

# **International Centre for Settlement of Investment Disputes**

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**Churchill Mining Plc**

The Claimant

v.

**Republic of Indonesia**

The Respondent

**ICSID Case No. ARB/12/14 and 12/40**

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## **DECISION ON JURISDICTION**

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Arbitral Tribunal:

Prof. Gabrielle Kaufmann-Kohler, President

Mr. Michael Hwang S.C., Arbitrator

Prof. Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal:

Mr. Paul-Jean Le Cannu

Assistant to the Tribunal:

Mr. Magnus Jesko Langer

Date: 24 February 2014

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## TABLE OF ABBREVIATIONS

AIM	Alternative Investment Market of the London Stock Exchange
BIT	Bilateral Investment Treaty, specifically, without further designation, the United Kingdom-Indonesia BIT (“UK-Indonesia BIT”)
BKPM	Indonesian Investment Coordinating Board
BPK	Financial Auditor Body ( <i>Badan Pemeriksa Keuangan</i> )
Claimant	Churchill Mining Plc
Claimants	Churchill Mining Plc and Planet Mining Pty Ltd
C-PHB1	Claimant’s first Post-Hearing Brief of 23 August 2013
C-PHB2	Claimant’s second Post-Hearing Brief of 30 August 2013
C-RFA	Churchill Mining Plc’s Request for Arbitration of 22 May 2012 in ICSID Case No. ARB/12/14
EKCP	East Kutai Coal Project
ER1	First Expert Report
ER2	Second Expert Report
Exh. C-	Claimant’s Exhibits
Exh. CLA-	Claimant’s Legal Authorities
Exh. P-	Planet’s Exhibits
Exh. R-	Respondent’s Exhibits
Exh. RLA-	Respondent’s Legal Authorities
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IUP	Mining Undertaking License ( <i>Izin Usaha Pertambangan</i> )
KP	Mining Authorization ( <i>Kuasa Pertambangan</i> )
Mem.	Claimant’s Memorial on Jurisdiction and the Merits of 13 March 2013
PKP2B	Coal Cooperation Agreement ( <i>Perjanjian Karya Pengusahaan Pertambangan Batubara</i> )

PMA	Foreign direct investment ( <i>Penanaman Modal Asing</i> )
PO	Procedural Order
P-RFA	Planet Mining Pty Ltd's Request for Arbitration of 26 November 2012 in ICSID Case No. ARB/12/40
PT	Limited liability company ( <i>Perseroan Terbatas</i> )
PT ICD	PT Indonesian Coal Development
PT INP	PT Investmine Nusa Persada
PT IR	PT Investama Resources
PT RP	PT Ridlatama Power
PT RS	PT Ridlatama Steel
PT RTM	PT Ridlatama Tambang Mineral
PT RTP	PT Ridlatama Trade Powerindo
PT TCUP	PT Techno Coal Utama Prima
Rejoinder	Respondent's Rejoinder on Objections to Jurisdiction of 6 May 2013
Reply	Claimant's Reply to the Objections to Jurisdiction of 30 April 2013
Respondent	Republic of Indonesia
RMOJ	Respondent's Memorial on Objections to Jurisdiction of 8 April 2013
R-PHB1	Respondent's first Post-Hearing Brief of 23 August 2013
R-PHB2	Respondent's second Post-Hearing Brief of 30 August 2013
Tr. [date, page:line]	Transcript of the hearing on jurisdiction of 13-14 May 2013
WS	Witness Statement

## **I. THE PARTIES**

### **A. THE CLAIMANT**

1. The Claimant is Churchill Mining Plc, a public limited company incorporated in England and Wales on 24 February 2005 (Registration No. 5275606) (“Churchill” or the “Claimant”). It provides mining services, including general survey services, exploration and exploitation of mining sites.
2. The Claimant is represented in this arbitration by Messrs. Stephen Jagusch, Anthony Sinclair, Alex Gerbi, Epaminontas Triantafilou, Ms. Bridie Balderstone, and Mr. Benjamin Burnham of Quinn Emanuel Urquhart & Sullivan UK LLP, and by Messrs. Fred Bennett, David Orta, and Tai-Heng Cheng of Quinn Emanuel Urquhart & Sullivan LLP.

### **B. THE RESPONDENT**

3. The Respondent is the Republic of Indonesia (“Indonesia” or the “Respondent”; and together with Churchill, the “Parties”).
4. The Respondent is represented in this arbitration by Dr. Amir Syamsudin, Minister of Law and Human Rights of the Republic of Indonesia, Coordinator of Legal Representative Team of the President of the Republic of Indonesia; Mr. Didi Dermawan, Legal Representative of the Regent of East Kutai and the Minister of Law and Human Rights of the Republic of Indonesia; Mr. Cahyo R. Muzhar, Ministry of Law and Human Rights of the Republic of Indonesia, Supporting Legal Team Member of Legal Representative Team of the President of the Republic of Indonesia; Ms. Claudia Frutos-Peterson of Curtis, Mallet-Prevost, Colt & Mosle LLP, Supporting Legal Team Member of Legal Representative Team of the President of the Republic of Indonesia; Dr. Freddy Harris, Secretary of Team Churchill Mining Case, Ministry of Law and Human Rights of the Republic of Indonesia; Mr. Richele S. Suwita, Ms. Marcia S. Tanudjaja, and Ms. Dwi Deila Wulandari Taslim of DNC Advocates at Work.

## **II. THE FACTS**

5. This section summarizes the facts of this dispute insofar as they bear relevance to Indonesia’s objections to jurisdiction. Unless otherwise indicated the facts are undisputed.

6. Pursuant to Procedural Order No. 4 of 18 March 2013, the present arbitration was consolidated with ICSID arbitration ARB/12/40 initiated by Planet Mining Pty Ltd, an Australian mining company wholly owned by Churchill. It was left open whether the Tribunal would render one or two decisions on jurisdiction or awards. The Tribunal has decided to issue two separate decisions (see below ¶ 83). The facts and the procedural history are largely identical in both cases.

#### **A. THE EAST KUTAI COAL PROJECT**

7. The East Kutai Coal Project (the “EKCP”) is a mining project developed by the Claimant jointly with various Indonesian companies in the Regency of East Kutai on the island of Kalimantan in Indonesia. According to various sources, the area encompassing the EKCP hosts the seventh largest coal deposit on the planet and the second largest coal deposit in Indonesia.<sup>1</sup> The Claimant asserts that through surveys conducted over several years, it has confirmed the existence of approximately 2.7 billion metric tons of coal in the EKCP area.
8. The coal found there is classified as high-quality sub-bituminous coal with very low sulphur and ash content.<sup>2</sup> According to the Claimant, this high-quality coal is ideally suited for the new generation power stations which have been developed lately in countries like India and China and are also in high demand in Europe because of their reduced environmental impact.<sup>3</sup>
9. Relying on a Feasibility Study modeling an evaluation of the EKCP for an initial 25-year period,<sup>4</sup> the Claimant indicates that the project has a pre-tax net present value of approximately USD 1.8 billion and pre-tax cash flows in excess of USD 500 million per year over the first 20 years of capacity production.
10. On 10 March 2005, the Regent of East Kutai issued three so-called KP Exploration Licenses to PT Nusantara Wahau Coal (“PT NWC”),<sup>5</sup> PT Kaltim Nusantara Coal

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<sup>1</sup> Mem., ¶¶ 7, 9.

<sup>2</sup> Mem., ¶¶ 9, 124.

<sup>3</sup> Mem., ¶ 124.

<sup>4</sup> Churchill Mining Plc East Kutai Coal Project Feasibility Study, September 2010 (**Exh. C-250**).

<sup>5</sup> Exploration Business License for Nusantara Wahau Coal, Decision No. 80/02.188.45/HK/III/2005 dated 10 March 2005 (**Exh. C-16**).



(“PT KNC”),<sup>6</sup> and PT Batubara Nusantara Kaltim (“PT BNK”)<sup>7</sup> (together the “Nusantara companies”) over areas that coincide with the future EKCP.

## **B. THE 2005 BKPM APPROVAL OF PT INDONESIA COAL DEVELOPMENT**

11. On 23 November 2005, the Indonesian Investment Coordinating Board (“BKPM”) delivered an authorization to PT Indonesian Coal Development (“PT ICD”) to be incorporated as an Indonesian foreign direct-investment company (a so-called “PMA”) and to conduct business in the mining sector in Indonesia (the “2005 BKPM Approval”).<sup>8</sup> PT ICD was initially created by Profit Point Group Ltd, a company incorporated in the British Virgin Islands, and Mr. Andreas Rinaldi, an Indonesian citizen and co-founder of the Ridlatama group.<sup>9</sup> The authorized capital of PT ICD is Rupiah (“Rp.”) 2,512,500,000, divided into 250’000 shares, with a nominal value of Rp. 10,050 per share.<sup>10</sup> Profit Point Group Ltd acquired 237,500 shares and Mr. Andreas Rinaldi 12,500 shares.<sup>11</sup>
12. According to the 2005 BKPM Approval, PT ICD could engage in general mining supporting services, *i.e.*, “consultancy in relation to business planning for construction of building and other facilities in the domain of general mining projects”.<sup>12</sup>
13. Section IX(4) of the 2005 BKPM Approval contains a dispute settlement clause making reference to ICSID arbitration in the following terms:

“In the event of dispute between the company and the Government of the Republic of Indonesia which cannot be settled by consultation/deliberation, the Government of Indonesia is prepared/ready to follow settlement according to provisions of the convention on the settlement of disputes between States and Foreign Citizen regarding investment in accordance with Law Number 5 Year 1968”.<sup>13</sup>

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<sup>6</sup> Exploration Business License for Kaltim Nusantara Coal, Decision No. 78/02.188.45/HK/III/2005 dated 10 March 2005 (**Exh. C-15**).

<sup>7</sup> Exploration Business License for Batubara Nusantara Kaltim, Decision No. 77/02.188.45/HK/III/2005 dated 10 March 2005 (**Exh. C-14**).

<sup>8</sup> Foreign Capital Investment Approval for PT ICD, Decision No. 1304/I/PMA/2005 (with Certificate of Translation) (**Exh. C-17**); BKPM Foreign Investment Approval Letter No. 1304/I/PMA/2005 (**Exh. R-003**), both dated 23 November 2005.

<sup>9</sup> *Id.*, Section I.

<sup>10</sup> *Id.*, Section VII.

<sup>11</sup> *Id.*, Section VII(4).

<sup>12</sup> *Id.*, Section III.

<sup>13</sup> *Id.*, Section IX(4).

14. On 28 December 2005, PT ICD's articles of association received approval from the Indonesian Ministry of Law and Human Rights.<sup>14</sup>

**C. CHURCHILL AND PLANET'S ACQUISITION OF SHARES IN PT ICD AND THE 2006 BKPM APPROVAL**

15. In 2006, an Indonesian group of companies, the Ridlatama group, introduced the EKCP to Churchill and Planet, who decided to invest in the project because they considered it promising. As a first step, Churchill and Planet entered into discussions with Ridlatama about acquiring PT ICD.
16. On 24 April 2006, Churchill and Planet acquired the shares in PT ICD from the initial shareholders, Profit Point Group Ltd and Mr. Andreas Rinaldi.<sup>15</sup> Churchill acquired a 95% stake in PT ICD, while Planet acquired the remaining 5%. On 8 May 2006, the BKPM approved the change in PT ICD's shareholding (the "2006 BKPM Approval").<sup>16</sup>
17. The 2006 BKPM Approval incorporated by reference the terms of the 2005 BKPM Approval, stating that "[t]his Letter of Approval is an integral part of Foreign Capital Investment Approval Letter No. 1304/I/PMA/2005 dated 23 November 2005".<sup>17</sup>
18. On 31 August 2007, the Ministry of Energy and Mineral Resources and the Investment Coordinating Board decided to grant PT ICD a Permanent Business License to undertake general mining supporting services.<sup>18</sup>
19. According to Indonesia, PT ICD was to report on the change in its shareholding to the Minister of Law and Human Rights. This was done, again according to Indonesia, on 8 April 2008.

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<sup>14</sup> Decree of the Minister of Justice and Human Rights No. C-34768 HT.01.01TH.2005 to approve the Establishment Deed of PT ICD dated 28 December 2005 (**Exh. C-19**).

<sup>15</sup> Mem., ¶¶ 62-66; RMOJ, ¶ 50.

<sup>16</sup> Approval of Changes in Participation Within the Company's Capital for PT ICD, Decision No. 579/III/PMA/2006 dated 8 May 2006 (**Exh. C-24**).

<sup>17</sup> *Id.*, p. 1. See also: Mem., ¶ 68; Reply, ¶ 12.

<sup>18</sup> Mem., ¶ 70; Makarim First Expert Report ("ER1"), p. 12; RMOJ, ¶¶ 51, 225. Ministry of Energy and Mineral Resources Grant of Business License to PT ICD, Decision No. 778/T/PERTAMBANGAN/2007 dated 31 August 2007 (**Exh. C-53**); Indonesian Investment Coordinating Board, Decision of the Chairman No. 778/T/MINING/2007 dated 31 August 2007 (**Exh. P-26**).

#### D. THE RIDLATAMA GROUP AND THE 2007 KP GENERAL SURVEY BUSINESS LICENSES

20. The Ridlatama group consists of seven companies incorporated in Indonesia and owned or controlled by four Indonesian individuals: Messrs. Andreas Rinaldi and Anang Mudjiantoro, and their wives, Mmes. Ani Setiawan Rinaldi (“Setiawan”) and Florita.<sup>19</sup> The seven companies are (1) PT Ridlatama Tambang Mineral (“PT RTM”), (2) PT Ridlatama Trade Powerindo (“PT RTP”), (3) PT Ridlatama Steel (“PT RS”), (4) PT Ridlatama Power (“PT RP”), (5) PT Investama Resources (“PT IR”), (6) PT Investama Nusa Persada (“PR INP”), and (7) PT Techno Coal Utama Prima (“PT TCUP”) (together the “Ridlatama companies”).
21. Of the seven Ridlatama companies, the first six successively obtained mining licenses for the area covering the EKCP. PT TCUP was initially established on 21 November 2006, being authorized to engage in geological and mining services.
22. On 12 February 2007, PT RS and PT RP were granted by the Regent of East Kutai (the “Regent”), and in accordance with 1967 Mining Law,<sup>20</sup> two General Survey Business Licenses in two blocks of the EKCP area,<sup>21</sup> covering an area of approximately 400 square kilometers situated approximately 110 kilometers northwest of Sangatta.<sup>22</sup> According to Churchill, the licenses lapsed in 2008 and the two companies became dormant because no sufficient coal deposits were found.<sup>23</sup> In any event, these two concessions did not overlap with any of the Nusantara concession areas (which according to Churchill had expired in March 2006), so no dispute arose between the Parties over these two concessions.<sup>24</sup>
23. On 24 May 2007, PT RTM and PT RTP obtained from the Regent two General Survey Business Licenses in the EKCP area,<sup>25</sup> and on 29 November 2007, PT IR and PT INP also

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<sup>19</sup> Mem., ¶ 59.

<sup>20</sup> Law No. 11/1967 on the Basic Provisions of Mining (**Exh. CLA-5**).

<sup>21</sup> General Survey Business License for Ridlatama Power, Decree No. 53/02.188.45/HK/II/2007 dated 12 February 2007 (**Exh. C-29**); General Survey Business License for Ridlatama Steel, Decree No. 52/02.188.45/HK/II/2007 dated 12 February 2007 (**Exh. C-30**).

<sup>22</sup> Mem., ¶ 94; Witness Statement of Brett Dennis Gunter (“Gunter WS”), ¶¶ 63-65.

<sup>23</sup> Mem., ¶ 74; Witness Statement of David Francis Quinlivan (“Quinlivan WS”), ¶ 26.

<sup>24</sup> Gunter WS, ¶ 59.

<sup>25</sup> Mem., ¶ 94; RMOJ, ¶¶ 55, 57; General Survey Business License for Ridlatama Tambang Mineral, Decree No. 210/02.188.45/HK/V/2007 dated 24 May 2007 (**Exh. C-40**; **Exh. P-18**; **Exh. R-011**); General Survey Business License for Ridlatama Trade Powerindo, Decree No. 211/02.188.45/HK/V/2007 dated 24 May 2007 (**Exh. C-41**; **Exh. P-19**; **Exh. R-012**).

obtained General Survey Business Licenses,<sup>26</sup> increasing the EKCP area to approximately 775 square kilometers.<sup>27</sup>

24. On 25 May 2007, following the issuance of the General Survey Business Licenses to PT RTM and PT RTP, Churchill and Planet, through PT ICD, entered into a Cooperation Agreement with PT RTM, PT RTP, PT RS, PT RP, and PT TCUP,<sup>28</sup> and an Investors Agreement with PT RTM, PT RTP, PT RS, PT RP, PT TCUP, Mmes. Setiawan and Florita.<sup>29</sup> At that point in time, Mmes. Setiawan and Florita held all shares in PT RTM, PT RTP, PT RS and PT RP. On the same date, Mmes. Setiawan and Florita also concluded Pledge of Shares Agreements with PT ICD, and PT RTM, PT RTP, PT RS, and PT RP.<sup>30</sup>
25. The Cooperation Agreement concerned, *inter alia*, PT ICD's obligation to "fully plan, set up and perform all mining operations" in the EKCP area covered by the mining licenses of PT RTM, PT RTP, PT RS and PT RP, in exchange for 75% of the generated revenue.<sup>31</sup> The Investors Agreement concerned primarily PT ICD's control over future transfers of shares in PT TCUP, PT RTM, PT RTP, PT RS, and PT RP.<sup>32</sup> The Pledge of Shares Agreements served as security for the contractual rights enshrined in the Cooperation and Investors Agreements.<sup>33</sup>

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<sup>26</sup> Mem., ¶ 94; RMOJ, ¶ 63. General Survey Business License for Investama Resources, Decree No. 248/02.188.45/HK/XI/2007 dated 29 November 2007 (**Exh. C-66**; **Exh. P-38**; **Exh. R-018**); General Survey Business License for Investmine Persada, Decree No. 247/02.188.45/HK/XI/2007 dated 29 November 2007 (**Exh. C-65**; **Exh. P-37**; **Exh. R-019**).

<sup>27</sup> Gunter WS, ¶ 65.

<sup>28</sup> Mem., ¶¶ 79-80; RMOJ, ¶ 59. Cooperation Agreement between PT ICD and TCUP, Ridlatama Mineral, Ridlatama Trade, Ridlatama Steel and Ridlatama Power dated 25 May 2007 (**Exh. C-43**).

<sup>29</sup> Investors Agreement between PT ICD and Ridlatama Mineral, Ridlatama Trade, Ridlatama Steel and Ridlatama Power, Ms. Florita and Ms. Ani Setiawan dated 25 May 2007 (**Exh. C-44**).

<sup>30</sup> Pledge of Shares between PT ICD and Ridlatama Mineral, Ms. Florita and Ms. Ani Setiawan (**Exh. C-45**); Pledge of Shares between PT ICD and Ridlatama Trade, Ms. Florita and Ms. Ani Setiawan (**Exh. C-46**); Pledge of Shares between PT ICD and Ridlatama Steel, Ms. Florita and Ms. Ani Setiawan (**Exh. C-47**); Pledge of Shares between PT ICD and Ridlatama Power, Ms. Florita and Ms. Ani Setiawan (**Exh. C-48**), all dated 25 May 2007.

<sup>31</sup> Auxiliary Agreement to the Cooperation Agreement between PT ICD and TCUP, Ridlatama Mineral, Ridlatama Trade, Ridlatama Steel and Ridlatama Power dated 25 May 2007, Art. 1(a) (**Exh. C-43**).

<sup>32</sup> Mem., ¶ 81.

<sup>33</sup> Mem., ¶ 81, n. 34.

26. On 26 November 2007, through a Deed Grant of Shares, Mmes. Florita and Setiawan transferred their shares in PT RTM and PT RTP to PT TCUP. Accordingly, PT TCUP held henceforth 75% of the shares in these two companies.<sup>34</sup>
27. On 28 November 2007, PT ICD entered into a new Cooperation Agreement with PT RTM, PT RTP, PT RS, and PT RP,<sup>35</sup> a new Investors Agreement with PT TCUP, PT RTM, PT RTP, PT RS, PT RP, Mmes. Florita and Setiawan,<sup>36</sup> and new Pledge of Shares Agreements<sup>37</sup> in replacement of the different agreements entered into on 25 May 2007.<sup>38</sup> As previously, PT ICD entered into these agreements with the primary aim of securing PT ICD's contractual right to 75% of the revenues generated from mining operations in the EKCP area covered by the licenses held by PT RTM, PT RTP, PT RS and PT RP.
28. On 31 March 2008, PT ICD concluded a Cooperation Agreement with PT IR and PT INP, together with an Auxiliary Agreement,<sup>39</sup> an Investors Agreement with PT IR, PT INP, and Mmes. Florita and Setiawan;<sup>40</sup> and two "Pledge of Shares" Agreements.<sup>41</sup> The primary aim of these agreements was to secure PT ICD's contractual right to 75% of the revenue generated from mining operations in the areas covered by the licenses held by PT IR and PT INP.<sup>42</sup>

<sup>34</sup> Mem., ¶ 74; RMOJ, ¶¶ 64-65. Deed Grant of Shares PT Ridlatama Tambang Mineral, Ms. Florita – PT Techno Coal Utama Prima, No. 21 (**Exh. R-021**); Deed Grant of Shares PT Ridlatama Trade Powerindo, Ms. Ani Setiawan – PT Techno Coal Utama Prima, No. 13 (**Exh. R-022**), both dated 26 November 2007.

