

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Churchill Mining PLC v. Republic of Indonesia
(ICSID Case No. ARB/12/14)**

PROCEDURAL ORDER NO. 2

Request For Joinder

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal
Mr. Michael Hwang S.C., Arbitrator
Professor Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal

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I. Procedural Background

1. On 20 November 2012, the Government of the Regency of East Kutai (“the Applicant”) submitted to the Arbitral Tribunal a petition to participate as a party in the present arbitration (“the Petition” or “the Request for Joinder”). The Respondent expressed its support by agreeing to the Petition on 22 November 2012. The Claimant submitted its comments on 26 November 2012, asking the Tribunal to dismiss the Petition.
2. At the first session, which was held on 27 November 2012, the Tribunal asked the Parties whether they wished to comment any further on the Petition. It is to be stressed that the first session was attended by representatives of both Parties, including Mr. Dermawan who has acted as the representative of the Regency of East Kutai and also holds a power of attorney to represent the Republic of Indonesia. Answering the Tribunal’s question, the Parties indicated that they had nothing to add in respect of the joinder. In Procedural Order No. 1 of 6 December 2012, the Tribunal noted that the question was thus left for the Tribunal to decide and that it would revert to the Parties with a decision on the Petition in due course. The present Order addresses the issues raised by the Petition.

II. Position of the Parties

1. Position of the Applicant
3. The Applicant requests permission to join the present arbitration proceedings as a party. The Applicant argues that the Claimant’s main cause of action, as stated in its Request for Arbitration, is primarily to assess the legality of the administrative acts of the Applicant issuing and revoking the mining licenses which are at the core of the present dispute. Thus, assessing the legality of the acts of the Respondent in this case, i.e. the Government of the Republic of Indonesia, would only be the secondary cause of action. According to the Applicant, the Government of the Regency of East Kutai has the authority to issue regulations and licenses for a broad range of economic activities taking place within the Regency, thus benefiting from a certain degree of autonomy from the central government.

4. In essence, the Applicant raises four arguments in support of the Petition. First, the Applicant affirms that it has a legitimate interest in the subject matter of the dispute, because it is the authority directly responsible for the administrative decisions that led to this arbitration. Second, the Applicant argues that its interests will be directly affected by the outcome of these proceedings. Third, the Applicant contends that, due to its direct knowledge of the facts underlying the case, it could contribute to the expeditious and correct solution of the case if it were allowed to participate as a disputing party in these proceedings. Fourth and last, the Applicant submits that fundamental justice and fairness require a fair hearing of all those whose interests may be adversely affected by the claims made in these proceedings. Whereas, in the view of the Applicant, most investor-State arbitrations are more of a private law character, the present case raises a series of issues of a public law nature that would best be addressed if the Applicant were allowed to join these proceedings in order to respond to any arguments raised by the other two parties.
5. With respect to the legal basis of the Petition, the Applicant invokes on the one hand Article 44 of the ICSID Convention which, it argues, grants sufficient flexibility to the Tribunal to establish fair and appropriate procedural rules in matters relating to intervention by third parties. On the other hand, the Applicant refers to two sections of the Indonesian Civil Procedure Code providing for the joinder of a third party if called upon by the Respondent in order to safeguard its rights (CPC Book One, Chapter I, Section 5, Articles 70-76) or in order to assert the third party's own interests (CPC Book One, Chapter II, Section 17, Articles 279-282).
6. Finally, the Applicant considers that it should have standing in the present proceedings as a party because it has duly been designated by the Respondent, as a constituent subdivision in the sense of Article 25(1) and (3) of the ICSID Convention on 27 September 2012, thus fulfilling the formal requirements set out in the Convention.
7. For these reasons, the Applicant asks that the Tribunal "(i) grant[] the Petitioner [i.e. the Applicant] standing to participate as party in ICSID Case No. ARB/12/14 arbitration proceedings and any proceedings that may be convened to determine the claim made by Churchill Mining PLC in this matter, and all rights of participation accorded to other parties to this/these arbitration proceedings; and (ii) permit[] the

Petitioner [i.e. the Applicant] to respond to any arguments by either party to this arbitration proceedings concerning this petition, including through attendance at and participation in any hearings in which this petition is discussed”.

