornod Project.<sup>542</sup>
269. In the alternative, the Respondents argue that the value of the Claimants' investment should be calculated by reference to the share price of Khan Canada as at the Valuation Date, which, according to the Respondents' expert Mr. John Lagerberg, would amount to **between USD 13.4 and USD 18.6 million**.<sup>543</sup> In support of this valuation, the Respondents note that CNNC's USD 39 million offer "was deemed by Khan itself to be a good offer for the business, and that secondly it was at an inflated, as opposed to a fair market value."<sup>544</sup>
270. The Respondents argue that, as on the Valuation Date, Khan Canada, a publicly-traded company, held all of the Claimants' interests, the Claimants' claim cannot exceed the value of this company.<sup>545</sup> And, as stated in *RosInvestCo v. Russia*,<sup>546</sup> the best evidence of fair value for a publicly-traded company is its quoted share price in an active market.<sup>547</sup> The Claimants' argument that the share value of Khan Canada as it was in 2007 – two years before the alleged expropriation – should be used is without a legal<sup>548</sup> or factual<sup>549</sup> basis, designed to inflate damages by profiting from the "uranium bubble" of 2007,<sup>550</sup> and contrary to the value of the Claimants' expenditures.<sup>551</sup> At the hearing, comparing Khan Canada's share price against peer group prices, the Respondents' expert Behre Dolbear observed that the 2007 "dip in Khan's price purportedly caused by the actions of the Mongolian government [follows] that same drop in the peer group prices that weren't affected by the Mongolian government."<sup>552</sup>

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<sup>540</sup> Respondents' Pre-Hearing Brief, ¶¶ 98, 102, 116; Respondents' First Post-Hearing Brief, ¶ 119.

<sup>541</sup> Statement of Defence, ¶ 399; Rejoinder, ¶ 254; Respondents' Pre-Hearing Brief, ¶ 99.

<sup>542</sup> Rejoinder, ¶ 255.

<sup>543</sup> Statement of Defence, ¶ 470; Respondents' Pre-Hearing Brief, ¶¶ 103-107; Respondents' First Post-Hearing Brief, ¶¶ 120-126.

<sup>544</sup> Respondents' Second Post-Hearing Brief, ¶ 57.

<sup>545</sup> Statement of Defence, ¶ 443.

<sup>546</sup> Reply, ¶¶ 262-263, referring to Exhibit RL-156 (¶ 675).

<sup>547</sup> Statement of Defence, ¶ 444.

<sup>548</sup> Rejoinder, ¶¶ 267-277; Respondents' Pre-Hearing Brief, ¶¶ 110-111.

<sup>549</sup> Rejoinder, ¶¶ 278-288; Respondents' Pre-Hearing Brief, ¶ 112.

<sup>550</sup> Rejoinder, ¶¶ 289-305; Respondents' Pre-Hearing Brief, ¶¶ 113-115; Respondents' Second Post-Hearing Brief, ¶¶ 47-53.

<sup>551</sup> Rejoinder, ¶¶ 306-317; Respondents' Pre-Hearing Brief, ¶¶ 116-118.

<sup>552</sup> Transcript (15 November 2013), 802:15-21.

271. Moreover, the Respondents argue that the DCF method and comparable companies and transactions methods used by the Claimants for the assessment of the fair market value of their investment are inapposite in the present case.
272. According to the Respondents, international tribunals have repeatedly rejected the application of the DCF method where, as here, there is no record of profitability<sup>553</sup> and there is insufficient certainty regarding future profitability.<sup>554</sup> In the present case, the Claimants had not begun mining activities.<sup>555</sup> Moreover, numerous hurdles to production render any future profits “highly speculative.” First, the Claimants did not possess title to any interest capable of exploitation.<sup>556</sup> In fact, for the Claimants to be able to exploit the Dornod Project, the Exploration License would have had to be converted to a mining license,<sup>557</sup> this mining license would have had to be merged with CAUC’s Mining License,<sup>558</sup> and an investment agreement with Mongolia and a joint venture agreement with the CAUC partners would have had to be concluded.<sup>559</sup> At the hearing, Behre Dolbear asserted that, in the absence of this investment agreement, “the conditions under which such a merger could have occurred were very unclear when you have 3 different parties.”<sup>560</sup> Second, the Claimants would have been unable to obtain the required financing for the Dornod Project.<sup>561</sup> The alleged CAD 37 million previously raised by the Claimants is dwarfed by the large amount of investment remaining to be made according to the Claimants’ own expert (USD 336.6 million before production and another USD 200 million after the start of production).<sup>562</sup> Third, the Claimants lacked experience in mine development.<sup>563</sup> In fact, Khan was a junior mining company that was “in the business of selling off interests after carrying out exploration works,” and so expected to sell its participation in CAUC once the DFS had been completed.<sup>564</sup>
273. The Respondents also note the large disparity between the actual amount invested by the Claimants and the result arrived at using the DCF method.<sup>565</sup>

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<sup>553</sup> Statement of Defence, ¶ 429-434; Respondents’ First Post-Hearing Brief, ¶¶ 106-107; Respondents’ Second Post-Hearing Brief, ¶¶ 41-42.

<sup>554</sup> Statement of Defence, ¶¶ 430-434; Respondents’ Pre-Hearing Brief, ¶ 144.

<sup>555</sup> Statement of Defence, ¶ 427.

<sup>556</sup> Respondents’ First Post-Hearing Brief, ¶ 109; Respondents’ Second Post-Hearing Brief, ¶¶ 39-40.

<sup>557</sup> Rejoinder, ¶¶ 343-349; Respondents’ Pre-Hearing Brief, ¶ 133.

<sup>558</sup> Rejoinder, ¶¶ 350-360.

<sup>559</sup> Rejoinder, ¶¶ 361-371.

<sup>560</sup> Transcript (15 November 2013), 790:11-14.

<sup>561</sup> Rejoinder, ¶¶ 372-385; Respondents’ Pre-Hearing Brief, ¶ 138; Respondents’ First Post-Hearing Brief, ¶ 109; Respondents’ Second Post-Hearing Brief, ¶¶ 43-46.

<sup>562</sup> Statement of Defence, ¶¶ 435-437

<sup>563</sup> Rejoinder, ¶¶ 386-391; Respondents’ First Post-Hearing Brief, ¶ 109.

<sup>564</sup> Rejoinder, ¶ 390.

<sup>565</sup> Statement of Defence, ¶¶ 438-442; Respondents’ Pre-Hearing Brief, ¶ 129.

274. The Respondents submit that, in any event, the Claimants' application of the DCF method is flawed, because it does not properly reflect the specific political, business and execution risks of Khan Canada's ability to finance and develop the Dornod Project,<sup>566</sup> relies on tax incentive calculations based on long-abolished Mongolian foreign investment laws, uses a 19-year forecast for the price of uranium (despite the limited certainty of uranium price forecasting beyond three years), and assumes a joint operation of the Main Property and the Additional Property with the adjacent Gurvanbulag mine owned by Western Prospector, which had rejected the Claimants' merger offer in 2008.<sup>567</sup> As put by Respondents' expert John Lagerberg, the DCF method distorts Khan Canada's economic value because "[t]he market would give you credit if you are about to get your hands on [financing] more than if that cash is many years and many hurdles away."<sup>568</sup> Should the Tribunal, contrary to Respondents' submissions, decide to apply the DCF method, it should rely on Mr. Lagerberg's DCF calculation of USD 29.1 million.<sup>569</sup>
275. The Respondents further argue that the comparable companies and transactions methodologies are generally inadequate,<sup>570</sup> relying on *OEPC v. Ecuador* for the premise that each resource property presents "a unique set of value parameters."<sup>571</sup> The Respondents criticize the Claimants' application of the comparable companies and transactions methodologies on the grounds that: (i) the "comparable" companies, unlike Khan, have projects that are in production, are located in more stable regions, possess the necessary permits and have partial or full funding,<sup>572</sup> (ii) the Claimants' comparable company calculations do not adjust for differences based on varying climatic, geographical and regulatory conditions,<sup>573</sup> and (iii) six of seven "comparable" transactions took place in significantly different market conditions, either during the "uranium bubble" of 2007 or over a year after the Valuation Date.<sup>574</sup>
276. No matter which valuation method is applied, the Respondents submit that any damages awarded to the Claimants should not include any possible mining profits from the exploitation of the area covered by the Exploration License,<sup>575</sup> as the Exploration License does not include a right to mine the area and is thus not an asset from which sales can be derived.<sup>576</sup> Moreover, the

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<sup>566</sup> Respondents' Second Post-Hearing Brief, ¶ 60.

<sup>567</sup> Rejoinder, ¶¶ 392-393; Respondents' Pre-Hearing Brief, ¶ 148.

<sup>568</sup> Transcript (15 November 2013), 830:18-21.

<sup>569</sup> Respondents' First Post-Hearing Brief, ¶ 115, referring to Second Lagerberg Report, ¶¶ 5.37-5.40.

<sup>570</sup> Respondents' First Post-Hearing Brief, ¶¶ 101-105.

<sup>571</sup> Rejoinder, ¶¶ 319-320, referring to Exhibit CLA-207 (¶ 787); Respondents' Pre-Hearing Brief, ¶ 122.

<sup>572</sup> Respondents' Pre-Hearing Brief, ¶¶ 120, 123-124.

<sup>573</sup> Rejoinder, ¶ 325; Respondents' Pre-Hearing Brief, ¶ 125.

<sup>574</sup> Rejoinder, ¶ 327; Respondents' Pre-Hearing Brief, ¶¶ 113, 126.

<sup>575</sup> Statement of Defence, ¶¶ 364, 366.

<sup>576</sup> Statement of Defence, ¶ 377.

Exploration License was set to expire in March 2011, only two years after the Claimants' Valuation Date.<sup>577</sup>

## 2. Interest

### *The Claimants' position*

277. The Claimants submit that a 7.5 percent compounded interest rate, calculated from the time of taking to the payment of any awarded damages, should be applied to their USD 255 million damages claim, resulting in a **total claim of USD 326 million**.<sup>578</sup>
278. The Claimants rely on Article 38 of the ILC Articles for the premise that interest must be compounded in order to reflect the reality of financial transactions,<sup>579</sup> and on Article 13 of the ECT for the premise that interest should be assessed at a commercial rate established on a market basis.<sup>580</sup> The Claimants also rely on recent case law for the general premise that interest should be granted, and *Occidental* in particular for the premise that “most recent awards provide for compound interest.”<sup>581</sup> The Claimants further submit that the interest rate granted should be consistent with “the concept that, prior to paying the award, Respondents will have essentially forced Claimants to make an involuntary loan to Respondents for the period prior to payment.”<sup>582</sup> The interest rate should therefore reflect the risk that the Claimants are taking that the Respondents will default on their payment.<sup>583</sup>
279. According to the Claimants, the Respondents' argument that, under Mongolian law, interest is payable only upon the breach of a monetary payment obligation is inconsistent with the general standard for compensatory damages established in Articles 227 and 229 of the 2002 Civil Code.<sup>584</sup>

### *The Respondents' position*

280. The Respondents submit that no interest should be applied to any damages awarded. In the alternative, interest should be awarded as simple interest,<sup>585</sup> calculated at a commercially reasonable rate “no higher than LIBOR, or at the very most LIBOR plus 1 or 2 %.”<sup>586</sup>

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<sup>577</sup> Statement of Defence, ¶¶ 357, 361-362.

<sup>578</sup> Memorial, ¶¶ 461, 458, referring to Exhibit CLA-168.

<sup>579</sup> Memorial, ¶ 460, referring to Exhibits CLA-163 (art. 38), CLA-179 (¶ 56).

<sup>580</sup> Memorial, ¶ 460, referring to Exhibit CLA-53 (art. 13).

<sup>581</sup> Reply, ¶ 482, referring to Exhibit CLA-207 (¶ 834); Claimants' Pre-Hearing Brief, ¶ 116; Claimants' First Post-Hearing Brief, p. 30.

<sup>582</sup> Reply, ¶ 481.

<sup>583</sup> Reply, ¶ 481; Claimants' First Post-Hearing Brief, p. 30.

<sup>584</sup> Claimants' Pre-Hearing Brief, ¶ 115.

<sup>585</sup> Statement of Defence, ¶¶ 474-478.

<sup>586</sup> Respondents' Pre-Hearing Brief, ¶ 150; Respondents' First Post-Hearing Brief, ¶ 127.



281. According to the Respondents, “the general view of courts and tribunals has been against the award of compound interest,”<sup>587</sup> while the award in *MTD v. Chile* should guide the Tribunal in capping the interest rate at the LIBOR level.<sup>588</sup>
282. The Respondents submit that the Claimants’ preferred 7.5 percent interest rate should be rejected because it is based on Mongolia’s foreign debt, which is irrelevant in the present case.<sup>589</sup> Moreover, the Claimants’ “coerced loan theory” should be rejected on the basis that tribunals have only adopted this theory in exceptional cases.<sup>590</sup>

## VII. COSTS

### *The Claimants’ position*

283. The Claimants “request that the Tribunal order the Respondents bear the Claimants’ full costs of the arbitration,” including Claimants’ accrued costs of **USD 13,405,158.50**.<sup>591</sup>

### *The Respondents’ position*

284. The Respondents submit that “the Claimants should pay all the associated costs of these proceedings [. . .] regardless of the outcome of this case,” as the Claimants have unnecessarily increased these costs through their approach to document production, quantum claims and requests for new submissions.<sup>592</sup> The Respondents calculate their accrued costs as **USD 7,116,707.80** and **EUR 300,000**.<sup>593</sup> The Respondents also dispute the reasonableness of the Claimants’ reported costs, particularly with respect to the nature and amount of the Claimants’ “success fee,” “other costs” and “additional costs.”<sup>594</sup>

## VIII. RELIEF REQUESTED

285. The Claimants request that the Tribunal:
- (i) Declare that the Respondents have respectively breached the terms of the ECT and international law, the Foreign Investment Law, the CAUC Agreements and Mongolian law;

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<sup>587</sup> Statement of Defence, ¶ 482; Respondents’ Pre-Hearing Brief, ¶ 156, referring to Exhibit CLA-163 (Comment to art. 38, ¶ 8).

<sup>588</sup> Statement of Defence, ¶¶ 479-480, referring to Exhibit RL-118 (¶ 250).

<sup>589</sup> Statement of Defence, ¶¶ 471-472.

<sup>590</sup> Rejoinder, ¶¶ 402-403, referring to Exhibit RL-125 (¶ 128); Respondents’ First Post-Hearing Brief, ¶ 128.

<sup>591</sup> Claimants’ Submission on Costs, pp. 1-2.

<sup>592</sup> Respondents’ Submission on Costs, ¶¶ 2-3.

<sup>593</sup> Respondents’ Submission on Costs, ¶ 12.

<sup>594</sup> Respondents’ Letter to the Tribunal, dated 15 April 2014, p. 1.

- (ii) Award the Claimants monetary damage of not less than US\$ 326 million (three hundred and twenty-six million US dollars) in compensation for all of their losses sustained as a result of the Respondents' illegal action and inaction and thus being deprived of their rights under the ECT and international law, the Foreign Investment Law, under the Founding Agreement and Mongolian law, including, *inter alia*, reasonable lost profits, direct and indirect losses (including, without limitation, loss of reputation and good will) and losses of all tangible and intangible property caused by the Respondents;
- (iii) Award all costs (including, without limitation, attorneys' and all other professional fees) associated with any and all proceedings undertaken in connection with this arbitration, including all such costs undertaken to investigate this matter and prepare this and earlier submissions, and all such costs expended by the Claimants in attempting to resolve this matter amicably with the Respondents; plus further costs and expenses as the Tribunal may find are owed under applicable law;
- (iv) Award pre- and post-judgment interest at a rate to be fixed by the Tribunal; and
- (v) Grant such other relief as counsel may advise or the Tribunal may deem appropriate.<sup>595</sup>

286. The Respondents request that the Tribunal:

- (i) Dismiss all the Claimants' claims and declare that the Respondents have not breached any of their obligations under the ECT or international law, the [Foreign Investment Law], the Founding Agreement or Mongolian law;
- (ii) Order the Claimants to pay all costs incurred in connection with these arbitration proceedings, including the costs of the arbitrators and the PCA, as well as the legal and other expenses incurred by the Respondents, including the fees of legal counsel and experts, plus interest; and
- (iii) Order such other relief as the Tribunal, in its discretion, considers appropriate.<sup>596</sup>

## **IX. THE TRIBUNAL'S ANALYSIS ON LIABILITY**

287. The Claimants in this arbitration have brought their claims against the Respondents on multiple legal bases, which are listed at paragraphs 105-106 above. The Tribunal has considered the Parties' arguments in relation to each of the legal bases invoked by the Claimants in full.