<sup>35</sup> Second Cooperation Agreement between PT ICD and Ridlatama Mineral, Ridlatama Trade, Ridlatama Steel and Ridlatama Power dated 28 November 2007 (**Exh. C-56**).

<sup>36</sup> Second Investors Agreement between PT ICD and TCUP, Ridlatama Mineral, Ridlatama Trade, Ridlatama Steel and Ridlatama Power, Ms. Florita and Ms. Ani Setiawan dated 28 November 2007 (**Exh. C-57**).

<sup>37</sup> Pledge of Shares between PT ICD, TCUP, Ms. Florita and Ms. Ani Setiawan, and Ridlatama Mineral (**Exh. C-58**), Ridlatama Trade (**Exh. C-59**), Ridlatama Steel (**Exh. C-60**), and Ridlatama Power (**Exh. C-61**), all dated 28 November 2007.

<sup>38</sup> Mem., ¶ 83; RMOJ, ¶ 66.

<sup>39</sup> Cooperation Agreement between PT ICD and Investama Resources and Investmine Persada dated 31 March 2008 (**Exh. C-86**); Auxiliary Agreement to the Cooperation Agreement between PT ICD, Investama Resources and Investmine Persada dated 31 March 2008 (**Exh. C-87**).

<sup>40</sup> Investors Agreement between PT ICD, Investmine Persada, Investama Resources, Ms. Florita and Ms. Ani Setiawan dated 31 March 2008 (**Exh. C-90**).

<sup>41</sup> Mem., ¶ 86; RMOJ, ¶ 67. Pledge of Shares between PT ICD, Investmine Persada, Ms. Florita and Ms. Setiawan (**Exh. C-88**); Pledge of Shares between PT ICD, Investama Resources, Ms. Florita and Ms. Setiawan (**Exh. C-89**), both dated 31 March 2008.

<sup>42</sup> Mem., ¶ 85.

## E. THE 2008 KP EXPLORATION LICENSES

29. After having obtained the issuance of General Survey Business Licenses during the year of 2007, PT RTM, PT RTP, PT IR and PT INP filed applications on 10 March 2008 to upgrade their existing KP General Survey Business Licenses to KP Exploration Licenses.<sup>43</sup> On 8 April 2008, the Regent of East Kutai approved co-operation between each of the license-holding companies of the Ridlatama group and PT ICD “to conduct exploration, exploitation, processing and refinery, sales and transportation of coal minerals”.<sup>44</sup>
30. On 9 April 2008, the Regent of East Kutai delivered KP Exploration Licenses to PT RTM, PT RTP, PT IR and PT INP.<sup>45</sup> The term of the KP Exploration Licenses was three years with the possibility of two one-year extensions, for a total of five years. The KP Exploration Licenses “allowed detailed surveys, including drilling and the definition of the mining resources”.<sup>46</sup>

## F. THE 2009 IUP EXPLOITATION LICENSES

31. On 12 January 2009, the Republic of Indonesia promulgated Law No. 4/2009 concerning Mining of Mineral and Coal.<sup>47</sup> Together with the implementing Regulation No. 23/2009 of

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<sup>43</sup> C-RFA, ¶ 55; Mem., ¶ 150; Witness Statement of Paul William Benjamin (“Benjamin WS”), ¶¶ 42-51. Applications for Exploration Licenses for Ridlatama Trade (**Exh. C-82**); Ridlatama Mineral (**Exh. C-83**); Investmine Persada (**Exh. C-84**); and Investama Resources (**Exh. C-85**), all dated 10 March 2008.

<sup>44</sup> Certificate of Bupati of East Kutai concerning PT Ridlatama Tambang Mineral, No. 38/02.188.45/HK/IV/2008 (**Exh. P-45**); Certificate of Bupati of East Kutai concerning PT Ridlatama Trade Powerindo, No. 39/02.188.45/HK/IV/2008 (**Exh. P-46**); Certificate of Bupati of East Kutai concerning PT Investmine Nusa Persada, No. 40/02.188.45/HK/IV/2008 (**Exh. P-47**); Certificate of Bupati of East Kutai concerning PT Investama Resources, No. 37/02.188.45/HK/IV/2008 (**Exh. P-48**), all dated 8 April 2008.

<sup>45</sup> P-RFA, ¶ 19; C-RFA, ¶ 55; Mem., ¶ 152; RMOJ, ¶ 82. Decree of the Regent of East Kutai No. 37/02.188.45/HK/IV/2008, concerning Granting of Mining Authorization for Exploration in the name of PT Ridlatama Tambang Mineral (**Exh. R-034**); Decree of the Regent of East Kutai No. 36/02.188.45/HK/IV/2008, concerning Granting of Mining Authorization for Exploration in the name of PT Ridlatama Trade Powerindo (**Exh. R-035**); Decree of the Regent of East Kutai No. 39/02.188.45/HK/IV/2008, concerning Granting of Mining Authorization for Exploration in the name of PT Investama Resources (**Exh. R-036**); Decree of the Regent of East Kutai No. 38/02.188.45/HK/IV/2008, concerning Granting of Mining Authorization for Exploration in the name of PT Investmine Nusa Persada (**Exh. R-037**) all dated 9 April 2008.

<sup>46</sup> Mem., ¶ 54 (c).

<sup>47</sup> Mem., ¶¶ 55-58; RMOJ, ¶¶ 35-40. Law No. 4 on Mineral and Coal Mining, 2009 (**Exh. CLA-13**) [The Unofficial English Translation of this document submitted by the Claimant is titled “Law of the Republic of Indonesia Number 4 of 2008 Regarding Mineral and Coal Mining”].

1 February 2009, this law adopted a new system of licensing through Mining Undertaking Licenses (“IUP”), abolishing the previous regime of KP Licenses.

32. On 23 March 2009, PT RTM, PT RTP, PT IR and PT INP sent application letters to the Regent to have their exploration licenses upgraded to exploitation licenses and to conform to the new legislative framework. On 27 March 2009, the Regent granted these four companies an upgrade of their licenses and issued IUP Exploitation Licenses.<sup>48</sup>
33. The IUP Exploitation Licenses are granted for performing construction, mining, processing, refining, hauling, and selling the resource for an initial term of 20 years with the possibility of two 10-year extensions.

#### **G. THE 2010 REVOCATION DECREES**

34. As previously stated, the Regent had apparently already granted on 10 March 2005 KP Exploration Licenses over an area substantially overlapping with the EKCP area to the three Nusantara companies, PT Batubara Nusantara Coal, PT Kaltim Nusantara Coal, and PT Nusantara Wahau Coal.<sup>49</sup> These licenses were extended for the first time by the Regent on 17 July 2008,<sup>50</sup> and again on 18 February 2010.<sup>51</sup>
35. On 21 April 2010, the Ministry of Forestry dispatched a letter to the Regent of East Kutai recommending the revocation/cancellation of the Ridlatama companies’ licenses in the EKCP area because (1) the Ridlatama companies were operating without permission from the Ministry of Forestry; (2) the Ridlatama licenses were allegedly forged; and (3) the Ridlatama licenses overlapped with other permit areas.<sup>52</sup>

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<sup>48</sup> Mem., ¶¶ 16, 100, 156, 205, 381, 383; RMOJ, ¶¶ 93-102. Exploitation Business Licence for Ridlatama Mineral, Decision No. 188.4.45/118/HK/III/2009 (**Exh. C-147**); Exploitation Business Licence for Ridlatama Trade, Decision No. 188.4.45/119/HK/III/2009 (**Exh. C-146**); Exploitation Business Licence for Investama Resources, Decision No. 188.4.45/116/HK/III/2009 (**Exh. C-148**); Exploitation Business Licence for Investmine Persada, Decision No. 188.4.45/117/HK/III/2009 (**Exh. C-149**), all dated 27 March 2009.

<sup>49</sup> See *supra* ¶ 10.

<sup>50</sup> Mem., ¶¶ 168, 349, 380.

<sup>51</sup> Mem., ¶¶ 176, 214, 215, 349, 380. Approval of Mining Exploration License for Batubara Nusantara Kaltim, Approval No. 540.1.K.150/2010 (**Exh. C-212**); Approval of Mining Exploration License for Kaltim Nusantara Coal, Approval No. 590.1.K.150/2010 (**Exh. C-213**); Approval of Mining Exploration License for Nusantara Wahau Coal, Approval No. 540.1.K.148/2010 (**Exh. C-214**), all dated 18 February 2010.

<sup>52</sup> Mem., ¶ 218; RMOJ, ¶ 106. Ministry of Forestry Letter to the Regent of East Kutai No.: S.10/Menhut-III/Rhs/2010, concerning Suspected Coal Mining Exploitation Activity within State

36. It is in this context that, on 4 May 2010, the Regent of East Kutai issued four Revocation Decrees of the IUP exploitation licenses held by PT RTM, PT RTP, PT IR and PT INP, relying on the letter that he had received from the Ministry of Forestry on 21 April 2010 and on a 30 April 2010 report from the East Kutai Department of Mines.<sup>53</sup>
37. On 17 February 2012, the Ridlatama group wrote to the Ministry of Forestry requesting a clarification of the 21 April 2010 letter.<sup>54</sup> The Ministry of Forestry responded on 5 March 2012 that the April letter was only an “initial information” and that “the decision to revoke mining license (IUP) by the East Kutai Bupati [*i.e.*, the Regent], which was based solely on the Ministry Letter was not correct”.<sup>55</sup>

#### H. CHURCHILL AND PLANET’S ACQUISITION OF SHARES IN PT TCUP AND THEIR DIRECT INTEREST IN THE EKCP

38. On 27 March 2009<sup>56</sup> and 12 May 2009,<sup>57</sup> the Regent granted the four license-holding Ridlatama companies permission to enter into cooperation with domestic and foreign companies and to amend their share structure.<sup>58</sup> On 12 May 2009, the Regent also

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Forest Area Without Permit of Borrow-for-Use Area in Regency of East Kutai, Province of East Kalimantan dated 21 April 2010 (**Exh. R-060**).

<sup>53</sup> Mem., ¶¶ 226-227; RMOJ, ¶ 111. Revocation of the Decision of the Regent of East Kutai to Ridlatama Mineral, Decision No. 540.1/K.443/HK/V/2010 (**Exh. C-231**); Revocation of the Decision of the Regent of East Kutai to Ridlatama Trade, Decision No. 540.1/K.444/HK/V/2010 (**Exh. C-230**); Revocation of the Decision of the Regent of East Kutai to Investama Resources, Decision No. 540.1/K.441/HK/V/2010 (**Exh. C-232**); Revocation of the Decision of the Regent of East Kutai to Investmine Persada, Decision No. 540.1/K.442/HK/V/2010 (**Exh. C-233**), all dated 4 May 2010.

<sup>54</sup> Letter from Ridlatama Group to Minister of Forestry dated 17 February 2012 (**Exh. C-313**).

<sup>55</sup> Letter from the Ministry of Forestry to Ridlatama Group dated 5 March 2012, p. 1 (**Exh. C-314**).

<sup>56</sup> Mem., ¶¶ 157, 350; Benjamin WS, ¶ 79. Certificate of Approval of Business Cooperation with National and International Companies, Decision No. 180/31/HK/III/2009 for Ridlatama Mineral (**Exh. C-152**); Certificate of Approval of Business Cooperation with National and International Companies, Decision No. 180/32/HK/III/2009 for Ridlatama Trade (**Exh. C-151**); Certificate of Approval of Business Cooperation with National and International Companies, Decision No. 180/33/HK/III/2009 for Investama Resources (**Exh. C-153**); Certificate of Approval of Business Cooperation with National and International Companies, Decision No. 180/34/HK/III/2009 for Investmine Persada (**Exh. C-154**), all dated 27 March 2009.

<sup>57</sup> Approval for Cooperation and Amendment to Share Composition for Ridlatama Mineral (**Exh. C-165**); Approval for Cooperation and Amendment to Share Composition for Ridlatama Trade (**Exh. C-166**); Approval for Cooperation and Amendment to Share Composition for Investama Resources (**Exh. C-167**); Approval for Cooperation and Amendment to Share Composition for Investmine Persada (**Exh. C-168**), all dated 12 May 2009.

<sup>58</sup> Mem., ¶ 158; RMOJ, ¶ 101. Approval for Cooperation and Amendment to Share Composition for PT RTM (**Exh. C-165**), PT RTP (**Exh. C-166**), PT IR (**Exh. C-167**), and PT INP (**Exh. C-168**), all dated 12 May 2009. The Respondent contests this presentation of the facts, calling the attention of the Tribunal to the fact that these documents relate to a different matter, namely a recommendation for amendment to share composition and not an approval. See: Regent of East Kutai Letter to



approved the change in the share structure of these companies.<sup>59</sup> On 19 March 2010, the shareholders of PT TCUP voted unanimously in favor of PT ICD's entry as majority shareholder. On 30 March 2010, PT TCUP obtained the BKPM Approval to operate as a PMA company, *i.e.*, to have foreign shareholders.<sup>60</sup> On 16 April 2010, PT TCUP amended its Articles of Association to increase its authorized capital and issue new shares.<sup>61</sup> On 15 June 2010, PT TCUP obtained the approval for this amendment by the Minister of Law and Human Rights.<sup>62</sup> Following this approval, PT TCUP increased its shares, and PT ICD acquired direct ownership of 99.01% of the shares, while Churchill acquired on 25 November 2010 the remaining 0.99% of PT TCUP's shares, making Churchill the 100% ultimate owner of PT TCUP.<sup>63</sup>

## I. THE PROCEEDINGS BEFORE THE INDONESIAN COURTS

39. Following the 4 May 2010 Revocation Decrees, the Ridlatama companies engaged in several legal proceedings against the Indonesian State to seek the annulment of the revocations.<sup>64</sup> Members of the Ridlatama Group also started legal actions against Churchill and Planet, while the latter two initiated still other proceedings against members of the Ridlatama Group.<sup>65</sup>
40. With respect to the proceedings initiated by the Ridlatama Group against the Indonesian State, PT RTM, PT RTP, PT IR and PT INP filed a lawsuit before the Samarinda Administrative Tribunal on 25 August 2010.<sup>66</sup> On 17 March 2011, that court found that the

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PT RTM No. 500/430/EKO/V/2009, concerning Recommendation for Amendment to Share Composition of PT RTM (**Exh. R-053**); Regent of East Kutai Letter to PT RTP No. 500/445/EKO/V/2009, concerning Recommendation for Amendment to Share Composition of PT RTP (**Exh. R-054**), both dated 12 May 2009.

<sup>59</sup>

*Id.*

<sup>60</sup>

Mem., ¶ 90. PT TCUP Investment Registration Approval No. 00481/1/PPM/PMA/2010 dated 30 March 2010 (**Exh. C-221**).

<sup>61</sup>

RMOJ, ¶ 116. Deed Approving Issue of New Share Capital in PT Techno Coal Utama Prima dated 16 April 2010 (**Exh. P-66**). The Respondent indicates that the appropriate title of the document should be: "Deed of Statement of Resolution of Shareholders of PT TCUP" (RMOJ, n. 178).

<sup>62</sup>

RMOJ, ¶ 116. Company Data – PT Techno Coal Utama Prima (**Exh. R-020**), p. 2, ¶ 5, Amendment of Articles of Association.

<sup>63</sup>

Mem., ¶ 90; Quinlivan WS, ¶¶ 53-54; Witness Statement of Russell Paul Hardwick ("Hardwick WS"), ¶ 35; RMOJ, ¶ 166.

<sup>64</sup>

Mem., ¶¶ 250-276.

<sup>65</sup>

RMOJ, ¶¶ 130-138.

<sup>66</sup>

Mem., ¶¶ 251-252; Makarim ER1, ¶¶ 24-29; RMOJ, ¶¶ 111, 120. Samarinda State Administrative Court Complaint of Ridlatama Mineral in Case No. 31/G/2010/PTUN.SMD (**Exh. C-246**); Samarinda State Administrative Court Complaint of Ridlatama Trade in Case No. 32/G/2010/PTUN.SMD (**Exh. C-247**); Samarinda State Administrative Court Complaint of Investmine Persada in Case

Revocation Decree issued against PT RTM was valid.<sup>67</sup> On 18 March 2011, it held that the Revocation Decrees issued against PT RTP, PT IR and PT INP were valid as well.<sup>68</sup>

41. On 4 May 2011, the plaintiffs appealed to the Jakarta State Administrative High Court,<sup>69</sup> which rendered its decision on 8 August 2011 upholding the ruling of the Samarinda Administrative Tribunal.<sup>70</sup>
42. On 26 September 2011, the plaintiffs submitted their Memorandums of Cassation to the Supreme Court of Indonesia.<sup>71</sup> On 21 May 2012, the Supreme Court rejected the requests for relief of PT IR and PT INP.<sup>72</sup> On 30 May 2012, the Supreme Court reached the same conclusion in the cases submitted by PT RTM and PT RTP.<sup>73</sup>
43. With respect to the legal proceedings between PT ICD and the Ridlatama companies, PT ICD delivered a Notice of Dispute to the Ridlatama Group on 4 July 2011.<sup>74</sup>

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<sup>67</sup> No. 33/G/2010/PTUN.SMD (**Exh. C-248**); Samarinda State Administrative Court Complaint of Investama Resources in Case No. 34/G/2010/PTUN.SMD (**Exh. C-249**), all dated 25 August 2010. Mem., ¶ 260; Samarinda State Administrative Court Decision No. 31/G/2010/PTUN.SMD on Licence for Ridlatama Mineral dated 17 March 2011 (**Exh. C-279**).

<sup>68</sup> Samarinda State Administrative Court Decision No. 32/G/2010/PTUN.SMD on Licence for Ridlatama Trade (**Exh. C-280**); Samarinda State Administrative Court Decision No. 33/G/2010/PTUN.SMD on Licence for Investmine Persada (**Exh. C-281**); Samarinda State Administrative Court Decision No. 34/G/2010/PTUN.SMD on Licence for Investama Resources (**Exh. C-282**), all dated 18 March 2011.

<sup>69</sup> Mem., ¶ 270. Memorandum of Appeal in Case No. 31/G/2010/PTUN.SMD for Ridlatama Mineral (**Exh. C-287**); Memorandum of Appeal in Case No. 32/G/2010/PTUN.SMD for Ridlatama Trade (**Exh. C-288**); Memorandum of Appeal in Case No. 33/G/2010/PTUN.SMD for Investmine Persada (**Exh. C-289**); Memorandum of Appeal in Case No. 34/G/2010/PTUN.SMD for Investama Resources (**Exh. C-290**), all dated 4 May 2011.

<sup>70</sup> Mem., ¶ 272. Jakarta State Administrative High Court, Decision in Case 31, 109/B/2011/PT.TUN.JKT for Ridlatama Mineral (**Exh. C-296**); Jakarta State Administrative High Court, Decision in Case 32, 110/B/2011/PT.TUN.JKT for Ridlatama Trade (**Exh. C-297**); Jakarta State Administrative High Court, Decision in Case 33, 111/B/2011/PT.TUN.JKT for Investmine Persada (**Exh. C-298**); Jakarta State Administrative High Court, Decision in Case 34, 112/B/2011/PT.TUN.JKT for Investama Resources (**Exh. C-299**), all dated 8 August 2011.

<sup>71</sup> Mem., ¶ 274. Memorandum of Cassation in Case No. 31 for Ridlatama Mineral (**Exh. C-300**); Memorandum of Cassation in Case No. 32 for Ridlatama Trade (**Exh. C-301**); Memorandum of Cassation in Case No. 33 for Investmine Persada (**Exh. C-302**); Memorandum of Cassation in Case No. 34 for Investama Resources (**Exh. C-303**), all dated 26 September 2011.

<sup>72</sup> Supreme Court of the Republic of Indonesia Verdict in Case No. 33 for Investmine Persada (**Exh. C-316**); Supreme Court of the Republic of Indonesia Verdict in Case No. 34 for Investama Resources (**Exh. C-317**), both dated 21 May 2012.

<sup>73</sup> Supreme Court of the Republic of Indonesia Verdict in Case No. 31 for Ridlatama Mineral (**Exh. C-318**); Supreme Court of the Republic of Indonesia Verdict in Case No. 32 for Ridlatama Trade (**Exh. C-319**), both dated 30 May 2012.

<sup>74</sup> RMOJ, ¶ 131. Churchill website, *Notice of Dispute delivered to Ridlatama*, dated 4 July 2011 (**Exh. R-088**).

