IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE MONGOLIAN PEOPLE'S REPUBLIC AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS AND THE FOREIGN INVESTMENT LAW OF MONGOLIA

中国黑龙江国际经济技术合作公司
(CHINA HEILONGJIANG INTERNATIONAL ECONOMIC & TECHNICAL COOPERATIVE CORP.)
and
北京首钢矿业投资有限责任公司
(BEIJING SHOUGANG MINING INVESTMENT COMPANY LIMITED)
and
秦皇岛市秦龙国际实业有限公司
(QINHUANGDAOSHI QINLONG INTERNATIONAL INDUSTRIAL CO. LTD.)
CLAIMANTS

v.

MONGOLIA

RESPONDENT

REQUEST FOR ARBITRATION
12 February 2010

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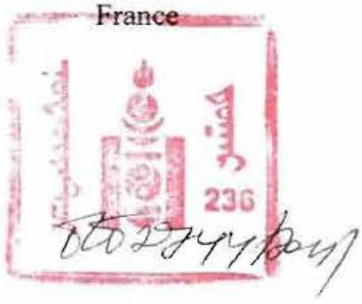

I. INTRODUCTION

1. 中国黑龙江国际经济技术合作公司 (China Heilongjiang International Economic & Technical Cooperative Corp., ***Heilongjiang***), 北京首钢矿业投资有限责任公司 (Beijing Shougang Mining Investment Company Limited, ***Beijing Shougang***) and 秦皇岛市秦龙国际实业有限公司 (Qinhuangdaoshi Qinlong International Industrial Co. Ltd., ***Qinlong***) (collectively, the ***Claimants***), all of which have been established according to the laws of the People's Republic of China (the ***PRC***), hereby file a Request for Arbitration against Mongolia, in accordance with the *Agreement between the Government of the Mongolian People's Republic and the Government of the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investments* signed on 26 August 1991 (the ***Treaty***),[1] and the *Foreign Investment Law of Mongolia* (the ***FIL***).[2]

2. The Treaty and the FIL provide protection to PRC investors for investments made in Mongolia. The Claimants are qualifying PRC investors, which have made qualifying investments in Mongolia, including through their direct interests in a Mongolian company, Tumurtei Huder LLC (***Tumurtei Ltd***). Tumurtei Ltd was the lawful holder of a mining licence issued on 28 January 1998 (the ***939A Licence***),[3] over an iron ore deposit located in Tumurtei, Khuder sub-province, Selenge province, in Mongolia (the ***Tumurtei mine***). The 939A Licence was, however, revoked by Mongolia in September 2006, in breach of Mongolia's obligations under the Treaty and the FIL, thus depriving the Claimants of their investment. In accordance with the requirements of Article 8 of the Treaty, the Claimants sent a notice of dispute to the Mongolian government (the ***Government***) on 26 December 2006.[4] No written response was received, and despite continuing efforts to resolve the matter through negotiations, as well as a further letter from Freshfields Bruckhaus Deringer dated 9

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1 The Treaty, **Exhibit CL-1**.

2 The FIL, **Exhibit CL-2**.

3 The 939A Licence, **Exhibit C-1**.

4 Copy of letter dated 26 December 2006, **Exhibit C-2**.

October 2009,[5] no settlement has been achieved in the six-month cooling-off period imposed by the Treaty, and indeed, in the past three years.

II. THE PARTIES

1. The Claimants

3. The Claimants in this arbitration are:

(a) Heilongjiang, a state-owned legal entity established in accordance with the laws of the PRC, whose address is No. 258 Xianfeng Road, Daowai District, Harbin, Heilongjiang Province, People's Republic of China;

(b) Beijing Shougang, a state-owned legal entity established in accordance with the laws of the PRC, whose registered office is at 36th Langshancun, west end of Liuniangfu Street, ShiJingShan district, Beijing, PR China;

(c) Qinlong, a limited liability company established in accordance with the laws of the PRC, whose address is No. 95 Hebei Dajie, Haigang District, Qinhuangdaoshi Municipality, People's Republic of China.[6]

4. The Claimants are represented in this arbitration by:[7]

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5 Letter from Freshfields Bruckhaus Deringer dated 9 October 2009, **Exhibit C-3**.