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<sup>595</sup> Memorial, ¶ 462; Reply, ¶ 485.

<sup>596</sup> Statement of Defence, ¶ 484; Rejoinder, ¶ 414.

However, for the purposes of this award, the Tribunal will address only those legal bases and arguments that are necessary to reach the Tribunal's conclusions on liability and damages.

**A. THE ALLEGED UNITY OF INVESTMENT**

288. The Tribunal first addresses the question of the alleged “unity of investment,” that is, the Claimants’ contention that the Mining and Exploration Licenses are to be viewed as a single investment, such that the impairment of rights conferred under one License would also constitute an impairment of rights under the other License.
289. Whether there was a “unity of investment” matters for the purposes of determining liability and damages. For example, the Claimants have argued that, if the Mining and Exploration Licenses are viewed as one investment, then, although the Exploration License is held by Khan Mongolia, an entity that is not a party to the Founding Agreement, it would suffice for the Claimants to demonstrate that the Respondents breached Article 3.6 of the Founding Agreement to establish liability in respect of both licenses.<sup>597</sup> In addition, if liability is found and the Mining and Exploration Licenses are viewed as one investment, then damages will have to be assessed on the basis of the value of a single Dornod Project comprising both licenses.
290. The Claimants submit that their intention to merge the Mining and Exploration Licenses and the informal discussions held in that regard with the partners to the CAUC joint venture suffice to connect the two Licenses for the purposes of this arbitration. The Claimants assert that the joint venture would not have been viable without the Additional Property covered by the Exploration License.<sup>598</sup> Conversely, the Respondents contend that since the Claimants took no steps to merge the Mining and Exploration Licenses, the Tribunal should not treat the Exploration License as part of the CAUC joint venture.<sup>599</sup>
291. In the Tribunal’s view, the Mining and Exploration Licenses must be treated separately. In its Decision on Jurisdiction, the Tribunal found that, “by all accounts, Khan Canada (through Khan Mongolia) acquired the Exploration License,” though Khan Mongolia was not a party to the CAUC joint venture.<sup>600</sup> It is also undisputed that the Exploration License was never formally merged with the Mining License, or transferred to the partners of the CAUC joint venture.<sup>601</sup> There is no evidence that the Claimants made any formal proposals or took any active steps in

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<sup>597</sup> Memorial, ¶¶ 176-181, 368-369; Claimants’ Post-Hearing Brief, pp. 16-17.

<sup>598</sup> See paragraphs 130-136 above.

<sup>599</sup> See paragraphs 137-143 above.

<sup>600</sup> Award on Jurisdiction, ¶ 337.

<sup>601</sup> See Memorial, ¶ 48; Statement of Defence, ¶ 178; Respondents’ First Post-Hearing Brief, ¶ 15; Respondents’ Second Post-Hearing Brief, ¶ 15.

this regard. Although, as the Claimants' assert, Khan may have intended to merge the two licenses and informal discussions regarding a potential merger may have taken place,<sup>602</sup> the Tribunal must take the situation as it was at the time of the Respondents' allegedly wrongful acts, which is that the Mining and Exploration Licenses were not in fact merged. Accordingly, there is no legal basis upon which the Tribunal could treat the Exploration License as being part of the CAUC joint venture.

292. Having found that there was no "unity of investment," the Tribunal must consider separately whether the Respondents breached their obligations toward (i) Khan Canada and CAUC Holding in relation to the Mining License, and (ii) Khan Netherlands in relation to the Exploration License. In the event of a finding of liability, the Tribunal will also have to assess the value of the Claimants' investments in Mongolia as they stood as at the Valuation Date.

**B. FOREIGN INVESTMENT LAW BREACHES AND LIABILITY TOWARD ALL THREE CLAIMANTS**

293. The Tribunal now turns to the question of the Respondents' liability. In particular, in the sections below, the Tribunal considers whether the Respondents breached their obligations under Articles 8.2 and 8.3 of the Foreign Investment Law.

294. As a preliminary matter, the Tribunal notes that a finding that the Respondents breached Articles 8.2 or 8.3 of the Foreign Investment Law in relation to each of the Mining License and the Exploration License, as well as in relation to any related contractual rights held under the Agreements, would suffice to establish the Respondents' liability toward all three Claimants.

295. In its Decision on Jurisdiction, the Tribunal found that a breach by Mongolia of any provision of the Foreign Investment Law would constitute a breach of the ECT's so-called "umbrella" clause, Article 10(1):

The Claimants submit that the terms "any obligations" [in Article 10(1) of the ECT] encompass the statutory obligations of the host state and in this case, Mongolia's obligations under the Foreign Investment Law. Given the ordinary meaning of the term "any" and the fact that the Respondents have not submitted any arguments or authorities to the contrary, the Tribunal accepts the Claimants' interpretation of Article 10(1) of the ECT. It follows that a breach by Mongolia of any obligations it may have under the Foreign Investment Law would constitute a breach of the provisions of Part III of the Treaty.<sup>603</sup>

296. Accordingly, a finding that the Respondents breached Articles 8.2 or 8.3 of the Foreign Investment Law in relation to the Mining and Exploration Licenses would establish that the Respondents breached their obligations toward CAUC Holding and Khan Canada under the

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<sup>602</sup> Claimants' Second Post-Hearing Brief, p. 6.

<sup>603</sup> Decision on Jurisdiction, ¶ 438.

Foreign Investment Law, and that Mongolia breached its obligations toward Khan Netherlands under the ECT through operation of the umbrella clause.

**C. DID THE RESPONDENTS BREACH ARTICLES 8.2 OR 8.3 OF THE FOREIGN INVESTMENT LAW?**

**1. Did the Claimants have an investment within the meaning of the Foreign Investment Law?**

297. Articles 8.2 and 8.3 of the Foreign Investment Law provide:

(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.

298. On their face, these provisions protect “foreign investment” and the “investment of foreign investors” against certain types of expropriation.

299. Article 3.1 of the Foreign Investment Law defines “foreign investment” as “every type of tangible and intangible property which is invested in Mongolia by a foreign investor for the purpose of establishing a business entity within the territory of Mongolia or cooperating with a Mongolian business entity.”<sup>604</sup> Article 6 of the Foreign Investment Law outlines the “forms of foreign investment,” which include “acquiring rights under the laws, concession and product sharing contract to exploit and process natural resources”<sup>605</sup> and “concluding a contract on marketing and management.”<sup>606</sup>

300. It appears from these provisions that the Claimants’ rights in the Mining and Exploration Licenses, as well as their contractual rights stemming from the Agreements, are protected as “foreign investment” under the Foreign Investment Law only if they constitute “tangible and intangible property” of the Claimants. This is a controversial question between the Parties, as the Respondents contend that rights held under mining exploration and exploitation licenses do not constitute a form of property under Mongolian law.<sup>607</sup>

301. The *Commentaries* on the Constitution define “property in its broad meaning” as “the relations between people for the purposes of acquiring individual material wealth, as well as producing and distributing it; and property rights arise from these relationships [ . . .].”<sup>608</sup> The 2002 Civil Code, in turn, defines “property” as “tangible assets, and intellectual values, which are

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<sup>604</sup> Foreign Investment Law of Mongolia, art. 3.1, Exhibit CLA-8. *See also* First Tsogt Report, ¶ 67.

<sup>605</sup> Foreign Investment Law of Mongolia, art. 6.4, Exhibit CLA-8.

<sup>606</sup> Foreign Investment Law of Mongolia, art. 6.5, Exhibit CLA-8.

<sup>607</sup> *See* paragraphs 123-124 above.

<sup>608</sup> Exhibit RL-59, as translated at Reply, ¶ 138.

intangible property, as well as rights earned by means not prohibited by law or not conflicting with commonly accepted behavioral moral norms [ . . . ].”<sup>609</sup> The Code goes on to define “intangible property” as “[r]ights and claims that bring profit to their owner or that entitle to demand from others [ . . . ].”<sup>610</sup>

302. The plain text of these provisions suggests that Mongolian law is consistent with the general notion that rights under licenses (as well as contractual rights) to exploit natural resources constitute intangible property.
303. In support of their argument that license rights are not property, the Respondents argue that (i) the 2002 Civil Code does not apply to relationships of administrative subordination, and that (ii) licenses such as the Mining and Exploration Licenses cannot be transferred or pledged freely. The Respondents’ expert, Mr. Bayar, cites a decision of the Mongolian Supreme Court, *Gobi Shoo LLC v. Mongolrudprom*, for the proposition that “[a] mining license [ . . . ] is possessed but not owned by any entity, and therefore there is no legal ground to consider such mining licence to be a property right which is transferable to the ownership of others.”<sup>611</sup>
304. On the first point, the Respondents’ argument cannot be sustained. Article 1.2 of the 2002 Civil Code states that it “shall not apply to the property relations [ . . . ] arising from the administrative subordination of one person to another.”<sup>612</sup> This provision necessitates a conclusion that property relations may arise from situations of administrative subordination, even though the Code itself may not apply. The Tribunal cannot extrapolate from this provision that licenses and the rights conferred thereunder are not the “property” of license holders in a general sense.
305. On the second point, the Tribunal finds that the Mining and Exploration Licenses can be pledged and transferred under Mongolian law.<sup>613</sup> The Mining License was issued under the 1995 Minerals Law, Article 14.2 of which provides that mining licenses are fully transferable with the consent of the State:

If Parties wish to transfer or take over a licence or to amend the rights and obligations established under it (whether in whole or in part) they shall submit an application, and the transferee of the licence or rights shall confirm and notify in writing that he or she can observe the obligations. The body which previously granted the licence shall give its decision in respect of the transfer of the licence or right(s) within 60 days of the date of receipt of the application and notification.<sup>614</sup>

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<sup>609</sup> 2002 Civil Code, art. 83.1, Exhibit CLA-117.

<sup>610</sup> 2002 Civil Code, art. 84.5, Exhibit CLA-117; Second Tsogt Report, ¶¶ 12, 23.

<sup>611</sup> Second Bayar Report, ¶ 44, quoting Mongolian Supreme Court, *Gobi Shoo LLC v. Mongolrudprom* (20 March 2012), Exhibit RL-173.

<sup>612</sup> 2002 Civil Code, art. 1.2, Exhibit RL-172.

<sup>613</sup> 2006 Minerals Law, arts. 49, 51-52, Exhibit CLA-118.

<sup>614</sup> 1997 Minerals Law, art. 14.2, Exhibit RL-50. See Second Tsogt Report, ¶ 22.

306. The Exploration License was issued under the 1997 Minerals Law, Article 12.3 of which similarly states that the holder of an exploration license holds “the right to transfer or pledge all or part of an exploration license in accordance with the terms and conditions of this law.”<sup>615</sup> The Exploration License also confers “the exclusive right to obtain a mining license for any part of an exploration area upon fulfilling the terms and conditions of this law.”<sup>616</sup>
307. Further, *Gobi Shoo LLC v. Mongolrudprom* does not provide a basis on which to depart from the understanding of license rights as intangible property. The Respondents cite this case to support their broader argument that, because Mongolian law places restrictions on the transfer and pledging of minerals licenses, licenses may not be transferred freely and, therefore, may not be considered “property.”<sup>617</sup> However, the Tribunal does not agree with the Respondents’ conclusion. Generally, states may place limitations and restrictions on property transactions. The presence of such limitations on the disposal of property does not mean that the rights in question are not “property.” In *Gobi Shoo LLC v. Mongolrudprom*, the Supreme Court held that Article 51.1 of the 1996 Minerals Law allows “that a holder of a mining licence or an exploration licence may pledge its licence to a bank or a non-banking financial institution together with the related documents such as the exploration work results, geological information and feasibility study reports, and assets which are permitted to pledge by law.”<sup>618</sup> The Court summarized that the 1996 Minerals Law “provide[s] that a licence alone shall not be a pledge item.”<sup>619</sup> The Court found that “the only possibility to pledge a minerals license” was a limited one, and there are circumstances in which a “mining licence holder has grounds to deem the pledge agreement illegal and void when the licence is pledged along and to persons other than banks or a non-banking financial institu[tion] [...]”<sup>620</sup> Nonetheless, the existence of this limitation on pledging does not lead the Tribunal to conclude that such licenses are not property, even though the Respondents take out of context a quotation from the decision and present it as a hard rule.<sup>621</sup> Indeed, *Gobi Shoo* holds that a mining license may be pledged to a

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<sup>615</sup> 1997 Minerals Law, art. 12.3, Exhibit CLA-140 (emphasis added). See Second Tsogt Report, ¶ 33.

<sup>616</sup> 1997 Minerals Law, art. 17.2, Exhibit CLA-17.2. See Second Tsogt Report, ¶ 35.

<sup>617</sup> See Second Bayar Report, ¶¶ 39-51; Respondents’ Rejoinder on the Merits, ¶¶ 183-189.

<sup>618</sup> Mongolian Supreme Court, *Gobi Shoo LLC v. Mongolrudprom* (20 March 2012), p. 1, Exhibit RL-173.

<sup>619</sup> Mongolian Supreme Court, *Gobi Shoo LLC v. Mongolrudprom* (20 March 2012), p. 1, Exhibit RL-173.

<sup>620</sup> Mongolian Supreme Court, *Gobi Shoo LLC v. Mongolrudprom* (20 March 2012), pp. 1-2, Exhibit RL-173.

<sup>621</sup> The Respondents’ legal expert quotes from the decision: “A mining licence, however, is possessed but not owned by any entity, and therefore there is no legal ground to consider such mining licence to be a property right which is transferable to the ownership of others.” Second Bayar Report, ¶ 44, quoting Mongolian Supreme Court, *Gobi Shoo LLC v. Mongolrudprom* (20 March 2012), p. 1, Exhibit RL-173. However, upon considering the entire decision, it becomes clear that a minerals licence may be pledged to a bank or financial institution when it is pledged together with “related documents.” Mongolian Supreme Court, *Gobi Shoo LLC v. Mongolrudprom* (20 March 2012), p. 1, Exhibit RL-173.

bank or other financial institution together with “related documents.”<sup>622</sup> The Tribunal is not convinced that it should depart from the general notion of license rights being intangible property.

308. Thus, the Tribunal is satisfied that the rights under the Mining and Exploration Licenses and stemming from the Agreements constitute intangible property under Mongolian law. Accordingly, the Tribunal finds that these rights are a protected investment under the Foreign Investment Law.

## **2. Were the Claimants deprived of their investment?**

309. The next question for the Tribunal is whether the Claimants were deprived of their investment by the Respondents’ actions. The Claimants assert that the correct standard to be applied here is that of “substantial deprivation.”<sup>623</sup> The Respondents do not dispute this.<sup>624</sup>

310. In the Tribunal’s view, the Claimants were substantially deprived of their rights under both the Mining License and the Exploration License through the combined effect of the supposedly temporary suspension of the two licenses by Order No. 141 and the Temporary Invalidation Notices and the NEA’s subsequent failure to re-register them. The fact that Mongolia did not intend to re-register the Mining and Exploration Licenses is supported by (i) the issuance of the Permanent Invalidation Notices on 9 April 2010; (ii) the NEA’s 12 November 2010 declaration in the Mongolian press that “the renewal of special permits by these companies is not a possibility”;<sup>625</sup> and (iii) the issuance on 15 December 2010 of Notices Nos. 4/1401 and 4/102, stating that the Mining and Exploration Licenses had “not been reinstated since your company has not satisfied the conditions and requirements of the law and has not pursued relevant laws and regulations in your operation.”<sup>626</sup>

311. Additionally, the loss of their rights under the Mining License deprived CAUC Holding and Khan Canada of their rights and benefits under the Agreements. The preamble of the Minerals Agreement makes clear that the Mining License was necessary for Khan to realize its benefits under the Agreements, since the CAUC joint venture was established “to mine and process uranium ore as well as other minerals [. . .] in the area of the Dornod deposit in northeastern

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<sup>622</sup> Mongolian Supreme Court, *Gobi Shoo LLC v. Mongolrudprom* (20 March 2012), p. 1, Exhibit RL-173.

