UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE

IN THE PROCEEDING BETWEEN

SERGEI PAUSHOK
CJSC GOLDEN EAST COMPANY
CJSC VOSTOKNEFTEGAZ COMPANY

Claimants

-AND-

THE GOVERNMENT OF MONGOLIA

Respondent

ORDER ON INTERIM MEASURES

Members of the Tribunal
The Honorable Marc Lalonde, P.C., O.C., Q.C. (President)
Professor Brigitte Stern (Arbitrator)
Dr. Horacio A. Grigera Naón (Arbitrator)

Secretary of the Tribunal
Me Lev Alexeev

For Claimants:

Mr. George M. von Mehren
Mr. Stephen P. Anway
Mr. Rostislav Pekař
Ms. Irina Golovanova
Squire, Sanders and Dempsey L.L.P.

For Respondent:

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

I- BACKGROUND AND PROCEDURAL HISTORY

1. On November 30, 2007, Claimants, namely Mr. Sergei Paushok, CJSC Golden East Company ("**Golden East**") and CJSC Vostokneftegaz Company ("**Vostokneftegaz**"), issued a Notice of Arbitration against the Government of Mongolia, in accordance with Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law (the "**UNCITRAL Rules**").

2. Mr. Paushok is a national of the Russian Federation, whereas Golden East and Vostokneftegaz are both registered in the Russian Federation.

3. Claimants, directly or indirectly, own 100% of the outstanding shares of KOO Golden East-Mongolia ("**GEM**"), a gold mining company, and KOO Vostokneftegaz ("**Vostokneftegaz-Mongolia**"), an oil and gas company. Both GEM and Vostokneftegaz-Mongolia are registered and operating in Mongolia.

4. In their Notice of Arbitration, Claimants alleged that Respondent breached its obligations under the Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the Russian Federation and the Government of Mongolia (the "**Treaty**" or "**BIT**") by, among others, enacting and enforcing legislation known as the Windfall Profit Tax Law (the "**WPT Law**") and the 2006 Minerals Law (the "**2006 Minerals Law**").

5. Under the WPT Law, any gold sales at prices in excess of USD 500 per ounce are subject to tax at the rate of 68% on the amount exceeding USD 500 per ounce.

6. Under the 2006 Minerals Law, the maximum number of foreign nationals employed by a mining company is limited to 10% of its workforce, unless the company pays a penalty equal to ten times the minimum monthly salary for each foreign national it employs.

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

> *"Disputes between one of the Contracting Parties and an investor of the other Contracting Party, arising in connection with realization of investments, including disputes concerning the amount, terms or method of payment of the compensation, shall, whenever possible, be settled through negotiations.*
>
> *If a dispute cannot be settled in such manner within six months from the moment of its occurrence, it may be referred to*
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> *(a) a competent court or arbitral tribunal of the Contracting Party in which territory the investments were made;*
>
> *(b) the Arbitration Institute of the Stockholm Chamber of Commerce;*
>
> *(c) an ad hoc arbitral tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."*

8. In their Notice of Arbitration, Claimants appointed Dr. Horacio A. Grigera Naón as arbitrator.

9. On February 18, 2008, Respondent appointed Professor Brigitte Stern as arbitrator.

10. On March 12, 2008, Arbitrators Stern and Grigera Naón, further to the consultation with counsel to the Parties, appointed the Honorable Marc Lalonde as President of the Tribunal.

11. On March 14, 2008, Claimants submitted to the Tribunal a *Request for Interim Measures including a Temporary Restraining Order Prior to March 24, 2008* (the "**Request**") pursuant to Articles 15 and 26 of the UNCITRAL Rules.

12. In their Request, Claimants requested an order from the Tribunal directing Respondent during the pendency of the arbitral proceedings:

    a- To suspend enforcement of the WPT Law, the 2006 Minerals Law, and penalties for alleged late tax payments against GEM;

    b- To suspend any criminal action against Claimants or their investments and guarantee free movement in and out of Mongolia for GEM's representatives, managers and employees;

    c- To suspend any other conduct that aggravates the dispute, including, but not limited to, disparagement of Claimants or their investment in the media or unjustified refusal of permission to continue to mine gold in the same way and at the same levels as were approved in 2006 and 2007;

13. Claimants also requested the issuance of a temporary restraining order directing Respondent to refrain from the activities listed in sub-paragraphs (a), (b) and (c) pending the Tribunal's decision on interim measures.

14. The request for the issuance of a temporary restraining order was based on the alleged intention of Respondent to prosecute the enforced collection of taxes and fees disputed in this arbitration with effect on March 24, 2008.

15. Subsequent to the Request, various letters and telephone communications were exchanged between the Parties and the members of the Tribunal, including (i) a letter from Counsel for Respondent dated March 22, 2008 and opposing the issuance of a temporary restraining order and (ii) a telephone conference call between counsel for the Parties and the President of the Tribunal on March 22, 2008.