6 The business licences of the Claimants are at **Exhibit C-4**.

7 See Powers of Attorney at **Exhibit C-5**.

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5. All correspondence relating to this arbitration should be addressed to the above-mentioned counsel.

2. The Respondent

6. Mongolia is represented by:

HE Mr Sukhbaatar Batbold
Prime Minister
Government of Mongolia
Government Palace
Ulaanbaatar -12
Mongolia

III. FACTUAL BACKGROUND

1. Investment in Tumurtei mine

7. Mongolia has vast reserves of iron ore. However, in the early and mid-1990s, there was little interest in obtaining governmental licences to develop such resources, given the depressed iron ore price of around USD20/tonne and the substantial capital investment required to develop the mines. Nevertheless, a Mongolian company, BLT LLC (***BLT***), saw the potential of investing in iron ore at such an early stage of Mongolia's development. After conducting feasibility studies, it applied for and was granted the licence for the Tumurtei mine on 21 June 1997.

8. Subsequently, a new Minerals Law (the ***Minerals Law 1997***) came into force. In January 1998, BLT was granted the 939A Licence pursuant to the new Law, with a validity period of 60 years. The 939A Licence is the subject of the present dispute.

9. After BLT had been granted the 939A Licence, Qinlong became interested in and contributed to the development of Tumurtei mine. In July 2002 it formed a joint

venture company with BLT, called Tumurtei Ltd, with Qinlong holding a 70% interest in Tumurtei Ltd.[8]

10. Two other PRC companies, Heilongjiang and Beijing Shougang, also joined as shareholders in Tumurtei Ltd, and the shareholding in Tumurtei Ltd became as follows:

(a) Qinlong – 29%;

(b) Beijing Shougang – 30%;

(c) Heilongjiang – 11%; and

(d) BLT – 30%.[9]

11. This is also the shareholding structure of Tumurtei Ltd today.

12. In March 2005, the 939A Licence was transferred from BLT to Tumurtei Ltd. This was approved by the Department of Geology and Mining Cadastre (***DGMC***) of the Mineral Resources and Petroleum Authority of Mongolia (***MRPAM***), and duly reflected on the licence itself.[10]

13. In the meantime, developmental activities for the mine were proceeding. Government approvals were obtained from government ministries, agencies and departments, as well as from the local provincial government in charge of land use.

14. In addition, the three PRC investors made various investments, including direct payments for expenditure related to the development of the mine, and procuring and transferring assets to Tumurtei Ltd. These investments were made in relation to preparatory works; pre-exploration (including geological) work; by way of contribution of mining ore equipment and road construction equipment; in the construction and improvement of roads leading to the mine; as well as in the development of the mine itself.

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8 Certificate of Foreign Incorporated Company, **Exhibit C-6**.

9 Certificate of Foreign Incorporated Company, **Exhibit C-7**.

10 Reflected as item number 10 in the First Appendix to the 939A Licence, **Exhibit C-1**.

15 As a result, by the beginning of 2006, Tumurtei Ltd was able to commence iron ore production. At that initial stage, its production line had an annual capacity of 1-2 million tonnes per year. By August 2006, Tumurtei Ltd had accumulated a net stockpile of about 500,000 tonnes of iron ore.

2. **Change in investment climate**

16. In the meantime, in the beginning of 2006, a new coalition government was formed, headed by the Mongolian People's Revolutionary Party. By that time, the price of iron ore had increased significantly, and there was increasing interest within some quarters of the Government in taking back the Tumurtei mine from Tumurtei Ltd.

17. By then, Tumurtei Ltd had also started exporting iron ore to the PRC. Shortly thereafter, the Government started investigations into these exports.

18. The investigations became more intrusive, and by May 2006, the Government had launched several investigations into different aspects of Tumurtei Ltd's mining activities. A number of these investigations were carried out by specially set up "working groups". As a result of these investigations, the Mongolian authorities ordered several suspensions of Tumurtei Ltd's mining rights.

19. Matters came to a head in August 2006. A final "working group" was formed (the ***Final Working Group***), pursuant to a direct instruction from the Prime Minister and from the Minister of Industry and Trade.

20. Then, on 17 August 2006, Tumurtei Ltd's executive director was summoned to a police station and arrested. He was jailed for about two weeks, purportedly on charges related to tax evasion.

