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

DECISION ON JURISDICTION

Tribunal

Dr. Bernard Hanotiau
Maître L.Yves Fortier CC, OC, QC
Mr. David A.R.Williams QC, Presiding Arbitrator

Representatives of the Claimants

Ian A. Laird
Ashley Riveira
Henry G. Burnett
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
United States of America

Representatives of the Respondents

Michael Davison
Laurent Gouiffès
Markus Burgstaller
Thomas Kendra
Hogan Lovells (Paris) LLP
6, avenue Kléber
75116 Paris
France

Registry

Permanent Court of Arbitration

DEFINED TERMS

2010 MOU	Memorandum of Understanding between Khan Canada and MonAtom, 22 January 2010
Administrative Court	Capital City Administrative Court, Ulaanbataar, Mongolia
Amto	*Amto LLC v. Ukraine*, SCC Case No. 080/2005, Final Award of 26 March 2008
Burlington	*Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction of 2 June 2010
CAUC	Central Asian Uranium Company Ltd., a Mongolian company
CAUC Holding	CAUC Holding Company Ltd., a company organized under the laws of the British Virgin Islands
Charter	Charter of CAUC, 6 June 1995
Civil Code	Civil Code of Mongolia, 2002
The Claimants (or Khan)	CAUC Holding, Khan Canada, and Khan Netherlands
Company Law	Law of Mongolia on Company, 1999
Contracting Party	A state which has accepted to be bound by the Treaty and for which the Treaty is in force
Counter-memorial	The Claimants' Counter-memorial on Jurisdiction, 3 February 2012
Dornod Project	Uranium exploration and extraction project pursued by CAUC in the Mongolian province of Dornod
Dow Chemical	*Dow Chemical France, The Dow Chemical Co. and others v. ISOVER Saint Gobain*, ICC Case No. 4131, Interim Award of 23 September 1982
ECT (or Treaty)	Energy Charter Treaty, 1994
Edey Statement	Witness Statement of Grant A. Edey, CEO of Khan Canada, 3 February 2012
Erdene	Mongol-Erdene, a Mongolian company

Exploration License	Mineral Resources and Petroleum Authority Certificate of Mineral Exploitation License 9282X
FIFTA	Foreign Investment and Foreign Trade Agency, Mongolia
Foreign Investment Law	Foreign Investment Law of Mongolia, 1993
Founding Agreement	Founding Agreement for the Creation of Company with Limited Liability "CAUC", 6 June 1995
Government (or Mongolia)	The Government of Mongolia
July 2009 Report	SSIA Report No. 08/01/1699 re: Temporary Suspension of Mineral Licenses, 10 July 2009
Khan (or the Claimants)	CAUC Holding, Khan Canada, and Khan Netherlands
Khan Bermuda	Khan Resources Bermuda Ltd, a Bermudan company
Khan Canada	Khan Resources Inc., a Canadian company
Khan Mongolia	Khan Resources LLC., a Mongolian company
Khan Netherlands	Khan Resources B.V., a Dutch company
Letter to the Prime Minister	Letter from Mr. Martin Quick, CEO of Khan Canada, to Mr. Sukhbaatar Batbold, Prime Minister of Mongolia, 15 April 2010
LSLP	Law on State and Local Government Property of Mongolia, 1996
Memorial	The Respondents' Memorial on Jurisdiction, 3 December 2011
Minerals Agreement	Agreement on Development of Mineral Deposits in Eastern Aimak (Province) of Mongolia between WM Mining, Priargunsky, and Erdene, 3 June 1995
Mining and Exploration Licenses	The Mining License and the Exploration License
Mining License	Mineral Resources and Petroleum Authority Certificate of Mineral Exploitation License Number 237A
MonAtom	MonAtom LLC, a Mongolian company

Mongolia (or the Government)	The Government of Mongolia
MRAM	Mineral Resources Agency of Mongolia
NEA	Nuclear Energy Agency, Mongolia
NEL	Nuclear Energy Law of Mongolia, 2009
Notice of Arbitration	The Claimants' Notice of Arbitration, 10 January 2010
PCA	Permanent Court of Arbitration
Pantechniki	*Pantechniki S.A.Contractors and Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009
Parties	The Claimants and the Respondents
Petrobart	*Petrobart Limited v. Kyrgyz Republic*, SCC No. 126/2003, Award of 29 March 2005
Phoenix	*Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 9 April 2009
Plama	*Plama Consortium v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005
***Plama* Award on the Merits**	*Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008
Priargunsky	Priargunsky Production Mining and Chemical Enterprise, a Russian company
Rejoinder	The Claimants' Rejoinder on Jurisdiction, 23 April 2012
Reply	The Respondents' Reply Memorial on Jurisdiction, 14 March 2012
Respondents	Mongolia and MonAtom
Salini	*Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 16 July 2001
SPC	State Property Committee, Mongolia
SSIA	State Specialized Inspection Agency, Mongolia

Tsogt Report	Expert Report on Mongolian Law by Tsogt Natsagdorj, 24 January 2012
Treaty (or ECT)	Energy Charter Treaty, 1994
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules, 2010
VCLT	Vienna Convention on the Law of Treaties, 1969
Vivendi	*Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002
Woodruff	*Woodruff Case*, 1903-1905
WM Mining	WM Mining Inc, a Colorado, United States company
Yukos	*Yukos Universal Limited (Isle of Man) v. the Russian Federation*, PCA Case No. 227, Interim Award on Jurisdiction and Admissibility of 30 November 2009

CONTENTS

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 Messrs. Ian A. Laird and Henry G. Burnett, 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, 61, avenue Kléber, 75116 Paris, France.

II. PROCEDURAL HISTORY

3. 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 ("**Founding Agreement**"),[1] 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**"),[2] and Article 3 of the 2010 Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Rules**").[3]

4. In the Notice of Arbitration, the Claimants appointed Maître L. Yves Fortier CC, OC, 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 Mr. David A. R. Williams QC as the presiding arbitrator.

5. On 13 July 2011, following an exchange of correspondence between the Parties in May and June 2011, and a procedural telephone conference on 22 June 2011, the Tribunal circulated for the Parties' comments the minutes of the procedural conference, the draft Terms of Appointment, and a draft Procedural Order No.1. The Tribunal also informed the Parties of the appointment of Mr. Epaminontas Triantafilou, Legal Counsel at the Permanent Court of

---

1 Exhibit R-1/ C-16A.

2 Exhibit CLA-8/ R-17.

3 Notice of Arbitration, paras. 12-13.

Arbitration ("**PCA**"), as Secretary to the Tribunal.[4] Mr. Triantafilou confirmed his independence and impartiality by letter dated 14 July 2011. By e-mail dated 4 May 2012, the Tribunal appointed Ms. Olga Boltenko, Legal Counsel at the PCA, to replace Mr. Triantafilou as Secretary to the Tribunal as of 1 June 2012.

6. On 21 July 2011, the Respondents submitted their Memorandum on Bifurcation.

7. On 26 July 2011, the Tribunal issued Procedural Order No. 1, setting forth, among other procedural matters, a timetable for submissions and a date for the hearing on bifurcation of the proceedings.[5]

8. On the same date, the Tribunal circulated a finalized version of the Terms of Appointment to the Parties. 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.[6]

9. The Parties elected English as the language of arbitration and Paris as the place of arbitration. The PCA was chosen to act as Registry.[7]

10. In accordance with Procedural Order No. 1, the Parties made submissions on bifurcation in the course of July, August, and September 2011. A hearing on bifurcation was held on 19 September 2011 in Paris. The Parties submitted post-hearing briefs on bifurcation on 26 September 2011.

11. By letter dated 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

---

[4] The Parties had previously agreed to case administration by the PCA and to the appointment as Secretary to the Tribunal of a member of the PCA's staff: see the Claimants' e-mail to the Tribunal of 30 June 2011 and the Respondents' e-mail to the Tribunal of 1 July 2011.

[5] Procedural Order No. 1, para. 2.

[6] Terms of Appointment, para. 4.

[7] Terms of Appointment, paras. 7, 9-10.

Respondents' remaining objections to jurisdiction in a separate jurisdictional phase, according to the schedule set forth in Section 3A of Procedural Order No. 1."

12. 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, 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.

14. On 2 December 2011, the Respondents submitted their Memorial on Jurisdiction ("**Memorial**").

15. On 6 February 2012, the Claimants submitted their Counter-memorial on Jurisdiction ("**Counter-memorial**"), together with the witness statement of Mr. Grant A. Edey ("**Edey Statement**") and the expert report on Mongolian law of Mr. Tsogt Natsagdorj ("**Tsogt Report**").

16. On 14 March 2012, the Respondents submitted their Reply Memorial on Jurisdiction ("**Reply**").

17. On 23 April 2012, the Claimants submitted their Rejoinder Memorial on Jurisdiction ("**Rejoinder**"). On 4 May 2012, the Claimants filed Exhibit C-121, which had come into existence after the Rejoinder was submitted.

18. In early May, the Parties corresponded and agreed on most of the logistical arrangements for the hearing on jurisdiction scheduled for 14 May 2012. On 11 May 2012, the Tribunal issued Procedural Order No. 3, confirming the agreed arrangements and ruling that "the party calling the witness would in first instance bear the cost of the interpreter."[8] In Annex A to Procedural Order No. 3, the Tribunal listed, without in any way limiting the right of counsel to present their cases as they saw fit, issues that the Tribunal suggested deserved particular attention at the hearing.

19. A hearing on jurisdiction was held at the ICC Hearing Center in Paris on 14 May 2012. Present at the hearing were:

Tribunal: Dr. Bernard Hanotiau

[8] Procedural Order No. 3, para. 1.3.

	Maître L.Yves Fortier CC, OC, QC Mr. David A.R.Williams QC
The Claimants:	Mr. Ian A. Laird, Crowell & Moring LLP Mr. Henry G. Burnett, Crowell & Moring LLP Ms. Ashley Riveira, Crowell & Moring LLP Ms. Kassi Talent, Crowell & Moring LLP Ms. Staci Gellman, Crowell & Moring LLP Mr. Grant A. Edey, Khan Canada Mr. Tsogt Natsagdorj, Bona Lex LLC (expert witness)
The Respondents:	Mr. Laurent Gouiffès, Hogan Lovells LLP Mr. Thomas Kendra, Hogan Lovells LLP Mr. Markus Burgstaller, Hogan Lovells LLP Ms. Melissa Ordonez, Hogan Lovells LLP Ms. Marie Bouchard, Hogan Lovells LLP Mr. Bayasgalan Gunjaa, Government of Mongolia Mr. Tsogtsaikhan Gombo, MonAtom Mr. Bayamanla Manaljav, GTs Advocates
Registry:	Mr. Epaminontas Triantafilou, PCA Ms. Olga Boltenko, PCA

20. Mr. Tsogt Natsagdorj, the Claimants' expert on Mongolian law, was cross-examined. A full transcript of the hearing was made by court reporter Ms. Yvonne Vanvi, and circulated to the Tribunal and the Parties on 16 May 2012.

III. FACTUAL BACKGROUND

A. THE DORNOD PROJECT

21. 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 located in Dornod, a province in the north-east of Mongolia.[9] 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.[10]

22. Around the same time, Priargunsky and the Mongolian state-owned company Mongol-Erdene ("**Erdene**") formed a joint venture known as the Central Asian Uranium Company ("**CAUC**") with the U.S. company WM Mining Inc. ("**WM Mining**"), in order to develop a uranium exploration and extraction project in Dornod ("**Dornod Project**").

23. The founders of CAUC executed three following documents: (i) the Founding Agreement, (ii) the Agreement on Development of Mineral Deposits in Eastern Aimak of Mongolia

[9] Memorial, para. 13; Counter-memorial, paras. 36, 38; Hearing Transcript 16:10-13.

[10] Counter-memorial, para. 36.

("**Minerals Agreement**"), and (iii) the Charter of the Company with Limited liability "Central Asian Uranium Company of Mongolia of the Mongolian-Russian-American Venture" ("**Charter**").[11] The Minerals Agreement was also signed by an authorized representative of the Mongolian Ministry of Energy, Geology, and Mining.[12] Under these agreements, WM Mining undertook to contribute financial capital to the Dornod Project.[13]

24. Initially, each of the three parties held an equal 33.3 percent share of the joint venture. On 12 December 1996, WM Mining's participation in CAUC was increased to 58 percent with Erdene and Priargunsky each maintaining a 21 percent share.[14] Thereafter, Erdene's share in CAUC 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.[15] MonAtom itself was incorporated in 2009.[16]

25. In July 1997, WM Mining transferred its shares to the British Virgin Islands company World Wide Mongolia Mining Inc.[17] This company was acquired by Khan Canada on 30-31 July 2003, through Khan Canada's newly incorporated wholly-owned subsidiary Khan Resources Bermuda Ltd ("**Khan Bermuda**").[18] Khan Canada had been incorporated in Ontario, Canada on 1 October 2002, with the sole purpose, according to the Claimants, of investing in Mongolia.[19] Following Khan Canada's acquisition of World Wide Mongolia Mining Inc., the latter was renamed CAUC Holding on 28 April 2004.

26. 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, in turn the wholly owned subsidiary of Khan Canada, held the remaining 58 percent share in CAUC.

27. 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.[20] Originally, all of the shares in Khan Mongolia were held by Khan Bermuda.

---

[11] Counter-memorial, paras. 40, 42, referring to Exhibits C-17a-c, C-18a-b.

[12] Hearing Transcript 17:10-19, referring to Exhibit C-17A.

[13] Memorial, para. 14; Counter-memorial, para. 38.

[14] Memorial, para. 15; Counter-memorial, para. 65.

[15] Counter-memorial, paras. 56, 62, 68.

[16] Hearing Transcript 10:19-21.

[17] Counter-memorial, para. 65.

[18] Counter-memorial, paras. 84-85.

[19] Counter-memorial, para. 81; Hearing Transcript 18:11-13.

[20] Counter-memorial, para. 86; Hearing Transcript 18:16-17.

28. On 5 September 2007, Khan Canada incorporated Khan Netherlands for the specific purpose of holding Khan Mongolia.[21] On 29 May 2008, the Foreign Investment and Trade Agency of Mongolia ("**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.[22]

29. On 10 November 1998, the joint venture company CAUC obtained the mineral exploration license 237A ("**Mining License**"), which allowed CAUC to engage in the exploitation of radioactive mineral resources on a specific area of land in the Dornod region.[23]

30. On 22 April 2005, Khan Mongolia, then wholly-owned by Khan Canada through Khan Bermuda, obtained the mineral exploration license 9282X ("**Exploration License,**" collectively with the Mining License, the "**Mining and Exploration Licenses**"), which allowed it to conduct radioactive mineral exploration within the boundaries of an area of land neighbouring the one covered by the Mining License.[24]

31. 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 "lure foreign investment to the country" by creating "the appearance of a positive investment environment by enacting laws and entering contracts that, at least on their face, promise a high level of protection to foreign investors."[25]

32. In reply, the Respondents state that the allegation that Mongolia sought to lure investment by a deceptive foreign policy is neither credible not substantiated. After its transition into democracy

---

[21] Counter-memorial, para. 123. At the hearing, the Respondents stated that Khan Netherlands was incorporated on 4 January 2008, referring to the date of an excerpt of the Amsterdam Chamber of Commerce trade register; however, this document also states that the date of the "incorporation deed" is 5 September 2007 (Hearing Transcript 22:4-5; Exhibit C-116a/C-116b).

[22] Counter-memorial, paras. 123-124, referring to Exhibit C-99; Hearing Transcript 15:15-16:2.

[23] Memorial, para. 17, referring to Exhibit R-4; Counter-memorial, paras. 115-116.

[24] Memorial, para. 20, referring to Exhibit R-6; Counter-memorial, para. 120. While observing that this is not relevant to the Tribunal's determination on jurisdiction, the Claimants argue in their Counter-memorial that, contrary to the Respondents' assertion, the areas covered by the Mining and Exploration Licenses are not "two distinct, albeit adjacent projects," but "a single mining project," which came to be known under two names and covered by two mining licenses due to a surveying error. Accordingly, the Claimants submit that Khan Canada acquired the Exploration License "for the purpose of benefiting all of the joint venture partners," with the intention to "merge" the Mining and Exploration Licenses in due course. At the hearing, the Claimants referred to Exhibit C-39, the minutes of a CAUC shareholders' meeting, noting that Khan Canada would have to include the Exploration License to ensure the "effective, efficient and sustainable operation" of the project (Hearing Transcript 146:24-149:8). In their Rejoinder, the Claimants further argue that the Respondents' failure to include any documentary evidence or rebuttal on this matter in their Reply should preclude any further attempts by the Respondents to describe the Mining and Exploration Licenses as unrelated or unconnected (Counter-memorial, paras. 111-122; Rejoinder, paras. 28-29).

[25] Counter-memorial, paras. 25-34.

in 1990, Mongolia spent considerable time and effort to encourage foreign investment. It now benefits from a good reputation among investors. In this context, Mongolia continues "to act lawfully and in full legitimacy."[26]

B. THE CLAIMANTS' INVESTMENT IN THE DORNOD PROJECT

33. The Parties disagree on the extent to which the Claimants invested in the Dornod Project.[27]

34. The Respondents argue that the Claimants have not carried out any ore production at the sites covered by the Exploration and Mining Licenses, and that, once Khan Canada obtained an indirect shareholding in CAUC, it "floated its shares on the Toronto Stock Exchange in 2008, generating millions of dollars in capital," the benefit of which was never seen in Mongolia.[28]

35. According to the Respondents, the Claimants' contention that they invested over USD 50 million in the project is not borne out by the thousands of pages of factual evidence they have produced. The Respondents argue that the Claimants have in fact made inconsistent estimates of the value of their investment.

36. The Respondents note that Khan Canada's 2007 Annual Report states that Khan Canada did not intend to make any substantial investments until an investment agreement was concluded with Mongolia. This was confirmed by Mr. Martin Quick, Khan Canada's then President and C.E.O., in an interview following Khan Canada's entry on the Toronto Stock Exchange.[29] In 2010, the Claimants claimed before the Mongolian Capital City Administrative Court ("**Administrative Court**") to have made an investment of more than USD 10 million. In a letter sent in April 2010 to the Mongolian Prime Minister, the Claimants' valuation of their investment had increased to USD 20 million. In this arbitration, the Claimants seek compensation in the amount of USD 200 million.[30]

37. As for the surveys allegedly carried out by the Claimants, the Respondents assert that the resulting reports either repeated or copied information collected during the period when Priargunsky operated the Dornod site.[31]

---

[26] Reply, paras. 42-45.

[27] The Respondents emphasise that they do not consider the issue of valuation of the Claimants' investment to be pertinent to the jurisdictional phase of these proceedings, but nonetheless address this issue in their submissions.

[28] Memorial, paras. 5, 19, 31.

[29] Hearing Transcript 21:1-22:2.

[30] Reply, paras. 31-36.

[31] Reply, paras. 37-41, referring to Exhibit C-50.

38. By contrast, the Claimants allege that, starting in 2004, Khan made "considerable and significant progress on the exploration and development" of the Dornod Project.[32] Initially, the Claimants spent time raising money through private investment fundings and on the Toronto Stock Exchange, and complying with Mongolian legal and regulatory requirements necessary for Khan Canada to acquire the CAUC shares.[33] The Claimants allege that Khan then spent more than USD 50 million toward the Dornod Project, and contributed valuable intellectual capital and technical expertise.

39. The Claimants contend that when Khan Canada joined the project, the joint venture was running on a "care and maintenance" basis, and could not move forward without Khan Canada's financial and technical investment.[34]

40. The Claimants emphasize that Khan Canada's 2011 consolidated audited financial statements confirm a cumulative deficit (from 1 October 2002 to 30 September 2011) of USD 46,438,000. Combined with Khan Canada's long-term assets of over USD 15 million (capital assets plus mineral interests), the amount expended on the Dornod Project is well in excess of USD 50 million.[35]

41. In particular, Khan confirmed the existence and extent of the uranium reserves in the Dornod site by conducting a magnetometer and gravity survey, as well as an extensive program of drilling and metallurgical testing, beginning in early 2005.[36]

42. Khan also assessed and refined the economic and technical parameters necessary to determine the economic viability of the project by conducting four "difficult, time-consuming, and costly" studies providing an extensive analysis of, among other, the resources and reserves at the site and the costs and methodologies required to exploit the mine in an economically feasible manner.[37]

43. In addition, Khan retained and funded expert firms to conduct various environmental and social assessments, and devoted funds to infrastructure construction in Mongolia.[38] The Claimants add

---

[32] Counter-memorial, para. 86.

[33] Counter-memorial, paras. 86, 93; Rejoinder, para. 27.

[34] Counter-memorial, para. 89.

[35] Rejoinder, para. 36, referring to Exhibit C-114.

[36] Counter-memorial, para. 94, referring to Exhibit C-50.

[37] The studies are the "Amended NI 43-101 Report on the Dornod uranium project" (September 2005), the "Scoping Study" (2006), the "Pre-Feasibility Study" (August 2007), and the "Definitive Feasibility Study" (May 2009) (Counter-memorial, paras. 95-97, referring to Exhibits C-50, C-58, C-59, C-60, C-61.)

[38] Counter-memorial, para. 98; Hearing Transcript 97:22-98:11.

that they have shared all their reports and studies with Mongolia.[39]

44. With regard to the Respondents' allegation that the Claimants' exploration work reproduced surveys carried out when Priargunsky operated the Dornod site, the Claimants 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 was performed to verify and expand upon the data collected by Priargunsky. Moreover, according to the Claimants, Priargunsky had neither conducted any social and environmental impact assessments, nor developed mining plans or engineered processing and support facilities.[40]

45. 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 results with Mongolia.[41]

C. THE INVALIDATION OF THE MINING AND EXPLORATION LICENSES

46. In April 2005 and April 2009, the State Specialised Inspection Agency of Mongolia ("**SSIA**") inspected the Dornod site. In July 2009, the SSIA issued a report raising a number of alleged violations of Mongolian law by CAUC in connection to its mining operations in Dornod ("**July 2009 Report**"). The same month, the MRAM informed CAUC that the Mining License was temporarily suspended due to the results of the 2009 SSIA inspection and, in the Respondents' view, to Khan's failure to remedy the alleged legal violations.[42]

47. In September 2009, Khan challenged the temporary suspension of the Mining License before the Administrative Court. However, the case was settled "pursuant to an agreement reached between CAUC and the MRAM, in connection with the negotiation of the 2010 Memorandum of Understanding," subsequently entered into by Khan Canada and MonAtom on 22 January 2010 ("**2010 MOU**").[43]

48. On 8 October 2009, the Mongolian Nuclear Energy Agency ("**NEA**") issued Decree No. 141, suspending the Mining and Exploration Licenses.[44] The NEA had been created a few months

---

[39] Counter-memorial, para. 100; Rejoinder, para. 33, referring to Exhibits C-64, C-65.

[40] Rejoinder, paras. 30-31.

[41] Counter-memorial, para. 100; Rejoinder, para. 32.

[42] Memorial, paras. 23-25, referring to Exhibits R-8, R-9; Counter-memorial, paras. 133-134; Hearing Transcript 19:11-14, 22:18-25.

[43] Counter-memorial, para.135, referring to Exhibit C-86; see also Exhibit C-4.

[44] Memorial, para. 26.

earlier under the Nuclear Energy Law of Mongolia ("**NEL**"), which came into effect on 15 August 2009.[45]

49. The NEL was enacted for the purpose of "regulating exploitation of radioactive minerals and nuclear energy in the territory of Mongolia for peaceful purposes, ensuring nuclear and radioactive safety and protecting population, society, and the environment from adverse effects of ionizing radiation."[46] According to the NEL, Mongolia was to take ownership, without compensation, of "no less that 51 percent of stake in the joint company, where exploration and determination of [uranium] reserve have been conducted with state budget." [47]

50. According to the Respondents, Decree No. 141 suspended 149 uranium exploration and exploitation licenses, pending confirmation from the NEA of their re-registration under the NEL.[48]

51. The Claimants contend that the Mining and Exploration Licenses should have been re-issued pursuant to the 2010 MOU. The 2010 MOU also provided that MonAtom would henceforth own 51 percent of CAUC in compliance with the NEL.[49]

52. On 15 March 2010, a governmental "Inspection Group" issued a report setting forth alleged violations of Mongolian law concerning the Mining and Exploration Licenses. On 9 April 2010, the NEA issued notices to both CAUC and Khan Mongolia, stating that their respective Mining and Exploration Licenses were invalidated.

53. On 15 April 2010 and 23 April 2010 respectively, Khan Mongolia and CAUC each commenced proceedings against the NEA before the Administrative Court to challenge the invalidation of the Mining and Exploration Licenses.[50]

54. On 19 July 2010, in the proceedings initiated by CAUC, the Administrative Court rendered a decision with regard to the Mining License, stating that its invalidation was "clearly unlawful."[51] This decision was confirmed on appeal by the Appellate Court of the Administrative Chamber of the Supreme Court of Mongolia on 13 October 2010.[52]

---

[45] Memorial, para. 26.

[46] Memorial, para. 26, quoting Exhibit R-11.

[47] Counter-memorial, paras. 136, 139, referring to Exhbit RL-11, Arts. 5.2, 5.3.

[48] Memorial, para. 26; Hearing Transcript 22:20-24.

[49] Counter-memorial, para. 138.

[50] Memorial, para. 27; Counter-memorial, para. 162.

[51] Counter-memorial, para. 164, quoting Exhibit R-25.

[52] Counter-memorial, para. 164.

55. On 2 August 2010, in the proceedings initiated by Khan Mongolia, the Administrative Court rendered a decision with regard to the Exploration License, stating that its invalidation was "clearly invalid."[53]

56. According to the Respondents, the Administrative Court found that certain "formal administrative" procedures had not been correctly followed but "did not cast any doubt upon the suspension of the Mining and Exploration Licenses pending re-registration in accordance with the NEL."[54]

57. In the Respondents' view, since the challenges by CAUC and Khan Mongolia before the Administrative Court did not extend to the substance of the allegations of regulatory breaches made against them, the Claimants "were found to have been in violation of numerous different provisions of the regulations."[55] Moreover, the decisions of the Administrative Court confirm that Mongolia did not act discriminatorily, as CAUC and Khan Mongolia were only two among many license holders whose licenses were suspended.[56]

58. The Parties agree that the Mining and Exploration Licenses were not re-issued after the purported April 2010 invalidation. The Respondents explain that Mongolia could not re-issue the licenses because of the outstanding alleged breaches of Mongolian regulations by CAUC and Khan Mongolia.[57]

59. According to the Claimants, the purpose of the inspections, license suspensions, and license revocations carried out in 2009 and 2010 against Khan was to expel Khan from the CAUC joint venture in order to allow for a strictly Mongolian-Russian joint venture to develop Mongolia's uranium projects in the Dornod region.[58]

60. In this respect, the Claimants allege that after Mr. Kiryenko, General Director of RosAtom, the Russian state nuclear agency, and ultimate owner of Priargunsky, visited the Dornod site in May 2008, the press reported in January 2009 on an announcement by Mr. Kyrienko and then Mongolian Prime Minister Mr. S. Bayer of plans to create a new Mongolian-Russian joint venture.[59]

---

[53] Counter-memorial, para. 163, quoting Exhibit C-13/R-26.

