INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

WM MINING COMPANY, LLC

v.

MONGOLIA

(ICSID CASE NO. ARB/21/8)

I hereby certify that the attached document is a true copy of the Tribunal's Award dated August 29, 2024.

Martina Polasek
Secretary-General

Washington, D.C., August 29, 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

WM MINING COMPANY, LLC

Claimant

and

MONGOLIA

Respondent

ICSID Case No. ARB/21/8

AWARD

Members of the Tribunal
Prof. Eduardo Zuleta Jaramillo, President
Mr. Stephen L. Drymer, Arbitrator
Prof. Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal
Ms. Jara Mínguez Almeida

Assistant to the President of the Tribunal
Ms. María Marulanda Mürrle

Date of dispatch to the Parties: 29 August 2024

REPRESENTATION OF THE PARTIES

Representing WM Mining Company, LLC:

Mr. Robert Wisner
Mr. J. Thomas Hatfield
Ms. Jeneya Clark
McMillan LLP
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Toronto, Ontario M5J 2T3
Canada

Representing Mongolia:

Dr. Patricia Nacimiento
Dr. Bajar Scharaw
Dr. Adilbek Tussupov
Herbert Smith Freehills LLP
Taunusanlage 9-10
60329 Frankfurt am Main
Federal Republic of Germany

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TABLE OF ABBREVIATIONS/DEFINED TERMS

2010 POAs	Powers of Attorney granted by Ikh Tokhoirol and WMM AG, respectively, to OPIC in November 2010
2013 Notice	Claimant's notice of dispute dated 29 March 2013
2021 Notice	Letter to H.E. Mr. Yondon Gelen and H.E. Mr. Khishgee Nyambaatar sent by McMillan LLP on behalf of WM Mining Company, LLC, 12 January 2021
Altan Zaamar	Altan Zaamar LLC
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings (2006)
BIT or Treaty	Treaty Between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment (with Annex and Protocol), which entered into force on 1 January 1997
C-[#]	Claimant's Exhibit
CL-[#]	Claimant's Legal Authority
Claimant's Memorial	Claimant's Memorial on the Merits dated 26 November 2021
Claimant's PHB	Claimant's Post-Hearing Brief dated 25 August 2023
Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction dated 6 April 2023
Claimant's Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated 19 December 2022
DCF	Discounted Cash Flow
Disputed Measures	(i) Government Resolution 174 of June 2011; (ii) Cadaster Decision 333 of May 2012; and

	(iii) Cadaster Decisions 70 and 76 of February 2013
FDM	Financial and Development of Mining NBFI
Hearing	Hearing on jurisdiction and the merits held from 30 May to 8 June 2023
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Ikh Tokhoirol	Ikh Tokhoirol LLC
License Pledge Agreement	Equipment Pledge Agreements between Ikh Tokhoirol and OPIC, dated 14 May 2010
Licenses	License Nos. 7712A and 7713A
Liquidation Order	Decision of the Swiss District Court of Olten-Gösgen ordering the liquidation of WMM AG, 8 December 2014
Liquidator	The liquidator of WMM AG
Loan Agreement	Finance Agreement between Ikh Tokhoirol LLC and OPIC, 20 April 2010
Mongolia or the Respondent	Republic of Mongolia
Mr. Mays	Wallace Mays
Mr. Miller	Patrick D. Miller
Mr. Vogt	Hans Vogt
MRAM	Mineral Resource Authority of Mongolia
OPIC	Overseas Private Investment Corporation
Parties	Collectively, the Claimant and the Respondent
Project	The Big Bend gold mining project
R-[#]	Respondent's Exhibit

Request	Claimant's Request for Arbitration dated 9 February 2021
Request for Bifurcation	Respondent's Memorial on Preliminary Objections and Request for Bifurcation dated 7 February 2022
Respondent's Counter-Memorial	Respondent's Counter-Memorial on the Merits dated 6 June 2022
Respondent's Memorial	Respondent's Memorial on Preliminary Objections and Request for Bifurcation dated 7 February 2022
Respondent's PHB	Respondent's Post-Hearing Brief dated 25 August 2023
Respondent's Rejoinder	Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated 10 March 2023
River Law	The Law on Prohibition of Mineral Exploration and Mining Operations at Headwaters of Rivers, Protected Zones of Water Reservoirs and Forested Areas
RL-[#]	Respondent's Legal Authority
Security for Costs Application	Respondent's application pursuant to Article 47 of the ICSID Convention
Settlement Agreement	Settlement Agreement between Mr. Mays, WMM, WMM AG, and FDM, 22 February 2017
Share Pledge Agreement	Share Pledge Agreement between WMM AG and OPIC, dated 12 November 2010
Share Transfer Agreement	Share Transfer Agreement between WMM and WMM AG, 7 July 2015
Shares	All outstanding shares of Ikh Tokhoirol
Switzerland-Mongolia BIT	Agreement between the Government of Mongolia and the Swiss Federal Council on the Promotion and Reciprocal Protection of Investments

TPF Agreement	Third-Party Funding Agreement
Tr. Day [#], [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 8 July 2021
WMM AG	WM Mining A.G.
WMM or the Claimant	WM Mining Company, LLC
Working Group	Working Group set up by Mongolia to address the Claimant's and Ikh Tokhoirol's request for compensation

I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Treaty Between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment (with Annex and Protocol), which entered into force on 1 January 1997 (the "**BIT**" or "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The dispute relates to the alleged investment of WM Mining Company, LLC ("**WMM**" or the "**Claimant**") in the Big Bend gold mining project (the "**Project**") in Mongolia ("**Mongolia**" or the "**Respondent**").

A. THE PARTIES

3. The Claimant is WM Mining Company, LLC, a limited liability corporation existing under the laws of Delaware, United States of America. WMM was founded by Mr. Wallace Mays ("**Mr. Mays**"), who ultimately owns it and is a principal within the company.

4. The Respondent is Mongolia.

5. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

B. PROCEDURAL HISTORY

6. On 9 February 2021, ICSID received a request for arbitration dated 9 February 2021 from WM Mining Company, LLC against Mongolia (the "**Request**"), together with Exhibits C-0001 through C-0019.

7. On 17 February 2021, the ICSID Secretary-General registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute

an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.

9. On 5 May 2021, the Claimant appointed Mr. Stephen L. Drymer, a national of Canada, as Arbitrator; Mr. Drymer subsequently accepted his appointment. On 17 May 2021, the Respondent appointed Prof. Albert Jan van den Berg, a national of the Kingdom of the Netherlands, as Arbitrator; Prof. van den Berg subsequently accepted his appointment.

10. By letter of 3 June 2021, the Claimant requested that the Chair of the ICSID Administrative Council appoint the arbitrator not yet appointed and designate him or her to be the President of the Tribunal in this case, pursuant to Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"). On 4 June 2021, the ICSID Secretariat wrote to the Parties inquiring whether they would be amendable to ICSID conducting a ballot procedure to assist the Parties in selecting a mutually agreeable presiding arbitrator. By the Claimant's email of 8 June 2021 and the Respondent's email of 10 June 2021, the Parties agreed to the proposed ballot procedure.

11. Following a successful ballot procedure, on 30 June 2021, the Parties agreed to appoint Prof. Eduardo Zuleta Jaramillo, a national of the Republic of Colombia, as President of the Tribunal.

12. On 8 July 2021, the ICSID Secretary-General, in accordance with ICSID Arbitration Rule 6(1), notified the Parties that all three arbitrators had accepted their appointments, and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Anna Holloway, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal; Ms. Holloway was subsequently replaced by Ms. Jara Mínguez Almeida, ICSID Team Leader/Senior Counsel.

13. On 28 July 2021, the President of the Tribunal inquired of the Parties whether they would agree to the appointment of Ms. María Marulanda Mürrle as Assistant to the President; the Parties subsequently confirmed their agreement by separate emails of 6 August 2021.

14. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 26 August 2021 by video conference. During the first session, the Claimant disclosed, on a provisional confidential basis, the identity of its third-party funder.

15. Following the first session, on 1 September 2021, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C., United States of America. Annex B to Procedural Order No. 1 also sets out the agreed procedural calendar, including in the event that the Respondent requested bifurcation of the proceeding.

16. Also in Procedural Order No. 1, the Tribunal, *inter alia*: (i) granted leave to the Claimant to apply for a confidentiality order regarding the identity of its third-party funder, and (ii) granted leave to the Respondent to make an application seeking disclosure of the Claimant's third-party funding agreement (the "**TPF Agreement**"), upon receipt of which the Tribunal would issue further instructions in this regard.

17. On 19 November 2021, the Claimant informed the Tribunal that the Parties had agreed to extend the time limit for the filing of the Claimant's Memorial by two days, with a corresponding extension of time for the filing of the Respondent's Counter-Memorial. The Tribunal approved the extension on 23 November 2021. On 24 November 2021, the Tribunal issued Procedural Order No. 2 setting forth the amended procedural calendar.

18. In accordance with the amended procedural calendar, on 26 November 2021, the Claimant filed its Memorial on the Merits (the "**Claimant's Memorial**"), together with: the Witness Statement of Mr. John Aronson dated 9 November 2021; the Witness Statement of Ms. Narangerel Nyamdorj dated 6 November 2021; the Witness Statement of Mr. Patrick Miller dated 24 November 2021; the Witness Statement of Mr. Wallace Mays dated

12 November 2021; the Expert Legal Opinion of Ms. Byambasuren Narantuya dated 10 November 2021; the Expert Report of Mr. Stanley Bartlett of Micon International dated 22 November 2021; the Expert Report of Mr. Neal Mizrahi and Mr. James Taylor of FTI Consulting dated 26 November 2021; Exhibits C-0001 through C-0294; and Legal Authorities CL-0001 through CL-0055.

19. On 7 February 2022, the Respondent filed its Memorial on Jurisdiction (the "**Respondent's Memorial**"), which included a request for the Tribunal to bifurcate the proceeding and address the objections to jurisdiction as a preliminary question (the "**Request for Bifurcation**"), together with the Expert Legal Opinion of Prof. Dr. Franco Lorandi dated 3 February 2022, with Exhibits FL-0001 through FL-0080; Exhibits R-0001 through R-0057; and Legal Authorities RL-0001 through RL-0088.

20. By letter of 17 February 2022, the Claimant informed the Tribunal of the Parties' agreement to extend the deadline of the filing of the Claimant's submission on bifurcation by one day, with a corresponding extension for the Respondent's subsequent filing.

21. On 22 February 2022, the Claimant filed its Observations on the Request for Bifurcation, together with Legal Authorities CL-0056 through CL-0082.

22. On 2 March 2022, the Tribunal issued Procedural Order No. 3 wherein it denied the Respondent's Request for Bifurcation.

23. Upon invitation from the Tribunal, by emails of 16 and 17 March 2022, the Parties jointly proposed an amended procedural calendar which the Tribunal subsequently confirmed by its Procedural Order No. 4 of 22 March 2022.

24. Pursuant to the amended procedural calendar, on 6 June 2022, the Respondent filed its Counter-Memorial on the Merits (the "**Respondent's Counter-Memorial**"), together with: the Witness Statement of Mr. Toison Baatar dated 27 May 2022; the Witness Statement of Ms. Dorj Bolormaa dated 26 May 26, 2022; the Witness Statement of Ms. Sugar Erdenetsetseg dated 1 June 2022; the Witness Statement of Mr. Shar Myagmar dated 30 May 2022; the Expert Legal Opinion of Prof. Dondov Ganzorig dated 31 May 2022; the Expert Report of Dr. Phil Newall of Wardell Armstrong International dated

1 June 2022, with Exhibits WAI-0001 through WAI-0038; the Expert Report of Mr. Ian Clemmence of PricewaterhouseCoopers dated 6 June 2022, with Exhibits PwC-0001 and PwC-0002; Exhibits R-0058 through R-0131; and Legal Authorities RL-0089 through RL-0265.

25. From June to September 2022, the Parties exchanged requests, objections and replies on document production. During the document production phase, the Claimant filed Legal Authorities CL-0083 through CL-0096 and the Respondent filed Exhibits R-0132 through R-0139 and Legal Authorities RL-0266 through RL-0278.

26. In the context of document production, the Respondent requested disclosure of the Claimant's TPF Agreement. On 3 September 2021, further to Procedural Order No. 1 (*see above* paragraph 16), the Claimant had confirmed the identity of its third-party funder, and further informed the Tribunal that it had elected not to make an application for an order requiring the identity of the third-party funder to be kept confidential, but reserved all rights with respect to "the confidentiality and disclosure of the funding agreement or any other confidential documents in its possession." .

27. On 20 September 2022, the Tribunal issued Procedural Order No. 5 concerning document production. In Procedural Order No. 5, the Tribunal, *inter alia*, denied the Respondent's request for disclosure of the Claimant's TPF Agreement; however, the Tribunal requested that the Claimant confirm, on or before 4 October 2022, that: (i) there is no agreement, commitment, undertaking, or similar provision pursuant to which the funding of these proceedings is provided, directly or indirectly, by a party other than the Claimant's third-party funder, and/or (ii) a party other than the Claimant and/or its third-party funder would be the beneficiary of any payments that were to be ordered in the award in this arbitration.

28. On 5 October 2022, the Tribunal reminded the Claimant of its confirmation to be made with respect to its third-party funder pursuant to Procedural Order No. 5. By email of later that date, the Claimant transmitted to the Tribunal its letter of 4 October 2022 copied directly to the Respondent wherein the Claimant, *inter alia*, made the confirmation as directed in Procedural Order No. 5.

29. On 2 November 2022, the Respondent filed an application for the Tribunal to order security for costs pursuant to Article 47 of the ICSID Convention (the "**Security for Costs Application**"), together with Exhibits R-0140 and R-0141 and Legal Authorities RL-0279 through RL-0287.

30. Pursuant to the briefing schedule set forth by the Tribunal on 3 November 2022 and subsequently amended on 7 November 2023 following exchanges with the Parties, the Parties made the following submissions with regard to the Security for Costs Application:

- On 21 November 2022, the Claimant filed its Response on Security for Costs, together with Exhibits C-0295 through C-0315 and Legal Authorities CL-0097 through CL-0109;

- On 28 November 2022, the Respondent filed its Reply on Security for Costs, together with Exhibits R-0142 through R-0168 and Legal Authorities RL-0288 through RL-0295; and

- On 5 December 2022, the Claimant filed its Rejoinder on Security for Costs, together with Exhibits C-0316 and C-0317 and Legal Authorities CL-0110 and CL-0111.

31. By email of 9 December 2022, the Claimant informed the Tribunal of the Parties' agreement to amend the procedural calendar; the Tribunal confirmed the agreement on 9 December 2022.

32. Pursuant to the amended procedural calendar, on 19 December 2022, the Claimant filed its Reply on the Merits and Counter-Memorial on Jurisdiction (the "**Claimant's Reply**"), together with: the Witness Statement of Mr. Jamsrandorj Galsan dated 13 December 2022; the Second Witness Statement of Mr. John Aronson dated 6 December 2022; the Second Witness Statement of Ms. Narangerel Nyamdorj dated 10 December 2022; the Second Witness Statement of Mr. Patrick Miller dated 9 December 2022; the Second Witness Statement of Mr. Wallace Mays dated 5 December 2022; the Expert Report of Dr. Michael Meyer dated 6 December 2022; the Second Expert Report of Mr. Stanley Bartlett of Micon International dated 13 December 2022; the Second Expert Report of Mr. Neal Mizrahi and Mr. James Taylor of FTI Consulting dated 16 December 2022; the Second Expert Legal

Opinion of Ms. Byambasuren Narantuya dated 1 December 2022; Exhibits C-0022.1 and C-0318 through C-0511; and Legal Authorities CL-0112 through CL-0122.

33. On 4 January 2023, the Tribunal issued Procedural Order No. 6 dismissing the Respondent's Security for Costs Application.

34. On 10 March 2023, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction (the "**Respondent's Rejoinder**"), together with: the Second Witness Statement of Mr. Shar Myagmar dated 28 February 2023; the Second Witness Statement of Ms. Dorj Bolormaa dated 1 March 2023; the Second Witness Statement of Ms. Sugar Erdenetsetseg dated 28 February 2023; the Expert Legal Opinion of Dr. Gabriel Bottini dated 8 March 2023, with Exhibits GB-0001 through GB-0055; the Second Expert Legal Opinion of Prof. Franco Lorandi dated 27 February 2023, with Exhibits FL-0081 through FL-0083; the Second Expert Legal Opinion of Prof. Dondov Ganzorig dated 2 March 2023; the Second Expert Report of Mr. Phil Newall and Ms. Alexandra Ommer of Wardell Armstrong International dated 10 March 2023, with Exhibits WAI-0040 through WAI-0050; the Second Expert Report of Mr. Ian Clemmence of PricewaterhouseCoopers dated 10 March 2023, with Exhibits PwC-0003 and PwC-0004; Exhibits R-0131a and R-0169 through R-0277; and Legal Authorities RL-0229a and RL-0296 through RL-0446.

35. On 6 April 2023, the Claimant filed its Rejoinder on Jurisdiction (the "**Claimant's Rejoinder**"), together with Legal Authorities CL-0123 through CL-0128.

36. On 20 April 2023, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference.

37. By separate emails of 8 May 2023, each Party transmitted to the Tribunal its own chronology, list of issues and *dramatis personae*, as the Parties were not able to agree on a joint set of documents. Later that same date, the Tribunal requested that the Parties liaise to provide a joint set of the aforementioned documents, listing in each those points on which the Parties agreed or disagreed, by 20 May 2023.