21. After he was released from jail, Tumurtei Ltd's executive director arranged to meet with the Minister of Industry and Trade. He had heard rumours that the Government was planning to revoke the 939A Licence, and he wished to explain Tumurtei Ltd's position, and to obtain more details from the Minister. However, at the meeting, the Minister refused to listen to his explanations. Instead, the Minister said that a compromise was not possible, and that all levels of the Government were determined to take back the licence.

3. Revocation of 939A Licence

22. Shortly thereafter, on 8 September 2006, the 939A Licence was revoked. Formal notification of the revocation was provided by way of a letter dated 13 September 2006, from the DGMC (a department under the Ministry of Industry and Trade) to Tumurtei Ltd. The letter stated that because of supposedly serious violations of licence conditions, the 939A Licence had been revoked, based on instructions in a letter dated 30 August 2006 from the Ministry of Industry and Trade, and a decision of the chairman of the DGMC on 8 September 2006.

23. The above letters were not provided to Tumurtei Ltd at the time, and they were only obtained subsequently. The 30 August 2006 letter had been sent by the State Administration and Management Department of the Ministry of Industry and Trade to the DGMC, and set out the following purported breaches by Tumurtei Ltd, to try to justify the revocation of the 939A Licence:[11]

(a) breach of Government resolution 160, made in 1990, which had supposedly granted a previous licence over the Tumurtei mine to a state-owned company;

(b) failure to repay the state budget, in breach of Article 7 of the Law on Implementation of the Minerals Law 1997 (the ***Implementing Law 1997***);[12]

(c) failure to prepare an environmental protection plan, contrary to Article 30.1 of the Minerals Law 1997;

(d) conducting blasting works without any licences for blasting works, contrary to Article 15.10.4 of the Law of Mongolia on Licensing and Article 11 of the Law on Control of Explosives, Blasting Items and their Circulation; and

(e) exporting non-processed iron ore to the PRC, contrary to the environmental impact assessment analysis prepared by Tumurtei Ltd which stated that processed iron ore would be produced, in violation of the Law on Environmental Impact Assessment.

24. None of these claims has merit, as will be briefly explained below.

[11] The 30 August 2006 letter, **Exhibit C-8**.

[12] The Implementing Law 1997, **Exhibit CL-3**

(i) Resolution 160/1990 is no longer applicable

25. According to what the Claimants later understood, this complaint was (a) that resolution 160 of 1990[13] granted a licence over the Tumurtei mine to Darkhan Metallurgical Plant (***Darkhan***), a state-owned company and (b) that it prevails over the 939A Licence. There is no basis for this complaint.

26. First, as a matter of construction, resolution 160 of 1990 does not purport to grant a licence over the Tumurtei mine to anyone.

27. Secondly, even if at the time, resolution 160 of 1990 had granted a licence over the Tumurtei mine to Darkhan, it has now lost its rights. Resolution 160 of 1990 was enacted in 1990. In 1994, a new Minerals Law was passed, and this was amended in 1997. As part of the 1997 amendments, the Implementing Law 1997 was issued in July 1997.[14] Article 1 of the Implementing Law 1997 provided that all mining licences issued before 1 July 1997 shall be re-registered within three months following the effective date of the Minerals Law 1997. Article 6 further provided that if a licence-holder did not apply for re-registration, the licence shall be cancelled and the licence area would be available for licensing to other applicants. Therefore, even if Darkhan had been granted a licence over the Tumurtei mine in 1990 (which is denied), it lost any such "licence", because it failed to re-register.

28. Thirdly, even if Darkhan retained a valid "licence" despite its failure to re-register, any such licence has been superseded by the 939A Licence. Resolution 160 of 1990 was enacted while Mongolia was still a communist state. Since then, a new Constitution and other new laws have been enacted. Mineral rights now fall within the purview of the Minerals Law. The 939A Licence was validly granted pursuant to the Minerals Law 1997, and in compliance with the new Constitution. Accordingly, even if conflicting rights were granted by resolution 160 of 1990 (which is denied), these have been superseded and are no longer valid.

[13] Resolution 160 of 1990, Exhibit CL-4.

[14] The Implementing Law 1997, Exhibit CL-3.

(ii) No delay in repaying the state budget

29. The second ground of revocation was an alleged failure by Tumurtei Ltd to repay the Mongolian state budget, in breach of Article 7 of the Implementing Law 1997.[15]

30. Leading up to the 1990s, Mongolia had incurred certain debts in carrying out survey works over prospective mines. To help repay these debts, Mongolia passed a law for such costs to be deemed attributable to licence-holders.