[54] Memorial, para. 28; Reply, paras. 52-55.

[55] Reply, paras. 46-48.

[56] Reply, para. 51.

[57] Memorial, para. 27.

[58] Counter-memorial, para. 130.

[59] Counter-memorial, paras. 125-127.

61. Furthermore, during a visit by 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."[60] According to the Claimants, Mongolia thus announced its intention to oust Khan from the Dornod Project.[61]

D. EVENTS SUBSEQUENT TO THE INVALIDATION OF THE MINING AND EXPLORATION LICENSES

62. The Parties provide divergent accounts of the events following the April 2010 invalidation of the Mining and Exploration Licenses.

63. The Claimants allege that they sought to resolve the dispute amicably, in particular through a letter sent on 15 April 2010, 6 days after the Mining and Exploration Licenses were invalidated, by Mr. Quick to the Mongolian Prime Minister Mr. Sukhbaatar Batbold ("**Letter to the Prime Minister**").[62]

64. The Claimants also refer to trips made by Mr. Quick, Mr. Edey, who replaced Mr. Quick as President and CEO of Khan Canada as of 10 June 2010, and other representatives of Khan Canada to Mongolia to meet with Mr. Ragchaa Badamdamdin, the Chairman and CEO of MonAtom, and other Mongolian representatives in April, June, and October 2010.[63]

65. According to the Claimants, during these visits to Mongolia Mr. Badamdamdin repeatedly advised Khan Canada that the Director of the NEA, Mr. Sodnom Enkhbat, "was resolutely opposed to Khan's participation in the Dornod Project, and was unlikely to engage in any settlement discussions."[64]

66. The Claimants further contend that during a meeting in October 2010 between Mr. Edey and representatives of the NEA, the SPC, and MonAtom, Mr. Enkhbat was "extremely antagonistic toward Khan," convincing Mr. Edey of the futility of Khan's efforts to achieve amicable dispute resolution.[65] The Claimants also note that Mr. Enkhbat made numerous vitriolic and public attacks against Khan in the press, supporting Khan's conclusion that amicable resolution of the dispute was not possible.[66]

---

[60] Counter-memorial, para. 128, quoting Exhibit C-80.

[61] Counter-memorial, para. 130; Hearing Transcript 94:25-95:6.

[62] Counter-memorial, paras. 150-151, referring to Exhibit C-15.

[63] Counter-memorial, paras. 152-155.

[64] Counter-memorial, paras. 152-153.

[65] Counter-memorial, para. 155.

[66] Counter-memorial, paras. 156-161.

67. The Respondents, in turn, state that the Claimants have not attempted to rectify their breaches of Mongolian law preventing the re-issuance of the Mining and Exploration Licenses.

68. Instead, the Respondents argue, the Claimants tried to put pressure on them by commencing court proceedings in Ontario against Atomredmetzoloto JSC, the owner of Priargunsky, embarking on an "aggressive publicity campaign against Mongolia, publishing correspondence directed at intimidating Mongolia," and commencing and rendering highly public these international arbitration proceedings.[67]

IV. LEGAL PROVISIONS RELEVANT TO THE DISPUTE

69. Article 12 of the Founding Agreement provides, in relevant part:

> Arbitration and Resolution of Disputes
>
> 12.1 Governing Law
>
> (i) This Agreement will be governed by and construed in accordance with Mongolian laws; provided, that if any dispute between the parties is submitted to arbitration pursuant to paragraph 12.2 hereof and the arbitrators determine that there exists no provision of any Mongolian law applicable to the issues under dispute, such issue shall be governed by and construed in accordance with Australian law, without regard to conflicts of law principles.
>
> . . .
>
> 12.2 Arbitration
>
> Disputes between the parties arising out of, or in connection with, any provisions of this agreement or the interpretation thereof shall be settled in the first instance by good faith negotiation. If amicable settlement cannot be reached within 90 days of the notice by the party claiming the existence of a dispute, the matter under dispute will be referred to binding arbitration in accordance with UNCITRAL arbitration rules.

70. Article 26 of the ECT provides, in relevant part:

> Settlement of Disputes Between an Investor and a Contracting Party
>
> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
> (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
> (c) in accordance with the following paragraphs of this Article.
>
> (3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

---

[67] Memorial, paras. 6, 30.

> (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).
> (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.
> (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

71. Article 25 of the Foreign Investment Law provides:

> Settlement of Disputes
>
> Disputes between foreign investors and Mongolian investors as well as between foreign investors and Mongolian legal or natural persons on the matters relating to foreign investment and the operations of the foreign invested business entity shall be resolved in the Courts of Mongolia unless provided otherwise by international treaties to which Mongolia is a party or by any contract between the parties.

V. THE PARTIES' ARGUMENTS

The Respondents' position

72. The Respondents submit that the Claimants, aware of the "weak legal footing of their complaints," have conflated "various different claims, claimant entities, and legal bases," bringing their claim under various legal instruments and multiplying claimant parties. According to the Respondents, "when properly deconstructed," it becomes clear that the Claimants have no basis on which to bring any of their claims and accordingly the Tribunal has no jurisdiction to hear them.[68]

The Claimants' position

73. According to the Claimants, the Respondents' assertion that the Claimants fail to explain which claimant entities are bringing which claims is "illogical" and an "attempt to create chaos where none exists," given that the Claimants have clearly stated in their Notice of Arbitration that Khan Canada and CAUC Holding are bringing claims under Article 12 of the Founding Agreement and that Khan Netherlands is bringing claims under Article 26 of the ECT, while all Claimants are invoking Article 25 of the Foreign Investment Law.[69]

---

[68] Memorial, paras. 7-8; Reply, para. 135.

[69] Rejoinder, para. 42, referring to Notice of Arbitration, para. 13.

A. BURDEN OF PROOF

The Respondents' position

74. The Respondents submit that all facts relevant to determining jurisdiction must be "considered in full and proved at the jurisdiction[al] stage."[70] The Respondents reject the Claimants' position that at the jurisdictional stage of the proceedings the Claimants' factual assertions must be taken *pro tem* by the Tribunal, once the Claimants have made a *prima facie* case.[71]

75. In the Respondents' view, the Claimants misconstrue the *prima facie* test by failing to distinguish between facts that bear on jurisdiction and facts that bear on the merits. To apply the test correctly, as explained in *Phoenix Action v. Czech Republic* ("***Phoenix***"), the Tribunal must "look into the role . . . facts play either at the jurisdictional or at the merits level. . . . If the alleged facts are facts that, if proven, would constitute a violation of the relevant [treaty], they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, *if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage*."[72]

76. The Respondents submit that because the purpose of the present proceeding is to "definitively determine whether the Tribunal has jurisdiction to hear the claims brought before it," both Parties must be given the opportunity to present their version of the facts related to jurisdictional issues, none of them being taken *pro tem*.[73] The contrary would defeat the purpose of bifurcating the proceedings.[74]

77. The Respondents dispute the Claimants' contention that the "fundamental principles of justice, fairness, and equality between the parties" require that the Claimants' version of the facts be accepted by the Tribunal, arguing instead that accepting the Claimants' version of the facts *pro tem* would impede the Respondents' right to be heard on the jurisdictional issues.[75]

78. Finally, according to the Respondents, none of the authorities cited in the Claimants' Counter-memorial support their position. Thus, the reasoning in *Glamis Gold Ltd. v. United States* applies solely to decisions on requests for bifurcation, not to the consideration of issues of jurisdiction after bifurcation is granted, and the dissent of Judge Higgins in *Oil Platforms*

---

[70] Hearing Transcript 27:11-14.

[71] Memorial, para. 12, n. 4; Reply, paras. 11-12.

[72] Reply, paras. 14-15, 26, quoting Exhibit CLA-51/RL-17, *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 9 April 2009, paras. 60-61 [emphasis added by the Respondents].

[73] Reply, paras. 13, 16, 25.

[74] Reply, paras. 24-25.

[75] Reply, paras. 17-18.

(Islamic Republic of Iran v. United Stated of America) refers only to the facts related to the merits.[76]

79. The Respondents argue that, contrary to the Claimants' assertion, they have advanced a version of the facts relevant to the determination on jurisdiction. According to the Respondents, if these facts also have a bearing on the merits of the case, this "does not cause the fundamental and irremediable injustice that the Claimants contend."[77]

80. Further, the Respondents specify that the Claimants bear the burden of proving all the facts relevant to jurisdiction, as "[t]here is no presumption of jurisdiction, particularly where a sovereign state is involved."[78]

The Claimants' position

81. In their written submissions, the Claimants assert that they must make a *prima facie* case on jurisdiction, while the Respondents bear the burden of proving the facts on which their jurisdictional objections rely. To this effect, the Claimants rely on Article 27(1) of the UNCITRAL Rules, which provides that "[e]ach party shall have the burden of proving the facts relied on to support its claim or defence," and the principle of *actori incumbit probatio*, "long recognized as the fundamental rule governing the burden of proof before international courts and tribunals."[79]

82. At the hearing, the Claimants further explained that the party asserting the affirmative of a proposition bears the initial burden of proof, "which then shifts to the party making the contrary view."[80] In application of this principle, the Claimants bear the initial burden of proving that (i) Khan Canada is a party to the Founding Agreement; (ii) Mongolia is a party to the Founding Agreement; and (iii) the Tribunal has jurisdiction *ratione materiae* over claims brought under the Founding Agreement. The Respondents must rebut these propositions. With respect to the claims brought under the ECT, the Claimants bear the initial burden of showing that the general jurisdictional requirements of the ECT have been met, while the Respondents bear the burden

---

[76] Reply, paras. 21-23, referring to Counter-memorial, para. 171, Exhibit CLA-1, *Glamis Gold Ltd. v. United States*, Procedural Order No.2, 31 May 2005, para. 12(a), Exhibit CLA-52, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, 12 December 1996, Separate Opinion of Judge Higgins, pp. 856-857; Hearing Transcript 26:9-25.

[77] Reply, paras. 11, 19-20.

[78] Hearing Transcript 28:16-31:14.

[79] Rejoinder, para. 13; see also Counter-memorial, para. 172; Rejoinder, paras. 14, 21. In their Counter-memorial, the Claimants refer to Article 24(1) of the UNCITRAL Rules, inadvertently referring to their 1976 version. This minor error does not affect the argument, as Article 24(1) of the 1976 UNCITRAL Rules and Article 27(1) of the 2010 UNCITRAL Rules have identical terms.

[80] Hearing Transcript 102:3-16, 105:10-17.

of proving the facts that underlie the "exceptions or affirmative defences" they invoke, such as the fork in the road and denial of benefits provisions of the ECT (Articles 26(3)(b)(i) and 17(1)).[81]

83. The Claimants also argue that once they have made a *prima facie* case, their factual assertions regarding merits must be taken as true *pro tem* at the jurisdictional phase. This is required by fundamental principles of justice, fairness, and equality between the parties.

84. If the Claimants were required to prove disputed facts by a preponderance of evidence at the jurisdictional phase, they would effectively be deprived of their right to a full hearing on the merits, as the Tribunal could decide on these facts before such a hearing. Accordingly, the Tribunal should only examine whether the facts alleged, if ultimately proven, are capable of falling within the scope of the instrument from which the Tribunal derives its jurisdiction.[82]

85. The Claimants reject the Respondents' contention that the Claimants wish all facts, including jurisdictional facts, to be accepted by the Tribunal *pro tem*. The Claimants accept the "uncontroversial proposition that, unlike facts concerning the merits, purely jurisdictional facts must be proven at the jurisdictional phase."[83]

86. The Claimants note that any facts relating to the merits, including those that are also relevant to jurisdiction, "must be fully and finally determined only at the merits stage."[84]

87. The Claimants submit that they have "firmly established their affirmative case on jurisdiction through reference to documentary evidence, witness and expert testimony, and credible legal theories," while the Respondents, to the extent that they have made allegations that are "exclusively (or even primarily) relevant to jurisdiction," have provided "almost no evidence whatsoever in support of those allegations."[85]

88. In particular, the Respondents have submitted no evidence or counter-evidence showing that: (i) it was not the intention of the signatory parties to the Founding Agreement that Khan Canada should be a party to this agreement; (ii) MonAtom and its predecessors were not the Government's representatives in CAUC; (iii) MonAtom is not directly controlled by Mongolia;

---

[81] Hearing Transcript 102:17-105:9, 166:9-167:15; 171:8-172:22; 185:23-186:20, referring to Exhibits CLA-64/RL-22, *Amto LLC v. Ukraine***,** SCC Case No. 080/2005, Final Award of 26 March 2008 ("*Amto*"), CLA-112, *Generation Ukraine, Inc v Ukraine*, Award, ICSID Case No ARB/00/9; IIC 116 (2003), (2005) 44 ILM 404, 15 September 2003.

[82] Counter-memorial, paras. 169-171.

[83] Rejoinder, paras. 8-11.

[84] Rejoinder, paras. 19-20.

[85] Counter-memorial, paras. 168-169; Rejoinder, paras. 15-17, 21, 23, 54; Hearing Transcript 103:2-6, 13-17, 21-22, 105:4-9, 105:24-106:7; see also Rejoinder, Appendix A: Claimants' unrebutted facts, and Appendix B: Respondents' unsubstantiated allegations.

(iv) the Tribunal has no *ratione materiae* jurisdiction over claims brought under the Founding Agreement; (v) Khan Netherlands has violated Mongolian law; (vi) Khan Netherlands' representatives did not repeatedly request amicable settlement of this dispute; (vii) Mongolia was willing to settle the dispute with Khan Netherlands; (viii) any of the triggers of Article 26(3)(b)(ii) of the ECT are implicated in this case; or (ix) the accepted requirements of Article 17(1) of the ECT are met in this case.[86]

89. The Claimants add that the Respondents' recitation of facts is mostly irrelevant to the issue of jurisdiction. For instance, Mongolia's purported invalidation of the Mining and Exploration Licenses and the quantification of the amounts invested by the Claimants into the Dornod Project concern the merits, and not jurisdiction.[87]

B. THE TRIBUNAL'S JURISDICTION OVER KHAN CANADA'S AND CAUC HOLDING'S CLAIMS UNDER THE FOUNDING AGREEMENT

1. Whether the Tribunal has jurisdiction *ratione personae* over Khan Canada

The Respondents' position

90. The Respondents acknowledge that the Tribunal has jurisdiction *ratione personae* over claims brought by CAUC Holding against MonAtom under the Founding Agreement, because CAUC Holding and MonAtom are parties to the Founding Agreement, by virtue of being successors, respectively, to WM Mining and Erdene, the original signatories of the Agreement.[88]

91. By contrast, the Respondents submit that the Tribunal does not have jurisdiction *ratione personae* over claims brought by Khan Canada under the Founding Agreement because Khan Canada is a party neither to the Founding Agreement nor to the arbitration agreement contained therein.[89]

92. The Respondents specify that Khan Canada did not sign the Founding Agreement or any of its four amendments, and that the Founding Agreement was not assigned to Khan Canada.[90]

93. According to the Respondents, the question of whether Khan Canada is a party to the Founding Agreement and to the arbitration agreement contained therein should be resolved on the basis of

---

[86] Rejoinder, para. 17, Table 3.

[87] Counter-memorial, paras. 2, 168-169; Rejoinder, paras. 7, 18.

[88] Memorial, paras. 27, 42, 44; Counter-memorial, para. 238; Reply, para. 56.

[89] Memorial, para. 44; Reply, para. 59. Citing the same reasons, the Respondents also submit that the Tribunal should decline jurisdiction over Khan Netherlands under the Founding Agreement (Memorial, para. 44). However, the Claimants do not assert that the Tribunal has jurisdiction over Khan Netherlands under the Founding Agreement (see Counter-memorial, paras. 163-192).

[90] Memorial, paras. 43-45.

Mongolian law. Pursuant to Article 12.1(i) of the Founding Agreement, Mongolian law is the governing law of the contract. The Respondents assert that, where an applicable law is chosen by the parties to a contract, there is a strong presumption that the law applicable to the arbitration clause is the law governing the substantive agreement.[91]

94. In the Respondents' view, the Claimants mistakenly invoke *Dow Chemical France, The Dow Chemical Co. and others v. ISOVER Saint Gobain* ("***Dow Chemical***") and the so-called "group of companies doctrine," as Mongolian law recognizes neither this case nor this doctrine.[92]

95. In any event, the "group of companies doctrine" is "merely a shortcut to avoid legal reasoning."[93] In fact, the analysis in *Dow Chemical* and subsequent French case law rests on consent – the "common intention of all the parties to the proceedings (*i.e.* the signatory and non-signatory parties) that the non-signatories be bound to the arbitration agreement."[94]

96. The Respondents argue that in the present case, the proper parties to the Founding Agreement did not form a common intention that Khan Canada, a non-signatory, be a party to the arbitration agreement of the Founding Agreement. According to the Respondents, the excerpts from various documents invoked by the Claimants as evidence of such common intention are in fact only "acknowledgements . . . of the indirect shareholding of CAUC by Khan Canada."[95]

97. Moreover, in order to extend an arbitration agreement to a non-signatory party, this party must at least have played a role in the contract's creation and performance. Yet Khan Canada, incorporated in 2002, did not even exist when the Founding Agreement was signed in 1995.[96]

98. In addition, the fact that the 2010 MOU contemplated Khan Canada and MonAtom concluding a "formal joint venture agreement to govern the development, construction and exploration of the Dornod Project" shows that Khan Canada was not at the time a party to any such joint venture.[97]

---

[91] Hearing Transcript, 32:9-34:6.

[92] Reply, paras. 61-65, referring to Exhibit CLA-40, *Dow Chemical France, The Dow Chemical Co. and others v. ISOVER Saint Gobain*, ICC Case No. 4131, Interim Award of 23 September 1982 ("*Dow Chemical*").

[93] Hearing Transcript 36:7-19, quoting Exhibit RL-39.

[94] Reply, para. 65; Hearing Transcript 34:11-37:7, referring to Exhibit RL-39.

[95] Reply, paras. 68-70.

[96] Memorial, para. 45; Reply, paras. 66-67.

[97] Hearing Transcript 39:17-41:22, quoting Exhibit C-4.

The Claimants' position

99. With regard to the Tribunal's jurisdiction *ratione personae* over Khan Canada, the Claimants submit that "entities that are not signatories to a contract that contains the relevant arbitration agreement may nevertheless be parties to that agreement."[98]

100. The Claimants submit that the question of whether Khan Canada, a non-signatory of the Founding Agreement, is nonetheless a party to the arbitration agreement contained therein is an inquiry "more factual than legal" and may be decided on the basis of the facts of the case, rather than on the basis of applicable law.[99]

101. Nevertheless, the Claimants assert that French law, and not Mongolian law as claimed by the Respondents, governs the arbitration agreement and therefore the analysis of the Parties' consent to arbitration. According to the Claimants, Article 12.1(i) of the Founding Agreement, invoked by the Respondents, identifies Mongolian law as applicable to the substantive provisions of the contract, but not to the arbitration agreement.[100] The Claimants argue that pursuant to Article 23(2) of the UNCITRAL Rules, an arbitration clause is "an agreement independent of the other terms of the contract" and can be governed by a law other than that governing the other terms of the contract. In the present case, as the law applicable to the arbitration agreement is not identified in the Founding Agreement, the arbitration agreement is governed by the law of the seat of arbitration, *i.e.* Paris, France. Accordingly, French law applies to the question of whether Khan Canada is a party to the Founding Agreement. [101]

102. In any event, the Claimants submit that, whether or not deciding only on the basis of the facts or on the basis of French law as the applicable law, the Tribunal must evaluate the common intention of the parties to the Founding Agreement, based on the conduct of the parties throughout the life of the contract and "all relevant facts and circumstances of the case."[102] The Claimants refer to what they consider to be the test laid down in *Dow Chemical* and approved by subsequent tribunals and commentators: "whether factual circumstances exist that demonstrate that the non-signatory party is a 'real party' to the contract and/or arbitration agreement, by virtue of its role in the performance or termination of the contract(s) containing the arbitration clause."[103] The Claimants add that the key inquiry is whether "related companies

---

[98] Counter-memorial, para.178.

[99] Counter-memorial, para. 178, quoting Exhibit CLA-38; Hearing Transcript 109:1-12.

[100] Rejoinder, paras. 63-66; Hearing Transcript 121:8-18.

[101] Rejoinder, paras. 63-66; Hearing Transcript 121:18-122:8.

[102] Counter-memorial, paras.178-179; Rejoinder, paras. 69, 72; Hearing Transcript 122:9-14.

[103] Counter-memorial, paras. 181, 183.

involved in a transaction or contract form 'a single economic reality' (*une réalité économique unique*)."[104]

103. Alternatively, the Claimants argue that if Mongolian law is applicable, Khan Canada is nevertheless a party to the Founding Agreement, given that Mongolian law, and in particular Article 43.3 of the Civil Code of Mongolia("**Civil Code**"), provides for implied consent to contract through conduct.[105]

104. The Claimants submit that, in the present case, Khan Canada was "a real party in interest" with "primary responsibility for coordinating and financing the entire Dornod Project."[106] In fact, without Khan Canada, the Dornod Project would not have been possible, as Mongolia and MonAtom were well aware.[107] In particular, the Respondents "fully understood, accepted, and agreed" that CAUC Holding, the successor to WM Mining under the Founding Agreement, was ultimately wholly owned and controlled by Khan Canada. The Respondents also "fully understood, accepted, and agreed" that all of the Claimants' contributions to the Dornod Project – financial, technical, or otherwise – came from Khan Canada.[108] Thus, the minutes of a CAUC management committee meeting held on 26 August 2009 evidence MonAtom's recognition that Khan Canada had completed and even exceeded its commitments "as per the original Founding Agreement."[109] Similarly, the minutes of the CAUC management committee meeting of 9 November 2009 recognize the expected benefits of Khan Resources' planned contribution of the Exploration License to the joint venture.[110]

105. The Claimants note that numerous other documents, such as CAUC's shareholder resolutions,[111] a resolution of the SPC,[112] licenses to CAUC issued by the SSIA,[113] a Mongolian parliamentary report,[114] the 2010 MOU,[115] a memorandum of understanding entered into by the

---

[104] Counter-memorial, para. 180, quoting Exhibit CLA-40, *Dow Chemical*, p.6.

[105] Rejoinder, paras. 73-76; Hearing Transcript 123:24-124:8, 129:1-10.

[106] Counter-memorial, para. 192; Rejoinder, paras. 60, 81.

[107] Hearing Transcript 122:22-123:4.

[108] Counter-memorial, paras. 184-185; Rejoinder, paras. 60, 77.

[109] Hearing Transcript 145:5-22, referring to Exhibit C-38, Item 6.

[110] Hearing Transcript 146:23-150:7, referring to Exhibit C-39.

[111] Exhibit C-11.

[112] Exhibit C-49.

[113] Exhibits C-67, C-68.

[114] Exhibit C-71.

[115] Exhibit C-4.

SPC and Khan Canada in 2005, and letters by the SSIA and the NEA[116] recognize that Khan Canada was "the party to be dealt with on matters concerning CAUC."[117] Among other, the Claimants highlight that (i) representatives of Khan Canada participated in CAUC shareholders' meetings in the capacities of "Chairman" and "voting member;"[118] (ii) the SPC and MonAtom negotiated memorandums of understanding with Khan Canada in 2005 and 2010 to address the future ownership and operation of CAUC;[119] and (iii) the Mongolian governmental agencies repeatedly identified Khan Canada as the Canadian partner in the Mongolia-Russia-Canada joint venture (CAUC).[120]

106. In addition, the Claimants explain that all the reports and studies necessary for the exploration and development of the Dornod Project were prepared and paid for by Khan Canada.[121]

107. According to the Claimants, Appendix A of the 2010 MOU further shows that the exploitation of the Dornod Project would have been financed largely by Khan Canada.[122]

108. Consistent with the decision in *Dow Chemical*, Khan Canada was therefore the party in a position to ensure the performance of CAUC Holding's obligations under the Founding Agreement.[123]

109. *Dow Chemical* also took into account the attempt of the respondent in that case to join the parent company in a related lawsuit against its subsidiary. The Claimants point out that, similarly, in the present case, Mongolia referred to the conduct of the parent company, Khan Canada, to justify the invalidation of the Mining and Exploration Licenses held by the subsidiaries, CAUC Holding and Khan Mongolia.[124]

110. Moreover, when CAUC Holding's and Khan Mongolia's respective Mining and Exploration Licenses were invalidated, it was Khan Canada's representatives that attempted to resolve amicably the dispute with MonAtom and the NEA.[125]

---

[116] Exhibit C-70/R-8.

[117] Counter-memorial, paras. 185-186; Rejoinder, paras. 79-80.

[118] Rejoinder, para. 80, referring to Exhibits C-38, C-39.

[119] Rejoinder, para. 80, referring to Exhibits C-4, C-66.

[120] Rejoinder, para. 80, referring to Exhibit C-71, Appendix B, s. II.B.

[121] Counter-memorial, paras. 187-188, referring to Exhibit C-50; Hearing Transcript 139:12-24; see also Exhibits C-58, C-59, C-60, C-61.

[122] Counter-memorial, para. 187, referring to Exhibit C-4.

[123] Counter-memorial, para. 189.

[124] Counter-memorial, para. 190; Rejoinder, para. 80; Hearing Transcript 157:19-158:1, referring to Exhibits C-13, C-14.

[125] Counter-memorial, para. 191; Rejoinder, para. 80, referring to the Edey Statement, paras. 34-41.

111. The Claimants argue further that, contrary to the Respondents' assertion, there is no requirement for a non-signatory to have played a role in the creation of the contract to be a party thereto. It is therefore irrelevant that Khan Canada did not exist when the Founding Agreement was concluded.[126]

112. Finally, the Claimants state that the above facts demonstrate that the parties to the joint venture understood and accepted that Khan Canada was a party to the Founding Agreement and the arbitration agreement therein. The Claimants emphasize that the Respondents provide no evidence to the contrary, merely insisting on the fact that Khan Canada did not sign the Founding Agreement.[127]

2. Whether the Tribunal has jurisdiction *ratione personae* over Mongolia

The Respondents' position

113. The Respondents submit that the Tribunal does not have jurisdiction *ratione personae* over claims brought against Mongolia under the Founding Agreement, given that MonAtom is the only respondent entity that is a successor to a signatory of the Founding Agreement (Erdene) and that MonAtom and Mongolia are separate entities.[128] The Respondents explain that MonAtom, while a wholly-owned subsidiary of Mongolia, is a "business entity with a separate legal personality . . . carrying out standard corporate business."[129] An arbitration agreement signed by an independent state-owned entity does not bind the state.[130]

114. The Respondents submit that MonAtom's registered corporate articles and the Company Law of Mongolia of 1999 ("**Company Law**") affirm MonAtom's independent character.[131] Thus, the Company Law states at Article 9.3 that "shareholders shall not be liable for the obligations of the company."[132] MonAtom's charter provides that "[t]he company is 100 percent a state-owned limited liability company and shall be a profit seeking legal entity with independent balance sheet, shall be empowered to enjoy rights and obligations on its own behalf, and shall have its own distinct assets," without any statement that MonAtom carries out its obligations or engages in activities on behalf of Mongolia.[133] MonAtom's charter further shows that

---

[126] Rejoinder, paras. 68-72.