38. On 9 May 2023, the Tribunal issued Procedural Order No. 7 concerning the organization of the upcoming hearing.

39. By the Claimant's communication of 19 May 2023 and the Respondent's communication of 20 May 2023, the Parties again informed the Tribunal that they were unable to agree on a joint chronology, list of issues and *dramatis personae*. The Respondent further commented on the issue by email of 21 May 2023. On 22 May 2023, the Tribunal noted that the "submissions received do not correspond to a joint effort" and informed the Parties that it would not rely on them and would not incorporate them into the record. The Tribunal furthermore stated that it would take this result into account in determining and allocating the costs of the arbitration.

40. By letter of 22 May 2023, the Claimant requested leave pursuant to Section 16.3 of Procedural Order No. 1 to submit into the record: (i) several documents which it alleged did not exist at the time of its Reply; and (ii) certain additional and/or updated translations of documents previously filed. Upon invitation from the Tribunal, the Respondent commented by letter of 24 May 2023, wherein it argued that, save for one document, the Claimant's request should be denied.

41. On 26 May 2023, the Tribunal denied the Claimant's 22 May request to file additional documents, with the exception of the one document agreed to by the Respondent; the Claimant subsequently filed the document as Exhibit C-0512.

42. A hearing on jurisdiction and the merits was held at the World Bank C Building in Washington, D.C., United States of America, from 30 May to 8 June 2023 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Prof. Eduardo Zuleta Jaramillo	President of the Tribunal
Mr. Stephen L. Drymer	Arbitrator
Prof. Albert Jan van den Berg	Arbitrator

ICSID Secretariat:

Ms. Jara Mínguez Almeida	Secretary of the Tribunal

Assistant to the President:

Ms. María Marulanda Mürrle	Assistant to the President of the Tribunal

For the Claimant:
Counsel

Mr. Robert Wisner	McMillan LLP
Mr. Thomas Hatfield	McMillan LLP
Ms. Jeneya Clark	McMillan LLP
Party Representatives	
Mr. Wallace Mays	
Mr. Patrick Miller	
Witnesses	
Mr. Wallace Mays	
Mr. Patrick Miller	
Mr. John Aronson	
Ms. Narangerel Nyamdorj	
Mr. Jamsrandorj Galsan	
Experts	
Mr. Stanley Bartlett	Micon International
Mr. Neal Mizrahi	FTI Consulting
Mr. James Taylor	FTI Consulting
Ms. Natalie Quinn*	FTI Consulting
Dr. Michael Meyer	
Ms. Byambasuren Narantuya	

For the Respondent:	
Counsel	
Dr. Patricia Nacimiento	Herbert Smith Freehills LLP
Dr. Bajar Scharaw	Herbert Smith Freehills LLP
Mr. Jacky Lui	Herbert Smith Freehills LLP
Dr. Adilbek Tussupov	Herbert Smith Freehills LLP
Mr. Andrés Eduardo Alvarado-Garzón	Herbert Smith Freehills LLP
Mr. Elmar Keusgen	Herbert Smith Freehills LLP
Party Representatives	
Ms. Solongoo Bayarsaikhan	
Ms. Munkhtuya Nyamsuren	
Mr. Dorj Batmagnai*	
Mr. Namsrai Munkhbileg*	
Mr. Zoljargal Bazargur	
Witnesses	
Ms. Sugar Erdenetsetseg*	
Mr. Shar Myagmar	
Ms. Dorj Bolormaa*	
Mr. Toison Baatar*	
Experts	
Prof. Ganzorig Dondov	
Dr. Phil Newall	Wardell Armstrong International
Ms. Alexandra Ommer	Wardell Armstrong International
Mr. Ian Clemmence	PricewaterhouseCoopers
Ms. Saleema Damji	PricewaterhouseCoopers

Court Reporter:

Ms. Marjorie Peters	B&B Reporters

Interpreters:

Ms. Batbayar Yanjiv	English-Mongolian Interpreter
Ms. Erdene-Ochir Erdenechimeg	English-Mongolian Interpreter
Mr. Munich Lamjav	English-Mongolian Interpreter

(*) denotes remote participant

43. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Witnesses

Mr. Wallace Mays
Mr. Patrick Miller
Mr. John Aronson
Mr. Jamsrandorj Galsan
Ms. Narangerel Nyamdorj

Experts

Ms. Byambasuren Narantuya	
Mr. Stanley Bartlett	Micon International
Dr. Michael Meyer	
Mr. Neal Mizrahi	FTI Consulting
Mr. James Taylor	FTI Consulting

On behalf of the Respondent:

Witnesses

Mr. Shar Myagmar
Ms. Sugar Erdenetsetseg
Ms. Dorj Bolormaa
Mr. Toison Baatar

Experts

Prof. Ganzorig Dondov	
Dr. Phil Newall	Wardell Armstrong International
Ms. Alexandra Ommer	Wardell Armstrong International
Mr. Ian Clemmence	PricewaterhouseCoopers

44. During the Hearing, the Respondent was granted leave to file Exhibit R-0278.

45. The Parties filed their Post-Hearing Briefs on 25 August 2023.

46. The Parties filed their Submissions on Costs on 21 September 2023.

47. On 28 September 2023, the Respondent submitted comments regarding the Claimant's Submission on Costs. Since this submission was not scheduled, the Tribunal granted the Claimant an opportunity to respond. The Claimant submitted its reply on the same date.

48. On 3 October 2023, after obtaining authorization from the Tribunal, the Respondent submitted a response to the Claimant's reply. Following the Tribunal's invitation, the Claimant submitted comments on the response on 5 October 2023.

49. The proceeding was closed on 28 June 2024.

II. FACTUAL BACKGROUND

50. The Tribunal will summarize the most relevant facts for the present decision. The lack of reference to a specific fact does not mean that the Tribunal has not reviewed and considered it.

51. In March 2008, WMM's Swiss subsidiary, WM Mining A.G. ("**WMM AG**"), acquired all outstanding shares (the "**Shares**") of Mongolian company Ikh Tokhoirol LLC ("**Ikh Tokhoirol**"),[1] which in turn owned mining licenses Nos. 7712A and 7713A (the "**Licenses**") and No. 4121A.[2] The Claimant claims that its investment in Mongolia consists of the Shares and the Licenses.[3]

52. As of March 2008, the corporate structure of the relevant companies of the Claimant's group of companies was as follows:[4]

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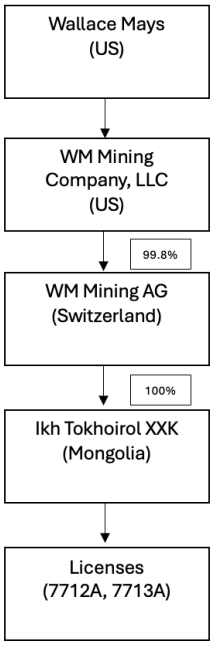
[1] **Exhibit C-0031**, Share Purchase Agreement for Ikh Tokhoirol between WMM AG and Berleg Mining LLC, including share transfer certificate, amended Charter of Ikh Tokhoirol, 1 March 2008; **Exhibit R-0007**, Mongolian Companies Register, p. 3.

[2] **Exhibit C-0006**, Mining Licenses 7712A, 7713A, and 4121A, Appendix; **Exhibit C-0027**, Share Purchase and Escrow Agreement for the shares of Ikh Tokhoirol, between Khan Resources Inc., Khan Resources Bermuda Ltd., Berleg Mining XXK and Lynch & Mahoney XXK, 22 August 2007.

[3] Claimant's Memorial, ¶ 3.

[4] *See*, **Exhibit C-0003**, WMM Articles of Organization, Colorado, USA; **Exhibit C-0018**, WMM – Delaware Conversion and Entity Details from Department of State: Division of Corporations of Delaware; **Exhibit C-0004**, WMM AG Swiss Share Registration, 15 November 1995 and Executed Share Transfer; **Exhibit C-0031**, Share Purchase Agreement for Ikh Tokhoirol between WMM AG and Berleg Mining LLC, including share transfer certificate, amended Charter of Ikh Tokhoirol, 1 March 2008; **Exhibit R-0007**, Mongolian Companies Register, p. 3; **Exhibit C-0006**, Mining Licenses 7712A, 7713A, and 4121A, Appendix; **Exhibit C-0027**, Share Purchase and Escrow Agreement for the shares of Ikh Tokhoirol, between Khan Resources Inc., Khan Resources Bermuda Ltd., Berleg Mining XXK and Lynch & Mahoney XXK, 22 August 2007.



53. In July 2009, Mongolia enacted the Law on Prohibition of Mineral Exploration and Mining Operations at Headwaters of Rivers, Protected Zones of Water Reservoirs and Forested Areas (the "**River Law**"), which prohibited mining within 200 meters of rivers.[5]

54. In April 2010, Ikh Tokhoirol and the Overseas Private Investment Corporation ("**OPIC**") entered into a USD 10 million finance agreement in connection with the Project ("**Loan Agreement**").[6] In May 2010, Ikh Tokhoirol and OPIC executed a pledge agreement establishing the Licenses as collateral ("**License Pledge Agreement**"),[7] and Ikh Tokhoirol granted a power of attorney to OPIC in connection with the said agreement.[8]

[5] *See*, **Exhibit C-0009**, Mongolian Law on Prohibition of Mineral Exploration and Mining Operations at Headwaters of Rivers, Protected Zones of Water Reservoirs and Forested Areas of 16 July 2009; **Exhibit C-0048**; The Implementing Law, enacted on 16 July 2009, and amended on 18 February 2015; and **Exhibit C-0047**, Parliament of Mongolia Resolution No. 55 of 16 July 2009.

[6] **Exhibit C-0051**, Finance Agreement between Ikh Tokhoirol and Overseas Private Investment Corporation, 20 April 2010.

[7] **Exhibit C-0187**, Equipment Pledge Agreements between Ikh Tokhoirol and Overseas Private Investment Corporation, 14 May 2010.

[8] **Exhibit C-0187**, Equipment Pledge Agreements between Ikh Tokhoirol and Overseas Private Investment Corporation, 14 May 2010, p. 21.

55. Additionally, in November 2010, WMM AG and OPIC entered into a share pledge agreement in connection with the Loan Agreement establishing the Shares as security interest ("**Share Pledge Agreement**"),[9] and WMM AG granted a power of attorney to OPIC in connection with the said agreement (together with the power of attorney granted in connection with the Licenses, the "**2010 POAs**").[10]

56. In June 2011, Mongolia issued Government Resolution No. 174 identifying the portions of the Licenses that overlapped the zone that was protected under the River Law.[11]

57. Subsequently, in May 2012, the Mineral Resource Authority of Mongolia ("**MRAM**") issued Cadaster Decision No. 333 formally invalidating the overlapping portions of the Licenses.[12]

58. On 19 and 22 February 2013, respectively, MRAM issued Cadaster Decisions Nos. 70 and 76 modifying the boundaries of the Licenses.[13] The Claimant claims that these decisions formally replaced the Licenses for "new mining licenses, with the boundaries substantially reduced as compared with the original Licenses."[14]

59. On 28 February 2013, OPIC sent Ikh Tokhoirol a notice of default and acceleration under the OPIC Loan Agreement.[15]

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[9] **Exhibit C-0188**, Share Pledge Agreement between WMM AG and Overseas Private Investment Corporation, 12 November 2010.

[10] **Exhibit C-0188**, Share Pledge Agreement between WMM AG and Overseas Private Investment Corporation, 12 November 2010, p. 15.

[11] **Exhibit C-0013**, Government of Mongolia Resolution No. 174, and its annexes, of 8 June 2011; **Exhibit C-0134**, Public Notice made by the Mineral Resource Authority of Mongolia regarding Resolution 174 and licenses required to submit request for compensation of 8 June 2011.

[12] **Exhibit C-0323**, Mineral Resources Authority of Mongolia Cadaster Decision 333 of 15 May 2012; **Exhibit C-0074**, Cadaster Decision No. 333 and Mineral Resource Authority of Mongolia Notice of Cadaster Decision No. 333 sent to Ikh Tokhoirol LLC of 17 May 2012.

[13] **Exhibit C-0014**, License 7713A with Notice of change No. 6-772, and Cadaster Decision No. 71, 19 February 2013, p. 2; **Exhibit C-0015**, License 7712A (including new License MV-017263) with Notice of change No. 6-850, 22 February 2013, p. 5.

[14] Claimant's Memorial, ¶¶ 162-166.

[15] **Exhibit C-0139**, Letter from OPIC to Ikh Tokhoirol LLC, 28 February 2013.

60. On 29 March 2013, WMM and Ikh Tokhoirol sent a letter to Mongolia requesting compensation under the River Law and the Treaty (the "**2013 Notice**").[16] The Claimant refers to this letter as the "Initial Notice Letter."[17] The 2013 Notice indicated it was "a formal notice in which WMM seeks compensation pursuant to the [Treaty]" for the actions taken by the MRAM to modify the coordinates of the Licenses and redraw their boundaries, without paying prompt and just compensation.[18] The Claimant pursued the matter further in letters of May, August, and October of 2013, and February and September of 2014.[19]

61. In response to the 2013 Notice, Mongolia set up a working group to address the Claimant's and Ikh Tokhoirol's request for compensation (the "**Working Group**").[20] The Working Group met during 2013 and 2014.

62. On 28 August 2014, the Swiss Official Gazette of Commerce published that WMM AG had lost its Swiss domicile as a result of the resignation of its Swiss-based director, Mr. Hans Vogt ("**Mr. Vogt**").[21]

63. On 8 December 2014, the Swiss District Court of Olten-Gösgen ordered the liquidation of WMM AG (the "**Liquidation Order**") and assigned a liquidator (the "**Liquidator**").[22] The decision was notified on 9 January 2015.[23] The corporate structure of the relevant

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[16] **Exhibit C-0016**, Letter from Fognani & Faught, PLLC to Minister of Environment and Green Development, 29 March 2013.

[17] Claimant's Memorial, ¶ 172.

[18] **Exhibit C-0016**, Letter from Fognani & Faught, PLLC to Minister of Environment and Green Development, 29 March 2013, p. 2.

[19] **Exhibit C-0085**, Letter to Minister of Minerals and Minister of Environment and Green Development following up on the notice and Request for Compensation letter submitted on March 29, 2013, 29 May 2013; **Exhibit C-0088**, Letter from John Fognani to Mining Minister of Mongolia regarding claim for compensation and return of licenses, 14 August 2013; **Exhibit C-0091**, Letter sent by John Fognani on behalf of WMM LLC and Ikh Tokhoirol LLC to C. Otgochuluu regarding offers for compensation, 3 October 2013; **Exhibit C-0095**, Letter sent by Wallace Mays to Kh. Gantsogt, Secretariat of Ministry of Finance, 14 February 2014; and **Exhibit C-0097**, Letter sent by Wallace Mays to Kh. Gantsogt, Secretariat of Ministry of Finance, 16 September 2014.

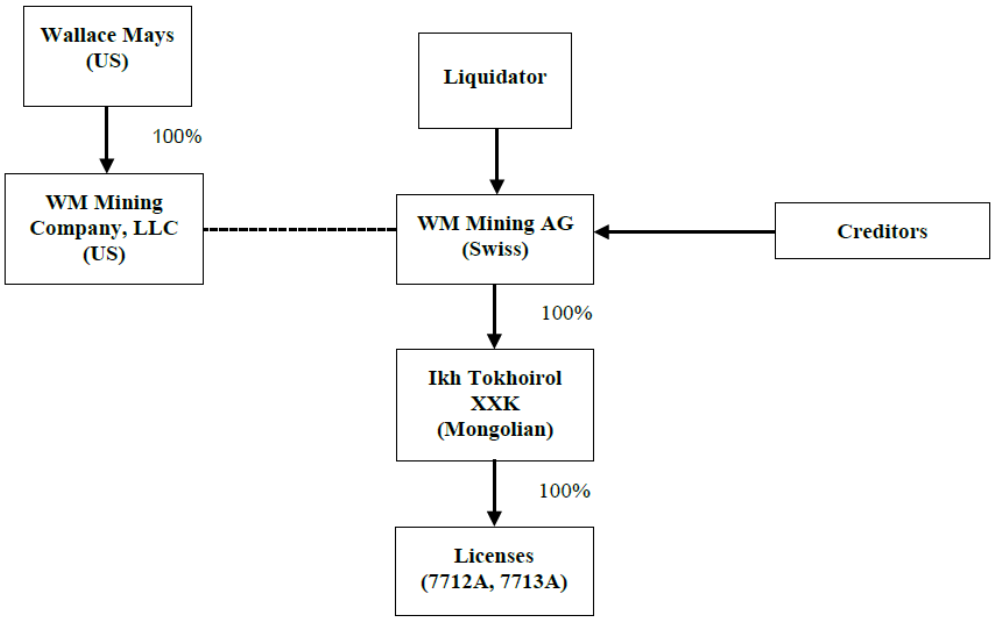
[20] **Exhibit C-0084**, Email correspondence regarding the creation of the Ministry of Mining Working Group, 17 April 2013.

[21] **Exhibit R-0009**, Swiss Official Gazette of Commerce, Daily Register No. 3627 (CH24930017486 / 01693407), 28 August 2014.

[22] **Exhibit R-0012**, Judgment of the District Court of Olten-Gösgen, 8 December 2014. *See also*, **Exhibit R-0018**, Official Gazette of the Canton of Solothurn, 12 December 2014.

