

**IN THE MATTER OF AN EMERGENCY ARBITRATION CONSTITUTED IN
ACCORDANCE WITH APPENDIX II OF THE ARBITRATION RULES OF
THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF
COMMERCE**

**MOHAMMED MUNSHI
(Claimant)**

v.

**THE STATE OF MONGOLIA
(Respondent)**

AWARD ON EMERGENCY MEASURES
Arbitration SCC EA 2018/007

5 February 2018

Emergency Arbitrator:

Mr. Bernardo M. Cremades

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This Award on Emergency Measures is issued in the SCC Arbitration EA 2018/007 pursuant to Appendix II (Emergency Arbitrator) of the Arbitration Rules of the Stockholm Chamber of Commerce of 2017 (the “**SCC Rules**”). Article 1.1 of Appendix II of the SCC Rules provides that:

“A party may apply for the appointment of an Emergency Arbitrator until the case has been referred to an Arbitral Tribunal pursuant to Article 22 of the Arbitration Rules.”

I. INTRODUCTION AND PROCEDURAL HISTORY

1. The emergency proceedings were commenced by the Claimant, Mr. Mohammed Munshi (a national of the United Kingdom and Australia) (the “**Claimant**” or “**Mr. Munshi**”) by an “Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures,” dated 19 January 2018, submitted pursuant to Article 2 of Appendix II of the SCC Rules (the “**Application**”). The Application was served by the SCC on the Respondent, the State of Mongolia (“**Mongolia**”) (jointly and together with the Claimant to be referred to as the “**Parties**”), on 31 January 2018, pursuant to Article 3 of Appendix II of the SCC Rules.
2. The Emergency Arbitrator was appointed by the Board of the Arbitration Institute of the SCC (the “**Board**”) on 31 January 2018, pursuant to Article 4 of Appendix II to the SCC Rules. The Emergency Arbitrator’s details are as follows:

Mr. Bernardo M. Cremades
Goya 18, 2º
Madrid, 28001
Spain
Tel: +34 914 237 200
bcremades@bcremades.com

3. Pursuant to Article 8 of Appendix II to the SCC Rules the Emergency Arbitrator has five (5) days from the date the Application is referred to the Emergency Arbitrator to render a decision.
4. The seat of the arbitration is governed by Article 5 of the SCC Rules, which provides:

“The seat of the emergency proceedings shall be that which has been agreed upon by the parties as the seat of the arbitration. If the seat of the arbitration has not been agreed by the parties, the Board shall determine the seat of the emergency proceedings.”

5. By letter dated 31 January 2018, the Board decided that the seat of the Emergency Arbitration shall be Stockholm.

6. The Claimant is represented in these emergency proceedings by:

Mr. Teddy Baldwin
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815 Connecticut Ave NW
Washington DC, 20006
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7. Mongolia is represented in these emergency proceedings by:

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8. On 31 January 2018, the Emergency Arbitrator issued Procedural Order No. 1.

9. On 2 February 2018, the Emergency Arbitrator wrote to Mongolia asking it to confirm whether it had received Procedural Order No. 1 and whether it intended to make submissions to the Emergency Arbitrator.

10. On 4 February 2018, the Claimant made further submissions to the Emergency Arbitrator.

11. Mongolia has not made any submissions to the Emergency Arbitrator and has not acknowledged receipt of the Claimant's Application. The Emergency Arbitrator must therefore decide on the Application without hearing from Mongolia.

II. SUMMARY OF THE DISPUTE

12. The following summary does not intend to be an exhaustive summary of all of the factual allegations in dispute and the history of the dispute between the Parties, and related parties, to date. Given the urgency of the Application this summary intends to recount the main factual and legal allegations argued by the Claimant as they relate to his Application.