[127] Rejoinder, paras. 78, 80; Hearing Transcript 111:20-112:11.

[128] Memorial, paras. 48, 53.

[129] Memorial, paras. 49, 54; Reply, para. 94.

[130] Hearing Transcript 42:19-21.

[131] Reply, paras. 93, 96, referring to Exhibit R-23.

[132] Memorial, paras. 49-51, quoting Exhibit R-23; Reply, para. 97.

[133] Memorial, para. 51, quoting Exhibit R-22, Art. 2.1; Reply, para. 98.

MonAtom is "constrained to act as an ordinary independent business, from the nature of the decisions taken at Shareholders' Meetings, to the actions implemented by the Board of Directors."[134]

115. The Respondents also contend that MonAtom's conduct supports the notion that it operates independently from the Government. For instance, the fact that the NEA, a state agency, purported to invalidate the 2010 MOU entered into by MonAtom and Khan Canada shows that MonAtom does not act in tandem with the Government, as otherwise MonAtom would not have signed the 2010 MOU in the first place.[135] Moreover, the fact that the Claimants wished to negotiate an investment agreement with Mongolia, as stated in the 2010 MOU, shows that they did not consider that Mongolia was a party to the Founding Agreement.[136]

116. Additionally, contrary to the Claimants' assertion, the fact that MonAtom is ultimately held by the state does not suggest that MonAtom entered into the Founding Agreement as an authorised representative of Mongolia.[137] Article 3.7 of the Founding Agreement draws a clear distinction between Mongolia and the parties to the joint venture by separately establishing their respective liabilities.[138]

117. Furthermore, the Claimants cannot rely on the Minerals Agreement to establish that MonAtom is an instrument of Mongolia.[139] The Minerals Agreement is "entirely irrelevant" to the present dispute, given that no claims have been brought under it.[140]

118. In any event, the Minerals Agreement clearly indicates that MonAtom and Mongolia are separate entities. For instance, Article 18.1 of the Minerals Agreement states that it is "contingent on approval by the Government of Mongolia," thus showing that Erdene, the Mongolian signatory of and MonAtom's predecessor under the agreement, is not a representative of the Government.[141]

---

[134] Memorial, para. 54.

[135] Memorial, paras. 55-56, referring to Exhibit C-4; Reply, para. 103.

[136] Hearing Transcript 47:5-48:25, referring to Exhibit C-4.

[137] Reply, para. 101.

[138] Hearing Transcript 44:10-45:8.

[139] Memorial, para. 57.

[140] Memorial, para. 58.

[141] Memorial, paras. 60-61.

119. Further, as established by case law, the signature of an "authorized representative of the Mongolian Ministry of Energy, Geology and Mining" on the last page of the Minerals Agreement does not mean that Mongolia is a party to this agreement.[142]

120. The Respondents reject the Claimants' argument that the Minerals Agreement and the Charter should be construed as evidencing Mongolia's role in CAUC, because the cited provisions only serve to recognize that the Government would "necessarily feature in the regulation and oversight of the project."[143] For this reason, the Parties "expressly separated Mongolia from incurring liability by way of the Founding Agreement's Article 3.7, and by contracting with a private limited liability company in the form of Erdene, and now MonAtom."[144]

121. According to the Respondents, by invoking the Law on State and Local Government Property ("**LSLP**"), the Claimants are inviting the Tribunal to ignore the legal status of MonAtom under the Company Law and MonAtom's own charter in favour of the legal framework governing state property in Mongolia. However, in the Respondents' view, there is no reason why any of the provisions of the LSLP would alter MonAtom's legal character as "an independent limited liability Mongolian company."[145]

122. Addressing the Claimants' argument that if MonAtom is not a representative of Mongolia, the 2009 transfer of shares in CAUC from the SPC to MonAtom would be void due to failure to comply with the requirements for transfer to a third party found at Article 11 of the Founding Agreement, the Respondents state that this provision applies only to transfers "for a price," and not situations where one entity (MonAtom) succeeds to another (the SPC). Indeed, Article 11(1) of the Founding Agreement refers to the "price and terms upon which the Disposing Member proposes to sell." In any event, the Claimants recognize that they were notified by a letter dated 4 June 2009 of the transfer of shares from the SPC to MonAtom.[146]

---

[142] Memorial, paras. 62-63, referring to Exhibit RL-14, *S.P.P. (Middle East) Ltd. v. Arab Republic of Egypt*, ICC Award No. 3493, 16 Feb. 1983, *République Arabe d'Egypte v. Southern Pacific Properties Ltd*., Paris Court of Appeal, 12 July 1984, Note. B. Goldman, Journal du Droit International, 1985, 130, and quoting Exhibit C-10, Art. 18(1); Hearing Transcript 45:14-46:24. The Respondents add that even if Mongolia were a party to the Minerals Agreement and had agreed to arbitration thereunder, Article 16.3 of the Minerals Agreement would apply. This provision allows MonAtom to bring another entity into the joint venture to replace CAUC Holding in the event CAUC Holding breaches the Minerals Agreement (Memorial, paras. 164-166).

[143] Reply, paras. 89-90.

[144] Reply, para. 91.

[145] Reply, paras. 95, 100.

[146] Reply, paras. 105-107.

123. Finally, the Respondents submit that the International Law Commission Draft Articles on State Responsibility of States for Internationally Wrongful Acts, while widely accepted as reflecting customary international law, are not applicable to the present dispute.[147]

The Claimants' position

124. The Claimants submit that MonAtom is not independent of Mongolia, as the Respondents claim. Rather, as confirmed by the Tsogt Report, MonAtom is Mongolia's representative in the Founding Agreement.[148]

125. In particular, the Claimants assert that: (i) MonAtom is Mongolia's representative in the specific context of the Founding Agreement; (ii) MonAtom, as an entity charged with holding state property, acts at the behest of Mongolia pursuant to the LSLP; and (iii) if MonAtom were indeed independent from Mongolia, the 2009 transfer of CAUC shares from the SPC to MonAtom would be invalid.[149]

(i) MonAtom is Mongolia's representative in the specific context of the Founding Agreement

126. The Claimants submit that MonAtom and its predecessors in the Founding Agreement (Erdene, the MRAM, and the SPC) have always acted and have always viewed themselves as acting on behalf of Mongolia. Thus, as apparent from numerous provisions of the Founding Agreement and related contracts, "Mongolia is the 'Mongolian party' to the Founding Agreement."[150]

127. For instance, Article 3.6 of the Founding Agreement provides that the property of the company "will not be subject to requisition or confiscation." As confirmed by the Tsogt Report and Black's Law Dictionary, "requisition" and "confiscation" are terms that apply uniquely to the governmental actions.[151] Article 15.1 of the Founding Agreement also provides that all notices are to be made "c/o Ministry of Energy, Geology and Natural Resources of Mongolia."[152]

128. The Claimants further submit that while they do not assert any claims under the Minerals Agreement and the Charter, these documents are nevertheless relevant to the interpretation of the Founding Agreement, insofar as they provide context for understanding Mongolia's role in the joint venture.[153]

---

[147] Memorial, paras. 67-79.

[148] Counter-memorial, paras. 193-194; Rejoinder, para. 83; Hearing Transcript 119:24-120:9.

[149] Counter-memorial, para. 196.

[150] Counter-memorial, paras. 41, 197, 206, referring to the Tsogt Report.

[151] Counter-memorial, para. 52, referring to the Tsogt Report, paras. 25-27, 57-59, Exhibit CLA-27.

[152] Counter-memorial, para. 53.

[153] Counter-memorial, paras. 44-46, 198.

129. Specifically, the Minerals Agreement includes the undertaking by the "Mongolian Party" to provide the joint venture with the "right to utilize mineral deposits," as well as an assumption of obligations regarding "questions of licensing, taxation, customs, royalties, and environmental liabilities" that could only have been assumed by a sovereign, – *i.e*. Mongolia.[154] The Minerals Agreement also refers to Erdene's acts "on behalf of the Ministry of Energy, Geology and Mining Industry of Mongolia."[155]

130. As for the Charter, it explains that the contribution of Erdene will be based on the reduction of fees to be paid by CAUC for use of natural resources and may consist of "rights for the use of land, water, and other natural resources."[156] Such contributions also could only be made by Mongolia.[157]

131. Furthermore, the Claimants assert that from 1995 to 2001, while Erdene held the CAUC shares, the Government used Erdene and other governmental agencies interchangeably as its representatives in CAUC. For instance, government officials signed official CAUC documents on behalf of Erdene.[158]

132. The Claimants further assert that, in 2001, the "Mongolian Party" shares in CAUC were transferred to the MRAM, a government regulatory agency. The other shareholders of CAUC accepted this transfer as merely a change in the designation of the government entity responsible for Mongolia's shares, and not as a formal sale of shares that would have needed to comply with the restrictions on transfer provided under Article 11 of the Founding Agreement.[159]

133. Thus, when Khan first invested in CAUC in 2003, the MRAM was the "Mongolian Party" to the Founding Agreement, and, as confirmed by the Edey Statement, Khan understood that the Government was its partner in CAUC.[160]

134. After Mongolia transferred the authority to represent it in CAUC from the MRAM to the SPC in 2005, the SPC attempted to sell its shares in the joint venture to Khan Canada. The offer to sell, as well as other correspondence exchanged by Khan Canada and the SPC, refer to the

---

[154] Counter-memorial, paras. 48-50, 197, n. 271, referring to Exhibit C-17A, Minerals Agreement, Arts.1.1, 2.2, 4.3, 7.1, 7.2, 7.3, 12.2, 13.1.

[155] Counter-memorial, para. 50, referring to Exhibit C-17A, Minerals Agreement, Art.13.1.

[156] Counter-memorial, para. 51.

[157] Counter-memorial, para. 51, quoting Exhibit C-18A, Charter, Art. 4.3.

[158] Counter-memorial, paras. 41, 57-60, 201, referring to Exhibit C-16E.

[159] Counter-memorial, paras. 63-66.

[160] Counter-memorial, para. 202, referring to the Edey Statement, para. 27; Rejoinder, para. 85.

SPC's shares as "state-owned" and confirm that the SPC acted on behalf of Mongolia.[161] A CAUC shareholders' resolution passed on 31 October 2005 "to clarify the status of respective interests in CAUC," lists the shareholders of CAUC as: "Mongolia (the State) (through the SPC)," Priargunsky, and CAUC Holding Company Ltd. The SPC's signature of this resolution demonstrates that it understood its role as proxy for Mongolia.[162]

135. In 2006, the prospectus for the initial public offering of shares in Khan Canada on the Toronto Stock Exchange confirmed Khan Canada's belief that Mongolia was the owner of 21 percent of the shares in CAUC.[163]

136. In 2009, when the SPC's shares were transferred to MonAtom, the shareholders were notified that the "state shares held in CAUC … that allow [. . .] to implement the right to represent the state ha[ve] been transferred …."[164] Finally, shortly after the NEL came into effect, providing that Mongolia's share in all Mongolian entities which had been granted a license to explore or exploit uranium in Mongolia was to reach 51 percent, MonAtom declared its status as the future owner of Mongolia's increased 51 percent interest in CAUC at the management board meeting held on 4 November 2009.[165]

137. In this connection, the Claimants argue that if MonAtom had been acting independently from Mongolia, it would have transferred its shares back to a government agency such as the SPC.[166]

138. The Claimants also note that Mongolian law recognizes "that civil transactions may be concluded through a representative on the basis of an authorization" and that Mongolia, as the principal, is responsible for MonAtom's obligations under the Founding Agreement.[167]

139. With regard to the Respondents' submissions on this issue, the Claimants emphasize that the Respondents have failed to respond to the relevant parts of the Edey Statement and the Tsogt Report and to provide evidence to counter the facts that: (i) successive Mongolian representatives to CAUC consistently held themselves out as representing the Government; (ii) government agencies have directly participated as shareholders in CAUC; (iii) CAUC

---

[161] Hearing Transcript 134:4-137:3, referring to Exhibits C-49, C-66.

[162] Counter-memorial, paras. 70-71, 203-204, quoting Exhibit C-11 and referring to the Edey Statement.

[163] Hearing Transcript 141:6-142:19, referring to Exhibit C-24.

[164] Counter-memorial, para. 205; Rejoinder, para. 95, referring to the Tsogt Report, paras. 29-45; Exhibits C-37, C-38.

[165] Exhibit C-39, Item 5; see also Exhibits C-89, C-90.

[166] Counter-memorial, paras. 207-211.

[167] Counter-memorial, paras. 212-213, referring to Exhibit CLA-43, Civil Code, Art. 62(6.1,6.3); Rejoinder, para. 96.

understood Mongolia to be a shareholder in the joint venture; and (iv) Mongolia understood that it was a shareholder of CAUC.[168]

140. In addition, the Claimants submit that the Respondents incorrectly rely on Article 3.7 of the Founding Agreement in support of their contention that "liability would not attach to Mongolia."[169] In fact, as confirmed by the Tsogt Report, Article 3.7 only stands for the proposition that Mongolia cannot be liable for the obligations of CAUC. Article 3.7 does not limit Mongolia's liability for breaching the Founding Agreement vis-à-vis other parties to the Agreement. The Claimants argue further that the mention of Mongolia's liability in the Founding Agreement demonstrates that Mongolia was a party to the agreement.[170]

(ii) MonAtom is controlled by Mongolia pursuant to the LSLP

141. The Claimants submit further that, contrary to the Respondents' contention, the fact that MonAtom is a limited liability company does not contradict its role as representative of Mongolia.[171] Nevertheless, the Claimants "feel compelled to correct the Respondents' mischaracterizations as to the general status of MonAtom under Mongolian law."[172] Thus, while corporate entities may be independent of their shareholders under "general Mongolian company law," the Respondents overlook the "larger framework governing state entities . . . charged with holding state property and executing state policies."[173]

142. According to the Claimants, MonAtom carries out governmental activities and is firmly under the control and direction of the Government.[174] Under Articles 3(1), 5(1), and 5(3) of the LSLP, shares held by state-owned enterprises, such as MonAtom's 21 percent shareholding in CAUC, are state property.[175] The LSLP grants the SPC, a state agency, the powers to "own, use, [and] dispose" of state property, to "appoint state property representatives to legal persons with state property", and to "supervise the[. . .] activity" of such legal persons.[176] Accordingly, and as sole shareholder of MonAtom, the SPC has complete power to appoint and dismiss members of

---

[168] Rejoinder, paras. 25, 84-88.

[169] Rejoinder, paras. 90-91, quoting Reply, para. 78.

[170] Rejoinder, paras. 91-92, referring to Tsogt Report, para. 28.

[171] Rejoinder, paras. 93-98.

[172] Counter-memorial, para. 214.

[173] Counter-memorial, para. 195.

[174] Counter-memorial, para. 216.

[175] Counter-memorial, paras. 218-219, referring to Exhibit CLA-44, LSLP.

[176] Counter-memorial, paras. 218, 220, quoting Exhibit CLA-44, LSLP, Arts. 10(1), 11(1)(6).

MonAtom's board of directors, as well as to dismiss MonAtom's executive director.[177]

143. Moreover, the LSLP provides that a "legal person with state property" such as MonAtom is established by the state "with the purpose of implementing its policy and maintaining social consumption," thus further confirming MonAtom's governmental purpose. [178]

(iii) The 2009 transfer of shares in CAUC from the SPC to MonAtom

144. The Claimants submit that if MonAtom were acting independently of Mongolia, the 2009 transfer of CAUC shares from the SPC to MonAtom would be void and of no effect. The Founding Agreement and Mongolian law both subject the transfer of shares in CAUC to any third party entity to strict formalities and rights of pre-emption for the other shareholders in CAUC.[179] These formalities, including the compulsory written notice to the other shareholders of CAUC, were not respected.[180] For instance, the letter dated 4 June 2009, referred to by the Respondents, does not constitute sufficient notice, as it fails to provide any details regarding the terms or price of the transaction and was not addressed to CAUC.[181]

145. In fact, the Claimants argue that Khan accepted the transfer of CAUC shares from the SPC to MonAtom only because it was understood that MonAtom was representing Mongolia's interests.[182]

146. The Claimants reject as implausible the Respondents' argument that the 2009 transaction whereby shares in CAUC passed from the SPC to MonAtom did not trigger the transfer of shares formalities merely because MonAtom "succeeded" the SPC as a shareholder in CAUC – *i.e.* received the shares for free. As these are the same shares that Mongolia offered to sell Khan Canada and Priargunsky for USD 30 million in 2005, it is unlikely the SPC would have been willing to transfer them for free to MonAtom had MonAtom been an independent third party.[183]

147. Furthermore, in the Claimants' view, it is not a coincidence that this transfer of shares from a state agency to a "nominally independent LLC" occurred just after Mongolia and Russia agreed in principle to develop the Dornod Project together and to the exclusion of the Claimants. In fact, the transfer of shares from the SPC to MonAtom was a "transaction…concluded by expressing intention based on serious misleading" in the meaning of Article 58.1 of the Civil

---

[177] Counter-memorial, paras. 220-222, referring to Exhibit R-22, MonAtom's charter, Art.8.1.

[178] Counter-memorial, paras. 223-224, quoting Exhibit CLA-44, LSLP, Art.13.

[179] Counter-memorial, para. 225, referring to the Tsogt Report, paras. 41-54; Rejoinder, para. 101.

[180] Counter-memorial, para. 226.

[181] Rejoinder, para. 104, referring to Exhibit C-37; Hearing Transcript 160:22-161:8.

[182] Counter-memorial, paras. 227-228, quoting the Edey Statement, para. 31.

[183] Rejoinder, paras. 101-102.

Code. The Claimants allege that such transactions are void.[184] Therefore, if MonAtom is indeed independent from Mongolia, the transfer of shares from the SPC to MonAtom likewise is void. In other words, Mongolia remains the responsible party under the Founding Agreement through the SPC.[185]

3. Whether the Tribunal has jurisdiction *ratione materiae* over the claims brought under the Founding Agreement

(i) Khan's breach of fiduciary duty claim

The Respondents' position

148. The Respondents submit that pursuant to Article 12 of the Founding Agreement, the Tribunal only has jurisdiction to hear claims "arising out of, or in connection with" provisions of the Founding Agreement.[186] The Claimants have failed to establish a link between their claim of breach of fiduciary duty and a specific obligation contained in the Founding Agreement.[187]

149. The Respondents also argue that given the Tribunal's lack of jurisdiction *ratione personae* over Mongolia, the only question as to the Tribunal's jurisdiction *ratione materiae* is with respect to claims against MonAtom. Yet, the Claimants' claim of breach of fiduciary duty, as described in the Notice of Arbitration and the Tsogt Report, is made exclusively against Mongolia.[188]

150. Finally, the Respondents aver that the Claimants' desire to enter into the 2010 MOU with MonAtom and MonAtom's cooperative behaviour in this context confirm that the Claimants "do not and cannot have any" breach of fiduciary duty claims against MonAtom.[189] Thus, the Claimants are attempting to "use MonAtom as a mere vehicle to direct their claims against Mongolia, which is not a party to the Founding Agreement."[190]

The Claimants' position

151. The Claimants submit that, contrary to the Respondents' main objection to the jurisdiction *ratione materiae* of the Tribunal, they have sufficiently identified relevant legal bases for their claims under the Founding Agreement in the Notice of Arbitration.[191]

---

[184] Counter-memorial, paras. 229-231; Rejoinder, para. 100.

[185] Counter-memorial, paras. 222-223; Rejoinder, para. 100.

[186] Memorial, para. 83; Reply, para. 112.

[187] Reply, para. 120; Hearing Transcript 57:7-17.

[188] Memorial, paras. 107-110; Reply, paras. 114-118; Hearing Transcript 56:16-57:6, 57:18-24.

[189] Memorial, para. 110; Reply, para. 118.

[190] Reply, para. 119.

[191] Counter-memorial, para. 234.

152. In particular, the breach of fiduciary duty claim is based on Articles 81 and 82 of the Company Law, which states that a "governing person" (*i.e.*, Mongolia) in a Mongolian company shall be personally liable to the company's shareholders if such a person intentionally violates the principle that requires it to "act in good faith and in CAUC's interest."[192] The breach of fiduciary duty claim is also founded on Articles 227.1 and 497.1 of the Civil Code.[193]

153. Addressing whether "the Claimants' Notice of Arbitration stated legally cognizable claims against the Respondents under the Founding Agreement," The Tsogt Report on Mongolian law states that if Mongolia illegally cancelled the Mining and Exploration Licenses in order to "enter a new joint venture covering the same purpose as the CAUC joint venture, . . . then the Government has breached its basic obligation to implement the business described in the Founding Agreement."[194] As the principal, Mongolia is responsible for the acts of its representatives Erdene, the MRAM, the SPC, and MonAtom.[195]

154. Moreover, even if the Tribunal were to find that Mongolia is not a party to the Founding Agreement, MonAtom still has breached its fiduciary duties "arising out of, or in connection with" the Founding Agreement.[196]

155. In particular, MonAtom will participate in the new Russia-Mongolia joint venture which "improperly and illegally displaces" Khan.[197] In this respect, the Claimants clarify that where they referred to "Mongolia" in their submissions, they were referring to all the Respondents, including MonAtom.[198]

156. According to the Claimants, the Respondents' argument that their fiduciary obligations under the Company Law are not sufficiently connected to the Founding Agreement "lacks any legal support, defies logic and must be rejected."[199] CAUC and its shareholders, including MonAtom, are governed by the Company Law. Thus, "[t]here can be no more fundamental claim than one between joint venture partners for a failure to meet their fiduciary obligations to one another."[200]

---

[192] Counter-memorial, paras. 235, 238-39.

[193] Counter-memorial, paras. 240-41.

[194] Counter-memorial, para. 237, referring to the Tsogt Report, para. 61.

[195] Counter-memorial, para. 242, referring to Exhibit CLA-43, Civil Code, Art. 63; Rejoinder, para. 108.

[196] Rejoinder, para. 109.

[197] Rejoinder, para. 109.

[198] Rejoinder, para. 107.

[199] Rejoinder, para. 111.

[200] Rejoinder, para. 111.

(ii) Khan's expropriation claims

The Respondents' position

157. The Respondents submit that the Claimants have failed to establish a link between their expropriation claims and the provisions of the Founding Agreement.[201]

158. Specifically, the Respondents contend that the Claimants rely on the second sentence of Article 3.6 of the Founding Agreement to argue that there is a connection between their unlawful expropriation claims under the Founding Agreement and the Foreign Investment Law.[202] While the Claimants construe Article 3.6 of the Founding Agreement as having an effect similar to that of an "expropriation provision, " the Respondents contend that the wording of the clause does not lend itself to such an interpretation.[203]

159. Article 3.6 reads, in full:

> "The Company will own, use, and dispose of its property in accordance with the laws of Mongolia and consistent with the goals of its activities and the purposes of such property. Property of the Company will not be subject to requisition or confiscation."

160. In the Respondents' view, this provision seeks to prevent CAUC's founders and their successors from using CAUC's property (raw materials, machinery, and other assets) for purposes other than those of the company, rather than to render Mongolia liable for state expropriation of CAUC's property.[204]

161. In fact, Article 3.6 of the Founding Agreement lacks "all of the essential elements" present in expropriation clauses found in international investment treaties in general and in Mongolia's bilateral investment treaties in particular.[205]

162. The Respondents note in this respect that unlike Mongolia's bilateral investment treaties, the Founding Agreement was not signed by a top-level government official.[206] The Respondents also note that the two lines of Article 3.6 of the Founding Agreement are significantly less detailed than the expropriation clauses of, *inter alia*, the ECT, the seven bilateral investment treaties signed by Mongolia in 1995, the year the Founding Agreement was concluded, the

---

[201] Memorial, para. 63.

[202] Reply, para. 122.

[203] Memorial, para. 88.

[204] Memorial, paras. 90-91; Reply, para. 129; Hearing Transcript 52:3-18, 53:11-14.

[205] Memorial, paras. 93-96, 98-102; Reply, para. 128; Hearing Transcript 52:19-53:12.

[206] Memorial, paras. 103-04.

recent investment agreement between Rio Tinto, Ivanhoe Mines, and Mongolia, and annex C of the 2010 MOU.[207]

163. According to the Respondents, the entire purpose of the Founding Agreement significantly differs from an investment agreement's aim to provide foreign investors with guarantees such as protection from expropriation. As is apparent from Article 2 of the Founding Agreement, its purpose relates rather to the creation and management of a joint venture company intended to generate profits for its members through the sale of minerals.[208]

164. Article 3.7 of the Founding Agreement further excludes any possible liability of Mongolia by stating that "the Government of Mongolia shall not be liable for the obligations of the Company."[209]

165. The Respondents submit that the Claimants "knew on no uncertain terms" that a provision for the protection of investments did not exist under the Founding Agreement.[210] That is why the Claimants were keen to enter into an investment agreement with Mongolia which would include such provisions, as was planned in the 2010 MOU.[211]

The Claimants' position

166. The Claimants submit that the Respondents "have created a lengthy argument based on the straw man that Article 3.6 is not an expropriation clause such as the ones found in the [Foreign Investment Law] or a BIT."[212] In response, the Claimants state that they do not contend that Article 3.6 is "precisely identical" to an expropriation provision in an investment treaty.[213] Rather, Article 3.6 is a more expansive expropriation provision, protecting the investor from confiscation of property, including mining licenses, in "*any* circumstances."[214] This wide scope makes "particular sense" in the context of a joint venture to which the Government is a party.[215]

---

[207] Memorial, paras. 95-104, referring to Exhibit C-4; Hearing Transcript 53:15-54:11, referring to Exhibit C-118.

[208] Memorial, paras. 84-85; Reply, paras. 125-26.

[209] Memorial, para. 92.

[210] Memorial, para. 97.

[211] Memorial, paras. 96-97; Reply, paras. 130-136.

[212] Counter-memorial, para. 243.

[213] Counter-memorial, para. 244; Rejoinder, para. 113.

[214] Counter-memorial, para. 244; Rejoinder, para. 113 [emphasis in original].

[215] Counter-memorial, para. 244; Rejoinder, para. 113.