<sup>623</sup> See Memorial, ¶ 188; Claimants’ Post-Hearing Brief, pp. 2-3.

<sup>624</sup> Statement of Defence, ¶ 204, n. 244, quoting *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic, and AWG Group v. The Argentine Republic, Decision on Liability*, 30 July 2010, ¶ 145, Exhibit RL-104 (“An indirect expropriation requires a substantial deprivation of an investment”).

<sup>625</sup> Declaration published in Mongolian National Post (12 November 2010), Exhibit C-7. See Third Tsogt Report, ¶ 45.

<sup>626</sup> Notifications 4/1401 and 4/1402, 15 December 2010, Exhibits C-8, C-9.



Mongolia for the benefit of the Parties.”<sup>627</sup> The Respondents had a number of obligations under the Agreements, and the invalidation and failure to re-register the Mining License made the execution of those contractual obligations impossible.<sup>628</sup> Without the Mining License, CAUC Holding’s (and through it, Khan Canada’s) contractual rights under the Agreements were essentially worthless.

312. Therefore, it does not matter that the Agreements were not formally terminated. Without the Mining License, the Agreements could not proceed. Thus, not only were the three Claimants deprived of their rights under the Mining and Exploration Licenses, but CAUC Holding (and through it, Khan Canada) was deprived of the benefit of its contractual rights under the Agreements.

### **3. Was this deprivation of property a *khuraakh* or a *daichlakh*?**

313. While in their English translations Articles 8.2 and 8.3 of the Foreign Investment Law both refer to property being “expropriated,” in the Mongolian original two different words are used in these provisions to refer to the notion of expropriation. Article 8.2 uses the word “*khuraakh*,” while Article 8.3 refers to “*daichlakh*.”<sup>629</sup> According to the Claimants’ legal expert, Mr. Tsogt, these two terms refer to two distinct situations in which a taking of property can be carried out under colour of authority under Mongolian law.<sup>630</sup>

314. Mr. Tsogt explains that *khuraakh* “refers to a situation in which the law authorizes the State to deprive an owner of its property due to the property owner’s breaches of law, or its use of the property in a manner that endangers the interests of third parties.”<sup>631</sup> As put by the Respondents’ legal expert, Mr. Bayar, *khuraakh* is “a seizure of property by authority of law as a penalty for unlawful conduct by a person or entity.”<sup>632</sup> A *khuraakh* may be carried out without payment of compensation.<sup>633</sup> *Daichlakh*, by contrast, “refers to a taking of property or other invalidation of property rights by the State under circumstances where that action is necessary

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<sup>627</sup> Joint Venture Agreement, Preamble, Exhibit C-17A.

<sup>628</sup> As Claimants noted in their Pre-Hearing Brief (¶ 39), the Agreements are clear about the obligations of Mongolia: to “guarantee [ . . . ] issuance of a license permitting development of [Deposit No. 2] and [Deposit No. 7]”; to guarantee that “[n]o area subject to a license or mineral title issued pursuant to this Agreement may later be designated by the Mongolian Party as opened to competitive bidding as long as this Agreement is in effect, unless such area has been returned to the Government”; and to “contribute[] the right to utilize [Deposit No. 7] [to CAUC]” when “uranium may be mined and produced from [Deposit No. 7] economically [ . . . ].” Minerals Agreement, arts. 1.1, 4.3, 5.4, respectively, Exhibit C-17A. *See also* Founding Agreement, art. 3.6, Exhibit C-16A (“Property of the Company will not be subject to requisition or confiscation”).

<sup>629</sup> *See* Second Tsogt Report, ¶¶ 65 and 71, n. 95.

<sup>630</sup> *See* Second Tsogt Report, ¶¶ 65, 69, 71.

<sup>631</sup> Third Tsogt Report, ¶ 38.

<sup>632</sup> First Bayar Report, ¶ 33 (emphasis in the original).

<sup>633</sup> *See* Second Tsogt Report, ¶ 68.

in order to satisfy an important public need”<sup>634</sup> and must be accompanied by the payment of compensation.<sup>635</sup> Both a *khuraakh* and a *daichlakh* can be legal or illegal.<sup>636</sup>

315. The Tribunal observes that the Mongolian authorities explicitly justified their refusal to re-register the Mining and Exploration Licenses by invoking alleged breaches of Mongolian law by the Claimants. The Permanent Invalidation Notices informed Khan Mongolia and CAUC that the “license[s] that used to be owned by [them] [were] made invalid on groundings that [they] ha[d] not undertaken any measures to remove violations of the laws and regulations up until now.”<sup>637</sup> The NEA’s Notices 4/1401 and 4/1402 of 15 December 2010 informed Khan Mongolia and CAUC that their “license[s] ha[d] not been reinstated since [they] ha[d] not satisfied the conditions and requirements of the law and ha[d] not pursued relevant laws and regulations in [their] operation.”<sup>638</sup> In a public declaration, the Mongolian Government stated that it had not renewed the Mining and Exploration Licenses “due to the fact that [the license holders] ha[d] repeatedly broken the laws on Mongolian Mineral Resources, the Underground Land usage, the Land of Especially Protected Areas, the Special Permit on Company Operations, and ha[d] not corrected these infractions within the time frame allotted by the law.”<sup>639</sup> The NEA argued before the Administrative Court that it could not re-register the Mining and Exploration Licenses because Khan had failed to correct its breaches of Mongolian law.<sup>640</sup> In these proceedings, the Respondents also argued that the Mining and Exploration Licenses could not be re-registered because the Claimants did not remedy their breaches of Mongolian law.<sup>641</sup>
316. Additionally, the Respondents did not pay (nor appeared to intend to pay) compensation to the Claimants.
317. Accordingly, the Tribunal finds that the invalidation and failure to re-register the Mining and Exploration Licenses must be analysed as a *khuraakh* under Mongolian law.

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<sup>634</sup> Second Tsogt Report, ¶ 71.

<sup>635</sup> FIL, art. 8.3, Authority CLA-8; Second Tsogt Report, ¶ 71.

<sup>636</sup> Second Tsogt Report, ¶¶ 67, 71.

<sup>637</sup> NEA Statement No. 8/361 (9 April 2010), Exhibit C-5; NEA Statement No. 8/360 (9 April 2010), Exhibit C-6.

<sup>638</sup> Notifications 4/1401 and 4/1402, 15 December 2010, Exhibits C-8, C-9.

<sup>639</sup> “Declaration,” NATIONAL POST, 12 November 2010, Exhibit C-7.

<sup>640</sup> “Taking into consideration the fact that until the present date Khan Resources LLC failed to correct breaches in above, re-registration and re-issuing of exploration license 9282X shall be considered as having no legal grounds.” Resolution No. 340, Administrative Court of the Capital City, *Khan Resources LLC v. Nuclear Energy Agency* (2 August 2010), Exhibit C-13 (p. 5).

<sup>641</sup> See paragraphs 154-63, 205 above.

**4. Was the *khuraakh* lawful?**

318. Having established that the invalidation of the licenses was a *khuraakh*, the Tribunal must consider whether this *khuraakh* was lawful or unlawful. Article 8.2 of the Foreign Investment Law only prohibits unlawful *khuraakh*, that is, according to Mr. Tsogt, a “situation where property rights are invalidated under color of authority but not in accordance with due authorization or process of law.”<sup>642</sup> In order for a *khuraakh* to be lawful, “the law must provide a basis to consider that the owner has forfeited its rights and, furthermore, the correct legal process must be followed in the execution of this law. If either of these requirements is not complied with, the confiscation will be considered illegal.”<sup>643</sup> It thus appears that the requirement of lawfulness has a substantive component (the penalty must be imposed on a valid legal basis) as well as a procedural component (the penalty must be imposed in accordance with due process of law).

(i) *Was there a valid legal basis for the invalidation and failure to re-register the Mining and Exploration Licenses?*

319. As described above, the Respondents invalidated and then refused to re-register the Mining and Exploration Licenses on the ground of the Claimants’ alleged breaches of Mongolian law. However, in the Tribunal’s view, the Respondents were not able to point to any breaches of Mongolian law that would justify the decisions to invalidate and not re-register the Mining and Exploration Licenses.

320. The April 2009, July 2009, and March 2010 SSIA Reports are the only documents in which the alleged breaches of Mongolian law are detailed. As seen from the citations set out in paragraph 315 above, later documents related to the invalidation and failure to re-register the Mining and Exploration Licenses only referred to the Claimants’ general failure to remedy violations of Mongolian law of which they had previously been notified.

321. With regard to the April 2009 Report, it is worth noting at the outset that the Claimants assert that they saw it for the first time in this arbitration.<sup>644</sup> As the Respondents have not been able to show otherwise, this Report must be approached with caution. This Report lists five violations of Mongolian law.<sup>645</sup> Two out of the five violations are mentioned again in the July 2009 SSIA Report,<sup>646</sup> which the Claimants acknowledge receiving at the time. For this reason, the Tribunal

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<sup>642</sup> Second Tsogt Report, ¶ 69.

<sup>643</sup> Second Tsogt Report, ¶ 69.

<sup>644</sup> Third Tsogt Report, ¶¶ 202-3.

<sup>645</sup> See paragraph 77 above, n. 72, referring to April 2009 SSIA Report, Exhibit R-62.

<sup>646</sup> These two violations regarded (1) Article 45.1 of the Subsoil Law and Article 5.6 of the 2006 Minerals Law, relating to the trading of shares and the publication of information regarding Mongolian mineral reserves on

considers the three unique violations identified in the April 2009 SSIA Report here, while the other two violations are discussed in the context of the July 2009 SSIA Report below.

322. First, in the April 2009 Report, the SSIA alleged that Khan was in violation of Article 19.2.3 of the 2006 Minerals Law, due to an overlap between the Additional Property (covered by the Exploration License) and the Yakhi Lake Special Protected Area, a reserve set aside for grazing animals.
323. The Tribunal agrees with the Claimants that this is a “hypothetical ‘violation’ lacking all credibility.”<sup>647</sup> Early maps of the Additional Property show it abutting, but not touching the nearby Yakhi Lake Special Protected Area.<sup>648</sup> The boundaries of the reserve area were imprecise from the beginning.<sup>649</sup> Further, Khan worked with Government officials to remedy the potential overlap, removing the area from its license conversion application after consultation with the Office of Geology, Mining and Cadastre.<sup>650</sup> Given the fact that the boundary coordinates of the protected area were unclear, and that Khan made a good faith attempt to remedy the potential violation, the Tribunal does not see how this alleged violation could have justified the invalidation and failure to re-register the Exploration License.
324. Second, the SSIA alleged that CAUC had violated the Radiation Protection and Safety Law, as had previously been noted during the 2005 and 2006 SSIA inspections. The Tribunal notes that Khan took steps to remedy this alleged violation, including by purchasing a monitoring tool and protective clothing for employees, and creating a waste management plan.<sup>651</sup>
325. Third, the April 2009 SSIA Report mentioned a violation of Article 33.1 of the Law on Special Protected Areas, due to the storage of radioactive materials in a protected area. The alleged violation concerned the manner in which Khan was storing radioactive drill cores. However, during a site visit in December 2008 by inspectors from the SSIA and the Nuclear Energy Commission, no violations were noted. An inspector from the SSIA even praised Khan for being “a good example for other companies undertaking radioactive mineral exploration and development activity,” and an inspector with the Nuclear Energy Commission noted that “[t]he storage building complies fully with the regulations of Mongolia on radiation protection and

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the Toronto Stock Exchange; and (2) Article 5.4 of the 2006 Minerals Law, due to a failure to “enter into a mining agreement with the MRAM.” Statement of Defence, ¶¶ 88-93, referring to Exhibit R-62.

<sup>647</sup> Reply, ¶ 291.

<sup>648</sup> Hrayr Agnerian, Technical Report on the Dornod Uranium Project, 27 September 2007, p. 48, Exhibit C-151; Dornod Uranium Project Pre-feasibility Study Report, 7 August 2007, Exhibit C-60.

<sup>649</sup> See Boundaries of Toson Khulstai, Khar Yamaat, Yakh Lake Natural Reserve Areas, Attachment of the Resolution No. 28, 9 April 1998, Exhibit C-412.

<sup>650</sup> Second Arsenault Witness Statement, ¶ 126; Letter No. 07/07/09 from Khan Resources to the MRAM, 17 July 2009, Exhibit C-84.

<sup>651</sup> See Second Arsenault Witness Statement, ¶ 143-5.

safety requirements [...].<sup>652</sup> The Chairman of the NEA followed up by writing to Khan that “the storage of cores containing uranium complies with the radiation protection and safety standards.”<sup>653</sup> Given this strong praise only months before the April 2009 inspection, the Tribunal finds that Khan did not violate the law in its storage of the drill core.

326. In the July 2009 Report, the SSIA first alleged that CAUC had “failed to submit the exploration results and work reports to the Mineral Council for its consideration” and had not “register[ed] the reserves of the deposit with the State Registry of Mineral Resources.”<sup>654</sup> The 1995 and 2006 Minerals Laws require license holders to submit a reserve report and a report on the results of exploration efforts.<sup>655</sup>
327. The Law on Subsoil also requires that “[r]eserves of mineral resources, deposits and occurrences shall be registered with the central national registry.”<sup>656</sup> However, the Law on Subsoil puts the ultimate burden of reserve registration on the State, as it requires that “[t]he state central administrative authority in charge of geology and mining [the MRAM] shall monitor compliance with the following regulations and requirements, and shall take actions to eliminate and prevent violations.”<sup>657</sup>
328. As at October 2007, the Claimants’ reserves were validly registered, as demonstrated by the MRAM’s 18 October 2007 letter indicating that “[t]he reserves of Dornod uranium deposit are registered under No. 0881 in the State Integrated Database.”<sup>658</sup>
329. In 2008, Khan submitted to the MRAM an updated reserve re-registration submission that reflected a “new estimate of mineral resources and mineral reserves.”<sup>659</sup> The fact that this new estimate was not ultimately registered appears to have been due primarily to the inaction of the Mongolian authorities.
330. The Parties agree that, before the licensing agency may register a reserve, a Team of Experts must be appointed to accept and review the reserves report submitted by the applicant. Next, the Minerals Council must be convened and must review and issue a decision on the conclusion put forth by the Team of Experts. Based on the decision of the Minerals Council, the MRAM must then register the reserves in the State Integrated Registry, or else will deny such

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<sup>652</sup> Meeting Minutes, 12 December 2008, Exhibit C-414.

<sup>653</sup> Letter No. 197 from NEC to Khan Resources, 29 December 2008, Exhibit C-422.

<sup>654</sup> SSIA Report No. 08/01/1699, 10 July 2009, Exhibit R-9.

<sup>655</sup> 1995 Minerals Law, art. 27, Authority RL-50; 2006 Minerals Law, arts. 48.3, 48.7.2, Authority CLA-118. See Second Tsogt Report, ¶ 149.

<sup>656</sup> 1989 Law on Subsoil, art. 45.1, Authority CLA-126a. See Second Tsogt Report, ¶ 152.

<sup>657</sup> 1989 Law on Subsoil, art. 53.1, Authority CLA-126a.

<sup>658</sup> Letter No. 141, the MRAM to Khan Resources, 18 October 2007, Exhibit C-123.