A. *Gobi Coal and the Claimant's Detention in Mongolia*

13. The Claimant is a national of the United Kingdom (since 1972) and Australia (since 1990). The Claimant is a shareholder in Gobi Coal & Energy Ltd., (hereinafter "*Gobi Coal*") a coking coal explorer and exploiter with operations in Mongolia, owning 11% of its share capital. The Claimant served as Chair of Gobi Coal until September 2017, when he was forced to resign as a result of the legal difficulties that he faces in Mongolia.
14. The Claimant founded Gobi Coal in October 2004 and Gobi Coal was established to explore coal-mining opportunities in Mongolia. In 2012 and 2013, Gobi Coal expanded its business in Mongolia from coal mining to activities in power generation and mining supplies. Around this time Gobi Coal extended loans in the amount of \$10 million to a Mongolia based company, Baz Group. The loans were extended to Jargalsaikhan Baz, the CEO of Baz Group. Also at this time Chuluunbaatar Baz (the brother of Jargalsaikhan Baz) purchased a number of shares in Gobi Coal and related companies.
15. Jargalsaikhan Baz made a number of the first repayments of his loans from Gobi Coal, but defaulted thereafter. Gobi Coal sent demand letters to Jargalsaikhan Baz in regard to the default on his loans.¹ Gobi Coal later won an arbitration award in a Hong Kong International Arbitration Center arbitration for Jargalsaikhan Baz's default on these loans. Subsequent to the sending of the demand letters Chuluunbaatar Baz contacted the Director General of Gobi Coal stating that he wished to have dinner with the Claimant and the Claimant's partner in Mongolia. From this invitation, the Claimant then began planning a trip to Mongolia in order to meet Chuluunbaatar Baz to discuss some of these business matters in dispute.
16. In March 2015, the Claimant travelled to Mongolia in order to meet with Chuluunbaatar Baz. Upon arriving at the airport and passing through customs the Claimant encountered Chuluunbaatar Baz who was accompanied by two plain-clothes police officers who immediately arrested the Claimant and brought him to

¹ Exhibit C-7.

a detention centre.² After a period of interrogation the police released the Claimant and informed him that he was not permitted to leave Mongolia until he paid Chuluunbaatar Baz a sum of money (in the millions of dollars) or transferred the assets of Gobi Coal to Chuluunbaatar Baz.

17. At the initial time of his arrest the Claimant was informed that he had been arrested because all funds given for Mongolia mining projects had to be spent in Mongolia. The Claimant contends that “[t]o assert that it is a crime that requires the Chair of a BVI company to be detained for multiple years because the company did not send every dollar to Mongolian bank accounts is absurd and violative of Mongolia’s international legal obligations, even if that were Mongolian law.”³
18. The Claimant states that at multiple times throughout the course of his detention in Mongolia he has been told that he would be released and allowed to leave the country if he pays an unspecified sum of money to Chuluunbaatar Baz.
19. For approximately the next two years the Claimant remained in Mongolia but was not formally charged with having committed any crime, despite being prevented from leaving the jurisdiction. Finally, in July 2017, the Claimant was tried and convicted of committing the crime of defrauding as the source of one’s income for life. He was sentenced to 11 years in prison. Prior to July 2017 this was not a crime in Mongolia, even though general fraud was a crime. This new crime was passed in 2015 but did not enter into force until July 2017. Therefore, the Claimant was convicted of having committed a crime that was not actually a crime in Mongolian statute books at the time that the Claimant had been initially arrested and prevented from leaving the country in March 2015. Furthermore, the alleged acts that constituted the Claimant’s commission of this crime were committed in 2010 and 2011.⁴ The facts that form the basis for the Claimant’s commission of this crime are essentially that the Claimant made statements about how well Gobi Coal would perform in order to cause Chuluunbaatar Baz to purchase shares in Gobi Coal. The Claimant contends that his conviction under this new law is a plain violation of the international law principle of *nullum crimen sine lege*.
20. Since March 2015 Mongolia has also taken a number of measures against Gobi Coal’s operations including the freezing of its assets and suspension of its licenses.

² Counsel for the Claimant indicate that they have been unable to provide a witness statement directly from the Claimant due to his incarceration, and that facts not supported by a document were obtained by information from the Claimant, his family, or his advisors - *see* Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures, dated 19 January 2018, p. 15, n. 36.

³ Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures, dated 19 January 2018, ¶ 49.

⁴ *Id.*, ¶ 55.