[23] **Exhibit R-0011**, Swiss Official Gazette of Commerce, Preliminary Bankruptcy Notification of WMM AG (in Liquidation) (01911097), 9 January 2015.

companies of the Claimant's group of companies following the Liquidation Order was as follows:[24]



64. On 6 April 2015, Mongolia issued Government Resolution No. 130 restoring the boundaries of the 2013 Licenses to their original boundaries.[25] In May 2015, Ikh Tokhoirol received the Licenses with the boundaries restored.[26]

65. On 9 June 2015, Ikh Tokhoirol and WMM AG granted new powers of attorney to OPIC in connection with the License Pledge Agreement and the Share Pledge Agreement, respectively.[27]

66. On 7 July 2015, WMM and WMM AG entered into a share transfer agreement pursuant to which WMM AG transferred the Shares of Ikh Tokhoirol to the Claimant (the "**Share**

[24] Respondent's Memorial, ¶ 78.

[25] **Exhibit C-0017**, Government of Mongolia Decision No.130, 6 April 2015.

[26] **Exhibit C-0101**, Mining License 7712A, 11 May 2015; **Exhibit C-0102**, Mining License 7713A, 12 May 2015.

[27] **Exhibit R-0024**, Power of Attorney of Ikh Tokhoirol to OPIC, 9 June 2015; **Exhibit R-0023**, Power of Attorney of WMM AG to OPIC, 9 June 2015.

Transfer Agreement").[28] The transfer of the Shares was recorded in the Mongolian Companies Register as of 21 August 2015.[29]

67. In January 2016, OPIC assigned "all of its right, title, interest and obligations" under the OPIC Loan Agreement to the Mongolian company Financial and Development of Mining NBFI ("**FDM**") for USD 8 million.[30] The assignment became effective as of 6 June 2016,[31] and, on 7 June 2016, FDM transferred the Licenses to Altan Zaamar LLC ("**Altan Zaamar**").[32]

68. In February 2017, a Mongolian court reversed and invalidated the transfer of the Shares from WMM AG to WMM in proceedings involving FDM.[33]

69. On 22 February 2017, Mr. Mays, the Claimant, WMM AG and Ikh Tokhoirol entered into a settlement agreement with FDM "for the purpose of termination of the reciprocal obligations assumed under the [OPIC Loan Agreement] and its related agreements" (the "**Settlement Agreement**"), pursuant to which Mr. Mays agreed to "transfer the shares in [Ikh Tokhoirol] *in lieu* of the payments of the loan and its interest, along with its rights…."[34] On the same date, WMM AG sold and assigned the Shares to Mr. Chintsogt Dagvasambuu, a Mongolian citizen designated by FDM.[35]

70. On 4 June 2020, WMM AG, represented by the Liquidator, sent a notice of dispute to Mongolia citing Mongolia's purported breaches of the Agreement between the

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[28] **Exhibit R-0013**, Share Transfer Agreement between WMM AG (in Liquidation) and WM Mining LLC, 7 July 2015.

[29] **Exhibit R-0007**, Mongolian Companies Register, p. 3. *See also*, **Exhibit R-0036**, Charter of Ikh Tokhoirol, 23 July 2015.

[30] **Exhibit C-0115**, Loan Assignment and Assumption Agreement between OPIC and Finance and Development of Mining, 14 January 2016.

[31] **Exhibits C-0117**, Letter from OPIC to Ikh Tokhoirol, 6 June 2016; **Exhibit C-0128**, OPIC – Freedom of Information Act Request Documents, pp. 22 and 48.

[32] **Exhibit R-029**, Mineral Resources Authority, Head of Cadastre Department, Decision No. 453, 24 June 2016; **Exhibit R-0030**, Mineral Resources Authority, Head of Cadastre Department, Decision No. 454, 24 June 2016.

[33] **Exhibit C-0123**, Decree of Prosecutor of the Ulaanbaatar City Prosecutor's Office – No. 41, 21 March 2017, p. 7.

[34] **Exhibit C-0122**, Agreement on Terminating the Reciprocal Obligations through Mutual Settlement Agreement between FDM, Ikh Tokhoirol, WMM AG, WMM, and Wallace Mays, 22 February 2017, pp. 1-2.

[35] **Exhibit R-0016**, Share Sale and Purchase Agreement between WMM AG (in Liquidation) and Chintsogt Dagvasambuu, 22 February 2017; **Exhibit R-0017**, Assignment Agreement between WMM AG(in Liquidation) and Chintsogt Dagvasambuu, 22 February 2017.

Government of Mongolia and the Swiss Federal Council on the Promotion and Reciprocal Protection of Investments signed on 29 January 1997 (the "**Switzerland-Mongolia BIT**"), concerning the Licenses.[36]

71. On 12 January 2021, the Claimant sent a letter to Mongolia purportedly "renewing its attempts to reach an amicable settlement of its investment dispute with the Government of Mongolia relating to the mistreatment of WM Mining's investments in the Big Bend Gold Project in Mongolia" (the "**2021 Notice**").[37]

72. On 9 February 2021, the Claimant filed the Request against Mongolia.

III. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

A. THE PARTIES' CLAIMS

73. The Claimant claims that "the measures taken by Mongolia to implement the River Law and its delay in restoring the Licenses had the effect of destroying WMM's investments in the Big Bend Project."[38] Specifically, the Claimant disputes the following measures: (i) Government Resolution 174 of June 2011, "announcing that a substantial but unclearly defined part of the Licenses would be revoked;"[39] (ii) Cadaster Decision 333 of May 2012, "implementing the revocation of the Licenses announced by Government Resolution 174;"[40] and Cadaster Decisions 70 and 76 of February 2013, "formally replacing the Licenses with the 2013 Licenses that very clearly removed a large swathe of the area from the Licenses"[41] (the "**Disputed Measures**").[42]

74. The Claimant accuses the Respondent of (i) directly expropriating the Licenses and indirectly expropriating the Shares, without compensation; (ii) subjecting its investments

[36] **Exhibit R-0043**, Letter of Mayer Brown International LLP on behalf of WMM AG (in Liquidation) to Prime Minister of the Government of Mongolia, Ministry for Foreign Affairs of Mongolia, Ministry for Justice and Internal Affairs of Mongolia and Ministry for Mining and Heavy Industry of Mongolia, 4 June 2020.

[37] **Exhibit C-0126**, Letter to H.E. Mr. Yondon Gelen and H.E. Mr. Khishgee Nyambaatar sent by McMillan LLP on behalf of WMM, 12 January 2021.

[38] Claimant's Memorial, ¶ 124.

[39] Claimant's Reply, ¶ 214(a).

[40] Claimant's Reply, ¶ 214(b).

[41] Claimant's Reply, ¶ 214(c).

[42] Claimant's Memorial, ¶ 218(b).

to unfair and inequitable treatment; and (iii) discriminating against foreign-owned Ikh Tokhoirol.[43] Accordingly, the Claimant seeks damages of USD 42.565 million based on a discounted cash flow ("**DCF**") valuation method plus compound interest thereon,[44] or, in the alternative, USD 23.87 million in sunk costs including pre-award interest to the date of the Claimant's Reply.[45]

75. The Respondent contests the Claimant's allegations on the merits, and challenges the Tribunal's jurisdiction and the admissibility of the Claimant's claims. It asserts that there was no direct expropriation of the Licenses because there was no forcible taking or permanent deprivation of title.[46] Furthermore, there was no indirect expropriation of the Shares as the Claimant was not permanently and completely deprived of their value.[47] Additionally, the River Law constitutes a legitimate exercise of police powers.[48] The Respondent also argues that the Claimant did not demonstrate that Mongolia's conduct fell below the international minimum standard of treatment,[49] or that it breached the standard for discrimination under the BIT.[50] Finally, the Respondent argues that the Claimant is not entitled to compensation because the alleged damages resulted from its own actions and are unsubstantiated in any event.[51]

76. The Respondent's objections to the Tribunal's jurisdiction and the admissibility of the Claimant's claims are based on multiple grounds: lack of jurisdiction over the direct expropriation claim; [52] inadmissibility of shareholder claims for reflective loss; [53] failure to

[43] *See*, Claimant's Memorial, ¶ 2.
[44] Claimant's Reply, ¶¶ 328 and 349(c).
[45] Claimant's Reply, ¶ 341.
[46] Respondent's Counter-Memorial, ¶¶ 593 and 597.
[47] Respondent's Counter-Memorial, ¶ 601.
[48] Respondent's Counter-Memorial, ¶ 616.
[49] Respondent's Counter-Memorial, §D.III.
[50] Respondent's Counter-Memorial, §D. IV.
[51] Respondent's Counter-Memorial, §E.
[52] Respondent's Memorial, ¶¶ 130-155; Respondent's Rejoinder, ¶¶ 664-684.
[53] Respondent's Memorial, ¶¶ 156-219; Respondent's Rejoinder, ¶¶ 685-726.

demonstrate a *prima facie* case of breach of the national treatment standard;[54] abuse of process;[55] and failure to comply with the BIT's waiting period.[56]

B. THE PARTIES' REQUEST FOR RELIEF

77. The Claimant requests the following relief:

> *WMM respectfully requests that the Tribunal render an award:*
>
> *(a) Dismissing Mongolia's preliminary objections on jurisdiction and admissibility;*
>
> *(b) Declaring that Mongolia has breached its obligations under Articles II and III of the Treaty;*
>
> *(c) Ordering Mongolia to pay compensation to WMM in an amount of US$42.565 million plus compound interest thereon; and*
>
> *(d) Granting WMM its costs of this arbitration and costs of legal representation in an amount to be determined in the final award.*[57]

78. The Respondent requests the following relief:

> *For the reasons set out in its submissions, Mongolia hereby requests that the Tribunal render an award in its favor. It respectfully requests that this Tribunal issue an award:*
>
> *(i) Finding and declaring that jurisdiction and/or admissibility is lacking over the claims and dismiss these claims, in accordance with Mongolia's Preliminary Objections.*
>
> *(ii) Dismissing the claim of a breach of Articles II(1), (2)(a), (b) and III(1) of the BIT.*
>
> *(iii) Dismissing the damages claim.*
>
> *(iv) Ordering the Claimant to bear the costs of this arbitration in full and to indemnify Mongolia for its legal fees and costs in this arbitration.*
>
> *(v) Granting any further relief it deems just and appropriate under the circumstances.*[58]

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[54] Respondent's Memorial, ¶¶ 220-228; Respondent's Rejoinder, ¶¶ 727-729.

[55] Respondent's Memorial, ¶¶ 229-307; Respondent's Rejoinder, ¶¶ 730-766.

[56] Respondent's Memorial, ¶¶ 308-332; Respondent's Rejoinder, ¶¶ 767-785.

[57] Claimant's Reply, ¶ 349.

[58] Respondent's Rejoinder, ¶ 1550.

IV. JURISDICTION AND ADMISSIBILITY

A. OVERVIEW OF THE RESPONDENT'S PRELIMINARY OBJECTIONS

79. The Respondent has raised five preliminary objections to the Tribunal's jurisdiction and the admissibility of the Claimant's claims:

(a) The Tribunal lacks jurisdiction *ratione materiae* over the Claimant's claims based on the alleged direct expropriation of the Licenses because they concern assets and rights of a separate Mongolian company, to which the Claimant holds no enforceable rights.[59]

(b) All of the Claimant's claims are inadmissible because the Treaty does not grant the Claimant any right to raise claims for compensation for reflective loss, and because they entail a real and material risk of prejudice to creditors, circumvention of priority ranking in bankruptcy proceedings, double recovery, multiplicity of actions and unfair distribution of any recovery amongst interested parties.[60]

(c) The Tribunal lacks jurisdiction over the Claimant's discrimination claim for breach of the national treatment standard, as the Claimant has failed to present a *prima facie* case of breach of this standard, which requires that there be discrimination based on the Claimant's nationality and against its foreignness.[61]

(d) The Claimant engaged in abuse of process by unduly delaying the commencement of these proceedings; attempting to circumvent Swiss laws and gain an illegitimate advantage through international arbitration; causing harm to Mongolia and third parties, and acting in bad faith in pursing this arbitration.[62] This, says the Respondent, should lead the Tribunal either to decline jurisdiction over the Claimant's claims or to declare them inadmissible.[63]

(e) The Tribunal lacks jurisdiction due to the Claimant's failure to comply with the waiting period in Article VI(3)(a) of the BIT.[64]

[59] Respondent's Memorial, ¶¶ 130-155; Respondent's Rejoinder, ¶¶ 664-684.
[60] Respondent's Memorial, ¶¶ 156-219; Respondent's Rejoinder, ¶¶ 685-726.
[61] Respondent's Memorial, ¶¶ 220-228; Respondent's Rejoinder, ¶¶ 727-729.
[62] Respondent's Memorial, ¶¶ 229-307; Respondent's Rejoinder, ¶¶ 730-766.
[63] Respondent's Memorial, ¶¶ 232 and 307.
[64] Respondent's Memorial, ¶¶ 308-332; Respondent's Rejoinder, ¶¶ 767-785.

B. THE SEQUENCE FOR DECIDING THE PRELIMINARY OBJECTIONS

80. The Tribunal observes that of the five preliminary objections raised by the Respondent, three are of a general nature, seeking to bar consideration of all claims —the objections regarding shareholder claims for "reflective loss", abuse of process, and failure to comply with the waiting period— while the remaining two are specific in scope, targeting only particular claims (the direct expropriation and the discrimination claims). For reasons of procedural economy, the Tribunal finds it appropriate to begin its analysis with a general objection.

81. The Tribunal further notes that there is an overlap in the factual bases of the "reflective loss" objection and the abuse of process objection with respect to WMM AG's bankruptcy proceedings. Similarly, the objection regarding the delay in commencing this arbitration and the objection concerning the failure to comply with the Treaty's waiting period are interconnected. The Claimant argues that the 2013 Notice initiated the dispute, making the waiting period irrelevant.[65] Conversely, the Respondent contends that the Claimant cannot rely on the 2013 Notice to bypass the waiting period, particularly after several years have lapsed and circumstances have changed, without the Claimant affirming the ongoing existence of its claims against Mongolia.[66]

82. Considering the overarching nature of the abuse of process objection and its potential to bar consideration of all claims, as well as the interconnection between the abuse of process objection and the alleged failure to comply with the waiting period, the Tribunal will establish whether it has *prima facie* jurisdiction and then address the abuse of process objection.

83. Finally, the Tribunal observes that the Respondent does not contest the Tribunal's jurisdiction *ratione personae* and *ratione temporis*, and that its objections to the Tribunal's jurisdiction *ratione materiae* only concern the direct expropriation claim. The Respondent itself accepts that the Claimant may assert claims in relation to its shareholding in Ikh

[65] Claimant's Rejoinder, ¶¶ 47-48.

[66] Respondent's Memorial, ¶¶ 308-332; Respondent's Rejoinder, ¶¶ 767-785.

Tokhoirol,[67] thus conceding that the Tribunal has jurisdiction *ratione materiae* over at least some of the Claimant's claims.

84. Considering the above, the Tribunal will proceed to verify in the first place whether the jurisdictional requirements under the Treaty and the ICSID Convention are *prima facie* met, and then proceed to address the abuse of process objection.

C. *PRIMA FACIE* JURISDICTION

(1) The Tribunal's Jurisdiction under the Treaty

85. There is no dispute that the Claimant's claims meet the requirements for jurisdiction *ratione temporis*. The Treaty entered into force in January 1997,[68] the Claimant acquired its purported investments in Mongolia in March 2008,[69] and the Disputed Measures began in 2011.[70]

86. The Claimant also meets the requirements for jurisdiction *ratione personae*. The Treaty grants the Tribunal jurisdiction over disputes between "a Party and a national or company of the other Party arising out of or relating to…an alleged breach of any right conferred or created by this Treaty with respect to an investment."[71] The Claimant is a limited liability company established under the state laws of the United States of America,[72] and thus qualifies as a "company of the other Party" under Article VI (1) of the Treaty.[73]

87. Finally, the Tribunal has jurisdiction *ratione materiae* to the extent that the Claimant's claims relate to assets that qualify as "investments" under the Treaty.

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[67] Respondent's Rejoinder, ¶ 665.

[68] **Exhibit CL-0001**, *Mongolia Bilateral Investment Treaty – The Treaty Between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment.*

[69] Award, ¶ 51 *supra*.

[70] Award, ¶ 73 *supra*.

[71] **Exhibit C-0002**, BIT, Article VI (1).

[72] WMM was established as a single member limited liability company under the laws of the State of Colorado on July 24, 1995 (**Exhibit C-0003**), and became a Delaware limited liability company on October 26, 2020 (**Exhibit C-0018**).

[73] Article I (1) (b) of the Treaty (**Exhibit C-0002**) defines "'company' of a Party" as "any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled."