<sup>659</sup> Letter No. 59/08 from Khan Resources to MRPA, 29 August 2008, Exhibit C-64.

registration.<sup>660</sup> In this case, although Khan submitted its updated reserve re-registration submission in August 2008, a Team of Experts was not appointed to review the submission until October 2009,<sup>661</sup> after the Mining License had been temporarily suspended,<sup>662</sup> the NEL and LPCNEL had been passed,<sup>663</sup> and Mongolia and Russia had agreed on a separate joint venture that would exploit the Dornod deposit.<sup>664</sup> After the Team of Experts' recommendation was finally issued, the Claimants made a diligent effort have the Minerals Council consider the re-registration of reserves, but in spite of such effort they were unsuccessful.<sup>665</sup> When the Minerals Council finally scheduled a meeting for January 2010, the meeting was cancelled one hour before it was set to begin,<sup>666</sup> and no further meeting was ever scheduled, in spite of multiple requests.<sup>667</sup>

331. Further, though the Respondents argue that Khan Mongolia's report was not re-registered because it contained "deficiencies" and it had undertaken "insufficient" work on exploration,<sup>668</sup> the Claimants have shown that Khan made an updated reserves submission to remedy those alleged deficiencies "in accordance with the experts' conclusions, and, in order to have it discussed at the Mineral Resources Professional Council (MRPC) and to have it in the state register [...]."<sup>669</sup> The Minerals Council and Team of Experts never requested that Khan revise that submission.
332. Moreover, the Tribunal notes that what were characterized as "deficiencies" by the Respondents were called "recommendations" in the conclusion of the Team of Experts.<sup>670</sup> The Claimants argue that these deficiencies were more akin to requests for technical clarification

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<sup>660</sup> Third Tsogt Report, ¶¶ 165-6; Second Bayar Report, ¶¶ 78-83.

<sup>661</sup> Letter No. 1/2790 from the MRAM to Khan Resources, 9 October 2009, Exhibit C-134.

<sup>662</sup> See SSIA Report No. 08/01/1699, 10 July 2009, Exhibit R-9.

<sup>663</sup> Law of Mongolia on Nuclear Energy, 16 July 2009, Exhibit R-11; Law of Mongolia on Procedures on Compliance of the Nuclear Energy Law, 16 July 2009, Authority CLA-142.

<sup>664</sup> See e.g. Russia, Mongolia form Dornod Uranium Joint Venture, Reuters, 25 August 2009, Exhibit C-81.

<sup>665</sup> See Arsenault Witness Statement, ¶ 85, citing Letter No. 59/08 from Khan Resources to the MRAM, 29 August 2008, Exhibit C-64; Letter No. 12/07/09 from Khan Resources to Ministry for Mineral Resources and Energy, 29 July 2009, Exhibit C-132; Letter No. 14/09 from CAUC to the Ministry for Mineral Resources and Energy, 29 July 2009, Exhibit C-133. See also CAUC Meeting Minutes, 16-17 April 2009, pp. 3-4, Exhibit C-409; Letter No. 33/09 from CAUC to SSIA, 24 December 2009, Exhibit C-395; Letter No. 08/01/09 from Khan Resources to the MRAM, 28 January 2009, Exhibit C-394; Letter No. 06/01/09 from Khan Resources to the MRAM, 22 January 2009, Exhibit C-393; Meeting Minutes, Khan Resources, 17 September 2007, Exhibit C-380.

<sup>666</sup> Letter No. 25/10 from CAUC to the MRAM, 22 July 2010, Exhibit C-140; Second Arsenault Witness Statement, ¶ 112; Second Jamsrandorj Witness Statement, ¶ 32.

<sup>667</sup> See e.g. Letter No. 21/10 from CAUC to the MRAM, 14 April 2010, Exhibit C-138; Letter No. 14/04/10 from Khan Resources to the MRAM, 14 April 2010, Exhibit C-139; Letter No. 25/10 from CAUC to the MRAM, 22 July 2010, Exhibit C-140.

<sup>668</sup> See Respondents' First Post-Hearing Brief, ¶ 29, referring to Letter No. 1/3882 from the MRAM to the Chairman of the NEA, p. 9, Exhibit C-137.

<sup>669</sup> Letter No. 04/01/10 from Khan Resources to MRPC, 19 January 2010, Exhibit C-250A.

<sup>670</sup> See Integrated Conclusion of the Experts on the Reserve, p. 10, Exhibit C-137.

that are ordinarily requested by the Team of Experts.<sup>671</sup> The Tribunal agrees with the Claimants on this point.

333. Both Parties' experts agree that "if the Minerals Council makes a determination that an applicant or a private company has submitted correct information about the reserves," then the reserves "will be registered."<sup>672</sup> The Tribunal observes that, even if there originally had been deficiencies, the MRAM should have registered the reserves once those deficiencies had been corrected.
334. Further, even if the Claimants had failed to register reserves, the Mining and Exploration Licenses should not have been revoked on that basis. The 1995 and 2006 Minerals Laws carry the penalty of a fine for failing to submit work reports and reserve estimates.<sup>673</sup> The Law on Subsoil provides no particular penalty for a failure to register.<sup>674</sup> Accordingly, the Tribunal sees no basis in law for the Government to depart from the normal sanction of a fine for failure to register reserves.
335. Second, the SSIA contended that CAUC did not "enter into a mining agreement with MRAM."<sup>675</sup> However, Article 5.4 of the 2006 Minerals Law, which the SSIA cited in its report, concerns state participation in a mining joint venture,<sup>676</sup> and the Tribunal notes that, at the time of the report, the Claimants had already entered into a mining agreement with Mongolia through the Minerals Agreement and the Founding Agreement.<sup>677</sup> The Tribunal finds that the Claimants were not in breach of Article 5.4 at the time of the July 2009 SSIA report or thereafter. Moreover, the 2006 Minerals Law does not give the SSIA the authority to monitor mining agreements, and does not prescribe any particular sanction for failure to "enter into a mining agreement with MRAM," much less a harsh penalty such as revocation of a license.<sup>678</sup>
336. Third, the SSIA cited as a breach the fact that Khan Canada "offered [its] shares for the public at the [Toronto] stock exchange."<sup>679</sup> However, the provision of law cited by the SSIA does not prohibit such activity. Article 5.6 of the 2006 Minerals Law states that "[a] legal person holding a mining license for a mineral deposit of strategic importance shall trade no less than 10 percent

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<sup>671</sup> Second Arsenault Witness Statement, ¶ 109.

<sup>672</sup> Bayar, Transcript 699:25 to 700:6, 13-18. See also Tsogt, Transcript 607:14-25.

<sup>673</sup> 1995 Minerals Law, art. 56.1.2, Authority RL-50; 2006 Minerals Law, art. 66.1.2, Authority CLA-118. See also Second Tsogt Report, ¶ 151.

<sup>674</sup> See Second Tsogt Report, ¶ 152.

<sup>675</sup> SSIA Report No. 08/01/1699, 10 July 2009, Exhibit R-9.

<sup>676</sup> 2006 Minerals Law, art. 5.4, Authority CLA-118.

<sup>677</sup> See Second Tsogt Report, ¶ 157.

<sup>678</sup> See Second Tsogt Report, ¶ 158.

<sup>679</sup> SSIA Report No. 08/01/1699, 10 July 2009, Exhibit R-9.

of its shares on the Mongolian Stock Exchange.”<sup>680</sup> The Tribunal finds that this provision would not have prohibited Khan Canada from offering shares on the Toronto Stock Exchange. In fact, as observed by the Claimants’ witness Mr. Arsenault, if the Respondents were correct, other major mining companies in Mongolia also would have their licenses suspended, as many of them have parent companies that trade shares on the Toronto Stock Exchange.<sup>681</sup> The Respondents are incorrect on this point.

337. Even Mongolia, it seems, recognized that the alleged breaches had been remedied. On 11 January 2010, CAUC reached an administrative settlement with the MRAM, and on 12 January 2010, the MRAM noted in a letter to the Administrative Court that “according to the conclusion of the experts appointed by the order of the Minister for Mineral Resources and Energy, the condition to eliminate the violations stated on the conclusion No. 08/01/1699 of 10 July 2009 of the inspector of the State Specialized Inspection Authority has been created.”<sup>682</sup>
338. Finally, the Tribunal notes that the Administrative Court held that the violations listed in the July 2009 SSIA Report were not legitimate grounds on which to deny re-registration.<sup>683</sup>
339. The SSIA carried out another inspection in 2010, resulting in the March 2010 SSIA Report.<sup>684</sup> Some of the violations in the March 2010 Report mirrored those of the July 2009 Report, including an allegation that CAUC had failed to register reserves.<sup>685</sup> The March 2010 SSIA Report also included allegations that CAUC violated terms of the Agreements.<sup>686</sup> However, the Claimants’ legal expert notes that the 2006 Minerals Law does not grant the SSIA authority to control or monitor mining agreements.<sup>687</sup> The Respondents’ expert cites Articles 11 and 66.1 of the Law of Mongolia on State and Local Property for the proposition that a member of the SPC has “a clear basis [...] to monitor questions such as changes in shareholding structure and compliance with contractual obligations in the case of an enterprise involving Mongolian State

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<sup>680</sup> 2006 Minerals Law, art. 5.6, Authority CLA-118a.

<sup>681</sup> Second Arsenault Witness Statement, ¶¶ 138-40.

<sup>682</sup> Letter, the MRAM to Capital City Administrative Court (12 January 2010), Exhibit C-233.

<sup>683</sup> Second Tsogt Report, ¶ 178. The Administrative Court held, regarding CAUC’s claim: “The argument regarding the suspension of CAUC’s license, which is based on the SSIA conclusions, is not legitimate grounds to not re-register Mining License 237A.” Decision No. 325 of the Administrative Court of the First Instance (19 July 2010), Exhibit R-25 (p. 13). For related resolutions of the Mongolian courts, see Resolution No. 340 (2 August 2010), issued by the Administrative Court of the Capital City in the matter of *Khan Resources LL v. Nuclear Energy Agency*, Exhibit C-13; Resolution No. 374 (13 October 2010), issued by the Administrative Appellate Court of Mongolia in the matter of *Central Asian Uranium Company LLC v. Nuclear Energy Agency*, Exhibit C-14.

<sup>684</sup> March 2010 Report, SSIA, 15 March 2010, Exhibit C-94.

<sup>685</sup> March 2010 Report, SSIA, 15 March 2010, ¶ 5.3, Exhibit C-94.

<sup>686</sup> March 2010 Report, SSIA, 15 March 2010, ¶¶ 5.1-5.2, Exhibit C-94.

<sup>687</sup> Second Tsogt Report, ¶ 158.



ownership.”<sup>688</sup> Yet, even if this is so under Mongolian law, it has not been demonstrated that the penalty for a violation related to contractual compliance would be the invalidation of a license.

340. In addition, the weakness of the Respondents’ argument regarding the alleged breaches of Mongolian law strongly suggests that imposing a penalty on the Claimants for such breaches was not the Respondents’ real motivation in invalidating and refusing to re-register the Mining and Exploration Licenses. Other evidence presented by the Claimants, and in particular the timing of the SSIA inspections, reports and the various invalidation notices, indicates that the Government was in fact motivated by the prospect of developing the Dornod deposits at greater profit with a Russian partner.
341. In January 2009, before the 2009 SSIA inspection, the Mongolian Prime Minister and the General Director of RosAtom met and planned a joint venture for the exploitation of uranium between Russia and Mongolia.<sup>689</sup> In March 2009, just one week after Khan announced that the Dornod Project was economically feasible, the Prime Ministers of Mongolia and Russia met and “established a cooperation agreement” between the NEA and RosAtom.<sup>690</sup> Soon after, in April 2009, the SSIA conducted its inspection of Khan. In August 2009, then Russian President Dmitry Medvedev visited Mongolia and, as reported in the media, formed a joint venture between Russia and Mongolia that would “exploit the Dornod uranium deposit.”<sup>691</sup> In March 2010, the RosAtom General Director sent a letter to the NEA Chairman, thanking the NEA for rejecting the 2010 MOU and asking how it intended to establish the “Dornod Uranium joint venture” given that ARMZ had failed in its hostile takeover of Khan Canada. One week later, the SSIA found additional alleged violations after another inspection of Khan. By January 2011, in the context of burgeoning agreements with Russia, Mongolian officials were making statements in the press regarding the untrustworthiness of Khan, as well as alleging that Khan did not hold any licenses.<sup>692</sup> Finally, there were press releases that indicated closer cooperation

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<sup>688</sup> Second Bayar Report, ¶ 126, referring to Law on State and Local Government Property, Articles 11 and 66.1, Exhibit CLA-44.

<sup>689</sup> “BBC hosted delegations of Russian and Mongolian governments” (28 January 2009), Exhibit C-79; Reply, ¶ 170.

<sup>690</sup> Interview by Prime Minister Bayar, *Century News* (19 March 2009), Exhibit C-181.

<sup>691</sup> “Russia, Mongolia Form Dornod Uranium Joint Venture,” Reuters, 25 August 2009, Exhibit C-81. See also “Russian President Signs China-Style Energy Deals with Mongolia, Radio Free Europe/Radio Liberty, 25 August 2009, Exhibit C-80.

<sup>692</sup> See e.g. “S. Enkhbat: Russian Accepted the Proposal of Mongolia Due to the Firm Position of the Prime Minister,” *Political Survey* (4 January 2011), Exhibit C-101 (“They [Khan] viewed Mongolia as a worst country that is weaker than the African countries. It could be inappropriate to say a bad word such as a swindler. Generally, they are very much cheaters”).

with Russia on the Dornod Project, including commentary from the mining industry that supported this conclusion.<sup>693</sup>

342. It is worth noting that the appointment of the Team of Experts, an essential step in the process for the re-registration of minerals reserves, was not appointed to review Khan's reserves re-estimation submission until October 2009. By this point, as explained above, Mongolia had already made an agreement with Russia on a joint venture that would exploit the Dornod reserves. The Team of Experts' appointment also came after the SSIA purported to temporarily suspend the Mining License on 10 July 2009.<sup>694</sup> The Tribunal observes that this confluence of dates is not merely coincidental, as it reflects the fact that Mongolia had decided to cooperate with the Russians on the Dornod deposit rather than to re-register the Claimants' reserves.

(ii) *Does alleged bad faith on the part of the Claimants justify the actions of the Respondents?*

343. The Respondents have invoked the Claimants' alleged bad faith as an affirmative defence. Specifically, the Respondents assert that the Claimants made little to no tangible progress on the Dornod Project over a number of years, simply relying on data provided by Priargunsky to inform its technical filings and reserves estimates.<sup>695</sup>
344. The facts do not support the Respondents' argument and it therefore cannot succeed as an affirmative defence.
345. The factual record shows that progress was being made and that, until Mongolia's apparent decision to replace Khan by a Russian partner, there did not appear to be any concern regarding the rate of progress. As noted by the Tribunal in its Decision on Jurisdiction, "the studies and reports produced by the Claimants are tangible proof that progress was being made on the project."<sup>696</sup> Most notably, the Claimants produced a DFS, which indicated that the Dornod Project was viable and could yield significant profits.<sup>697</sup>
346. MonAtom itself was aware of this progress. According to the minutes of a CAUC meeting in 2009, "Khan Resources stated it had completed its commitments as per the original Founding Agreement," and "Monatom acknowledged that, with the completion of these activities, and the recent changes brought forward by the GOM, it was timely to review the operational

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<sup>693</sup> See e.g. Exhibits C-198, C-245, C-483, C-496.

<sup>694</sup> SSIA Report No. 08/01/1699, 10 July 2009, Exhibit R-9.

<sup>695</sup> See paragraph 62 above.

<sup>696</sup> Decision on Jurisdiction, ¶ 337.

<sup>697</sup> See paragraph 60 above.

requirements of CAUC to move forward into production with a proper sharing of responsibilities.”<sup>698</sup>

347. Further, it is clear that the Claimants kept the Government informed of their activities. In addition to communication by people “on the ground,”<sup>699</sup> the Claimants submitted annual reports to the Government describing the operations of the past year.<sup>700</sup> As such, the Respondents cannot credibly claim that the Claimants failed to keep them informed.

348. As for the Respondents’ claim that the Claimants attempted to surreptitiously deprive the other members of the CAUC joint venture of the benefits of the Exploration License, the Respondents have provided no evidence to support this assertion.

(iii) *Was the invalidation of the Mining and Exploration Licenses carried out in accordance with due process of law?*

349. The Parties disagree on (1) whether the MRAM or the NEA was the proper licensing agency to make the final decision on re-registration of the Mining and Exploration Licenses under the NEL, and (2) whether certain NEL provisions apply to the decision-making procedure on re-registration. As will be seen below, the Tribunal need not resolve these disagreements here.

350. In short, the Tribunal finds that, after the temporary suspension of all minerals licenses in Mongolia through operation of Order No. 141, the relevant Mongolian licensing agency, whether the MRAM or the NEA, was obliged to re-register the licenses of all license holders who complied with the re-registration requirements set out in Attachment No. 1 to Order No. 120. A failure to re-register the license of a license holder whose application was compliant with Order No. 120, such as occurred in respect of the Mining and Exploration Licenses, thus constituted a breach of due process. Additionally, the relevant Mongolian licensing agency was under an obligation, at the very least, to issue a decision regarding re-registration. No such decision was issued in this case.