44. PT ICD then filed a claim in the District Court of Tangerang on 15 August 2011 against Mr. Andreas Rinaldi for alleged breaches of the Investors Agreements.<sup>75</sup> On 9 February 2012, the District Court of Tangerang dismissed PT ICD's action against Mr. Andreas Rinaldi.<sup>76</sup>
45. On 18 August 2011, PT ICD also commenced ICC arbitration proceedings in Singapore against Mmes. Florita and Setiawan.<sup>77</sup> However, PT ICD recently withdrew its claims in these proceedings, and the tribunal rendered an order of termination on 21 March 2013.<sup>78</sup>
46. On 9 November 2011, PT INP and PT IR notified PT ICD of their intention to terminate the 2008 Investors Agreement for failure to make payments under Article 3.1 of the agreement.<sup>79</sup> On 16 November 2011, Mmes. Setiawan and Florita filed a claim with the District Court of South Jakarta against PT ICD, PT TCUP, PT RTM and PT RTP.<sup>80</sup> On 21 November 2011, the District Court of South Jakarta declared all Deeds of Grants of Shares by Mmes. Florita and Setiawan to PT TCUP null and void by law.<sup>81</sup>

<sup>75</sup> RMOJ, ¶ 132. PT Indonesia Coal Development – represented by Hiswara Bunjamin & Tandjung – Claim of Unlawful Act (*Onrechtmatige Daad*) against Mr. Andreas Rinaldi filed with the District Court of Tangerang on 15 August 2011 and registered under Case No. 376/PDT.G/2011/PN.TNG (**Exh. R-026**).

<sup>76</sup> RMOJ, ¶ 138.

<sup>77</sup> Rejoinder, ¶ 12. Request for Arbitration [under the] 2007 Investors Agreement by PT ICD (Claimant) v. Ms. Florita (1st Respondent) and Ms. Setiawan (2nd Respondent), under the Rules of the ICC (**Exh. R-103**); Request for Arbitration [under the] 2008 Investors Agreement by PT ICD (Claimant) v. Ms. Florita (1st Respondent) and Ms. Setiawan (2nd Respondent), under the Rules of the ICC (**Exh. R-104**), both dated 18 August 2011.

<sup>78</sup> Rejoinder, ¶ 12, n. 31. Order Terminating Proceedings in the International Chamber of Commerce Arbitration, PT Indonesia Coal Development v. (1) Ms. Florita and (2) Ms. Ani Setiawan, Case No. 18141/CYK (c. 18142/CYK) dated 21 March 2013 (**Exh. C-355**).

<sup>79</sup> RMOJ, ¶ 133.

<sup>80</sup> RMOJ, ¶ 134. Letter of Kailimang & Ponto representing Ms. Setiawan and Ms. Florita to Chief of District Court of South Jakarta, No. 120/Ext/DK-RK/XI/2011, concerning Claim of Unlawful Act against PT TCUP (Defendant I), PT ICD (Defendant II) and PT RTM (Co-Defendant) (**Exh. R-091**); Letter of Kailimang & Ponto representing Ms. Setiawan and Ms. Florita to Chief of District Court of South Jakarta, No. 121/Ext/DK-RK/XI/2011, concerning Claim of Unlawful Act against PT TCUP (Defendant I), PT ICD (Defendant II) and PT RTP (Co-Defendant) (**Exh. R-092**), both dated 16 November 2011.

<sup>81</sup> Makarim Second Expert Report (“ER2”), p. 9; RMOJ, ¶ 138. District Court of South Jakarta Decision No. 604/Pdt.G/2011/PN.Jkt.Sel. in the case between Ms. Setiawan (Plaintiff I) and Ms. Florita (Plaintiff II) v. PT TCUP (Defendant I), PT ICD (Defendant II) and PT RTM (Co-Defendant) (**Exh. R-076**); District Court of South Jakarta Decision No. 605/Pdt.G/2011/PN.Jkt.Sel. in the case between Ms. Setiawan (Plaintiff I) and Ms. Florita (Plaintiff II) v. PT TCUP (Defendant I), PT ICD (Defendant II) and PT RTP (Co-Defendant) (**Exh. R-077**), both dated 21 November 2011.

47. On 7 December 2011, PT RTM, PT RTP, PT IR and PT INP informed Churchill of their intent to start legal proceedings against the latter for breach of confidentiality<sup>82</sup> and for defamation.<sup>83</sup>

### III. PROCEDURAL HISTORY

#### A. INITIAL PHASE

48. The present arbitration is between Churchill and Indonesia. Their dispute is brought before the International Centre for Settlement of Investment Disputes (“ICSID”), under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) and the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments dated 27 April 1976 (the “UK-Indonesia BIT”, the “Treaty”, or the “BIT”).<sup>84</sup> A parallel ICSID arbitration was initiated by Planet Mining Pty Ltd, an Australian mining company, against Indonesia essentially regarding the same set of facts. That dispute is brought under the Agreement concerning the Promotion and Protection of Investments dated 17 November 1992 (the “Australia-Indonesia BIT”). Eventually, the parties to these two proceedings agreed to consolidate the two arbitrations (see below ¶ 58).
49. For purposes of clarity, the present section will first address the initiation of ICSID Case No. ARB/12/14 by Churchill, followed by an outline of the initiation of ICSID Case No. ARB/12/40 by Planet, and then conclude with the procedural steps involved in the decision to consolidate both cases.

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<sup>82</sup> RMOJ, ¶ 135. Letter of M&A Law Corporation to Churchill, concerning Claim of Breach of Confidentiality No. IK/PM/AC/ms/0624.04/ct dated 7 December 2011 (**Exh. R-093**).

<sup>83</sup> RMOJ, ¶ 136. Letter of M&A Law Corporation to Churchill, concerning Claim against Churchill Mining Plc. for Defamation of the Ridlatama Group No. IK/PM/AC/ms/0624.04/ct dated 7 December 2011 (**Exh. R-094**).

<sup>84</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments (“UK-Indonesia BIT”) (**Exh. CLA-18; Exh. R-001**). The BIT entered into force on 24 March 1977.

## 1. Initiation of ICSID Case No. ARB/12/14

50. On 22 May 2012, Churchill Mining Plc filed a Request for Arbitration with ICSID pursuant to Article 36 of the ICSID Convention and the UK-Indonesia BIT. In its Request for Arbitration, Churchill requested that the Tribunal render an award:

- “(i) declaring that Respondent has violated its international legal obligations under the Treaty;
- (ii) ordering Respondent to pay to Claimant full compensation in accordance with the Treaty and customary international law, in an amount to be established in the arbitration;
- (iii) ordering Respondent to pay all costs of this arbitration, including, without limitation, the fees and expenses of the tribunal and the cost of legal representation;
- (iv) ordering Respondent to pay pre- and post- award compound interest up until full payment of the award at a rate deemed appropriate by the arbitral tribunal; and
- (v) ordering such other relief as the arbitral tribunal may deem appropriate in the circumstances”.<sup>85</sup>

51. On 22 June 2012, the Secretary-General of the Centre registered Churchill’s Request for Arbitration pursuant to Article 36(3) of the ICSID Convention. On 14 September 2012, the Respondent requested that the Arbitral Tribunal in this case be constituted pursuant to the formula provided by Articles 37(2)(b) of the ICSID Convention. On 19 September 2012, Professor Albert Jan van den Berg, a Dutch national, accepted his appointment as the Claimant-appointed arbitrator. On 21 September 2012, Mr. Michael Hwang S.C., a Singaporean national, accepted his appointment as the Respondent-appointed arbitrator. On 3 October 2012, Prof. Gabrielle Kaufmann-Kohler, a Swiss national, accepted her appointment as President of the Tribunal. Thus, the Arbitral Tribunal in ICSID Case No. ARB/12/14 was constituted in accordance with Article 37(2)(b) and the proceedings commenced on 3 October 2012. On the same date, the Centre designated Mr. Paul-Jean Le Cannu as Secretary of the Tribunal. After having obtained the agreement of the Parties, the Tribunal informed the Parties by letter of 5 February 2013 that the

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<sup>85</sup> C-RFA, ¶ 92.

appointment of Mr. Magnus Jesko Langer as Assistant to the Tribunal had become effective.

52. On 27 November 2012, the Tribunal and the Parties held the first session by video link. During that session, the Parties agreed on several procedural issues and addressed several outstanding issues which are outlined in more detail below. On 6 December 2012, the Tribunal issued Procedural Order No. 1 containing the schedule of submissions for the jurisdictional phase. It was decided that a hearing on jurisdiction would take place in Singapore on 13 May 2013, May 14 being kept as a reserve day.
53. On 20 November 2012, the Government of the Regency of East Kutai submitted, with the support of the Republic of Indonesia, a Petition to participate as a party in these proceedings. Churchill objected to this request, asking the Tribunal to dismiss the petition. On 5 February 2013, the Tribunal issued Procedural Order No. 2 rejecting the Petition on the grounds of lack of consent of Churchill to join the Government of the Regency of East Kutai to the proceedings.
54. On 22 November 2012, Indonesia filed a Request for Provisional Measures and a Document Production Request in connection with jurisdiction. With regard to the Request for Provisional Measures, Indonesia asked that Churchill refrain (i) from making false, unfounded and misleading statements in the media regarding the case at hand, and (ii) from approaching and/or persuading and/or inducing any officials of the Government of the Republic of Indonesia to enter into amicable settlement outside the arbitral proceedings. On 17 December 2012, Churchill filed its observations, which were followed by Indonesia's reply on 7 January 2013. On 21 January 2013, Churchill filed its rejoinder to Indonesia's reply. In its decision of 4 March 2013, the Tribunal issued Procedural Order No. 3 finding that the conditions for the recommendation of provisional measures were not met, thus rejecting the provisional measures sought by Indonesia.
55. With respect to the Document Production Request, Churchill filed its Response to Indonesia's document request, whereby Churchill undertook to produce the requested documents with its first memorial. After having heard the respective views of the Parties, the Tribunal decided that Churchill should produce the requested documents together with an explanatory note by 17 December 2012. On that date, Churchill submitted to Indonesia all of the requested documents.

56. On 27 February 2013, Churchill submitted to the Tribunal an amended Request for Arbitration purportedly adding PT Indonesia Coal Development (PT ICD) as a claimant in ICSID Case No. ARB/12/14. After having heard both Parties' position at the 1 March 2013 common session (see below ¶ 58), the Tribunal informed the Parties by letter of 4 March 2013 that the request was denied on the grounds of lack of consent of Indonesia to join PT ICD to the proceedings.

## **2. Initiation of ICSID Case No. ARB/12/40**

57. On 4 October 2012, Planet Mining Pty Ltd sent a Notification of Dispute to the Republic of Indonesia. On 26 November 2012, Planet then filed a Request for Arbitration with the ICSID pursuant to Article 36 of the ICSID Convention and the Australia-Indonesia BIT. On 26 December 2012, the Secretary-General of the Centre registered Planet's Request for Arbitration pursuant to Article 36(3) of the ICSID Convention.

## **3. Consolidation**

58. The Tribunal and the Parties in ICSID Cases No. ARB/12/14 and No. ARB/12/40 held a common session by video link on 1 March 2013, which was sound and video recorded. Besides serving as the first session in ICSID Case No. ARB/12/40 pursuant to Rule 13 of the ICSID Arbitration Rules, the common session addressed consolidation. Having secured the agreement in principle of the Parties that the two disputes be heard in a consolidated case,<sup>86</sup> the Tribunal heard the Parties on the modalities of consolidation. The Tribunal noted that the Parties agreed to join the two proceedings in all respects, but disagreed on whether the Tribunal should render one joint decision/award in respect of both Churchill and Planet or two separate decisions/awards, one in respect of each claimant.

59. In Procedural Order No. 4 of 18 March 2013, the Tribunal confirmed the content of the common session. With regard to the modalities of the consolidated proceedings, it decided that the procedural calendar under Annex 3 to Procedural Order No. 1, amended by letter of 21 February 2013 and supplemented by letter of 1 March 2013, would govern; that the Tribunal's orders issued as of the date of the common session would apply to all three

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<sup>86</sup> See, *inter alia*, Planet's letter of 4 October 2012; Churchill's letter of 12 October 2012; and Indonesia's letter of 4 January 2013.

Parties, with the exception of Procedural Order No. 3 dealing with Indonesia's request for provisional measures in ICSID Case No. ARB/12/14; that the Centre would maintain only one case account; and that Mr. Magnus Jesko Langer would serve as assistant to the Tribunal in the consolidated proceedings.

60. Further, the Tribunal noted that it would decide whether to render one or two awards at a later stage, after consultation with the Parties.

#### **B. WRITTEN PHASE ON JURISDICTION**

61. In paragraph 14.1 of Procedural Order No. 1, as amended by the Tribunal's letter of 21 February 2013, and recorded in Procedural Order No. 4, the Tribunal set the following schedule for the jurisdictional phase:

- (i) Churchill and Planet would file their Memorial by 13 March 2013;
- (ii) the Respondent would file its Objections to Jurisdiction by 8 April 2013;
- (iii) Churchill and Planet would file their Response to the Objections to Jurisdiction by 30 April 2013; and
- (iv) the Respondent would file a Reply to the Response to the Objections to Jurisdiction by 6 May 2013.

62. During the common session of 1 March 2013, the Respondent stated that it intended to make additional document requests in connection with jurisdiction. After having heard the views of Churchill and Planet, the Tribunal established the following schedule for document production in a letter of 1 March 2013, confirmed in Procedural Order No. 4:

- (i) the Respondent would file its Request by 6 March 2013;
- (ii) Churchill and Planet would state their Response to the Request and any objections thereto by 11 March 2013;
- (iii) the Respondent would respond to the aforementioned objections, if any, by 14 March 2013;
- (iv) the Tribunal would rule on the objections, if any, by 19 March 2013; and
- (v) Churchill and Planet would produce those documents for which no objection has been sustained by the Tribunal by 22 March 2013.



63. On 19 March 2013, the Tribunal issued Procedural Order No. 5 ruling on the objections to the document production request submitted by Churchill and Planet. By letter of 22 March 2013, Churchill and Planet informed the Tribunal that they had sent hard copies of all responsive documents in their possession at that time, and that they would adhere to the continuing obligation under Procedural Order No. 5 to produce any outstanding final awards or decisions, as specified in that Order, as soon as they become available.
64. On 13 March 2013, Churchill and Planet filed their Memorial on Jurisdiction and the Merits, enclosing 348 exhibits and 69 legal exhibits. In the Request for Relief, Churchill requested the following relief:
- (i) a declaration that Indonesia had violated Article 5 of the UK-Indonesia BIT;
  - (ii) a declaration that Indonesia had violated Article 3 of the UK-Indonesia BIT;
  - (iii) an order directing Indonesia to pay monetary compensation or damages or alternatively, full compensation for Churchill's expenses – in each case in amounts to be specified in the Claimant's forthcoming quantum presentation – plus interest thereon, compounded quarterly, accruing at a reasonable commercial rate per annum to be determined by the Tribunal, from 4 May 2010 through to the date of payment;
  - (iv) an order directing Indonesia to pay all fees and costs incurred in connection with the respective arbitration proceedings, including the costs of the arbitrators and of ICSID as well as legal and other expenses incurred by Churchill on a full indemnity basis, plus interest accrued thereupon at a rate to be determined by the Tribunal from the date on which such costs are incurred to the date of payment; and
  - (v) any other relief the Tribunal may deem just and appropriate.
65. On 8 April 2013, the Respondent filed its Memorial on Objections to Jurisdiction, enclosing 101 exhibits and 77 legal exhibits. In the Objections to Jurisdiction, the Respondent contends (i) that the "Tribunal lacks jurisdiction to entertain [Churchill's] claims due to the absence of any written consent by the Respondent to submit the dispute encompassed by the Request[...] for Arbitration",<sup>87</sup> and (ii) that "all of the claims asserted by [Churchill] should be dismissed as [Churchill is] seeking the protection of the U.K.-Indonesia [...] [BIT]

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<sup>87</sup> RMOJ, ¶ 255.

for investments which have not been admitted by the Republic of Indonesia and which, consequently, fall outside the scope of protected investments under [this BIT]”.<sup>88</sup> For these reasons, the Respondent requested that the Tribunal:

- (i) decline jurisdiction in the present case; and
- (ii) order [Churchill] to pay the totality of costs relating to this Arbitration, including the fees and expenses of the Members of the Tribunal, Respondent’s legal fees and all other amounts incurred by Respondent.<sup>89</sup>

66. On 30 April 2013, the Churchill and Planet filed their Reply to Indonesia’s Objections to Jurisdiction, enclosing 12 exhibits and 70 legal exhibits. The Reply was also accompanied by the Second Expert Report of the Claimants’ expert on Indonesian law, Dr. Nono A. Makarim. In their Response, Churchill and Planet requested that the Tribunal:

- (i) Reject all jurisdictional objections raised by Indonesia; and
- (ii) Declare that it had jurisdiction under the UK-Indonesia BIT and the ICSID Convention.
- (iii) Order that Indonesia pay all fees and costs incurred in connection with the arbitration proceedings, including the costs of the arbitrators and of ICSID as well as legal and other expenses incurred by the Claimant on a full indemnity basis, plus interest accrued thereon at a rate to be determined by the Tribunal from the date on which such costs were incurred to the date of payment; and
- (iv) Award any other relief the Tribunal may deem just and appropriate.<sup>90</sup>

67. On 6 May 2013, the Respondent filed its Rejoinder on Objections to Jurisdiction, enclosing 9 exhibits and 28 legal exhibits. In its Rejoinder, the Respondent contended that the Tribunal lacked jurisdiction to entertain the case because:

- (i) The Respondent has not provided its consent in writing to submit the disputes encompassed in the Requests for Arbitration to ICSID;

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<sup>88</sup> RMOJ, ¶ 256.

<sup>89</sup> RMOJ, ¶ 257.

<sup>90</sup> Reply, ¶ 200.

- (ii) Churchill's alleged investments do not fall within the scope of investments protected under the U.K.-Indonesia BIT, because (a) Churchill violated the terms of the investment approvals by engaging in activities not contemplated in the approvals, including using PT ICD as an investment vehicle; (b) Churchill, in complete disregard of Indonesian laws prohibiting PMA companies such as PT ICD to own shares or any interest in KP Holders such as the Ridlatama Companies, entered into beneficial ownership arrangements in order to circumvent that limitation, thereby violating Article 1320 of the Civil Code and Article 33 of the 2007 Investment Law.<sup>91</sup>

68. For these reasons, the Respondent requested the Tribunal to:

- (i) decline jurisdiction in the present case; and
- (ii) order Churchill to pay the totality of costs relating to this Arbitration, including the fees and expenses of the Members of the Tribunal, the Respondent's legal fees and all other amounts incurred by the Respondent.<sup>92</sup>

69. On 8 May 2013, the Tribunal and the Parties held a pre-hearing telephone conference in order to discuss outstanding matters related to the organization of the hearing on jurisdiction. The telephone conference was audio-recorded. On the same day, the Tribunal issued Procedural Order No. 6 containing the schedule of the hearing.

### **C. HEARING ON JURISDICTION**

70. On 13-14 May 2013, the Arbitral Tribunal held a hearing on jurisdiction in Singapore. In attendance at the hearing were the members of the Arbitral Tribunal, ICSID Legal Counsel Ms. Aurélia Antonietti, the Assistant to the Tribunal, and the following party representatives:

- (i) On behalf of Churchill
- Mr. Stephen Jagusch, Quinn Emanuel Urquhart & Sullivan UK LLP
  - Mr. Anthony Sinclair, Quinn Emanuel Urquhart & Sullivan UK LLP

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<sup>91</sup> Rejoinder, ¶ 135.

<sup>92</sup> Rejoinder, ¶ 136.