16. On March 23, 2008, the Tribunal issued the following temporary restraining order:

> *"1- Taking into account the undertaking already given, Respondent shall refrain from seizing or obtaining a lien on the assets of Claimants and shall allow Claimants to maintain their ordinary business operations;*

2- Claimants shall immediately sign an undertaking not to move assets out of Mongolia nor to take any action which would alter in any way the ownership and/or financial interests of the Claimants with respect to their assets in Mongolia, without prior notice to and agreement of Respondent;

3- Claimants shall, within seven days, provide Respondent with a complete list of their assets in Mongolia;

4- The issue raised by Respondent of the provision of security by Claimants shall be dealt with at the time of the consideration of the Request for Interim Measures;

5- The briefing schedule for any issue related to Claimants' interim measures application shall be decided in a separate procedural order by the Tribunal, after consultation with the Parties.

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

17. On April 18, 2008, an organizational meeting was held at the offices of Stikeman Elliott L.L.P. located at 1155, René-Lévesque Blvd West, 40th floor, Montreal, Québec, Canada. The purpose of this meeting was to establish the terms of reference and to discuss various procedural and logistical issues.

18. In addition to the members of the Tribunal and the Secretary thereof, the following counsel attended that meeting:

Mr. George M. von Mehren (Counsel for Claimants)
Mr. Stephen P. Anway (Counsel for Claimants)
Mr. Michael D. Nolan (Counsel for Respondent)
Mr. Edward G. Baldwin (Counsel for Respondent)

19. Further to the meeting, the contents of which, as per counsel for the Parties' agreement and request, were not transcribed, the Secretary of the Tribunal communicated to counsel for the Parties detailed minutes of the said meeting on April 29, 2008.

20. On April 30, 2008, Respondent submitted its *Opposition* to the Request, arguing that the latter should be dismissed.

21. On the basis of the minutes of the meeting referred to in paragraph 17, counsel for the Parties prepared a draft Procedural Order No. 1 and submitted same for consideration to the Tribunal on May 14, 2008.

22. On May 30, 2008, Claimants submitted their *Reply on Interim Measures*, amending their Request and limiting the relief sought to the extension of the temporary restraining order in an Order on Interim Measures.

23. On June 3, 2008, the President of the Tribunal issued Procedural Order No. 1, which dealt with all the procedural and logistical issues, save the timetable of submissions and hearing for Phase 1 (Jurisdiction/Admissibility and Liability).

24. On June 4, 2008, the President of the Tribunal issued Procedural Order No. 2, which dealt with the timetable for Phase 1.

25. On June 30, 2008, Respondent submitted its *Rejoinder* to the Request, requesting to dismiss the latter or, subsidiarly, to order Claimants to cause GEM to pay Windfall Profit Taxes into an escrow account.

26. On July 1, 2008, Claimants submitted their Statement of Claim, but this submission was not considered by the Tribunal either for the purposes of the hearing on interim measures or for the purpose of the present order on interim measures.

27. On July 2, 2008, a conference call was held between counsel for the Parties and the President of the Tribunal in order to address various organizational and procedural issues in relation to the forthcoming hearing on interim measures.

28. From the date of filing of the Request until the date of the hearing on interim measures, counsel for the Parties addressed numerous letters to the members of the Tribunal with respect to the Request as well as in relation to issues peripheral thereto.

29. On July 8, 2008, a full day hearing on interim measures was held at the offices of Stikeman Elliott L.L.P. located at 1155, René-Lévesque Blvd West, 40th floor, Montreal, Québec, Canada (the "**Hearing**").

30. In addition to the members of the Tribunal, the Secretary of the Tribunal and the Court Reporter, this Hearing was attended by:

On behalf of the Claimants:

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

On behalf of the Respondent:

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

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

32. Verbatim transcripts of the Hearing were produced in English and were concurrently available for viewing throughout the Hearing. Hard and soft copies of the transcripts were distributed to the Tribunal and Parties a few days after the Hearing.

33. Having consulted with counsel for the Parties, the Tribunal decided that post-hearing submissions were not required and took the Request under advisement.

II- GENERAL COMMENTS

1- The applicable rules

34. The Tribunal wishes to point out, first, that this case is taking place under the UNCITRAL Arbitration Rules. The powers of the Tribunal relating to interim (or provisional) measures are set in Articles 15(1), 26(1) and 26(2) of those Rules which provide as follows:

> *"Article 15(1):*
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> *Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.*
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> *Article 26(1):*
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> *At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.*
>
> *Article 26(2)*
>
> *Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the cost of such measures."*

35. The Parties have drawn the Tribunal's attention to a number of awards under the ICSID Convention dealing with requests for provisional measures under Article 47 of that Convention and Arbitration Rule 39 under it. Rule 39(1) in particular provides that:

> *"At any time during the proceeding a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The*

request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures."