351. The Parties agree that Order No. 141 was issued to implement the LPCNEL.<sup>701</sup> Article 1 of the LPCNEL required that “[t]he exploration and mining licenses of Radioactive Minerals issued before the date the Nuclear Energy Law comes into force shall be newly registered according to the conditions and procedures specified in this Law on or before November 15, 2009.”<sup>702</sup> Article 2 required a license holder to “submit an application to renew the registration of its

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<sup>698</sup> See Minutes of the 13<sup>th</sup> Meeting of the Management Committee of CAUC (26 August 2009), Exhibit C-38 (p. 4).

<sup>699</sup> See testimony of Mr. Edey, Transcript (12 November 2013), 346:25 to 347:2.

<sup>700</sup> See testimony of Mr. Arsenault, Transcript (13 November 2013), 497:12–18.

<sup>701</sup> Third Tsogt Report, ¶ 183; First Bayar Report, ¶ 77.

<sup>702</sup> LPCNEL, art. 1, 16 July 2009, CLA-142.

license to the State Administrative body in charge of the nuclear energy issues and the licenses shall be registered and newly issued according to the Article 1 of this Law if it meets the conditions and requirements specified in the Nuclear Energy Law.”<sup>703</sup>

352. The Parties disagree, however, about whether the NEL applied retroactively to licenses registered under prior minerals laws. The Respondents argue that the NEL governed the procedure for the invalidation of the Mining and Exploration Licenses.<sup>704</sup> However, the licenses were not originally registered under the NEL, and, as the Claimants’ expert, Mr. Tsogt, notes, it is not clear that the NEL was intended “to regulate legal situations that came into existence prior to its entry into force [15 August 2009], or that make reference to the rights of minerals license holders acquired or maintained under other Mongolian laws.”<sup>705</sup> For this reason, Mr. Tsogt, suggests that the NEL “did not purport to apply retroactively.”<sup>706</sup> The Respondents’ expert, Mr. Bayar, disagrees, arguing that there is no temporal limitation in the NEL and pointing out that other changes to mineral legislation had been applied to the Mining and Exploration Licenses in the past.<sup>707</sup>
353. The Tribunal agrees with Mr. Tsogt that the NEL does not apply retroactively to licenses registered under other minerals laws. The NEL regime applies to licenses registered under that law, and a license would need to be newly registered under the NEL for that regime to apply. In other words, the relevant Mongolian authority would have been in a position to invalidate the Mining and Exploration Licenses on the basis of a breach of the NEL only once the licenses had been initially registered under that law.
354. Ultimately, it is Order No. 120 that specifies the requirements for re-registration. Order No. 120 assumes this procedural authority because Order No. 141, which purported to invalidate the Mining and Exploration Licenses, required the NEA to follow Order No. 120.
355. Mr. Bayar states that the Mining and Exploration Licenses were invalidated according to Order No. 141, noting also that the Administrative Appellate Court found the Order to be valid.<sup>708</sup> Thus, the Tribunal notes that the Respondents accept the authority of Order No. 141. Mr. Tsogt also appears to believe that Order No. 141 is the proper decree to look toward in determining whether due process was followed. Mr. Tsogt adds that, if Mr. Bayar “accepts that Order No.

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<sup>703</sup> LPCNEL, art. 2, 16 July 2009, CLA-142.

<sup>704</sup> See paragraphs 202-205 above.

<sup>705</sup> Second Tsogt Report, ¶ 100.

<sup>706</sup> Third Tsogt Report, ¶ 174; Second Tsogt Report, ¶ 122-29.

<sup>707</sup> Second Bayar Report, ¶ 90-1.

<sup>708</sup> First Bayar Report, ¶ 114, referring to Notifications 4/1401 and 4/1402, Exhibits C-8 and C-9.

141 was the basis for the NEA to temporarily revoke the Licenses, he must also accept that the NEA should have followed the procedure for re-registration established in Order No. 141.”<sup>709</sup>

356. With the Parties in agreement on the significance of Order No. 141, the Tribunal has examined the requirements of this Order, and it agrees with Mr. Tsogt that it required the NEA to follow the re-registration process set forth in Order No. 120.<sup>710</sup> The Tribunal also agrees with Mr. Tsogt that, with regard to the revocation of the licenses, Order No. 141 was intended as a temporary measure, since Article 2 of the LPCNEL required that “the licenses shall be registered and newly issued according to the Article 1 of this Law if it meets the conditions and requirements specified in the Nuclear Energy Law.”<sup>711</sup> No license was to be permanently invalidated until the re-registration application had been reviewed by the relevant licensing agency—whether the MRAM or the NEA—and the NEA had issued an official decision.
357. The process for re-registration is described in Articles 3.1 through 4.1 of Attachment No. 1 to Order No. 120.<sup>712</sup> Article 4.1 of Attachment No. 1 specifies that “[t]he Licensing Department shall examine the application requesting to renew the registration of exploration and mining license in conformity with the clause 3.1 of this instruction and shall re-issue the license if the application has met the conditions specified in the clauses 18.2, 18.3, 18.5 and 18.6 of the Nuclear Energy Law.”<sup>713</sup> Article 3.1 specifies two “activities” that the NEA must undertake in the review of applications: “[e]xamin[ing] whether the applicant [...] has completed documents” that meet certain conditions and “[e]xamin[ing] whether the applicant [...] has paid exploration and mining license fees and royalty [...]”<sup>714</sup> The NEL Articles 18.2, 18.3, 18.5 and 18.6 reference Articles 17.2 and 17.3, and, read together, the NEL articles referred to in Article 4.1 of Attachment No. 1 require that an applicant possess, *inter alia*, financial and operational ability, technological capability, and industry experience.<sup>715</sup> Together, these provisions in Attachment No. 1 constitute the applicable criteria for re-registration of the Mining and Exploration Licenses.

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<sup>709</sup> Third Tsogt Report, ¶ 197.

<sup>710</sup> See Third Tsogt Report, ¶ 194. “[B]efore the Nuclear Energy Law takes effect, Bayarbaysgalan T., head of the Licensing Department, is instructed to re-register exploration and exploitation licences of radioactive minerals in accordance with the conditions and procedures set forth in the Nuclear Energy Law and Temporary Procedures on Re-registering and Issuing Radioactive Minerals Licences as adopted by the Chairman’s Decree no. 120 of Nuclear Energy Agency, dated 20 August 2009, on or before 15 November 2009.” Order No. 141, art. 2, Exhibit R-12.

<sup>711</sup> LPCNEL, art. 2, 16 July 2009, CLA-142. Third Tsogt Report, ¶¶ 187, 193.

<sup>712</sup> Attachment No. 1 to Order No. 120, Exhibit C-95. See also Third Tsogt Report, ¶¶ 195-6.

<sup>713</sup> Attachment No. 1 to Order No. 120, art. 4.1, Exhibit C-95.

<sup>714</sup> Attachment No. 1 to Order No. 120, art. 3.1, clauses 3.1.1-3.1.2, Exhibit C-95.

<sup>715</sup> Nuclear Energy Law, arts. 17-18, Exhibit R-11.

358. The Tribunal finds no legally significant reason why the Claimants would not have fulfilled the above application requirements. As argued at length by the Claimants, Khan Mongolia and CAUC possessed significant resources, capabilities, and expertise.<sup>716</sup> A company of this level of capability should have no difficulty complying with the relevant NEL requirements. Nor did any of the Mongolian authorities rely on any purported failure by the Claimants to comply with the relevant NEL requirements.
359. Mr. Bayar admitted at the hearing that “[i]t is written in [...] Order No. 141, the Chairman of the NEA says to re-register,” such that “Order No. 141 required all the licenses covered by that order to be re-registered.”<sup>717</sup> The Tribunal therefore finds that the licensing agency—whether properly the MRAM or the NEA—should have re-registered the Mining and Exploration Licenses pursuant to the process set forth in Attachment No. 1 of Order No. 120 and its failure to do so constituted a breach of due process.
360. The Respondents contend, however, that re-registration could be refused on the basis of Article 26.1 of the NEL. Their legal expert, Mr. Bayar, connects Attachment No. 1 to Article 26.1 of the NEL.<sup>718</sup> First, Mr. Bayar points out that Article 7.2 of Attachment No. 1, which states that “[t]he Licensing Department shall invalidate the license on the grounding of the clause 26.2 of the Article 26 of the Nuclear Energy Law,” refers to Article 26.2 of the NEL. Next, Mr. Bayar connects Article 26.2 of the NEL to Article 26.1 of the NEL by noting that Article 26.2.1 cross-refers to Article 26.1.<sup>719</sup> By so doing, Mr. Bayar suggests that the procedure set out in Attachment No. 1 incorporates by reference the four grounds of invalidation prescribed in Article 26.1, and, notably, the following ground: “[f]ailure to comply with the requirement to eliminate violations during the period of suspension of a license.” For Mr. Bayar, this connection between Article 26.1 of the NEL and Attachment No. 1 would justify the NEA’s failure to re-register the Mining and Exploration Licenses: “As the existence of these grounds would justify the revocation of a license, they must justify a decision not to re-register a license. Otherwise, the NEA would be in a position where it would re-register a license and then be required to de-register it straight away.”<sup>720</sup>
361. The Tribunal disagrees. Article 26.1 concerns the invalidation of licenses under the NEL. It is not a part of the re-registration procedure. As discussed above, the Mining and Exploration Licenses were registered under the prior minerals laws. To be invalidated based on the

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<sup>716</sup> See paragraphs 57-61 above.

<sup>717</sup> Bayar, Transcript 691:6-21.

<sup>718</sup> Third Bayar Report, ¶ 198.

<sup>719</sup> Second Bayar Report, ¶ 104-5, referring to Attachment No. 1 to Order No. 120, art. 7.2, Exhibit C-95; Nuclear Energy Law, arts. 26.1-26.2, Exhibit R-11.

<sup>720</sup> Second Bayar Report, ¶ 102.

conditions described in Article 26.1 of the NEL, they would have needed to first be registered under that new law. This re-registration never occurred.

362. The Tribunal notes here that, even if Article 26.1 of the NEL were a valid part of the re-registration procedure, the NEA would not have been justified in failing to re-register the Mining and Exploration Licenses on the grounds of non-compliance with this provision. As stated at paragraphs 319-342 above, the violations relied on by the Respondents did not justify the invalidation and failure to re-register the Mining and Exploration Licenses.
363. Further, the Tribunal notes that Attachment No. 1 to Order No. 120 requires the Chairman of the NEA to notify applicants of the NEA's decision on re-registration.<sup>721</sup> According to Mr. Bayar's second expert report, such notice was completed by the NEA's Notices 4/1401 and 4/1402, which stated that the Claimants' Licenses "ha[d] not been reinstated since your company has not satisfied the conditions and requirements of the law and has not pursued relevant laws and regulations in your operation."<sup>722</sup> In contrast, Mr. Tsogt explained that Notices 4/1401 and 4/1402 do not actually include the decision on re-registration itself, and moreover, they give no legal bases for rejecting the application to re-register and, thus, are not decisions pursuant to Attachment No. 1 of Order No. 120.<sup>723</sup>
364. The Tribunal finds that Notices 4/1401 and 4/1402 failed to provide the Claimants with the decision that the NEA was required to provide pursuant to Attachment No. 1 of Order No. 120. As Mr. Bayar admitted during the hearing, Notices 4/1401 and 4/1402 were not decisions on re-registration: "If you are asking if the decision was made on re-registration, I will reply no, it is not a decision on re-registration. [...] Perhaps the decision was made, but this letter is not a legal document on par with a decision, it's not a decision made pursuant to the Mongolian laws and regulations."<sup>724</sup> The Respondents have not put forward any other document that could plausibly constitute a decision on re-registration. Accordingly, the Tribunal finds that the Government never provided such a decision. This failure to provide a final decision constituted a breach of due process.
365. In addition to the two aforementioned breaches of due process, the Tribunal also notes that the NEA did not appear to possess the authority to invalidate licenses issued under prior minerals laws.<sup>725</sup> Under prior minerals laws, that authority was legally vested in the MRAM.<sup>726</sup> The

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<sup>721</sup> See Attachment No. 1 of Order No. 120, arts. 4.3, 4.4.3, and 4.4.4, Exhibit C-95.

<sup>722</sup> Second Bayar Report, ¶ 109, referring to Notifications 4/1401 and 4/1402, Exhibits C-8, C-9.

<sup>723</sup> Third Tsogt Report, ¶ 201.

<sup>724</sup> See Transcript (14 November 2013), 667:5-18, 680:22 to 681:6.

<sup>725</sup> See NEA Notification No. 447 (8 October 2009), Exhibit C-2; NEA Notification No. 448 (8 October 2009), Exhibit C-3.

<sup>726</sup> Second Tsogt Report, ¶ 154.

LPCNEL gives the NEA the authority to determine whether licenses issued under prior mineral laws would be re-registered under the NEL, but it does not appear to give the NEA the authority to invalidate those same licenses.<sup>727</sup> If the NEA did not possess the authority to invalidate, through Order No. 141, all mineral licenses issued under prior minerals laws, this *ultra vires* action would mean that Order No. 141 itself did not conform with the LPCNEL.

#### **D. CONCLUSION ON LIABILITY**

366. The Tribunal concludes that the Respondents breached their obligations toward the Claimants under Article 8.2 of the Foreign Investment Law in relation to both the Mining and Exploration Licenses. This breach of Article 8.2 of the Foreign Investment Law also means that the Respondents are liable toward Khan Netherlands under the ECT through operation of the umbrella clause, Article 10(1) of the ECT.

#### **X. THE TRIBUNAL'S ANALYSIS ON QUANTUM**

367. The Tribunal will now determine the damages caused to the Claimants by the Respondents' breach of the Foreign Investment Law and the ECT.

##### **A. PRINCIPLES TO BE APPLIED**

368. The starting point of any quantum analysis is to identify the principles to be applied when assessing damages. In the present case, the liability of the Respondents having been established under the Foreign Investment Law – a Mongolian statute – and the ECT – an international treaty – the relevant damages principles are to be derived from these two instruments, as well as both Mongolian and customary international law.

369. The Claimants submit that the customary international law principles set out in the *Chorzów Factory* case apply, as neither the ECT nor Mongolian law set out a specific standard of compensation for illegal expropriation.<sup>728</sup> The Respondents also refer to the *Chorzów Factory* standard.

370. *Chorzów Factory* establishes that the purpose of compensation under international law is to “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.”<sup>729</sup> The Claimants alternatively describe this standard as “address[ing] a hypothetical future situation that would have existed,

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<sup>727</sup> Order No. 141, art. 1, Exhibit R-12.

<sup>728</sup> Memorial, ¶¶ 412-414, 424.

<sup>729</sup> *Case concerning the Factory at Chorzów* (Germany v. Poland), Jurisdiction, Judgment, 26 July 1927, P.C.I.J., Series A, No. 9, Exhibit CLA-173 (p. 47).



in all probability, but for the illegal conduct<sup>730</sup> and assert that, in this case, it amounts to “fair market value.”<sup>731</sup>

371. In addition, the Respondents refer to Article 8(4) of the Foreign Investment Law, which provides that “the amount of compensation shall be determined by the value of the expropriated assets at the time of expropriation or public notice of expropriation.”<sup>732</sup> This is essentially also a “fair market value” standard.

372. As noted by the Respondents, “fair market value” is defined by the World Bank as:

An amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.<sup>733</sup>

373. As will be seen below, the Parties disagree on the most appropriate methodology to be used to assess the fair market value of the Claimants’ investment in the present case.<sup>734</sup>

374. The Claimants advocate a Valuation Date of 1 July 2009, which is at the end of the quarter during which the DFS was issued, nine days before the Mining License was first suspended, and 44 days before the NEL was enacted.<sup>735</sup> The Respondents do not dispute this suggested date.<sup>736</sup>

375. The burden of proof falls on the Claimants to show that they have suffered the loss they claim. The standard of proof required is the balance of probabilities. This, of course, means that damages cannot be speculative or uncertain. However, scientific certainty is not required and it is widely acknowledged by investment treaty tribunals and publicists that the assessment of damages is often a difficult exercise and will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions, which does not of itself mean that the burden of proof has not been satisfied.