- Mr. Epaminontas Triantafilou, Quinn Emanuel Urquhart & Sullivan UK LLP
- Ms. Bridie Balderstone, Quinn Emanuel Urquhart & Sullivan UK LLP
- Mr. Nicholas Smith, Churchill Mining Plc
- Ms. Fara Luwia, Churchill Mining Plc

(ii) On behalf of the Respondent

- Mr. Dr. Amir Syamsudin, Minister of Law and Human Rights of the Republic of Indonesia – Coordinator of Legal Representative Team of the President of the Republic of Indonesia
- Mr. Didi Dermawan, Legal Representative of the Regent of East Kutai and the Minister of Law and Human Rights of the Republic of Indonesia
- Mr. Cahyo R. Muzhar, Ministry of Law and Human Rights of the Republic of Indonesia – Legal Team Member of Legal Representative Team of the President of the Republic of Indonesia
- Ms. Claudia Frutos-Peterson, Advocate at Curtis, Mallet-Prevost, Colt & Mosle LLP - Supporting Legal Team Member of Legal Representative Team of the President of the Republic of Indonesia
- Mr. Dr. Freddy Harris, Secretary of Team Churchill Mining Case - Ministry of Law and Human Rights of the Republic of Indonesia
- Mr. Richele Stephen Suwita, Advocate at DNC advocates at work – Supporting Legal Team Member of Legal Representative Team of the President of the Republic of Indonesia
- Ms. Marcia S. Tanudjaja, Advocate at DNC advocates at work – Supporting Legal Team Member of Legal Representative Team of the President of the Republic of Indonesia
- Ms. Dwi Deila Wulandari Taslim, Advocate at DNC advocates at work – Supporting Legal Team Member of Legal Representative Team of the President of the Republic of Indonesia
- Mr. Isran Noor, Regent of East Kutai
- Mr. Herry H. Horo, Office of the Attorney General of the Republic of Indonesia
- Mr. Bagus Priyonggo, Office of the Attorney General of the Republic of Indonesia

- Mr. Riyatno, Head of Legal Affairs of the Investment Coordination Board of the Republic of Indonesia
- Mr. Endang Supriyadi, Investment Coordination Board of the Republic of Indonesia
- Ms. S. Purwaningsih, Ministry of Internal Affairs of the Republic of Indonesia
- Mr. Andry Indrady, Ministry of Law and Human Rights of the Republic of Indonesia
- Mr. Hadaris Samulia Has, Ministry of Law and Human Rights of the Republic of Indonesia
- Ms. Harniati Sikumbang, Ministry of Law and Human Rights of the Republic of Indonesia
- Ms. Monalissa Anugerah, Ministry of Law and Human Rights of the Republic of Indonesia
- Mr. Budi Surjono, Assistant (adjunct) to the Regent of East Kutai
- Mr. M. Nasiruddin, Assistant (adjunct) to the Regent of East Kutai
- Mr. Fachruraji, Assistant (adjunct) to the Regent of East Kutai
- Mr. Edwin Irawan, Assistant (adjunct) to the Regent of East Kutai
- Mr. Jhoni, Assistant (adjunct) to the Regent of East Kutai
- Mr. Ad Sagaria, Assistant (adjunct) to the Regent of East Kutai
- Mr. Nur Kholis, Assistant (adjunct) to the Regent of East Kutai
- Mr. Wardi, Assistant (adjunct) to the Regent of East Kutai
- Mr. Fachrizal Muliawan, Assistant (adjunct) to the Regent of East Kutai
- Mr. Muhammad Ali, Assistant (adjunct) to the Regent of East Kutai
- Mr. Puluk Aluk, Assistant (adjunct) to the Regent of East Kutai
- Mr. Lem Anyeq, Assistant (adjunct) to the Regent of East Kutai
- Mr. Syahbudin, Assistant (adjunct) to the Regent of East Kutai
- Mr. Dia Budi, Assistant (adjunct) to the Regent of East Kutai
- Mr. Syahriansyah, Assistant (adjunct) to the Regent of East Kutai

- Mr. Lalu Joni, Assistant (adjunct) to the Regent of East Kutai
- Mr. Andri Hadi, The Ambassador of the Republic of Indonesia to Singapore

71. Messrs. Stephen Jagusch, Anthony Sinclair and Epaminontas Triantafilou presented oral arguments on behalf of Churchill; Mr. Didi Dermawan and Ms. Claudia Frutos-Peterson presented oral arguments on behalf of the Respondent.

72. During the morning session of the hearing on 13 May 2013, the Parties made short opening statements, followed by the examination of Churchill's expert witness on Indonesian law, Dr. Nono Makarim. In the afternoon, the Respondent then presented its first round of oral arguments. During the morning session of the hearing on 14 May 2013, Churchill presented its first round of oral arguments. In the afternoon, each Party, starting with the Respondent, presented its second round of oral arguments.

73. The hearing was sound recorded. A *verbatim* transcript was produced and subsequently distributed to the Parties.

#### **D. POST-HEARING PHASE**

74. On 28 May 2013, the Tribunal issued Procedural Order No. 7 confirming that there would be no post-hearing briefs, that corrections to the hearing transcript were due by 29 May 2013, that the Tribunal would decide on any disagreement between the Parties in this respect, and that each Party was to submit its statement of costs by 5 June 2013, allowing the other Party to comment by 12 June 2013. The Parties submitted their agreed revisions to the hearing transcript on 29 May 2013.

75. In the course of its deliberations, the Tribunal identified several matters requiring further submissions. On 22 July 2013, the Tribunal sent to the Parties a series of questions, inviting them to respond simultaneously by 12 August 2013, and to comment, again simultaneously, by 16 August 2013. On the Claimant's request, the Tribunal postponed these dates and the Parties filed their submissions on 23 and 30 August 2013.

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76. Having deliberated, the Tribunal renders the present decision on jurisdiction.<sup>93</sup> The Tribunal will first summarize the positions of the Parties (Section IV), then analyze these positions (Section V), and finally set out its decision on jurisdiction (Section VI).

#### **IV. POSITIONS OF THE PARTIES AND REQUESTS FOR RELIEF**

##### **A. THE RESPONDENT’S POSITION**

77. In its written and oral submissions, Indonesia raised the following objections to the jurisdiction of this Tribunal with regard to Churchill:

- (i) Article 7(1) of the UK-Indonesia BIT does not provide consent to ICSID arbitration;
- (ii) the BKPM approvals provided to PT ICD do not contain consent to ICSID arbitration of the claims asserted by Churchill; and
- (iii) the investment is not covered by Article 2(1) of the UK-Indonesia BIT, as it has not been granted admission in accordance with the 1967 Foreign Capital Investment Law or any law amending or replacing it.

78. On the basis of these arguments, Indonesia invites the Tribunal to:

- (i) decline jurisdiction in the present case; and
- (ii) order Churchill to pay the totality of costs relating to this Arbitration, including the fees and expenses of the Members of the Tribunal, Respondent’s legal fees and all other amounts incurred by Respondent.

##### **B. THE CLAIMANT’S POSITION**

79. In its written and oral submissions, the Claimant put forward the following main arguments:

- (i) Indonesia consented to ICSID arbitration under the UK-Indonesia BIT;
- (ii) in any event, the requirement of consent under the UK-Indonesia BIT is fulfilled by way of the BKPM Approvals granted to PT ICD;

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<sup>93</sup> The Tribunal uses the term “jurisdiction” as referring to “the jurisdiction of the Centre” and “the competence of the Tribunal” (see Art. 41(2) of the ICSID Convention).

- (iii) the investment has been admitted in accordance with the 1967 Foreign Capital Investment Law or any law amending or replacing it.

80. On the basis of these contentions, Churchill Mining Plc requests the Tribunal to:

- 1) Reject all jurisdictional objections raised by Indonesia; and
- 2) Declare that it has jurisdiction under the UK-Indonesia BIT and the ICSID Convention.
- 3) Order that Indonesia pay all fees and costs incurred in connection with the arbitration proceedings, including the costs of the arbitrators and of ICSID as well as legal and other expenses incurred by the Claimant on a full indemnity basis, plus interest accrued thereupon at a rate to be determined by the Tribunal from the date on which such costs are incurred to the date of payment; and
- 4) Award any other relief the Tribunal deems just and appropriate.

## **V. ANALYSIS**

81. The Tribunal will first address a number of preliminary matters (A) before it enters into the analysis of the jurisdictional objections (B and C).

### **A. PRELIMINARY MATTERS**

#### **1. One or two decisions/awards?**

82. At the common session during which consolidation of the proceedings before the Tribunal was agreed, the Respondent indicated a preference for a single decision/award, while Churchill and Planet asked for two separate decisions/awards. The issue was left open and Procedural Order No. 4, issued after the common session, states that the Tribunal would resolve it after further consultation with the Parties.<sup>94</sup> At the hearing, the Tribunal again requested the Parties' views.<sup>95</sup> The Respondent reiterated its preference for a single decision/award, and stated that "Planet is controlled by Churchill Mining and the claims are the same, so the fact that there are two different bilateral investment treaties is really

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<sup>94</sup> Procedural Order No. 4, ¶ 1.3.4.

<sup>95</sup> Tr. 14052013, 126:3-22.



irrelevant for us. So we would like the tribunal just to render one award or one decision on jurisdiction”.<sup>96</sup> Churchill and Planet, for their part, maintained their prior position and stated that “the earlier position we articulated was that we encouraged the efficiencies to be gained by having single hearings in respect of the two cases and that we sought separate awards, and that remains our position”.<sup>97</sup>

83. The Tribunal is of the view that it must respect the modalities of consolidation agreed by the Parties. The Parties have agreed to consolidate the two arbitrations for all purposes including the conduct of the proceedings and the case account, with the exception of the decisions/awards. Absent consent in this latter respect, the Tribunal considers that it lacks the power to issue a joint decision or award. Hence, the Tribunal will render two separate decisions, the first and present one concerning Churchill (original ICSID Case No. ARB/12/14) and the second one concerning Planet (original ICSID Case No. ARB/12/40).

## **2. The relevance of previous ICSID decisions or awards**

84. In support of their positions, the Parties relied on previous ICSID decisions or awards, either to conclude that the same solution should be adopted in the present case or in an effort to explain why this Tribunal should depart from that solution.
85. The Tribunal considers that it is not bound by previous decisions.<sup>98</sup> At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. Specifically, it deems that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further deems that, subject to the specific provisions of a given treaty and of the circumstances of the actual case, it has a duty to contribute to the harmonious development of investment law, with a view to meeting the legitimate expectations of the community of States and investors towards certainty of the rule of law.

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<sup>96</sup> Tr. 14052013, 155:7-12.

<sup>97</sup> Tr. 14052013, 166:6-10.

<sup>98</sup> In its Reply, ¶ 173, the Claimant indicates that “investor-state jurisprudence, which constitutes non-binding but persuasive authority [constitutes] therefore appropriate ‘supplementary means of interpretation’ under Article 32 of the Vienna Convention”. In its Rejoinder, ¶ 18, the Respondent states that “scholarly commentary constitutes a ‘subsidiary means for the determination of rules of law’ in international law (Art. 38(1)(d) of the ICJ Statute)”. In a footnote, Rejoinder, ¶ 18, n. 45, the Respondent adds that “[t]his is true as well for the reasoning of the tribunal in *Millicom*”, *infra* note 115. See also: Tr. 13052013, 139:22-140:16.

### 3. Legal framework

86. The Tribunal's jurisdiction is contingent upon the provisions of the ICSID Convention on the one hand, and of the UK-Indonesia BIT,<sup>99</sup> on the other hand. In addition, where an international law instrument refers to jurisdictional requirements governed by the municipal law of a Contracting State, that municipal law shall also govern the jurisdiction of the Tribunal to the extent provided by the BIT.

#### 3.1 Jurisdictional requirements under the ICSID Convention

87. Article 25(1) of the ICSID Convention reads in relevant part as follows:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting 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”.

88. Accordingly, Article 25 of the ICSID Convention provides for four requirements for jurisdiction. There must be (i) a dispute between a Contracting State and a national of another Contracting State,<sup>100</sup> (ii) of a legal nature, (iii) arising directly from an investment,<sup>101</sup> and (iv) the Parties must have consented in writing to arbitration.

89. There is no dispute on the first three requirements and rightly so. Indeed, the Tribunal is satisfied that these requirements are met. By contrast, there is a dispute about the fourth requirement, Indonesia arguing in its first jurisdictional objection that it has not consented to submit the present dispute to ICSID arbitration.

#### 3.2 Jurisdictional requirements under the BIT

90. Article 7(1) of the BIT provides the following:

The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre

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<sup>99</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments, 27 April 1976, U.K. Treaty Series No. 62 (1977) (**Exh. CLA-18**).

<sup>100</sup> Mem., ¶ 312; Reply, ¶ 5; Tr. 13052013, 8:10-11.

<sup>101</sup> Mem., ¶ 313; Reply, ¶ 7.

established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any dispute that may arise in connection with the investment.

91. It is undisputed that Indonesia is a Contracting Party of the BIT, and that Churchill qualifies as a “national or company of the other Contracting Party”, i.e. of the United Kingdom. It is equally undisputed that Churchill has made an investment in the territory of Indonesia, and that the dispute arises in connection with the investment.
92. It is further common ground that Article 2(1) of the BIT spells out an additional requirement for jurisdiction, namely that the investment must “have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it”. It does so in the following terms:

This Agreement shall only apply to investments of nationals or companies of the United Kingdom in the territory of the Republic of Indonesia which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it.

93. In this latter respect, the Tribunal notes that the Foreign Capital Investment Law No. 1 of 1967 (“1967 Foreign Investment Law”) was amended by Law No. 11 of 1970,<sup>102</sup> and replaced on 26 April 2007 by Law No. 25 of 2007 concerning Investment (“2007 Investment Law”).<sup>103</sup>
94. The Parties diverge on the fulfillment of the requirement spelled out under Article 2(1), which is the object of Indonesia’s second jurisdictional objection.

### 3.3 Rules for treaty interpretation

95. The ICSID Convention and the BIT must be interpreted pursuant to the rules of the Vienna Convention on the Law of Treaties (VCLT) which codifies customary international law. The Tribunal expands on such rules in its analysis below.

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<sup>102</sup> Law No. 1 on Foreign Investment (1967) (**Exh. CLA-2**).

<sup>103</sup> Law No. 25 on Investment (2007) (**Exh. CLA-4**).

### 3.4 Test for jurisdiction

96. At the jurisdictional stage, the Claimant must establish (i) that the jurisdictional requirements of Article 25 of the ICSID Convention and of the Treaty are met, which includes proving the facts necessary to meet these requirements, and (ii) that it has a *prima facie* cause of action under the Treaty, that is, that the facts it alleges are susceptible of constituting a breach of the Treaty if they are ultimately proven. The Tribunal finds that this test strikes a proper balance between a more exacting standard which would call for examination of the merits at the jurisdictional stage, and a less exacting standard which would confer excessive weight to the Claimant's own characterization of its claims.

## **B. FIRST OBJECTION: CONSENT**

### **1. The Respondent's Position**

97. Indonesia challenges jurisdiction on the ground that it has not consented to ICSID jurisdiction under the UK-Indonesia BIT. Bearing in mind the fundamental requirement of State consent under international law (1.1. below) and the general rules of treaty interpretation (1.2. below), Indonesia argues in essence that Article 7(1) of the UK-Indonesia BIT does not provide consent to ICSID arbitration with respect to Churchill's claims (1.3. below). More specifically, Indonesia contends that the "shall assent" clause contained in Article 7(1) does not constitute consent for purposes of the ICSID Convention and the BIT, and that a subsequent act is required to achieve consent. In this case, Indonesia has not performed such subsequent act thereby exercising a Treaty-based right (1.4. below). In this respect, it also contends that this Tribunal lacks jurisdiction to assess whether Indonesia legitimately withheld its consent. Finally, Indonesia submits that the BKPM approvals granted to PT ICD do not encompass Indonesia's consent to ICSID arbitration of the claims asserted by Churchill (1.5. below), and that, in any event, they do not extend to Churchill (1.6. below).

#### 1.1 State consent is a fundamental requirement under international law

98. Indonesia recalls that the jurisdiction of international courts and tribunals is based on the consent of States, and that various ICSID tribunals have described consent as the

cornerstone of the jurisdiction of ICSID tribunals.<sup>104</sup> State consent cannot be presumed; it must be established by definitive evidence.<sup>105</sup> In the framework of ICSID, “consent must be supplied by a written manifestation of consent”.<sup>106</sup>

## 1.2 The rules on treaty interpretation as reflected in the Vienna Convention on the Law of Treaties

99. Indonesia argues that Article 7(1) must be interpreted in accordance with Articles 31-33 of the VCLT. In this respect, Indonesia puts emphasis on the ordinary meaning of the provision; a holistic approach, considering the object and purpose of the BIT, would not justify disregarding the words themselves.<sup>107</sup> Indonesia also claims that “interpretation of a treaty cannot amount to its revision”.<sup>108</sup> Finally, for Indonesia, the Tribunal should apply the principle of contemporaneity and determine the original will of the Contracting States, instead of adopting an evolutionary interpretation of the dispute settlement clause contained in the BIT.

## 1.3 Article 7(1) of the BIT does not provide consent

100. Indonesia submits that the “shall assent” clause in Article 7(1) does not provide “automatic” consent to ICSID arbitration. For consent to be established, the State must perform a further act following the submission of a request by a claimant. In support of this position, the Respondent advances essentially six arguments: first, the ordinary meaning of “shall assent” is clear - it requires an additional act of consent; second, the structure of the UK-Indonesia BIT, in particular the link between Articles 7(1) and 2(1), confirms the ordinary meaning of “shall assent”; third, the object and purpose of a treaty cannot defeat its plain language; fourth, particular attention must be paid to the principle of contemporaneity; fifth,

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<sup>104</sup> RMOJ, ¶¶ 142-143; Tr. 13052013, 131:21-133:4.

<sup>105</sup> RMOJ, ¶ 145; Tr. 13052013, 132:19-25. The Respondent relies in particular on the *Daimler* decision, where it was held that “it is not possible to presume that consent has been given by state [...] Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence”. **Exh. RLA-020**, ¶ 175.

<sup>106</sup> RMOJ, ¶ 146.

<sup>107</sup> RMOJ, ¶ 149. “Under Article 31, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the treaty’s object and purpose. The holistic approach of considering the object and purpose of a treaty in the interpretation of its terms does not justify disregard of the words themselves”.

<sup>108</sup> RMOJ, ¶ 175; Rejoinder, ¶ 17; Tr. 13052013, 137:5-7.

doctrinal writings support Indonesia's understanding of Article 7(1); and sixth, no relevance should be attributed to the *Millicom* decision.

101. First and foremost, Indonesia argues that the ordinary meaning of the "shall assent" clause in Article 7(1) of the BIT cannot be understood as conferring automatic jurisdiction to the Tribunal, it is a *pactum de contrahendo* whereby the Contracting State must and can only give its consent after the filing of a request by a qualifying investor.<sup>109</sup>
102. According to Indonesia, the "shall assent" clause requires a further declaration on the part of Indonesia.<sup>110</sup> The clause merely requires a Contracting Party to the BIT to give its assent to ICSID arbitration after having been requested to do so by a qualifying investor. Indonesia contrasts the "shall assent" clause with the "hereby consents" clause found in the UK Model BIT. The latter provides for *ex ante* consent, while the former envisages *ex post* consent.<sup>111</sup>
103. According to Indonesia, the "shall assent" clause presumes a sequence "in which the investor first makes a request to which the host state is expected to assent".<sup>112</sup> Therefore, in the absence of a subsequent declaration, the Tribunal cannot but deny its jurisdiction.
104. Second, the structure of the BIT with respect to the "shall assent" clause and the link to other jurisdictional requirements confirms Indonesia's position.
105. For the Respondent, Article 7(1) institutes a two-step procedure allowing Indonesia to refuse to consent if other jurisdictional requirements are not fulfilled,<sup>113</sup> in particular, if the investment has not been granted admission in accordance with Indonesia's Foreign Investment Capital Law as required by Article 2(1) of the BIT.<sup>114</sup>
106. In this context, Indonesia distinguishes *Millicom v. Senegal* to which we will revert below.<sup>115</sup> It also relies on *Desert Line v. Yemen*, where the tribunal held that some States "require that investors wishing to be protected must identify themselves, on the footing that only specifically approved investments will give rise to benefits under the relevant

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<sup>109</sup> RMOJ, ¶ 151.

<sup>110</sup> RMOJ, ¶ 152.

<sup>111</sup> RMOJ, ¶ 157.

<sup>112</sup> RMOJ, ¶ 152.

<sup>113</sup> Tr. 13052013, 134:11-16.

<sup>114</sup> RMOJ, ¶ 186.

<sup>115</sup> *Millicom International Operations B.V. and Sentel GSM S.A. v. Republic of Senegal* ("*Millicom*"), ICSID Case No. ARB/08/20, Decision on Jurisdiction, 16 July 2010 (**Exh. CLA-65**).

treaty”.<sup>116</sup> The tribunal, which expressly referred to the UK-Indonesia BIT,<sup>117</sup> went on to state that “[t]his is a different approach, but it too has a legitimate policy rationale, in the sense that the Governments of such States evidently wish to exercise a qualitative control on the types of investments which are indeed to be promoted and protected”.<sup>118</sup>

107. Third, Indonesia contends that “an interpretation based upon the object and purpose cannot go against the plain language of the treaty”.<sup>119</sup> It submits that the encouragement and protection of foreign investments is not the sole object and purpose of the BIT and that a “State may balance the policy of encouraging investment by investors of the other State party to the BIT with other policies or considerations, one of which may be to preserve the ability to avoid ICSID arbitration of disputes relating to investments outside the protection of the BIT in question”.<sup>120</sup> The screening of foreign investments is a legitimate policy which is reflected in the drafting of Article 7(1) of the Treaty.

108. The Respondent further argues that, even if the object and purpose of the BIT were limited to the encouragement and protection of foreign investments, it cannot defeat the clear language of the “shall assent” clause.<sup>121</sup> In support, Indonesia in particular quotes the Iran-US Claims Tribunal, which held that “[t]he object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty’s object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text”.<sup>122</sup> In connection with the relationship between the object and purpose of an investment treaty and the dispute settlement clause more specifically, Indonesia refers to the tribunal in *Telenor Mobile v. Hungary*, which stressed that its task was “to interpret the BIT [...], not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties”.<sup>123</sup>

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<sup>116</sup> *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 (“*Desert Line*”), ¶ 108 (**Exh. RLA-061**).