31. There was no basis for Mongolia to revoke the 939A Licence for non-payment of such costs. First, Tumurtei Ltd has never denied that monies were due. On the contrary, on 5 June 2006, an agreement was reached between Tumurtei Ltd and MRPAM,[16] for a five-year repayment plan (the ***Repayment Agreement***). At the time of the revocation, Tumurtei Ltd had paid all instalments that had fallen due.

32. Secondly, before the Repayment Agreement was entered into, it was unclear what sums were payable under the applicable laws. Tumurtei Ltd was able to begin payment only after a sum of USD667,522 was attributed to the Tumurtei mine.

33. Thirdly, even if Tumurtei Ltd was late in paying (which is denied), the Repayment Agreement clearly provides that the penalty for late payment is the payment of interest, not the revocation of Tumurtei Ltd's licence. Similarly, whereas Article 6 of the Implementing Law 1997 clearly states that failure to re-register or to pay licence fees will result in revocation of the licence, no similar penalty is stipulated for delay in repaying the state budget pursuant to Article 7.

(iii) Tumurtei Ltd prepared and submitted environmental plans

34. The third ground for revoking the 939A Licence was a purported failure by Tumurtei Ltd to submit an environmental protection plan in accordance with Article 30.1 of the Minerals Law 1997.[17]

35. This is incorrect, and an environmental protection plan was submitted. In any event, even if Article 30.1 had been breached (which is denied), Articles 26 and 52 of the

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15 The Implementing Law 1997, **Exhibit CL-3**.

16 The Repayment Agreement, **Exhibit C-9**.

17 The Minerals Law 1997, **Exhibit CL-5**.

Minerals Law 1997[18] provide that the sanction for a breach is the imposition of a penalty, not the revocation of Tumurtei Ltd's licence.

(iv) Proper licences were obtained for blasting works

36. The fourth ground was an alleged failure by Tumurtei Ltd to obtain requisite licences prior to conducting blasting (explosives) works. This ground even as set out in the 30 August 2006 letter is unspecified, and no proper details were provided on what precise licences were alleged not to have been obtained by Tumurtei Ltd.

37. In any event, blasting licences have been obtained by Tumurtei Ltd and even if not all licences had been obtained, this would not justify the revocation of Tumurtei Ltd's licence.

(v) No violation of the Law on Environmental Impact Assessments

38. The fifth and final ground was a purported violation of the Law on Environmental Impact Assessments 1998,[19] allegedly due to Tumurtei Ltd's exporting of non-processed iron ore to the PRC.

39. The basis for this ground is vague. However, it appears that Mongolia was alleging that Tumurtei Ltd was exporting non-processed iron ore to the PRC, instead of processed iron ore, contrary to the environmental impact assessment analysis prepared by Tumurtei Ltd.

40. This ground, too, is without foundation. The proposed process in the environmental impact assessment analysis involved processing the iron ore by crushing and physical separation using magnetic means; this was duly carried out before the iron ore was exported.

41. In addition, in relation to all the above alleged violations, under Article 56 of the Minerals Law 2006,[20] within five business days following a determination that grounds for licence revocation exist, the State administrative agency is obliged to notify the licence-holder, specifically indicating the grounds for the revocation of the licence. Tumurtei Ltd was not given the requisite notice, in breach of that provision.

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18 The Minerals Law 1997, **Exhibit CL-5**.

19 The Law on Environmental Impact Assessments 1998, **Exhibit CL-6**.

20 The Minerals Law 2006, **Exhibit CL-7**.

If notice had been given, Tumurtei Ltd would have been able to exercise its right under that provision of the Minerals Law to make submissions (including provision of documentary evidence) to the DGMC to review its determination that grounds existed for the revocation of its licence. The DGMC's failure to comply with this provision invalidates and nullifies its decision.

42. Furthermore, even if the above violations occurred (which is denied), the penalty imposed was contrary to Mongolian law, and disproportionate to the minor nature of the alleged breaches.

4. Transfer of licence to Darkhan

43. As noted above, one of the grounds for the revocation of the 939A Licence was that resolution 160 of 1990 had purportedly granted the Tumurtei mine to Darkhan. Given Darkhan's status as a state-owned company, its interest may help explain Mongolia's motive in unlawfully revoking the 939A Licence.