2. Position of the Respondent

8. In its letter of 22 November 2012, addressed to the Office of the Secretary General of ICSID, the Respondent expressed its support for the Petition and requested the Tribunal to grant the Applicant the right to join the present proceedings as a party.
9. Pursuant to the Presidential Decree No. 30 and the Presidential Regulation No. 78 of 22 September 2012, the Respondent notified ICSID on 27 September 2012 that it designated the Government of the Regency of East Kutai, i.e. the Applicant, as a constituent subdivision within the meaning of Article 25(1) of the ICSID Convention. The Respondent equally notified ICSID in accordance with Article 25(3) of the Convention that no approval of the Respondent was required for the consent given by the designated constituent subdivision.

3. Position of the Claimant

10. The Claimant asks the Tribunal to dismiss the Petition for essentially three reasons. First, regarding the applicable law, the Claimant submits that Indonesian procedural law does not apply to this question of procedure. The Claimant also argues that neither the ICSID Convention nor the Arbitration Rules contain any provisions relating to the joinder of third parties to ICSID proceedings. Second, regarding the consent of the parties, the Claimant states that it brought its claim against the Republic of Indonesia, and not the Regency of East Kutai, on the basis of Article 7 of the Bilateral Investment Treaty between the United Kingdom and the Republic of Indonesia (the “BIT”). Therefore, no consent to arbitrate can be established in the absence of any investment agreement between the Applicant and the Claimant containing an ICSID arbitration clause. Third and last, regarding the designation by the Respondent of the Government of the Regency of East Kutai as a subdivision in the sense of Article 25(1) and (3), the Claimant affirms that the designation took place four months after it filed its Request for Arbitration on May 22, 2012 and three months after its registration on June 22,

2012, which, according to the Claimant, are the critical dates for the existence of the designation.

11. For these reasons, the Claimant argues that the Petition must fail and the Applicant lacks *locus standi*, in the absence of an express consent given by the Claimant. Furthermore, the Claimant asserts that no issues of fundamental justice and fairness arise in the present instance, as the Government of the Regency of East Kutai will have ample opportunity to participate in the proceedings, either as a part of the Indonesian team of attorneys or by furnishing evidence and arguments to these same attorneys.

III. Applicable Legal Framework

12. The relevant legal framework regarding the conduct of the proceedings is composed of (i) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention” or “the Convention”); and (ii) of the 2006 version of the ICSID Rules of Procedure for Arbitration Proceedings (“the Arbitration Rules”).
13. With regard to the procedural powers of the Arbitral Tribunal, Article 44 of the ICSID Convention provides that:

“Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”

14. Rule 19 of the Arbitration Rules further provides that:

“The Tribunal shall make the orders required for the conduct of the proceeding.”

15. The relevant legal framework in connection with the participation of constituent subdivisions or agencies of a Contracting State as parties in ICSID proceedings is to be found in (i) the ICSID Convention; and (ii) the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“the Institution Rules”).

16. Article 25 of the ICSID Convention provides in relevant part that:

“(1) 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.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.”

17. The formal requirements concerning the content of a Request for Arbitration are set out in Article 36 of the ICSID Convention and Rule 2 of the Institution Rules. Article 36(2) of the ICSID Convention reads as follows:

“The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.”

18. Rule 2 of the Institution Rules provides the following where relevant:

“(1) The request shall:

(a) designate precisely each party to the dispute and state the address of each;

(b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention;

(c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required.”

19. The Applicant also invokes provisions of the Indonesian Code of Civil Procedure on joinder of third parties. ICSID proceedings are governed exclusively by international law, i.e. by any procedural rules contained in the investment treaty as well as by the ICSID Convention, Arbitration and Institution Rules. Accordingly, there is no room for the application of rules of procedure pertaining to municipal law.