167. In fact, Article 3.6 uses language "substantially identical" to the prohibition against expropriation by the state found in Article 16(3) of the Constitution.[216] Moreover, in the context of Mongolian law, the terms "confiscation" and "requisition," found in Article 3.6 of the Founding Agreement, specifically mean "a taking, or expropriation" by the Government and do not describe a situation where one private party takes or misuses the property of another private entity.[217]

168. The Claimants also argue that Article 3.7 of the Founding Agreement, which states that "the Government will not be liable for the obligations of the Company," is only an "acknowledgement that the Government will not be liable for the obligations of *CAUC*."[218] This provision does not absolve Mongolia from liability for its own breaches of the Founding Agreement.[219]

169. With respect to the Respondents' argument that the Claimants would not have sought to enter into a new investment agreement with Mongolia, as was provided in the 2010 MOU, if investment protections already existed in the Founding Agreement, the Claimants argue that an investment agreement serves to "update the relationship" between the Parties in light of new circumstances and would, in addition to an expropriation clause, contain other desirable elements, such as "tax stabilization, assurance of sale of products at international market prices, amount and term of investment, guarantee of investor's right of use, plus others."[220]

(iii) Khan's claims under international law

The Respondents' position

170. The Respondents submit that the Tribunal does not have jurisdiction *ratione materiae* for "the Founding Agreement claims under international law."[221] The Respondents emphasize that the Claimants have failed to explain why international law should apply automatically to private investors in Mongolia.[222]

171. According to the Respondents, private parties can only directly enforce their rights under international law against a state where the state has created a mechanism for a direct right of

---

[216] Counter-memorial, para. 245, quoting the Tsogt Report, paras. 25-27, 57.

[217] Counter-memorial, paras. 245-46, referring to the Tsogt Report, para. 25.

[218] Counter-memorial, para. 246, referring to the Tsogt Report, para. 28 [emphasis in original].

[219] Counter-memorial, para. 246.

[220] Rejoinder, paras. 114-115; Hearing Transcript 151:7-152:19.

[221] Reply, para. 150.

[222] Reply, para. 137.

action.[223] In the present case, under Article 12.1(i) of the Founding Agreement, the intention of the parties was to subject the Founding Agreement to Mongolian rather than international law.[224] Nor can it be concluded that general international law is directly incorporated into Mongolian national law on the basis of Article 10(1) of the Constitution, as the Claimants assert.[225] This provision merely states that Mongolia "adheres" to international law and can only be interpreted as meaning that Mongolia respects international law toward other States. The Claimants, by quoting different translations of this provision, show their "willingness to manipulate the wording of Article 10(1) to seek an effect that the clause cannot have."[226]

The Claimants' position

172. The Claimants submit that the Tribunal has jurisdiction *ratione materiae* over claims that Mongolia breached its obligations toward the Claimants under general principles of international law.[227] The Claimants assert that, irrespective of whether "the proper law of the Founding Agreement is local law," Mongolia's conduct in the exercise of its sovereign authority in relation to foreign investors is governed by minimum international legal standards, which include "non-expropriation without compensation, non-arbitrariness and non-abuse of discretion."[228] The fact that Mongolia undertook "*sovereign* obligations" under the Founding Agreement and the other constitutive CAUC documents suggests that the Founding Agreement "is properly subject to international law."[229] Moreover, according to the Claimants, all organs of international jurisdiction have the inherent power to refer to general principles of international law, unless this power is expressly excluded from their competence. The Claimants submit that the Tribunal is such an organ of international jurisdiction, given that the subject matter of the dispute is "the treatment of foreign investors *qua* foreign investors."[230] Further, a mere selection of national law does not suffice to exclude the application of international law.[231]

173. The Claimants argue further that, whether Article 10(1) of the Constitution is read as being mandatory with respect to adherence to international law ("shall adhere") or as a statement of recognition that Mongolian law adheres to international law ("Mongolia adheres"), and as

---

[223] Reply, paras. 138-141; Hearing Transcript 58:13-59:2.

[224] Reply, paras. 142-43; Hearing Transcript 57:24-58:2.

[225] Hearing Transcript 58:2-16, 59:2-7.

[226] Reply, paras. 144-49.

[227] Counter-memorial, para. 254.

[228] Counter-memorial, paras. 249-250; Rejoinder, para. 125.

[229] Counter-memorial, para. 251 [emphasis in original].

[230] Rejoinder, para. 125.

[231] Rejoinder, paras. 120-125.

confirmed by the Mongolian Supreme Court's resolution "On the Application of International Treaties and Universally Recognized Norms and Principles of International Law in Judicial Court Practice," Mongolian law may not be interpreted or applied in a manner that falls below the international minimum standard with respect to treatment of foreign investors.[232]

174. Finally, the Claimants submit that, in any event, the Tribunal can find that it has jurisdiction over claims made under the Founding Agreement without having to determine whether Mongolia is liable under international law for actions carried out in connection with the Founding Agreement.[233]

C. THE TRIBUNAL'S JURISDICTION OVER KHAN NETHERLANDS' CLAIMS UNDER THE ECT[234]

1. Whether Khan Netherlands is prevented from bringing ECT claims due to its failure to comply with Mongolian Law

The Respondents' position

175. The Respondents submit that Khan Netherlands' violations of Mongolian law deprive it of the protection of the ECT, "regardless of whether these [violations] occurred before or after the initial investment was made."[235] While admitting that the ECT is silent on the "necessary compliance of an investment with the laws of the host state," the Respondents cite the *Plama Consortium Limited v. Bulgaria* award on the merits ("***Plama* Award on the Merits**") to argue that the ECT's substantive protections cannot apply to "investments that are made contrary to law."[236] The Respondents also refer to the rationale for this rule as expressed in *Phoenix*: "[t]he purpose of international protection is to protect legal and bona fide investments."[237]

176. According to the Respondents, this rationale applies in the same way to "an investment *made* illegally as to an investment *carried out* illegally, as here, where the Claimants have conducted themselves with flagrant disregard for national or international laws."[238]

---

[232] Counter-memorial, paras. 252-253; Rejoinder, para. 117.

[233] Rejoinder, paras. 116, 119.

[234] The Claimants specify that Khan Netherlands is the only claimant asserting claims under the ECT (Rejoinder, para. 44; see also Notice of Arbitration, para. 13; Counter-Memorial, para. 9; Reply, para. 151; Hearing Transcript 72:23-73:6).

[235] Memorial, para. 124; Reply, para. 153.

[236] Memorial, paras. 125-128, quoting Exhibit C-50, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, para. 139 ("*Plama* Award on the Merits").

[237] Memorial, para. 126, quoting Exhibit CLA-51/RL-17, *Phoenix*, para. 100; see also Hearing Transcript 60:8-61:2.

[238] Reply, paras. 156-158 [emphasis added by the Respondent].

177. The Respondents also submit that an interpretation of the ECT in accordance with its purpose pursuant to Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"), which is "to strengthen the rule of law on [e]nergy issues," suggests that the ECT contains an implicit obligation of "continued conformity of an investment with the law."[239]

178. In the Respondents' view, it is "impossible to consider" that the drafters and signatories of the ECT would have intended to extend its protections to "investors, who, once their investment has been made, chose to ignore a host state's laws at [their] whim."[240]

179. The Respondents further submit that Khan Netherlands committed and failed to remedy upon notification numerous regulatory breaches, which are detailed and substantiated in the reports following the routine inspections carried out by the SSIA in 2005 and 2009.[241]

180. The Respondents add that, contrary to the Claimants' assertion, in ruling that the suspension of the Exploration License was invalid on 2 August 2010, the Administrative Court did not make any "substantive decision with respect to Khan's regulatory breaches."[242] The Respondents also submit that the Claimants have breached Article 21.2.1 of the Law of Mongolia on Subsoil, as no activities took place within three years from the granting of the Exploration License in the relevant area, as required by the statute.[243]

181. Finally, the Claimants' argument that the Respondents may not rely on Khan's regulatory breaches because these breaches form a central component of Khan's claim on the merits in this arbitration is "illogical," as the Respondents are entitled at the jurisdictional stage to rely on any facts relevant to jurisdiction, whether or not they have a bearing on the merits as well.[244]

The Claimants' position

182. The Claimants submit that the Respondents' objection to the Tribunal's jurisdiction over Khan Netherlands' ECT claims on the basis of alleged non-compliance with Mongolian law is "manifestly frivolous."[245]

183. The Claimants agree with the proposition that an investor seeking the protection of an investment treaty must have made an "investment" and that such an investment must not have

---

[239] Memorial, paras. 129-130, quoting the "The Energy Charter and Related Documents, A Legal Framework for International Cooperation," Energy Charter Secretariat, September 2004, p. 14; Reply, paras. 159-160.

[240] Reply, paras. 159-160; Memorial, paras. 129-130.

[241] Memorial, paras. 132-133; Reply, para. 154, referring to Exhibits R-8, R-9; Hearing Transcript 61:3-16.

[242] Reply, para. 155.

[243] Reply, paras. 49-50.

[244] Reply, paras. 161-162.

[245] Counter-memorial, para. 256; Rejoinder, para. 179.

been "made contrary to law."[246] However, according to the Claimants, to deprive the investor of the protection of the investment treaty, the violation of the law must be such that as a result "no protected investment ha[s] ever come into existence."[247]

184. The Claimants state that "there is nothing whatsoever in the *Plama* and *Phoenix* decisions – or in any other arbitral decision, for that matter – to suggest that a *bona fide* investor can be denied access to arbitration by an international tribunal simply because its investment enterprise was "cited (legitimately or otherwise) for any breach of law."[248]

185. The Claimants submit that the Respondents' attempt to justify the assertion that "the very same logic applies to an investment *made* illegally as to an investment *carried out* illegally" by reference to the object and purpose of the ECT, in particular the "strengthening of the rule of law on energy issues," fails.[249] In the Claimants' view, rules of interpretation, including the rule that a treaty must be interpreted in good faith and in light of its object and purpose cannot be used to fabricate a requirement that is absent from the text of the treaty.[250]

186. In any event, the object and purpose of the ECT would not be served by precluding any investor who has allegedly breached the laws of the host state from making claims under the Treaty. Such a rule would incentivize host state regulators to impose pretextual sanctions on foreign investment enterprises as a means of avoiding arbitration under the ECT, running contrary to the ECT's goals of "promot[ing] long-term cooperation" and "strengthening . . . the rule of law" in the energy field.[251]

187. The Claimants further note that the Respondents' premise is not supported by any of the principles of international law invoked in *Plama*, as these were all directed towards circumstances where "the claims in question are based upon, arise from, or otherwise would not exist in the absence of the claimant's own illegal or non-bona fide acts."[252]

188. Further, the Claimants argue that, even if a violation of the host state's law during the course of an investment sufficed to preclude a foreign investor from bringing a claim under the ECT, the Respondents would bear the burden of proving the facts underlying their objection to

---

[246] Counter-memorial, paras. 260-261.

[247] Counter-memorial, paras. 261-263.

[248] Counter-memorial, para. 264; Rejoinder, para. 131.

[249] Rejoinder, para. 134, quoting Reply, paras. 158-159.

[250] Rejoinder, para. 135.

[251] Rejoinder, para. 136.

[252] Rejoinder, paras. 137-138.

jurisdiction. Yet, in the present case, the Respondents have "failed even to make a *prima facie* showing that any Khan entity ever committed *any* breach of law."[253]

189. According to the Claimants, the Respondents refer to a single document, the July 2009 Report issued by the SSIA, as evidence of Khan's alleged regulatory breaches and in support of the July 2009 suspension of the Mining License, the April 2010 revocation of the Mining and Exploration Licenses, and the NEA's subsequent refusal to re-register the Mining and Exploration Licenses.[254]

190. Yet, the Claimants assert, this report cannot be considered reliable evidence of regulatory breaches, much less definitive evidence sufficient to sustain the Respondents' burden of proof on this issue at this stage of the proceedings.[255] On its face, the July 2009 Report does not identify any facts or provide any legal analysis to substantiate the conclusions it sets forth. In issuing it, the SSIA ignored both the "wealth of information" provided to it by CAUC and Khan Mongolia during the inspections and Khan's requests to meet again with the SSIA.[256]

191. Besides, the Claimants aver that the MRAM's original reaction to the July 2009 Report was contradictory, as it took no action against Khan Mongolia, informing the SSIA that its conclusions were not legitimate grounds for cancelling a minerals license, while at the same time suspending CAUC's Mining License "pursuant to" the report.[257]

192. In addition, the July 2009 Report was never notified to CAUC or Khan Mongolia, who were therefore not afforded the opportunity to challenge the SSIA's conclusions or remedy the putative breaches.[258] Moreover, the July 2009 Report was "never verified, challenged or confirmed through any proper administrative procedure."[259] In fact, the Administrative Court ruled that the April 2010 invalidation of the Exploration License was illegal, stating that (i) "the NEA had failed to implement its duty to monitor and control, inasmuch as it had never verified any of the 'breaches' set out in the July 2009 Report" and (ii) "the July 2009 Report could not provide a justifiable basis for the invalidation" of the Exploration License.[260]

---

[253] Rejoinder, paras. 40, 140-144.

[254] Rejoinder, paras. 145-147, 155, 158.

[255] Rejoinder, para. 148.

[256] Rejoinder, paras. 148-149, 157.

[257] Rejoinder, paras. 150-151.

[258] Rejoinder, paras. 40, 151, 155, 157-158.

[259] Rejoinder, paras. 41, 157.

[260] Counter-memorial, para. 258; Rejoinder, paras. 156, 160.

193. The Claimants emphasize that the Respondents have not sought to verify or otherwise prove the allegations of the 2009 July Report, and in fact have failed even to address the "threshold" issues pertaining to the report's weight and credibility, such as the function of the SSIA, the methods and reasons for the SSIA's inspections, and the significance of the SSIA reports to other government agencies as a matter of Mongolian law.[261]

194. The Claimants acknowledge that the Respondents also "obliquely" referred to a 2005 inspection by the SSIA as alleged evidence of regulatory violations, but note that, as with the July 2009 Report, the Respondents have failed to demonstrate the "relevance, credibility or significance" of the only supporting document they invoke, a letter from the SSIA to CAUC dated 25 April 2005.[262] In any event, the Claimants consider that this letter has nothing to do with Khan Mongolia or Khan Netherlands.[263]

195. With regard to this letter, the Claimants note that it never led to any administrative action against CAUC, which suggests that even if any alleged breaches did occur, they were remedied by the company.[264] Administrative sanctions were imposed on CAUC only in 2009, after "Russia and Mongolia launched their campaign to exclude Khan from the Dornod Project."[265]

196. The Claimants argue that the Respondents' suggestion that Khan Mongolia somehow accepted that it had violated Mongolian law in the context of the proceedings before the Administrative Court by not challenging the substance of the SSIA's conclusions denotes a misunderstanding of the purpose of Khan Mongolia's action before the Administrative Court.

197. Specifically, Khan Mongolia sought to challenge the validity of the administrative act of the NEA purporting to invalidate the Exploration License, not to investigate issues – such as the substance of the SSIA's conclusions – that are "of no legal relevance to the validity of the act in question."[266] In fact, the Administrative Court's invalidation of the suspension of the licenses should have prompted the NEA itself to investigate any alleged breaches by Khan Mongolia that could justify refusing re-registration of the Exploration License.[267] Besides, since the July

---

[261] Rejoinder, paras. 159-162.

[262] Rejoinder, paras. 164-165.

[263] Rejoinder, para. 165.

[264] Rejoinder, para. 166.

[265] Rejoinder, para. 168.

[266] Rejoinder, para. 171.

[267] Rejoinder, paras. 169-173.

2009 Report was never notified to the Claimants, they had no administrative basis to challenge its contents.[268]

198. The Claimants also submit that they are "confused" by the Respondents' "sudden and startling" allegation in their Reply that by failing to engage in any activities in the three years that followed issuance of the Exploration License, Khan Mongolia breached Article 21.2.1 of the Law of Mongolia on Subsoil.[269] The allegation of a breach of this provision was not mentioned in the Respondents' prior pleadings, and Khan Mongolia was never cited for such a breach. In any event, the Claimants submit that in fact Khan carried out an extensive drilling program in the area covered by the Exploration License during the relevant period.[270]

199. Finally, the Claimants submit that denying them access to arbitration on the basis of the very same allegations of regulatory breaches challenged by them as a central component of their claim on the merits would lead to "absurd and unacceptable results."[271]

2. Whether Khan Netherlands is prevented from bringing ECT claims by operation of Article 26(3)(b)(i) of the ECT

The Respondents' position

200. The Respondents submit that the fork in the road clause at Article 26(3)(b)(i) of the ECT precludes Khan Netherlands from making its claims under the Treaty, because the Claimants have already brought these claims before the Mongolian courts.[272]

201. Article 26(3) of the Treaty provides, in relevant part:

> (3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b)(i) The Contracting Parties listed in Annex ID **do not give such unconditional consent where the Investor has previously submitted the dispute** under subparagraph (2)(a) or (b).
>
> (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.[273]

---

[268] Rejoinder, para. 170.

[269] Rejoinder, paras. 175-176.

[270] Rejoinder, paras. 176-178.

[271] Counter-memorial, para. 265.

[272] Memorial, para. 156.

[273] Memorial, para. 158, quoting the ECT [emphasis added by the Respondents].

202. Article 26(2)(a) refers to the resolution of disputes by "the courts or administrative tribunals of the Contracting Party party to the dispute." According to the Respondents, as Mongolia was listed in Annex ID of the ECT when the Claimants filed the Notice of Arbitration, Mongolia had "clearly" not given "its unconditional consent to arbitrate where the dispute has already been referred to its courts or administrative tribunals."[274] Mongolia's intention to withhold such unconditional consent is further emphasized by its written statement of policies, practices, and conditions provided in accordance with Article 26(3)(b)(ii).[275]

203. To determine whether the dispute submitted to international arbitration has already been "referred to . . . courts or administrative tribunals of the Contracting Party," the Respondents champion the "fundamental basis" test, while rejecting the "restrictive" "triple identity" test proposed by the Claimants.[276] At the hearing, the Respondents acknowledged that the "triple identity" test's criteria are not met in this case.[277] However, according to the Respondents, the three requirements of the triple identity test – identity of parties, cause, and object – combine to rob Article 26(3)(b)(i) of the ECT of "any practical effect."[278] The Respondents explain that this "practical ineffectiveness" of the triple identity test is noted by numerous commentators, who have proposed to replace it by the fundamental basis test, a "more appropriate test" that grants "practical meaning" to fork in the road provisions in investment treaties.[279] In applying the fundamental basis test, the Tribunal must examine "whether the 'fundamental basis' of a claim is autonomous of claims heard in other fora" and "whether the substance of the factual complaint is the same."[280] The fundamental basis test was applied in *Pantechniki S.A.Contractors and Engineers v. Republic of Albania* ("*Pantechniki*"), with reference to the *Woodruff Case* ("***Woodruff***") and *Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic* ("***Vivendi***").[281] According to the Respondents, the *Pantechniki* tribunal

---

[274] Memorial, paras. 159-160, 162.

[275] Memorial, para. 161; Hearing Transcript 64:4-65:11. The relevant part of the statement reads as follows: "Disputes resolved by Courts of Mongolia cannot be resubmitted to the International Courts as national courts have already given a final judgment and will contradict the Constitution of Mongolia and has a risk of having two judgments on the same dispute. Therefore, policies, practices and conditions of Mongolia do not allow an investor to resubmit the same dispute in international arbitration" (Memorial, para. 161, quoting Exhibit RL-28).

[276] Memorial, paras. 164-186; Reply, paras. 192-199.

[277] Hearing Transcript 65:12-66:4.

[278] Memorial, para. 166.

[279] Memorial, paras. 165-67; Reply, paras. 192-93; Hearing Transcript 66:5-22.

[280] Memorial, para. 167; Reply, paras. 197-98, quoting Exhibit RL-66.

[281] Memorial, paras.167-174, referring to Exhibit RL-8, *Pantechniki S.A.Contractors and Engineers v. Republic of Albania*, Award, 30 July 2009 ("Pantechniki"), Exhibit RL-3, *Compañia de Aguas del Aconquija SA and*

held that, in that case, "the arbitration concerned a claim which, although brought on a different legal basis to the court applications, was brought on the same fundamental basis as the court cases."[282] This precluded jurisdiction as a result of the fork in the road provision of the bilateral investment treaty invoked.[283]

204. The Respondents assert that the two proceedings initiated by Khan Mongolia and CAUC respectively before the Administrative Court in April 2010 satisfy the fundamental basis test and thus trigger the application of Article 26(3)(b)(i) of the ECT.[284] The Respondents explain that the claims were brought by Khan Mongolia and CAUC on behalf of the same entities who are the Claimants in this arbitration. While this arbitration and the proceedings before the Administrative Court do not have the "exact same legal bases," "the bases of the claims" are the same in both instances, as both are based on the "same alleged conduct of Mongolia, i.e. the invalidation of the Mining and Exploration Licenses."[285] Thus, before the Administrative Court, the Claimants sought "a declaration of the Court that the NEA's purported action to invalidate the mining licenses was itself invalid."[286] Similarly, in the present arbitration, the Claimants argue for an award on the basis of, *inter alia*, the Respondents' alleged "illegal invalidation of the mining and exploration licenses."[287] While the Claimants argue that no ECT claims were invoked before the Administrative Court, the Respondents submit that the Claimants' "ECT claims do not exist independently of their contractual claims."[288]

205. The Respondents also argue that Article 25 of the Foreign Investment Law specifically grants Mongolian courts jurisdiction over disputes such as this one.[289] The Respondents add that the Claimants multiply their legal proceedings to "put pressure" on Mongolia.[290]

206. In addition, the Respondents contend that the Claimants' arguments are internally contradictory. Thus, while arguing that the case before the Administrative Court did not involve any alleged ECT breach, the Claimants simultaneously argue that the mention of "Khan Mongolia having suffered illegality and injustice at the hands of the NEA (in the [Letter to the

---

Vivendi Universal v. Argentine Republic, Decision on Annulment, 3 July 2002 ("Vivendi"), Exhibit RL-30, *Woodruff Case*, UN Reports of International Arbitral Awards, Volume IX ("Woodruff").

[282] Memorial, para. 119.

[283] Memorial, para. 169.

[284] Memorial, paras. 176-86.

[285] Memorial, para. 182.

[286] Memorial, para. 184.

[287] Memorial, para. 184; Hearing Transcript 69:1-70:1, referring to the Notice of Arbitration.

[288] Memorial, para. 183.

[289] Hearing Transcript 69:23-70:8.

[290] Memorial, para. 186.

Prime Minister])" – the very facts on which their case before the Administrative Court was based – allows them to bring a claim under the ECT.[291] Moreover, while the Claimants assert that the proceedings before the Administrative Court and this Tribunal are distinct, they also invoke the Administrative Court proceedings as evidence in this arbitration.[292]

The Claimants' position

207. The Claimants submit that the limitation contemplated in Article 26(3)(b) of the ECT has not been triggered, regardless of the applicable set of criteria, as the present dispute between Khan Netherlands and Mongolia has not been submitted to any other forum.[293]

208. With respect to the administrative action filed by CAUC, the Claimants indicate that the Respondents have failed to explain how an action filed by CAUC could trigger the ECT fork in the road provision *vis-à-vis* Khan Netherlands.[294]

209. As for the administrative action filed by Khan Mongolia, it did not involve "the same parties, the same legal claims, the same subject matter, the same relief requested, the same underlying facts or the same 'fundamental bases'" as the present proceeding.[295]

210. The Claimants find inexplicable the Respondents' assertion that "the ECT claims do not exist independently of their contractual claims, as the same arguments could have been made before the Mongolian Courts."[296] According to the Claimants, none of the claims brought before the Administrative Court were based on contract and neither Khan Netherlands nor Khan Mongolia is a party to any contract with Mongolia.[297]

211. The Claimants submit that the Respondents have not provided any "substantive information" or "reasoned analysis" of any similarity between the administrative proceedings and this arbitration.[298] The Claimants note that even if there were any such similarity, the Claimants are not "unsatisfied" with the Administrative Court's decisions, as the Respondents allege, but

---

[291] Memorial, para. 189.

[292] Reply, paras. 189-191 [emphasis in the original].

[293] Counter-memorial, paras. 287, 294.

[294] Counter-memorial, para. 267.

[295] Counter-memorial, para. 329; Rejoinder, para. 181.

[296] Counter-memorial, para. 271, quoting Memorial, para. 183.

[297] Counter-memorial, para. 271.

[298] Counter-memorial, para. 268.

rather with the conduct of Mongolia, which has refused to recognize or take any action based on the Administrative Court's decision.[299]

212. The Claimants argue that to determine whether any other tribunal has previously considered the "dispute" in this arbitration, the Tribunal should first consider the definition of "dispute" in Article 26(1) of the ECT. This provision refers to three elements: "parties ('between a Contracting Party and an Investor'); subject matter ('relating to an Investment'); and legal grounds ('concerning an alleged breach of an obligation of the former under Part III of the ECT')."[300] As the proceeding brought by Khan Mongolia against the NEA before the Administrative Court involved neither a breach of the ECT, nor an "Investor" for purposes of the ECT, this proceeding did not pertain to the same "dispute" as the one presently before the Tribunal.[301]

213. The Claimants further allege that the ECT's definition of a "dispute" largely reflects what is known as the "triple identity" test, which requires an identity of parties, legal grounds, and subject matter or, in its only distinction from the ECT's definition of a dispute, relief.[302] The Claimants submit that the Tribunal should accept the triple identity test, because its relevance to the application of fork in the road provisions such as Article 26(3)(b) of the ECT and to Article 26(3)(b) itself is "supported by the weight of arbitral authority."[303]

214. In the present case, the Respondents contend, there is no identity of legal claims between this arbitration and Khan Mongolia's case before the Administrative Court. The administrative case was based solely on the NEA's alleged non-compliance, in its issuance of notifications and resolutions purporting to invalidate Khan Mongolia's Exploration License, with procedural

---

[299] Counter-memorial, paras. 270, 281-282, 287.

[300] Counter-memorial, paras. 289-290, quoting ECT, Art. 26(1); Hearing Transcript 175:10-25.

[301] Counter-memorial, para. 291.

[302] Counter-memorial, para. 292; Hearing Transcript 177:1-4.

[303] Counter-memorial, paras. 294-297, 300, referring to Exhibit CLA-58, *Lauder v. Czech Republic*, UNCITRAL Arbitration Rules, Final Award of 3 September 2001, paras. 163-66, Exhibit CLA-59, *CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction of 17 July 2003, para. 80, Exhibit CLA-60, *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003, Exhibit CLA-61, *Pan American Energy LLC et al. v. Argentina*, ICSID Case No. ARB/04/8, Decision on preliminary Objections of 27 July 2006, paras. 154-157, Exhibit C-62, *Toto Costruzioni Generali SpA v. Lebanon*, ICSIC Case No ARB/07/12, Decision on Jurisdiction of 8 September 2009, paras. 211-212, Exhibit CLA-63, *Cf. Genin v. Estonia*, ICSID Case No. ARB/99/2, IIC 10(2001), paras. 331-334, Exhibit CLA-64/RL-20, *Amto*, para. 71, Exhibit CLA-65, *CME v. Czech Republic*, Final Award of 14 March 2003, ad hoc – UNCITRAL Rules, paras. 432-433.

requirements of Mongolian law.[304] All the facts underlying the complaint revolved around the notifications and resolutions issued by the NEA.[305]

215. Furthermore, the Administrative Court identified the legal bases for its conclusions as Articles 26.3, 26.4, and 26.5 of the NEL, and Articles 1 and 2 of the Law on Regulation for Implementation of Nuclear Energy Law.[306] The Administrative Court made no determination as to whether the NEA's actions breached any investor protection standards.[307]

216. By contrast, in the present arbitration, the Tribunal does not need, and is not empowered, to determine whether the NEA's invalidation of the Exploration License was in violation of procedural requirements of Mongolian law.[308] The NEA's breach of Mongolian law would constitute no more than one of the many facts evidencing Mongolia's violation of its obligations under Articles 10 and 13 of the ECT.[309]

217. Indeed, the primary relevance to this arbitration of the decisions of the Administrative Court is that Mongolia chose to disregard them, thus showing that its actions were not motivated by legitimate regulatory concerns, but were "simply an illegal taking of [the] Claimants' investments."[310]

218. In addition, the Claimants observe that the relief requested of the Administrative Court and this Tribunal is different.[311] Before the Administrative Court, Khan Mongolia requested a declaration that the NEA's actions were invalid as a matter of Mongolian law. In contrast, before this Tribunal, Khan Netherlands is requesting compensation for the total loss of its investment in Mongolia.[312]

219. The Claimants acknowledge that the Respondents rely on three international decisions, *Woodruff*, *Vivendi*, and *Pantechniki*, to argue for the use of a "fundamental basis" test in the application of Article 26(3)(b) of the ECT. However, according to the Claimants, the cited cases do little to support the Respondents' argument.[313]

---

[304] Counter-memorial, paras. 273, 283, 298.