44. By 2005, the Claimants had become aware of Darkhan's interest in the Tumurtei mine. After the revocation, additional details were uncovered. It appears that both Darkhan and a number of senior government officials within Mongolia (including officials from Darkhan's parent, the State Property Agency of Mongolia) had been lobbying the Ministry of Industry and Trade for the 939A Licence to be revoked and granted to Darkhan. This occurred, even though it was improper for one government department to be putting pressure on another department to revoke a licence that had already been granted to a private company, in order to re-grant the licence to a state-owned company. Their plan eventually succeeded and, following revocation of the 939A Licence, the Tumurtei mine licence was indeed granted to Darkhan in June 2008.

5. Court proceedings and investigations

45. In September 2006, BLT and Tumurtei Ltd filed a claim with the Capital Administrative Court in Ulaanbaatar, seeking to cancel the revocation, on the basis that the plaintiffs had complied with Mongolian law and that the decision had been made with no prior consultation. Their challenge failed, and appeals all the way up to

the Supreme Court were also dismissed.[21] The PRC investors were not involved in these proceedings, but were hoping to resolve the dispute through negotiations.

46. A number of proceedings were also brought against Tumurtei Ltd's then-executive director. These included the tax investigation referred to above in which he was thrown in jail (charges were eventually dropped);[22] separate criminal investigations alleging a conspiracy, simply because the executive director had in the mid-1990s worked in Darkhan, and one of his relatives had been a director of Darkhan (even though there was little overlap in their time at Darkhan); and a further imprisonment of Tumurtei Ltd's former executive director in June 2007. He became increasingly concerned about his treatment and eventually had no choice but to leave the jurisdiction.

IV. MONGOLIA'S BREACHES OF ITS OBLIGATIONS

1. Mongolia is in breach of its obligation not to unlawfully expropriate the Claimants' investment

47. Article 4 of the Treaty provides in relevant parts that:

> 1. Investments made by investors of one Contracting State shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting State, except for the need of social and public interests. The expropriation shall be carried out on a non-discriminatory basis in accordance with legal procedures and against compensation.
>
> 2. The compensation mentioned in Paragraph 1 of this Article shall be equivalent to the value of the expropriated investments at the time when expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay.[23]

48. Article 8 of the FIL similarly provides as follows:

> *Article 8. Legal guarantees for foreign investment*
>
> 1. Foreign investment within the territory of Mongolia shall enjoy the legal protection guaranteed by the Constitution, this law and other legislation which is consistent with those laws and as guaranteed by the international treaties to which Mongolia is a party.

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[21] On 21 August 2007, the Chief Justice of the Supreme Court of Mongolia rejected a final application by the plaintiffs, meaning that all avenues of appeal under the Mongolian court system had been exhausted.

[22] See para 20 above.

[23] The Treaty, Exhibit CL-1, Article 4(1) and 4(2)

> 2. Foreign investment within the territory of Mongolia shall not be unlawfully expropriated.
>
> 3. Investments of foreign investors may be expropriated only for public purposes or interests and only in accordance with due process of law on a non-discriminatory basis and on payment of full compensation.
>
> 4. Unless provided otherwise in any international treaties to which Mongolia is a party, the amount of compensation shall be determined by the value of the expropriated assets at the time of expropriation or public notice of expropriation. Such compensation shall be paid without delay.
>
> ....[24]

49. As a result of the measures set out above, and in particular, the taking of the 939A Licence, the Claimants have been unlawfully deprived of their investment, in breach of Article 4 of the Treaty, and Article 8 of the FIL.

50. Indeed, the revocation of the 939A Licence was not made for social or public interests. In addition, the measures taken were discriminatory, not carried out in accordance with legal procedures or due process of law, and no compensation (even partial) has been paid.

2. Mongolia has breached its obligation to accord fair and equitable treatment, and protection, to the Claimants' investment

51. Mongolia's actions as set out above also constitute a breach of its obligation under Article 3 of the Treaty, to accord the investment fair and equitable treatment, and protection.

52. Article 3 provides (relevantly), that,

> *Article 3*
>
> 1. Investments, returns and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State.
>
> ....[25]

[24] The FIL, Exhibit CL-2, Article 8; explanatory notes omitted.