IV. Analysis

20. Unlike some other international arbitration statutes and institutional rules, neither the ICSID Convention nor the Arbitration Rules contain a provision on the joinder of third parties to pending proceedings. The issue thus is whether under its general procedural powers provided in Article 44 of the Convention, read in conjunction with Article 19 of the Arbitration Rules, the Tribunal may decide to join the Applicant to the present proceedings.
21. Article 44 does not confer unlimited discretionary powers to the Tribunal. Article 44 provides that “[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules *or any rules agreed by the parties*, the Tribunal shall decide the question” (emphasis added). Similarly, Rule 20(2) of the Arbitration Rules requires that the Tribunal “shall apply any agreement between the parties on procedural matters” as long as it does not conflict with the Convention or the Administrative and Financial Regulations. Both these provisions show that the Tribunal must generally defer to the Parties’ agreements on procedural matters.
22. Yet, in the present case, there is no agreement between the original Parties on the joinder. While the Respondent gave its approval to the Applicant’s request to be joined, the Claimant has opposed it.
23. In addition, the powers granted to the Tribunal under Article 44 ICSID Convention do not authorize it to disregard the Convention’s requirements on jurisdiction. The ICSID framework allows constituent subdivisions of Contracting States to appear as parties in ICSID proceedings if all the conditions set out in the Convention are met. Article 25(1) and (3) of the Convention expressly envisage this possibility provided that (i) the constituent subdivision has been designated to the Centre by the Contracting State; (ii) the constituent subdivision has expressed its consent to the jurisdiction of the Tribunal; and (iii) the Contracting State has given its approval to the consent expressed by the constituent subdivision or has indicated that it waives such approval.
24. In this case, the Respondent notified ICSID of its designation of the Applicant as a constituent subdivision pursuant to Article 25(1) on 27 September 2012, i.e. over four months after the institution of these proceedings. While the Applicant and the

Respondent seem to be of the opinion that this designation satisfies the requirements of the Convention, the Claimant asserts that these requirements need to be fulfilled on the day of the institution of the proceedings, i.e. on the day of the filing of the Request for Arbitration.

25. For purposes of this order, it can be left open whether a designation communicated after the Request for Arbitration may be admissible. The Tribunal can similarly dispense with deciding whether the Applicant's request to be joined constitutes consent of the constituent subdivision in accordance with Article 25(1). Indeed, bearing in mind the consensual nature of ICSID arbitration, the Tribunal need only observe that the Claimant has not consented to arbitrate with the Regency of East Kutai. It has filed an arbitration under the BIT and, by doing so, has accepted the arbitration offer extended by the Republic of Indonesia in such treaty. That acceptance does not cover third parties. As stated by the Claimant in its submission of 26 November 2012, "Churchill has brought its claim against the Republic of Indonesia pursuant to Article 7 of the Bilateral Investment Treaty between the United Kingdom and the Republic of Indonesia (the "Treaty"). The Contracting Parties to the Treaty are the United Kingdom and the Republic of Indonesia. For the purposes of Article 7, it is only these Contracting Parties who have consented to submit to the Centre any dispute in relation to an 'investment' (as defined in the Treaty)." The Tribunal concurs with this proposition.
26. Considering the Republic of Indonesia as sole Respondent also appears in line with the fundamental principle of the unity of the State. It is Indonesia as a State, represented by its central governmental authorities, which is sued under the BIT and stands to respond for alleged treaty breaches by the various organs and agents making up the State.
27. On this basis, the Tribunal cannot but deny the Applicant's first request to be granted the status of party in this arbitration. The Applicant's second request which essentially seeks permission for the Applicant to be heard in connection with its request for joinder serves no further purpose, there having been no further written or oral submissions on this matter and the Tribunal having duly considered the Applicant's arguments as stated in its Petition.

28. Even though the Regency of East Kutai cannot be joined as a party to these proceedings, the Respondent may obviously include any representative of the Regency in the legal team that argues the case before the Tribunal, as it actually has already done; it may also cooperate with the Applicant in the preparation of the case and submit evidence provided by representatives of the Regency of East Kutai.

V. Order

29. For the foregoing reasons, the Tribunal determines that the Applicant cannot join the present proceedings as a party. The Request for Joinder is rejected.

For and on behalf of the Tribunal

[Signed]

Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 5 February 2013