88. Article I(1)(a) defines "investment" as follows:

> *"investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:*
>
> *(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;*
>
> *(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;*
>
> *(iii) a claim to money or a claim to performance having economic value, and associated with an investment;*
>
> *(iv) intellectual property which includes, inter alia, rights relating to…*
>
> *(v) any right conferred by law or contract, and any licenses and permits pursuant to law*[74]

89. It is undisputed that (i) since January 2006, the Claimant has held 99.8% of the shares of WMM AG;[75] (ii) in March 2008, WMM AG acquired 100% of the shares in Mongolian company Ikh Tokhoirol (i.e., the Shares) and remained a shareholder of Ikh Tokhoirol when Mongolia adopted the Disputed Measures;[76] and (iii) Ikh Tokhoirol owned the Licenses.[77]

90. The definition of "investment" under the Treaty encompasses assets indirectly owned or controlled by companies of the other Party.[78] It explicitly includes companies legally constituted under the laws and regulations of a Party,[79] as well as licenses granted in accordance with the law.[80]

91. The Respondent argues that the Claimant cannot assert any direct claims over the Licenses, as they are assets of Ikh Tokhoirol and the Claimant has no legal rights over them.[81]

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[74] **Exhibit C-0002**, BIT, Article I (1)(a).
[75] Claimant's Memorial, ¶ 218(a).
[76] Claimant's Memorial, ¶ 218(b).
[77] **Exhibit C-0006**, Mining Licenses 7712A, 7713A, and 4121A.
[78] **Exhibit C-0002**, BIT, Article I(1)(a).
[79] **Exhibit C-0002**, BIT, Article I(1)(a)(ii) and Article I(1)(b).
[80] **Exhibit C-0002**, BIT, Article I(1)(a)(v).
[81] Respondent's Counter-Memorial, ¶ 556.

Therefore, according to the Respondent, the Tribunal has no jurisdiction in respect of the direct expropriation of the Licenses.[82] On the Respondent's own case, however, this jurisdictional objection concerns only one category of claims (i.e., the direct expropriation claim), but the Claimant would still have an indirect expropriation claim in relation to its shareholding in Ikh Tokhoirol.[83]

92. Since the Respondent does not dispute that the Tribunal has jurisdiction over the Shares, one of the assets that constitute the investment, and which are subject to the Claimant's claims, the Tribunal does not find it necessary to rule on the Respondent's objection to jurisdiction over the Licenses at this point.

93. Based on the Parties' arguments and the evidence on record, the Tribunal is satisfied that it has *prima facie* jurisdiction under the Treaty and can therefore address the Respondent's preliminary objections in the order it deems most pertinent.

(2) The Tribunal's Jurisdiction under the ICSID Convention

94. Article 25(1) of the ICSID Convention reads as follows:

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*[84]

95. The Respondent has not raised any specific objections to the Tribunal's jurisdiction under the ICSID Convention and the Tribunal is satisfied that the jurisdictional requirements of Article 25(1) of the ICSID Convention are met. It will therefore proceed to analyze the Respondent's preliminary objections, starting with the abuse of process objection.

[82] Respondent's Counter-Memorial, ¶ 556.

[83] Respondent's Rejoinder, ¶¶ 664-665.

[84] **Exhibit CL-0004**, ICSID Convention, Article 25(1).

D. THE ABUSE OF PROCESS OBJECTION

(1) The Parties' Positions

96. Following is a brief summary of the Parties' positions on this preliminary objection. The fact that an argument is not mentioned in this summary does not mean that the Tribunal has not considered it.

a. The Respondent's Position

97. The Respondent argues that "the Claimant's initiation of these proceedings constitutes an abuse of process,"[85] and the Tribunal should therefore dismiss the Claimant's claims for lack of jurisdiction or due to their inadmissibility.[86] According to the Respondent, "[t]his abuse is found in the Claimant's undue delay, obtaining an illegitimate advantage, gaining a benefit contrary to the purpose of international arbitration, causing harm to the Respondent and creditors, and conduct contrary to good faith."[87]

98. The Respondent argues that the doctrine of abuse of process is an implementation of the general doctrine of abuse of rights, which is a general principle of law under Article 38(1) of the ICJ Statute, that has been applied in investment arbitration to dismiss claims when the investor procures an illegitimate advantage with the arbitration.[88] Investment tribunals have also dismissed claims that violate good faith, which is a "constituent principle of international law", when finding that a party arbitrated in bad faith.[89]

99. The Respondent clarifies that its objections in this regard have "nothing to do with the dates of an alleged investment, dispute or breach," "investment illegality," or "nationality and ownership planning."[90] On the contrary, it concerns the Claimant's undue delay in initiating this arbitration, and the operations it undertook to circumvent the bankruptcy proceedings of WMM AG, the direct shareholder of Ikh Tokhoirol.[91]

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[85] Respondent's Rejoinder, ¶ 731.
[86] Respondent's Rejoinder, ¶ 766.
[87] Respondent's Rejoinder, ¶ 766.
[88] Respondent's Rejoinder, ¶¶ 732-734.
[89] Respondent's Rejoinder, ¶¶ 736-737.
[90] Respondent's PHB, ¶ 51.
[91] *See*, Respondent's Rejoinder, ¶¶ 738-740.

100. First, the Respondent argues that the Claimant's excessive delay in bringing this arbitration renders its claims inadmissible. According to the Respondent, international tribunals have held that the delay in the presentation of a claim may amount to abuse of process,[92] and may also be construed as an abandonment of the dispute, or cause its prescription. [93]

101. The Respondent asserts that the Claimant filed for arbitration eight years after the 2013 Notice, specifically after WMM AG had submitted a notice of dispute for substantially similar claims.[94] This significantly prejudices the Respondent, as it exposes it to "the pressure of two claims" and the risk of parallel proceedings or double recovery.[95]

102. The Respondent further argues that the Claimant's reliance on the 2013 Notice is improper, given the numerous procedural and substantive issues that arose after the notice, including WMM AG's bankruptcy proceedings.[96] Moreover, the Respondent asserts that it had reason to believe that any dispute with the Claimant had been resolved or abandoned, particularly since the Claimant attempted to dispose of the Shares in 2015 and 2017.[97]

103. Additionally, the Respondent argues that the delay has impaired its ability to present its case: potential witnesses are now unavailable, documents are missing, and even the Claimant has submitted a quantum case "built on a speculation," with limited contemporaneous documentation to support the alleged costs.[98]

104. Second, the Respondent submits that, "[t]he Claimant's pursuit of these proceedings provides it with an illegitimate advantage in that it enhances its position from being a mere shareholder to an award creditor in the Bankruptcy Proceedings."[99] According to the Respondent, by filing a claim concerning assets of the bankruptcy estate without the

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[92] Respondent's Rejoinder, ¶ 741. The Respondent cites ICJ cases *Certain Phosphate Lands in Nauru*, *Ambatielos* and *Avena.*

[93] Respondent's Rejoinder, ¶ 745. The Respondent refers to *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 ("*Wena Hotels v. Egypt*") (**Exhibit CL-0013**) and *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case No. ARB/05/18 and ARB/07/15 ("*Kardassopoulos v. Georgia*") (**Exhibit RL-0137**).

[94] Respondent's Rejoinder, ¶ 742.

[95] Respondent's Rejoinder, ¶¶ 743-744.

[96] Respondent's Rejoinder, ¶¶ 742-744.

[97] Respondent's Rejoinder, ¶¶ 745-746.

[98] Respondent's Rejoinder, ¶ 746.

[99] Respondent's Rejoinder, ¶ 748.

Liquidator's authorization, the Claimant is violating Swiss bankruptcy laws and harming WMM AG's creditors.[100]

105. Citing to *Lotus v. Turkmenistan*, the Respondent claims that the Claimant has no approval "to collect for the assets of the bankruptcy estate" outside the bankruptcy proceedings.[101] According to the Respondent, payments to the Claimant, as shareholder of WMM AG, can only validly be made once the liquidation process of the company is completed and if any remaining funds are available from the estate, not through the arbitration.[102]

106. Third, the Respondent claims that the Claimant initiated this arbitration to "unduly interfere" with the bankruptcy proceedings of WMM AG and obtain a benefit inconsistent with the purpose of international arbitration.[103] The Respondent refers to *Orascom v. Algeria*, where the tribunal determined that exercising a right for purposes other than those for which the right was established may be considered abusive.[104] The Respondent contends that the Claimant's underlying interest is to use this arbitration as a pressure mechanism to compel Mongolia to pay for the Claimant's "own business failures" while excluding the interests of WMM AG's creditors, thereby causing harm through the proceedings.[105]

107. Lastly, the Respondent maintains that the Claimant's conduct in this arbitration is contrary to good faith, as it "circumvents the priority ranking system of a bankruptcy process, frustrates the operation of bankruptcy laws and avoids the rights of creditors."[106] The Respondent claims that its abuse of process objection must be read against Mr. Mays's and the Claimant's post-bankruptcy conduct, which includes the unauthorized pledging and transfer of the Licenses and Shares, the misinformation provided to the Mongolian authorities regarding the bankruptcy proceedings, and the unauthorized settlement with

[100] Respondent's Rejoinder, ¶¶ 751-755, citing **Exhibit RL-0001**, *Lotus Holding Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/17/30 ("*Lotus v. Turkmenistan*"), Award, 6 April 2020.

[101] Respondent's Rejoinder, ¶¶ 753-754.

[102] Respondent's Rejoinder, ¶ 755.

[103] Respondent's Rejoinder, ¶¶ 756-757.

[104] Respondent's Rejoinder, ¶¶ 756-758, citing **Exhibit RL-0071**, *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35 ("*Orascom v. Algeria*"), Award, 31 May 2017.

[105] Respondent's Rejoinder, ¶¶ 759-763.

[106] Respondent's Rejoinder, ¶ 764.

FDM, resulting in Mr. Mays's receipt of USD 2 million.[107] According to the Respondent, the Claimant has sought to avoid the scrutiny of the Swiss bankruptcy authorities and WMM AG's creditors by ensuring that proceeds of alleged claims over the Shares are not paid to the bankruptcy estate, but to the Claimant and Mr. Mays.[108]

108. In conclusion, the Respondent claims that "[t]he Claimant's conduct and initiation of this arbitration is in bad faith and constitutes an abuse of process" and the Claimant's claims must therefore be dismissed.[109]

b. The Claimant's Position

109. The Claimant contends that there was neither undue delay nor abuse of process in initiating this arbitration.

110. The Claimant asserts that in all the cases cited by Mongolia in support of its undue delay claims, the respective tribunals rejected the respondent's claims.[110] In this case, there was no undue delay either. After the 2013 Notice, the Claimant engaged in negotiations with the Respondent and, following the return of the Licenses in 2015, it focused on mitigating damages.[111] Any delay in initiating this arbitration after the sale of Shares in 2017 was due to the need to seek funding and expert counsel, as well as the COVID pandemic.[112] Additionally, the Claimant reserved its rights and warned Mongolia that it would continue to seek to compensation even if the Licenses were returned.[113] In any event, Mongolia failed to demonstrate that it suffered prejudice due to the alleged delay.[114]

111. The Claimant further contends that the abuse of process or so-called unclean hands doctrines are irrelevant in this arbitration as all of Mongolia's allegations "relate to alleged violations of the laws of a third state (Switzerland) long after the alleged measures that

[107] *See*, Respondent's Memorial, ¶¶ 80-116.
[108] Respondent's Memorial, ¶ 116.
[109] Respondent's Memorial, ¶ 116.
[110] *See*, Claimant's Reply, ¶¶ 207-209.
[111] Claimant's Reply, ¶ 204.
[112] Claimant's Reply, ¶ 205.
[113] Claimant's Reply, ¶ 203.
[114] Claimant's Reply, ¶ 211.

deprived WMM of its indirect investment in the Licenses."[115] According to the Claimant, abuse of process is an admissibility issue only when the investor has engaged in treaty shopping, or when the investor violated the laws of the host State either when making the investment or during its operation.[116] The Claimant adds that the doctrine of unclean hands is not recognized as a general principle of law, as found by the tribunal in *South American Silver v. Bolivia.*[117]

112. In any event, the Claimant argues that there is no evidence of abuse of process or violations of domestic laws in connection with the Swiss bankruptcy proceedings.[118]

113. First, the Claimant contends that the transfer of WMM AG'S Shares in Ikh Tokhoirol to the Claimant in 2015 was not a violation of Swiss law and could not have diminished the value of WMM AG's estate since the Shares already had no value at the time.[119] Also, the share transfer was necessary to "prevent Ikh Tokhoirol from losing its corporate status due to the insolvency of its sole shareholder."[120]

114. Moreover, says the Claimant, Ikh Tokhoirol had an obligation to grant OPIC the powers of attorney over the Licenses restored in 2015, which was also a condition for the payment of the 2016 fees to maintain the Licenses.[121] In any case, neither the transfer of the Shares in 2015 nor the powers of attorney altered the debt priority of WMM AG's bankruptcy proceedings since OPIC and FDM already had priority over Ikh Tokhoirol's assets by virtue of the pledge of the Licenses.[122] Ikh Tokhoirol's remaining creditors, including Mr. Mays, would have priority to receive the proceeds of the sale of Ikh Tokhoirol's assets over WMM AG's creditors.[123]

[115] Claimant's Reply, ¶ 178.
[116] Claimant's Reply, ¶¶ 177-178.
[117] Claimant's Reply, ¶¶ 176-179, citing **Exhibit CL-0011,** *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15 ("*South American Silver v. Bolivia*"), Award, 30 August 2018.
[118] Claimant's Reply, ¶ 180.
[119] Claimant's Reply, ¶ 181.
[120] Claimant's Reply, ¶ 182.
[121] Claimant's Reply, ¶ 182.
[122] Claimant's Reply, ¶¶ 183-184, 186.
[123] Claimant's Reply, ¶ 184.

115. Second, the Claimant argues that "[r]esort to investment treaty arbitration by a shareholder does not offend the rights of creditors at either the local company or intermediate holding company level."[124] The Claimant's filing of a claim under the Treaty is an exercise of its rights to recover losses from investments held by it indirectly, rather than an abusive attempt to gain precedence over Ikh Tokhoirol's creditors. Were this not the case, the Liquidator's threat of a BIT claim could similarly be viewed as an abusive attempt to gain priority over Ikh Tokhoirol's creditors.[125]

116. Third, the Claimant argues that there is no risk of multiple or parallel proceedings against the Respondent. WMM AG's Liquidator did not initiate an arbitration against Mongolia, and there are no other pending cases pertaining to the Big Bend Project.[126] In any event, referring to *Ampal-American v. Egypt*, the Claimant argues that the mere existence of other proceedings against Mongolia would not be a sufficient basis on which to find that the initiation of this arbitration amounts to an abuse of process.[127] Additionally, the Claimant has made efforts to avoid overlapping proceedings by offering WMM AG's creditors to share the proceeds of the arbitration *pro rata.*[128]

117. According to the Claimant, the risk of parallel proceedings would also be mitigated by the doctrines of *res judicata* or collateral estoppel.[129] Furthermore, a tribunal would likely lack jurisdiction over WMM AG's claims because the Mongolia-Switzerland BIT only permits claims from Swiss companies that have their seat and real economic activities in Switzerland, a requirement WMM AG does not meet.[130] The Claimant further contends that *Lotus v. Turkmenistan* differs from the present case in that the Claimant is not asserting contract rights of WMM AG or Ikh Tokhoirol, nor is it invoking umbrella clause claims

[124] Claimant's Reply, ¶ 190.

[125] Claimant's Reply, ¶¶ 188-192.

[126] Claimant's Reply, ¶¶ 193, 197.

[127] Claimant's Reply, ¶¶ 193-194, citing **Exhibit CL-0070**, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11 ("*Ampal-American v. Egypt*"), Decision on Jurisdiction, 1 February 2016, ¶ 329.

[128] Claimant's Reply, ¶ 195.

[129] Claimant's Reply, ¶ 196.

[130] Claimant's Reply, ¶¶ 196, 198.

arising from such contract rights. Instead, the Claimant is asserting the expropriation of property rights held indirectly through the corporate chain.[131]

118. Finally, the Claimant argues that the cases cited by the Respondent to support its objection of abuse of process are irrelevant, as they involve allegations of investments made solely to bring an international claim or alterations to document dates to establish tribunal jurisdiction, neither of which apply here.[132] However, these cases also establish that a high threshold must be met to establish abuse of process in investment claims.[133]

(2) The Tribunal's Analysis

a. Introduction

119. As a preliminary matter, the Tribunal notes the Respondent argues that the abuse of process objection could impact either the Tribunal's jurisdiction or the admissibility of the Claimant's claims.[134] Other ICSID tribunals have found[135] that it is unnecessary to entertain the debate as to whether the Respondent's abuse of process objection goes to jurisdiction or admissibility. Regardless of its categorization, accepting this objection in this case would ultimately prevent the Tribunal from hearing the Claimant's claims. In any event, the Tribunal considers that, in the particular circumstances of this case, the Respondent has not convincingly proven that its allegations of abuse of process affect the jurisdiction of the Tribunal. Rather, the Respondent's allegations seem to go to the admissibility of the claims. Therefore, if the Tribunal concludes, as it does, that there was abuse of process, such conclusion does not deprive the Tribunal of jurisdiction but makes the claims inadmissible.

120. The doctrine of abuse of process derives from the doctrine of abuse of rights and the principle of good faith, a recognized principle of international law applicable in investment

[131] Claimant's Reply, ¶ 201.
[132] Claimant's Rejoinder, ¶¶ 35-42.
[133] Claimant's Rejoinder, ¶¶ 41-42.
[134] *See*, e.g., Respondent's Memorial, ¶ 307; Respondent's Rejoinder, ¶ 766.
[135] **Exhibit RL-0061**, *Renée Rose Levy de Levi and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17 ("*Renée v. Peru*"), Award, 9 January 2015, ¶¶ 181-182; **Exhibit RL-0137,** *Kardassopoulos v. Georgia*, Award, 3 March 2010, ¶ 258; **Exhibit RL-0072**, *Burlington Resources, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, ¶¶ 317-318, and 340.

arbitration.[136] Conduct deemed to violate good faith can be considered abusive and may prevent the tribunal from hearing the case.[137] Whether conduct constitutes an abuse of process depends on the specific circumstances of each case and involves careful consideration of all relevant facts.[138]

121. The Claimant is correct that abuse of process in investment disputes has generally been discussed in situations involving corporate restructurings intended to secure treaty protection for the claimant at a time when a dispute with the host state had already arisen or was foreseeable,[139] which is not the case here. By the time the Respondent adopted the Disputed Measures, the Claimant, a U.S. company, was an indirect shareholder in Ikh Tokhoirol and thus had access to treaty protection under the BIT.