<sup>117</sup> RMOJ, ¶ 184.

<sup>118</sup> *Desert Line*, ¶ 108.

<sup>119</sup> RMOJ, ¶ 155.

<sup>120</sup> RMOJ, ¶ 154.

<sup>121</sup> Tr. 13052013, 137:5-7.

<sup>122</sup> RMOJ, ¶ 177, citing *United States v. Iran*, Decision No. 130-A28-FT, 19 December 2000, 36 Iran-US Claims Tribunal Reports 5, ¶ 58 (**Exh. RLA-052**).

<sup>123</sup> RMOJ, ¶ 178.

109. Fourth, although unqualified direct consent to ICSID jurisdiction may not be exceptional anymore in today's times, Indonesia submits that such consent was rather uncommon in the 1970s. Therefore, the principle of contemporaneity must apply in order to assess the real intent of the Contracting States at the time of the conclusion of the BIT in 1976.<sup>124</sup> In support of this proposition, Indonesia invokes the comments of the UK Foreign and Commonwealth Office on the UK Draft Model BIT which contains a "hereby consents" clause, but recognize that prospective signatories "may wish to reserve themselves the right to decide in the case of each individual dispute whether they are prepared to have referred to the Centre for arbitration".<sup>125</sup>
110. Fifth, Indonesia claims that there is virtual unanimity among commentators for its view of the "shall assent" clause. It finds support from the authors who directly refer to the UK-Indonesia BIT,<sup>126</sup> from those commenting on similar provisions in other treaties,<sup>127</sup> and from those making general comments on instruments providing for future consent.<sup>128</sup>

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<sup>124</sup> Tr. 13052013, 138:2-4.

<sup>125</sup> RMOJ, ¶ 156.

<sup>126</sup> RMOJ, ¶ 159. Chester Brown & Audley Sheppard, "United Kingdom", in Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013), p. 745 (**Exh. RLA-035**).

<sup>127</sup> RMOJ, ¶¶ 160-163, 166. Aron Broches, "Bilateral Investment Protection Treaties and Arbitration of Investment Disputes", in Jan C. Schultz & Albert Jan van den Berg (eds.), *The Art of Arbitration, Essays on International Arbitration* (Kluwer Law, 1982), p. 66 (**Exh. RLA-036**) (Commenting on the 1968 Netherlands-Indonesia Economic Cooperation Treaty: "The above-quoted provision would not, however, by itself, enable the investor to institute proceedings before the Centre"); Antonio R. Parra, *The History of ICSID* (Oxford University Press, 2012), p. 133, n. 96 (**Exh. RLA-037**) (Commenting on the 1968 Netherlands-Indonesia Economic Cooperation Treaty: "The provision [...] did not itself represent a consent to the jurisdiction of the Centre but rather an undertaking to give such consent when requested by the Investor"); Antonio R. Parra, "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment", 12 *ICSID Review – Foreign Investment Law Journal* (1997), pp. 322-323 (**Exh. RLA-038**) (Commenting on the 1992 Japan-Turkey BIT: "In the absence of the requisite consent of the host State, the investor would nevertheless remain unable to resort to arbitration or conciliation as envisaged in the BIT"); Schreuer *et al.*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 208-209 (**Exh. RLA-022**) (Commenting on the Netherlands-Pakistan BIT: "It is unlikely that a promise to give consent will be accepted as amounting to consent"); and Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff, 1995), pp. 133-134 (**Exh. RLA-041**) (Commenting on the Netherlands-Pakistan BIT and other BITs concluded by Japan, Australia, France and the UK: "Under none of these provisions, however, would the investor have an immediate right to resort to ICSID arbitration. Such right would in each case depend upon the granting by the host State of the required "assent" or consent"). According to Indonesia, all these authors highlight that the formulation "shall assent" does not provide the necessary consent for international arbitration.

<sup>128</sup> RMOJ, ¶¶ 164-165, 167-169. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), p. 258 (**Exh. RLA-039**) ("Some clauses in BITs referring to arbitration are phrased in terms of an undertaking by the host state to give consent in



111. All these doctrinal opinions underline that the formulation “shall assent” does not provide the investor with an immediate right to resort to international arbitration.
112. Sixth and last, the Respondent seeks to distinguish *Millicom v. Senegal*.<sup>129</sup> There, the Tribunal found that nothing in the wording of the “shall assent” clause in the Netherlands-Senegal BIT “leads to the conclusion that such decision could be left up to the discretion of the State”, and held that “it is more reasonable to view this as a unilateral offer and a commitment by Senegal to submit itself to ICSID jurisdiction”.<sup>130</sup> Indonesia contends that “the *Millicom* decision can hardly be taken as a persuasive authority, let alone one having conclusively settled the issue”.<sup>131</sup>
113. Specifically, Indonesia argues that *Millicom* does not apply to the present case for the following reasons: (i) the *Millicom* tribunal reached its conclusion without discussing any of the doctrinal writings referred to above; (ii) commentators have criticized the *Millicom* decision as being “debatable”, “inconsistent with the clear and unambiguous treaty

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the future. For instance, states may promise to accede to a demand by an investor to submit to arbitration by stating that the host state ‘shall consent’ to arbitration in the event of a dispute”); Kenneth J. Vandeveld, *Bilateral Investment Treaties. History, Policy, and Interpretation* (Oxford University Press, 2010), p. 434 (**Exh. RLA-040**) (“Some BITs provide that, in the event of an investment dispute, the parties “shall” consent to investor-state arbitration. This implies that the BIT itself does not constitute the host state’s consent”); Jean-Pierre Lavie, *Protection et promotion des investissements. Etude de droit international économique* (Presses Universitaires de France, 1985) p. 278 (**Exh. RLA-044**) (“This method does not amount to an expression of state consent within the meaning of the *Washington Convention*; in addition, it will be necessary that the State concerned express its consent in a separate juridical act”); Moshe Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Martinus Nijhoff, 1993), p. 56 (**Exh. RLA-045**) (“The second category of treaties referring to the jurisdiction of the Centre includes treaties that provide that the host state shall give its consent to jurisdiction upon the investor’s request [...] Although provisions of this sort commit the host State to consent to the jurisdiction of the Centre, either in the investment agreement or in another form, they do not constitute actual consent for the purposes of the Centre’s jurisdiction”); Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012), p. 204 (**Exh. RLA-042**) (quoting Moshe Hirsch, *loc. cit.*, p. 56); Matthew Wendlandt, “SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes”, 43 *Texas International Law Journal* (2008) pp. 531-532 (**Exh. RLA-046**) (“Other BIT provisions also stop short of giving consent, providing that a contracting state shall give ‘sympathetic consideration to a request’ for arbitration or, more forcefully, ‘shall assent to any demand’”). The Respondent also relies on a study prepared by the WTO Secretariat: Working Group on the Relationship between Trade and Investment, Consultation and the Settlement of Disputes between Members, WT/WGTI/W/134, Note by the Secretariat dated 7 August 2002, ¶ 49 (**Exh. RLA-043**) (“Other [international investment agreements] stipulate that the host State “shall consent” to ICSID arbitration, or that it “shall assent” to any such demand by the investor, suggesting that the host State’s consent would need to be obtained in respect of each dispute”).

<sup>129</sup> *Millicom*, *supra* note 115 (**Exh. CLA-65**).

<sup>130</sup> *Id.*, ¶ 63.

<sup>131</sup> RMOJ, ¶ 172.

language”, and “contrary to the letter of the treaty”; (iii) the *Millicom* tribunal’s interpretation amounts to treaty revision; (iv) its methodology is fundamentally flawed as it allows the alleged purpose of the treaty to override the plain text; (v) unlike Senegal, Indonesia does not argue that it has discretion to consent or not to a request submitted by an investor. Rather, it claims that it exercised its right to withhold its consent; and (vi) the structure of the BIT, reflecting the “approved investment” approach, is markedly different from the Netherlands-Senegal BIT, which requires that the investment be “in accordance with local law”.

#### 1.4 Indonesia legitimately exercised its treaty-based right to withhold consent

114. Article 2(1) of the UK-Indonesia BIT limits protection to investments that have been granted admission in accordance with the 1967 Foreign Capital Investment Law or any law amending or replacing it.<sup>132</sup> Indonesia considers that Churchill’s investment does not meet this requirement, thus justifying its refusal to arbitrate the present dispute.

115. In any event, the Tribunal could not accept jurisdiction on the ground that Indonesia’s refusal to give consent is illegal, as this would “put the cart before the horse”.<sup>133</sup> Indeed, the Tribunal must have jurisdiction to be able to rule on the legality of Indonesia’s omission. Indonesia further asserts that any challenge of its refusal is subject to the State-to-State dispute resolution mechanism provided in the BIT. In other words, this Tribunal is the wrong tribunal and the Claimant is the wrong party for that hypothetical dispute.<sup>134</sup>

#### 1.5 The BKPM approvals granted to PT ICD do not contain consent to ICSID arbitration of Churchill’s claims

116. Indonesia notes further that Churchill did not rely on the BKPM approvals in its Request for Arbitration; it relied exclusively on the BIT as the source of Indonesia’s consent.<sup>135</sup> Churchill’s attempt to amend its Request for Arbitration on 1 March 2013 by including

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<sup>132</sup> RMOJ, ¶¶ 210-213; Rejoinder, ¶¶ 64-66.

<sup>133</sup> RMOJ, ¶ 212.

<sup>134</sup> Rejoinder, ¶¶ 65, 66.

<sup>135</sup> RMOJ, ¶ 189.

PT ICD as another claimant demonstrates that Churchill knows well that consent is lacking under the BIT and that the BKPM approvals only cover PT ICD, not Churchill.<sup>136</sup>

117. More specifically, Indonesia submits that Section IX(4) of the 2005 BKPM approval does not constitute consent to ICSID arbitration, because (i) the BKPM does not have authority to grant consent to ICSID arbitration, (ii) the wording of Section IX(4) does not include consent on the part of Indonesia, because the word *bersedia* means “is prepared/ready”<sup>137</sup> and not “is willing” as proposed by the Claimant;<sup>138</sup> (iii) in any case, Section IX(4) of the 2005 BKPM approval only extends to PT ICD and not to the Claimant,<sup>139</sup> and (iv) the UK-Indonesia BIT only contemplates consent given by Indonesia after the request has been submitted to ICSID, as opposed to consent given through an instrument drafted in 2005.<sup>140</sup>
118. At the hearing, the Respondent argued that only the President of the Republic can validly grant consent to arbitrate under ICSID and that the authority delegated to the BKPM does not encompass the power to agree to ICSID arbitration.<sup>141</sup> Had the BKPM given Indonesia’s consent to ICSID arbitration:

“That would be a transgression of authority if you treated what BKPM said in paragraph 9(4) as a consent. If you treated it as you mention it, willingness or preparedness to follow, then it will not. Because once the dispute arises, then BKPM will help the investors to go back to the one who has the authority to give us consent”.<sup>142</sup>

119. Thus, according to Indonesia, the BKPM’s “preparedness” can only be interpreted as meaning that, if an investor raises a dispute with the BKPM or any other agency of the Government, such as the Ministry of Mining, then the BKPM would act as an intermediary to “assist the investors to go back to the one who holds the authority”, i.e. the President of the Republic.<sup>143</sup>
120. At the hearing, a member of the Tribunal asked the Respondent whether it could point to any Indonesian law or regulation prohibiting the BKPM to give consent to ICSID arbitration.

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<sup>136</sup>

*Id.*

<sup>137</sup> RMOJ, ¶ 192. See the Respondent’s translation of the BKPM Foreign Investment Approval Letter No. 1304/I/PMA/2005 dated 23 November 2005 (**Exh. R-003**).

<sup>138</sup> RMOJ, ¶¶ 195-197.

<sup>139</sup> Rejoinder, ¶¶ 62-63; R-PHB1, pp. 6-8; R-PHB2, ¶¶ 10-18.

<sup>140</sup> RMOJ, ¶ 206.

<sup>141</sup> Tr. 13052013, 97:25-106:16. See *a/so*: R-PHB1, pp. 5-6; R-PHB2, ¶¶ 1-9.

<sup>142</sup> Tr. 13052013, 105:12-18.

<sup>143</sup> Tr. 13052013, 106:13-15.

The Respondent answered that the question should be put differently. As Article 2 of Law No. 5 of 1968,<sup>144</sup> read in combination with the Indonesian constitution,<sup>145</sup> provides that only the Government, i.e. the President, has the authority to grant ICSID consent, it should be explored whether there is a law or regulation delegating such authority to the BKPM:

“[Tribunal:] The real question is, if you want to say that BKPM has no authority to give this consent to ICSID dispute resolution, then can you ask – I’ve asked Dr. Makarim whether he is aware of any law that prevents them from giving that assent or that consent and he says he is not. So if you are aware of some law that does constrain BKPM’s powers in regard to saying what they said in 9(4), then why don’t you put it to Dr. Makarim?”

[Respondent:] Okay. Because the way I want to ask is different than the way what you just mentioned. You are coming from whether there is any law restricting constraining but this is not the way it works. It should be whether there is any law giving authority to BKPM in granting the consent required under the ICSID Conventions where our law number 5 1968, on the ratification of the ICSID Convention, article 2 clearly stipulate that that authority to give consent is with the government, and based on our constitutions that government is solely represented by the president and then of course it is the president then whether or not he wants to delegate”.<sup>146</sup>

121. With regard to the wording of Section IX(4) of the 2005 BKPM Approval, the Respondent argues that the word *bersedia*, even if it means “willingness” or “preparedness”, “fails to express anything more than a predisposition or openness to pursue settlement in accordance with the provisions of the ICSID Convention”.<sup>147</sup> In this context, Indonesia criticizes Churchill for relying merely on Dr. Makarim who adopts a literal translation of the word *bersedia*.<sup>148</sup> Dr. Makarim makes no effort to argue that Section IX(4) contains Indonesia’s consent, as opposed to a mere disposition to pursue a settlement.<sup>149</sup> Nor does Dr. Makarim provide an opinion on the delegation of authority to the BKPM or on the extension of Section IX(4) to PT ICD’s shareholders.<sup>150</sup>

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<sup>144</sup> Law No. 5 Year 1968, concerning approval to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, with Elucidation (**Exh. RLA-064**).

<sup>145</sup> 1945 Constitution of the State of the Republic of Indonesia (Excerpts, Revised Version), Ch. III, Art. 4(1) (**Exh. RLA-001**).

<sup>146</sup> Tr. 13052013, 110:4-25. See also: R-PHB1, pp. 5-6.

<sup>147</sup> RMOJ, ¶ 198.

<sup>148</sup> Rejoinder, ¶¶ 55-56.

<sup>149</sup> *Id.*, ¶ 57.

<sup>150</sup> *Id.*, ¶ 58.

122. Responding to the Claimant's reliance on *Amco*, Indonesia asserts that such decision is inapposite as the dispute settlement provisions are different. The provision in *Amco* contained definitive language of approval, while Section IX(4) contains "no explicit commitment to pursue a settlement through arbitration".<sup>151</sup>

1.6 Section IX(4) of the 2005 BKPM approval, in connection with the 2006 BKPM approval, does not extend to Churchill

123. Indonesia contends that both Churchill and Planet knew that the dispute settlement clause in Section IX(4) of the 2005 BKPM does not encompass disputes with PT ICD's shareholders. Indeed, none of the Requests for Arbitration referred to the 2005 BKPM Approval as source of Indonesia's consent; they only relied on the BITs. In any event, the wording of Section IX(4) of the 2005 BKPM Approval shows that it only covers disputes with PT ICD.<sup>152</sup> The word "perusahaan" is correctly translated as "company", i.e. PT ICD, and not as "business" as contended by the Claimant.<sup>153</sup>

## 2. The Claimant's Position

124. In addition to stressing that it is an investor and that all other jurisdictional requirements are met,<sup>154</sup> the Claimant submits that Indonesia has consented to ICSID arbitration under the BIT (2.1. through 2.5. below). However, in the event that the Tribunal were to hold that the BIT requires additional consent, Churchill submits that Indonesia has provided such consent by issuing the BKPM Approvals (2.6. below).

125. In its written submissions and at the hearing, the Claimant identified Indonesia's submissions and evidence which, in its view, have no bearing on jurisdiction.<sup>155</sup> These include (i) whether the Claimant's initial interest was in East Kutai or Sendawar; (ii) its allegedly misleading public announcements; (iii) Indonesia's allegation that the Claimant misled its investors; and (iv) Indonesia's "aspersion" on the character of the Claimant's witness, Mr. Quinlivan.

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<sup>151</sup> RMOJ, ¶ 203. See also: Rejoinder, ¶ 63; Tr. 13052013, 161:24-163:7.

<sup>152</sup> RMOJ, ¶ 189; Rejoinder, ¶¶ 62-63; Tr. 14052013, 141:3-143:7; R-PHB1, pp. 6-8; R-PHB2, ¶¶ 10-18.

<sup>153</sup> R-PHB1, pp. 7-8; R-PHB2, ¶ 15.

<sup>154</sup> Mem., ¶¶ 291-300; Reply, ¶¶ 83-86. Regarding fulfillment of the requirements under the ICSID Convention: Mem., ¶¶ 312-315.

<sup>155</sup> Reply, ¶ 4 (referring to Indonesia's "unsupported and inaccurate aspersions"; Reply, ¶¶ 49-53, 55, 57-58, 62-63, 114, 120, 122-123, 124, 126-128, 130); Tr. 13052013, 13:6-14:16.

## 2.1 Indonesia has given its consent under Article 7(1) of the BIT

126. The Claimant argues that Article 7(1) provides Indonesia's written consent to ICSID arbitration. It essentially expands on its position in four steps. First, it outlines the relevant rules on treaty interpretation (2.2. below); second, it discusses its main contention according to which the words "shall assent" provide automatic consent to ICSID arbitration upon filing of the Request for Arbitration (2.3. below); third, it disputes Indonesia's reliance on the principle of contemporaneity (2.4. below); and fourth, it challenges the impact of various authorities cited by the Respondent (2.5. below).

## 2.2 Treaty interpretation rules

127. In connection with treaty interpretation, the Claimant summarized at the hearing its position with regard to the relevant dispute settlement clause as follows:

"Did the drafters intend that the words "shall assent", far from creating certainty, would actually introduce some sort of an option for a state to breach the treaty and prevent resolution of a dispute in a neutral forum? Plainly, they did not. That would be contrary to the object and purpose of the treaty, contrary to the stated desire to achieve certainty and security for investors, contrary to good faith interpretation of treaties [...], and also contrary to the obligation to perform treaties in good faith".<sup>156</sup>

128. According to Churchill, there is a hierarchy between the general rule of interpretation under Article 31 VCLT and recourse to supplementary means of interpretation under Article 32 VCLT.<sup>157</sup> Supplementary means can only come into play if the meaning of the terms is not clear.<sup>158</sup> The interpretation must therefore begin with the language and ensure that the meaning of the Treaty's terms is consistent with the rest of the Treaty, including the preamble and annexes and the specific materials listed under Article 31(2)(a)-(b) and 31(3)(a)-(c) of the VCLT.<sup>159</sup>

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<sup>156</sup> Tr. 14052013, 24:22-25:9.

<sup>157</sup> Reply, ¶ 93.

<sup>158</sup> C-PHB1, ¶ 35.

<sup>159</sup> Reply, ¶ 92.

### 2.3 “Shall assent” provides automatic consent

129. Churchill disputes Indonesia’s interpretation of the terms “shall assent”, arguing that Indonesia’s proposed solution of diplomatic protection runs counter to the modern investor-state system and that it would leave the Claimant *de facto* without recourse.<sup>160</sup> The ordinary meaning of “shall” denotes a binding obligation; it does not provide Indonesia with an “option to veto”.<sup>161</sup> The “shall assent” wording suggests the opposite of an option. The drafters inserted the word “shall” to implement certainty, not to grant the Respondent discretion.<sup>162</sup>
130. Responding to a question from the Tribunal, the Claimant stated at the hearing that the meaning of “assent” was different from the one of “consent”.<sup>163</sup> It does not seem, however, that Churchill drew any conclusion from this difference. It argued that “[c]onsent exists without any further act required of Indonesia beyond the language of the treaties. Any other finding would fly in the face of common sense, ignore the undoubted intention of the drafters of both treaties and lead to palpably absurd results”.<sup>164</sup>
131. Churchill claims that its interpretation of “shall assent” is also supported by the object and purpose of the BIT, which is to create favorable conditions for investments by nationals and companies of one State in the territory of the other State.<sup>165</sup>

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<sup>160</sup> *Id.*, ¶¶ 97-98.

<sup>161</sup> Mem., ¶¶ 318-322; Reply, ¶ 95.

<sup>162</sup> Tr. 13052013, 10:25-11:4.

<sup>163</sup> “To answer your question, is there a distinction between “consent” and “assent”? Yes, there is. There is a difference. “Assent” means something different” (Tr. 14052013, 61:2-6). And the Claimant went on:

“[Claimant:] Let’s look at what assent means, as you have asked. Black’s Law Dictionary, which we’ve already seen, it’s on the record, “assent”, agreement approval or permission, especially verbal or nonverbal conduct reasonably interpreted as willingness. The Oxford Dictionary of English, the expression of approval. There is, we say, a distinction, perhaps a fine one, but there is a distinction between “assent” and “consent”. Verbal or nonverbal conduct reasonably interpreted as willingness will suffice.