[25] The Treaty, Exhibit CL-1, Article 3.

3. Breach of other provisions of FIL

53 Article 10.1 of the FIL sets out a number of additional rights and obligations of foreign investors Mongolia's actions as set out above constitute breaches of these rights.

> *Article 10. Rights and obligations of foreign investors*
>
> 1. Foreign investors shall enjoy the following rights:
>
> 1) to possess, use, and dispose of their property including the repatriation of investments which contributed to the equity of a business entity with foreign investment;
>
> 2) to manage or to participate in managing a business entity with foreign investment;
>
> 3) to transfer their rights and obligations to other persons in accordance with the law;
>
> 4) remit the following income, profit and payments to abroad without any barriers:
>
> (a) allotted stockholders income and share dividends;
>
> (b) allotted income after property and securities' sale, transfer of property right to other party, completion of an investment agreement and liquidation of an entity;
>
> (c) principal and interest of debt or other identical payments;
>
> (d) compensation payment for confiscated property;
>
> (e) other income gained under the legislation of Mongolia.
>
> 5) any other rights conferred by law.[26]

4. Most favoured nation clause

54. Both the Treaty and the FIL contain most favoured nation clauses,[27] and the Claimants reserve the right to invoke them to rely on more favourable provisions elsewhere.

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[26] The FIL, **Exhibit CL-2**, Article 10.1; explanatory notes omitted.

[27] The Treaty, **Exhibit CL-1**, Article 3(2) and 9; the FIL, **Exhibit CL-2**, Article 9.

V. THE CLAIMANTS' LOSS

55. The Claimants claim their loss of profits from their investment in Tumurtei Ltd which will be quantified in a later submission, and further or alternatively, their lost investment of about USD60 million.

VI. JURISDICTION

1. The Claimants are qualifying investors

56. The Treaty defines "investors" to mean,

> In respect of the People's Republic of China:
>
> ...
>
> (b) economic entities established in accordance with the laws of the People's Republic of China and domiciled in the territory of the People's Republic of China.[28]

57. The Claimants are economic entities falling within the terms of the above definition,[29] and therefore qualify as "investors" under the Treaty.

58. Similarly, the FIL defines a "foreign investor" to mean,

> a foreign legal person or individual (a foreign citizen or stateless person not residing permanently in Mongolia or a citizen of Mongolia permanently residing abroad) who invests in Mongolia.[30]

59. The Claimants are foreign legal persons within the terms of the above definition.

2. The Claimants have made a qualifying investment

60. Article 1(1) of the Treaty sets out a broad definition of "investments" as follows:

> For the purpose of this Agreement,
>
> 1. The term "investments" means every kind of asset invested by investors of one Contracting State in accordance with the laws and regulations of the other Contracting State in the territory of the Latter, including mainly:

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28 The Treaty, Exhibit CL-1, Article 1(2).

29 See Section II above.

30 The FIL, Exhibit CL-2, Article 3.2.

> (a) movable and immovable property and other property rights such as mortgages, pledges;
>
> (b) shares, stocks and debentures of companies or interest in the property of such companies;
>
> (c) a claim to money or to any performance having an economic value;
>
> (d) copyrights, industrial property, know-how and technological process;
>
> (e) concessions conferred by law, including concessions to search for or exploit natural resources.[31]

61. As explained in paragraph 10 above, the Claimants have the following shareholding interest in Tumurtei Ltd:

(a) Heilongjiang has an 11% direct interest;

(b) Beijing Shougang has a 30% direct interest; and

(c) Qinlong has a 29% direct interest.

62. In addition, as explained at paragraph 14 above, the Claimants made various investments in the Tumurtei mine.

63. Their investments therefore qualify as covered "investments" protected by the terms of the Treaty.

64. In the case of the FIL, "foreign investment" is defined to mean,

> every kind of tangible and intangible property which is invested in Mongolia by a foreign investor for the purpose of establishing a business entity with foreign investment within the territory of Mongolia or for the purpose of jointly operating with an existing business entity of Mongolia.[32]

65. As before, the Claimants' investment, including their investments and shares in Tumurtei Ltd, fall within the terms of the above definition.