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<sup>730</sup> Claimants’ Pre-Hearing Brief, ¶ 91 (emphasis by the Claimants).

<sup>731</sup> Claimants’ Pre-Hearing Brief, ¶ 91.

<sup>732</sup> Statement of Defence, ¶¶ 393-394.

<sup>733</sup> See Respondents’ Statement of Defence, ¶ 446.

<sup>734</sup> In addition to the question of compensation for illegal expropriation, the Claimants also state that the 2002 Civil Code creates an obligation by a person who causes damages to compensate for such damages (Article 497.1), including for lost income (Articles 227 and 229). The Claimants summarise Mongolian laws on compensation as aiming to “put Claimants in a position they would have been in if the Agreements had properly been performed and the [Mining and Exploration] [L]icenses had not been illegally invalidated.” Claimants’ Pre-Hearing Brief, ¶ 92; Memorial, ¶¶ 416, 419, referring to 2002 Civil Code, Exhibit CLA-117. The Respondents state that only “inevitable” lost income may be awarded under Article 227 of the 2002 Civil Code and that their legal expert, Mr. Bayar, explained that this would require a history of profit to be demonstrated. Statement of Defence, ¶ 396, referring to First Bayar Report, ¶ 134.

<sup>735</sup> Claimants’ First Post-Hearing Brief, p. 23.

<sup>736</sup> See Respondents’ Pre-Hearing Brief, ¶ 103.

## B. CAUSATION

376. The Respondents have suggested that causation between the violations of international and Mongolian law and any loss has not been proven in the present case because there is no evidence that the Claimants could have taken the mine into profitability. Consequently, the Respondents argue that the Claimants' investment had no value and no damages should be awarded (or, at most, compensation should be limited to the investment already made by the Claimants).<sup>737</sup>
377. The Tribunal does not agree. While there may have been a number of uncertainties that needed to be overcome by the Claimants before the mine could come into production – as discussed below – the fact that the Dornod Project itself had a considerable inherent value as at the Valuation Date is clear from the DFS. The Claimants' investment in the Dornod Project therefore also had value, as acknowledged by the Respondents when they stated that “[t]he Claimants had always sold off their interests after carrying out exploration in the past, and the reality is that [they] expected to do the same here.”<sup>738</sup>
378. The Claimants clearly would have realised value from selling their interest in the Dornod Project to a willing buyer. As noted above, this reflects the definition of fair market value – what a willing buyer would have paid the Claimants for the mine on the Valuation Date. Moreover, the Claimants have provided examples of other companies in similar situations that have taken similar projects through to production and therefore the Tribunal accepts that this may well have occurred in the present case. In any case, whether Khan would have sold the mine or developed it to production is not the issue at hand. The issue is what the mine's market value was on the Valuation Date – prior to the Respondents' breaches.
379. The Tribunal does not consider the fact that the Exploration License over the Additional Property had not yet been converted into a mining license to be a causation issue, as suggested by the Respondents. It is clear that, under Mongolian law, a mining license will be granted provided the requisite conditions are met. The evidence in the record demonstrates that the requisite conditions *were* being met.<sup>739</sup> The Tribunal finds that Khan Mongolia was taking the

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<sup>737</sup> Statement of Defence, ¶ 354; Rejoinder, ¶¶ 233, 259.

<sup>738</sup> Rejoinder, ¶ 240.

<sup>739</sup> The Tribunal agrees with the Claimants' legal expert, Mr. Tsogt, that the conditions for the conversion of an exploration license into a mining license were that the applicant: (i) hold an exploration license; (ii) be a legal person formed and operating under the laws of Mongolia; (iii) pay the applicable annual fee; and (iv) submit a final report on the results of the exploration work, including an estimate of the ore reserve. *See* Second Tsogt Report ¶¶ 35-48, referring to 2007 Minerals Law, Exhibit CLA-140, arts. 10.2, 12.2, 17.1, 17.2, 18, 22, 24, 25.1, 39; *see also* Third Tsogt Report, ¶¶ 118-124. Conditions (i), (ii), (iii) were met. *See* Certificate of Registration of Khan Mongolia, 7 May 2003, Exhibit C-234; Certificate of Registration for Khan Mongolia, 12 October 2006, endorsement of 29 May 2012, Exhibit C-235; Certificate of Mineral

relevant steps and that, had the Mongolian Government not decided to abandon the project in favour of working with Russian partners, a mining license over the Additional Property would likely have been granted in due course.

380. Similarly, the fact that licenses over the Main Property and the Additional Property were held separately at the time does not mean that the venture had no value. If the two properties needed to be mined together to be economic (as both Parties agree),<sup>740</sup> a willing buyer would clearly have wished to purchase both properties. The fact that no formal merger had taken place by July 2009 does not prevent a valuation being undertaken of the Claimants' overall investment in Mongolia (although, as discussed below, it is a factor when considering which methodology may be appropriate for valuating the project).
381. The other issues raised by the Respondents as going to "causation" (*e.g.*, whether financing would have been raised or whether a new joint venture agreement was needed) are relevant to assessing the correct methodology, but do not demonstrate that the Dornod Project had no intrinsic market value as at the Valuation Date. The Tribunal takes these factors into account below.
382. In summary, the Tribunal finds that, in the light of the DFS, the Respondents' primary position that Khan's investment in the Dornod Project was of no value at all is untenable.

### **C. OWNERSHIP PERCENTAGE**

383. Before considering the methodology for calculating damages and the specific amount of any loss suffered by the Claimants, it is pertinent to clarify the percentage of the Claimants' interest in the Dornod Project for the loss of which compensation is due.
384. As at the Valuation Date, Khan Canada and CAUC Holding owned 58 percent of CAUC (which held the Mining Licence over the Main Property), while Khan Netherlands owned 75 percent of Khan Mongolia (which held the Exploration Licence over the Additional Property), with the remaining 25 percent being held by Khan Bermuda (and, through it, by Khan Canada).
385. The Claimants' expert, Dr. José Alberro (of BRG), assumed that this meant that the Claimants held 58 percent of the interest in the resources of the Main Property and 100 percent in the resources of the Additional Property, and, based on the resources available in each property, concluded that the Claimants had an interest in 68 percent of the total resources found in the

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Exploration License, 19 December 2006, endorsements, Exhibit R-6. As for condition (iv), Khan Mongolia took the requisite steps to register the ore reserves. As described in paragraphs 329-334 above, the registration did not take place due to the inaction of the Government.

<sup>740</sup> Statement of Defence, ¶¶ 378-379; Reply, ¶ 380.

two properties.<sup>741</sup> The Respondents' expert, Mr. Lagerberg, provided three alternative calculations, using ownership figures of 58, 62 and 68 percent.<sup>742</sup> Mr. Lagerberg arrived at the ownership percentage of 62 on the basis that the Claimants are only entitled to claim damages for 75 percent of the resources of the Additional Property, as this represents Khan Netherlands' interest (through Khan Mongolia) and therefore the percentage interest subject to an ECT claim. The third figure of 58 percent was based on the assumption that the Claimants' interest in CAUC would have remained unchanged if the Additional Property had been merged into the CAUC joint venture (*i.e.*, the merger of the two properties would have occurred without any alteration to the shareholding percentages of the three joint venture partners or any other compensation to the Claimants).<sup>743</sup>

386. The damages assessment is being made as at 1 July 2009, before any formal merger had taken place. Given that at the Valuation Date Khan (that is, Khan Canada, CAUC Holding and Khan Netherlands) had an interest in 68 percent of the resources of the two properties, and given that it is impossible to know the percentages that may have been agreed had the properties been formally merged after July 2009, the Tribunal considers that, as a starting point, 68 percent is the appropriate adjustment to apply. Consequently, the Tribunal does not consider Mr. Lagerberg's third alternative of 58 percent to be appropriate.
387. The only remaining issue, therefore, is whether, under the ECT, the Claimants can only recover 75 percent of the value of the Additional Property, being the percentage owned by Khan Netherlands. If so, the overall percentage of the two properties for which the Claimants could seek damages would be reduced to 62 percent.
388. The Claimants argue that the ECT provides that the controlling investor is entitled to 100 percent of the damages in relation to the covered investment, even if the remainder of the investment is not owned by an entity covered by the ECT.<sup>744</sup> The basis for this argument appears to be that the Exploration License itself would qualify as an investment under the ECT by virtue of being indirectly controlled by Khan Netherlands through its majority shareholding in Khan Mongolia – *i.e.*, the licence is a covered investment, not just the shares in Khan Mongolia.<sup>745</sup> This reasoning, however, does not automatically lead to the conclusion – as the Claimants appear to assume – that Khan Netherlands can claim for 100 percent of the loss of an investment in which it only has a 75 percent interest. Principles of reparation in international law, as set out in *Chorzów Factory*, are clear that a claimant is entitled to compensation for

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<sup>741</sup> First BRG Report, Figure 3 (p. 12).

<sup>742</sup> Second Lagerberg Report, ¶¶ 5.39, 9.66.

<sup>743</sup> Second Lagerberg Report, ¶ 5.39.

<sup>744</sup> Claimants' Pre-Hearing Brief, ¶ 111.

<sup>745</sup> Claimants' Pre-Hearing Brief, ¶ 111.

losses it has actually suffered – not for losses suffered by third parties over which the tribunal has no jurisdiction. Only express wording to the contrary in a treaty could override this fundamental principle. No such wording has been provided in the present circumstances and the Tribunal concludes it has no jurisdiction to award compensation in relation to the 25 percent interest in the licence owned by Khan Bermuda.

389. The Tribunal therefore finds that the correct ownership percentage to adopt is 62 percent (of the value of the Dornod Project).

#### **D. METHODOLOGY TO BE APPLIED**

390. The Tribunal has been presented with three principal methodologies by the Parties: DCF, market comparables and market capitalisation. The Tribunal examines each of the methodologies below, but has ultimately come to the conclusion that – while all of them are valid and widely-used methods for valuing mines – none of these methodologies are wholly satisfactory in the present case. This conclusion is not a reflection on the expert witnesses, all of whom the Tribunal found to be helpful and professional. Ultimately, however, the Tribunal considers that the true value of Khan’s investment is better reflected by the offers made for the mine or for Khan Canada’s shares in and around the relevant period than by the more traditional methodologies advanced by the Parties.

##### **1. DCF**

391. The Claimants advocated using a DCF method, which they state is appropriate for determining the fair market value of a mine with proven reserves.<sup>746</sup> According to the Claimants, once these reserves are known, together with the costs associated with development and production, the market price for the relevant resource can be applied to estimate future earnings with reasonable certainty. It therefore does not matter that the mine has not actually come into full production or is not a functioning “going concern.” The Tribunal agrees that, in the case of a mine with proven reserves, the DCF method is often considered an appropriate methodology for calculating fair market value.<sup>747</sup>

392. However, in this particular case, there are a number of additional factors and uncertainties which, in the Tribunal’s view, make the use of the DCF method unattractive and speculative. These uncertainties include:

- (i) how the Dornod Project would have been financed;

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<sup>746</sup> Claimants’ Post-Hearing Brief, p. 24.

<sup>747</sup> See e.g. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No ARB/06/11, Award, 24 September 2012, Exhibit CLA-207.

- (ii) whether a further strategic partner would have been brought into the business and, if not, whether Khan was capable of bringing the Dornod Project into production itself;
- (iii) whether Khan would have taken the Dornod Project through to production or sold it;
- (iv) when and how the Additional Property would have been merged into the CAUC joint venture to create a single “Dornod Project”; and
- (v) the signing of various agreements (an investment agreement and a new joint venture agreement) to finalise the commercial terms of the Dornod Project.

393. The combination of these factors does not mean, as the Respondents allege, that the Dornod Project had no value in the Claimants’ hands,<sup>748</sup> but it does mean that the level of certainty required for the DCF method to be used has not been attained. In particular, it is far from certain: (i) whether the mine would actually have reached production; (ii) if it did, on what terms the parties would have participated in the venture; and (iii) whether the Claimants would still have been involved in the Dornod Project at all. In this context, the Tribunal finds that the DCF method is inappropriate and that any damages calculated through it would be too speculative.

## **2. Market comparables approach**

394. The Claimants’ valuation expert, Mr. Kevin J. Carter (of Raymond James), used the market comparables approach to determine the value of the Dornod Project on the Valuation Date. He considered both “trading comparables” and “transaction comparables” to arrive at an overall value of USD 245 million.<sup>749</sup>

395. In his first expert report, to derive a figure based on trading comparables, Mr. Carter reduced an initial list of fifty uranium companies to what he considered to be the ten most comparable companies. He stated that:

This list was selected based on several criteria including but not limited to, project stage, resource size and quality, technical risks associated with development/operation, and recovery method. In selecting comparable companies, the public companies considered should be comparable in terms of commodity mix, geographic location, operating characteristics, growth prospects, risk profile and size.<sup>750</sup>

396. Mr. Carter also identified seven comparable transactions and noted that:

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<sup>748</sup> Respondents’ Pre-Hearing Brief, ¶ 103.

<sup>749</sup> First Raymond James Report, p. 16; Second Raymond James Report, p. 26. *See also* Memorial, ¶ 451; Claimants’ First Post-Hearing Brief, pp. 29-30.

<sup>750</sup> First Raymond James Report, p. 12.

Ideally, comparable transactions considered would be comparable with the [Dornod] Project in terms of commodity mix, geographic location, operating characteristics, growth prospects, risk profile and size.<sup>751</sup>

397. The Respondents accept that market comparables are a valid way of valuing a mine in circumstances where other more reliable data is not available. However, the Respondents state that this methodology is only as good as the comparables chosen and that, in the present case, the comparables are not truly “comparable” to the Dornod Project. Therefore, according to the Respondents, Mr. Carter’s conclusions are unreliable.<sup>752</sup>
398. Although Mr. Carter may have used the companies he considered most comparable to Khan, the Tribunal agrees with the Respondents’ damages experts’ criticisms of Mr. Carter’s selection and considers that the companies and transactions chosen are not sufficiently comparable to allow the Tribunal to make a true determination of Khan’s fair market value. Reasons for this conclusion include the following:
- (i) CAMECO, Denison Mines Corp., Paladin Energy Ltd., and Uranium One Inc – being large, producing, multi-project companies – are not appropriate comparables for Khan.
  - (ii) With respect to the remaining six junior mining companies, the differences presented in Table 8.1 of Behre Dolbear’s second report are, taken together, sufficient to cause concern as to the accuracy of any valuation based solely on those comparables.<sup>753</sup> These differences were similarly summarised by Mr. Lagerberg at Appendix 2 of his second report.<sup>754</sup>
  - (iii) The comparable transactions chosen suffer from similar issues, as the projects concerned were in different locations with different conditions and stages of development, all of which are factors that have a significant effect on value.<sup>755</sup> The Tribunal is not convinced that sufficient adjustments were made – or could be made – to account for these differences.
399. Overall, the Tribunal agrees with the Respondents’ observations that the comparables chosen represent “companies whose sites are based in different countries, under varying climatic, geographical and regulatory conditions to those experienced by Khan.”<sup>756</sup> This is one of the key reasons why arbitral tribunals are often reluctant to rely on a comparables analysis as the sole or

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<sup>751</sup> First Raymond James Report, p. 12.

<sup>752</sup> See e.g. Respondents’ First Post-Hearing Brief, ¶¶ 101-105.

<sup>753</sup> See also Second Behre Dolbear Report, ¶ 43.

<sup>754</sup> See also Second Lagerberg Report, ¶¶ 4.7-4.10.

<sup>755</sup> Second Lagerberg Report, ¶ 4.13.

<sup>756</sup> Rejoinder, ¶ 325.

primary method of valuation.<sup>757</sup> The difficulty of finding truly comparable companies in the present case makes this method unattractive.