36. The Tribunal notes that the wording of Article 26(1) of the UNCITRAL Rules is not the same as under the ICSID Convention; it leaves wider discretion to the Tribunal in the awarding of provisional measures (*"any interim measures it deems necessary in respect of the subject-matter of the dispute"*) than under Article 47 of the ICSID Rules (*"provisional measures for the preservation of its rights"*).

2- What is the subject-matter of the dispute

37. The subject-matter of the dispute is the validity under the Treaty of the Windfall Profit Tax and of the levying of a fee for the import of foreign workers imposed by Respondent. In their Notice of Arbitration of November 30, 2007, Claimants request declaratory relief based on Articles 3(1) and 4 of the Treaty as well as damages, interest and costs. And, in their Statement of Claim filed on June 27, 2008, Claimants request declaratory relief with regard to those two types of measures as contrary to Articles 2, 3 and 4 of the Treaty; in addition, they claim damages, interest and costs to be determined by the Tribunal.

38. The Parties have spent some considerable time arguing the issue of disputed rights in this case. These matters will be dealt with in the section of this Order dealing with imminent danger of prejudice.

3- Interim measures not to be granted lightly

39. It is not contested that interim measures are extraordinary measures not to be granted lightly, as stated in a number of arbitral awards rendered under various arbitration rules[1]. Even under the discretion granted to the Tribunal under the UNCITRAL Rules, the Tribunal still has to deem those measures urgent and necessary to avoid "irreparable" harm and not only convenient or appropriate.

4- Evidentiary Burden

40. In requests for interim measures, it is incumbent upon Claimants to demonstrate that their request is meeting the standards internationally recognized as pre-conditions for such measures[2].

41. In the present instance, Claimants submitted as principal evidence the testimony of Mr. Sergei Paushok, the Executive Director of GEM and the indirect owner of 100% of the shares of that company. Respondent argued that the Tribunal should attach no value to what it considers a self-serving statement from a party; it argues in particular that Mr. Paushok's Statement *"merely parrots Claimants' legal argument and conclusions, rather than*

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1 See for example, *Emilio Agustin Maffezini* v. *Spain*, ICSID Case No ARB/97/7, IIC 84 (1999), Procedural Order No 2, October 28, 1999.

2 *Ibid.* at ¶10. See also *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *Ecuador*, ICSID Case No ARB/06/11, IIC 305 (2007), Decision on provisional measures, August 17, 2007 at ¶90 [*Occidental Petroleum*].

adducing concrete factual material" and that, as such, it did not provide "*evidence of a specificity and concreteness that would allow Mongolia the opportunity of confrontation*"[3].

42. The Tribunal views the matter somewhat differently. The Witness Statement and the oral testimony (the latter taking place at the instigation of the Tribunal) were made in the form of a solemn declaration and it contains some elements which could be considered as statements of facts and others as legal conclusions. Respondent was given full opportunity to cross-examine Mr. Paushok on his Statement. In many cases, a statement by one of the parties may be of great importance in the analysis of the facts and it is up to the tribunal in each case to attach to such a statement the credibility and relevancy it considers appropriate. In the present instance and at this stage of the proceedings, the Tribunal sees no reason to ignore Mr. Paushok's Statement and oral testimony.

5- The specific features of this request

43. In deciding upon the present request for interim measures, the Tribunal will attach significant importance to the specific features surrounding this particular request which differentiate it from other awards referred to by the Parties. In particular, the Government of Mongolia, while not admitting to any illegality in the measures which have been enacted and which are challenged in this case, has recognized, both in 2007 and 2008, that the WPT Law was not achieving its objectives and should be replaced by a less severe taxation regime. In addition, Respondent appears to wish GEM to continue its operations in Mongolia. Evidence in that regard can be seen from the written undertaking given by the State Secretary of the Minister of Justice and Home Affairs on March 19, 2008, (confirmed at the Hearing by Ms. Taivankhuu Altangerel, of the Ministry of Justice and Home Affairs of Mongolia) that no seizure of or lien on GEM's assets would take place in connection with this dispute until a final award has been rendered in the present case.

6- Peripheral issues

44. Before the Hearing, a considerable exchange of correspondence took place between the Parties and with the Tribunal relating to a number of peripheral issues; all of them were resolved before the Hearing, except for the allegation by Respondent that, by selling gold rather than pledging it, GEM was in breach of the Temporary Restraining Order issued by the Tribunal. On the basis of the evidence submitted to it, the Tribunal has come to the conclusion that, in spite of some understandable concern on the part of Respondent, there was no breach of the TRO by Claimants. The Tribunal will deal with this specific issue for the future in this Order.

III- THE CRITERIA GUIDING THE TRIBUNAL

45. It is internationally recognized that five standards have to be met before a tribunal will issue an order in support of interim measures. They are (1) prima facie jurisdiction, (2)

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[3] Mongolia's Rejoinder to Claimants' March 14, 2008 Request for Interim Measures, June 30, 2008 at ¶12.

prima facie establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality.