122. However, a finding of abuse of process or abuse of rights is not limited to cases of corporate restructurings. Even though there is no catalogue of situations or acts that qualify as an abuse of rights, investment tribunals have considered that conduct such as corporate restructuring aimed at securing jurisdiction under an investment treaty, the multiplication of arbitral proceedings to maximize chances of success, or the use of a treaty to gain advantages that are inconsistent with the purpose of international arbitration, may be considered abusive.[140]

123. The commencement of treaty arbitration for purposes other than the legitimate protection of an investment is one example of an advantage inconsistent with the purpose of international investment arbitration. As held by the tribunal in *Orascom v. Algeria,* "the doctrine of abuse of rights prohibits the exercise of a right for purposes other than those for which the right was established" and such doctrine is not limited to "situations where an investment was restructured to attract BIT protection at a time when a dispute with the host

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[136] **Exhibit RL-0060**, *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 646.

[137] *See*, e.g., **Exhibit RL-0052**, *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Award, 6 August 2019, ¶ 234.

[138] **Exhibit RL-0061**, *Renée v. Peru*, Award, 9 January 2015, ¶ 186.

[139] **Exhibit RL-0061**, *Renée v. Peru*, Award, 9 January 2015, ¶ 185.

[140] *See*, e.g., **Exhibit RL-0061**, *Renée v. Peru*, Award dated 9 January 2015, ¶¶ 187-195; **Exhibit RL-0071**, *Orascom v. Algeria*, Final Award, 31 May 2017, ¶¶ 542-545; **Exhibit CL-0070**, *Ampal-American v. Egypt*, Decision on Jurisdiction, 1 February 2016, ¶¶ 330-334.

state had arisen or was foreseeable" because as a "'general principle applicable in international law as well as in municipal law', the prohibition of abuse of rights may equally apply in contexts other than the one just mentioned."[141]

124. The issue in this case is not whether the transactions carried out by the Claimant after the return of the Licenses were aimed at obtaining access to treaty protection, which the Claimant always had, but rather whether the exercise by the Claimant of its right to submit its alleged dispute with Mongolia to arbitration had a purpose other than that for which such right was established.

125. The facts of this case are unique and fairly complicated. Approximately one year after the Claimant acquired the Shares in Ikh Tokhoirol through its Swiss subsidiary (WMM AG), Mongolia enacted the River Law.[142] Based on this law, in February 2013, Mongolia altered the boundaries of the Licenses, reducing their area.[143]

126. In March 2013, the Claimant sent a notice to Mongolia requesting compensation under the River Law and the Treaty (i.e., the 2013 Notice).[144] The 2013 Notice emphasized that the primary basis for compensation was "[t]he reduction in gold resources resulting from the altered coordinates and redrawn boundaries [of the Licenses]."[145]

127. Following the 2013 Notice, Mongolia established a Working Group to address the Claimant's request for compensation.[146] This group met during 2013 and 2014, and eventually, the following year, the Respondent reinstated the original boundaries of the Licenses.[147] The Claimant received the Licenses without objection or reservation.[148]

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[141] **Exhibit RL-0071**, *Orascom v. Algeria*, Final Award, 31 May 2017, ¶¶ 540-541.
[142] Award, ¶¶ 51-53 *supra*.
[143] Award, ¶ 58 *supra*.
[144] Award, ¶ 60 *supra*.
[145] **Exhibit C-0016**, Letter from Fognani & Faught, PLLC to Minister of Environment and Green Development, 29 March 2013, p. 15. *See also*, Id. pp. 2, 3, 4, 7, 12, and 14.
[146] Award, ¶ 61 *supra*.
[147] Award, ¶ 64 *supra*.
[148] Award, ¶¶ 180 - 181 *infra.*

128. In August 2014, while the Working Group meetings were still ongoing, WMM AG, the Claimant's Swiss subsidiary and direct shareholder in Ikh Tokhoirol, lost its Swiss domicile and was thus placed into liquidation.[149] A few months later, in December 2014, a Swiss court ordered the liquidation of WMM AG.[150] The Claimant failed to inform the Respondent of this development at the time and for a period of six years until the 2021 Notice. The consequences of such failure are addressed in §IV.D(2)d. *infra*.

129. After Mongolia reinstated the original boundaries of the Licenses in early 2015, the Claimant ceased all communication with Mongolia regarding its compensation claim under the 2013 Notice. Instead, the Claimant engaged in a series of transactions involving the Shares and the Licenses, which were part of WMM AG's estate in liquidation.[151] Specifically, among other actions and without notice to the Liquidator, Mr. Mays, the Claimant's principal and beneficial owner, attempted to transfer WMM AG's Shares in Ikh Tokhoirol to the Claimant.[152] When this transfer was reversed by a Mongolian court, Mr. Mays purported to cause the Claimant and its subsidiary, WMM AG, to enter into an agreement with a third party, who acquired the Shares, and paid USD 2 million to Mr. Mays.[153]

130. In January 2021, after six years without any communication with Mongolia regarding its claim for compensation, the Claimant reappeared with a new notice of dispute, purporting to revive the negotiations regarding its investment in the Big Bend Project.[154] This notice came a few months after the Liquidator had filed a notice of dispute under the Switzerland-Mongolia BIT on behalf of WMM AG and the waiting period under that other treaty had just expired.[155]

[149] Award, ¶ 62 *supra*.
[150] Award, ¶ 63 *supra*.
[151] Award, ¶¶ 66-68 *supra.*
[152] Award, ¶ 66 *supra.*
[153] Award, ¶ 69 *supra.*
[154] Award, ¶ 71 *supra*.
[155] Award, ¶ 72 *supra*.

131. Against this backdrop, the Tribunal must determine whether the series of actions on the part of the Claimant —including not having informed Mongolia about the liquidation of WMM AG, not having made any reservation of rights after the return of the Licenses, not having communicated with the Respondent for more than six years after the Licenses were returned to their original boundaries, the multiple transactions entered into by the Claimant and Mr. Mays in connection with the assets of WMM AG in liquidation, the 2021 Notice and the filing of the arbitration— either individually or collectively, provide grounds to conclude that the Claimant's claims are inadmissible.

132. Of note, to determine whether there has been an abuse of process, the Tribunal does not need to establish whether the conduct of the Claimant or Mr. Mays violated Swiss bankruptcy or criminal laws. The Parties extensively discussed the relevance of Swiss laws and whether the Claimant and Mr. Mays incurred in violations of such laws.[156] However, after much consideration and deliberation, the Tribunal is of the view that on balance the facts of this case make it unnecessary for it to entertain a debate on the extraterritorial effects of Swiss laws. What is relevant is the conduct of the Claimant and Mr. Mays in relation to this case; their knowledge of their specific rights and obligations with respect to the bankruptcy and the liquidation of WMM AG; their knowledge of the restrictions on the disposal of the assets of WMM AG; their knowledge that there was a Liquidator appointed for WMM AG and a group of WMM AG's creditors with higher-ranking rights to the company's estate; and their acts aimed at disposing of such assets and of the Shares of WMM AG to the prejudice of the Liquidator and other creditors with better rights.

133. As further discussed below, the evidence shows that the Claimant —in particular but not solely Mr. Mays— was fully aware that neither the Claimant nor Mr. Mays could legitimately dispose of the Shares or the Licenses;[157] that there were third party creditors with better rights to WMM AG's assets than the Claimant and Mr. Mays;[158] that the Shares

[156] *See*, e.g., Respondent's Memorial, ¶¶ 117-118; 275-279; Claimant's Reply, ¶¶ 13, 185-187.

[157] *See*, **Exhibit C-0108**, Email from Wallace Mays to Daniel Horrigan (OPIC) and others, 10 July 2015, and **Exhibit C-0327**, Email from Wallace Mays to Hans Vogt and others re resignation of director, 31 July 2015.

[158] Hearing Tr. Day 1, 330:16 – 331:5; Hearing Tr. Day 2, 442: 1-17; Hearing Tr. Day 8, 2651:2 – 2652:3. The Tribunal observes that the Claimant did not contest the Respondent's assertion that WMM AG's creditors have a higher priority than WMM in the liquidation process. *See also*, **Exhibit R-0161**, Email from Patrick Miller to the Bankruptcy

and the Licenses were the only assets available to pay such creditors;[159] and that the Claimant and Mr. Mays knowingly created various schemes, some of which in isolation appeared legitimate on their face, to secure payment for the Licenses and the Shares in the Claimant's favor and to the prejudice of WMM AG's creditors.[160] Certain of these schemes involved illegitimate transactions that the Tribunal considers were characterized by concealed information, and misrepresentations to authorities in both Switzerland and Mongolia.

134. The Claimant's persistent efforts to obtain benefits from the Shares and the Licenses by means of such schemes and transactions extended for more than six years, during which period the Claimant did not once communicate with or informed Mongolia that despite the return of the Licenses to the original boundaries, the Claimant still maintained its claim against the Respondent. Only when the schemes seem to have failed and WMM AG's Liquidator announced that he would file a claim against Mongolia did the Claimant submit the 2021 Notice, demanding that Mongolia reply within 21 days and then filing the arbitration, arguing that the waiting period provided for in Article VI(3)(a) of the BIT had already lapsed, eight years earlier, in 2013.

135. In the view of the Tribunal, filing the arbitration was the culmination of the Claimant's attempt to collect funds and gain undue advantages over other creditors by taking precedence over WMM AG's Liquidator in a treaty claim against the Respondent. As such, and as discussed further below, the Tribunal considers that the Claimant's initiation of this arbitration goes against the purpose for which the right to arbitrate was established in the Treaty and thus amounts to an abuse of process.

136. In the following sections, the Tribunal will analyze the Claimant's conduct subsequent to the return of the Licenses in May 2015. Specifically, the Tribunal will examine the transactions involving the Shares and Licenses that the Claimant engaged in, as well as the

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Authorities, 3 November 2020; **Exhibit R-0252**, List of Creditors of WMM AG (in Liquidation) as contained in the unexecuted copy of the Group Subordination Agreement of WMM, Wallace Mays, and others; Hearing Tr. Day 1, 339:7-16.

[159] Hearing Tr. Day 1, 330: 1-7.

[160] *See*, Award, § IV.D.(2) *infra*.

2021 Notice. Before turning to this analysis, however, the Tribunal will address the reasons for the liquidation of WMM AG.

b. The Liquidation of WMM AG

137. The Claimant contends that Mongolia's revocation of the Licenses triggered the insolvency of WMM AG.[161] This assertion was not proven.

138. In December of 2014, that is, when the negotiations between the Claimant and Mongolia following the 2013 Notice were still ongoing, a Swiss court ordered the liquidation of WMM AG and appointed a liquidator.[162] WMM AG's liquidation was prompted by the loss of its domicile, which followed the resignation of its sole Swiss-based director, Mr. Vogt, in August of 2014.[163]

139. The Claimant asserts that Mr. Vogt's resignation and the ensuing liquidation of WMM AG was a result of Mongolia's alleged Treaty breaches, specifically that "Mr. Vogt's resignation was the direct result of the loss of the Licenses, which led to the insolvency of WMM AG."[164] The Claimant's explanation for Mr. Vogt's resignation, however, is inconsistent.

140. The Claimant's witness, Mr. Patrick D. Miller ("**Mr. Miller**"), claimed that Mr. Vogt resigned to avoid risk of personal liability after the company's insolvency, caused by the revocation of the Licenses.[165] Specifically, in his witness statements and at the Hearing, Mr. Miller testified that due to the cloud over title to the Licenses caused by Mongolia's actions in 2011, WMM AG's independent auditor was unable to provide a going concern opinion, which ultimately led to Mr. Vogt's resignation (in August 2014).[166] Mr. Miller

[161] Claimant's Reply, ¶ 132.

[162] **Exhibit R-0012**, Judgment of the District Court of Olten-Gösgen, 8 December 2014. *See also*, **Exhibit R-0018**, Official Gazette of the Canton of Solothurn, 12 December 2014, and **Exhibit R-0011**, Swiss Official Gazette of Commerce, Preliminary Bankruptcy Notification of WMM AG (in Liquidation) (01911097), 9 January 2015.

[163] **Exhibit R-0009,** Swiss Official Gazette of Commerce, Preliminary Bankruptcy Notification of WMM AG (in Liquidation) (01911097), 28 August 2014. *See*, Legal Opinion of Prof. Franco Lorandi, 3 February 2022 ("**Lorandi I**"), ¶¶ 14, 34-36.

[164] Claimant's Reply, ¶ 132; Second Witness Statement of Patrick D. Miller, 9 December 2022 ("**Miller II**"), ¶ 51.

[165] Miller II, ¶ 51.

[166] Witness Statement of Patrick D. Miller, 24 November 2021 ("**Miller I**"), ¶ 13; Miller II, ¶¶ 15 and 51; Hearing Tr., Day 2, 31 May 2023, 514:4-18.

further testified that he was aware of the auditor's concerns from email conversations he had with the auditor, in which Mr. Vogt was also involved.[167] Notably, however, no such emails were submitted to the record by the Claimant. Moreover, at the Hearing, Mr. Miller conceded that there was no going concern opinion for WMM AG prior to 2011 either.[168]

141. In his second witness statement, Mr. Mays also claimed that Mongolia's actions caused WMM AG's insolvency and further testified that "[w]ithout the ability to pay debts, the sole Swiss resident director of WMM AG resigned out of fear of personal liability under Swiss law."[169] In prior correspondence with OPIC, however, Mr. Mays asserted that Mr. Vogt had quit because of unpaid fees.[170] When asked about this discrepancy at the Hearing, Mr. Mays explained that Mr. Vogt may have used the lack of payment as an excuse, but his actual concern stemmed from "the American investigation of Swiss banks."[171]

142. Setting aside these inconsistencies, the explanations from Mr. Miller and Mr. Mays merely reflect, at best, their own interpretations of what might have prompted Mr. Vogt to resign. Importantly, the Claimant did not bring Mr. Vogt in as a witness or provided any document where Mr. Vogt himself explained the reasons for resigning.

143. In any event, Mr. Mays made no attempt to pursue any legally viable options to prevent the liquidation of WMM AG such as, for example, appointing another Swiss-based director.[172] The evidence on record is insufficient to establish the Claimant's claim in the arbitration that seeking another Swiss-based director would have been futile because no reasonable person would have accepted the position due to concerns about compensation or personal liability. On the one hand, the Claimant was unable to confirm the Swiss director's fees[173] and, on the other, Messrs. Mays and Miller acknowledged they did not

[167] Hearing Tr., Day 2, 31 May 2023, 514:19 – 515:3.

[168] Hearing Tr., Day 2, 31 May 2023, 534:5-20.

[169] Second Witness Statement of Wallace Mays, 5 December 2022 ("**Mays II**"), ¶ 9.

[170] **Exhibit C-0108**, Email from Wallace Mays to Daniel Horrigan (OPIC) and others, 10 July 2015, pp. 3-4.

[171] *See*, Hearing Tr. Day 1, 30 May 2023, 327:9 – 328:9.

[172] **Exhibit C-0326**, Emails between Hans Vogt, Wallace Mays, Patrick Miller and Narangerel Nyamdorj, 31 July 2015, p.1.

[173] *See*, Hearing Tr. Day 3, 731:9 – 732:1; Hearing Tr. Day 4, 990:6 – 992:15.

bother to seek legal advice on Swiss bankruptcy law,[174] which could have shed light on the validity of the director's alleged personal liability concerns. Contrary to the Claimant's claims in this arbitration, contemporary correspondence shows that Mr. Mays deliberately opted for the liquidation of WMM AG because he did not trust anyone other than Mr. Vogt to serve as director.[175]

144. During negotiations with the Respondent over its compensation request in the 2013 Notice, the Claimant notably failed to disclose that WMM AG had been placed into liquidation and a Liquidator appointed, much less that the liquidation was caused, as the Claimant now claims, by the acts of Mongolia. Neither Mr. Miller's affidavit of 23 December 2014 nor OPIC's letter of 14 January 2015, both submitted to the Working Group at the Claimant's request, mentioned what the Claimant now contends is this crucial fact.[176]

145. Had the liquidation of WMM AG been prompted by the acts of Mongolia, as claimed by the Claimant in this arbitration, such a determinative fact should have been —and presumably would have been— notified to Mongolia. But there is no contemporaneous evidence to that effect. The Claimant seems never to have suggested as much, whether to Mongolia or to anyone else, until the commencement of this arbitration. Moreover, the evidence shows that the Claimant attempted to blame Mr. Vogt and even OPIC for the liquidation, but not Mongolia until the commencement of this arbitration.[177]

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[174] Hearing Tr. Day 1, 332:20 – 333:4; Hearing Tr. Day 2, 445:21 – 446:4.