[Tribunal:]. Are you saying that all assents are consents and not the other way around?

[Claimant:] At first blush, sir, that seems right, but I’d like to think about that question and come back to you, if I have anything further to add”.

It does not appear, however, that the Claimant drew conclusions from this difference (Tr. 14052013, 63:19-64:9).

<sup>164</sup> Tr. 13052013, 9:20-25. See also: Mem., ¶ 322; Reply, ¶ 95.

<sup>165</sup> Reply, ¶ 100. UK-Indonesia BIT, *supra* note 84, (**Exh. CLA-18; Exh. R-001**), preamble.

132. Similarly, relying on *Millicom*, the Claimant explains that Indonesia’s interpretation is contrary to the “clear intent” of the drafters of the treaty.<sup>166</sup> It is also irreconcilable with the obligation to interpret treaty provisions in good faith, which cannot permit “a State to violate its treaty obligations at will”.<sup>167</sup> Churchill further argues that, if a text has two possible meanings, then good faith interpretation “requires the interpreter to prefer the ‘better faith’ interpretation consistent with the object and purpose of the treaty and the presumption that States mean what they say” when ratifying a treaty.<sup>168</sup>
133. The Claimant seeks to substantiate its interpretation of the terms “shall assent” by relying on the *Millicom* decision.<sup>169</sup> In that case, the arbitral tribunal was faced with a provision in the Netherlands-Senegal BIT similar to the one at issue here and held that nothing in the wording of the term “shall assent” would lead to the conclusion that such decision could be left to the discretion of the host State.<sup>170</sup> It decided that the dispute settlement clause contained Senegal’s unilateral offer of consent, which was accepted by the filing of the investor’s request.
134. Relying on explanatory notes of the Dutch Foreign Ministry on similar “shall assent” wording in various agreements entered into by the Netherlands,<sup>171</sup> the Claimant argues that the UK-Indonesia BIT seeks to offer investors certainty in terms of recourse to arbitration.<sup>172</sup>

#### 2.4 Indonesia’s reliance on the principle of contemporaneity is misleading

135. As a threshold matter, the Claimant stresses that the principle of contemporaneity must be applied with restraint, as it is not part of the rules on interpretation of the VCLT.<sup>173</sup>
136. In any event, the interpretation of the terms “shall assent” proposed by the Claimant with regard to the UK-Indonesia BIT is consistent with the original will of the drafters in 1976.

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<sup>166</sup> Reply, ¶ 99.

<sup>167</sup> Reply, ¶ 100.

<sup>168</sup> C-PHB1, ¶ 29.

<sup>169</sup> Mem., ¶¶ 323-324; Reply, ¶¶ 96-99, n. 131 and 134.

<sup>170</sup> *Millicom*, *supra* note 115, ¶ 63.

<sup>171</sup> Reply, ¶¶ 120-131.

<sup>172</sup> Reply, ¶ 124.

<sup>173</sup> Reply, ¶ 103.



They intended to express in mandatory terms the certainty that investors would have access to ICSID proceedings.<sup>174</sup>

137. Furthermore, Indonesia's understanding of the principle of contemporaneity is misleading. The VCLT leaves the door open for evolutive interpretation so as to render the terms of a treaty effective in the light of changing circumstances.<sup>175</sup>

138. In the present instance, the terms "shall assent" must be read bearing in mind subsequent practice; it must be interpreted "within the framework of the entire legal system prevailing at the time of interpretation", i.e. in essence the system of arbitration without privity.<sup>176</sup> Proceeding in this manner could result in a departure from the original intent of the parties to the BIT.

## 2.5 Indonesia's reliance on various commentators is erroneous

139. Indonesia's reliance on doctrinal writings which observe that there is a "virtual unanimity" among commentators about the interpretation of "shall assent" is "misleading in its breadth and mistaken in its content".<sup>177</sup>

140. The Claimant starts by calling attention to the fact that Indonesia's interpretation of "shall assent" is not substantiated by any *travaux préparatoires* relating to Indonesia's own treaties.<sup>178</sup> Nor do the commentators cited by Indonesia rely on preparatory materials relating to the negotiation or conclusion of the UK-Indonesia BIT.<sup>179</sup>

141. Churchill further points out that most commentators referred to by Indonesia uncritically rely on Aron Broches' analysis, who himself cites nothing in support of his view. Subsequent authors have thus reproduced the same mistaken interpretation. Through a

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<sup>174</sup> Reply, ¶ 102.

<sup>175</sup> Reply, ¶ 103.

<sup>176</sup> Reply, ¶¶ 104-105.

<sup>177</sup> Reply, ¶ 113.

<sup>178</sup> Reply, ¶ 115.

<sup>179</sup> Reply, ¶ 115.

“citation chain” dating back to Broches,<sup>180</sup> that interpretation has become “conventional wisdom”. That wisdom is no evidence of the intent of the drafters.<sup>181</sup>

## 2.6 Indonesia has provided its consent under the BKPM Approvals

142. Should the Tribunal find that the UK-Indonesia BIT requires an additional act of consent, Churchill argues that the Respondent has given such consent in the 2005 BKPM Approval. This consent was transferred to the Claimant upon its acquisition of PT ICD and through the 2006 BKPM Approval, which validated the acquisition of PT ICD and incorporated the 2005 BKPM Approval.
143. The Claimant disagrees with the Respondent’s contention that the BKPM Approvals only extend to PT ICD and not to its shareholders. Relying on *Noble Energy v. Ecuador*, the Claimant disputes that the Respondent granted its consent only to PT ICD “when the only manner in which that company could benefit from such consent would be under investment treaties [...] to which it would resort by virtue of its foreign ownership”.<sup>182</sup>
144. The Claimant further relies on *Amco v. Indonesia* and *Holiday Inns v. Morocco* for the proposition that a host State’s consent contained in domestic instruments, such as contracts concluded with or licenses granted to local subsidiaries, extends to the foreign investors insofar as they carry out their obligations under the contract.<sup>183</sup> The Claimant argues that it is the driving force behind PT ICD’s activities and that it funded these activities allocating resources, contacts and expertise in developing the EKCP project. Therefore, it is “reasonable to interpret the ICSID consent granted by the Respondent as intended to protect its rights as investor as well, especially since they overlap almost entirely with those of PT ICD”.<sup>184</sup>
145. The Claimant also seeks support in the expert report of Dr. Makarim, who opines that the inclusion of ICSID dispute settlement clauses in the BKPM approvals is “not standard”<sup>185</sup>

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<sup>180</sup> Reply, ¶ 118.

<sup>181</sup> Tr. 13052013, 11:7-11. The Claimant observes that the more recent authors on whom Indonesia relies have not taken into account *Millicom* and that Indonesia omitted to cite Andrew Newcombe and Lluís Paradell who acknowledge that the words “shall assent” are ambiguous (Reply, ¶119).

<sup>182</sup> Reply, ¶ 156.

<sup>183</sup> Reply, ¶¶ 157-158.

<sup>184</sup> Reply, ¶ 159. See also: C-PHB2, ¶¶ 21-27.

<sup>185</sup> Reply, ¶ 155; Makarim ER2, p. 10.

and “not at all consistent practice of BKPM”.<sup>186</sup> In spite of a divergent practice, reference to ICSID dispute settlement was expressly included here and granted to a local company that was in foreign hands at 95% from its inception and at 100% since the Claimants’ acquisition. For these reasons, Dr. Makarim is of the view that the “deliberate insertion of the clause must be interpreted as the Government’s intention to follow the [ICSID] Convention’s dictates in settling disputes”.<sup>187</sup>

146. With regard to the wording of Section IX(4) of the 2005 BKPM Approval, the Claimant translates the Indonesian word *bersedia* as “is willing”.<sup>188</sup> On that basis, the Claimant submits that the “shall assent” requirement under the UK-Indonesia BIT is fulfilled.<sup>189</sup> It also refutes the Respondent’s allegation that the BKPM lacked authority to agree to ICSID arbitration, pointing to the fact that the BKPM Approval was copied to the President’s office and various other Ministries.<sup>190</sup> Had the BKPM overstepped its authority, the President would presumably have taken appropriate action.

147. Finally, with regard to Indonesia’s argument that the BIT only considers consent given by the host State after the request for arbitration has been filed by a qualifying investor, thus giving the host State the right to refuse to grant its consent on a case by case basis, the Claimant argues that no provision in the BIT prevents either State party to provide its consent in advance such as through the BKPM Approvals.<sup>191</sup>

### 3. Analysis

#### 3.1 Consent to ICSID arbitration in general

148. Article 25 of the ICSID Convention requires consent for the Parties to be bound to arbitrate under the ICSID regime. Several arbitral tribunals have taken the position that the expression of consent to ICSID arbitration must be “clear and unambiguous”,<sup>192</sup> or that

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<sup>186</sup> Reply, ¶ 162.

<sup>187</sup> Makarim ER2, p. 10.

<sup>188</sup> Foreign Capital Investment Approval for PT ICD, Decision No. 1304/I/PMA/2005 dated 23 November 2005 (with Certificate of Translation) (**Exh. C-17**); Reply, ¶ 154; Tr. 14052013, 67:15-19.

<sup>189</sup> Tr. 14052013, 67:25-68:4.

<sup>190</sup> C-PHB1, ¶ 16; C-PHB2, ¶¶ 29-31.

<sup>191</sup> Reply, ¶ 163; C-PHB2, ¶ 28.

<sup>192</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (“*Plama*”), ¶¶ 198, 218 (**Exh. CLA-130**); *Telenor Mobile*

consent must be proven through “affirmative evidence”.<sup>193</sup> Except for calling for a writing, the ICSID Convention contains no particular requirement of clarity or otherwise. Hence, the Tribunal will assess consent pursuant to the general rules on treaty interpretation.

### 3.2 The Tribunal’s interpretative approach

149. The interpretation of the UK-Indonesia BIT is governed by Articles 31-32 of the Vienna Convention on the Law of Treaties (VCLT),<sup>194</sup> which codify customary international law.<sup>195</sup>
150. When interpreting the BIT and seeking to assess the common intention of the Contracting States, account must be taken of the special nature of investor-State arbitration, namely that the home State of the investor is not a party to the arbitration. It does not have the opportunity to present its views on the interpretation of “its” treaty nor to produce evidence in support, unlike the host State. This asymmetry inherent in investment treaty arbitration may justify recourse to the Tribunal’s procedural powers under Rules 34 and 37 of the ICSID Arbitration Rules.
151. According to Article 31 VCLT, a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. No special rule applies to the interpretation of a dispute settlement provision. Hence, such treaty provisions must be construed like any other, neither restrictively nor broadly. Or in the words of *Amco*:

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*Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, ¶ 90 (**Exh. RLA-053**); *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 August 2006, ¶¶ 177-178, 181-182; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, ¶ 167 (**Exh. RLA-021**).

<sup>193</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (“*Daimler*”), ¶ 175 (**Exh. RLA-020**).

<sup>194</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 243 (**Exh. CLA-17**).

<sup>195</sup> Mem., ¶ 289; RMOJ, ¶ 149 (referring to *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, ICJ Report 213 (2009), ¶ 47 (**Exh. RLA-023**); *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 136 (2004), ¶ 94 (**Exh. RLA-024**); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, ¶ 75 (**Exh. RLA-025**); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, ¶ 141 (**Exh. RLA-026**); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 50 (**Exh. RLA-027**); *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶ 88 (**Exh. RLA-028**). The United Kingdom ratified the VCLT on 25 June 1971. Indonesia has not ratified the VCLT.

“[L]ike any other convention, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly or liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties; such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law”<sup>196</sup>.

152. The Parties concur, and rightly so, that the starting point for treaty interpretation is the text.<sup>197</sup> The ordinary meaning of the text must be ascertained in the light of the context and the treaty’s object and purpose, any subsequent agreement or practice of the Contracting States related to the interpretation of the treaty, and any other relevant rules of international law binding the Contracting States.<sup>198</sup>

153. The primacy of the text viewed in its context and bearing in mind the treaty’s object and purpose implies that recourse to extrinsic evidence is only allowed in limited circumstances. Pursuant to Article 32, one may resort to supplementary means of interpretation (i) to confirm the meaning resulting from the application of Article 31, or (ii) to determine the meaning when the interpretation according to Article 31 “leaves the meaning ambiguous or obscure”, or (iii) “leads to a result which is manifestly absurd or unreasonable”. In *HICEE*, the tribunal noted that supplementary means are not a closed category.<sup>199</sup>

### 3.3 Article 7 of the UK-Indonesia BIT

154. Article 7 of the UK-Indonesia BIT reads as follows:

“(1) The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre

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<sup>196</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, Award on Jurisdiction, 25 September 1983, 1 ICSID Reports (1983) 389 (“*Amco*”) (**Exh. CLA-38**). See also: *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 43 (**Exh. CLA-128**) (“In the Tribunal’s view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary law”).

<sup>197</sup> International Law Commission, Draft Articles on the Law of Treaties (1966), Art. 27 and 28, ¶ 18, p. 220, par. (11) (**Exh. CLA-96**).

<sup>198</sup> *Id.*

<sup>199</sup> *HICEE BV v. Slovak Republic*, Partial Award, 23 May 2011, ¶ 117.

established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any dispute that may arise in connection with the investment.

(2) A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which immediately before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party”.

155. Indonesia submits that it has not consented to ICSID arbitration, and that Article 7(1) of the UK-Indonesia BIT cannot be construed as a standing offer to arbitrate. It merely constitutes a promise to consent. Indonesia also submits that the BKPM Approvals do not express consent to ICSID arbitration.

The Tribunal will first determine whether the UK-Indonesia BIT contains a standing offer of ICSID arbitration and will only analyze whether the BKPM Approvals contain consent to ICSID arbitration if it reaches a negative conclusion in respect of the UK-Indonesia BIT.

### 3.4 The ordinary meaning of the words “shall assent”

156. It is Indonesia’s main contention that it did not “assent” to Churchill’s Request for Arbitration, and that therefore this Tribunal lacks jurisdiction. According to Indonesia, Article 7(1) contemplates a two-step process in which the foreign investor submits a request for arbitration and Indonesia then gives its consent.<sup>200</sup> The natural and ordinary meaning of “shall assent” implies a future action.

157. Indonesia has not developed specific arguments on the meaning of “assent” and on the distinction between “assent” and “consent”. Instead, Indonesia sought to ascertain the ordinary meaning of the words “shall assent” taken together. According to Indonesia, “shall assent” signifies that a separate, subsequent act of consent by the host State is called for each time a qualifying investor seeks to engage in ICSID arbitration. Article 7(1) only encompasses a promise to consent, a so-called *pactum de contrahendo*.

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<sup>200</sup> Tr. 13052013, 134:11-16.

158. Indonesia acknowledges that in principle it is required to grant its consent.<sup>201</sup> It submits, however, that it is entitled to review on a case-by-case basis whether the jurisdictional requirements set in the treaty are fulfilled as a prerequisite for its decision to give consent. In particular, Indonesia argues that there is a link between Articles 7(1) and 2(1) of the treaty.<sup>202</sup> Accordingly, it is required to give its consent only if it is established (after the filing of the request for arbitration) that the investment at issue was granted admission as required under Article 2(1) of the BIT. Since Churchill failed to conform to the requirements of Article 2(1), Indonesia is entitled to withhold its consent. In any event, even if the Tribunal were to find that the Article 2(1) objection is ill-founded, the Tribunal would nevertheless lack jurisdiction, because Indonesia has not given its consent.<sup>203</sup> In this context, Indonesia submits that the inter-State dispute settlement mechanism enshrined in Article 8 of the Treaty was specifically designed to address whether a host State is bound to grant its consent or whether it is justified to withhold it.<sup>204</sup>
159. For its part, Churchill argues that the formula “shall assent” in and of itself fulfills the requirement of consent by the host State under Article 25 of the ICSID Convention. There is no further action required from the host State after the filing of the request for arbitration. The ordinary meaning of the word “shall” denotes a legally binding obligation. In other words, “[f]ar from signifying an option, it is an expression of a mandatory obligation”.<sup>205</sup> It was thus the clear intent of the treaty drafters to provide investors with the certainty of access to ICSID arbitration.
160. Until the hearing, the Claimant seemed to assume that “assent” and “consent” were synonyms. Relying on various dictionary definitions, Churchill put forward that “assent” signifies “verbal or nonverbal conduct reasonably interpreted as willingness” or “expression of approval”.<sup>206</sup> Even at the hearing, the Claimant did not appear to draw clear-cut conclusions from the use of different words. Its arguments about this distinction rather concerned the question whether the BKPM Approvals contained an expression of consent.<sup>207</sup> For the Claimant, were the Tribunal to find that an additional act is required

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<sup>201</sup> RMOJ, ¶ 187.

<sup>202</sup> RMOJ, ¶ 186.

<sup>203</sup> Rejoinder, ¶ 66.

<sup>204</sup> Rejoinder, ¶ 65. See also: Tr. 13052013, 163:23-165:11.

<sup>205</sup> Reply, ¶ 95.

<sup>206</sup> Tr. 14052013, 63:21-25.

<sup>207</sup> Tr. 14052013, 62:17-63:4 and 63:19-64:4.

under Article 7(1) of the UK-Indonesia BIT, such “assent” could readily be found in the BKPM approvals.

161. A closer look at the Claimant’s submissions reveals that, in reality, the Claimant has put forward two different lines of reasoning. The first one works on the assumption that Article 7(1) already encompasses the necessary advance consent, conceptualized as an offer to arbitrate, which is accepted by the investor when filing of the request for arbitration. In sum, the Claimant seems to argue that “shall assent” is the functional equivalent of “hereby consents” or of “shall be bound to submit”.<sup>208</sup> The Claimant’s second line of reasoning assumes that the investor’s request for arbitration contains the offer to arbitrate, which offer is automatically met by the consent of the host State without any need of further action by that State.<sup>209</sup>
162. The core disagreement between the Parties hinges on the meaning of the words “shall assent”. It is common ground, and rightly so, that the word “shall” implies an obligation. This would suggest that the submission to ICSID on the part of the Respondent is mandatory. The Tribunal tends to agree with the Claimant that, taken on its own, the word “shall” implies that there is no discretion on the part of the host State confronted with a request for arbitration. On the other hand, “shall” can also be understood as implying a future action. In this sense, the use of the word “shall” does not necessarily imply automaticity in the achievement of the contemplated result.
163. It comes as no surprise that the Parties have not articulated any clear difference between “assent” and “consent”. A review of relevant dictionaries does not allow one to identify the substance of the distinction, if any. Black’s Law Dictionary defines “assent” as “[a]greement, approval, or permission, esp. verbal or nonverbal conduct reasonably interpreted as willingness”.<sup>210</sup> The definition refers back to consent. “Consent” is defined as “[a]greement, approval or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent”.<sup>211</sup>
164. Garner’s Dictionary of Legal Usage indicates that the verbs assent, consent, accede, agree, acquiesce, subscribe share the sense “to express a willingness to go along with

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<sup>208</sup> C-PHB1, ¶ 42.

<sup>209</sup> Mem., ¶ 319. See also: Rejoinder, ¶ 95; and Tr. 14052013, 26:10-13.

<sup>210</sup> Black’s Law Dictionary, 9<sup>th</sup> edition, 2009, p. 132.

<sup>211</sup> *Id.*, p. 346.



someone else's wishes or views". With regard to assent, the dictionary states that assent "involves the intellect and applies to propositions or opinions", whereas consent "involves feelings or the will and connotes complying with a request". The dictionary adds, "[o]f course, one can assent or consent against one's better judgment".<sup>212</sup> Merriam-Webster's Dictionary of Law defines "assent" as follows: "1. *v.* to agree to something esp. freely and with understanding: give one's assent; 2. *n.* agreement to a matter under consideration esp. based on freedom of choice and a reasonable knowledge of the matter".<sup>213</sup> It defines "consent" as follows: "1. compliance in or approval of what is done or proposed by another; 2. agreement as to action or opinion".<sup>214</sup>

165. These definitions do not allow one to draw a clear distinction between the two terms. Both "consent" and "assent" are manifestations indicating a willingness to engage in certain conduct or an agreement with a proposed opinion. It is true that "consent" is a term of foundational importance in the area of international dispute settlement. In the ICSID framework, disputing parties are required to "consent in writing" to ICSID arbitration. Accordingly, one might venture to say that, *prima facie* at least, assent may not suffice to create the jurisdiction of an ICSID tribunal.
166. In the same vein, the Tribunal tends to agree with the Respondent that the natural meaning of "shall assent to any request" seems to imply a certain time sequence. Indeed, this expression lends support to the view that the investor must first file a request and only thereafter will the host State "assent".
167. A closer look to the consequences of the Parties' theses may be helpful. If one adopts one or the other of the Claimant's approach, it is clear that the Respondent's consent existed at the latest at the time of filing the request for arbitration.
168. By contrast, the consequences of Indonesia's interpretation give rise to a number of questions. Article 7(1) of the UK-Indonesia BIT is unequivocal in that Indonesia committed itself to grant its assent. It indicates that the host State "shall assent to any request". The Tribunal understands this formulation as implying that, in one manner or another, a qualifying investor will have access to ICSID arbitration. However, under Indonesia's interpretation, even if this Tribunal were to hold that Indonesia has an obligation to

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<sup>212</sup> Garner's Dictionary of Legal Usage, 3<sup>rd</sup> edition, 2011, p. 85.