### 3. Market capitalization or “Quoted Market Price” (“QMP”) approach

400. The market capitalization approach advocated by the Respondents on its face has much attraction. The Tribunal accepts that Khan Canada ultimately held the investment that is the subject of this dispute and that it was essentially a “single-project” company. The market capitalisation of Khan Canada should, therefore, reflect the market’s (*i.e.*, a willing buyer’s) view of the value of the company and its interest in the Dornod Project. Using this approach, Mr. Lagerberg calculated that Khan Canada’s market capitalisation in April-July 2009 was between USD 14.8 and USD 20.4 million.<sup>758</sup> Mr. Lagerberg then discounted this price to reflect the possibility that the part of the Claimants’ investment for which compensation is due includes only a 75 percent interest in the Additional Property and thus arrived at his final estimate of a value between USD 13.4 and USD 18.6 million.<sup>759</sup>
401. Absent countervailing factors, this should be the simplest and most accurate reflection of the value of the Claimants’ interest in the Dornod Project and is preferable to the approximations and estimations provided by the DCF and market comparables methodologies, which are used in the absence of an accurate valuation. The Tribunal therefore needs to consider whether, in the present case, there were other factors affecting the share price of Khan Canada as at the Valuation Date that would make it an inaccurate reflection of the value of the Dornod Project.
402. The Claimants reject a QMP approach. They argue that:
- To properly apply a QMP Approach [. . .] there are two key requirements: first, the shares must be liquid, and, second, the share price must be analyzed in a period in which it has not been negatively impacted by the complained of measures.<sup>760</sup>
403. Thus, the Claimants suggest that events prior to July 2009 had created concern within the market and had unduly distressed Khan Canada’s share price such that it was not an accurate indication of the investment’s value. Therefore, the Respondents’ illegal conduct would be taken into account if a valuation date in July 2009 were to be used for this method. In particular, the Claimants suggest that Mongolia’s actions in 2007 had a lasting effect on Khan Canada’s share price. Dr. Alberro observed:

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<sup>757</sup> See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No ARB/06/11, Award, 24 September 2012, Exhibit CLA-207 (¶ 787). See also *El Paso Energy International Company v. Argentine Republic*, Award, 27 October 2011, Exhibit CLA-172 (¶ 711).

<sup>758</sup> First Lagerberg Report, ¶ 2.6; Second Lagerberg Report, ¶ 3.18.

<sup>759</sup> Second Lagerberg Report, ¶¶ 3.18-3.19.

<sup>760</sup> Reply, ¶ 429 (footnotes omitted).



On August 17 2007, Khan announced it had received a notice from the Mineral Resources Authority of Mongolia (the “Minerals Authority”) advising that the Minerals Authority had determined that the decision to issue Khan’s [Exploration License] was considered invalid. Khan’s share price declined 48% on the announcement with 4.8 million shares trading on that day, more than 10 times the average volume for the preceding 20 days. The market reaction reduced Khan’s market capitalization by Cdn\$90.0 million.<sup>761</sup>

404. The Claimants also state that the market in July 2009 was “illiquid,” making a QMP approach inappropriate. In the event that a QMP approach is used, the Claimants advocate a valuation date in early August 2007, which, in the Claimants’ view, would ensure that no negative effect of the Government’s temporary invalidation of the licences in 2007 would be included in the valuation.<sup>762</sup>
405. The Tribunal has examined the movements of Khan Canada’s share price and cannot see any permanent impact on it of the temporary invalidation of the licences in August 2007. The Tribunal accepts the Respondents’ position that none of the ECT and Foreign Investment Law violations complained of by the Claimants had occurred prior to 1 July 2009. In principle, therefore, there is no reason to shift the share price two years earlier to August 2007, at which time the short-lived “uranium bubble” artificially inflated the value of the Dornod Project.
406. It appears to the Tribunal that the share price of uranium companies generally fell in late 2007 as the so-called “uranium bubble” burst and the global credit crisis began. The movement of Khan Canada’s share price at this time seems consistent with that of other uranium companies. The graph on page 58 of the Rejoinder clearly demonstrates this trend.<sup>763</sup>
407. However, the Tribunal does have concerns that the QMP approach produces a valuation for the Claimants’ interests in the Dornod Project that bears little or no relation to the inherent value of the project as set out in the DFS.<sup>764</sup> This may mean that, when the DFS was released in April 2009, the market was indeed already suspicious of Mongolia’s motives and therefore approached Khan Canada cautiously or that, as argued by the Claimants, the “illiquid” nature of the market at the time makes the approach unreliable.
408. Whatever the reason, it seems clear from the contemporaneous offers discussed below that a willing buyer in or around the relevant time was willing to pay much more for Khan’s investment than suggested by the Respondents’ QMP approach. The Respondents have not been able to offer any persuasive evidence to explain why their proposed value as at July 2009 (before the expropriation) was lower than the later offers by ARMZ and CNNC in November

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<sup>761</sup> Second BRG Report, ¶ 9.

<sup>762</sup> Reply, ¶ 435.

<sup>763</sup> See also First Behre Dolbear Report, pp. 13-15.

<sup>764</sup> The DFS provided an independent assessment of the value of the Dornod Project as at April 2009 of USD 275.9 million. Exhibit C-50. The Claimants also note that a valuation by World Growth Mongolia in January 2009 assessed the value as USD 382.9 million. Reply, ¶ 377, referring to Exhibit C-470.

2009 and February 2010 (after the expropriation). Faced with this reality, the Tribunal does not consider that the valuation advanced by the Respondents reflects the true market value of the investment. The Tribunal therefore accepts the Claimants' position that, as of July 2009, the market price of Khan did not reflect the intrinsic value of the Dornod Project.

409. In any case, if the Respondents' contention that the Dornod Project had no value in the Claimants' hands is put aside, both Parties acknowledge that the minimum that the Claimants would be entitled to receive as compensation for any expropriation is the equivalent of their investment in the Dornod Project to date.<sup>765</sup> The Tribunal accepts that the Dornod Project had moved beyond a minimal stage of development, particularly after the release of the DFS. Consequently, a "sunk investment" approach is not appropriate. However, such an approach can serve as a "bottom line" below which compensation should not fall. Unfortunately, even the costs figure in this arbitration has proved controversial, although it seems to fall somewhere between USD 16.7 and USD 50 million. The fact that the Claimants' investment is likely to be higher than the market capitalisation calculated by the Respondents means that the QMP approach is of limited use, unless the upper end of the Respondents' range is used. Although the investment made is the minimum the Claimants should be entitled to recover, the Tribunal agrees with the Claimants that it is not an accurate method for ascertaining the fair value of a mine,<sup>766</sup> and therefore the Tribunal has looked to other information in its possession.

#### **E. VALUE DERIVED FROM OFFERS TO PURCHASE THE DORNOD PROJECT**

410. As indicated in the previous analysis, the situation that arises here is one of considerable difficulty in establishing a reasonable figure for damages. In arriving at the quantum conclusions set out in this section, the Tribunal has been guided by the following principles and conclusions:

- (i) The burden is on the Claimants to prove their loss. Estimating future losses will often involve some level of uncertainty or estimation, but should not be purely speculative.<sup>767</sup>
- (ii) As stated by Judge Greenwood in the ICJ *Case Concerning Ahmadou Sadio Diallo*:

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<sup>765</sup> Claimants' Pre-Hearing Brief, ¶ 90 (although the Claimants argue that compensation amounting to investments made would be inappropriate as it would not equate to fair market value). *See also* Respondents' Pre-Hearing Brief, ¶¶ 98, 103; Statement of Defence, ¶ 385. The Claimants state that this form of compensation may be appropriate for an "early stage exploration project." Reply, ¶ 402.

<sup>766</sup> Claimants' First Post-Hearing Brief, p. 24.

<sup>767</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, 19 June 2012, ICJ Reports 2012, p. 324, ¶¶ 40, 49; *Lusitania cases*, Opinion, 1 November 1923, Reports of International Arbitral Awards, vol. VII, p. 32 at p. 40.

[w]hat is required is not the selection of an arbitrary figure but the application of principles which at least enable the reader of the judgment to discern the factors which led the Court to fix the sum awarded. Moreover, those principles must be capable of being applied in a consistent and coherent manner, so that the amount awarded can be regarded as just, not merely by reference to the facts of this case, but by comparison with other cases.<sup>768</sup>

- (iii) The Parties have agreed that the date of the valuation is 1 July 2009 and that a fair market value approach is appropriate.
- (iv) The costs, DCF, market comparables and QMP methods are not appropriate for the reasons set out above.
- (v) Having discounted these other methods, the only remaining material on the basis of which the Tribunal might estimate fair market value is the various offers that were made between 2005 and 2010 for the shares in the CAUC joint venture or Khan Canada, as set out in detail in this section.
- (vi) When examining this material, the Tribunal is mindful of the comments of Sergey Ripinsky and Kevin Williams in *Damages in International Investment Law*:

Valuation can be performed on the basis of past transactions with the evaluated asset itself. Such transactions, whether actually executed or only contemplated by the parties at arm's length, represent strong evidence of the asset's [fair market value], provided that no value-affecting factors have interfered between the date of the transaction and the valuation date.<sup>769</sup>

411. Hence, the three offers made to acquire the shares in the Dornod Project during the relevant period are the best information presented to the Tribunal in terms of the real value of the Claimants' investment. The two most relevant offers time-wise are the offers made in late 2009 and early 2010 by ARMZ and CNNC respectively. ARMZ was already a minority shareholder of Khan Canada and made a hostile takeover bid in November 2009 for the remaining shares at approximately CAD 0.65 per share.<sup>770</sup> This resulted in an overall offer of USD 33 million (net-of-cash USD 18.2 million).<sup>771</sup> Mr. Lagerberg calculated that this offer included a 44 percent control premium.<sup>772</sup>
412. The offer made in February 2010 by CNNC was for all shares in Khan Canada. The offer was made at CAD 0.96 per share and, on Mr. Lagerberg's calculation, included a control premium

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<sup>768</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Declaration of Judge Greenwood appended to Compensation Judgment, 19 June 2012, ¶ 7.

<sup>769</sup> Sergey Ripinsky and Kevin Williams, *DAMAGES IN INTERNATIONAL INVESTMENT LAW* (2008), p. 216.

<sup>770</sup> Press Release, "Khan Board of Directors Recommends Shareholders Reject ARMZ's Highly Inadequate and Prejudicial Offer," 15 December 2009, Exhibit C-202.

<sup>771</sup> First Lagerberg Report, ¶ 5.16; Respondents' First Post-Hearing Brief, ¶¶ 105, 124.

<sup>772</sup> First Lagerberg Report, ¶ 5.10.

of around 33 percent.<sup>773</sup> The total offer for all shares was USD 53 million (net-of-cash USD 39.1 million).<sup>774</sup> Mr. Lagerberg speculated that CNNC's offer may have been higher due to synergies that the company was hoping to achieve.<sup>775</sup> However, the Tribunal has been presented with no evidence or detail as to such synergies. Given that the control premium seems to have been smaller in the CNNC offer, the Tribunal finds no evidence to support a contention that the price was unduly inflated.

413. The ARMZ offer was rejected by Khan's shareholders, but the CNNC offer was accepted (although it did not progress due to a failure to obtain the required regulatory approvals from Chinese authorities). Of course, these offers were made after the expropriatory acts had taken place and were thus made in a distressed environment. The fair market value of the investment must therefore be presumed to be higher than the CNNC offer. As stated by the Claimants, these offers provide only "a very conservative baseline"<sup>776</sup> for the value of the Dornod Project which, when assessed from a willing buyer / willing seller perspective would have been higher.
414. The only other evidence of offers to acquire the Dornod Project is the Government's offer to sell to Khan Canada its 21 percent shareholding in CAUC in November 2005. This offer is obviously more distant time-wise. It was also made before proven reserves had been confirmed in the DFS. However, it has the advantage of having been made well before there was any hint of the expropriatory acts (including the 2007 temporary invalidation of the licences) and of not being affected by the "uranium bubble" of 2007. The offer represented a valuation of Mongolia's 21 percent shareholding agreed after almost a year of negotiation. The agreed value was USD 31.5 million.<sup>777</sup> Dr. Alberro calculated that this translates to an overall value for CAUC of USD 150 million (being USD 31.5 million / 21 percent).<sup>778</sup> The Tribunal accepts Dr. Alberro's explanation that the offer for Mongolia's CAUC shares was exclusive of the USD 50 million capital cost that Khan had agreed to finance in addition to payment of the sum of USD 31.5 million for the 21 percent interest in CAUC. There is therefore no basis on which to deduct the USD 50 million from the agreed price as suggested by Mr. Lagerberg.<sup>779</sup>
415. The Claimants submitted that the offer of 2005 is conservative because at that time no definitive feasibility study had yet been completed and the long term uranium price was

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<sup>773</sup> Director's Circular Recommending Acceptance of CNNC's Offer, 25 February 2010, Exhibit C-259 (p. ii); First Lagerberg Report, ¶ 5.10.

<sup>774</sup> First Lagerberg Report, ¶¶ 5.10-5.16; Respondents' First Post-Hearing Brief ¶¶ 105, 124.

<sup>775</sup> First Lagerberg Report, ¶ 5.18.

<sup>776</sup> Claimants' Pre-Hearing Brief, ¶ 95.

<sup>777</sup> Letter from Khan Canada to Mr. Sukhbaatar Batbold, 5 November 2004, Exhibit BRG-82.

<sup>778</sup> Second Alberro Report, ¶ 58.

<sup>779</sup> See Letter from Khan Canada to Mr. Sukhbaatar Batbold, 5 November 2004, Exhibit BRG-82; Second Alberro Report, ¶¶ 59-60; First Lagerberg Report, ¶ 3.20.

approximately one third (USD 22 per pound) of that in 2009 (USD 65 per pound in the Claimants' case). However, the Tribunal also accepts that market conditions were less favourable in 2009, which would have affected a prospective buyer's ability to raise finance and other important factors related to value. A prospective buyer would also face the uncertainties of attempting to merge the Main Property and the Additional Property and of negotiating new agreements with the other joint venture owners (uncertainties which made the DCF model unattractive). Therefore, because there are factors which suggest both better and worse conditions in 2009 for a sale, the Tribunal has decided to make no adjustments to the 2005 figure. Any attempt to adjust the figure up or down to account for other factors would be speculative.

416. The 2005 offer provides a value for the CAUC joint venture and therefore the overall value derived from this offer does not include the Claimants' interest in the Additional Property, which included part of the resources in Deposit No. 2. The Tribunal accepts that the 2005 Mongolia offer suggests that the Additional Property would provide a further USD 50 million of value, equating to an overall value for the two properties of around USD 200 million.<sup>780</sup>
417. In order to estimate the value of the Claimants' investments in the two properties, the overall value must be divided by the percentage of the resources for which the Claimants are entitled to compensation. As discussed above, the appropriate percentage to represent the Claimants' investment in the Dornod Project is 62 percent, yielding on the basis of the 2005 offer a value of USD 124 million.
418. In this case, all three offers suffer from clear "value-affecting factors" and therefore an adjustment would need to be made to reflect the change in value between July 2009 and the date of any given offer. As such, the value of the Dornod Project as at the Valuation Date cannot be determined precisely, but this does not mean a fair value cannot be determined at all. Rather, the Tribunal has used its best efforts to balance these issues and arrive at a damages estimate that it considers reasonable in the circumstances.
419. Having examined the offers carefully, the Tribunal considers that the offer that most closely approximates the fair value of the Claimants' investment as at July 2009 is CNNC's offer of February 2010, for the following reasons:
- (i) The offer is sufficiently close temporally to the Valuation Date for the Tribunal to be satisfied that general market conditions would not have altered so significantly as to considerably affect valuation.

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<sup>780</sup> See Reply, ¶ 377, n. 803.