46. In addressing the first two criteria, the Tribunal wishes to make it clear that it does not in any way prejudge the issues of fact or law which may be raised by the Parties during the course of this case concerning the jurisdiction or competence of the Tribunal or the merits of the case.

1- Prima facie jurisdiction

47. The International Court of Justice described the interpretation to be given to this standard in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*:

> *"(O)n a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, or, as the case may be, that an objection to jurisdiction is well founded, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the court might be founded;"*[4]

48. The Tribunal is of the view that, in their Notice of Arbitration and their submissions in connection with their Request, Claimants have established such a basis upon which the jurisdiction of the Tribunal might be founded. In particular,

a- The Treaty (Article 6) provides for UNCITRAL arbitration.

b- Until proven otherwise, Mr. Paushok is considered a citizen of Russia and the other two Claimants are considered legal persons constituted in accordance with the laws of Russia.

c- GEM appears to meet the definition of investment in Article 1(b) of the Treaty and Claimants appear to be direct or indirect shareholders in GEM and to have a separate claim of their own.

d- The dispute relates to investment in Mongolia.

49. Respondent raises two arguments in support of its challenge to the jurisdiction of the Tribunal.

50. The first is to the effect that the six-month amicable dispute resolution period prescribed in Article 6 of the BIT was not abided by Claimants. Article 6 states (in part): *"If a dispute cannot be settled in such a manner within six months of its occurrence, it may be referred to"* courts or arbitral institutions specified in that Article.

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[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Provisional Measures, Order of May 10, 1984, [1984] I.C.J. Rep. 169 at ¶24.

51. Respondent argues that Claimants initiated the arbitration on November 30, 2007, a mere month after having sent their formal notice to Respondent of their intent to commence investment arbitration. For their part, Claimants argue that a letter sent to the President of Mongolia by Mr. B.A Igoshin, First Deputy Executive Director of GEM, constituted sufficient notice[5], an argument with which Respondent disagrees.

52. The Tribunal is not ruling at this stage on these arguments, as it believes that they are more matters to be considered as part of the jurisdictional and merits phase of these proceedings. The Tribunal notes however that in the *Lauder* v. *The Czech Republic* case[6], an arbitral tribunal ruled that the requirement for a six-month waiting period was not a jurisdictional provision and that other tribunals also ruled that the waiting period need not have lapsed before initiating an arbitration, if negotiation attempts were clearly futile[7].

53. Respondent's second argument relates to estoppel allegedly resulting from negotiations surrounding Respondent's agreement, in January 2007, to grant to GEM an extension for the payment of the Windfall Profit Tax. This is even more clearly a matter that should be the subject of debate at the time of the jurisdictional and merits phase of these proceedings. It is clearly a contested matter about which both written and oral evidence will be required and it would be premature to embark on such an expedition at the stage of a request for interim measures, where the Tribunal only needs to decide whether there is prima facie jurisdiction.

54. The Tribunal therefore concludes that, for the purpose of a request for interim measures, the prima facie jurisdiction of the Tribunal has been established.

2- Prima facie establishment of the case

55. At this stage, the Tribunal need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal[8]. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.

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5 Claimants' Reply on Interim Measures, March 30, 2008, CE-46.

6 Ad hoc - UNCITRAL Arbitration Rules, IIC 205 (2001), Final Award, September 3, 2001 at ¶187.

7 *L.E.S.I. S.p.A. et ASTALDI S.p.A.* v. *Algeria*, ICSID Case No.ARB/05/3, Decision on Jurisdiction, July 12, 2006 at ¶32; *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, August 6, 2003 at ¶187; *Ethyl Corporation* v. *Government of Canada*, NAFTA/UNCITRAL Case, Award on Jurisdiction, June 24, 1998 at ¶84.

8 *Víctor Pey Casado, Président Allende Fondation* c. *République du Chili*, ICSID Case No. ARB/98/2, ICC 185 (2001), Decision on Provisional Measures, September 25, 2001 at ¶8; *Application of the Convention on the Punishment of the Crime of Genocide*, Provisional Measures, Order of September 13, 1993, [1993] I.C.J. Rep. 325 at ¶24.

56. In the present circumstances, the Tribunal concludes that Claimants have succeeded in a prima facie establishment of the case. In so ruling, the Tribunal wishes to stress that in no way does that ruling imply that the Tribunal would reach a similar conclusion on the merits of the case, once it has received submissions and heard witnesses and experts from each side on their respective allegations.

3- Urgency

57. From the evidence submitted, it appears that the WPT Law has had a major negative impact on the gold mining industry in Mongolia. Ms. S. Oyun, the President of the Mongolian Geologists Association and a Member of the Mongolian Parliament declared in September 2007 that, subsequently to the adoption of that Law, some 93 gold mining companies discontinued their operations, most of them declaring bankruptcy[9]. This would represent a reduction by more than 50% of the previous number of firms in the industry.