[305] Counter-memorial, paras. 272, 274-280.

[306] Counter-memorial, para. 280.

[307] Counter-memorial, paras. 283, 298.

[308] Counter-memorial, para. 273.

[309] Counter-memorial, para. 284.

[310] Counter-memorial, para. 273.

[311] Counter-memorial, para. 299.

[312] Counter-memorial, paras. 272, 285-286, 299.

[313] Counter-memorial, paras. 301, 306.

220. First, the Claimants specify that *Woodruff*, a 1903 decision of the U.S.-Venezuela Mixed Claims Commission concerning Venezuela's failure to re-pay bonds issued under a concession agreement, stands for the proposition that "where a claim brought on the international plane is 'fundamentally based on a [domestic law] contract,' an exclusive forum selection clause in that contract should be respected – *although without prejudice to the right to pursue further remedies based on causes of action in international law*."[314]

221. The Claimants further observe that in *Vivendi*, the tribunal's dismissal of the claims on the merits because the adjudication of those claims would violate the exclusive jurisdiction clause of the underlying concession agreement was annulled by an ICSID annulment committee decision. In doing so, the annulment committee invoked the "fundamental basis" test not in the context of a fork in the road provision, but rather to "dispel the notion that the mere existence of a contractual forum selection clause could preclude investment treaty arbitration."[315]

222. *Vivendi* also stands for the proposition that fork in the road provisions are triggered where (i) jurisdiction under the treaty is not limited to claims for treaty breaches; and (ii) the disputes in the national and international fora are "coextensive."[316]

223. In this respect, the Claimants contend that jurisdiction under the ECT is certainly limited to claims based on breaches of the Treaty. Further, the issues before the Administrative Court and this Tribunal are not coextensive. Thus, this Tribunal must not determine the legality of the NEA's conduct under Mongolian law, but rather whether Mongolia's "disregard for the Administrative Court's ruling and its subsequent development of the Dornod Project" breached Mongolia's obligations under the ECT.[317]

224. Finally, the Claimants note that *Pantechniki*, an ICSID case concerning money owed by Albania under a contractual provision, is the only decision mentioned by the Respondents or known to the Claimants to employ the "fundamental basis" test in the context of a fork in the road provision.[318] In that case, the Albanian courts had already dismissed the investor's claims, and the investor resorted to arbitration under the Greece-Albania bilateral investment treaty "rather than [pursuing] an appeal in Albania."[319]

---

[314] Counter-memorial, paras. 301-305, quoting Exhibit CLA-69, *Woodruff*, para. 160 (emphasis added).

[315] Counter-memorial, paras. 307, 312.

[316] Counter-memorial, paras. 311-314, quoting Exhibit CL-68, *Vivendi*, para. 55.

[317] Counter-memorial, para. 315.

[318] Counter-memorial, paras. 316-321.

[319] Counter-memorial, para. 319.

225. The Claimants argue that the sole arbitrator in *Pantechniki* based his decision that he lacked jurisdiction on the fact that Albania's failure to comply with a contractual provision, which had already been declared to be null by the Albanian courts, was the only conduct identified by the claimant as capable of constituting a breach of the relevant investment treaty. In this case, however, Khan Netherlands' claims are not based on Mongolia's breach of a domestic law contract.[320]

226. Additionally, unlike the investor in *Pantechniki*, Khan Netherlands is not seeking the same remedy before the national and international tribunals.[321]

227. In sum, the Claimants state that "this arbitration is based on fundamentally different legal claims and a factual predicate that goes far beyond the limited procedural issues before the Administrative Court."[322] The factual basis for Khan Netherlands' claims of ECT violations before this Tribunal is based on Mongolia's pursuit of a joint venture with Russian interests to develop the Dornod Project without the Claimants, and the Government's related decision to invalidate and refuse to re-register the Mining and Exploration Licenses, to disregard the 2010 MOU, to disseminate false information about Khan Netherlands, and finally to disregard the decision of the Administrative Court. By contrast, the factual basis for Khan Mongolia's claim before the Administrative Court consisted of the NEA's failure to comply with the requirements of administrative due process in formulating its notifications to Khan Mongolia.[323] Consequently, the fundamental basis test, to the extent that the Tribunal finds it relevant, is not satisfied in the present case.[324]

228. In addition, the Claimants argue that even if the dispute before this Tribunal were the same as the one before the Administrative Court, Mongolia's disregard for that court's decision nonetheless constitutes an independent basis for Khan Netherlands to pursue a treaty claim against Mongolia under the ECT.[325]

229. The Claimants add that the Mongolian statement of policies provided with respect to Annex ID of the ECT does not support the Respondents' fork in the road objection.[326]

---

[320] Counter-memorial, para. 320; Hearing Transcript 183:10-184:4.

[321] Counter-memorial, paras. 319, 321.

[322] Counter-memorial, 321.

[323] Hearing Transcript 180:1-181:6.

[324] Counter-memorial, para. 321; Rejoinder, paras. 182-183.

[325] Hearing Transcript 184:5-184:14.

[326] Counter-memorial, paras. 322-328.

230. Finally, the Claimants assert that the Respondents "have conceded their objection under ECT Article 26(3)(b)(i)" in their Reply, as they did not attempt to rebut any of the Claimants' submissions regarding the application of this provision and did not challenge the Claimants' submission that the fundamental basis test is not satisfied in this case.[327] In particular, by not contesting and in part even confirming the Claimants' characterization of the proceeding brought by Khan Mongolia before the Administrative Court, the Respondents have conceded that the fundamental basis of the claims brought by Khan Mongolia before the Administrative Court was completely different from the fundamental basis of the claims presently before the Tribunal.[328]

3. Whether Khan Netherlands has complied with the waiting period requirement of Article 26(2) of the ECT

The Respondents' position

231. The Respondents submit that the Tribunal should decline jurisdiction because Khan Netherlands has not made any valid attempt to settle the dispute amicably and has thus failed to comply with the procedure set forth in Article 26 of the ECT.[329]

232. Article 26(1) and (2) of the Treaty provides:

> (1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.
>
> (2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
>
> (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
> (c) in accordance with the following paragraphs of this Article.

233. The Respondents submit that, as confirmed by numerous arbitral tribunals, in stipulating a three-month waiting period following the request to settle the dispute amicably, Article 26(2) of the ECT creates a jurisdictional, rather than "merely" procedural, requirement, failure to comply with which deprives the tribunal of jurisdiction.[330]

---

[327] Rejoinder, paras. 180-183.

[328] Rejoinder, paras. 184-186, referring to Reply, paras. 48, 155.

[329] Memorial, para. 136.

[330] Memorial, paras. 138, 140-146, referring to Exhibit RL-33, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Decision on Jurisdiction, 14 January 2008, para. 88, Exhibit RL-11, *Murphy Exploration and Production Company International v. Republic of Ecuador*, Award on Jurisdiction, 15 December 2010, paras. 153, 154, 157, Exhibit RL-34, *Antoine Goetz et al. v. Burundi*, Award, 10 February

234. The Respondents argue that the Claimants' "narrow" interpretation to the effect that Article 26(2) of the Treaty only requires disputes to be settled amicably "if possible" is a "gross underestimation" of the importance of the waiting period and a "miscomprehension" of the Treaty's object and purpose.[331]

235. According to the Respondents, Article 2 of the ECT identifies one of the Treaty's aims as the promotion of cooperation. In this context, cooperation implies that parties must attempt to settle a dispute amicably despite the complexity of the dispute and the unforeseeability of the outcome of the amicable dispute resolution process.[332] Moreover, the Respondents assert that, in the present case, there was no sign that Mongolia would have willfully refused to negotiate.[333]

236. The Respondents also submit that the Claimants did not comply with the mandatory waiting period of three months from the request to settle the dispute amicably.[334] Contrary to the Claimants' assertion, the Letter to the Prime Minister did not trigger the three-month period, as it does not constitute the request for amicable settlement contemplated by Article 26 of the ECT, lacking the necessary elements of such a request set out in Article 26(1).[335]

237. First, the letter does not relate to an "Investor of another Contracting Party." Sent by Khan Canada, it contains no mention of Khan Netherlands.[336] Second, the letter makes no mention of any disputes "which concern an alleged breach of an obligation of the [Contracting Party] under Part III [of the Treaty]."[337] The letter concerns exclusively breaches of Mongolian law, rather than Mongolia's alleged ECT breaches. Yet, in *Burlington Resources Inc. v. Republic of Ecuador* ("***Burlington***"), the tribunal stated that a dispute under a treaty "only arises once an allegation of [t]reaty breach is made" and found that the applicable six-month waiting period would begin only at that point in time.[338] Third, the letter did not attempt to settle the dispute

---

1999, para. 93, Exhibit RL-35, *Western NIS Enterprise Fund v. Ukraine*, Order, 16 March 2006, para. 5; Reply, paras. 172-173, referring to Exhibit CLA-77, *Salini*, para. 16, Exhibit RL-60, *ICS Inspection and Control Services Ltd. v. Argentina, Award on Jurisdiction*, 10 February 2012, paras. 250-251, n.275.

[331] Reply, paras. 163-166, 170.

[332] Reply, paras. 167-171, 174.

[333] Reply, paras. 175-176.

[334] Memorial, paras. 136, 139, 155; Reply, paras. 164, 177.

[335] Memorial, paras. 147-148, 155; Reply, para. 185.

[336] Memorial, para. 149; Reply, paras. 181-182, 185; Hearing Transcript 62:9-12.

[337] Memorial, para. 150; Reply, paras. 182-184.

[338] Reply, para. 183, quoting Exhibit RL-61, *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Jurisdiction, 2 June 2010, para. 336 ("*Burlington*").

amicably. It contained neither offers to negotiate nor any suggestion of a potential settlement.[339] Instead, the letter was "aggressive[. . .]" and "threatening," reflecting the Claimants' policy of negative publicity and intimidation against the Respondents.[340] In fact, the Claimants publicized the letter on their website and, on the very day it was sent, commenced proceedings against the NEA in the Mongolian courts.[341]

The Claimants' position

238. The Claimants submit that far from seeking to disregard the requirements of Article 26 of the Treaty, they have actually complied with that provision.[342]

239. The Claimants argue that given the stipulation in Article 26(1) that disputes shall be settled amicably "if possible" and the conditional language of Article 26(2), the relevant inquiry for purposes of these provisions is whether the dispute in question can or cannot be settled amicably.[343]

240. Moreover, according to the Claimants, the ECT, unlike some other investment treaties, does not require a formal, written, specific, notice of a dispute, but only a good faith "request" for amicable settlement. As confirmed by the *Salini Construttori S. P.A. and Italstrade S.P.A. v. Kingdom of Morocco* ("***Salini***") and *Limited Liability Company Amto v. Ukraine* ("***Amto***") decisions, given the ordinary meaning of the word "request," the investor need only make its problems known to the host state's decision-makers and ask that they be resolved.[344]

241. The Claimants further submit that they complied with the requirements of Article 26(1) and (2) by sending the Letter to the Prime Minister on 15 April 2010. The letter refers to the "ongoing unlawful and unjust actions being taken by the Nuclear Energy Agency," including the NEA's purported invalidation of the Mining and Exploration Licenses, and specifically requests the Prime Minister of Mongolia to "exercise [his] authority to review and overturn the NEA's

---

[339] At the hearing, however, counsel for the Respondents stated that the Letter to the Prime Minister was "offering apparently negotiation" (Hearing Transcript 23:6-24:5).

[340] Reply, paras. 178-179.

[341] Memorial, paras. 151-154; Reply, paras. 177-179.

[342] Rejoinder, para. 190.

[343] Counter-memorial, paras. 332-333.

[344] Counter-memorial, paras. 334-340, 351, referring to Exhibit CLA-77, *Salini Construttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 16 July 2001, para. 20 ("*Salini*"), Exhibit CLA-64/RL-20, *Amto LLC v. Ukraine*, SCC Case No. 080/2005, Final Award of 26 March 2008, para. 189.

decisions" and "to closely examine and assist [the Claimants] in rectifying the NEA's unlawful actions."[345]

242. Moreover, the Letter to the Prime Minister mentions that Mr. Quick, Khan Canada's President and CEO, "would appreciate an opportunity to speak directly" with the Prime Minister of Mongolia or his staff.[346] In the Claimants' view, the fact that this letter was sent on Khan Canada's letterhead does not vitiate its character as a request for amicable settlement between Khan Netherlands and the Respondents, as Khan Canada represented the interests of all its wholly-owned subsidiaries, including Khan Netherlands and Khan Mongolia.[347]

243. According to the Claimants, Mongolia was well aware of Khan Netherlands' interest in the issues canvassed in the Letter to the Prime Minister, as the FIFTA was informed of Khan Netherlands' majority ownership of Khan Mongolia in May 2008, and as this ownership was set forth in the 2010 MOU. [348]

244. Moreover, a request for amicable settlement under the ECT need not refer to specific breaches of the Treaty. The *Burlington* case invoked by the Respondents was concerned with a treaty that did not condition submission to arbitration on an attempt to settle the dispute amicably, but only on the passing of six months. Thus, *Burlington* did not analyze the question of whether a request for amicable settlement must contain allegations of treaty breach. As for *Burlington*'s wider proposition that a dispute "only arises once an allegation of [t]reaty breach is made," it is contrary to the weight of authority on the question, as evidenced by the *Maffezini v. Spain* decision.[349]

245. In any event, seen in its full context, this phrase from *Burlington* does not support the conclusion that the Claimants have failed to satisfy the requirements of Article 26 of the ECT. In fact, the *Burlington* tribunal specified that an investor should not be required "to spell out its legal case in detail . . . [or] even . . . to invoke specific [t]reaty provisions . . ." but need only "apprize the host State of the likely consequences that would follow should the negotiation

---

[345] Counter-memorial, para. 343.

[346] Counter-memorial, paras. 343-345, quoting Exhibit C-15; Rejoinder, para. 189.

[347] Rejoinder, para. 191.

[348] Counter-memorial, paras. 346-349.

[349] Rejoinder, paras. 192-195, referring to Exhibit CLA-11, *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decicision on Jurisdiction dated 25 Jan. 2000, para. 96.

process break down."[350] The Letter to the Prime Minister did just that by informing Mongolia of the possibility of resort to international arbitration.[351]

246. The Claimants also recall that after the Letter to the Prime Minister, numerous further efforts were made to achieve an amicable settlement, including three trips to Mongolia by Khan Canada's officers and directors.[352]

247. The Claimants submit that since an amicable dispute resolution provision aims to allow parties to engage in good faith negotiations, such a provision cannot preclude the Tribunal from having jurisdiction where any further attempts at negotiation would have been futile.[353]

248. In the present case, based on the lack of positive response to any of Khan's efforts to achieve an amicable settlement and the "larger set of circumstances surrounding the claims before the Tribunal," it was clear that amicable settlement of Khan Netherlands' dispute with Mongolia was impossible.[354]

249. The Claimants submit that the Respondents adduce no evidence in support of their assertion to the contrary. In particular, the Respondents fail to give any explanation for the "obvious" questions arising in this connection, such as why Mongolia refused to honor the 2010 MOU and the decisions of the Administrative Court; why the NEA sent an inflammatory letter concerning Khan to the Toronto Stock Exchange in March 2010; why no Mongolian official ever responded to the Letter to the Prime Minister; why Mr. Edey was advised that an amicable resolution would be difficult to achieve given Mr. Enkhbat's opposition to Khan's participation in the Dornod Project; why Mr. Enkhbat publicly insulted Khan and stated that it would never get its licenses and; why Mongolia entered into an agreement with Russia for the development of the Dornod Project, even as the Claimants remained the project's legitimate owners.[355]

---

[350] Rejoinder, para. 196.

[351] Rejoinder, paras. 196-197.

[352] Counter-memorial, para. 352; Rejoinder, para. 189.

[353] Counter-memorial, paras. 354-356.

[354] Counter-memorial, paras. 350, 353, 356; Rejoinder, para. 189.

[355] Rejoinder, paras. 50-51, 198-200.

4. Whether Khan Netherlands' claims are barred by operation of Article 17(1) of the ECT

The Respondents' position

250. The Respondents submit that Article 17(1) of the ECT, its denial of benefits provision, applies in the present case to exclude the Tribunal's jurisdiction over Khan Netherlands' claims under the ECT.[356]

251. Article 17(1) of the ECT provides, in relevant part:

> "Each Contracting Party reserves the right to deny the advantages of … Part [III of the Treaty] to:
>
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized…."

252. According to the Respondents, given the Treaty's purpose to "foster mutual cooperation for the benefit of the signatories to the Treaty," the aim of Article 17(1) of the Treaty is that ECT benefits be awarded to "genuine nationals of contracting party states," but denied to "investors which ha[ve] no real connection with a Contracting Party, even if technically they [are] organized within one of those contracting states," the so-called "mailbox companies."[357]

253. The Respondents submit that if they can show that Khan Netherlands is a mailbox company within the meaning of Article 17(1) of the ECT, *i.e.*, that (i) "nationals of a third state own or control" Khan Netherlands and (ii) Khan Netherlands "has no substantial business activities" in the Netherlands, then Mongolia may deny Khan Netherlands the advantages of Part III of the Treaty in this arbitration.[358] This denial also includes denial of the advantages of Article 26 of the ECT because this provision, invoked as the jurisdictional basis of Khan Netherlands' ECT claims, applies only to alleged breaches of Part III of the ECT.[359]

254. The Respondents acknowledge that recent arbitral decisions are inconclusive regarding the application of Article 17(1) of the ECT.[360] Of the four recent "notable" decisions on this matter, two, namely, the *Plama Consortium v. Bulgaria* ("***Plama***") and *Yukos Universal Limited (Isle of Man) v. the Russian Federation* ("***Yukos***") decisions on jurisdiction, have found that the right to deny the benefits of the ECT must be exercised actively by the host state and with

---

[356] Memorial, paras. 199-200.

[357] Memorial, paras. 189-192, quoting ECT, Art.2.

[358] Memorial, paras. 193-194; Hearing Transcript 73:15-75:5.

[359] Memorial, paras. 193-194.

[360] Memorial, paras. 199-200.

exclusively prospective effect, *i.e*., before the investment is made and the arbitration commenced.[361]

255. Addressing the Treaty's "object and purpose" to "promote long-term co-operation in the energy field" and investors' "legitimate expectations" of enjoying the advantages of Part III of the ECT unless the state exercises its right to deny ECT benefits under Article 17(1) of the Treaty, the *Plama* tribunal explained that under this interpretation, the putative investor would receive "reasonable notice" of a potential host state's decision to exercise its right under Article 17(1), and hence be able to "come within or without the criteria there specified, as it chooses" or "plan not to make an investment at all or to make it elsewhere."[362]

256. By contrast, the other two decisions concerning the interpretation of Article 17(1) of the ECT, *Petrobart Limited v. Kyrgyz Republic ("**Petrobart**")* and *Amto,* directly proceeded to consider whether on the facts of the case the relevant entity fell within the description of Article 17(1) of the ECT, "on the basis that the benefits would be denied if the conditions of Article 17 were fulfilled,"[363] "as if the exercise of the [host state's] right [to deny benefits] could be made upon the exercise of the investor's rights, that is, at the outset of the arbitration."[364] In *Amto*, as in *Plama*, the tribunal examined the purpose of the ECT, but attached a particular significance to the reciprocal nature of the ECT and to the reference to "complementarities" and "mutual benefits" in the expression of the Treaty's objective in its Article 2.[365]

257. The Respondents submit that the legal commentary is "almost unanimous[]" in criticizing the interpretation of Article 17(1) of the ECT adopted in *Plama* and *Yukos.*[366] According to the Respondents, the requirement of prior notification contradicts a plain reading of Article 17(1) of the Treaty, as this provision makes no mention of specific notice.[367] In fact, where the "authors of the [Treaty] wished to subordinate the exercise of rights to conditions of form, they

---

[361] Memorial, paras. 200-203, 209-210, 212, referring to Exhibit RL-22, *Plama Consortium v. Bulgaria***,** ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005 ("*Plama*"), Exhibit RL-24, *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009 ("*Yukos*").

[362] Memorial, para. 203, quoting Exhibit RL-22, *Plama*, para. 161, ECT, Art.2.

[363] Memorial, paras. 205-208, referring to Exhibit CLA-64/RL-20, *Amto*, Exhibit CLA-101/RL-23, *Petrobart Limited v. Kyrgyz Republic*, SCC No. 126/2003, Award of 29 March 2005 ("*Petrobart*").

[364] Memorial, para. 212.

[365] Memorial, para. 207, quoting Exhibit CLA-64/RL-20, *Amto*, para. 61.

[366] Memorial, paras. 215-233, referring to Exhibits RL-4, RL-5, RL-6, RL-26, RL-27.

[367] Memorial, paras. 217-218.

formulated them explicitly."[368] It is also contended that Article 17(1) itself constitutes sufficient notice.[369]

258. The Respondents add that commentators consider *Plama*'s reference to the Treaty's purpose as "fallacious" and "one-sided."[370] For instance, in quoting the Treaty's purpose as expressed in its Article 2, the tribunal in *Plama* omits the words "complementarities and mutual benefits," thus ignoring the "reciprocal elements of the [Treaty]."[371]

259. Moreover, the Respondents observe that the view that the exclusively prospective effect of the denial of benefits is necessary to protect the legitimate expectations of investors is criticized, because "a company controlled by nationals of a third state and which has no activity in the state in which it is incorporated has no legitimate expectation of protection under the Treaty."[372]

260. Finally, the *Plama* interpretation has "utterly impractical consequences," as it imposes on the host state the obligation to review "every corporate structure, down to its smallest of subsidiaries and empty mailbox companies that may be contained somewhere within the investors' group, of every investment that is made within its territory" if it wishes to avail itself of its rights under Article 17(1) of the ECT.[373]

261. In addition, the Respondents submit that the Claimants' interpretation of Article 17(1) of the Treaty, derived from the *Plama* and *Yukos* decisions, runs contrary to the rules of treaty interpretation found at Article 31 of the VCLT.[374] With respect to the "ordinary meaning" of Article 17(1) of the ECT, the Respondents assert that the statement that a state "reserves the right to" deny benefits does not suggest that any further action is necessary to exercise the denial of benefits.[375]

262. This meaning of "to reserve a right" is confirmed by the Oxford English Dictionary, numerous commentators, and the French and Spanish versions of the Treaty.[376] The heading of Article 17(1) of the ECT and Part C(2)(11) of the ECT Reader's Guide also indicate that the denial of

---

[368] Memorial, para. 219, quoting Exhibit RL-5, para. 70; Reply, para. 262; see also Hearing Transcript 74:23-75:5, referring to ECT, Arts. 26(3)(b)(iii), 26(4), and 27(1)(2).

[369] Memorial, para. 220.

[370] Memorial, paras. 224, 226.

[371] Memorial, paras. 223-227.

[372] Memorial, para. 228, quoting Exhibit RL-5, para. 71.

[373] Memorial, paras. 230-232.

[374] Reply, paras. 248-250, 268.

[375] Reply, paras. 252-253.

[376] Reply, paras. 251-259.

benefits is not an option.[377] By contrast, where the authors of other treaties wished to subject the use of a denial of benefits clause to prior notice, they inserted an explicit compulsory requirement of notification, as in Article 1113(2) of the North-American Free Trade Agreement and Article 18(2) of the 2004 Canada Model BIT.[378]

263. Regarding the object and purpose of the ECT, the Respondents submit that their interpretation does not "incentivize states to be non-transparent in their implementation of ECT policies" contrary to the Treaty's goal to create "stable, equitable, favorable and transparent conditions for Investors," because investors are on notice by virtue of Article 17(1) of the ECT, as explained above.[379] Rather, it is the Claimants' position that incentivizes investors to be non-transparent by keeping "quiet about the structure of their investment." [380]

264. Finally, with respect to "subsequent practice," the Respondents highlight that whereas the Claimants assert that states may exercise their right under Article 17(1) of the ECT by making a "blanket" denial of advantages towards all companies caught by the provision's definition, tellingly the Claimants have not identified a single blanket denial of this sort.[381] In any event, such a blanket denial would constitute a "reservation" prohibited by Article 46 of the Treaty.[382]

265. In their Memorial, the Respondents state that the preferred view of legal commentators and the one that should be adopted by the Tribunal is that the host state's right to deny ECT benefits can be exercised at the start of any dispute, when the state becomes aware of a mailbox company investor that is attempting, despite being controlled by nationals of a non-ECT Contracting Party, to obtain the advantages of the Treaty.[383] At the hearing, the Respondents explained that where the two conditions of Article 17(1) (ownership or control by nationals of a third state and lack of substantial business activities in the state of incorporation) are met, Article 17(1) provides "directly for the non-application" of Part III of the Treaty, without requiring that the state take any "additional action to deny benefits" and without any "temporal limits" on the exercise of the state's right to deny benefits.[384]

---

[377] Reply, paras. 260-264.

[378] Reply, paras. 265-267, referring to Exhibits CLA-73, RL-81.

[379] Reply, paras. 269-271, quoting Counter-memorial, para. 380; ECT, Art. 10.1

[380] Reply, para. 272; Hearing Transcript 77:1-8.

[381] Reply, paras. 273-274, 276; Hearing Transcript 78:18-23.

[382] Reply, para. 275; Hearing Transcript 77:20-78:23.

[383] Memorial, para. 235.

[384] Hearing Transcript 74:17-75:9.