3. The Arbitral Tribunal has jurisdiction over the dispute

66. The Arbitral Tribunal has jurisdiction over the Claimants' claims under both the Treaty and Mongolia's FIL.

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[31] The Treaty, **Exhibit CL-1**, Article 1(1).

[32] The FIL, **Exhibit CL-2**, Article 3.1.

67. As far as the Treaty is concerned, its dispute resolution provisions are contained in Article 8, which provides, in relevant part, as follows:

> 1. Any dispute between an investor of one Contracting State and the other Contracting State in connection with an investment in the territory of the other Contracting State shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
>
> 2. If the dispute cannot be settled through negotiations within six months, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting State accepting the investment.
>
> 3. If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the (sic) procedure specified in the paragraph 2 of this Article.[33]

68. Article 8 on its true interpretation is not limited to an assessment of the compensation due for an expropriation but gives the Arbitral Tribunal jurisdiction to determine the existence of an expropriation under Article 4 of the Treaty and its lawfulness as well as any compensation due.

69. Any other interpretation would render the standard of protection under the Treaty purely formal and would thus defeat the purpose of the Treaty, namely to promote investment. Indeed, in order to assess the amount of compensation due, the Arbitral Tribunal has to have jurisdiction over the predicate on which its assessment is based, *i.e.* the existence and lawfulness of the expropriation itself.

70. So far as the Claimants' claims for breach of the protections given under Article 3(1) of the Treaty are concerned, the Arbitral Tribunal has jurisdiction by virtue of Article 3(2), which provides as follows:

> The treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments, returns and activities associated with such investments of investors of a third State.[34]

71. Article 3(2) guarantees Chinese investors a treatment no less favourable than that accorded by Mongolia to investors from third states. That this includes the width of the dispute resolution provisions in the basic treaty is now well established. The

[33] The Treaty, **Exhibit CL-1**, Article 8(1) to 8(3).

[34] The Treaty, **Exhibit CL-1**, Article 3(2).

Claimants are thus able to rely on the more favourable dispute resolution provisions in other treaties entered into by Mongolia. The Claimants point, by way of example, to the dispute resolution clause in the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Mongolian People's Republic for the Promotion and Protection of Investments (the ***Mongolia-UK BIT***), signed on 4 October 1991, in this regard, which provides:

> (1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of six months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.
>
> (2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:
>
> (a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 in the event that the Mongolian People's Republic becomes a party to this Convention, and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or
>
> (b) an international arbitration or *ad hoc* arbitral tribunal to be appointed by special agreement or establishment under the Arbitration Rules of the United Nations Commission on International Trade Law.
>
> If after a period of six months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.
>
> (3) Nothing in this Article shall be construed to prevent the parties to the dispute from agreeing upon any other form of arbitration or procedure for settlement of their disputes which they consider appropriate.[35]

72. As any disputes relating to an investment can be submitted to international arbitration under the Mongolia-UK BIT, the Arbitral Tribunal thus has jurisdiction over the Claimants' claims under Article 3(1) of the Treaty.

[35] The Mongolia-UK BIT, Exhibit CL-8, Article 8 (footnotes omitted).

73. Furthermore, Article 9 of the Treaty allows the Claimants to rely on more favourable treatment given to investors by Mongolian laws and regulations. Article 9 provides as follows:

> If the treatment to be accorded by one Contracting State in accordance with its laws and regulations to investments or activities associated with such investments of investors of the other Contracting State is more favorable than the treatment provided for in this Agreement, the more favorable treatment shall be applicable.[36]

74. Mongolia's FIL, by its Article 25, allows investors with disputes with the State arising out of the protections given under the Law to bring claims either in the Mongolian courts or as "provided otherwise by international treaties to which Mongolia is a party ...".[37] As already set out above, Mongolia has entered into investment-protection treaties that provide for a full right of arbitration for any disputes arising from an investment. This right is not limited to investors from the state party to the treaty concerned.

75. The Claimants are thus entitled to rely on the wide dispute-resolution provisions of the Mongolia-UK BIT under Article 9 as well as Article 3(2).

76. Article 25 of the FIL also, of course, gives the Claimants the right to have their claims under the Law referred to international arbitration.