58. The Government of Mongolia itself recognized the critical situation resulting from its legislation and proposed in 2007 major amendments which it did not succeed in getting enacted. And, according to information transmitted to the press service of the Mongolian Government and contained in an undated press release submitted to the Tribunal[10], the Government decided on May 7, 2008, to propose to Parliament a new law reducing very substantially the tax rates established under the WPT Law. As an explanation, the Government said that the changes were proposed *"(w)ith the purpose of easing the tax burden on the mining companies, increasing the amount of gold deliveries and consolidating all of the tax payment on sold gold and gold-related royalties in the national budget and harmonizing the royalty payments with the international standards"*[11]. The use of the expression "standards" and its interpretation by Claimants were contested by Respondent, but, even accepting Respondent's translation of the appropriate Mongolian word into English, it is clear that the Mongolian Government has realized for quite some time that its taxation regime had led its gold mining industry into a crisis.

59. The Tribunal is not called upon to rule on that overall situation but taking cognizance of it helps the Tribunal in understanding whether the condition of urgency alleged by Claimants can be met in the present case.

60. From the evidence submitted by the Parties and taking into account the very specific features of this case, it appears to the Tribunal that urgent action in the form of interim measures is justified.

61. Respondent claims that over US$41 million is currently owed by GEM, under the WPT Law. It appears from the financial statements and taxation reports submitted to the Tribunal that GEM could not proceed to the immediate payment of this total sum out of its own resources. The only alternatives would be either loans from financial institutions or a large equity infusion by shareholders. It has been established to the satisfaction of

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9 Interview published in Mongolya Segodnya on September 15, 2007, CE-54.

10 CE-30.

11 *Idem.*

the Tribunal that, in the current fiscal conditions, no financial institution would consider lending such an amount of money to GEM. And, assuming that Respondent is right in stating that GEM's net book value assets are worth less than 50% of the amount of WPT owing and the possibility that the Mongolian Parliament would again refuse to amend the WPT Law, it would be very presumptuous for any investor to make additional equity investment in that company. The likelihood of GEM's bankruptcy in such a context therefore becomes very real.

62. The Tribunal is aware of preceding awards concluding that even the possible aggravation of a debt of a claimant did not ("generally" says the *City Oriente* case cited below) open the door to interim measures when, as in this case, the damages suffered could be the subject of monetary compensation, on the basis that no irreparable harm would have been caused[12]. And, were it not for the specific characteristics of this case, the Tribunal might have reached the same conclusion, although it might have expressed reservations about the concept that the possibility of monetary compensation is always sufficient to bar any request for interim measures under the UNCITRAL Rules. But those specific features point not only to the urgency of action by the Tribunal but also to the necessity of such action in the face of an imminent danger of serious prejudice.

4- Imminent danger of serious prejudice (necessity)

63. The Parties have raised a number of arguments in relation to the issue of disputed rights in this case.

64. Respondent, citing ICSID awards, contends that provisional measures are limited to situations where specific performance is requested and that such a request for specific performance could only occur when the dispute is based on a contractual relationship. Respondent further argues that when the dispute only relates to a claim for damages, as in this case, there is no place for provisional measures, as damages can always be compensated with the payment of money. Moreover, says Respondent, the only remedy available under Article 6 the BIT is monetary compensation.

65. Respondent refers in particular to the following cases. In *Occidental Petroleum*, the Tribunal says that *"provisional measures should only be granted in situations of necessity and urgency in order to protect legal rights that could, absent such measures, be definitely lost"* and in paragraph 98, it adds: *"The harm in this case is only "more damages", and this is harm of a type which can be compensated by monetary compensation, so there is neither necessity nor urgency to grant a provisional measure to prevent such harm"*[13]. Respondent also refers to the Decision on revocation of provisional measures in *City Oriente* where the Tribunal states that *"a possible aggravation of a debt does not generally warrant the ordering of provisional measures"* [14]. Respondent also relies on *Plama Consortium Limited* v. *Bulgaria* where the

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[12] *Plama Consortium Limited* v. *Bulgaria*, ICSID Case No ARB/03/24, IIC 190 (2005), Order, September 6, 2005 at ¶46 [*Plama*]; *Occidental Petroleum, supra* note 2 at ¶99; *City Oriente Limited* v. *Ecuador*, ICSID Case No. ARB/06/21, IIC 325 (2008), Decision on Revocation of Provisional Measures, May 13, 2008 at ¶64 [*City Oriente*].

[13] *Occidental Petroleum, supra* note 2 at ¶59 and ¶98.

[14] *City Oriente, supra* note 12 at ¶64.

Tribunal says that *"(t)he Tribunal accepts Respondent's argument that harm is not irreparable if it can be compensated for by damages, which is the case in the present arbitration and which, moreover is the only remedy Claimant seeks"* [15].