266. The Respondents further submit that, in the present case, the Tribunal is "faced with the application of Article 17(1) to the exact situation for which it was designed."[385] In particular, the Respondents assert that the Claimants have admitted that Khan Netherlands is owned and controlled by nationals of a third state – Canada – which is not party to the ECT, and that Khan Netherlands is a "mailbox" company, with "no substantial business activities in the Area of the Contracting Party in which it is organized."[386] As a result, the Tribunal is faced with an entirely new question, as all the above-referenced decisions concerning the operation of Article 17(1) were ultimately decided on the basis that one or the other of the two factual conditions of Article 17(1) was not met.[387]

267. Moreover, the Respondents submit that even if Article 17(1) of the ECT is interpreted to require an active denial of benefits, in the present case Mongolia has not had a "realistic opportunity" to exercise its right to deny ECT benefits. This is because Khan Netherlands was created and inserted into the Claimants' corporate structure after the Claimants had been notified of their breaches of Mongolian regulations and coinciding with the Claimants' negative publicity campaign against the Respondents.[388] Moreover, Khan Netherlands was given a "low profile" even after its incorporation.[389]

268. The Respondents argue, therefore, that if the Claimants' approach to Article 17(1) of the ECT were taken, Mongolia would be faced with the "impossible task" not only of examining the corporate structure of every investment made in its territory, but also of constantly monitoring changes in this structure.[390]

269. Furthermore, the Respondents submit that Article 17(1) was drafted specifically to avoid the benefit of the Treaty being extended to an entity such as Khan Netherlands, which was created in the lead up to this arbitration as a "cynical attempt" or "subterfuge" to allow Khan Canada, a

---

[385] Memorial, paras. 238, 240.

[386] Memorial, para. 239, quoting ECT, Art. 17(1), and paras. 195-197; Reply, para. 279; Hearing Transcript 79:3-80:12. This is confirmed by the Claimants in their Counter-memorial, para. 360.

[387] Hearing Transcript 80:13-82:7.

[388] Memorial, para. 257.

[389] Memorial, paras. 242-249, 252; Reply, para. 273. At the hearing, the Respondents explained that while Khan Netherlands may have been registered in Mongolia in May 2008, "this is not the same people in the government who are dealing with this registration process" (Hearing Transcript 88:2-5). The Respondents emphasized that no mention of Khan Netherlands was made to the NEA or the Mongolian Ministry of Energy and Mines between 2008 and 2010 and that even in the Letter to the Prime Minister, Khan Netherlands was not named (Hearing Transcript 88:6-89:9).

[390] Memorial, paras. 252-254; Hearing Transcript 77:9-15.

Canadian entity, to obtain the benefit of the ECT, despite the fact that Canada has not adhered to the Treaty.[391]

270. Among "further notable elements," the Respondents stress that the investment was made without any involvement by Khan Netherlands, which was incorporated only in 2007, after the Claimants' alleged investments in Mongolia.[392] It is thus "misleading" for the Claimants to assert that if "capital could not have been channeled through a Dutch company, it may never have been invested in the first place."[393]

271. In addition, the Respondents contend that the Claimants are incorrect in stating that mailbox companies have been led to expect to receive the protections of Part III of the ECT by reason of the Treaty's wide definition of "investor." [394] The Claimants' reading of the ECT is "myopic," as it "surgically remov[es]" Article 17(1) from the ECT.[395] In fact, Article 17(1) is an exception to the definition of "investor" found in Article 1(7) of the Treaty.[396]

272. Accordingly, investors can plan their investments on the basis of the notice given by Article 17(1) that if they fall within the definition of this provision, they may not rely on the protections of the ECT.[397] Wide definitions of "investor" have been coupled with denial of benefits clauses in other instruments, such as the 2004 US Model BIT.[398] A state is free to limit its consent to arbitration in a treaty, and the investor may "accept or decline the offer to arbitrate, but cannot vary its terms."[399]

273. Thus, the Respondents' interpretation of Article 17(1) of the ECT does not create any injustice for the investor. In order to benefit from the ECT, the investor can always structure its activities so as to have "substantial" business activities in a Contracting Party.[400] Nor does it make any sense to argue, as the Claimants do, that Mongolia's intentions in signing the ECT can be inferred from the Netherlands-Mongolia BIT, as there is no reason to believe that a state wishes

---

[391] Memorial, paras. 255-257; Hearing Transcript 85:14-90:2.

[392] Memorial, paras. 241-242; Reply, para. 206.

[393] Reply, para. 206, quoting Counter-memorial, para. 398.

[394] Reply, paras. 203-204.

[395] Reply, paras. 205, 216.

[396] Hearing Transcript 83:14-85:10.

[397] Reply, para. 207.

[398] Reply, paras. 211-214.

[399] Reply, paras. 208-209.

[400] Reply, para. 210.

to engage itself in the same way toward one other state by means of a BIT as toward an unlimited number of states by way of a unilateral treaty.[401]

274. The Claimants are also incorrect in suggesting that the Netherlands has a vested interest in gaining international protection for mailbox companies, in particular Special Financial Institutions. In fact, multiple sources note that Special Financial Institutions do not contribute substantially to the Dutch economy.[402]

275. Finally, the Claimants are incorrect in claiming that investors and states should be expected to act in accordance with arbitral decisions, and in particular that Mongolia should have conformed with *Plama* and Y*ukos*, as there is no doctrine of precedent in international arbitration.[403] In fact, the authority of an arbitral tribunal's decision is limited to the parties which have agreed to submit their dispute to arbitration; the arbitral decision cannot have any impact on parties not bound by the arbitration agreement.[404]

276. Even if it were accepted that states should form policy on the basis of arbitral decisions, this reasoning is inapplicable to the present case, in the absence of an accepted line of authority existing at the relevant time. When Khan Netherlands was created in 2007 and when the Claimants' claims crystallized sometime in or around October 2009, of the three decisions considering Article 17(1) of the ECT, two, namely, *Petrobart* and *Amto*, supported the Respondents' interpretation, and the third, *Plama*, had been criticized by legal commentators. The *Yukos* decision, which the Claimants state confirms the reasoning in *Plama*, had not yet been rendered.[405]

The Claimants' position

277. The Claimants submit that Mongolia cannot at this stage deny Khan Netherlands the advantages of Part III of the ECT with regard to its pre-existing investments pursuant to Article 17(1) of the Treaty. At the outset, the Claimants highlight that Article 26 of the ECT, concerning dispute settlement, is not included in Part III of the ECT and thus falls outside the scope of Article 17(1). For this reason, the interpretation of Article 17(1) is not a question of

---

[401] Reply, para. 215.

[402] Reply, paras. 217-224, referring to Exhibits C-112, RL-69, RL-70, RL-71.

[403] Reply, paras. 225-232.

[404] Reply, para. 228.

[405] Reply, paras. 234-238.

jurisdiction.[406] Nonetheless, the Claimants note that the Parties have agreed to resolve the applicability of Article 17(1) of the ECT in this preliminary phase.[407]

278. The Claimants state that whether Mongolia's right to deny benefits was exercised must be evaluated at the time when the Contracting Party's offer of consent to arbitration is accepted by the investor. In the present case, Mongolia had not exercised its right when the Claimants commenced this arbitration.[408]

279. According to the Claimants, the Respondents argue that Article 17(1) at once constitutes an automatic denial of benefits by all the ECT contracting parties to all companies meeting the criteria of Article 17(1) and reserves a Contracting Party the right to deny an investor the advantages of Part III of the ECT at any time with regard to its pre-existing investments. Contrary to the Respondents' assertion, the Claimants reject the Respondents dual interpretation of Article 17(1) of the ECT not because it is "unjust," but because it is inconsistent with (i) the terms of the ECT, (ii) the object and purpose of the ECT, and (iii) relevant rules of international law.[409]

(i) Terms of the ECT

280. First, it is clear, according to the Claimants, that the terms of Article 17(1) of the ECT do not constitute an automatic denial of benefits.[410] The Respondents' attempt to analogize Article 17(1) to a limitation on the contracting parties' consent to arbitrate disputes with investors meeting the conditions stipulated therein is "overtly flawed."[411] Article 17(1) is not one of the dispute resolution provisions of the ECT and indeed is located in a different part of the Treaty.[412] The controlling language, "reserves the right to," indicates that, while a state may deny the benefit of Part III of the ECT to a certain class of investors, the exercise of this right is optional.[413]

281. In this respect, the Respondents' attempt to invoke the French and Spanish versions of the ECT is "unprincipled and disingenuous." The Respondents create the impression that contracting parties are reserving their obligation to comply with Part III of the ECT, while both in French

---

[406] Hearing Transcript 187:4-6.

[407] Counter-memorial, para. 360; Hearing Transcript 187:6-187:12.

[408] Rejoinder, para. 217.

[409] Counter-memorial, paras. 362, 404; Rejoinder, paras. 207, 250-251.

[410] Counter-memorial, paras. 364-365; Rejoinder, para. 208.

[411] Rejoinder, para. 214.

[412] Rejoinder, paras. 213-214.

[413] Counter-memorial, para. 365; Rejoinder, para. 215.

and Spanish the object of the verb "réserver" and "reservar" is the right of the Contracting Party to deny benefits. As Respondents acknowledge, this means that this right is being retained, and as confirmed by the Macmillan English Dictionary, may or may not be exercised.[414]

282. According to the Claimants, had the contracting parties to the Treaty intended to uniformly impose a "real and effective nationality requirement" as a prerequisite to investor protection, they would have drafted a restrictive definition of "Investor."[415] However, because the Treaty's actual definition of "Investor" includes "a company or other organization organized in accordance with the law applicable in that Contracting Party," any entity falling within this definition, including Khan Netherlands, is entitled to the protections of Part III of the Treaty, to the extent that such protections have not been denied by the state in the exercise of its right under Article 17(1) of the ECT.[416]

283. Moreover, the *Plama* tribunal confirms that Article 17(1) of the ECT does not itself constitute a notice of denial of benefits. If all investors should "expect" to be denied the benefits of Part III of the Treaty by all contracting parties, Article 17(1) would be rendered functionally equivalent to a "real and effective nationality requirement."[417] Yet it cannot be presumed that the drafters of the Treaty rejected this requirement in the definition of "Investor," but implemented "a more complicated and equivocal provision just to accomplish the same result."[418]

284. The Claimants reject the Respondents' reference to other investment treaties. Instruments such as model BITs or the ASEAN Comprehensive Investment Agreement are not sources of interpretive authority for Article 17(1) of the ECT under the general rules of interpretation for treaties found at Articles 31 and 32 of the VCLT.

285. Besides, the Respondents have failed to identify an interpretive authority to indicate that the denial of benefits provisions of these instruments should themselves be interpreted in the way advocated here by the Respondents with regard to Article 17(1) of the ECT.[419]

286. Similarly, the Respondents' reliance on the NAFTA as an example of a treaty referring explicitly to a prior notification is misplaced because the Respondents fail to mention that the NAFTA's explicit notification requirement applies toward the contracting state of which the

---

[414] Rejoinder, paras. 232-237.

[415] Counter-memorial, para. 366.

[416] Counter-memorial, paras. 366-367, quoting ECT, Art. 1(1); Rejoinder, para. 238.

[417] Counter-memorial, para. 368.

[418] Counter-memorial, para. 369.

[419] Rejoinder, paras. 218-221.

investor is a national, not toward the investor himself. The mechanism in NAFTA is therefore not comparable to that of the ECT.[420]

(ii) Object and purpose of the ECT

287. Interpreting Article 17(1) as allowing the right to deny benefits to be exercised retroactively would undermine the object and purpose of the Treaty, including the preservation of "complementarities and mutual benefits."[421]

288. The Claimants argue that the Treaty does not impose any generic requirements as to ownership, control, or business activities of the investors entitled to the protection of the ECT, because different states take different approaches to international investment holding companies, such as Khan Netherlands.

289. In this regard, the Netherlands has a generous approach to international investment holding companies because it derives a significant economic benefit from being the home state to many Special Financial Institutions, which incorporate in its jurisdiction rather than in the domiciles of their parent companies and account for 75 percent of direct investment outflows in the Netherlands.[422]

290. In this context, Article 17(1) of the ECT serves the interest of maximizing treaty participation by allowing the contracting parties to implement their own policies within the overall framework of the Treaty. A state that does not wish to extend protection to international investment holding companies may exercise its right under Article 17(1) to deny benefits to such entities, while international investment holding companies may choose to invest in another signatory state of the ECT that has not exercised this right.[423]

291. However, this balance of interests can only be achieved if the state exercises its right under Article 17(1) of the ECT *ex ante*. Moreover, the host country may derive a benefit in the form of additional investment from declining to exercise its right under Article 17(1) of the ECT.

292. In the present case, the investment of capital and technical expertise invested by the Claimants in Mongolia might not have been made had it not been possible to channel the investment through a Dutch company. Thus, if Mongolia is allowed to invoke Article 17(1) at this stage, it will have derived most of the benefits it could expect from the Treaty with none of the

---

[420] Rejoinder, paras. 222-224.

[421] Counter-memorial, para. 370; Rejoinder, paras. 243, 251.

[422] Counter-memorial, paras. 370-371. The Claimants add that the Respondents' assertion that international investment holding companies provide no benefits to the states in which they incorporate is "simply wrong." In fact, as many states encourage their incorporation, international investment holding companies have become "an integral component of modern international business" (Rejoinder, para. 256).

[423] Counter-memorial, paras. 372-374.

corresponding obligations.[424] Allowing Mongolia to deny benefits now would also incentivize states to be non-transparent in their implementation of ECT policies, in contradiction with the Treaty's purpose and Mongolia's obligation under Article 10(1) of the ECT to create transparent conditions for investment.[425]

(iii) Rules of international law and the ECT

293. In addition, interpreting Article 17(1) of the ECT as allowing the retroactive exercise of the right to deny benefits would violate the "relevant rules of international law applicable in the relations between the parties," and, particularly, the general principle of estoppel.[426]

294. According to the Claimants, estoppel "precludes person A from averring a particular state of things against person B if A had previously, by words or conduct, unambiguously represented to B the existence of a different state of things, and if on the faith of that representation, B had so altered his position that the establishment of the truth would injure him." [427]

295. Consequently, in the present case, Mongolia cannot exclude Khan Netherlands from the protections of Part III of the ECT after the company has invested in the Dornod Project in reliance on these protections, given that Mongolia created the presumption that it assented to affording these protections to Dutch international investment holding companies, in particular by failing to exercise its right under Article 17(1) of the ECT and by offering investment protections to such companies in other contexts, for instance through the Netherlands-Mongolia BIT of 1996. [428]

296. Furthermore, the Claimants insist that the fact that Article 17(1) of the ECT does not specify a method of notice for the exercise of a state's right to deny benefits under this provision does not entail that no notice is required.[429]

297. The Claimants also resist the Respondents' assertion that an interpretation allowing only for the prospective exercise of a state's right under Article 17(1) of the ECT strips the provision of effective meaning.[430] The Respondents' argument rests entirely on the "unnecessary assumption" that the right under Article 17(1) of the ECT would need to be exercised toward

---

[424] Counter-memorial, paras. 375-378.

[425] Counter-memorial, paras. 380-382.

[426] Counter-memorial, paras. 383-384.

[427] Counter-memorial, para. 387, quoting Exhibit CLA-30.

[428] Counter-memorial, paras. 389-390.

[429] Counter-memorial, paras. 391-393.

[430] Counter-memorial, paras. 391, 397.

each investor individually, thus requiring the host state to investigate all foreign investors in its territory.[431]

298. However, as explained by the *Plama* tribunal, a state could deny the advantages of Part III of the ECT to a whole class of investors at once, by a "general declaration in a Contracting Party's official gazette … or a statutory provision."[432] While the Respondents assert that a general declaration may amount to a reservation to the Treaty, which is prohibited by its Article 46, in the Claimants' view, actions taken in accordance with Article 17(1) of the ECT cannot implicate Article 46, as Article 17(1) forms part of the Treaty and applies equally to all contracting parties.[433]

299. Moreover, even if the Claimants' interpretation deprived Article 17(1) of the ECT of effective meaning, this could not lead the Tribunal to accept the Respondents' alternative interpretation, given that the principle of *effet util* cannot be employed to attribute to a treaty a meaning contrary to its letter and spirit.[434]

300. The Claimants also assert that, even if the decisions in *Plama* and *Yukos* were not "correct" in their interpretation of Article 17(1) of the ECT, they nevertheless constitute the "accepted interpretation" and entitle investors and signatory states to act accordingly.[435]

301. Various commentators, including the Respondents' authorities, have thus remarked that the *Plama* and *Yukos* decisions serve "as notice to all ECT signatories that they should make proactive use of Article 17(1) of the ECT or risk losing its benefit."[436]

302. In addition, the Claimants indicate that the views of legal commentators are not a source of interpretive authority under Article 31 of the VCLT, except to the extent that they reflect or evidence "relevant rules of international law applicable in the relations between the parties," and in any event are inferior sources compared to the reasoned decisions of international tribunals who have applied Article 17(1) of the ECT, such as in *Plama* and *Yukos*.[437]

---

[431] Counter-memorial, para. 398.

[432] Counter-memorial, paras. 399-401, quoting Exhibit RL-22, *Plama*, para. 157.

[433] Counter-memorial, paras. 401-402; Rejoinder, para. 242.

[434] Counter-memorial, para. 397.

[435] Counter-memorial, paras. 404-413.

[436] Counter-memorial, paras. 406-411, quoting CLA-98.

[437] Rejoinder, paras. 225-227.

303. The Claimants also assert that the decisions in *Petrobart* and *Amto* cannot be cited as evidence of conflicting authority, because in these proceedings the issue of the contracting parties' obligation to exercise their Article 17(1) right was not raised by the parties.[438]

304. Additionally, the Claimants explain that, contrary to the Respondents' contention, they do not rely on *Plama* and *Yukos* as "binding precedent."[439] Nonetheless, consistent decisions of arbitral awards may properly be referenced as evidence of the ordinary meaning of the terms of a provision in their context and in light of the Treaty's object and purpose. Moreover, numerous arbitral tribunals and commentators have observed that tribunals deciding investment cases should, where possible, "pay due consideration to earlier decisions of international tribunals."[440]

305. As for the Respondents' reliance on the subsequent practice of contracting parties to the ECT, none of whom have exercised their right to deny benefits under Article 17(1) of the Treaty, it is a *non sequitur*. For omissions to establish a practice, they must be accompanied by some statement or action indicating that they constitute an application of the Treaty. In this case, there is no evidence that any Contracting Party intentionally refrained from exercising a right under Article 17(1), which it otherwise intends to rely upon, because it did not believe that such action was necessary.[441]

306. Furthermore, the Claimants submit that the Respondents' assertion that a state's right under Article 17(1) of the ECT can be exercised not only with respect to pre-existing investments, but also after arbitration has been initiated, runs contrary to Article 26(3) of the ECT and to the principle that mutual consent to arbitration, once perfected, cannot be unilaterally withdrawn. By Article 26(3) of the ECT, each party gives its "unconditional consent to the submission of a dispute to international arbitration."[442] Article 26(5) of the ECT confirms that once an investor has provided its consent to UNCITRAL arbitration of a dispute pursuant to Article 26(4)(b), an agreement to arbitrate is constituted between the investor and the Contracting Party. At that moment, the consent to arbitration is "perfected" and can no longer be revoked.[443]

307. Under the Respondents' interpretation of Article 17(1) of the ECT, however, the host state may retroactively limit the scope of its consent to arbitration once its consent is perfected. Thus, in this arbitration, Mongolia is purporting to create new factual circumstances (the exercise of a

---

[438] Counter-memorial, para. 413, referring to Exhibit CLA-64/RL-20, *Amto*, para. 26(h), Exhibit CLA-101/RL-23, *Petrobart*, paras. 345-346; Rejoinder, para. 265.

[439] Rejoinder, para. 261.

[440] Rejoinder, paras. 260-263, referring to Exhibits CLA-13, RL-72; Hearing Transcript 188:18-189:19.

[441] Rejoinder, paras. 244-246.

[442] Counter-memorial, para. 419.

[443] Counter-memorial, para. 418.

latent prerogative to deny benefits) and thereby to quash the Tribunal's jurisdiction after both Parties have consented to such jurisdiction.[444]

308. Finally, the Claimants take issue with the Respondents' "factual misrepresentations," in particular denying that Khan Netherlands was created in preparation for this arbitration and any subsequent attempts to conceal the company's existence from the Respondents.[445]

309. The Claimants contend that, in fact, while Khan Netherlands was incorporated in 2007, the events leading to the current claims began only with the January 2009 announcement of the forthcoming Russian-Mongolian joint mining venture and could not have been predicted at the time of Khan Netherlands' incorporation. Khan Netherlands' existence was made known to Mongolia in May 2008 through registration with the FIFTA, during the negotiations of the MOU in 2009 and 2010, and in Khan Mongolia's March 2010 letter to Mr. Enkhbat.[446]

310. In addition, the Respondents are incorrect in stating that all the Claimants' investments in the Dornod Project were made before Khan Netherlands acquired its interest in Khan Mongolia in 2007, as in fact the Claimants made significant investments in 2008 and 2009.[447]

D. THE TRIBUNAL'S JURISDICTION OVER THE CLAIMANTS' CLAIMS UNDER THE FOREIGN INVESTMENT LAW

The Respondents' position

311. The Respondents succinctly submit that pursuant to Article 25 of the Foreign Investment Law, the Mongolian courts are specifically granted jurisdiction over the subject matter of the present dispute, unless a contract or treaty provides otherwise.[448] The Respondents note that the Foreign Investment Law itself does not contain any recourse to arbitration.[449]

---

[444] Counter-memorial, paras. 416-419.

[445] Counter-memorial, para. 420.

[446] Counter-memorial, paras. 138, 420-425; Rejoinder, para. 266.

[447] Rejoinder, paras. 253-254.

[448] Memorial, paras. 11, 36, 186.

[449] Memorial, paras. 11, 36; Hearing Transcript 24:16-20.

The Claimants' position

312. The Claimants submit that the Tribunal has jurisdiction over the claims of all the Claimants against all the Respondents made under the Foreign Investment Law, pursuant to its Article 25.[450] This provision states, in relevant part:

> "Disputes between … foreign investors and Mongolian legal or natural persons on the matters relating to foreign investment and the operations of the foreign invested business entity shall be resolved in the Courts of Mongolia unless provided otherwise by international treaties to which Mongolia is a party or by any contract between the parties."

313. The Claimants assert that Khan Canada, Khan Netherlands, and CAUC Holding are all "foreign investors" under the Foreign Investment Law.[451] The Claimants further state that, as alleged in the Notice of Arbitration, the Respondents, by illegally invalidating the Mining and Exploration Licenses, have breached Articles 8, 9, and 10 of the Foreign Investment Law, as well as Article 16(3) of the Constitution, the protections of which are specifically extended to foreign investors by Article 8(1) of the Foreign Investment Law.[452] The Claimants also note that the Respondents "appear to concede at least that there 'is a dispute arising out of the present subject matter.'"[453]

314. The Claimants submit that the Tribunal has jurisdiction over these claims by virtue of Article 25 of the Foreign Investment Law, which, while it does not contain an independent arbitration clause, provides that where a relevant treaty or contract between Mongolia and the investor provides for international arbitration, Foreign Investment Law claims are to be resolved in arbitration.[454]

315. In the present case, the Founding Agreement, a "contract between the parties," and the ECT, an "international treat[y] to which Mongolia is a party," both contain enforceable clauses that provide for UNCITRAL arbitration. Therefore, if the Tribunal finds that it has jurisdiction over CAUC Holding's and Khan Canada's claims against MonAtom and Mongolia under the Founding Agreement and over the claims of Khan Netherlands against Mongolia under the ECT, then the Tribunal also has jurisdiction over all of the Claimants' claims against all the Respondents under the Foreign Investment Law.[455] The Claimants assert that the Respondents

---

[450] Counter-memorial, para. 447.

[451] Counter-memorial, paras. 429-438.

[452] Counter-memorial, paras. 439-441.

[453] Counter-memorial, para. 442, referring to Memorial, para. 37.

[454] Counter-memorial, paras. 426, 427, 443-444.

[455] Counter-memorial, paras. 427, 445-447; Rejoinder, para. 127; Hearing Transcript 115:19-118:16.

do not contest the Claimants' submissions, demonstrating that the Tribunal has jurisdiction under the Foreign Investment Law.[456]

VI. RELIEF REQUESTED

316. The Respondents request that the Tribunal decline jurisdiction to hear the claims brought by the Claimants under the Notice of Arbitration.[457] In particular, the Respondents request that the Tribunal grant an award on jurisdiction which finds that:

> (i) The Tribunal does not have jurisdiction *ratione personae* over any claims advanced by either Khan Canada or Khan Netherlands, nor over any claims advanced against the Government of Mongolia under the Founding Agreement;
>
> (ii) The Tribunal does not have jurisdiction *ratione materiae* for any claims advanced under the Founding Agreement;
>
> (iii) The Tribunal does not have jurisdiction *ratione personae* over any claims advanced by either Khan Canada or [CAUC Holding] under the ECT;
>
> (iv) The Tribunal does not have jurisdiction over any claims advanced by Khan Netherlands under the ECT on the basis that:
>
> (1) Khan Netherlands has failed to comply with Mongolian law;
>
> (2) Khan Netherlands has failed to respect the required three month waiting period following a request for amicable settlement, as required by Article 26(2);
>
> (3) Mongolia has not given unconditional consent for the submission of this dispute to arbitration by operation of Article 26(3)(b)(1) ECT, as the dispute has previously been submitted for determination by the Mongolian courts; and
>
> (4) Khan Netherlands is denied the benefits of Part III of the ECT in accordance with Article 17(1) ECT.[458]

317. Furthermore, the Respondents request that the Tribunal "order the Claimants to pay all of the costs and expenses of this arbitration including all the Respondents' legal fees and costs, and associated interest."[459]

318. The Claimants submit that the Tribunal should:

> (a) Dismiss Respondents' Objections to Jurisdiction;
>
> (b) Proceed to the merits and quantum phase of the arbitration pursuant to the schedule set forth in paragraphs 3.7-3.11 of Procedural Order No.1;
>
> (c) Award [the] Claimants their costs and attorney's fees; and
>
> (d) Order such other relief as counsel may advise and/or as the Tribunal may deem appropriate.[460]

---

[456] Rejoinder, para. 126; Hearing Transcript 116:1-9.

[457] Memorial, para. 259; Reply, para. 279.

[458] Memorial, para. 260; Reply, para. 280.

[459] Memorial, para. 261; Reply, para. 281.

[460] Counter-memorial, para. 448; Rejoinder, para. 267.

VII. THE TRIBUNAL'S ANALYSIS

319. Below, the Tribunal first addresses the burden of proof arguments put forward by the Parties (section A), then considers its jurisdiction under the Founding Agreement (sections B, C, and D) and the Energy Charter Treaty (sections E, F, G, and H), and finally analyses its jurisdiction over Khan's claims of breach of the Foreign Investment Law (section I).