<sup>213</sup> Merriam-Webster's Dictionary of Law, (Merriam-Webster, Springfield Mass., 1996), p. 34.

<sup>214</sup> *Id.*, p. 97.

consent, it could not enforce it as only the inter-State arbitral tribunal could determine whether Indonesia legitimately withheld its consent.

169. There are at least three main difficulties with this theory. First, there is no specific link between the investor-State and the inter-State arbitration clauses, none of which makes a cross-reference to the other. Second, even if an inter-State arbitral tribunal under Article 8 of the Treaty were to hold that Indonesia breached its obligation under Article 7(1), it is not clear to what extent Churchill could eventually have recourse to ICSID arbitration. If the inter-State tribunal considers that Indonesia was bound to give its assent upon the filing of Churchill's request for arbitration, that tribunal would not be in a position to procure Indonesia's missing consent. It could order specific performance. It would be left to Indonesia to abide by such order with the result that Churchill might remain without recourse to ICSID arbitration.

170. Third, it is generally accepted that, in the ICSID framework, consent must exist on the day when the request for arbitration is filed.<sup>215</sup> Indonesia's thesis that consent under Article 7(1) would by definition be provided *after* the filing of the request is at odds with this requirement. In sum, Indonesia's thesis raises difficulties which square badly with the categorical connotation of "shall assent".

171. To conclude, the interpretation on the basis of the meaning of the words of the treaty is inconclusive, as two readings of the words "shall assent" are possible. The Tribunal will now review whether the context lends support to one reading rather than the other.

### 3.5 The context surrounding the words "shall assent"

172. Several observations can be made on the context of the words "shall assent". First, Article 7 only provides for access to ICSID to the exclusion of other fora. Thus, on the international plane, the only possibility for Churchill to obtain redress is by gaining access to ICSID arbitration. Although not conclusive, this observation rather lends support to the investor's argumentation.

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<sup>215</sup> Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ¶ 24 [available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section05.htm#02>].

173. Second, Article 7(1) lacks any indication as to how Indonesia is to give its assent. If one assumes Indonesia's interpretation to be correct, i.e. that Indonesia must give its assent after the filing of a request, one would expect Article 7 to specify the modalities of such assent. This observation also seems to favor the Claimant's position.
174. Third, Article 7(1) mandates the host State to assent to "any request". Indonesia argues that it has the discretion, albeit limited, to withhold its consent if the jurisdictional requirement contained in Article 2(1) is not met. While it will review the merits of Indonesia's objection based on Article 2(1) in the framework of Indonesia's second preliminary objection, it must determine now whether Indonesia can legitimately withhold its consent in light of the alleged link between Article 7(1) and Article 2(1). The plain words of Article 7(1) state that Indonesia "shall assent" to "any request". Article 7(1) contains no link to Article 2(1), nor does Article 2(1) refer to Article 7(1). In these circumstances, the Tribunal cannot accept that Article 7(1) grants Indonesia discretion to assent or not depending on the assessment of the requirements set in Article 2(1). While Indonesia's objection under Article 2(1) may eventually be well-founded, it is not for Indonesia to make that determination at the level of its assent under Article 7, but for this Tribunal ruling on its jurisdiction.
175. In sum, the context surrounding the words "shall assent", while not decisive, rather favors Churchill's interpretation that it has a right to initiate ICSID arbitration.

### 3.6 The object and purpose of the BIT

176. The Claimant argues that Indonesia's interpretation frustrates the object and purpose of the Treaty, which, in accordance with the preamble, is to "create favourable conditions for [...] investments by nationals and companies of one State in the territory of the other State".<sup>216</sup>
177. For its part, Indonesia argues that the mere adherence to a bilateral investment treaty does not automatically commit the Contracting States to provide optimal and maximum security to foreign investors.<sup>217</sup> In this regard, Indonesia puts forward that a "State may balance the policy of encouraging investment by investors of the other State party to the BIT with other policies or considerations, one of which may be to preserve the ability to avoid ICSID

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<sup>216</sup> Preamble of the UK-Indonesia BIT, *supra* note 84, (**Exh. CLA-18; Exh. R-001**). See Reply, ¶ 100.

<sup>217</sup> RMOJ, ¶ 154.

arbitration of disputes relating to investments outside the protection of the BIT in question”.<sup>218</sup> In any event, Indonesia contends that an interpretation based on the object and purpose of a treaty cannot go against the plain language of a treaty.<sup>219</sup>

178. The Tribunal considers that the object and purpose of the treaty is neutral for present purposes. The preamble of the UK-Indonesia BIT states that the United Kingdom and Indonesia strive “to create favourable conditions for greater economic co-operation between them and in particular for investments by nationals and companies of one State in the territory of the other State”.<sup>220</sup> The preamble further provides that both States recognize “that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States”.<sup>221</sup> In other words, the preamble refers to both the private interests of the investor as well as the public interests of the State. It is thus of little assistance in the present context.

179. At this juncture, the result of the Tribunal’s analysis can be summarized as follows. First, for the reasons stated above, the ordinary meaning of “shall assent” is unclear. Second, the context rather supports Churchill’s interpretation, without however delivering a fatal blow to Indonesia’s interpretation. Third, the object and purpose of the BIT is of no avail in the present dispute.

180. As a result, the Tribunal cannot but find that the meaning of “shall assent” is unclear or ambiguous. Consequently, it will now review any relevant supplementary means of interpretation pursuant to Article 32 VCLT. In doing so, it will conduct a review of cases and scholarly writings which it had not covered in the first step of the analysis to better focus on the treaty’s intrinsic elements.

### 3.7 Supplementary means of interpretation

181. Article 32 VCLT allows recourse to the preparatory work of the treaty and the circumstances surrounding the treaty’s conclusion. It does not give an exhaustive list of

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<sup>218</sup>

*Ibid.*

<sup>219</sup>

RMOJ, ¶¶ 155, 174; Rejoinder, ¶ 17.

<sup>220</sup>

UK-Indonesia BIT, *supra* note 84, (**Exh. CLA-18; Exh. R-001**), preamble.

<sup>221</sup>

*Ibid.*

admissible materials and the Tribunal thus has latitude to include any element capable of shedding light on the interpretation of “shall assent”.

182. Since the Respondent has put most emphasis on doctrinal writings and the Claimant on case law, the Tribunal will address these materials first. Accordingly, the analysis will focus on (i) doctrinal writings, (ii) case law, (iii) the treaty practice of Indonesia and the United Kingdom with third States, and (iv) the preparatory materials regarding the negotiation of the UK-Indonesia BIT.

### 3.7.1 Doctrinal writings on “shall assent”

183. Indonesia filed a number of doctrinal writings<sup>222</sup> showing virtual unanimity in support of Indonesia’s interpretation of the “shall assent” clause.<sup>223</sup> It stresses that the first author to comment upon a “shall assent” clause was Aron Broches, the father of the ICSID Convention. In 1982, he wrote that the “shall assent” clause of the 1968 Netherlands-Indonesia Economic Cooperation Treaty “would not [...] by itself, enable the investor to institute proceedings before the Centre” and that “[a] request to that effect would presumably be rejected by the Secretary-General of the Centre”.<sup>224</sup> He also stated that if the host State refused to give its consent once asked, the home State could resort to remedies available under the treaty or other rules of international law.<sup>225</sup>

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<sup>222</sup> See the references with excerpts, *supra* notes 127 and 128.

<sup>223</sup> In addition to those referred to expressly in the following paragraphs, Indonesia also relies on Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), p. 258 (**Exh. RLA-039**); Chester Brown & Audley Sheppard, “United Kingdom”, in: Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP, 2013), p. 745 (**Exh. RLA-035**); Kenneth J. Vandeveld, *Bilateral Investment Treaties. History, Policy, and Interpretation* (Oxford University Press, 2010), p. 434 (**Exh. RLA-040**); Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012), p. 204 (**Exh. RLA-042**); Moshe Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes* (Martinus Nijhoff, 1993), p. 56 (**Exh. RLA-045**); Matthew Wendlandt, *SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes*, 43 *Texas International Law Journal* (2008), pp. 531-532 (**Exh. RLA-046**).

<sup>224</sup> Aron Broches, ‘Bilateral Investment Protection Treaties and Arbitration of Investment Disputes’, in: Jan C. Schultz & Albert Jan Van den Berg (eds), *The Art of Arbitration. Essays on International Arbitration* (Kluwer Law, 1982), p. 66 (**Exh. RLA-036**).

<sup>225</sup> *Loc cit*.

184. The same opinion was expressed by others,<sup>226</sup> including Parra<sup>227</sup> and Schreuer<sup>228</sup> who also took the view that “shall assent” does not amount to a standing consent and that a failure of a host State to grant such assent when requested by the qualifying investor can only be resolved through inter-State arbitration.
185. For its part, Churchill asserts that none of these authors engages in an in-depth analysis of “shall assent” clauses, mostly relying on previous publications. According to Churchill, these authors can all be placed in a single “citation chain” that one can trace back to Broches citing nothing in support of his opinion. Churchill also notes that the recent decision in *Millicom v. Senegal*, to which we will revert, has led certain observers to be less assertive about the meaning of “shall assent”. For instance, Dolzer and Schreuer, while sticking to the conventional wisdom, have in fact uncritically taken notice of the *Millicom* decision. Commenting on Article 11 of the Netherlands-Indonesia treaty of 1968, Newcombe and Paradell are of the view that the meaning of “shall assent” is not as clear-cut as most doctrinal writings make it to be and that “[t]he effect of the article is unclear”.<sup>229</sup>
186. Doctrinal writings may indeed provide guidance on the state of the law (Article 38(1)(d) of the ICJ Statute) and it is self-evident that an opinion grounded on thorough research and rigorous reasoning is more likely to influence the interpretative process than one that is not. Bearing this in mind, it is striking that the doctrinal opinions invoked by Indonesia essentially rely on previous writings and refer to Broches and Schreuer (who himself cites Broches) and quote similar provisions in various BITs.
187. To mention only the most authoritative here, Broches, who appears to have been the first to address the “shall assent” clause, only seeks support in similar provisions in other Dutch and English BITs; he does not refer to any documents emanating from the Contracting

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<sup>226</sup> Jean-Pierre Lavie, *Protection et promotion des investissements. Etude de droit international économique* (PUF, 1985), p. 278 (**Exh. RLA-044**); Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff, 1995), pp. 133-134 (**Exh. RLA-041**).

<sup>227</sup> Antonio R. Parra, ‘Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment’, 12 *ICSID Review – Foreign Investment Law Journal* (1997), pp. 322-323 (**Exh. RLA-038**). See also: Antonio R. Parra, *The History of ICSID* (OUP, 2012), p. 133, n. 96 (**Exh. RLA-037**).

<sup>228</sup> Christoph Schreuer, *The ICSID Convention. A Commentary* (2<sup>nd</sup> edition, CUP, 2009), pp. 208-209 (**Exh. RLA-022**). See also the identical formulation contained in the first edition (CUP, 2001), p. 216 (**Exh. CLA-105**).

<sup>229</sup> Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (2009), p. 44, n. 264 (**Exh. CLA-111**).

States eliciting the intention of the drafters.<sup>230</sup> Schreuer too merely reviews Article 10 of the 1988 Netherlands-Pakistan BIT, refers to similar provisions in other BITs, and cites to Broches and Dolzer & Stevens.<sup>231</sup> Chester Brown and Audley Sheppard<sup>232</sup> contrast the “shall assent” clause of the UK-Indonesia BIT with the 1972 UK Model dispute settlement clause by referring to the official commentary on the UK Model BIT.<sup>233</sup> They do not engage in a more detailed discussion of the UK-Indonesia BIT and do not refer to materials or arguments to establish the intent of the Contracting States.

188. The Tribunal tends to agree with the Claimant’s argument about the “citation chain” and cannot but conclude that the doctrinal writings are inconclusive.

### 3.7.2 The *Millicom* decision

189. Indonesia has not referred to any cases corroborating its interpretation, while Churchill heavily relied on *Millicom*, which held that a similar provision in the Netherlands-Senegal BIT contained the host State’s standing offer to engage in ICSID arbitration.<sup>234</sup>

190. In *Millicom*, the tribunal was confronted with the interpretation of Article 10 of the Netherlands-Senegal BIT, which in its official version reads as follows:

“La Partie Contractante sur le territoire de laquelle un ressortissant de l’autre Partie Contractante effectue ou envisage d’effectuer un investissement, *devra consentir à toute demande* de la part de ce ressortissant en vue de soumettre, pour arbitrage ou conciliation, tout différend pouvant surgir au sujet de cet investissement au Centre institué en vertu de la Convention de Washington du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d’autres Etats” (emphasis added).

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<sup>230</sup> With regard to the Netherlands BITs, and in addition to the 1968 Netherlands-Indonesia BIT, Broches refers to the 1971 Netherlands-Morocco BIT, the 1971 Netherlands-Ivory Coast BIT, the 1972 Netherlands-Singapore BIT, the 1974 Netherlands-Korea BIT, and the 1976 Netherlands-Egypt BIT. With regard to the United Kingdom BITs, Broches refers to the 1976 UK-Indonesia BIT and the 1980 UK-Philippines BIT. Finally, Broches mentions the 1977 Japan-Egypt BIT. See Aron Broches, ‘Bilateral Investment Protection Treaties and Arbitration of Investment Disputes’, in: Jan C. Schultz & Albert Jan Van den Berg (eds), *The Art of Arbitration. Essays on International Arbitration* (Kluwer Law, 1982), p. 66 (**Exh. RLA-036**).

<sup>231</sup> Schreuer cites the 1977 Japan-Egypt BIT, the 1980 UK-Philippines BIT, the 1993 Australia-Czech Republic BIT, and the 1998 Japan-Pakistan BIT, p. 208, n. 602 (**Exh. RLA-022**).

<sup>232</sup> Chester Brown & Audley Sheppard, “United Kingdom”, in: Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP, 2013), p. 745 (**Exh. RLA-035**).

<sup>233</sup> United Kingdom, Foreign and Commonwealth Office (“FCO”), Model Investment Protection Agreement, 21 February 1973, p. 9.

<sup>234</sup> *Millicom*, *supra* note 115, ¶ 66.

191. In the English translation used by the tribunal, Article 10 is worded as follows:

“The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment *shall assent to any request* on the part of such national to submit, for arbitration or conciliation, any dispute that may arise in connection with that investment, to the centre established by the Washington Convention of 18 March 1965 on the settlement of investment disputes between States and nationals of other States” (emphasis added).

192. In the Tribunal’s view, the correct English translation of the French authentic text “devra consentir” would be “shall consent” rather than “shall assent”. In spite of this difference, the reasoning of the *Millicom* tribunal is interesting. While it accepts that the wording is “not unequivocal”, the Tribunal focuses on its mandatory nature (“devra” and not “pourra”) and considers that “in spite of the wording of the rule, Senegal’s ratification of the Accord entails consent to the ICSID arbitration system”.<sup>235</sup> It “does not see why it would be necessary [...], to adopt a two-step procedure pursuant to which, before submitting a request, the party intending to act would have to request authorization from the Contracting State which it would have no right to refuse, unless otherwise specifically stated”.<sup>236</sup>

193. The *Millicom* tribunal then confirms its understanding by reference to the origin<sup>237</sup> and the “spirit” of the rule. Under this latter heading, it notes that “the purpose of a treaty such as that in question is indeed to guarantee efficient and full protection. This purpose is made clear, in particular, by Articles 3 and 4 of the Accord, whose objective is ‘sécurité intégrale’ (“full security”) (Article 4, paragraph 1). Such objective, however, cannot be truly attained unless investors, the primary beneficiaries of the protection, dispose of legal means enabling them to obtain compliance therewith”.<sup>238</sup>

194. While this Tribunal is certainly prepared to pay due regard to earlier decisions, it does not believe that *Millicom* is of much assistance here. Indeed, it does not reveal how it followed the process of interpretation outlined in the Vienna Convention.

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<sup>235</sup> *Id.*, ¶ 63.

<sup>236</sup> *Ibid.*

<sup>237</sup> *Id.*, ¶ 64 (“The former Article 5 *ter* of the *Accord de 1965 sur la coopération économique* (as amended in 1972) provided for a moral obligation only that the text of Article 10 of the Accord has elevated to a legal obligation. This rule undoubtedly primarily establishes an inter-State obligation [...], but there is no reason why the establishment by the new rule of its mandatory nature could not be extended to investors, who are precisely those for whom the provision concerning the resolution of disputes is intended”).

<sup>238</sup> *Id.*, ¶ 65.



### 3.7.3 Treaties with third States

195. Treaties on the same subject matter concluded respectively by the United Kingdom and Indonesia with third States can legitimately be considered as part of the supplementary means of interpretation. For instance, in *Oil Platforms*, the ICJ had recourse to treaties concluded by one disputing party with third States dealing with the same subject-matter.<sup>239</sup> This approach also found resonance in investment treaty arbitration, for example in *AAPL*<sup>240</sup> or in *Plama*.<sup>241</sup>
196. Prior to the hearing, the Parties had filed a selection of BITs of either the United Kingdom or Indonesia and third parties. To gain a complete view of potential treaty patterns for its decision, the Tribunal drew up a tentative table containing the dispute settlement clauses entered into by the United Kingdom and Indonesia with third parties. It circulated that table for the Parties' comments in two rounds of post-hearing submissions.
197. On this basis, the Tribunal will now pursue its interpretation of the words "shall assent" in Article 7(1) of the UK-Indonesia BIT. In doing so, it does not mean to make any finding on the existence of consent to arbitration in the third party treaties. It limits itself to a *prima facie* analysis of such treaties and expresses an opinion on the UK-Indonesia BIT only.
198. According to publicly available information, the United Kingdom signed 102 BITs, of which 94 have entered into force. Broadly speaking, one discerns four categories:
- In the first category, 53 BITs give the investor access to ICSID arbitration. Out of these, 49 BITs give only access to ICSID,<sup>242</sup> while three others provide that, if

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<sup>239</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, ICJ Reports 1996 ("*Oil Platforms*"), ¶¶ 29, 47. See also: Case Concerning Rights of Nationals of the United States of America in Morocco, Judgment, ICJ Reports 1952, pp. 191-192 (**Exh. CLA-146**).

<sup>240</sup> *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 ("*AAPL*"), ¶ 40 (**Exh. CLA-145**).

<sup>241</sup> *Plama*, *supra* note 192, ¶ 195 (**Exh. CLA-130**).

<sup>242</sup> UK-Egypt BIT, Art. 8(1); UK-Singapore BIT, Art. 8(1); UK-Republic of Korea BIT, Art. 8(1); UK-Jordan BIT, Art. 6; UK-Sri Lanka BIT, Art. 8(1); UK-Senegal BIT, Art. 8(1); UK-Bangladesh BIT, Art. 8(1); UK-Lesotho BIT, Art. 8(1); UK-Papua New Guinea BIT, Art. 8(1); UK-Malaysia BIT, Art. 7(1); UK-Yemen BIT, Art. 7; UK-Cameroon BIT, Art. 8(1); UK-Costa Rica BIT, Art. VIII; UK-Mauritius BIT, Art. 8(1); UK-Jamaica BIT, Art. 9(1); UK-Hungary BIT, Art. 8(1); UK-Tunisia BIT, Art. 8(1); UK-Republic of Congo BIT, Art. 8(1); UK-Guyana BIT, Art. 8(1); UK-Burundi BIT, Art. 8(1); UK-Morocco BIT, Art. 10(1); UK-Nigeria BIT, Art. 8(1); UK-Turkey BIT, Art. 8(2); UK-United Arab Emirates BIT, Art. 8(2); UK-Nepal BIT, Art. 8(1); UK-Barbados BIT, Art. 8(1); UK-Armenia BIT, Art. 8(1); UK-Paraguay BIT, Art. 8(1); UK-Peru BIT, Art. 10(2); UK-Tanzania BIT, Art. 8(1);

one of the States is not a member of the ICSID Convention, the ICSID Additional Facility mechanism or UNCITRAL arbitration is available.<sup>243</sup> The last BIT provides that, unless the disputing parties agree otherwise, ICSID is the default procedure.<sup>244</sup>

The vast majority of these 53 BITs follows the first UK model clause of 1972, whereby each Contracting State “hereby consents” to submit any dispute to ICSID.<sup>245</sup> The others use similar wording. In the UK-Mexico BIT, each Contracting State gives its “unconditional consent” to ICSID arbitration. In the UK-Romania BIT, the investor “shall be entitled to submit” the dispute to ICSID. In the UK-Chile BIT, the investor “may submit” the dispute to ICSID. In the UK-Costa Rica BIT, the Contracting States also consented to ICSID arbitration (“consciente en someter”). In the UK-Venezuela BIT, the investor “may choose to refer” the dispute to ICSID, if available. In the UK-India BIT, any dispute “may be referred” to ICSID, if available.