66. Claimants, for their part, argue that their right to interim measures is not excluded in the case of a claim for damages only and that, in any event, their request for relief is not only for damages but also for declaratory relief under the provisions of the Treaty.

67. They refer in particular to the *Behring International, Inc.* v. *Islamic Republic Iranian Air Force* case where the Iran-U.S. Claims Tribunal states that *"the concept of irreparable prejudice in international law arguably is broader than the Anglo-American concept of irreparable injury. While the latter formulation requires a showing that the injury complained of is not remediable by an award of damages (...), the former does not necessarily so require"* [16]. Claimants also mention *Saipem S.p.A* v. *The People's Republic of Bangladesh* where the Tribunal found that Saipem was facing a risk of irreparable damage if it had to pay the amount of a bond[17].

68. The Tribunal does not agree with Respondent that Claimants are merely requesting damages, as is clearly demonstrated by the text of their request for relief. Moreover, the possibility of monetary compensation does not necessarily eliminate the possible need for interim measures. The Tribunal relies on the opinion of the Iran-U.S. Claims Tribunal in the *Behring* case to the effect that, in international law, the concept of "irreparable prejudice" does not necessarily require that the injury complained of be not remediable by an award of damages. To quote K.P. Berger who refers specifically to Article 26 of the UNCITRAL Rules:

> *"To preserve the legitimate rights of the requesting party, the measures must be "necessary". This requirement is satisfied if the delay in the adjudication of the main claim caused by the arbitral proceedings would lead to a "substantial" (but not necessarily "irreparable" as known in common law doctrine) prejudice for the requesting party."*[18]

69. The Tribunal shares that view and considers that the "irreparable harm" in international law has a flexible meaning. It is noteworthy in that respect that the UNCITRAL Model Law in its Article 17A does not require the requesting party to demonstrate irreparable harm but merely that "(h)arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted".

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15 *Plama, supra* note 12 at ¶46.

16 *Behring International, Inc.* v. *Islamic Republic Iranian Air Force, Iran Aircraft Industries, and The Government of Iran*, Award No. ITM/ITL 52-382-3, June 21, 1985, 8 Iran-U.S. C.T.R. 238 at p. 276.

17 ICSID Case No. ARB/05/07, ICC 280 (2007), Decision on Jurisdiction and Recommendation of Provisional Measures , March 21, 2007 at ¶182.

18 Berger, K.P., *International Economic Arbitration*, in *Studies in Transnational Economic Law*, vol. 9, Kluwer Law and Taxation Publishers, Deventer, Boston, 1993 at p. 336.

70. Whatever the situation under the ICSID Convention, the Tribunal does not support the contention that such measures can only be issued, under the UNCITRAL Rules, when specific performance is requested in connection with a contractual relationship. No such restriction is implied under the broad language of Article 26(1) of the UNCITRAL Rules. The specific examples mentioned in that Article, on the contrary, point to a wide discretion in the hands of the Tribunal.

71. Finally, the Tribunal does not find that the Treaty limits the rights of Claimants to requests for monetary compensation. Respondent bases its argument on Articles 4 and 6 of the Treaty.

72. Article 4 indicates indeed that, in the case of nationalization or measures tantamount to nationalization, *"the compensation shall correspond to the real value of the nationalized investments"*. It is quite understandable that, in a situation where a State has exercised its right to takeover a foreign investment under the conditions mentioned in the Treaty, financial compensation would be the proper remedy. But, that Article only applies to cases of nationalization and, even then, it does not restrict what remedy a Tribunal could order where the nationalization does not meet the conditions mentioned in Article 4. Moreover, that Article certainly does not define the remedies available under Article 3 (fair and equitable treatment provision), even though, in practice, financial compensation is the overwhelming form of remedy requested by claimants.

73. As to the relevant part of Article 6 of the Treaty cited by Respondent, it reads as follows:

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

74. While payment of compensation is specifically mentioned, it is only referred to as one of the types of disputes which may arise under the Treaty but not as the exclusive one.

75. In the Tribunal's view, the Treaty does not restrict the available remedies of investors to monetary compensation. The three types of remedies available at public international law (*restitutio in integrum*, compensation and satisfaction) remain available under the Treaty.

76. Claimants have raised another argument in support of their request for interim measures on the basis that, in this case, the Tribunal would have reasons to believe that Claimants would encounter serious difficulties in having enforced an award which would be rendered in their favor. They allege in particular the modest financial means of Respondent as well as some recent political turbulence in Mongolia. The Tribunal does not believe that such allegations are sufficient to justify the ordering of interim measures in this case. The Tribunal should not presume that Respondent will not honor its international obligations, if an award is to be eventually rendered against it and nothing in the allegations made by Claimants is of such substance as to justify a different stand.