[175] **Exhibit C-0327**, Email from Wallace Mays to Hans Vogt and others re resignation of director, 31 July 2015, p. 1 ("I believe that you sent me a report (in German) from the Swiss Court informing me of my choices. Pat translated this report and sent me the translation. It said, if my memory is correct, that I had the choice and was authorized of Liquidating the Company or reinstated it with another Resident Director. Since you are the only Director that I trust, I am choosing to Liquidate the company by transferring the Assets to WM Mining Company LLC, the US Parent, in exchange for the Debt that WM Mining AG has to WM Mining Company, LLC. I am aware now that Pat never informed you about some of the obligations, although he drafted the Loan and Operating Agreements."). *See also*, **Exhibit C-0326**, Emails between Hans Vogt, Wallace Mays, Patrick Miller and Narangerel Nyamdorj, 31 July 2015, p.1, and **Exhibit C-0108**, Email from Wallace Mays to Daniel Horrigan (OPIC) and others, 10 July 2015, p. 4.

[176] *See*, **Exhibit C-0099**, Affidavit of Patrick D. Miller, 23 December 2014; **Exhibit C-0375**, Letter from OPIC to the Department for Coordination of Policy Implementation, Mongolia Ministry of Mining, 14 January 2015.

[177] *See,* **Exhibit C-0108**, Email from Wallace Mays to Daniel Horrigan (OPIC) and others, 10 July 2015, p. 3. ("As Hans worked loyally and very well for 20 years, I did not want to liquidate W M Mining A.G, but I have no other choice at this time. If we could have worked out a Collateral Sharing Agreement and the Loan from Golomt when you were here in UB, I would not have to take this action. I am somewhat frustrated as this Project can support both loans and repayment of all liabilities easily and meets all of OPIC and Gloom's Loan Criteria but I am running out of time

146. In sum, there is no evidence that Mr. Vogt's resignation was the direct result of the loss of the Licenses, which led to the insolvency of WMM AG, as claimed by the Claimant. The evidence suggests that the reasons for Mr. Vogt's resignation are not related to the Licenses or the acts of the Respondent. Such evidence is reinforced by the conduct of the Claimant. Mongolia negotiated with the Claimant, restored the Licenses and the Claimant at the time made no reservation whatsoever, much less claimed that the value of the Licenses was nil or that the restoration was not sufficient. Such claims were only made in this arbitration after six years of silence after the restoration.

c. The Transactions Related to the Licenses and the Shares

147. After Mongolia restored the Licenses to their original boundaries in 2015,[178] the Claimant stopped communication with the Respondent and never, until the 2021 Notice, mentioned to Mongolia its alleged claim for compensation. Instead of further pursuing resolution of its purported outstanding claims against Mongolia, the Claimant embarked in a series of questionable, incongruent acts that sought to benefit Mr. Mays to the detriment of WMM AG's and Ikh Tokhoirol's creditors. The Claimant attempts to characterize such acts as designed to mitigate damages because the value of the Shares was nil as implicitly recognized, according to the Claimant, by OPIC and the Liquidator.[179] But as analyzed below in this Award, the evidence does not support such allegations.

148. First, Mr. Mays caused WMM AG and Ikh Tokhoirol to grant powers of attorney to OPIC in connection with the Share Pledge Agreement and the License Pledge Agreement, respectively, without the knowledge or authorization of the Liquidator.

149. Specifically, on 6 June 2015, Mr. Mays purported to have WMM AG adopt a shareholder resolution agreeing to pledge the Licenses to OPIC to implement the License Pledge

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to resolve problems. My key sfaff [sic] that has been working without pay for the last few years are ready to call it quits as a result of the inability to work things out between OPIC and Golomt. Since, we were encouraged by OPIC in 2011 to seek a Mongolian Bank Loan or sell an interest in the project, I am frustrated that because of OPIC, I can do neither. Indeed OPIC was set up to provide financing in cases just like this.")

[178] **Exhibit C-0017**, Government of Mongolia Decision No.130, 6 April 2015. *See also*, **Exhibit C-0101**, Mining License 7712A, 11 May 2015; **Exhibit C-0102**, Mining License 7713A, 12 May 2015.

[179] Claimant's Reply, ¶ 181.

Agreement.[180] Notably, Mr. Mays signed this resolution as a "shareholder" of WMM AG, a capacity he never personally held.[181]

150. Then, on 9 June 2015, Mr. Mays caused WMM AG to grant a power of attorney to OPIC in connection with the Share Pledge Agreement, purportedly authorizing OPIC to exercise the voting rights associated with the Shares, and to otherwise act with respect to the Shares as though OPIC was their outright owner.[182]

151. Additionally, on the same date, Mr. Mays caused Ikh Tokhoirol to grant a power of attorney to OPIC to register a pledge over the Licenses or to transfer the Licenses to a third party.[183] After executing the powers of attorney, Mr. Mays applied to the Mongolian authorities to register the pledges over the Licenses, which were subsequently registered to OPIC.[184] In January 2016, OPIC assigned the pledge over the Licenses to Mongolian company FDM, which in turn transferred the Licenses to Altan Zaamar in June 2016.[185]

152. Significantly, all decisions regarding the pledging of the Licenses were directed by WMM AG, purportedly represented by Mr. Mays, with no mention in any of the documents that WMM AG was actually in liquidation.[186] Mr. Mays knew or should have known with a minimum degree of diligence that WMM AG was in liquidation and that he was not the representative of WMM AG and there is no evidence that the Liquidator was properly informed of these transactions or that he approved them.

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[180] **Exhibit R-0033**, WMM AG Shareholder Resolution No. 001-2015, 6 June 2015.

[181] **Exhibit R-0033**, WMM AG Shareholder Resolution No. 001-2015, 6 June 2015.

[182] **Exhibit R-0023**, Power of Attorney of WMM AG to OPIC, 9 June 2015.

[183] **Exhibit R-0024**, Power of Attorney of Ikh Tokhoirol to OPIC, 9 June 2015.

[184] **Exhibit R-0025**, Application by Wallace Mays for Ikh Tokhoirol with the Department of Geology and Mining Cadastre of Mineral Resources for the Registration of a Pledge over Licenses MV-004121, MV-007712A, MV-007713A, 9 and 10 June 2015; and **Exhibit R-0026**, Mineral Resources Authority, Head of Cadaster Department, Decision No. 496, 25 June 2015.

[185] *See*, ¶ 155 *infra*.

[186] *See*, **Exhibit R-0033**, WMM AG Shareholder Resolution No. 001-2015, 9 June 2015, and **Exhibit R-0025**, Application by Wallace Mays for Ikh Tokhoirol with the Department of Geology and Mining Cadastre of Mineral Resources for the Registration of a Pledge over Licenses MV-004121, MV-007712A, MV-007713A, 9 and 10 June 2015, p. 5, listing WMM AG as "the decision-making authority of the Applicant Legal Entity."

153. The Claimant submits that these powers of attorney granted the same rights to OPIC as the 2010 POAs, but that they needed to be reissued to secure funding from OPIC to maintain the Licenses and to resolve previous registration issues.[187]

154. The Tribunal observes that there is disagreement between the Parties about the scope of these new powers of attorney.[188] Setting aside this debate, what the Tribunal finds significant is that Mr. Mays acted outside the liquidation proceedings without even acknowledging their existence in the documents.

155. Furthermore, the Tribunal notes further aspects of what it has called Mr. Mays's incongruent conduct: when FDM transferred the Licenses to Altan Zaamar in June 2016, Mr. Mays warned the Mongolian authorities not to transfer the Shares, arguing that the change in Ikh Tokhoirol's shareholding, from WMM AG to WMM (discussed below), invalidated the powers of attorney granted to OPIC in June 2015.[189] Mr. Mays's conduct exemplifies a recurring pattern of inconsistent behavior. He takes and retracts actions on behalf of the Claimant, WMM AG, and Ikh Tokhoirol as it suits his convenience, while misrepresenting facts to the Mongolian authorities for the Claimant's benefit.

156. Second, in July 2015, once again behind the backs of the Liquidator and the creditors of Ikh Tokhoirol and WMM AG, Mr. Mays sought to transfer WMM AG's shares in Ikh Tokhoirol (i.e., the Shares) to the Claimant. By that time, Mr. Mays was well aware that (i) WMM AG had been placed into liquidation and a liquidator had been appointed;[190] (ii) the Shares were WMM AG's main asset;[191] (iii) WMM AG had several creditors other

[187] Claimant's Reply, ¶ 141.

[188] Respondent's Rejoinder, ¶ 640.

[189] **Exhibit R-0037**, Letter No. 39/16 of Ikh Tokhoirol signed by Wallace Mays to the General State Registration Office, 21 June 2016.

[190] Hearing Tr. Day 1, 336:19 – 337:2 and 338:19-21. *See also,* **Exhibit R-0012**, Judgment of the District Court of Olten-Gösgen, 8 December 2014; **Exhibit R-0018**, Official Gazette of the Canton of Solothurn, 12 December 2014; **Exhibit R-0011**, Swiss Official Gazette of Commerce, Preliminary Bankruptcy Notification of WMM AG (in Liquidation) (01911097), 9 January 2015; and **Exhibit C-0326**, Emails between Hans Vogt, Wallace Mays, Patrick Miller and Narangerel Nyamdorj, 31 July 2015.

[191] Hearing Tr. Day 1, 330: 3-5.

than the Claimant and Mr. Mays;[192] (iv) the Claimant did not have priority over the claims of such creditors;[193] and (v) Mr. Mays could not legally dispose of the Shares.[194] Mr. Mays also knew, or should well have known, that he no longer had the power to represent WMM AG.[195]

157. Indeed, email correspondence between Mr. Mays and an OPIC official in July 2015 indicates that Mr. Mays initially sought to transfer the Shares from WMM AG to the Claimant without obtaining the consent of OPIC[196] —which held a pledge over the Shares pursuant to the Loan Agreement and the Share Pledge Agreement[197]—, and despite the fact that the Swiss Liquidator, not Mr. Mays, was the authorized representative of WMM AG.

158. Upon learning of Mr. Mays's plans, OPIC explicitly cautioned Mr. Mays that such a transfer would breach the terms of the Loan Agreement and the Share Pledge Agreement.[198] Mr. Mays misrepresented to OPIC that the share transfer was in accordance with Swiss, Mongolian, and US law —though he never sought legal advice on the matter—[199] and urged OPIC to approve the transfer "before the Swiss Bankruptcy Court creates even more problems for us."[200] OPIC eventually said it would not object to Mr. Mays's

[192] Hearing Tr. Day 1, 330:16 – 331:5; Hearing Tr. Day 2, 442: 1-17; *See also*, **Exhibit R-0161**, Email from Patrick Miller to the Bankruptcy Authorities, 3 November 2020; **Exhibit R-0252**, List of Creditors of WMM AG (in Liquidation) as contained in the unexecuted copy of the Group Subordination Agreement of WMM, W. Mays, and others; Hearing Tr. Day 1, 339:7-16.

[193] Hearing Tr. Day 8, 2651:2 – 2652:3. The Tribunal observes that the Claimant did not contest the Respondent's assertion that WMM AG's creditors have priority over WMM in the liquidation process.

[194] *See*, **Exhibit C-0108**, Email from Wallace Mays to Daniel Horrigan (OPIC) and others, 10 July 2015, and **Exhibit C-0327**, Email from Wallace Mays to Hans Vogt and others re resignation of director, 31 July 2015.

[195] *See*, Hearing Tr. Day 1, 341:7 – 344:17. Additionally, Mr. Mays admitted to not seeking legal advice regarding his ability to act on behalf of WMM AG (*See*, Hearing Tr. Day 1, 332:20 – 333:4 and 339:3 – 21).

[196] **Exhibit C-0108**, Email from Wallace Mays to Daniel Horrigan (OPIC) and others, 10 July 2015, pp. 4-5.

[197] Award, ¶¶ 54-55 *supra.*

[198] **Exhibit C-0108**, Email from Wallace Mays to Daniel Horrigan (OPIC) and others, 10 July 2015, pp. 3-4. ("It has come to our attention that you have made inquiries regarding the transfer of Ikh Tokhoirol's shares out of WM Mining AG and into another entity. Such a transfer would be an explicit violation of the OPIC loan agreement, and of the share pledge and retention agreement entered into by WM Mining AG. Depending on other circumstances, it may also constitute criminal fraud on your part.")

[199] Hearing Tr. Day 1, 332:20 – 333:4, 339:3 – 11.

[200] **Exhibit C-0108**, Email from Wallace Mays to Daniel Horrigan (OPIC) and others, 10 July 2015, p. 3.

restructuring of his shareholding in Ikh Tokhoirol, on the condition that, after the transfer, the Claimant would pledge the Shares to OPIC.[201]

159. Despite the alert received from OPIC and the condition imposed for the transfer, Mr. Mays, again purportedly representing WMM AG, proceeded to transfer the Shares to the Claimant and the Claimant never granted the pledge of the Shares in favor of OPIC.

160. Mr. Mays did not seek the Liquidator's consent either. Contrary to the Claimant's assertion that the Liquidator was aware of and did not object to the share transfer,[202] the record shows that Mr. Mays informed the Liquidator of this transaction only in November 2016, nearly one and a half years after the Share Transfer Agreement was executed, and only after the Liquidator made an inquiry.[203]

161. Mr. Mays attempted to register the Claimant as the sole shareholder of Ikh Tokhoirol, but was asked by the Mongolian authorities to provide "documents showing that [he had] the authority from the Swiss Court to liquidate the company [by transferring its assets to the Claimant],"[204] Mr. Mays never sought or received such authorization, but he nevertheless proceeded with the transfer, which was recorded in the Mongolian Companies Register as of 21 August 2015.[205]

162. To this end, Mr. Mays signed a share transfer order on behalf of WMM AG, purportedly placing the company into liquidation —despite the Swiss authorities having issued the Liquidation Order in December 2014— and granting himself authorization to transfer the

[201] **Exhibit C-0108**, Email from Wallace Mays to Daniel Horrigan (OPIC) and others, 10 July 2015, pp. 1-2.

[202] Claimant's Reply, ¶¶ 146-147.

[203] **Exhibit C-0308**, Email from Patrick Ruch to Wallace Mays re WMM AG auction [redacted for privilege], 10 November 2016; **Exhibit C-0309**, Email from Wallace Mays to Patrick Ruch re Swiss bankruptcy inquiry, 16 November 2016.

[204] **Exhibit C-0327**, Email from Wallace Mays to Hans Vogt and others re resignation of director, 31 July 2015, p. 1. Mr. Mays states that he proceeded to prepare the documents for registering WMM as the sole shareholder of Ikh Tokhoirol, but filing of the documents was refused, among others, because "3. We need to provide documents showing that I have the authority from the Swiss Court to liquidate the company, 4. All of this needs to be with proper letterhead, signed and sealed by a responsible person, with documentation of their authority."

[205] **Exhibit R-0007**, Mongolian Companies Register, p. 3. *See also*, **Exhibit R-0013**, Share Transfer Agreement between WMM AG (in Liquidation) and WM Mining LLC, 7 July 2015, and **Exhibit R-0036**, Charter of Ikh Tokhoirol, 23 July 2015.

Shares to the Claimant and register it as the sole shareholder of Ikh Tokhoirol.[206] Mr. Mays was well aware, as indicated in his exchange with Mr. Vogt about this transaction, that the matters related to the disposition of the Shares and the documents required to register the share transfer in Mongolia were "in the hands of the bankruptcy office."[207]

163. Mr. Mays further caused WMM AG to enter into a Share Transfer Agreement with WMM, thereby purportedly transferring 100% of the Shares of Ikh Tokhoirol to the Claimant.[208] The share transfer was supposedly made "in exchange for [WMM AG's] debt of $16 million to WM Mining Company LLC."[209] Such debt is reflected in a loan agreement allegedly entered into in February 2010 between WMM and WMM AG which recorded a purported USD 16 million loan from March 2008. Notably, the transfer appears to contravene the subordination clause in the aforesaid loan agreement.[210]

164. Both the Share Transfer Agreement[211] and the share transfer order[212] bear an obfuscated notary seal of Ms. Narangerel Nyamdorj, a witness in this arbitration, who was Mr. Mays's subordinate at the time of the events in question.[213] The obscured portion of the seal corresponds to the expiration date of Ms. Nyamdorj's notarial commission, which had lapsed by the date she purported to notarize these documents. Ms. Nyamdorj was not only a subordinate of Mr. Mays when these events took place but also, it turns out, his sister-in-

[206] **Exhibit R-0034**, Share Transfer Order of WMM AG, 7 July 2015.

[207] **Exhibit C-0326**, Emails between Hans Vogt, Wallace Mays, Patrick Miller and Narangerel Nyamdorj, 31 July 2015, p.1.

[208] **Exhibit R-0013**, Share Transfer Agreement between WMM AG (in Liquidation) and WM Mining LLC, 7 July 2015.

[209] **Exhibit R-0013**, Share Transfer Agreement between WMM AG (in Liquidation) and WM Mining LLC, 7 July 2015. *See also*, **Exhibit R-0034**, Share Transfer Order of WMM AG, 7 July 2015.

[210] **Exhibit C-0163**, Loan and Subordination Agreement between WMM and WMM AG, 1 February 2011, p. 2. ("The Lender [i.e., WMM] hereby fully subordinates any amount drawn by the Borrower [i.e., WMM AG] under the Loan (and all interest accrued thereon), so that the claim (and all interest accrued thereon) (individually a 'Claim' and collectively the 'Claims') will be junior to all other existing or future claims against the Borrower. In the event of bankruptcy, moratorium, composition proceedings or voluntary liquidation of the Borrower, the Lender waives it's [soc] rights to collect the Claims until all other creditors of the Borrower (excluding the Lender) have been fully paid.").