- (ii) The value of Khan Canada's shares improved following the ARMZ offer and, unlike the ARMZ offer, the CNNC offer was not a hostile takeover bid motivated by an apparent desire to further an alternative joint venture between the Russian and the Mongolian Governments.
  - (iii) The offer was acceptable to Khan Canada's shareholders.
  - (iv) By the time CNNC made its offer, the 2010 MOU had been signed between the Claimants and the Mongolian Government, which would suggest that the investment was less distressed than it was when the ARMZ offer was made (although the 2010 MOU was rejected by the NEA before the offer was formally announced to the market).
  - (v) When the CNNC offer was made, steps were being taken to register the proven reserves.
  - (vi) The CNNC offer was made by a Chinese investor that had no prior investment in the Dornod Project. CNNC must therefore have been satisfied that it could persuade the Government to re-register the licenses.
420. Clearly, however, despite the efforts of Khan Canada to work with the Mongolian Government to restore the licences, the investment remained in a distressed state. A fair market value as at July 2009 must take into account the actions of the NEA between July 2009 and January 2010, and the valuation must be adjusted to remove the impact of such actions. To do this, the valuation derived from the 2005 offer is informative. In the Tribunal's view, the 2005 offer – which was made almost four years prior to the Valuation Date – is too distant to serve as the basis for assessing fair value in July 2009. Market conditions, both generally and in relation to uranium, altered significantly in the period from 2005 to 2009. However, the value of the Claimants' investment in 2005 (USD 124 million) and the value of the proven reserves as estimated in the DFS (net present value of USD 276 million, which would result in the Claimants' investment being valued at USD 171 million) are informative when assessing the adjustment that should be made to the CNNC offer. Both valuations suggest that CNNC would have acquired the investment at a significant discount had its purchase been approved by the relevant Chinese regulatory authorities.
421. Taking all of the above into account, the Tribunal considers that the fair value of the Claimants' investment as at July 2009 is USD 80 million. The Tribunal has applied a 100 percent adjustment factor to the CNNC offer to eliminate the effects of the Respondents' actions post-July 2009. The figure takes into account the considerable challenges and uncertainties that would face a new investor in order to realise the value of the proven reserves at Dornod. It also

takes into account the Claimants' prior investment into the Dornod Project and the fact that considerable further investment would have been needed. The Tribunal considers this figure to provide fair and reasonable compensation to the Claimants for the loss of their investment. It reflects the Tribunal's best and conscientious effort at assessing the fair value of the Claimants' investments immediately prior to the Government's illegal acts.

#### **F. INTEREST**

422. The Respondents do not dispute that, if damages are awarded to the Claimants, the Claimants would be entitled to interest on those damages. The Respondents also do not dispute that the minimum standard on which interest should be awarded is at a "commercially reasonable rate,"<sup>781</sup> the underlying principle being that interest is required to effect "full reparation" for the breach and therefore should be applied from the date of expropriation.<sup>782</sup>
423. The Claimants have argued that they have effectively been forced to take an involuntary loan from the Government and that the Respondents' borrowing rate of 7.14 percent is therefore the appropriate interest rate to apply. The Claimants request interest on a compounding basis.<sup>783</sup>
424. The Respondents state that interest should be simple and awarded at a commercial rate of LIBOR or, at most, LIBOR plus 1 or 2 percent. The Respondents note that the Claimants' approach has been rejected by most ICSID tribunals as not being commercially reasonable.<sup>784</sup>
425. The Tribunal agrees with the Respondents that the interest rate requested by the Claimants is too high and that using Mongolia's borrowing rate is not equivalent to a "commercially reasonable rate." The Tribunal considers that an interest rate based on LIBOR plus a small percentage reflects a commercially reasonable borrowing rate over the relevant period. This view is consistent with recent practice amongst ICSID tribunals and the prevailing scholarly view. It is also consistent with recent practice to compound interest, rather than to award it on a simple basis (as used to be the prevailing view).<sup>785</sup>
426. Taking the above into account, the Tribunal concludes that a commercially reasonable interest rate would be LIBOR plus 2 percent. The Tribunal therefore orders that interest be calculated at a rate of LIBOR plus 2 percent compounded annually from 1 July 2009 until the date of payment of this Award.

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<sup>781</sup> Memorial, ¶ 460.

<sup>782</sup> Memorial, ¶ 458.

<sup>783</sup> Memorial, ¶¶ 458, 461; Reply, ¶ 481.

<sup>784</sup> Statement of Defence, ¶ 482; Rejoinder, ¶¶ 402-403; Respondents' Pre-Hearing Brief, ¶ 156; Respondents' First Post-Hearing Brief, ¶ 128.

<sup>785</sup> See e.g. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No ARB/06/11, Award, 24 September 2012, Exhibit CLA-207; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, Exhibit RL-125 (¶ 129).

## **XI. THE TRIBUNAL'S ANALYSIS ON COSTS**

### **A. INTRODUCTION**

427. As set out at paragraph 283 above, the Claimants have claimed **USD 13,405,158.50** in costs. This amount is broken down as follows:

- (i) Legal costs: USD 6,991,731.82, consisting of legal fees already paid of USD 3,748,171.82, plus a success fee to be paid of USD 3,243,560;
- (ii) Expenses incurred by the Claimants' legal counsel: USD 530,680.20;
- (iii) Expert witness costs (fees and travel): USD 1,112,271.96;
- (iv) Other arbitration expenses paid by the Claimants, including vendor charges and expenses for duplicating, translating, etc., costs associated with counsel, client and witness travel and paying factual witnesses for their time and expenses: USD 269,315.58. This includes payments to Mr. Arsenault of USD 125,661.05, to Ms. Davis of USD 38,650, and to Dr. Jamsrandorj of USD 20,800;
- (v) "Other costs" specified as the costs of keeping the Khan companies running while the arbitration was continuing, including the cost of salaries, accounting services, insurance, office expenses and investor relations: USD 4,093,404.12; and
- (vi) Costs of the arbitration: USD 407,754.82.<sup>786</sup>

### **B. THE UNCITRAL RULES**

428. This arbitration is governed by the UNCITRAL Rules.

429. Article 40 of the UNCITRAL Rules states, in relevant part, that:

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.
2. The term "costs" includes only:
  - (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
  - (b) The reasonable travel and other expenses incurred by the arbitrators;
  - (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
  - (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
  - (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

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<sup>786</sup> Claimants' Submission on Costs, p. 2.



- (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

[...]

430. Article 42 of the UNCITRAL Rules states that:

1. The costs of arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

431. The text of UNCITRAL Rules clearly evidences a presumption in relation to the costs of the arbitration that such costs will follow the event, *i.e.*, that the successful party is entitled to recover from the unsuccessful party the costs of the arbitration which the former has incurred. In relation to the costs of legal representation, no such presumption exists and the Tribunal is free to determine the allocation of such costs at its discretion, subject to the requirement that they are reasonable. Of course, the Tribunal's wide discretion in relation to legal costs includes the discretionary power to order that such costs will also follow the event, *i.e.*, that the amount of the successful party's legal costs will be recovered from the unsuccessful party.

## C. THE TRIBUNAL'S FINDINGS

### 1. Costs of the arbitration

432. In relation to the costs of the arbitration, having considered the Parties' submissions in detail, the Tribunal concludes that there are no extraordinary factors that would cause it to depart from the presumption that costs follow the event. The Claimants were the successful party in the merits phase of the arbitration. There are no countervailing circumstances that suggest that the Claimants should not be compensated for these costs. In particular, the Tribunal does not find that either the Claimants or the Respondents acted inappropriately in their conduct of the arbitration. As such, it is appropriate that costs should follow the event as provided in Article 42 of the UNCITRAL Rules and that the Claimants should be able to recover their share of the costs of the arbitration as the ultimately successful party.

433. The Parties deposited with the PCA a total of EUR 700,000 (EUR 350,000 from each side) for this arbitration. The PCA has determined that the final costs of the arbitration are EUR 634,882.37, including the fees of the arbitral tribunal, which, in accordance with Article 40(2)(a) and Article 41 of the UNCITRAL Rules, are fixed as follows:

- (i) Professor David A. R. Williams Q.C. — EUR 189,006.89;

- (ii) Dr. Bernard Hanotiau — EUR 131,781.13; and
- (iii) The Hon. L. Yves Fortier PC CC OQ QC — EUR 126,999.42.

434. The PCA's fees and expenses for registry services amount to EUR 94,481.72.
435. Other Tribunal costs, including for hearing facilities, court reporters, interpreters, courier expenses, bank costs, communication expenses and supplies, amount to EUR 92,613.21.
436. Accordingly, the costs of the arbitration, including all items set out in paragraphs (a), (b), (c), (d), and (f) of Article 40(2) of the UNCITRAL Rules amount to EUR 634,882.37, or USD 710,510.00.
437. The Tribunal orders that the Claimants' share of the costs of the arbitration (being USD 355,255.00) be borne by the Respondents.
438. The unexpended balance of the deposit shall be returned to the Parties in accordance with Article 43(5) of the UNCITRAL Rules and Section 6.4 of the Terms of Reference.

## **2. Legal and other costs**

439. As noted above, the Tribunal has wide discretion to decide on how to allocate the legal and other costs incurred by the successful party, if at all.
440. The Claimants were largely successful in their claims. Because of this success, the Tribunal, in its discretion, considers that the Claimants should be entitled to recover at least some of their reasonable legal and related costs in the present case.
441. Specifically, the Tribunal finds that the costs claimed by the Claimants in relation to expert evidence (USD 1,112,271.96) are reasonable. The Tribunal also finds that the disbursements incurred by the Claimants' legal counsel (USD 530,680.20) are reasonable. While the Respondents have noted that these disbursements are considerably larger than their own,<sup>787</sup> this is not uncommon in an international arbitration where the claimant often produces a much larger amount of documents and is responsible for preparation of materials for the hearing. The Tribunal therefore orders that the Claimants should be entitled to recover from the Respondents these costs, together amounting to USD 1,642,952.16.
442. The Claimants have also claimed approximately USD 4 million in other costs related to the costs of keeping Khan Canada and related entities running – such as salaries, insurance, office expenses, investor relations costs etc. – while the arbitration was continuing. The Tribunal agrees with the Respondents that these costs do not fall within any of the categories set out in

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<sup>787</sup> Respondents' Letter to the Tribunal, dated 15 April 2014, p. 3.

Article 40 of the UNCITRAL Rules.<sup>788</sup> They are, therefore, not recoverable. In particular, the cost of running these companies is not a “legal and other cost[] incurred by the parties in relation to the arbitration,”<sup>789</sup> as suggested by the Claimants.<sup>790</sup>

443. The Tribunal also does not consider that the cost of time spent by witnesses in preparing witness statements or preparing and attending the hearing is recoverable under Article 40 of the UNCITRAL Rules. The Claimants confirmed that three of their factual witnesses (being those no longer employed by Khan entities) were reimbursed for their time in preparing statements and attending the hearing.<sup>791</sup> These costs amount to USD 185,111.05. The Tribunal finds that the Claimants are not entitled to reimbursement of these costs.
444. Other expenses claimed by the Claimants amount to USD 84,204.53 (being USD 269,315.58 minus USD 185,111.05). The Claimants have stated that these expenses relate to vendor charges, additional duplication costs, translation costs and travel expenses for witnesses, all of which fall within Article 40 of the UNCITRAL Rules.<sup>792</sup> The Tribunal therefore orders that the Claimants are entitled to recover these costs, which it finds reasonable, from the Respondents.
445. The final issue concerns the Claimants’ costs of legal representation. This is an issue only because of the success fee arrangement that the Claimants have entered into with their legal representatives. The Tribunal notes that the time spent by counsel for the Claimants (which would have incurred a fee of approximately USD 5.7 million if it had charged at the firm’s normal rates) is reasonable. This is additionally confirmed by the fact that the time for which this amount is being claimed is similar to that spent by counsel for the Respondents.
446. The Claimants have confirmed that they will be liable to pay the success fee if a favourable award is rendered. A favourable award was said to “involve a decision of the Tribunal confirming the liability of Respondents resulting in an award of damages.”<sup>793</sup>
447. Counsel for the Claimants has provided a redacted copy of the agreed fee arrangement. On the basis of the information before it, the Tribunal is satisfied that the decisions rendered in this Award will result in the Claimants being liable to pay the success fee to its counsel. Although this is not a fee that has been “incurred” to date as required by Article 40(2)(e) of the UNCITRAL Rules, it is a fee that the Claimants have already incurred a legal obligation to pay. The Tribunal thus finds that it is recoverable under this same provision. Moreover, creating a

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<sup>788</sup> Respondents’ Letter to the Tribunal, dated 15 April 2014, p. 1.

<sup>789</sup> Article 40(2)(e) of the UNCITRAL Rules.

<sup>790</sup> Claimants’ Submission on Costs, p. 3.

<sup>791</sup> Claimants’ Letter to the Tribunal, dated 8 May 2014, p. 2.

<sup>792</sup> Claimants’ Submission on Costs, p. 2.

<sup>793</sup> Claimants’ Letter to the Tribunal, dated 8 May 2014, p. 2.

distinction between “incurred and paid” fees and fees for which the liability has been incurred seems artificial, given that the Tribunal could, in theory, render a partial award on liability and quantum, followed by a separate costs award that would include the paid success fee. The same conclusion was reached in *Siag v Egypt*.<sup>794</sup>

448. The Respondents’ primary objection to the success fee was that details of the fee arrangement were not fully disclosed by the Claimants.<sup>795</sup> The Respondents did not object to the legality of the fee arrangement or the reasonableness of the arrangement itself. Although the Respondents retained their disclosure objection following the provision of further information by the Claimants – including the provision of a redacted fee agreement letter – the Tribunal, as noted above, considers that sufficient detail and evidence of the success fee arrangement has now been provided by the Claimants. There is therefore no basis on which the Respondents’ continued disclosure objection can be sustained.
449. As a result, the Tribunal orders that the Claimants are entitled to recover legal costs in the amount of USD 6,991,731.82.
450. In summary, the Tribunal therefore finds and declares that the Claimants are entitled to be paid by the Respondents a total of USD 9,074,143.51, calculated as follows:

Arbitration costs	USD 355,255.00
Expert costs	USD 1,112,271.96
Disbursements	USD 530,680.20
Other costs	USD 84,204.53
Legal costs	USD 6,991,731.82
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Total:	USD 9,074,143.51

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<sup>794</sup> *Waguilh Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009), ¶ 604: “Because of the Claimants’ financial circumstances they had asked, and the Claimants’ counsel had agreed, that the Claimants will pay attorney’s fees only on a successful recovery in this matter. It was argued that since the Claimants were contractually obligated to pay such fees, they should be entitled to an award of fees equal to the value of the time worked by their counsel [even though no fees had yet been paid]” and ¶ 625: the tribunal awarded the claimants their legal costs, which it found to be reasonable.

<sup>795</sup> Respondents’ Letter to the Tribunal, dated 15 April 2014, p. 1-2.

## **XII. DECISION**

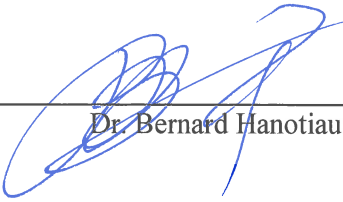
451. For all of the foregoing reasons, and rejecting all submissions and contentions to the contrary, the Tribunal **DECLARES, AWARDS and ORDERS** as follows in respect of the issues arising for determination in these proceedings:

- (i) The Respondents breached Article 8.2 of the Foreign Investment Law by illegally expropriating the Mining License and the Exploration License.**
- (ii) The breach of Article 8.2 of the Foreign Investment Law constitutes a breach by Mongolia of Article 10(1) (the umbrella clause) of the Energy Charter Treaty 1994 in relation to Khan Netherlands' investment in the Exploration License.**
- (iii) The Respondents shall forthwith pay to the Claimants compensation for the breach of the Foreign Investment Law and the Energy Charter Treaty 1994 in the sum of USD 80,000,000.**
- (iv) The Respondents shall forthwith pay to the Claimants interest on the sum awarded in (iii) above at a rate of LIBOR plus 2%, compounded annually, from 1 July 2009 until the date of payment of this Award in full.**
- (v) The Respondents shall forthwith reimburse the Claimants for their share of the costs of the arbitration and for their legal and other reasonable costs incurred in connection with this arbitration, in the amount of USD 9,074,143.51.**

**All other claims and requests for relief by either Party are dismissed.**

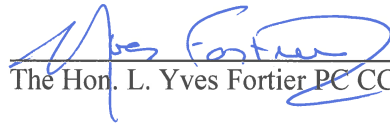
Paris, France

Date: 2 March 2015



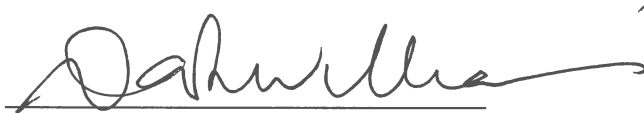
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Dr. Bernard Hanotiau



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The Hon. L. Yves Fortier PC CC OQ QC



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Professor David A. R. Williams QC  
Presiding Arbitrator