77. After review of the evidence and the pleadings submitted to it by the Parties, the Tribunal has come to the conclusion that Claimants are facing, in this case, very substantial prejudice unless some interim measures are granted. Immediate payment of the WPT allegedly owing to Mongolia would likely lead to the insolvency and bankruptcy of GEM (Mongolia's second largest gold producer) and the complete loss of Claimants' investment in that company. In an interview published in Odriyn Sonin, on December 17, 2007, the Director of Mongolia's Tax Office, Mr. L. Zorig, is reported as saying that *"(t)he company's licenses might be suspended or cancelled altogether"* unless payment of the WPT was made. Moreover, on February 25, 2008, Respondent commenced enforcement of GEM's tax debt before the Bayangol District Court. Respondent itself subsequently recognized the critical situation of GEM by agreeing not to seize or put a lien on its assets until a final award was rendered in this case, even if payment of the WPT owing was not paid immediately.

78. While it is true that Claimants would still have a recourse in damages and that other arbitral tribunals have indicated that debt aggravation was not sufficient to award interim measures, the unique circumstances of this case justify a different conclusion. In particular, while not putting in doubt the value of the undertaking of Respondent not to seize or put a lien on GEM's assets, the Tribunal believes that it is preferable to formalize that commitment into an interim measures order.

5- Proportionality

79. Under proportionality, the Tribunal is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties.

80. The Tribunal has just discussed the issue of the burden of immediate payment upon Claimants.

81. In its consideration of this criterion with regard to Respondent, the Tribunal does not question in any way the sovereign right of a State to enact whatever tax measures it deems appropriate at any particular time. Every year, governments around the world propose the adoption of tax measures which constitute either new initiatives or amendments to existing fiscal legislation. There is a presumption of validity in favor of legislative measures adopted by a State and the burden of the proof is upon those who challenge such measures to demonstrate their invalidity. Moreover, a government is generally entitled to demand immediate payment of taxes owing, even if there is a dispute with a taxpayer about them. Finally, the fact that a particular level of taxation would appear excessive to some taxpayers does not make it illegal *per se*, even though it may open the door to contestation, including by foreign investors under a relevant BIT.

82. However, in the present instance, the Government itself has recognized that the WPT Law was not achieving the objectives it had in mind when it was adopted in 2006. This is quite apparent in its attempts, both in 2007 and 2008, to repeal that Law and to replace it with a much more modest taxation regime; similarly with the more recent undertaking made by Respondent not to seize or put a lien upon GEM's assets until a final award has been rendered in this case.

83. Clearly, and quite understandably so, Respondent sees that it is in its own interest that its second largest gold producer should continue its operations. A sudden collapse of GEM would put Respondent in a situation where it would, most likely, be unable to realize a large share of the amount owing to it under the WPT Law and some considerable time could elapse before it could find another investor willing to restart gold production on the relevant properties, unless a new fiscal regime would have been legislated - an eventuality which, considering the 2007 experience, cannot be guaranteed.

84. If Respondent were to prevail, it would be in a position to obtain payment of the full amount owing to it, specially taking into account the security in favor of Respondent to be provided by Claimants according to directions further issued under this Order. If, on the other hand, Claimants were to prevail, Respondent would probably face a claim for lower damages than if GEM's activities had been terminated; this is not an insignificant factor, considering Respondent's tight budgetary constraints.

85. On balance, the Tribunal concludes that there is considerable advantage for both parties in the issuance of interim measures of protection.

86. However, while granting Claimants the requested protection from immediate payment of the WPT and from seizure of or liens upon GEM's assets, the Tribunal also understands Respondent's concern that, at the end of the process, it should not be "thrown the keys" of GEM with assets worth significantly less than the amount of the WPT owing. Hence, its request that, if Claimants' request for interim measures were to be accepted, an escrow account should be established where the full amount of the WPT owing would be deposited until a final award.

87. The Tribunal finds that the Respondent's concern underlying its request in that regard is legitimate but not that setting up an escrow account is the only alternative to address it.

88. If Respondent were to prevail, it would not find itself without possibility of realizing at least part of its tax claim upon GEM's assets, if that company would not be able to pay the whole sum out of its own liquidities. Respondent itself has recognized that GEM's assets currently represent close to 50% of its tax claim, Claimants arguing that those assets are worth significantly more. The present Order provides that those assets and the revenues from future production should remain in Mongolia until a final award has been rendered.

89. In those circumstances, taking into account the value of GEM's assets inside Mongolia, the restrictions in that regard imposed by the Tribunal in the present Order and that GEM's business prospects are likely to improve since it will be free from the WPT burden so long as the present Order remains in place, it does not appear necessary that the security to be provided by Claimants should cover the full value of the claimed WPT; thus, limiting it to about 50% of that amount would be sufficient. At the same time, taking into account GEM's inability to pay the full amount immediately, a schedule of monthly payments by Claimants into the escrow account would be a reasonable solution. Moreover, such payments could be reduced or increased depending on reasonable proof as to the evolution of GEM's business.