The Claimant intends to assert in the arbitration that Mongolia has seriously damaged the share value of Gobi Coal. The Claimant intends to bring causes of action which include breach of the fair and equitable provision of the Energy Charter Treaty (the “ECT”), illegal expropriation, and denial of justice.⁵

B. The Claimant’s Conditions of Imprisonment

21. Since July 2017 the Claimant had been detained at Detention Centre 461 (“**DC 461**”). During his time at DC 461 the Claimant states that he was denied important medical treatments, was not permitted to see his family, was given limited access to his local counsel, and no direct access to his international counsel.⁶
22. On 15 January 2018, Mongolia moved the Claimant from DC 461 to Prison 409, a strict security prison. Prison 409 is alleged to not be in compliance with Mongolia’s own laws, as well as international standards for the safety of prisons.⁷ It is stated that prisons in Mongolia do not provide sufficient medical care, clothing, bedding, food, quality water, heating, lighting, ventilation, and sanitary facilities.⁸ In addition to the state of the prison facilities, Prison 409 imposes strict visitation rules. According to Mongolian law, the Claimant is allowed one “short” visit every 90 days and one lengthy visit every 120 days. Furthermore, the Claimant may only receive one parcel every 60 days and can make only one phone call every 60 days. This phone call must last no longer than 5 minutes. Prison 409’s strict visitation rules have meant that it has not been possible for Claimant’s lawyers to consult with him with respect to his claims against Mongolia.
23. The Claimant’s health has further deteriorated since he was sentenced in July 2017. The Claimant argues that he has been deprived of a number of basic sanitary rights which are causing damage to his health. Furthermore, the Claimant has been denied essential medical treatment. The Claimant has a bulging disc in his lumbar spine and severe varicose veins in his legs. The Claimant was visited by a Singapore-based vascular surgeon in 2015 (which under the travel ban) who determined that the Claimant requires immediate surgery to correct the veins, which pose a risk of deep vein thrombosis. The Claimant has been denied the ability to leave Mongolia to receive this treatment. The Claimant does not have access to a blood thinning medication recommended as a prophylactic measure by the Singapore-based surgeon. Furthermore, the Claimant currently requires a prescription of Enilpril in order to combat his high blood pressure. Most recently the Claimant is suffering

⁵ *Id.*, ¶¶ 77-81.

⁶ The Claimant’s international counsel were forced to deliver oral messages to the Claimant through local counsel.

⁷ Exhibit C-16.

⁸ Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures, dated 19 January 2018, ¶ 85.

from possible kidney problems, as noted by the presence of blood in his urine.⁹ Counsel for the Claimant has not been guaranteed that the Claimant will be able to avail of this medication while in Prison 409.¹⁰ Due to the strict rules in place in Prison 409 it is difficult to monitor the Claimant's health with regards to these issues going forward.

24. The Claimant believes that his life is in danger as long as he remains in Prison 409. The Claimant points to a number of foreign businesspeople who have previously been detained in Mongolia and have died in allegedly suspicious circumstances.¹¹ The Claimant believes that he is being targeted by members of the Baz family who orchestrated his arrest in Mongolia in order to force him to pay large sums of money to Chuluunbaatar Baz. A statement put forward by a man allegedly contacted by the Baz family (Mr. Karem Akbas) states that:

“He asked me if I could introduce him to criminal elements of organised crime in China, so that he could arrange a scheme with them, by paying or offering money to them, to physically threaten and intimidate your [Mr. Munshi's] family in Beijing, in an attempt to extort money and assets from him, whilst he had him in custody in Mongolia.”¹²

25. In addition to the Claimant's fears for his health and safety while in Prison 409, the Claimant is seriously concerned about his lack of access to international counsel so that he may proceed with his arbitration claim. Claimant believes that his transfer to Prison 409 arose on foot of his counsel's letters to the Government of Mongolia indicating that he was preparing to file an arbitration under the ECT.
26. As already set out above, the Claimant's access to international counsel has been severely limited since his detainment in DC 461 in July 2017. The Claimant has only been permitted to have visitations through a glass partition and has not been allowed to access and review important documents. Due to his recent move to Prison 409 the ability of both international and local counsel to communicate with the Claimant has been seriously affected. The Claimant's counsel explains:

“Whereas Mongolian counsel used to be able to show Mr. Munshi some documents, now counsel has no ability to be able to show Mr. Munshi any document as all communications with him are made through a partition and by phone (which is likely monitored). Prison officials do not allow his lawyers to give him any information or documents for his review. In

⁹ Claimant's Letter to the Emergency Arbitrator, dated 3 February 2018, p. 1.