A. BURDEN OF PROOF

320. The Parties first debate which facts must be proven at the jurisdictional stage of the proceedings.

321. In this respect, the Tribunal finds compelling the reasoning of the *Phoenix* award on jurisdiction, stating that:

> [i]t . . . must look into the role [the] facts play either at the jurisdictional level or at the merits level . . . . If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.[461]

322. Accordingly, in the Tribunal's view, facts relevant only to the Tribunal's determination on jurisdiction must be proven at the jurisdictional stage. By contrast, facts relevant only to the merits need not be proven at this stage. For the latter facts, it is sufficient that the Claimants make a *prima facie* case, and the Tribunal will take them as true *pro tem* for the purposes of its determination on jurisdiction.[462]

323. Despite the Parties' detailed submissions on this subject, there appears to be no real disagreement between them with regard to these two categories of facts. Both Parties seem to accept the above propositions.[463]

324. The Parties do disagree as to whether facts relevant both to jurisdiction and merits must be proven at this stage of the proceedings.[464] In the Tribunal's view, where the determination on jurisdiction depends on facts, these facts must be proven at the jurisdictional stage and cannot be taken *pro tem*, whether or not they will remain relevant for the determination on the merits. This logically follows from the purpose of bifurcation between a jurisdictional and a merits phase, which is to allow for the complete determination of jurisdictional issues during a

---

[461] Exhibit CLA-51/RL-71, *Phoenix*, paras. 60-61.

[462] For instance, when considering whether particular claims fall within the scope of the relevant arbitration clause(s), the Tribunal will assume the accuracy of the facts on which the claims are based.

[463] See Reply, paras. 14-15, 26; Rejoinder, paras. 8-11.

[464] Reply, para. 20; Rejoinder, paras. 19-20.

preliminary phase which may put an end to the proceedings before any need to debate the merits arises and before the costs associated with such debate are incurred by the Parties.

325. For example, the facts relied upon by the Respondents to support their objection to the Tribunal's jurisdiction under the ECT on the ground that Khan Netherlands has breached Mongolian law are relevant to both jurisdiction and merits. To support their objection, the Respondents invoke the same alleged legal violations by the Claimants the occurrence of which the Claimants challenge as part of their case on the merits. If the Tribunal were to accept the legal argument supporting the Respondents' objection, it would then have to make a factual determination regarding the alleged legal violations by the Claimants.[465]

326. With regard to all facts that must be proven at this stage of the proceedings in accordance with the principles explained above, the rule, *actori incumbit probatio*, cited by both Parties, applies. Article 27(1) of the UNCITRAL Rules, which are the applicable procedural rules in this case, formulates the rule as follows: "Each party shall have the burden of proving the facts relied on to support its claim or defence." The Tribunal applies this proposition where relevant in the analysis below.

B. WHETHER THE TRIBUNAL HAS JURISDICTION *RATIONE PERSONAE* OVER KHAN CANADA

327. The Respondents' first objection to jurisdiction is that the Tribunal cannot assert jurisdiction over Khan Canada because Khan Canada is not a party to the Founding Agreement.

328. It is undisputed between the Parties that Khan Canada is not a signatory of the Founding Agreement, the contract containing Article 12, the arbitration clause invoked by the Claimants as the basis for the Tribunal's jurisdiction over Khan Canada. It is also undisputed that Khan Canada has not become a party to the Founding Agreement by operation of any of the classical mechanisms of contract or company law (assignment, agency, subrogation, succession, etc.). The question that divides the Parties and that must be decided by the Tribunal is therefore whether Khan Canada is a party to the arbitration agreement on some other basis.

329. While the Parties have formulated arguments as to applicable law – the Respondents arguing for the application of Mongolian law, and the Claimants, for the application of French law,[466] – in the Tribunal's view this point is of secondary importance. The Tribunal considers that the

[465] However, as explained in section E of its analysis, the Tribunal does not accept the Respondents' argument on the law.

[466] The Respondents argue for the application of Mongolian law, the governing law of the contract pursuant to Article 12.1(i) of the Founding Agreement (Hearing Transcript 32:9-34:6), while the Claimants argue for the application of French law, the law of the seat of arbitration in these proceedings (Rejoinder, paras. 63-66; Hearing Transcript 121:18-122:8). The Claimants also acknowledge that this determination may be made solely on the basis of the facts of the case (Counter-memorial, para. 178; Hearing Transcript 109:1-12).

question of whether a non-signatory to a contract is nevertheless a party to the arbitration agreement contained therein requires a factual determination of the common intention of the signatory and non-signatory parties to the contract. The intention of the parties may be inferred from their conduct in connection with the negotiation, performance, and termination of the contract.

330. In passing, the Tribunal notes that both Parties have indicated that they consider consent to be the basis of contractual relations in both Mongolian and French law.[467] The Tribunal is also satisfied that under Mongolian and French law, the parties may manifest their consent not solely by the signature of relevant documents, but also through conduct. The Parties agree that this is the case under French law,[468] and Article 43.3 of the Civil Code of Mongolia states as much.[469]

331. The Respondents insist that Mongolian law does not recognize the so-called "group of companies doctrine." In this respect, the Tribunal observes that the Claimants do not rely on this doctrine.[470] The Tribunal further notes that no clear submissions have been made as to the content of any such doctrine. In the Tribunal's view, the mere existence of a group of companies cannot affect the scope of the arbitration clause. As stated above, the relevant inquiry is into the common intention of the Parties, as manifested through their conduct in the negotiation, performance, and termination of the contract.

332. In the present case, it is undisputed that Khan Canada did not participate in the negotiation of the Founding Agreement. In fact, Khan Canada was only incorporated in October 2002, long after the Founding Agreement had been negotiated and executed. It is therefore plain that at the time when Erdene, Priargunsky, and WM Mining executed the Founding Agreement, Khan Canada was not a party thereto.

333. However, on July 2003, Khan Canada acquired the shares of WM Mining (through Khan Bermuda) and thus became the ultimate controlling shareholder in CAUC. While this sole fact does not suffice to make Khan Canada a party to the Founding Agreement, the Tribunal notes that as of that time Khan Canada behaved as if it were replacing CAUC Holding as a party to the Founding Agreement, in particular by performing CAUC Holding's obligations under the Founding Agreement.

---

[467] Memorial, para. 45; Counter-memorial, paras. 178-179; Reply, paras. 66-67; Rejoinder, paras. 69, 72; Hearing Transcript 122:9-14.

[468] Memorial, para. 45; Counter-memorial, paras. 178-179; Reply, paras. 66-67; Rejoinder, paras. 69, 72; Hearing Transcript 122:9-14.

[469] Exhibit CLA-117.

[470] Counter-memorial, para. 82.

334. At this juncture, the Tribunal considers it useful to explain that in its view, in order to achieve a complete understanding of the relationship between the Parties, it is necessary to examine not only the Founding Agreement itself, but also the Minerals Agreement. The fact that no claims are asserted under the Minerals Agreement is irrelevant. While a Tribunal may only give effect to an agreement on which its jurisdiction is based, it may, however, take into consideration another agreement (in this case the Minerals Agreement) involving all or some of the same parties for the purpose of interpretation of the first agreement (*i.e.*, the Founding Agreement). The fact that it does not have jurisdiction over all parties to the Minerals Agreement matters not.[471]

335. The Minerals Agreement was entered into by Erdene, Priargunsky, and WM Mining three days before they concluded the Founding Agreement. In its introduction, it expresses the parties' desire to form a joint venture for the purpose of developing a uranium extraction project in Dornod (what both Parties refer to in their memorials as the "Dornod Project"). As a means of giving life to the proposed joint venture, the Minerals Agreement provides for the establishment of a company through the conclusion of a "Founding Agreement." The Founding Agreement of 6 June 1995 was executed as a result. As the Founding Agreement establishes CAUC, while the purpose of this company is found in part in the Minerals Agreement, these two documents complete one another in portraying the relationship between the parties involved in the Dornod Project. Articles 3.4 and 16.1 of the Founding Agreement further confirm the relevance of the Minerals Agreement.[472]

336. In accordance with Article 5.4 of the Founding Agreement and Article 2.4 of the Minerals Agreement, the role of WM Mining, CAUC Holding's predecessor in the Founding Agreement, was to raise money and invest it into the joint venture. Under Articles 1.2 and 1.3 of the Minerals Agreement, WM Mining was also expected to conduct and assume the costs of feasibility studies regarding the Dornod Project.

337. The Tribunal notes that the Parties' submissions provide no indication that WM Mining or CAUC Holding ever acted in performance of these obligations. In fact, it is Khan Canada that raised funds on the Toronto Stock Exchange and commissioned feasibility studies and other

---

[471] See eg *Klockner v. Cameroon*, ICSID Annulment Decision of 3 May 1985, Y.B.Com.Arb 162, 1986. See also Hanotiau on Complex Arbitrations, paras. 270 - 271.

[472] Article 3.4 of the Founding Agreement states that CAUC, "in all its activities, will be governed by the laws of Mongolia, the Mineral[s] Agreement as well as the provisions of this Agreement and the Charter." Article 16.1 of the Founding Agreement reads as follows: "[The Founding Agreement] and the attachments to it and any supplementary agreements, including the Charter and the Mineral[s] Agreement, represent the entirety of the agreement between the Members."

reports.[473] While the Respondents argue that the Dornod Project never benefited from the money raised, the Tribunal observes that the studies and reports produced by the Claimants are tangible proof that progress was being made on the project. Khan Canada itself, and not any of its subsidiaries, is indicated as the client in all of them. In addition, by all accounts, Khan Canada (through Khan Mongolia) acquired the Exploration License. The other parties to the Founding Agreement recognized that this acquisition would benefit the Dornod Project.[474]

338. By ensuring the performance of CAUC Holding's obligations under the Founding Agreement, Khan Canada acted as the "real party" to the Founding Agreement.

339. Further, the Claimants, in tackling their burden of proof, have successfully demonstrated that the other parties to the Founding Agreement – the SPC, the MRAM, and MonAtom – knew of and accepted Khan Canada's participation in the Dornod Project. CAUC Holding is seldom, if ever, mentioned in the documents relating to CAUC and the Dornod Project produced by the Parties. By contrast, a variety of documents issued by Mongolian state agencies refer to the third shareholder in CAUC or the owner of the Mining License as "Khan Canada" or the "Canadian,"[475] and to CAUC as the "Mongolian-Russian-Canadian" joint venture.[476] The minutes of a CAUC management committee meeting held on 26 August 2009, and signed by, *inter alia*, MonAtom, are the most compelling acknowledgment of Khan Canada's active role in the performance of the Founding Agreement. These minutes record the fact that Khan Canada completed and even exceeded "its commitments *as per the original Founding Agreement*."[477] Similarly, the minutes of the CAUC management committee meeting of 9 November 2009, also signed by MonAtom, recognize the expected benefits of Khan Resources' planned contribution of the Exploration License to the joint venture.[478]

340. The documents pertaining to the SPC's attempt to sell its shares in CAUC in 2005 are also telling. The SPC issued a resolution on 22 September 2005, stating that the shares would first be offered to Priargunsky and Khan Canada, "a Canadian company owning 58 % of shares of [CAUC]," and that, if these "other shareholders" refused to buy the shares, these would be sold

---

[473] Exhibit C-50, Definitive Feasibility Study (2009), p. 2; Exhibit C-58, NI 43-101 Report (2005), p.1; Exhibit C-59, Scoping Study Report (2006), p.1; Exhibit C-60, Pre-feasibility Study, p.3.

[474] Exhibit C-39.

[475] Exhibit C-70, Letter from the SSIA to the Toronto Stock Exchange, p.1; Exhibit C-71, Report of a working group of the State Great Khural (the Mongolian unicameral Parliament) (2010), p.2; Exhibit C-8, Letter from the General Agency for Specialized Inspection of Mongolia (SSIA) to CAUC (2005), p.6.

[476] Exhibit C-67, License issued by the SSIA to CAUC (2005); Exhibit C-68, License issued by the SSIA to CAUC (2007).

[477] Exhibit C-38 (emphasis added).

[478] Exhibit C-39.

at a public auction.[479] This plan reflects the SPC's attempt to comply with the pre-emption rights accorded to other shareholders under Article 11 of the Founding Agreement in cases of transfer of shares to a third party. Pursuant to the SPC's offer, a memorandum of understanding for the sale of the SPC's shares in CAUC was entered into between the SPC and, notably, Khan Canada itself.[480] The fact that the shares were offered to Khan Canada rather than CAUC Holding shows that the SPC considered Khan Canada, and not CAUC Holding, to be the real party to the Founding Agreement.

341. Given that Khan Canada performed the obligations of CAUC Holding in the joint venture from the time that it acquired WM Mining, and that MonAtom and its predecessors in the Founding Agreement were aware of, expressly acknowledged and never objected to that fact, the Tribunal finds that Khan Canada, MonAtom, and its predecessors, formed the common intention that Khan Canada become a party to the Founding Agreement and the arbitration agreement contained therein.

342. As a result, the Tribunal concludes that it has jurisdiction over Khan Canada under the Founding Agreement.

C. WHETHER THE TRIBUNAL HAS JURISDICTION *RATIONE PERSONAE* OVER MONGOLIA

343. The Respondents object to the Tribunal's jurisdiction *ratione personae* over Mongolia under the Founding Agreement on the ground that Mongolia is not a party to it. The Claimants, for their part, assert that Mongolia is and has from the start been a party to the Founding Agreement through various representatives, namely, Erdene, the SPC, the MRAM, and, currently, MonAtom.

344. The Claimants bear the burden of proving the facts on which they rely in support of this proposition. Having reviewed the evidence produced by both Parties, including the Tsogt Report, the Tribunal finds that the Claimants have succeeded in discharging this burden.

345. In the Tribunal's view, the relationship between a state and its alleged representative must be assessed under the law of this state and in light of the factual background of this relationship. As concerns Mongolian law, the Tribunal relies on the Tsogt Report produced by the Claimants. The Respondents did not put forward a Mongolian law expert of their own, and Mr. Tsogt's plausible analysis was unshaken in cross-examination. The Tribunal therefore accepts Mr. Tsogt's opinion that under Mongolian law, and in particular in light of the LSLP,

[479] Exhibit C-49.

[480] Exhibit C-66.

Erdene and MonAtom acted as representatives of Mongolia.[481] This assessment coheres with what seems to have been the parties' understanding throughout the life of the Founding Agreement.

346. The fact that the SPC and the MRAM were parties to the Founding Agreement from 2001 to 2009 is uncontested. These entities are by all accounts Mongolian state agencies. As they do not have a legal existence separate from the Government, it is plain that Mongolia was the party to the Founding Agreement under the names "SPC" and "MRAM" from 2001 to 2009.

347. Erdene and MonAtom, the other two Mongolian entities who have been at one time parties to the Founding Agreement, are, by contrast, limited liability companies. To understand their relationship with Mongolia in the context of the Founding Agreement, it is helpful to start with the texts of both this Agreement and the Minerals Agreement. As explained in section B of the Tribunal's analysis, the latter document provides an essential element of context for understanding the relationship between the parties to the Founding Agreement.

348. Remarkably, under both the Founding Agreement and the Minerals Agreement, Erdene undertook obligations that only a sovereign state could fulfil. Thus, Article 5.3 of the Founding Agreement provides that the contribution of Erdene to the Charter fund will materialize out of a "reduction of fees to be paid by [CAUC] for the utilization of natural resources." Article 2.2 of the Minerals Agreement phrases the same idea in more general terms: "The contribution of Erdene consists of the right to utilize mineral deposits."

349. The Respondents point out that in some provisions of the Minerals Agreement (such as Articles 1.1 and 7.2), it is the "Ministry of Energy, Geology and Mining of Mongolia" or the "government of Mongolia" that undertakes the sovereign actions of issuing licenses or exempting CAUC from taxes and customs duties. On this basis, the Respondents argue that Erdene and Mongolia are conceptualized as separate entities in the Minerals Agreement. The Tribunal disagrees. Read in context of the entire agreement, the cited provisions appear to provide the detail of Erdene's contribution to the joint venture, expressed succinctly in Article 5.4 of the Founding Agreement. In fact, Article 1.1 of the Minerals Agreement explicitly states that the undertaking was made by the "Ministry of Energy, Geology and Mining of Mongolia, *represented by* Erdene," while Article 13.1 of the Minerals Agreement states that it was made by "Erdene, *on behalf of* the Ministry of Energy, Geology and Mining Industry of Mongolia."[482]

[481] Tsogt Report, paras. 30-54.

[482] Minerals Agreement, Arts. 1.1, 13.1.

350. Given that Erdene is wholly owned by Mongolia, and that no private party could fulfil Erdene's undertakings under either the Founding Agreement or the Minerals Agreement, it is reasonable to conclude that these undertakings were made on behalf of the Government.

351. Further, Articles 12.1 and 12.2 of the Minerals Agreement illustrate an interchangeable use of the words "Erdene" and "Mongolia." These provisions read, in relevant part:

> 12.1 Erdene acknowledges that its equity interest in the Company (33 1/3 %) is its entire interest in the mineral titles covered by this Agreement, except for the royalty as set forth in Paragraph 12.2 herein.
>
> 12.2 [CAUC] agrees to pay to Mongolia five percent (5 %) royalty . . . .

352. Thus, while both subparagraphs refer to the same "royalty," the first describes it as payable to Erdene and the second, as payable to Mongolia.

353. Additionally, Article 15.1 of the Founding Agreement indicates that all notices addressed to Erdene should be directed to the address of the Mongolian Ministry of Energy, Geology, and Mining. This also suggests some level of identity between Erdene and Mongolia.

354. Taken together, these provisions show that from the start, Mongolia was a party to the Founding Agreement, albeit through a representative.

355. The Claimants have also succeeded in demonstrating that at all subsequent times, from the establishment of CAUC to the commencement of this arbitration, the parties understood that Mongolia was a party to the Founding Agreement. The behaviour of the parties with respect to the transfers of CAUC shares from Erdene to the MRAM in 2001, and from the SPC to MonAtom in 2009, is decisive.

356. Under Article 11 of the Founding Agreement, any shareholder wishing to "assign, transfer, convey or otherwise dispose" of its shares in CAUC must give the other shareholders of CAUC a ninety day "written notice of the price and terms upon which the [d]isposing [shareholder] would be willing to sell such interest," giving the other shareholders the opportunity to acquire the shares themselves. No such notice appears to have been provided with respect to the transfers from Erdene to the MRAM (*i.e.*, Mongolia), and from the SPC (*i.e.*, Mongolia) to MonAtom.

357. The Respondents rely on a letter from the SPC dated 4 June 2009[483] to prove that the transfer of shares from the SPC to MonAtom was notified to the other shareholders in accordance with Article 11 of the Founding Agreement. However, this letter was not addressed to the other shareholders, but to MonAtom, and it merely announced post-factum that the CAUC shares

[483] Exhibit C-37.

"had been" transferred to MonAtom. In the Tribunal's view, this letter does not constitute a sufficient notice under Article 11 of the Founding Agreement.

358. Remarkably, this letter refers to the CAUC shares being transferred as "the state shares . . . that allow[…] to implement the right to represent the state."[484]

359. The minutes of the shareholder meeting of 26 August 2009 similarly refer to the passage of the management of the state shares from the SPC to MonAtom.[485]

360. The fact that no notice was given pursuant to Article 11 of the Founding Agreement and that accordingly the other shareholders were not given an opportunity to exercise their right of pre-emption suggests that these transfers of shares were not considered transfers to a third party in the meaning of Article 11.

361. In conclusion, the text of the Founding Agreement and the Minerals Agreement, as well as the behaviour of Mongolia, Erdene, the SPC, the MRAM, and MonAtom, demonstrate the understanding of the parties that all the Mongolian entities, including MonAtom, were acting on behalf of the state. The Tsogt Report confirms that this understanding was correct under Mongolian law. Accordingly, the Tribunal finds that it has jurisdiction over Mongolia under the Founding Agreement.

D. WHETHER THE TRIBUNAL HAS JURISDICTION *RATIONE MATERIAE* OVER THE CLAIMS BROUGHT UNDER THE FOUNDING AGREEMENT

362. Having found that Khan Canada and Mongolia are both parties to the Founding Agreement and the arbitration agreement contained therein at Article 12, the Tribunal now turns to the question of whether the claims asserted by Khan Canada and CAUC Holding against MonAtom and Mongolia under the Founding Agreement fall within the scope of Article 12.

363. At the outset, it is useful to quote both the relevant language of the arbitration agreement and Khan's description of its claims.

364. Article 12 of the Founding Agreement provides for arbitration of "[d]isputes between the parties arising out of, or in connection with, any provisions of this agreement or the interpretation thereof."

365. In the section of their Notice of Arbitration dedicated to the Founding Agreement, the Claimants state as follows:

> In entering the Founding Agreement, Mongolia also undertook obligations to [the] Claimants in its capacity as the State party to a joint venture designed to develop the State's natural

[484] Exhibit C-37.

[485] Exhibit C-38.

> resources. Article 3.6 of the Founding Agreement specifically provides that "Property of the Company [*i.e.*, CAUC] will not be subject to requisition or confiscation." Moreover, Mongolia, as a party to the Founding Agreement (currently through its representative, MonAtom) breached its fiduciary obligations to the joint venture and its partner [CAUC Holding] under Mongolian law. Under Mongolian law, joint venture partners are fiduciaries to one another. Respondents were required to act in good faith and owed a duty to act in the best interests of CAUC. In addition, under Article 82 of the *Company Law* of Mongolia, a duty is imposed upon a "governing party" of a company to act in good faith and in the best interests of the company. A "governing party" includes any shareholder who holds more than 20% of the shares of a limited liability company and, therefore, includes the Mongolian Government as a 21% shareholder in CAUC. Any governing party who breaches this duty is liable to the company itself and to any shareholder holding more than 1% of the company's shares (such as [CAUC Holding]) for damages caused by the breach. Furthermore, Article 497.1 of the *Civil Code* of Mongolia provides that a person or company is liable where it has caused damage to another person's rights, life, health, dignity, business reputation or property deliberately or due to negligent action.[486]

366. In their Counter-memorial, the Claimants allege that Mongolia, "as a party to the Founding Agreement," has breached its obligation under international law to treat foreign investors in accordance with certain minimum standards, which include "non-expropriation without compensation, non-arbitrariness and non-abuse of discretion."[487]

367. The Claimants further state that the following facts underlie their claims:

> Specifically, Respondent's acts and omissions breaching these obligations include (but are not limited to): the illegal invalidation of the [M]ining and [E]xploration [L]icenses; the passage of the [NEL] that provides, *inter alia*, for the taking of the ownership interest in CAUC and Khan Mongolia without compensation; Mongolia's refusal to re-register the licenses under the NEL pursuant to the 9 November 2009 Re-registration Applications; making unfounded public statements alleging that the Claimants were in breach of Mongolian law; and, the repeated actions intended to undermine [the] Claimants' reputation in Mongolia and abroad.[488]

368. While the Respondents focus much of their argument on the absence of an appropriate legal foundation to Khan's claims, the Tribunal considers that at this stage of the proceedings, it can proceed on the assumption that Khan's claims are valid in law.

369. Furthermore, in the Tribunal's view, the Claimants have made out a *prima facie* case with respect to the facts on which their claims depend. Therefore, in analyzing its *ratione materiae* jurisdiction, the Tribunal takes the Claimants' factual allegations concerning the merits as true *pro tem.*

370. Therefore, the only relevant question at this point is whether Khan's claims fall within the scope of the arbitration agreement – *i.e.*, whether for each of these claims the dispute "arises out of, or in connection with, the provisions of the [Founding Agreement] or the interpretation thereof."

---

[486] Notice of Arbitration, paras. 71-72.

[487] Counter-memorial, paras. 249, 254.

[488] Notice of Arbitration, para. 74.

371. The Respondents divide Khan's claims into three categories: (i) expropriation claims, (ii) breach of fiduciary duty claims, and (iii) claims under international law. The Tribunal addresses each category in turn.

(i) Expropriation claims

372. The Tribunal notes that, contrary to the Respondents' depiction, the Claimants do not make any broad "expropriation claims" under the Founding Agreement. Rather, the Claimants specifically allege that Mongolia has breached Article 3.6 of the Founding Agreement.[489] While the Parties extensively debate whether Article 3.6 constitutes an expropriation clause similar to those typically found in investment treaties, this is a matter of interpretation of Article 3.6 to be resolved at the merits stage. At present, it is sufficient for the Tribunal to observe that a dispute exists between the Parties concerning the interpretation and application of Article 3.6 and that, as a dispute arising out of the interpretation of a provision of the Founding Agreement, it falls squarely within the scope of the arbitration agreement.

(ii) Breach of fiduciary duty claim

373. The Tribunal observes that Khan's breach of fiduciary duty claim is based on various provisions of Mongolian law rather than on a specific provision of the Founding Agreement. The question is therefore whether any fiduciary duties that the Respondents may have toward Khan Canada and CAUC Holding under Mongolian law are sufficiently connected to the Founding Agreement to fall within the scope of the language of Article 12. The Tribunal considers that they are.

374. The Tribunal understands the words "in connection with" in Article 12 of the Founding Agreement to be quite broad. They encompass more than only claims of breach of the Founding Agreement.

375. As described in section B of the Tribunal's analysis, the introduction to the Minerals Agreement expresses the "desire" of the founders of CAUC (WM Mining, Erdene, and Priargunsky) "to establish a joint business venture pursuant to Mongolian law in order to mine and process uranium ore as well as other minerals . . . in the area of the Dornod deposit in northeastern Mongolia." Article 3.1 of the Minerals Agreement specifies that the founders of CAUC "shall conduct the business of the venture as a company with limited liability under the laws of Mongolia . . . and shall form the Company by entering into the Founding Agreement." It is apparent on this basis that CAUC Holding was established by the Founding Agreement for the purpose of the pursuit of the joint venture described in the Minerals Agreement.

---

[489] See Notice of Arbitration, para. 71; Counter-memorial, para. 243; Rejoinder, paras. 112-113.

376. The fiduciary duties invoked by the Claimants arise precisely out of the relationship between Khan Canada, CAUC Holding, Mongolia, and MonAtom as partners in the joint venture for the pursuit of which CAUC was created through the Founding Agreement. The Claimants base their breach of fiduciary duty claims in great part on the allegation that Mongolia revoked and refused to re-issue the Mining and Exploration Licenses in order to be able to pursue the Dornod Project without the participation of the Claimants, *i.e.*, to avoid having to comply with its obligations under the Founding Agreement and the Minerals Agreement to pursue a joint venture with CAUC Holding and Khan Canada.

377. The Tribunal therefore finds that the breach of fiduciary duty claims arise "in connection with" the provisions of the Founding Agreement and therefore fall within the scope of Article 12.

(iii) Claims under international law

378. Similarly, the Tribunal finds that since Khan Canada's and CAUC Holding's breach of international law claims are based on Mongolia's alleged attempts to avoid participating in the joint venture set up under the Founding Agreement, these claims are sufficiently connected to the provisions of the Founding Agreement to fall within the scope of Article 12.

379. As a result, the Tribunal finds that it has *ratione materiae* jurisdiction over all the above claims made by Khan Canada and CAUC Holding under the Founding Agreement.

E. WHETHER KHAN NETHERLANDS IS PREVENTED FROM BRINGING ECT CLAIMS DUE TO ITS FAILURE TO COMPLY WITH MONGOLIAN LAW

380. The Respondents object to the Tribunal's jurisdiction over Khan Netherlands under the ECT on the ground that Khan Netherlands has violated Mongolian law in the course of its investment. In support of their objection, the Respondents argue that an investor who has violated the laws of the host state is not entitled to the substantive protections of the ECT regardless of whether such violations "occurred before or after the initial investment was made."[490]

381. The Tribunal disagrees with this proposition.

382. The awards cited by the Respondents in support of their assertion merely state the rule that the protections of an investment treaty such as the ECT cannot be extended to an investment *made* illegally.[491]

---

[490] Memorial, para. 124; Reply, para. 153.