90. Article 26 of the UNCITRAL Rules does not mandate any specific type of security. An escrow account is not the exclusive measure of protection from which Respondent could benefit. Different measures with equivalent results can also be considered. The Tribunal is retaining one such measure: the provision of a bank guarantee having the same effect.

91. The Tribunal is giving Claimants the right to choose the option they prefer under the conditions mentioned below.

ON THE BASIS OF THE ABOVE, THE TRIBUNAL THEREFORE ORDERS AS FOLLOWS

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

1- Payment to Respondent of the Windfall Profit tax owing by GEM (including interest and penalties) is suspended until the Tribunal has ruled on the merits of Claimants' request for relief.

2- Taking note of the undertaking previously made by Respondent on March 19, 2008 and confirmed at the Hearing, Respondent shall refrain from seizing or obtaining a lien on the assets of GEM and other assets of Claimants in connection with the WPT owing to Respondent or from directly or indirectly taking any other action leading to the same or similar effect, except in accordance with the Tribunal's Orders, and shall allow GEM and Claimants to maintain their ordinary business operations in Mongolia.

3- Following their previous undertaking in that regard on March 26, 2008, Claimants shall not move assets out of Mongolia, nor take any action which would alter in any way the ownership and/or financial interests of Claimants with respect to their assets in Mongolia, without prior notice to and agreement of Respondent. Sale and pledges of gold are authorized provided the funds thus obtained are used for the ordinary business operations of GEM. Under no circumstances should such funds be used for other purposes; in particular, no transfer of funds or assets of any kind should be made outside of Mongolia (except for deposit into the escrow account under the conditions described below) or to any of the Claimants or any person, corporation or business related to them, without Respondent's agreement.

4- Claimants shall provide gradually increasing security as described below. The Tribunal may increase or decrease the security for good cause shown premised on the evolution of GEM's business. Claimants shall submit for approval by the Tribunal, within twenty days of the present Order, a detailed proposal, which will have been discussed with Respondent, concerning the implementation of one of the following measures of protection which they will have selected:

   a- An escrow account in an internationally recognized financial or other institution outside Mongolia and Russia and acceptable to the Tribunal;

b- The provision of a bank guarantee to the same effect and under the same conditions from an internationally recognized financial or other institution outside Mongolia and Russia and acceptable to the Tribunal.

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

5- The cost of the escrow account shall be borne equally by Claimants and Respondent but can be made part of the claim for compensation by each Party.

6- Claimants shall deposit in the escrow account (if such is the option retained), on the first working day of each month following the establishment of that account, the sum of US$2 million, until a final award is rendered in the present case or until the sum in the escrow account has reached 50% of the total amount of the accrued WPT claimed by Respondent, including interest and penalties, whichever comes first. The monies deposited in the escrow account may be invested in financial instruments of high liquidity. The decision regarding the scope of the security is adopted by majority, Dr. Horacio A. Grigera Naón being of the view that tax penalties should be excluded from the determination or calculation of the security.

7- Claimants may use the income resulting from the sale of gold by GEM for deposit into the escrow account, provided that, in no circumstance, such transfer would result in a reduction of shareholders' equity in GEM below the sum of MNT 31,578,323,602.35 mentioned at line 2.3.20 of the Balance Sheet of the Financial Statements of December 31, 2007 (after inclusion in the liabilities of the company the amount of WPT payable at that time - but not actually paid - of MNT 35,241,117,584.00 mentioned at line 2.1.1.12)[19]. Each such transfer shall be preceded by an affidavit signed by Director S.V. Paushok and the Chief Accountant of GEM confirming that fact and sent to Respondent and the Tribunal.

8- If, instead of the escrow account, the bank guarantee option is retained, arrangements to the same effect shall be put into place.

9- Claimants shall, every six months, provide Respondent with a complete list of their assets in Mongolia.

10- The scope of this Order does not extend beyond the subject-matter of this dispute and does not prevent Mongolia, after due consideration in good-faith of the Tribunal's direction under paragraph 11 below, from exercising its rights against GEM or Claimants in matters unrelated to this dispute, including taxes owing in other respect than the Windfall Profit Tax.

11- The Parties shall refrain, until a final award is rendered in this case, from any action which could lead to further injury and aggravation of the dispute between the Parties.

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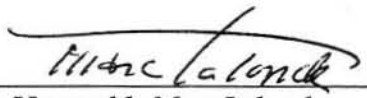
[19] CE-93.

12- The Tribunal reserves for later consideration its decision on costs arising from these proceedings.

13- The Temporary Restraining Order is terminated.

14- The Tribunal reserves the right to amend or revoke the present Order at any time during the proceedings, upon request by one of the Parties demonstrating the need for such action. In particular, failure by Claimants to timely provide or maintain the required security could lead to the immediate revocation of the present Order.

FOR THE TRIBUNAL



The Honorable Marc Lalonde,
Chairman of the Tribunal

Date: September 2, 2008