¹⁰ Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures, dated 19 January 2018, ¶ 91.

¹¹ *Id.*, ¶¶ 95-96.

¹² Exhibit C-14, p. 2.

addition, Mr. Munshi is not allowed any access to a pen or paper, such that he cannot write his thoughts down or sign anything. Thus, any communication between the lawyer and Mr. Munshi has to be conveyed only orally and only written down by the lawyer after she leaves."¹³

27. The Claimant contends that Prison 409 is a facility generally reserved for people that have committed the most serious crimes and that his detention in Prison 409, among murderers and rapists, is unwarranted and simply motivated by his intention to commence international arbitration proceedings against Mongolia. The circumstances of the Claimant's confinement present considerable difficulties in drafting a request for arbitration, and all of the further procedural steps that must be taken in any arbitration.

III. JURISDICTION

28. The Claimant asserts that he is an Investor under the ECT as he qualifies as being a national of another Contracting State by virtue of the fact that he is both a United Kingdom and an Australian national. The United Kingdom is a Member State of the ECT and the ECT has been in effect in the United Kingdom since 16 April 1998. Australia's Ministry of Foreign Affairs states that it provisionally applies the ECT as of 17 December 1994 "except for Part VII for signatories accepting such application." The Australian Ministry of Foreign Affairs states that the ECT entered into force in Australia on 16 April 1998.¹⁴ Article 1(7) of the ECT provides:

"'Investor' means:

(a) with respect to a Contracting Party

(i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law."

29. The Claimant has been a national of the United Kingdom since 1972, with passport number GBR504575002. The Claimant has been a national of Australia since 1990 with passport number E4066177.¹⁵ Therefore the Claimant argues that he falls under the definition of Investor provided in Article 1(7) of the ECT.
30. The Claimant asserts that Mongolia has consented to arbitration in accordance with the SCC Rules by being a member of the ECT, and by the force of application of

¹³ Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures, dated 19 January 2018, ¶ 105.

¹⁴ Exhibit C-5.

¹⁵ Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures, dated 19 January 2018, ¶ 34.

the ECT in Mongolia.¹⁶ The Claimant refers to Article 26 of the ECT, which provides in relevant part as follows:

“Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

[...]

In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to...an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.”

31. The Claimant states that he accepts Mongolia’s offer to arbitrate in accordance with Article 26 of the ECT. The Claimant indicates that he has sent a number of letters to Mongolia notifying the State of his treaty claims.¹⁷ The Claimant refers to his most recent letter, dated 29 November 2017, addressed to the President of Mongolia and various government officials, explaining that the Claimant would pursue claims under the ECT if a resolution was not reached.¹⁸ The Claimant has not received a response to this letter.
32. Article 4(2) of Appendix II to the SCC Rules provides:

“An Emergency Arbitrator shall not be appointed if the SCC manifestly lacks jurisdiction over the dispute.”

33. The Board has therefore already decided that the Emergency Arbitrator does not manifestly lack jurisdiction. Based on the submissions of the Claimant the Emergency Arbitrator decides that the Claimant has *prima facie* established jurisdiction such that it is proper to decide on the emergency measures now being requested.

IV. THE EMERGENCY MEASURES REQUESTED

34. The Claimant requests the following measures to be granted by the Emergency Arbitrator:

34.1. To “issue a decision ordering Mongolia to release Mr. Munshi from detention and allow him to leave Mongolia until the Tribunal can decide this issue.

¹⁶ Exhibit C-2.

¹⁷ *Id.*, ¶ 30.

¹⁸ Exhibit C-13.

Mongolia can maintain the criminal proceedings against Mr. Munshi and continue to investigate until the Tribunal can decide Mr. Munshi's interim measures application. Mr. Munshi will agree to check-in with Australian police authorities upon his arrival and agree to turn himself into these authorities should the Tribunal later rescind the Emergency Arbitrator's decision or otherwise order Mr. Munshi to do so. Mongolia currently has Gobi Coal's licenses and assets in its control and Mr. Munshi will not object to that control until the issue can be presented to the Tribunal for interim relief."¹⁹

34.2. "In the alternative, Mr. Munshi requests that Mongolia be ordered to release Mr. Munshi from Prison 409 and any detention facility, even if it doesn't necessarily allow Mr. Munshi to leave Mongolia."²⁰

34.3. "Given the risks to Mr. Munshi's health, Mr. Munshi further requests that even if he is not allowed to leave Mongolia generally that he be allowed to travel to Singapore to receive the medical treatment that he requires."²¹

V. STANDARDS TO BE MET FOR THE GRANTING OF INTERIM MEASURES

35. The Claimant refers to Article 26 of the ECT, which provides in relevant part:

"Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably."