[491] In the *Plama* Award on the Merits, the tribunal found that "the substantive protections of the ECT cannot apply to investments *made* contrary to law" (Exhibit CLA-50, para. 139) (emphasis added). Similarly, in *Phoenix*, the tribunal stated that ". . . States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments *made* in violation of their laws" (Exhibit CLA-51/RL-17, para. 101) (emphasis added). In *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award of

383. This is logical. An investor who has obtained its investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought him or herself within the scope of application of the ECT only as a result of his wrongful acts. Such an investor should not be allowed to benefit as a result, in accordance with the maxim *nemo auditur propriam turpitudinem allegans*.

384. However, there is no compelling reason to altogether deny the right to invoke the ECT to any investor who has breached the law of the host state in the course of its investment. The ECT contains no provision to this effect. If the investor acts illegally, the host state can impose upon it sanctions available under local law, as Mongolia indeed purports to have done by invalidating and refusing to re-register the Exploration License. However, if the investor believes these sanctions to be unjustified, it must have the possibility of challenging their validity. It would undermine the purpose and object of the Treaty to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.

385. Accordingly, the Tribunal rejects the Respondents' objection to jurisdiction and defers the question of whether Khan Netherlands has breached Mongolian law to the merits.

F. WHETHER KHAN NETHERLANDS IS PREVENTED FROM BRINGING ECT CLAIMS BY OPERATION OF ARTICLE 26(3)(B)(I) OF THE ECT

386. The Respondents object to the Tribunal's jurisdiction under the ECT on the ground that Article 26(3)(b)(i) of the ECT, the Treaty's fork in the road provision, was triggered by the claims initiated by Khan Mongolia and CAUC in April 2010 before the Administrative Court.

387. The Tribunal notes that Mongolia is listed in Annex ID of the Treaty as one of the states which, in accordance with Article 26(b)(i) of the ECT, have restricted their unconditional consent to

---

2 August 2006, the claimant was denied the protection of the BIT because it had acted improperly "in order to be awarded the bid that made its investment possible" (para. 243). In *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award of 16 August 2007, this point was addressed in some detail in *obiter*: "Although this contention is not relevant to the analysis of the problem which the Tribunal has before it, namely the *entry* of the investment and not the way it was subsequently conducted, the Tribunal would note that this part of the Respondent's interpretation appears to be a forced construction of the pertinent provisions in the context of the entire Treaty. The language of both Articles 1 and 2 of the BIT emphasizes the *initiation* of the investment. Moreover the effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed *substantive* violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction" (para. 345) (emphasis in the original).

the submission of disputes to international arbitration to those disputes that have not been previously submitted to the "courts or administrative tribunals of the Contracting Party."[492]

388. The Tribunal must therefore determine whether the dispute submitted to arbitration before it is the same dispute that was submitted to the Administrative Court in the proceedings indicated by the Respondents.

389. At the hearing on jurisdiction, the Respondents admitted that their objection to the Tribunal's jurisdiction would fail if the Tribunal were to apply the so-called "triple identity" test to compare the local and international proceedings.[493] The Respondents therefore argued for the application of what they identified as the "fundamental basis" test.

390. However, in the present case, the Tribunal sees no reason to go beyond the triple identity test. There is ample authority for its application.[494]

391. The Respondents principally argue that the triple identity test strips the fork in the road provision of any practical effect, presumably because it is unrealistic to expect all three prongs of the test to be satisfied. It must first be replied that the test for the application of fork in the road provisions should not be too easy to satisfy, as this could have a chilling effect on the submission of disputes by investors to domestic fora, even when the issues at stake are clearly within the domain of local law. This may cause claims being brought to international arbitration before they are ripe on the merits, simply because the investor is afraid that by submitting the existing dispute to local courts or tribunals, it will forgo its right to later make any claims related to the same investment before an international arbitral tribunal.

392. The Respondents' argument that the test is too strict may have some persuasive force in cases where only one of the requirements of the triple identity test is not satisfied, while the remaining requirements, as well as other aspects of the two disputes are identical. But this is not the case here. The Respondents identify the three criteria of the triple identity test as being parties, cause, and object. Not one of these criteria is satisfied in the present case.

---

[492] Treaty, Art. 26(2)(a).

[493] Hearing Transcript 65:12-66:4.

[494] Exhibit CLA-58, *Lauder v. Czech Republic*, UNCITRAL Arbitration Rules, Final Award of 3 September 2001, paras. 163-66; Exhibit CLA-59, *CMS v. Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction of 17 July 2003, para. 80; Exhibit CLA-60, *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003, paras. 88-91; Exhibit CLA-61, *Pan American Energy LLC et al. v. Argentina*, ICSID Case No. ARB/04/8, Decision on preliminary Objections of 27 July 2006, paras. 154-157; Exhibit C-62, *Toto Costruzioni Generali SpA v. Lebanon*, ICSIC Case No ARB/07/12, Decision on Jurisdiction of 8 September 2009, paras. 211-212.

393. First, the parties to both disputes are different. The proceedings before the Administrative Court were initiated by Khan Mongolia and CAUC, while the only claimant asserting ECT claims before the Tribunal is Khan Netherlands.[495]

394. Second, the causes of action of both disputes are different. Before the Administrative Court, Khan Mongolia and CAUC challenged the NEA's invalidation of the Mining and Exploration Licenses on the grounds that the NEA had violated procedural requirements of various Mongolian laws and regulations. The Administrative Court decided on this basis.[496] Before this Tribunal, Khan argues its case on the basis of breach of the ECT. Such claims could not have been submitted for decision by the Administrative Court.

395. Finally, and most importantly, the objects of the local and international proceedings differ. CAUC and Khan Mongolia asked the Administrative Court to quash the NEA's administrative decision to invalidate the Mining and Exploration Licenses.[497] By contrast, in these proceedings, Khan Netherlands is seeking compensation for the alleged loss of its investment. In light of Mr. Tsogt's unhesitating testimony at the hearing, the Tribunal considers that this goal could not have been achieved through the proceedings before the Administrative Court, as that Court does not have the power to grant damages. [498]

396. This is therefore not a case where the investor seeks to try its luck a second time to obtain what it wants in relation to the same dispute but before a different forum.

397. The Tribunal further notes that CAUC's claim before the Administrative Court was concerned with the allegedly invalid invalidation of the Mining License, an action of Mongolia that Khan Netherlands does not contest under the ECT. The Tribunal also notes that Khan Mongolia, for its part, challenged only one of the actions of Mongolia (invalidation of the Exploration License) that form the basis of Khan Netherlands' claims in this arbitration.[499]

398. The Respondents also invoke the following part of Mongolia's written statement of policies, practices, and conditions made in accordance with Article 26(3)(b)(ii) of the ECT:

> Disputes resolved by Courts of Mongolia can not be resubmitted to the International Courts as national courts have already given a final judgment and that will contradict the Constitution of Mongolia and has a risk of having two judgments on the same dispute. Therefore, policies,

[495] Compare Exhibits C-13/R-26 and R-25, and the Notice of Arbitration.

[496] Exhibit C-13/R-26; Exhibit R-25.

[497] Exhibit C-13/R-26; Exhibit R-25.

[498] Hearing Transcript 204: 7-21.

[499] See Notice of Arbitration, para. 74.

> practices and conditions of Mongolia do not allow an investor to resubmit the same dispute to International arbitration.[500]

399. The Tribunal does not see how this statement lends support to the Respondents' objection, as it contains no additional guidance as to what constitutes the "same dispute" under the ECT or as a matter of policy or practice in Mongolia.

400. The Tribunal therefore finds that the fork in the road provision of the ECT has not been triggered.

G. WHETHER KHAN NETHERLANDS HAS COMPLIED WITH THE WAITING PERIOD REQUIREMENT OF ARTICLE 26(2) OF THE ECT

401. The Respondents object to the Tribunal's jurisdiction on the ground that Khan Netherlands has not respected the amicable dispute settlement requirements of Articles 26(1) and 26(2) of the ECT.

402. Article 26(1) provides that disputes under the Treaty "shall, if possible, be settled amicably." Article 26(2) further provides that if such disputes cannot be settled according to the provisions of paragraph 1, *i.e.*, amicably, "within a period of three months from the date on which either party to the dispute requested amicable settlement," the investor may submit its dispute to international arbitration.

403. The Tribunal is of the view that Khan Netherlands has complied with the requirement to attempt amicable resolution of the present dispute by the Letter to the Prime Minister, sent on 15 April 2010, almost nine months before the commencement of this arbitration, and by the subsequent negotiation attempts made by senior officers of Khan Canada and Khan Netherlands during meetings with representatives of MonAtom and Mongolia.

404. The Tribunal adopts a broad understanding of what constitutes sufficient notice to trigger the three month waiting period of Article 26(2) of the Treaty, as the ECT does not contain any explicit formal requirements for such purpose. Article 26(1) aims at encouraging good faith negotiations between parties, without unduly limiting the recourse to arbitration. Thus, in making the amicable settlement request referred to at Article 26(2) of the ECT, the investor need only (i) describe the dispute in a manner sufficient to enable the other party to understand what is being referred to, and (ii) manifest the desire to seek an amicable resolution.

405. The Tribunal shares the views of the tribunal in *Amto*, which stated:

> A party can request amicable settlement of a dispute without identifying any ECT claims, and an Investor may have good reason not to formulate claims at this stage, in order to avoid taking a position or appearing to threaten the State party with arbitration before bona fide

[500] Exhibit RL-28.

> settlement discussions. The purpose of Article 26(2) —to provide for settlement discussions— requires the avoidance of legal forms, and the facilitation of open communication. The Investor must inform the State of the state of affairs involving disagreement, and request amicable settlement. If the State considers there is insufficient information to initiate discussions then the good faith response is simply to so advise the Investor, and require more detail. In other words, to initiate the type of communications envisaged by Article 26(2).[501]

406. In the present case, the Letter to the Prime Minister described the history of the dispute at length and in much the same way as it is described in the Notice of Arbitration by which these proceedings were commenced. This description was more than sufficient to allow Mongolia to understand what the dispute was about, and, in the words of the *Amto* tribunal, to "investigate and take steps to resolve the dispute."[502] Contrary to the Respondents' assessment, the Tribunal considers that the tone of the letter is neither "aggressive" nor "threatening." In fact, the Letter to the Prime Minister contains language expressing the Claimants' willingness to discuss the issues raised by the letter, as well as an offer by Mr. Quick to travel to Mongolia to meet the Prime Minister in person.[503]

407. The Respondents argue that the Letter to the Prime Minister did not constitute sufficient notice to trigger the three month waiting period of Article 26(2) because it was sent on the letterhead of Khan Canada, signed by Mr. Quick, Khan Canada's CEO, and did not explicitly mention Khan Netherlands, although it mentioned both Khan Canada, its parent company, and Khan Mongolia, its direct subsidiary.[504] However, the Tribunal considers that it was reasonable for Khan Canada, the ultimate shareholder of CAUC and the parent of both CAUC Holding and Khan Mongolia, to write to the Prime Minister of Mongolia with respect to a dispute that concerned both the Mining and Exploration Licenses. Khan Canada was the only party with an interest in both licenses at once, and also the only party with the authority to reach an amicable settlement on behalf of all the others. Had Mongolia been able to reach agreement with Khan Canada with regard to the grievances expressed in the Letter to the Prime Minister, it would also have eliminated the grounds for Khan Netherlands' claims in this arbitration.

408. In addition, in the Tribunal's view, the Respondents' claim that the Claimants attempted to hide the existence of Khan Netherlands is not borne out by the evidence.[505]

409. Given that the Tribunal finds that Khan Netherlands has met the attempt at amicable settlement requirement of Article 26, it becomes unnecessary to address the Parties' arguments concerning

---

[501] Exhibit CLA-64/RL-20, *Amto*, para. 57.

[502] Reply, paras. 169-170, quoting Exhibit CLA-64/RL-20, *Amto*, para. 50.

[503] Exhibit C-15, p. 5.

[504] Reply, paras. 180-182.

[505] See Exhibit C-4, Appendix D; Exhibit C-78.

the jurisdictional or procedural nature of this requirement. Nor does the Tribunal need to decide whether the requirement extends only to situations where amicable dispute settlement is "possible," as asserted by the Claimants.

H. WHETHER KHAN NETHERLANDS' CLAIMS ARE BARRED BY OPERATION OF ARTICLE 17(1) OF THE ECT

410. The Tribunal now turns to the Respondents' argument that the benefits of Part III of the ECT are denied to Khan Netherlands by operation of Article 17(1), the denial of benefits clause of the Treaty.

411. At the outset, it must be stated that in the Tribunal's view, the Respondent's argument cannot affect the Tribunal's jurisdiction over Khan Netherlands' claims under the ECT. The introductory section of Article 17 of the ECT specifies that it concerns the denial of advantages of "*this Part*," that is, Part III of the Treaty, which is titled "Investment Promotion and Protection" and sets forth the substantive protections that each Contracting Party shall accord to investors of other contracting parties. Article 26 of the ECT, on which the Claimants rely to establish the Tribunal's jurisdiction, is found in Part V, which is dedicated to "Dispute Settlement." Thus, on a reading of the ordinary meaning of the terms of Article 17, this provision can operate to deny Khan Netherlands the benefit of the substantive protections it would otherwise be entitled to under the Treaty, but not to deny it the advantage of arbitrating its dispute with the Respondents before this Tribunal. The question of the application of Article 17 is therefore one for the merits, not jurisdiction.

412. The Tribunal's views on this point concord with those of the tribunals in *Yukos* and *Plama*.[506]

413. Nevertheless, as the Parties have agreed to treat the question of the application or non-application of Article 17(1) as a preliminary question,[507] and have extensively briefed the Tribunal thereon, and as a finding that Article 17(1) applies in the present case may spare the Parties the cost and effort of making further voluminous submissions concerning the merits of Khan Netherlands' claims under the Treaty, the Tribunal will render a definitive decision on this question in this award.

414. The relevant section of Article 17 is reproduced for ease of reference:

> Article 17
>
> Non-Application of Part III in Certain Circumstances

---

[506] Exhibit RL-22, *Plama*, paras. 146-151; Exhibit RL-24, *Yukos*, para. 441.

[507] Counter-memorial, para. 364, referring to Claimants' Response Memorial on Bifurcation, para. 44; Hearing Transcript 187:4-12.

> Each Contracting Party reserves the right to deny the advantages of this Part to:
>
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized . . .

415. The Claimants have conceded that the substantive conditions of Article 17(1) of the ECT – that the legal entity invoking the protections of the ECT be owned or controlled by citizens or nationals of a third state and that such legal entity have no substantial business activities in the place in which it is organized – are met in the present case. It is uncontested that Khan Netherlands is owned and controlled by Khan Canada, an entity incorporated in Canada, which is a "third state" for purposes of Article 17(1), and that Khan Canada has no substantial business activities in the Netherlands, the "Contracting Party" in which it is organized. Hence, Khan Netherlands is the kind of entity to which Article 17(1) could apply.

416. However, the Parties disagree as to whether Article 17(1) applies to Khan Netherlands in the present case. This is a matter of interpretation of the provision. The Respondents appear to put forward, without clearly distinguishing between them, two interpretations of Article 17(1). On the one hand, the Respondents contend that Article 17(1) operates as an automatic denial of benefits by all Contracting Parties to all legal entities that satisfy the substantive conditions of paragraph 1 of this Article.[508] On the other hand, the Respondents seem to argue that under Article 17(1), a Contracting Party may at any time, including after the commencement of the arbitral proceedings, deny the benefits of Part III of the Treaty to a legal entity that satisfies the provision's criteria.[509] It is plain that these two interpretations of Article 17(1) are mutually exclusive and the Tribunal will address each in turn in the following, as if they had been presented as alternative arguments.

(i) Does Article 17(1) of the ECT constitute an automatic denial of benefits?

417. The ECT is an international treaty. Its interpretation is governed by the rules of international law expressed in Articles 31 and 32 of the VCLT. Both Parties have made arguments on this basis. The Parties have also extensively referred to arbitral decisions that have previously considered the interpretation of Article 17 of the ECT. While the Tribunal does not believe that it is bound to follow the precedent of any prior relevant arbitral decisions, the Tribunal considers that it has a duty to take account of these decisions, in the hope of contributing to the formation of a consistent interpretation of the ECT capable of enhancing the ability of investors to predict the investment protections which they can expect to benefit from under the Treaty.

---

[508] Reply, para. 261; Hearing Transcript 74:17-75:9.

[509] Memorial, paras. 194, 235; see also Reply, para. 279: "Mongolia avails itself of its right under Article 17(1) to deny the advantages of Part III to Khan Netherlands in this case."

418. In accordance with Article 31 of the VCLT, the Tribunal seeks to interpret Article 17(1) "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

419. Article 17(1) of the ECT provides that the Contracting Party "reserves the right" to deny the benefits of Part III of the ECT. The ordinary meaning of the verb "to reserve" suggests that the right to deny the benefits of the Treaty is being *kept* by the Contracting Party, to be exercised in the future.[510] Had Article 17 been intended to deny benefits automatically, it could easily have been phrased to do so. A formulation such as: "The advantages of Part III of the ECT shall be denied to" would have made such meaning plain. This leads the Tribunal to conclude that the Contracting Party's right to deny the benefits of Part III of the ECT must be exercised actively.

420. Article 1(7) of the ECT contains a broad definition of what counts as an "Investor" for purposes of the Treaty. If Article 17(1) were to provide for an automatic denial of benefits, it would effectively create an exception to this broad definition. Such exception would more logically be found within the definition at Article 1(7) itself.

421. The interpretation that Article 17 requires an active exercise of the Contracting Party's right to deny the benefits of Part III of the ECT is in line with the Treaty's object and purpose. Article 2 of the ECT describes its purpose to establish "a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits." The provision of an option to deny the benefits of Part III of the ECT furthers this goal of "long-term cooperation," as it creates an incentive to join the Treaty for states with a variety of policies with respect to legal entities that fall within the definition of Article 17(1). Thus, both states that wish to attract the investment of such legal entities, and those that do not wish to extend investment protections to such entities, are encouraged to become Contracting Parties. The expression "mutual benefits" of Article 2 of the ECT refers to the receipt of a benefit by each Contracting Party, but does not imply that such benefits must be coextensive.

422. Both the *Plama* and *Yukos* tribunals, faced with precisely the same question of whether the Contracting Party must actively exercise its right under Article 17(1) of the ECT, answered in the affirmative.

423. Concerning the manner in which the host state's right may be exercised, the Tribunal concurs with the *Plama* tribunal in that:

> [t]he exercise [of the Contracting State's right to deny benefits under Article 17(1) of the ECT] would necessarily be associated with publicity or other notice so as to become reasonably available to investors and their advisers. To this end, a general declaration in a Contracting

[510] Exhibit CLA-129, Macmillan English Dictionary, Definition of the phrase "reserve the right to do something": "to keep the right to do something if you later think it necessary."

> State's official gazette could suffice; or a statutory provision in a Contracting State's investment or other laws; or even an exchange of letters with a particular investor or class of investors. Given that in practice an investor must distinguish between Contracting States with different state practices, it is not unreasonable or impractical to interpret Article 17(1) as requiring that a Contracting State must exercise its right before applying it to an investor and be seen to have done so.[511]

424. Once it is found that the Article 17(1) right must be actively exercised, the question arises of whether in the present case Mongolia has in fact exercised its right. While Mongolia does not clearly point to a moment when it exercised its right to deny the benefits of Part III of the Treaty to Khan Netherlands, the Tribunal accepts the implication of Mongolia's argument that in raising this objection to the Tribunal's jurisdiction, Mongolia is in fact exercising its right under Article 17(1). The question then remains of whether the Article 17(1) right may be effectively exercised toward a particular investor after the investor in question commences international arbitration against the host state.

(ii) Whether the Contracting Party's right to deny benefits under Article 17 of the ECT may be exercised after commencement of the arbitration

425. In the Tribunal's view, this question of interpretation is not solved by reference to the terms of Article 17(1). It is therefore necessary to investigate with particular attention the "object and purpose" of the Treaty.

426. The Treaty seeks to create a predictable legal framework for investments in the energy field. This predictability materializes only if investors can know in advance whether they are entitled to the protections of the Treaty. If an investor such as Khan Netherlands, who falls within the definition of "Investor" at Article 1(7) of the Treaty and is therefore entitled to the Treaty's protections in principle, could be denied the benefit of the Treaty at any moment after it has invested in the host country, it would find itself in a highly unpredictable situation. This lack of certainty would impede the investor's ability to evaluate whether or not to make an investment in any particular state. This would be contrary to the Treaty's object and purpose.

427. In contrast, an obligation for contracting parties to exercise their Article 17 right in time to give adequate notice to investors would be consistent with the obligation of host states under Article 10(1) of the Treaty to create "transparent conditions" for investments.

428. In this respect the *Plama* tribunal stated as follows:

> The covered investor enjoys the advantages of Part III unless the host state exercises its right under Article 17(1) ECT; and a putative covered investor has legitimate expectations of such advantages until that right's exercise. A putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its rights under Article 17(1) ECT. At that stage, the putative investor can so plan its business

---

[511] Exhibit RL-22, *Plama*, para. 157.

> affairs to come within or without the criteria there specified, as it chooses. It can also plan not to make any investment at all or to make it elsewhere. After an investment is made in the host state the "hostage-factor" is introduced; the covered investor's choices are accordingly more limited; and the investor is correspondingly more vulnerable to the host state's exercise of its right under Article 17(1) ECT. At this time, therefore, the covered investor needs at least the same protection as it enjoyed as a putative investor able to plan its investment. The ECT's express "purpose" under Article 2 ECT is . . . . It is difficult to see how any retrospective effect is consistent with this "long-term" purpose.[512]

429. It is difficult to imagine that any Contracting Party, whatever its general policy regarding mailbox companies, would refrain from exercising its right to deny the substantive protections of the ECT to an investor who has already commenced arbitration and is claiming a substantial sum of money. A good faith interpretation does not permit the Tribunal to choose a construction of Article 17 that would allow host states to lure investors by ostensibly extending to them the protections of the ECT, to then deny these protections when the investor attempts to invoke them in international arbitration.

430. The Respondents invoke the *Petrobart* and *Amto* decisions to assert that there is no settled interpretation of Article 17(1).[513] However, in the Tribunal's view, *Petrobart* and *Amto* do not conflict with its interpretation of this provision. The *Amto* tribunal considered that Article 17(1) requires the active exercise of the Contracting Party's right, stating, among other, that the investor falling within the definition of Article 17(1) has "a *defeasible right* to investment protection under the ECT, because the host State of the investment has *the power to divest*" the investor of his right and referring to the "potential" exclusion of the investor from ECT investment protection.[514] The *Amto* tribunal then found it unnecessary to address the question of when the Contracting Party must exercise its Article 17 right, as in any event the claimant in that case did not satisfy the substantive criteria of Article 17(1). For the same reason, the *Petrobart* tribunal did not address the question of interpretation of Article 17(1).[515]

431. For the above reasons, the Tribunal finds that Article 17(1) of the ECT does not operate in the present case to bar Khan Netherlands from invoking the protections of the ECT.

I. THE TRIBUNAL'S JURISDICTION OVER THE CLAIMANTS' CLAIMS UNDER THE FOREIGN INVESTMENT LAW

432. The only question left for determination by the Tribunal is whether it has jurisdiction over Khan's claim that the Respondents have breached the Foreign Investment Law.

433. Article 25 of the Foreign Investment Law provides:

---

[512] Exhibit RL-22, *Plama*, para. 161.

[513] Memorial, paras. 199-200, 205-112.

[514] Exhibit CLA-64/RL-20, *Amto*, para. 61 (emphasis added).

[515] Exhibit CLA-101/RL-23, *Petrobart*, paras. 344-348.

> Settlement of Disputes
>
> Disputes between foreign investors and Mongolian investors as well as between foreign investors and Mongolian legal or natural persons on the matters relating to foreign investment and the operations of the foreign invested business entity shall be resolved in the Courts of Mongolia unless provided otherwise by international treaties to which Mongolia is a party or by any contract between the parties.

434. In the Tribunal's view, the Respondents incorrectly emphasize this provision's reference to the courts of Mongolia. Article 25 does not preclude the submission of breach of the Foreign Investment Law claims to international arbitration. On the contrary, Article 25 authorizes the resolution of disputes concerning foreign investment in international arbitration where a relevant treaty or contract provides for this method of dispute resolution.

435. However, Article 25 does not constitute an independent basis for a recourse to arbitration. Rather, it refers to relevant treaties and contracts. Accordingly, in order for the Tribunal to have jurisdiction over Khan's claims of breach of provisions of the Foreign Investment Law, these claims must fall within the scope of the relevant arbitration clauses, namely, Article 12 of the Founding Agreement and Article 26 of the ECT.

436. The Tribunal finds that Khan Canada's and CAUC Holding's Foreign Investment Law claims fall within the broad scope of Article 12 of the Founding Agreement, as they, like the breach of fiduciary duty and international obligations claims discussed in section D(ii) and (iii) of the Tribunal's analysis, arise out the relationship between the Parties defined by the Founding Agreement.

437. Phrased less broadly than Article 12 of the Founding Agreement, Article 26 of the ECT provides only for the resolution of disputes that "concern an alleged breach of an obligation of [a Contracting Party] under Part III" of the ECT. This formulation cannot encompass disputes arising out of the breach of other legal instruments, such as the Foreign Investment Law. The Claimants, however, invoke Article 10(1) of the ECT to bring Khan Netherlands' Foreign Investment Law claims within the scope of Article 26 of the ECT. The last sentence of Article 10(1) of the ECT, the Treaty's so-called "umbrella" provision, reads as follows:

> 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.

438. The Claimants submit that the terms "any obligations" encompass the statutory obligations of the host state and in this case, Mongolia's obligations under the Foreign Investment Law.[516] 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'

[516] Counter-memorial, para. 446, n. 564.

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. Consequently, the Tribunal finds that it has jurisdiction under the ECT over Khan Netherlands' Foreign Investment Law claims.

VIII. DECISION

439. For all the reasons stated above, and rejecting all contentions to the contrary, the Tribunal:

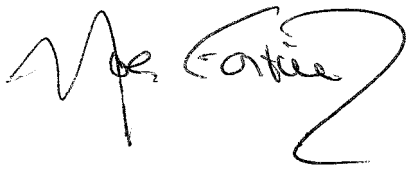
(a) DISMISSES all of the Respondents' objections to jurisdiction;

(b) FINDS jurisdiction over all of the Claimants' claims under the Founding Agreement and the Energy Charter Treaty; and

(c) RESERVES 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.

Paris, France
Date: 25 July 2012

Dr. Bernard Hanotiau



Maître L.Yves Fortier, CC, OC, QC

Mr. David A.R.Williams, QC
Presiding Arbitrator