VII. CONSTITUTION OF THE ARBITRAL TRIBUNAL

77. Pursuant to Article 8(4) of the Treaty:

> 4. Such an arbitral tribunal shall be constituted for each individual case in the following way: each party to the dispute shall appoint an arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two Contracting States as Chairman. The first two arbitrators shall be appointed within two months of the written notice for arbitration by either party to the dispute to the other, and the Chairman be selected within four months. If within the period specified above, the tribunal has not been constituted, either party to the dispute may invite Secretary General of the International Center (sic) for Settlement of Investment Disputes to make the necessary appointments.[38]

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[36] The Treaty, **Exhibit CL-1**, Article 9.

[37] The FIL, **Exhibit CL-2**, Article 25.

[38] The Treaty, **Exhibit CL-1**, Article 8(4).

78. In accordance therewith, the Claimants hereby appoint:

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as their party-appointed arbitrator.

79. To the best of the Claimants' knowledge and belief, Dr Banifatemi is impartial and independent of the parties to the dispute.

80. The Claimants further invite the Respondent to appoint its party-appointed arbitrator within a maximum of two months of this Request for Arbitration.

VIII. LAW APPLICABLE TO THE MERITS

81. Article 8(7) of the Treaty provides as follows:

> The tribunal shall adjudicate in accordance with the law of the Contracting State to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognized principle (sic) of international law accepted by both Contracting States.[39]

82. It is the Claimants' submission that although Mongolian law has a role to play in the adjudication of the Dispute, the Claimants' claims for breaches of the Treaty shall be determined in accordance with the Treaty itself and principles of customary international law. Moreover, in case of conflict, the latter two shall prevail over Mongolian law. Finally, any lacuna in Mongolian law shall be remedied by resorting to the Treaty and principles of customary international law.

IX. PROCEDURE

83. Article 8(5) of the Treaty provides:

[39] The Treaty, **Exhibit CL-1**, Article 8(7).

> The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Center (sic) for Settlement of Investment Disputes.[40]

84. Given the importance of the Dispute, the Claimants suggest that the arbitration be administered by either the International Centre for Settlement of Investment Disputes (***ICSID***) in accordance with the ICSID Arbitration (Additional Facility) Rules, or by the Permanent Court of Arbitration (***PCA***) in accordance with the United Nations Commission on International Trade Law Arbitration Rules. Both alternatives will further allow the parties and the Arbitral Tribunal to avoid any impression of impropriety as, instead of having each party paying the fees of its party-appointed arbitrator directly (as provided for under Article 8(8) of the Treaty), payments will be made through ICSID or the PCA. The Claimants are content to let the Arbitral Tribunal decide which of the two alternatives it prefers.

85. In the absence of any provision determining the seat of the arbitration, the Claimants submit that such a decision is to be left to the parties to the dispute and, failing agreement between the parties by the time the Arbitral Tribunal is constituted, the Tribunal itself.

86. In view of the location of the parties to the Dispute, and hence of the evidence (whether documentary or testimonial), the Claimants suggest that the seat of the arbitration be Singapore.

X. CLAIMANTS' REQUEST FOR RELIEF

87. The Claimants respectfully request the Arbitral Tribunal to:

(a) Find that Mongolia is in breach of its obligations under the Treaty and the FIL by having unlawfully expropriated the Claimants' investment, having failed to accord them fair and equitable treatment and having failed to protect them;

As a consequence,

(b) Order Mongolia to compensate the Claimants for their losses as set out in paragraph 55 above, through the payment of damages; or

[40] The Treaty, **Exhibit CL-1**, Article 8(5).

In the alternative,

(c) Order the restitution by Mongolia of the 939A Licence to Tumurtei Ltd, as well as damages in an amount to be later determined;

In any event,

(d) Order Mongolia to pay interest to the Claimants on any damages awarded, at such rates and for such periods as to be determined later in these proceedings; and

(e) Order that Mongolia pay all of the costs and expenses incurred by the Claimants in relation to these proceedings, including the fees and expenses of the members of the Arbitral Tribunal, the administrative fees of the arbitral institution, the fees and expenses of any experts appointed by the Arbitral Tribunal and the Claimants, the fees and expenses of the Claimants' legal representation, the internal costs expended by the Claimants, and interest, on a full indemnity basis.

88. The Claimants respectfully reserve the right to amend and/or supplement their claim, including this request for relief, as they may consider necessary or appropriate.

Respectfully submitted on this 12th day of February 2010.

For and on behalf of the Claimants
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