36. By Mongolia's consent to arbitration the Claimant argues that the applicable law to the substance of the dispute is international law, i.e. the ECT.

37. The specific powers given to the Emergency Arbitrator are specified in Article 1(2) of Annex II of the SCC Rules, which provides:

"The powers of the Emergency Arbitrator shall be those set out in Article 37 (1)-(3) of the Arbitration Rules. Such powers terminate on referral of the case to an Arbitral Tribunal pursuant to Article 22 of the Arbitration Rules, or when an emergency decision ceases to be binding according to Article 9(4) of this Appendix."

38. Article 37 of the SCC Rules provides in relevant part:

¹⁹ Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures, dated 19 January 2018, ¶ 168.

²⁰ *Id.*, ¶ 169.

²¹ *Id.*, ¶ 170.

“(1) The Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate.

(2) The Arbitral Tribunal may order the party requesting an interim measure to provide appropriate security in connection with the measure.

(3) An interim measure shall take the form of an order or an award.”

39. This appears to be a broad rule requiring a broad construction. Had the SCC Rules intended to limit the interim measures to a specific subset, the SCC Rules would have set out a list of specific interim measures that a tribunal or emergency arbitrator could grant. Instead, the SCC Rules uses the word “any.” The intention of the SCC Rules is therefore to give an arbitral tribunal or emergency arbitrator a broad discretion to grant interim measures if warranted by the issues presented in the case.
40. The Claimant states that the traditional requirements for the granting of interim relief in international law are: irreparable harm; necessity; urgency, and; proportionality.
41. The Emergency Arbitrator shall therefore determine the Claimants’ requested emergency relief in accordance with these criteria.

A. Irreparable Harm

42. The Claimant states that he is in fear for his life because of the conditions of his confinement in Prison 409 as well as his health conditions. The Claimant relies on a decision in which the former President of the International Court of Justice Gilbert Guillaume stated:

“In this respect, the Tribunal first observes that the International Court of Justice often granted provisional measures to avoid irreparable harm, although damages could be awarded in order to compensate the alleged prejudice. This has been done in particular when the health or life of people and sometimes their properties were in jeopardy.”²²

43. The Claimant further relies on the decision granting provisional measures in *United States Diplomatic and Consular Staff in Teheran*, where the International Court of Justice ordered the release of American hostages stating that the:

“...continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even

²² *Cemex Caracas Investments BV v. Venezuela*, ICSID Case No. ARB/08/15, preliminary measures (Mar. 3, 2010), ¶ 47.

danger to life and health and thus to a serious possibility of irreparable harm.”²³

44. The Emergency Arbitrator is troubled by the conditions of the Claimant’s detention in Mongolia. These conditions have been widely reported by international media outlets.²⁴ The alleged practice of the Mongolian government in detaining foreign business persons has also received attention in the international press.²⁵ The Emergency Arbitrator accepts that significant human hardship and serious risk to life and health is capable of constituting irreparable harm for as long as such conditions of confinement continue.

B. Necessity

45. The Claimant asserts that the granting of his requested emergency measures is necessary for the orderly conduct of the impending arbitration proceedings as Mongolia has made it systematically impossible for the Claimant to assist in the development of his own case. Of most relevance to the Claimant’s argument in this regard is the case of *Libananco Holding Co. Ltd. v. Turkey*, in which the tribunal ordered Turkey to not intercept or record communications between legal counsel for the claimant on the one hand and representatives for the claimant and other persons in Turkey on the other hand.²⁶ In granting these provisional measures the tribunal stated that “basic procedural fairness, respect for confidentiality and legal privilege...[and] the right of parties both to seek advice and to advance their respective cases freely and without interference...are indeed fundamental principles.”²⁷ The tribunal continued that:

*“...like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process – even if remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID Member State. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; **this principle applies in all arbitration, including***

²³ *United States Diplomatic and Consular Staff in Teheran (U.S. v. Iran)*, interim measures, 1979 I.C.J. 7, 20 (Dec. 15).