[211] **Exhibit R-0013**, Share Transfer Agreement between WMM AG (in Liquidation) and WM Mining LLC, 7 July 2015.

[212] **Exhibit R-0034**, Share Transfer Order of WMM AG, 7 July 2015.

[213] *See*, Witness Statement of Narangerel Nyamdorj, 6 November 2021, ¶¶ 1 and 5.

law.[214] Ms. Nyamdorj's family relationship with Mr. Mays was not disclosed in either of her two witness statements and only came to light during the cross-examination at the Hearing.[215]

165. Although there is no dispute that the lapsed notary seal was applied over Mr. Mays's genuine signature on the indicated date, it is reasonable to conclude that the notarization of these documents by Ms. Nyamdorj was intended by Mr. Mays to lend legitimacy to the transactions in question, and thereby deceive the Mongolian authorities.

166. Third, in February 2017, Mr. Mays transferred the Shares of Ikh Tokhoirol to a Mongolian individual for consideration, without the knowledge or authorization from the Liquidator.

167. In circumstances which the Claimant could not satisfactorily explain,[216] in February 2017, a Mongolian court reversed and invalidated the transfer of the Shares from WMM AG to WMM in proceedings involving FDM.[217]

168. A few days after the court ruling, on 22 February 2017, Mr. Mays, WMM, WMM AG and Ikh Tokhoirol —all three companies purportedly represented by Mr. Mays, who knew that as a result of the Swiss liquidation proceedings he had no authority to represent WMM AG— entered into a settlement agreement with FDM "for the purpose of termination of the reciprocal obligations assumed under the [OPIC Loan Agreement] and its related agreements (i.e., the "Settlement Agreement"), pursuant to which Mr. Mays agreed to "transfer the shares in [Ikh Tokhoirol] in lieu of the payments of the loan and its interest, along with its rights…."[218] On the same date, WMM AG sold and assigned the Shares to Mr. Chintsogt Dagvasambuu, a Mongolian citizen designated by FDM.[219]

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[214] Hearing Tr. Day 3, 808:21 – 809:8.

[215] Hearing Tr. Day 3, 808:21 – 809:8.

[216] *See*, Hearing Tr. Day 4, 996:21 – 1000:15.

[217] **Exhibit C-0123**, Decree of Prosecutor of the Ulaanbaatar City Prosecutor's Office – No. 41, 21 March 2017, p. 7.

[218] **Exhibit C-0122**, Agreement on Terminating the Reciprocal Obligations through Mutual Settlement Agreement between FDM, Ikh Tokhoirol LLC, WMM AG, WMM, and Wallace Mays, 22 February 2017, pp. 1-2.

[219] **Exhibit R-0016**, Share Sale and Purchase Agreement between WMM AG (in Liquidation) and Chintsogt Dagvasambuu, 22 February 2017; **Exhibit R-0017**, Assignment Agreement between WMM AG (in Liquidation) and Chintsogt Dagvasambuu, 22 February 2017.

169. Mr. Mays further signed a letter of guarantee in his own name and on behalf of the Claimant, WMM AG, and Ikh Tokhoirol, in favor of FDM.[220] This letter included a waiver of litigation against FDM and a promise of indemnification in FDM's favor.[221]

170. There is no evidence on the record that Mr. Mays ever sought or received authorization from the Liquidator to transfer the Shares to FDM or to any other third party. In contrast, the evidence suggests that at the time the Settlement Agreement was finalized, Mr. Mays was well aware that FDM, an approved creditor within WMM AG's bankruptcy proceedings, had placed a bid for the Shares in the amount of their claim.[222]

171. Mr. Mays effectively circumvented the bankruptcy proceedings by selling the Shares to FDM and securing personal payment under the guise of project management fees. Pursuant to the Settlement Agreement, Mr. Mays received a USD 2 million cash payment "for the compensation of implementation and executive management of the 'Ikh Tokhoirol' project, which includes payment of the share transfer under clause 2.1 of this Agreement."[223] The Claimant attempts to characterize Mr. Mays as one of the largest creditors of Ikh Tokhoirol "as he had been providing the local company with unpaid management services for over four years."[224] However, there is no documentary evidence of the purported services or other evidence proving that the services were effectively rendered and the scope thereof, and no evidence exists that the bankruptcy office or any creditors of WMM AG received payment under the Settlement Agreement.

172. In sum, it appears that Mr. Mays and the Claimant knowingly and recklessly engaged in a series of obscure transactions seeking to serve their own economic benefit to the detriment of the Swiss Liquidator, the creditors of WMM AG and even OPIC. The transactions involved intercompany loans with dubious dates, payments for services with no support

[220] **Exhibit R-0038**, Letter of Guarantee of Wallace Mays, Ikh Tokhoirol LLC, WMM AG, WMM to FDM, 22 February 2017.

[221] **Exhibit R-0038**, Letter of Guarantee of Wallace Mays, Ikh Tokhoirol LLC, WMM AG, WMM to FDM, 22 February 2017, para. 7.

[222] **Exhibit C-0331**, Email from Wallace Mays to Patrick Ruch re: WMM AG Auction, 16 November 2016, pp. 1-3.

[223] **Exhibit C-0122**, Agreement on Terminating the Reciprocal Obligations through Mutual Settlement Agreement between FDM, Ikh Tokhoirol LLC, WMM AG, WMM, and Wallace Mays, 22 February 2017, clause 2.3.

[224] Claimant's Reply, ¶ 184(b).

under suspicious settlement agreements, unauthorized transfers of shares and purported representation of companies that neither Mr. Mays nor the Claimant were authorized to represent.

173. None of these transactions reflect valid attempts to mitigate damages, as the Claimant now claims, but rather attempts to receive funds and benefits to which it knew it was not entitled as a result of the liquidation of WMM AG.

d. The 2021 Notice

174. On 12 January 2021 —i.e. almost six years after the Respondent had restored the Licenses to their original boundaries— the Claimant sent the 2021 Notice to the Respondent purportedly "renewing its attempts to reach an amicable settlement of its investment dispute with the Government of Mongolia relating to the mistreatment of WM Mining's investments in the Big Bend Gold Project in Mongolia."[225] The Claimant advised that "[i]f no response is provided within the next 21 days, WM Mining will proceed to file a Request for Arbitration under the US-Mongolia BIT with the International Centre for the Settlement of Investment Disputes."[226] Four weeks later, on 9 February 2021, the Claimant filed its Request.

175. The Respondent takes issue with the Claimant's delay in filing this arbitration,[227] and with its failure to comply with the waiting period in Article VI(3)(a) of the BIT.[228] The Claimant asserts that there was no undue delay in bringing its claim, and highlights that international tribunals have declined to apply extinctive prescription in similar circumstances.[229] Additionally, it argues that the BIT's six-month waiting period starts when the dispute

[225] **Exhibit C-0126**, Letter to H.E. Mr. Yondon Gelen and H.E. Mr. Khishgee Nyambaatar sent by McMillan LLP on behalf of WMM., 12 January 2021, p. 1.

[226] **Exhibit C-0126**, Letter to H.E. Mr. Yondon Gelen and H.E. Mr. Khishgee Nyambaatar sent by McMillan LLP on behalf of WMM., 12 January 2021, p. 2.

[227] *See*, Respondent's Counter-Memorial, ¶ 572(i).

[228] *See*, Respondent's Counter-Memorial, ¶ 573.

[229] Claimant's Reply, ¶¶ 207-209.

arises, not when the notice of dispute is given.[230] The 2021 Notice merely reaffirmed the existing dispute from the 2013 Notice, without resetting the waiting period.[231]

176. The Tribunal notes that the Respondent has not raised an objection of extinctive prescription, but rather claims that the Claimant's delay in filing its claim amounts to abuse of process.[232] While the Tribunal does not consider the passage of time alone as a sufficient reason to deem the Claimant's claim inadmissible, it finds that the nature, timing and content of the 2021 Notice support its conclusion that the Claimant abused its rights in bringing this claim.

177. The evidence on record in this arbitration shows that (i) the compensation request in the 2013 Notice was mainly based on Mongolia's alteration of the Licenses' boundaries, which reduced the mining area;[233] (ii) after holding meetings with the Claimant to discuss its compensation request, Mongolia restored the Licenses to their original boundaries in 2015;[234] (iii) after the Licenses were restored, the Claimant ceased communicating with Mongolia about the compensation request[235] and instead (iv) engaged in the series of questionable transactions described above involving the Shares and Licenses, which it did

[230] *See*, Claimant's Rejoinder, ¶¶ 47-48.

[231] *See*, Claimant's Rejoinder, ¶¶ 47-48.

[232] Hearing Tr. Day 4, 1159:10-14.

[233] **Exhibit C-0016**, p. 15 ("The reduction in gold resources resulting from the altered coordinates and redrawn boundaries has compromised the value of the entire Project on which compensation must be based. We, therefore, seek immediate and full, fair and just compensation for the value of the Project.") *See also*, **Exhibit C-0016**, p. 2 ("MRAM's most recent action in unilaterally altering the boundaries of Ikh Tokhoirol's Licenses has substantially diminished the Project's value and rendered it uneconomic."); p. 3 ("As a result of MRAM's action, large areas of mineralization have been removed from the Project that were previously available for mining, thereby making mine development both economically and technically infeasible. Consequently, the Project has been severely impacted from an economic and technical standpoint with the viability of the Project impaired."); p. 4 ("The Project has also been adversely impacted by waning international faith and confidence in Mongolia's support for foreign direct investment which is regularly addressed in international press publications and trade journals. Even with these continuing and well-publicized struggles in Mongolia, the final breaking point for the Project is in the narrowly drawn Licenses that have made the Project dramatically less economical than was otherwise the case. It is simply no longer the viable project it once was."); and p. 7 ("The investment by WMM and Ikh Tokhoirol of time, effort and funds in the Project was based on all the mineral resources associated with the three licenses being available for development and mine production…But, because the Mongolian Government has withdrawn certain areas with gold mineralization previously held through the Licenses, the entire Project has been jeopardized for which compensation is due (i.e., not just compensation for the areas removed from the Licenses and their associated mineralization since the Project is rendered uneconomical.").

[234] Award, ¶ 64 *supra*.

[235] Hearing Tr., Day 2, 536:3-14; Hearing Tr. Day 4, 1128:17- – 1129:6.

not have the authority to dispose of as they were part of the liquidation estate;[236] and (v) only when the Liquidator submitted a notice of dispute did the Claimant hastily submit the 2021 Notice.

178. The 2021 Notice is striking in many respects. First, it purports to "renew" the Claimant's attempts to reach an amicable settlement of its investment dispute. The only attempts it could refer to are the 2013-2014 Working Group negotiations that ended up with the restoration of the Licenses in 2015. No other attempts were ever made.

179. Specifically, after the 2013 Notice, there were meetings to attempt a settlement in 2013 and 2014 and, as a result of such meetings, the Licenses were restored to their original boundaries and the restoration was accepted by the Claimant.[237] The Claimant remained silent for more than six years and never communicated to Mongolia that the restoration was somehow insufficient. The Claimant cannot in good faith allege now that the 2013-2014 negotiations should be renewed because the restoration of the Licenses was not sufficient.

180. The Claimant contends that a reservation of rights was made at the time, rendering further communication in this regard unnecessary.[238] The Claimant specifically points to a letter sent to Mongolia in October 2013 regarding the "[o]ffers of compensation made by the Working Group to [the Claimant] for compensation pursuant to the [BIT]," in which the Claimant wrote that (i) "nothing herein in any way represents a waiver of the Companies' right to seek and obtain full compensation as outlined and demanded in the Claim and related correspondence;" (ii) "[a]ny alternative that does not involve the Government acknowledging formally and stipulating to compensate in settlement of the Claim, the full value of $72.8 million (which represents the minimal amount of compensation recognized in the Claim pursuant to the BIT), is not acceptable;" (iii) "between the two possible remedies of compensation for value or restoration of the mining license, compensation is

[236] Award, ¶¶ 147 et seq. *supra*.
[237] Award, ¶¶ 61 and 64 *supra*.
[238] Hearing Tr. Day 4, 1124:2-18.

by far the more critical component;" and (iv) "compensation in this matter is not *simply* restoring the licenses."[239]

181. The Tribunal does not agree with the argument. This letter was presented during ongoing negotiations in 2013, when the return of the Licenses was one among the options under discussion and the terms for their return had not yet been established.[240] The negotiations continued for at least one more year, and in April 2015, Mongolia issued Government Resolution No. 130 restoring the Licenses to their original boundaries.[241] In May 2015, Ikh Tokhoirol received the Licenses with the boundaries restored and made no reservation whatsoever. It is undisputed, as a matter of fact, that after the return of the Licenses in 2015, the Claimant ceased communication with Mongolia regarding its claim for compensation. The Claimant cannot in good faith claim that a letter sent in the middle of the 2013-2014 negotiations, that was followed by further negotiations concluding with the receipt of the Licenses with no reservation, must now be taken by the Tribunal as a reservation of rights with respect to the factual and legal situation as it existed at the conclusion of negotiations, upon restoration of the original boundaries, and that remained in effect notwithstanding and throughout six years of silence. This, entirely apart from the attempts described above by which the Claimant sought to gain control of the Licenses and the Shares through questionable schemes.

182. Second, the 2021 Notice unilaterally grants Mongolia 21 days to respond, before filing the request for arbitration.[242] This short period of time has no basis in the Treaty. On the contrary, the Treaty mandates a six-month waiting period after a dispute arises before filing an arbitration request.[243] The Claimant argues that the 2021 Notice did not initiate a new

[239] **Exhibit C-0091**, Letter sent by John Fognani on behalf of WMM LLC and Ikh Tokhoirol LLC to C. Otgochuluu regarding offers for compensation, 3 October 2013, pp. 1-3 (italics in the original).

[240] *See*, **Exhibit C-0091**, Letter sent by John Fognani on behalf of WMM LLC and Ikh Tokhoirol LLC to C. Otgochuluu regarding offers for compensation, 3 October 2013, p. 2.

[241] **Exhibit C-0017**, Government of Mongolia Decision No.130, 6 April 2015.

[242] **Exhibit C-0126**, Letter to H.E. Mr. Yondon Gelen and H.E. Mr. Khishgee Nyambaatar sent by McMillan LLP on behalf of WMM., 12 January 2021,

[243] *See*, **Exhibit C-0002**, BIT, Article VI(3)(a).

waiting period, but simply reaffirmed the existing dispute outlined in the 2013 Notice.[244] The Tribunal is not persuaded.

183. As held by the tribunal in *Wena v. Egypt* with respect to the notion of "repose," "a respondent who reasonably believes that a dispute has been abandoned or laid to rest long ago should not be surprised by its subsequent resurrection."[245] Contrary to other cases discussed by the Parties where the tribunal rejected the respondent's argument that the claim was untimely,[246] here, the Claimant did not further pursue its claim against Mongolia after the Licenses were returned. This could have led the Respondent to reasonably believe that the matter had been resolved.

184. Additionally, considering the significant events that transpired between the 2013 Notice and the 2021 Notice —including the liquidation of WMM AG, the transfer of the Shares from WMM AG to the Claimant, the invalidation of this transaction, and the subsequent sale of the Shares to a third party—, the principle of good faith required that the Claimant comply with the waiting period to make Mongolia aware of the substantial change in the structure and circumstances of the investment and its consequences in the alleged right for compensation and enable a good-faith attempt at amicable settlement.

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[244] *See*, Claimant's Rejoinder, ¶¶ 47-48.

[245] **Exhibit CL-0013**, *Wena Hotels v. Egypt*, Award on Merits, 8 December 2000, ¶¶ 104-106.

[246] In analyzing whether there had been an undue delay, the *Wena Hotels v. Egypt* tribunal refused to reject the claimant's claims because claimant had "continued to be aggressive in prosecuting its claims and that Egypt has had ample notice of this on-going dispute" also "neither party appears to have been substantially harmed in its ability to bring its case". (**Exhibit CL-0013**, *Wena Hotels v. Egypt*, Award on Merits of 8 December 2000, ¶¶ 104-106). The same approach was followed by the tribunal in *Kardassopoulous v. Georgia,* where the respondent's defense related to the claim being untimely was rejected because the claimants had "continuously and persistently pursued compensation for the loss of their investment in Georgia since 1996. It is simply not credible to suggest that Georgia has not had ample notice of this dispute." The tribunal also found that there was no unreasonable or unjustified delay from the claimants in bringing their claims because they "had good reason to suppose that a fair resolution of the dispute could be achieved in the manner proposed by the Georgian Government if the Claimants did not have recourse to arbitration. The Claimants were (reasonably, in the circumstances) trying to avoid having to pursue arbitration of the dispute." (**Exhibit RL-0137**, *Kardassopoulos v. Georgia*, Award, 3 March 2010, ¶¶ 261-268). In *WeBuild v. Argentina*, the tribunal found that "[t]he decisive factor is not the length of elapsed time in itself, but whether the respondent has suffered prejudice because it could reasonably have expected that the claim would no longer be pursued" and concluded that in that case Argentina had suffered no harm in its ability to defend its case and that the State "was on notice at least by that date [2007] that there might be a treaty claim forthcoming." (**Exhibit CL-0081**, *Webuild S.p.A. (formerly Salini Impregilo S.p.A.) v. Argentine Republic*, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, 23 February 2018, ¶¶ 88, 90.)