²⁴ <https://www.theguardian.com/world/2018/jan/23/british-australian-businessman-jailed-in-mongolia-appeals-to-un-over-unfair-trial>

²⁵ <http://time.com/3696794/mongolia-justin-kapla-hilarion-cajucom-jr-cristobal-david-taxevasion-mining-southgobi/>

²⁶ *Libananco Holding Co. Ltd. v. Turkey*, ICSID Case No. ARB/06/8, preliminary decision (June 23, 2008), ¶ 82.

²⁷ *Id.*, ¶ 78.

*investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).*²⁸

46. Necessity is at the heart of the determination as to whether or not interim measures should be granted, pending resolution of the merits of the case before a full tribunal. The Emergency Arbitrator is in agreement with the tribunal in *Libananco* that it is a fundamental principle, in all arbitration, for a claimant to be able to seek legal advice and advance their respective cases freely and without interference. This is especially relevant where, as is the case here, a claimant's incarceration and prevention from access to means of legal recourse forms part of the basis for the claimant's intended treaty claims. The Claimant's access to both Mongolian counsel and international counsel is severely limited. The strict rules in Prison 409 prevent the Claimant from having meaningful and confidential communications with counsel. The motivation for the Claimant's transfer to Prison 409 is unclear, but to the extent that this prevents the Claimant from instructing counsel and formulating his ECT claims against Mongolia, the Emergency Arbitrator decides that this seriously threatens the basic procedural fairness of the future arbitration. The Emergency Arbitrator is endowed with inherent powers to preserve the integrity of the arbitral process and considers that it is therefore necessary for Claimant to have reasonable access to both Mongolian and international counsel in order to advance his ECT claims. Furthermore, the Emergency Arbitrator considers that it would amount to a grave breach of access to justice, and a breach of international law, if Claimant's local and international counsel were prevented in any way from fulfilling their duties to their client by the imposition of restrictions on their ability to act. The Emergency Arbitrator is therefore satisfied that access to local and international counsel is a necessary interim measure that it would be appropriate for this Emergency Arbitrator to grant.
47. Where the Emergency Arbitrator diverges from the Claimant is in his argument that it would be necessary to be permitted to leave the jurisdiction of Mongolia in order to advance his claim. The Emergency Arbitrator recognises the Claimant's frailty and his health conditions that put him at risk, and the Emergency Arbitrator is deeply sympathetic to the Claimant in this regard, however, this Emergency Arbitrator is not satisfied that the Claimants fundamental rights in the procedural running of the arbitration extend so far as to interfere with the justice system of a sovereign state. As the Claimant himself makes clear in his Application, he "is not seeking this Emergency Arbitrator to declare him innocent, or even to have Mongolia suspend its criminal proceedings against Mr. Munshi. Mongolia can continue to investigate Mr. Munshi and can leave the conviction in place pending

²⁸ *Id.* (emphasis added).

an order from the Tribunal, once constituted.”²⁹ The Claimant also points out that an order from the Emergency Arbitrator would be interfering with the executive branch of the Mongolian government, and not the judiciary.³⁰ However, an order from this Emergency Arbitrator to release the Claimant and to permit him to leave Mongolia would essentially be granting the Claimant part of the final relief that he is seeking in the arbitration. Despite the Claimant’s assurances that he would hand himself over to Australian or British authorities if it is finally decided that his incarceration is proper, of which this Emergency Arbitrator is not entirely convinced, an emergency award requiring the Claimant’s release would go beyond that which is strictly necessary to allow the Claimant to file his request for arbitration and advance his claims against Mongolia.

48. The Claimant relies on the case of *Nova Group Investments v. Romania*, in which the tribunal ordered Romania to halt its attempts to extradite to Romania a party representative and key witness for the claimant in order to face criminal charges there.³¹ The Emergency Arbitrator is not satisfied that *Nova Group* establishes a precedent that would warrant the Claimant’s release. In *Nova Group* Romania was temporarily prevented from pursuing their attempts to extradite the witness to Romania. The witness had not yet been tried and convicted of any crime, and the tribunal’s interference with the sovereignty of Romania was therefore narrower and more limited. In the Claimant’s case, he has already been convicted of a crime and sentenced to a term of imprisonment by Mongolian courts. It is not for this Emergency Arbitrator to decide that the Claimant is in fact innocent,³² but an award granting the Claimant’s release would, as a practical consequence, be overturning a decision of Mongolian courts, and one that has not yet been fully briefed or argued. The Emergency Arbitrator is not aware of any general or fundamental right, or any right granted by the provisions of the ECT, to be temporarily released from incarceration in order to pursue claims under Part III of the ECT, even if a person’s health is deteriorating.
49. The Claimant states that “[h]e merely seeks to be released so that he is able to file and prosecute his claims free of interference by the Mongolian state.”³³ The Emergency Arbitrator is not persuaded that it is necessary for the Claimant to be released from detainment in order to proceed with his arbitration claims. However, it is a fundamental principle of the arbitral process that the Claimant be afforded

²⁹ Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures, dated 19 January 2018, ¶ 19.

³⁰ Claimant’s Letter to the Emergency Arbitrator, dated 3 February 2018, p. 3.

³¹ *Nova Group Investments BV v. Romania*, ICSID Case No. ARB/16/19, provisional measures (Mar. 29, 2017).

³² Application for the Appointment of an Emergency Arbitrator and Issuance of a Decision on Interim Measures, dated 19 January 2018, ¶ 140.

³³ *Id.*

reasonable and confidential access to his local and international counsel in order to pursue his claims.

C. Urgency

50. The Claimant further argues that his requested relief is urgent, both in light of his need to file a request for arbitration and because of his health and conditions of imprisonment. The Claimant argues that this urgency has been made all the more apparent in the context of Mongolia's recent decision to move the Claimant to Prison 409, which places the Claimant's health at further risk and also prevents the Claimant from communicating effectively and confidentially with local and international counsel in order to seek to assert his rights under the ECT.
51. While Article 37(1) of the SCC Rules does not reference urgency as a criteria for deciding on interim measures, Article 7 of Appendix II of the SCC Rules provides that the Emergency Arbitrator shall take "into account the urgency inherent in such proceedings." As the Claimant makes reference to, the tribunal in *Azurix v. Argentina* stated that:

*"[g]iven that the purpose of the measures is to preserve the rights of the parties, the urgency is related to the imminent possibility that the rights of a party be prejudiced before the tribunal has rendered its award."*³⁴

52. As the Emergency Arbitrator has already identified, the fundamental right of the Claimant to access his counsel is currently being infringed upon. Without being able to exercise this right the Claimant is being deprived of access to justice. There is no indication that the Claimant's current situation will be resolved, or that Mongolia will ease his strict rules of detention anytime soon. In these circumstances, the Emergency Arbitrator decides that the Claimant's right to communicate with local and international counsel is urgent.

D. Proportionality

53. Lastly, the Claimant argues that the granting of his emergency measures is proportional as Mongolia is not burdened by the Claimant's release from incarceration.
54. In determining proportionality, the Emergency Arbitrator seeks to weigh the benefits and burdens imposed on the Parties should the requested emergency relief be granted. The Claimant contends that there would be no burdens to Mongolia because it is free to keep the Claimant's conviction in place and continue to investigate the Claimant if it so chooses. Mongolia could also seek to have the

³⁴ *Azurix v. Argentina*, ICSID Case No. ARB/01/12, provisional measures (Aug. 6, 2003), ¶ 33.

Claimant extradited to Mongolia to serve the remainder of his sentence, or request the tribunal to do so, should the Claimant ultimately be unsuccessful in his claims. Meanwhile, the Claimant argues that if he is granted his emergency measures and permitted to leave Mongolia the benefits will be his ability to have unfettered access to his international counsel in order to bring forward a claim, and also to address his aforementioned health conditions which he says currently pose a significant threat to him. Thus, the Claimant argues, the benefits of granting the emergency measures fair outweigh the burdens that would be imposed on Mongolia in these circumstances.