185. Rather than genuinely attempting to open negotiations for a dispute that Mongolia could legitimately have considered abandoned, the 2021 Notice appears to aim at gaining an advantage over WMM AG's investment claim. The Claimant knew that WMM AG had filed a notice of dispute against Mongolia in June 2020[247] and, after years of inactivity, it hastily filed its own case under the U.S.-Mongolia BIT. The Claimant provided Mongolia with a brief 21-day period to respond to its notice threatening to file for arbitration, knowing that the 6-month waiting period of the Switzerland-Mongolia BIT had lapsed in December 2020, but counsel for the Liquidator had indicated its willingness to extend the negotiation period until 31 January 2021.[248]

186. The Claimant alleges that resort to investment treaty arbitration by a shareholder does not offend the rights of creditors at either the local company or intermediate holding company level, and that, if that were the case, the filing of arbitration by the Liquidator could be seen as an attempt by creditors of WMM AG to gain priority over the creditors of Ikh Tokhoirol.[249] However, the Tribunal is not determining a priority of creditors under domestic law or establishing whether the arbitration filed by the Claimant should take precedence over the arbitration filed by the Liquidator on behalf of WMM AG or vice versa. The filing of the arbitration by the Claimant once it knew that WMM AG had filed a notice of dispute is taken by the Tribunal as an additional fact to evidence that the Claimant did not proceed in good faith and disregarded the six-month waiting period provided for by the Treaty and arbitrarily fixed a 21-day term to gain a time advantage with respect to the notice of the Liquidator.

187. Third, the 2021 Notice indicates that the negotiation with Mongolia had been unsuccessful and that the Claimant had not been able to "mitigate in full the extensive damages resulting from Mongolia's breaches of the BIT."[250] However, as discussed above, nothing in the

[247] **Exhibit C-0126**, Letter to H.E. Mr. Yondon Gelen and H.E. Mr. Khishgee Nyambaatar sent by McMillan LLP on behalf of WMM, 12 January 2021, p. 2.

[248] **Exhibit R-0046**, Letter of Mayer Brown International LLP on behalf of WMM AG (in Liquidation) to Deputy Head of Cabinet Secretariat Office of the Government of Mongolia and Ministry for Justice and Internal Affairs of Mongolia, 15 January 2021, ¶ 4.

[249] Claimant's Reply, ¶¶ 189-190.

[250] **Exhibit C-0126**, Letter to H.E. Mr. Yondon Gelen and H.E. Mr. Khishgee Nyambaatar sent by McMillan LLP on behalf of WMM, 12 January 2021, p. 2.

record indicates that the Claimant informed Mongolia about a damage claim for more than six years after the Licenses were restored. At best, even under the unproven allegation that the transactions undertaken by Mr. Mays and the Claimant were aimed at mitigating damages, the Claimant in good faith should have submitted a claim for compensation and open the six-month negotiation period required by the BIT rather than unilaterally fixing a 21-day term for renewal of the negotiations.

188. The Claimant cannot in good faith claim that a negotiation period that concluded with the restoration of the Licenses to their original boundaries with no reservation whatsoever expressed at that specific time must now be renewed for an arbitrarily fixed term of 21 days. There can be no renewal of a negotiation period that concluded with the reparation consisting of restoration. The claim of a renewal of the negotiation period and the arbitrary fixing of the 21-day period are contrary to good faith and aimed only at gaining an advantage over the claim of the Liquidator in prejudice of the rights of Mongolia.

189. Fourth, in the 2021 Notice, the Claimant informs Mongolia for the first time about the liquidation of WMM AG, suggesting that Mongolia was to blame for such liquidation. As discussed in Section IV.D(2)b above, the Claimant knew about the liquidation at the time of the settlement negotiations that ended up with the restoration of the Licenses in 2015.

190. Fifth, the 2021 Notice attempts to disqualify the claim of the Swiss Liquidator on behalf of WMM AG.[251] Notably, the Claimant never pursued a collaborative strategy with either the Liquidator or WMM AG's creditors to secure relief from Mongolia. The agreement with the third-party funder notably excludes the majority of WMM AG's creditors and grants the Claimant a priority that it did not have in standard bankruptcy proceedings.[252]

191. Under these circumstances, the Tribunal finds that the 2021 Notice and the subsequent initiation of this arbitration were not made in good faith. The Claimant had attempted through various transactions to gain an illegitimate advantage over the creditors in the

[251] **Exhibit C-0126**, Letter to H.E. Mr. Yondon Gelen and H.E. Mr. Khishgee Nyambaatar sent by McMillan LLP on behalf of WMM, 12 January 2021, p. 2.

[252] *See,* **Exhibit R-0144**, Email from Brian Richards of AATA to Patrick Miller and attached invoice, 2 May 2012; and **Exhibit C-0177**, Amendment No.1 to Group Subordination Agreement between WMM, Wallace Mays, and others, 25 January 2021.

liquidation of WMM AG, submitted a notice of arbitration with serious mischaracterizations of the status of the prior negotiations and the restoration of the Licenses and unilaterally fixing terms for the alleged renewal of concluded negotiations and is now attempting to use the BIT for the same purpose. Since the schemes to obtain the said advantage failed and the Liquidator decided to act in protection of the creditors, the Claimant is attempting, in a final push, to use the Treaty to secure payment for itself, potentially at the expense of other creditors of WMM AG.

e. Conclusions

192. The principle of good faith is a constituent principle of international law. The abuse of rights doctrine, as a derivative of the principle of good faith and which includes abuse of process, has been applied by investment arbitration tribunals to dismiss claims when the investor procures an illegitimate advantage with the arbitration or where the tribunal finds that a party arbitrated in bad faith.[253] This stems from the tribunal's obligation to safeguard the integrity of the proceedings.

193. The abuse of rights doctrine, as correctly mentioned in *Orascom v. Algeria,* "prohibits the exercise of a right for purposes other than those for which the right was established", is not limited to cases of corporate restructuring and "there is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused."[254]

194. It is not disputed that both the Claimant, a US company, and Mr. Mays, a US citizen, had the right to invoke the US-Mongolia BIT if they considered that they, as investors, or the Claimant's investment, had been affected by acts of Mongolia. However, the Claimant's conduct, from the restoration of the Licenses to their original boundaries in 2015 until the filing of the Request in 2021, demonstrates a lack of good faith and constitutes an abuse of process.

[253] *See*, ¶ 120 *supra*.

[254] **Exhibit RL-0071**, *Orascom v. Algeria*, Final Award, 31 May 2017, ¶¶ 540-541.

195. The Claimant accepted the restoration of the Licenses into their original boundaries in 2015 and never claimed, until the 2021 Notice and this arbitration, that such restoration was not sufficient, and that compensation was pending. There is no contemporary evidence of the reservation of rights that the Claimant alleges were made at the time of the restoration. Moreover, the attempt to characterize the 2013 Notice as the notice of arbitration and the 2021 Notice as a renewal of the Claimant's attempts to reach an amicable settlement is unacceptable under the most basic principles of good faith.

196. The silence of the Claimant with respect to Mongolia for over six years after the restoration of the Licenses also evidences lack of good faith. On the one hand, should the Claimant, as it now claims, consider that the restoration of the Licenses was not sufficient and that compensation was due, it should have, if acting in good faith, alerted Mongolia that a dispute was pending. It did not and therefore Mongolia could legitimately assume that the dispute was over. On the other, the evidence on the record indicates that the reason for such silence was that, in view of the liquidation of WMM AG, the Claimant was, in bad faith or at least recklessly, attempting to sell the Licenses and the Shares through schemes that allowed the Claimant or Mr. Mays to obtain economic benefits in the liquidation that they knew they did not have under the bankruptcy proceedings.

197. The different transactions entered into by the Claimant and Mr. Mays between 2015 and 2017 in connection with the Licenses and the Shares, which included transactions questioned by the Swiss Liquidator, by OPIC and even by Mongolian courts, evidence lack of good faith or at the very best a high degree of recklessness. Both the Claimant and Mr. Mays knew that WMM AG was in liquidation, that only the Liquidator was authorized to represent WMM AG and to dispose of the Shares and the Licenses, and that the creditors of WMM AG had privilege over both the Claimant and Mr. Mays.

198. However, in the various transactions, the Claimant and Mr. Mays purported to represent WMM AG, attempted to dispose of the Licenses and the Shares, disregarded the alerts they received in connection with the illegality or questionability of their acts, and entered into suspicious transactions, aiming at illegitimately circumventing the consequences of the liquidation of WMM AG.

199. In the view of the Tribunal, the 2021 Notice and the filing of this arbitration is no more than one additional attempt by the Claimant to gain an illegitimate advantage over the Liquidator and the creditors of WMM AG. Knowing that it had no privilege over the creditors of WMM AG and that as a shareholder it would only be paid after all creditors, the Claimant attempted for over six years to get a hold of the Shares and the Licenses through questionable schemes. Having failed in its attempts to get such illegitimate advantages and in view of the action taken by the Swiss liquidator of WMM AG to file a claim against Mongolia, the Claimant filed a notice of arbitration that misrepresents the negotiations that ended with the restoration of the Licenses in 2015, disregards the cooling-off period under the guise that it lapsed in 2013, claims for the first time before Mongolia —contrary to the evidence in this arbitration— that the liquidation of WMM AG is attributable to Mongolia and funds this arbitration under an agreement that notably excludes the majority of WMM AG's creditors and grants the Claimant a priority that it did not have in standard bankruptcy proceedings.[255]

200. This is precisely what the doctrine of abuse of rights seeks to prevent, the exercise of a right for purposes other than those for which the right was established. What the Claimant seeks is for this Tribunal to entertain a claim that, if decided in favor of the Claimant, would grant the Claimant the advantages over other creditors in the bankruptcy that it knows it does not have and that it attempted to obtain through questionable operations for over six years. The Treaty cannot serve as the means for the Claimant to achieve the illegitimate advantages that it unsuccessfully attempted to obtain for more than six years. That is not the purpose of the rights provided for under the Treaty.

201. For the above reasons, the Tribunal concludes that there was an abuse of rights and an abuse of process on the part of the Claimant that makes its claims inadmissible.

[255] *See,* **Exhibit R-0144**, Email from Brian Richards of AATA to Patrick Miller and attached invoice, 2 May 2012; **Exhibit C-0177**, Amendment No.1 to Group Subordination Agreement between WMM, Wallace Mays, and others, 25 January 2021.

V. COSTS

A. THE CLAIMANT'S COST SUBMISSIONS

202. In its submissions, the Claimant requests that the Tribunal "[g]rant WMM its costs of this arbitration and costs of legal representation in an amount to be determined in the final award."[256]

203. The Claimant's legal fees and expenses total USD 4,924,550.27, broken down as follows:[257]

DESCRIPTION	AMOUNT (USD)
ATTORNEYS' FEES	
McMillan LLP – Billed and Paid	2,000,000.00
McMillan LLP – Deferred Fees	1,000,000.00
EXPERT FEES - BILLED AND PAID	
Mongolian law expert	74,251.28
Technical experts	215,516.78
Quantum experts	425,000.00
TOTAL PROFESSIONAL FEES	3,714,768.06
EXPENSES	
Translation Fees – Billed and Paid	38,193.68
Administrative expenses – Billed and Paid5	72,552.42
Deferred Interest Expense	524,036.11
TOTAL EXPENSES	634,782.21
ARBITRATION COSTS	
Filing Fee Paid and Advances on Costs to ICSID	575,000.00
TOTAL ARBITRATION COSTS	575,000.00

B. THE RESPONDENT'S COST SUBMISSIONS

204. In its Memorial, the Respondent requests that the Tribunal "[o]rder the Claimant to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the costs of Mongolia's legal representation, plus pre-award and post-award interest thereon."[258]

[256] Claimant's Memorial, ¶ 362(c); Claimant's Reply, ¶ 349(d).

[257] Claimant's Statement of Cost, 21 September 2023, table after ¶ 2 (footnotes omitted).

[258] Respondent's Memorial, ¶ 363(b).

205. Subsequently, in its Counter-Memorial and in its Reply, the Respondent requests that the Tribunal "[order] the Claimant to bear the costs of this arbitration in full and to indemnify Mongolia for its legal fees and costs in this arbitration."[259]

206. The Respondent's legal fees and expenses total USD 6,040,539.47[260], broken down as follows:[261]

[259] Respondent's Counter-Memorial, ¶ 1101(iv); Respondent's Reply, ¶ 1550 (iv).

[260] Respondent's Statement of Cost, 21 September 2023, table after ¶ 4. The Respondent's Statement of Costs indicated the grand total as USD 6,070,239.47, however, the sum of the individual items adds up to USD 6,040,539.47

[261] Respondent's Statement of Cost, 21 September 2023, table after ¶ 4.

Item	Amount (in USD)	Status
Legal fees of Herbert Smith Freehills LLP	4,364,175.26	All amounts have been paid by the Respondent, with the exception of the invoices for May 2023, June 2023, July 2023 and August 2023.
Travel and accommodation expenses of Herbert Smith Freehills LLP	84,409.23	Paid by the Respondent, with the exception of the invoices for May 2023 and June 2023.
Expert fees for Professor Franco Lorandi, Legal Expert	39,970.35	Paid by the Respondent.
Expert fees and expenses for Professor Dondov Ganzorig, Legal Expert (including travel and accommodation expenses for attendance at the Hearing)	39,013.00	All amounts have been paid by the Respondent, with the exception of the invoices for January 2023 to June 2023.
Expert fees for Dr Gabriel Bottini, Legal Expert	32,739.53	Paid by the Respondent.
Expert fees and expenses for PwC, Quantum Expert (including travel and accommodation expenses for attendance at the Hearing)	615,230.58	All amounts have been paid by the Respondent, with the exception of the invoices for March 2023 to June 2023.
Expert fees and expenses for Wardell Armstrong International, Technical and Environmental Experts (including travel and accommodation expenses for attendance at the Hearing)	251,785.52	All amounts have been paid by the Respondent, with the exception of the invoices for May 2023 and June 2023.
Travel and accommodation expenses for Mongolian witnesses and party representatives for attendance at the Hearing	25,969.12	Paid by the Respondent.
Payments made to ICSID	550,000.00	Paid by the Respondent.
Other expenses (printing, courier charges, telephone usage, office charges and other administrative costs, translation)	37,246.88	Paid by the Respondent, with the exception of the invoices for courier services of May 2023, printing of May 2023 and translation services of July 2023.

C. THE TRIBUNAL'S DECISION ON COSTS

207. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

208. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

209. Based on this discretion, ICSID tribunals have primarily adopted two different approaches regarding costs. The first approach, known as "costs lie where they fall," requires each party to cover their own costs. The second approach, called "costs follow the event," mandates that the unsuccessful party covers all costs.

210. In the Tribunal's view, adopting a "costs follow the event" approach in this case is justified due to the Tribunal's finding that the Claimant engaged in abuse of process and abuse of rights in bringing this arbitration, which rendered its claims inadmissible.

211. The Tribunal acknowledges a substantial disparity of approximately USD 1 million in costs between the Parties, with the Respondent having incurred higher fees and expenses. However, the Tribunal finds the Respondent's costs to be reasonable considering the case's features, including the complexity of the dispute.

212. The Respondent originally requested in its Memorial the payment of pre- and post-award interest on costs but did not reiterate its request in the Counter Memorial or the Rejoinder. The Tribunal finds that the request was not only apparently abandoned but is not supported in Respondent's submissions. Therefore, the Tribunal will not grant interest on legal fees, costs and expenses.

213. Accordingly, the Claimant shall bear its own fees and expenses and the following amounts:

(a) The Respondent's legal fees, costs, and expenses (not including advances to ICSID): USD 5,490,539.47;

(b) The costs of the arbitration proceedings, including the fees and expenses of the Tribunal, expenses of the President's Assistant, ICSID's administrative fees, and direct expenses, as follows (in USD):

(i)	Arbitral Tribunal Fees and Expenses:	
	(1) Prof. Eduardo Zuleta Jaramillo	218,951.40
	(2) Mr. Stephen L. Drymer	178,182.99
	(3) Prof. Albert Jan van den Berg	219,516.32
(ii)	Assistant's expenses	5,781.59
(iii)	ICSID Administrative Fees:	178,000.00
(iv)	Direct Expenses:	163,199.05
	Total:	963,631.35

214. The costs of the arbitration proceedings detailed in (b) above have been paid out of the advances made by the Parties in equal parts.[262] As a result, each Party's share of the costs of arbitration amounts to USD 481,815.68.

215. Accordingly, the Tribunal orders the Claimant to pay the Respondent USD 481,815.68 for the expended portion of the Respondent's advances to ICSID and USD 5,490,539.47 to cover the Respondent's legal fees and expenses.

VI. AWARD

216. For the reasons set forth above, the Tribunal unanimously decides as follows:

(i) The Tribunal is precluded from exercising jurisdiction over the Claimant's claims;

(ii) The Claimant shall bear its own costs, fees, and expenses, as well as the costs of this arbitration, and the fees, costs, and expenses of the Respondent as specified

[262] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

in paragraph 215 of this Award and is ordered to pay the Respondent USD 5,972,355.15; and

(iii) All other requests for relief are dismissed.

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Mr. Stephen L. Drymer
Arbitrator

Date: AUG 19 2024

Prof. Albert Jan van den Berg
Arbitrator

Date:

Prof. Eduardo Zuleta Jaramillo
President of the Tribunal

Date:

Mr. Stephen L. Drymer
Arbitrator

Date:

Prof. Albert Jan van den Berg
Arbitrator

Date: AUG 19 2024

Prof. Eduardo Zuleta Jaramillo
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Prof. Eduardo Zuleta Jaramillo
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Date: AUG 2 1 2024