55. The Emergency Arbitrator is seriously concerned by the version of facts and events that have been alleged by the Claimant. The Claimant's conditions of detention, the circumstances in which he became detained in Mongolia, and the recent escalation of events which culminated in his transfer to Prison 409 all present significant human rights issues. As the *Libananco* tribunal also held, the interference or the obstruction of the arbitration amounts to a violation of fundamental principles at the core of the arbitral process.³⁵ To the extent that Mongolia seeks to impair the Claimant's ability to present an ECT claim the Emergency Arbitrator believes that he is obliged to award measures that would permit the Claimant to proceed with his claim. Even though the Claimant has not provided arguments on this point, the Emergency Arbitrator is satisfied that the Claimant has established, *prima facie*, reasonable prospects of success on the merits of his claims.
56. Nevertheless, the Emergency Arbitrator is not persuaded by the Claimant's argument that the granting of all the emergency measures being sought would not place any burden on Mongolia. The Claimant's current detention has come about by application of Mongolian law and through the criminal procedure process in place in Mongolia. While the Claimant may have legitimate issues with this system, the Emergency Arbitrator must still accept that these are actions that have been taken by a sovereign state. To therefore seek to interfere with Mongolia's justice system and police power would place a considerable burden on Mongolia. The Emergency Arbitrator accepts that Mongolia, like most other states, has sacrificed part of their sovereignty by signing international agreements and consenting to international arbitration,³⁶ but the Emergency Arbitrator does not believe that it would be proportional, based on the evidence that has been submitted to the Emergency Arbitrator, to order Mongolia to relinquish its control of a person that has been tried and convicted of committing a crime under Mongolian law.

³⁵ *Libananco Holding Co. Ltd. v. Turkey*, ICSID Case No. ARB/06/8, preliminary decision (June 23, 2008), ¶ 78.

³⁶ *Nova Group Investments BV v. Romania*, ICSID Case No. ARB/16/19, provisional measures (Mar. 29, 2017), ¶ 315.

57. While being understanding of the Claimant's circumstances the Emergency Arbitrator is concerned that there exists no basis in international law for an award on interim measures ordering a person to be released from incarceration in order to commence an international arbitration. If the Emergency Arbitrator ignored the fact that the Claimant is seeking to shortly file a claim under Article 26 of the ECT, would there exist any other basis for the Claimant's release (right now) under international investment treaty law? The Emergency Arbitrator is not persuaded that the commencement of an arbitration under the ECT is sufficient reason to interfere with the powers of a sovereign state and to order the release of the Claimant. This would not be a proportional measure in accordance with the test laid down by the Claimant. The Emergency Arbitrator believes that recourse to diplomatic means of protection may be the most appropriate way for the Claimant to seek the requested relief.
58. For these reasons, the Emergency Arbitrator decides that it is appropriate to award the Claimant interim measures allowing him access to local and international counsel in the commencement and progression of his claims against Mongolia. The Emergency Arbitrator does not consider it appropriate to order Mongolia to release the Claimant from detention pending the outcome of his forthcoming arbitration.

VI. COSTS

59. Article 10(6) of Appendix II of the SCC Rules provides as follows:

"The Emergency Arbitrator shall apply the principles of Articles 49 (6) and 50 of the Arbitration Rules when apportioning the costs of the emergency proceedings."

60. Article 49(6) of the SCC Rules provides:

"Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances."

61. Article 50 of the SCC Rules provides:

"Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, at the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances."

62. The Claimant has not requested the Emergency Arbitrator to make any decision on costs. The Emergency Arbitrator therefore makes no determination as to the allocation of costs between the Parties.

VII. DECISIONS

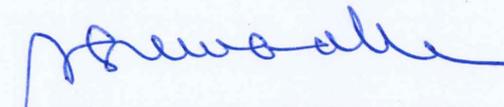
63. For the foregoing reasons, the Emergency Arbitrator:

63.1. ORDERS Mongolia to allow the Claimant to have reasonable access to both his local Mongolian counsel and to international counsel. Such access to counsel must uphold the right of the Claimant to communicate confidentially with counsel, and must also be without any forms of surveillance or interference from Mongolian authorities or other persons.

63.2. DENIES all and any other relief sought by the Claimant in his Application.

Decided by the Emergency Arbitrator:

Seat of Arbitration: Stockholm, Sweden



Mr. Bernardo M. Cremades

Date: 5 February 2018