- The second category includes 46 BITs that provide for UNCITRAL arbitration as the default procedure. Most of these BITs follow the second UK model clause, whereby the disputing parties “may agree” to submit their dispute to ICSID.<sup>246</sup> However, in the absence of an agreement, the investor has the right to initiate UNCITRAL proceedings.<sup>247</sup> Others allow an investor to choose several arbitral

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UK-Latvia BIT, Art. 8(1); UK-Belarus BIT, Art. 8(1); UK-Albania BIT, Art. 8(1); UK-Ecuador BIT, Art. 8; UK-Estonia BIT, Art. 8(1); UK-Zimbabwe BIT, Art. 8(1); UK-Ivory Coast BIT, Art. 8(1); UK-Romania BIT, Art. 4(2); UK-Azerbaijan BIT, Art. 8(1); UK-Chile BIT, Art. 7(2); UK-Moldova BIT, Art. 8(1); UK-Nicaragua BIT, Art. 8(1); UK-Benin BIT, Art. 8(1); UK-Uganda BIT, Art. 8(1); UK-Kenya BIT, Art. 8(1); UK-El Salvador BIT, Art. 8(1); UK-Sierra Leone BIT, Art. 8(1); UK-Mozambique BIT, Art. 8(1); and UK-Mexico BIT, Art. 12. Under the UK-Romania BIT, the qualifying investor can only submit a dispute to ICSID relating to the amount of compensation due. The UK-Zimbabwe BIT did not enter into force.

<sup>243</sup> UK-India BIT, Art. 9(3); UK-Georgia, Art. 8; UK-Venezuela, Art. 8(2).

<sup>244</sup> UK-Colombia BIT, Art. IX. The UK-Colombia BIT did not enter into force.

<sup>245</sup> FCO, Model Investment Protection Agreement, *supra* note 233, p. 9.

<sup>246</sup> The first BIT to employ the second, alternative model, is the UK-Belize BIT of 1982. See also: Chester Brown & Audley Sheppard, “United Kingdom”, in Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013), p. 745 (**Exh. RLA-035**).

<sup>247</sup> UK-Belize BIT, Art. 8(1)-(2); UK-Saint Lucia BIT, Art. 8(1)-(2); UK-Malta BIT, Art. 8(3); UK-Dominican Republic BIT, Art. 8(1)-(2); UK-Antigua and Barbados BIT, Art. 8(1)-(2); UK-Poland BIT, Art. 8(1)-(2); UK-Grenada BIT, Art. 8(1)-(2); UK-Bolivia BIT, Art. 8(1)-(2); UK-Ghana BIT, Art. 10(2)-(3); UK-Argentina BIT, Art. 8(2)-(3); UK-Mongolia BIT, Art. 8(1)-(2); UK-Uruguay BIT, Art. 8(2)-(3); UK-Vietnam BIT, Art. 8(1)-(3); UK-Ukraine BIT, Art. 8(1)-(2); UK-Lithuania BIT, Art. 8(1)-(2); UK-Trinidad and Tobago BIT, Art. 10(1)-(2); UK-Uzbekistan BIT, Art. 8(1)-(2); UK-Honduras BIT, Art. 8(1)-(2); UK-Brazil BIT, Art. 7(1)-(3); UK-South Africa BIT, Art. 8(1)-(2);

mechanisms to the exclusion of ICSID,<sup>248</sup> while still others provide advance consent for UNCITRAL only.<sup>249</sup>

- The third category is composed of the UK-Indonesia BIT and the UK-Philippines BIT.<sup>250</sup> Both BITs indicate that the host State “shall assent” to ICSID arbitration.
- The fourth category comprises only the 1978 UK-Thailand BIT, which contains no investor-State dispute settlement provision.

199. The foregoing description shows that the United Kingdom seems to follow a consistent policy of securing access to international arbitration for their investors. In 99 cases out of 102 the relevant dispute settlement clauses enshrine an expression of consent.

200. As regards the United Kingdom’s treaty practice at the time of the conclusion of the UK-Indonesia BIT in 1976, the description above shows that the first optional model clause containing the “hereby consents” language is replicated in several BITs concluded during the 1970s, while the second optional model clause is employed for the first time in 1982.

201. From the information on record, the United Kingdom signed its first BIT, the UK-Egypt BIT, on 24 February 1975, followed on 22 July 1975 by the signature of the UK-Singapore BIT, and on 4 March 1976 with the signature of the UK-Korea BIT. All these BITs employ the unequivocal “hereby consents” language. These three BITs precede the signature of the UK-Indonesia BIT, which took place on 27 April 1976. Finally, the United Kingdom signed a BIT with Thailand in 1978 with no dispute settlement provision for investor-State arbitration; and on 10 October 1979 the United Kingdom signed a BIT with Jordan again employing the “hereby consents” language.

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UK-Pakistan BIT, Art. 8(1)-(2); UK-Kyrgyzstan BIT, Art. 8(1)-(2); UK-Turkmenistan BIT, Art. 8(1)-(2); UK-Swaziland BIT, Art. 8(1)-(2); UK-Kazakhstan BIT, Art. 8(1)-(2); UK-Slovenia BIT, Art. 8(1)-(2); UK-Croatia BIT, Art. 8(1)-(2); UK-Tonga BIT, Art. 8(1)-(2); UK-Lebanon BIT, Art. 8(1)-(2); UK-Angola BIT, Art. 8(1)-(2); UK-Gambia BIT, Art. 8(1)-(2); UK-Bosnia and Herzegovina BIT, Art. 8(1)-(2); UK-Serbia BIT, Art. 8(1)-(2); UK-Vanuatu BIT, Art. 8(1)-(2), UK-Ethiopia BIT, Art. 8(1) and (3). The UK-Vietnam, UK-Brazil, UK-Angola, UK-Gambia, UK-Vanuatu and UK-Ethiopia BITs are not in force.

<sup>248</sup> UK-Russia BIT, Art. 8(3); UK-Czech and Slovak Federal Republic BIT, Art. 8; UK-Haiti BIT, Art. 8(2); UK-China BIT, Art. 7(2)-(3); UK-Cuba BIT, Art. 8(2).

<sup>249</sup> UK-Panama BIT, Art. 7; UK-Bahrain BIT, Art. 8(1); UK-Laos BIT, Art. 8; UK-Oman BIT, Art. 7; UK-Bulgaria BIT, Art. 9(2); UK-Hong Kong BIT, Art. 8.

<sup>250</sup> UK-Indonesia BIT, Art. 7(1); UK-Philippines BIT, Art. X(1).

202. Turning now to the analysis of Indonesia's treaty practice, the information on record shows that Indonesia signed 64 BITs,<sup>251</sup> 49 of which are in force. In addition, Indonesia concluded an economic cooperation agreement with the Netherlands in 1968, which is the only other agreement entered into by Indonesia containing the "shall assent" language. Indonesia also concluded a BIT with Australia which contains the wording "shall consent in writing [...] within 45 days", a provision directly relevant to ICSID arbitration ARB/12/40.

203. The tables provided by the Parties in response to the Tribunal's listings show 25 different formulations indicating Indonesia's advance consent to international arbitration:

- a. "hereby consents to submit",<sup>252</sup>
- b. "hereby consents to the submission",<sup>253</sup>
- c. "hereby gives its unconditional consent",<sup>254</sup>
- d. "hereby irrevocably and anticipatory [sic] gives its consent",<sup>255</sup>
- e. "hereby irrevocably consents in advance",<sup>256</sup>
- f. "irrevocably consents in advance",<sup>257</sup>
- g. "agrees in advance and irrevocably",<sup>258</sup>

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<sup>251</sup> In its first post-hearing submission, Churchill provided the Tribunal with a list of 58 BITs concluded by Indonesia, out of which 50 are publicly available. In addition, Churchill referred to the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area. Cf. C-PHB1, Annex 1. Indonesia provided the Tribunal, together with its first post-hearing brief, with a list of 64 BITs, including the text of all investor-State dispute settlement clauses (**Exh. R-111**).

<sup>252</sup> Indonesia-Turkmenistan BIT, Art. VIII(3); Indonesia-Sweden BIT, Art. 8(1); Indonesia-Netherlands BIT, Art. IX(4); Indonesia-Slovak Republic BIT, Art. VIII(3); Indonesia-Laos BIT, Art. VIII(3); Indonesia-Kyrgyzstan BIT, Art. VIII(3); Indonesia-Suriname BIT, Art. VIII(3); Indonesia-Pakistan BIT, Art. VIII(3); Indonesia-Ukraine BIT, Art. VIII(3); Indonesia-Sri Lanka BIT, Art. VIII(3); Indonesia-Uzbekistan BIT, Art. VIII(3); Indonesia-Jordan BIT, Art. VIII(3); Indonesia-Mongolia BIT, Art. VIII(3); Indonesia-Bangladesh BIT, Art. VIII(3); Indonesia-Sudan BIT, Art. VIII(3); Indonesia-Yemen BIT, Art. VIII(3); Indonesia-Zimbabwe BIT, Art. VIII(3); Indonesia-Algeria BIT, Art. VIII(3); Indonesia-Tajikistan BIT, Art. VIII(3); Indonesia-Denmark BIT, Art. 9(2). The Indonesia-Turkmenistan, Indonesia-Suriname, Indonesia-Yemen, Indonesia-Zimbabwe, Indonesia-Algeria and Indonesia-Tajikistan BITs are not in force.

<sup>253</sup> Indonesia-Romania BIT, Art. IX(3).

<sup>254</sup> Indonesia-Finland BIT, Art. 9(5).

<sup>255</sup> Indonesia-Belgium BIT, Art. 10.

<sup>256</sup> Indonesia-Singapore BIT, Art. VIII(2)(c).

<sup>257</sup> Indonesia-Croatia BIT, Art. 10(2). The BIT is not in force.

<sup>258</sup> Indonesia-Libya BIT, Art. 12(4); Indonesia-Serbia BIT, Art. 11(4). These BITs are not in force.

- h. “the investor may refer”,<sup>259</sup>
- i. “the investor may submit”,<sup>260</sup>
- j. “the investor affected may submit”,<sup>261</sup>
- k. “the investor concerned may submit”,<sup>262</sup>
- l. “the investor in question may submit”,<sup>263</sup>
- m. “the investor will be entitled to submit”,<sup>264</sup>
- n. “the investor shall be entitled to refer”,<sup>265</sup>
- o. “the dispute may be submitted”,<sup>266</sup>
- p. “the dispute can be submitted”,<sup>267</sup>
- q. “the dispute shall, at the request of the investor be submitted”,<sup>268</sup>
- r. “the dispute shall, at the request of the investor concerned, be submitted”,<sup>269</sup>
- s. “the dispute shall, at the request of the investor of the other Contracting Party, be submitted”,<sup>270</sup>
- t. “the dispute shall be submitted”,<sup>271</sup>

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<sup>259</sup> Indonesia-Malaysia BIT, Art. VII(2).

<sup>260</sup> Indonesia-Chile BIT, Art. IX(2). The BIT is not in force.

<sup>261</sup> Indonesia-South Korea BIT, Art. 9(2).

<sup>262</sup> Indonesia-Bulgaria BIT, Art. VIII(2); Indonesia-Qatar BIT, Art. 9(2). The Indonesia-Qatar BIT is not in force.

<sup>263</sup> Indonesia-Italy BIT, Art. 10(2); Indonesia-Norway BIT, Art. IX(2); Indonesia-Hungary BIT, Art. IX(2); Indonesia-Vietnam BIT, Art. IX(2).

<sup>264</sup> Indonesia-Cuba BIT, Art. VIII(3).

<sup>265</sup> Indonesia-Syria BIT, Art. VIII(3); Indonesia-Thailand BIT, Art. X(3); Indonesia-Cambodia BIT, Art. VIII(3); Indonesia-India BIT, Art. 9(3); Indonesia-North Korea BIT, Art. 8(3). The Indonesia-North Korea BIT is not in force.

<sup>266</sup> Indonesia-Spain BIT, Art. X(2).

<sup>267</sup> Indonesia-Morocco BIT, Art. VIII(2); Indonesia-Turkey BIT, Art. VIII(2).

<sup>268</sup> Indonesia-Iran BIT, Art. 11(2).

<sup>269</sup> Indonesia-Czech Republic BIT, Art. 8(2); Indonesia-Mozambique BIT, Art. VII(2); Indonesia-Philippines BIT, Art. 8(2). The Indonesia-Philippines BIT is not in force.

<sup>270</sup> Indonesia-Germany BIT, Art. 10(2).

<sup>271</sup> Indonesia-Argentina BIT, Art. 10(3); Indonesia-Jamaica BIT, Art. IX(5); Indonesia-Guyana BIT, Art. 9(5). The Indonesia-Jamaica and Indonesia-Guyana BITs are not in force.

- u. “it may be submitted”;<sup>272</sup>
- v. “such disputes may be submitted”;<sup>273</sup>
- w. “it shall be at the request of the investor filed”;<sup>274</sup>
- x. “it shall, upon request of the investor, be submitted”;<sup>275</sup>
- y. “either party to the dispute may institute”.<sup>276</sup>

204. Thus, in at least 60 out of 64 BITs, Indonesia has given its advance consent.<sup>277</sup> This list does not include the UK-Indonesia and the Australia-Indonesia BITs in dispute here. It does not include the Indonesia-France BIT either as it mandates the inclusion of consent in the investment approval documentation.<sup>278</sup> Finally, the only BIT entered into by Indonesia and still in force, which unequivocally lacks a standing offer to arbitrate, is the Indonesia-Switzerland BIT containing no investor-State dispute settlement provision at all.

205. More specifically in relation to BITs concluded in or around the 1970s, i.e. the decade of the BIT under review, the first investor-State dispute settlement clause entered into by Indonesia is contained in the 1968 economic cooperation agreement with the Netherlands. It employs the “shall assent” language and refers to ICSID arbitration. In the same year, Indonesia concluded BITs with Germany and Denmark, none of which provided for investor-State arbitration.<sup>279</sup>

206. During the 1970s, Indonesia concluded only four BITs. The first one, the Indonesia-Belgium BIT, provides that each Contracting State “hereby irrevocably and anticipatory [sic] gives its consent” to ICSID arbitration.<sup>280</sup> The second BIT, with France, mandates Indonesia to include a standing consent to ICSID arbitration in the investment approval,

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<sup>272</sup> Indonesia-China BIT, Art. IX(3); Indonesia-Mauritius BIT, Art. 9(3); Indonesia-Egypt BIT, Art. 9.

<sup>273</sup> Indonesia-Russia BIT, Art. 8(2).

<sup>274</sup> Indonesia-Saudi Arabia BIT, Art. 11(2).

<sup>275</sup> Indonesia-Poland BIT, Art. IX(2).

<sup>276</sup> Indonesia-Tunisia BIT, Art. 10(2).

<sup>277</sup> It is to be noted that 15 out of these 60 BITs have not entered into force.

<sup>278</sup> Indonesia-France BIT, Art. 3 *cum* Art. 2.

<sup>279</sup> It is to be noted that Indonesia has renegotiated its treaties with these three States, each time providing for an unequivocal expression of consent (“hereby consent”). In 1994 with the Netherlands (“hereby consent”); in 2003 with Germany (“it shall, at the request of the investor of the other Contracting Party, be submitted”); and in 2007, with Denmark (“hereby consents”).

<sup>280</sup> Indonesia-Belgium BIT, Art. 10.

thus implying that the BIT itself does not encompass advance consent.<sup>281</sup> The third BIT, with Switzerland contains no dispute settlement provision at all; and the fourth BIT was the UK-Indonesia BIT.

207. To sum up, the United Kingdom's practice is to secure advance consent to international arbitration, including during the 1970s. Indonesia follows a similar practice but clauses adopted in the 1970s show considerable variations. As a result, third party treaty practice does not allow one to reach a conclusion on the meaning of "shall assent" thus leading the Tribunal to review the preparatory materials that are on the record.

#### 3.7.4 Preparatory materials

208. Neither Party has put any *travaux préparatoires* into evidence prior to the hearing. Churchill mostly relied on explanatory notes eliciting the Dutch government's understanding of "shall assent" clauses which that government concluded with third parties.<sup>282</sup> Upon a question from the Tribunal the Parties indicated that they had tried to locate *travaux* of the UK-Indonesia BIT, but had been unsuccessful.<sup>283</sup>

209. In the course of the deliberation, the Tribunal became aware through a press article of the award on jurisdiction rendered in *Rizvi*, the first case directly dealing with the UK-Indonesia BIT.<sup>284</sup> Since the award had not been published, the Tribunal invited Indonesia to circulate that decision with the understanding that the content would be kept confidential. It appeared that in *Rizvi* Indonesia filed the *travaux préparatoires* of the British Government.

210. The Tribunal therefore informed the Parties that it envisaged to requesting preparatory materials from the United Kingdom pursuant to Rule 34 of the ICSID Arbitration Rules. While Indonesia objected to this course of action, Churchill advised the Tribunal that it had

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<sup>281</sup> Indonesia-France BIT, Art. 3.

<sup>282</sup> The Claimant provided the Tribunal with three Explanatory Notes relating respectively to the Netherlands-Indonesia BIT signed in 1994, the Netherlands-Philippines BIT signed in 1985, and the Netherlands-Pakistan BIT signed in 1988. See Explanatory Note to the Agreement between the Kingdom of the Netherlands and the Government of the Republic of Indonesia on the Advancement and Protection of Investments, with Protocol, 3 February 1995, (**Exh. C-356**); Explanatory Note to the Agreement between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments, 29 November 1985, (**Exh. C-357**); Explanatory Note to the Agreement on Economic Cooperation and Protection of Investments between the Kingdom of the Netherlands and the Islamic Republic of Pakistan, 31 March 1989, (**Exh. C-358**).

<sup>283</sup> Tr. 14052013, 17:10-18:13.

<sup>284</sup> *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Case No. ARB/11/13, Award on Jurisdiction, 16 July 2013 ("*Rizvi*") (**Exh. RLA-108**; **Exh. CLA-140**).

engaged in new research and located the relevant materials. It filed these materials with its first post-hearing submission, and both Parties then commented on them.

211. According to the Claimant, the preparatory materials reveal that “neither the British nor the Indonesian side intended for the term ‘shall assent’ to have any effect different from that of the United Kingdom Model BIT of that time”, and that the *travaux* “confirm that the treaty negotiators intended and believed the ‘shall assent’ language to comprise a binding and effective offer to arbitrate disputes before ICSID”.<sup>285</sup> For its part, Indonesia avers that Churchill is unable to point to a single document proving that the phrase “shall assent” reflects a standing consent to ICSID arbitration,<sup>286</sup> and that Churchill’s reading of the materials is “deeply flawed because it imputes to the negotiators a state of mind based upon the benefit of hindsight”.<sup>287</sup>
212. The British materials contain four folders from the Foreign and Commonwealth Office archives.<sup>288</sup> They are mainly composed of internal notes and drafts of British officials and counter-drafts submitted by Indonesia. With respect to Article 7 of the BIT, the materials contain no exchanges of notes or similar documents clearly depicting a common understanding. The Tribunal nevertheless believes that it may draw some useful indications from these materials, both of the intentions of the British negotiators and of Indonesia. With these considerations in mind, the Tribunal now embarks upon a closer analysis of these *travaux*.
213. Negotiations between the United Kingdom and Indonesia took place in 1974 and 1975. The principal negotiators on the British side were Messrs. Desmond Kerr of the Financial Relations Department and Anthony Aust from the Office of Legal Adviser of the British Foreign and Commonwealth Office; and on the Indonesian side Messrs. Ferdy Salim, Director for International Trade Relations, and Sanadji, Head of Administration Division, Directorate of Investment and Finance.
214. It appears that the British Government initiated contacts with Indonesia and proposed a draft agreement. In that proposal, the investor-State dispute settlement provision replicated

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<sup>285</sup> C-PHB1, ¶ 88.

<sup>286</sup> R-PHB2, ¶ 52.

<sup>287</sup> R-PHB2, ¶ 56.

<sup>288</sup> Exh. C-362 to C-365.



the optional model clause of the 1972 UK Model BIT, that is the standard “hereby consents” language.<sup>289</sup>

215. On 11 March 1974, Indonesia provided a counter-draft to Article 7, which read as follows:

“The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national and any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of March 18, 1965, any dispute that may arise in connection with the investment”.<sup>290</sup>

216. In June 1974, the two main British negotiators, Messrs. Kerr and Aust, exchanged comments on the Indonesian counter-draft. Their observations essentially focus on Indonesia’s attempt to introduce some sort of reciprocity in the disputing parties’ possibility to initiate ICSID arbitration. Mr. Kerr thus wrote:

“The Indonesians have redrafted the Article. Their text is shorter but more importantly it now contains a new provision; i.e. an investor must assent to a demand by the host Government to submit a dispute to ICSID. The new provision is unacceptable because HMG cannot force a UK investor to accept arbitration or conciliation by ICSID. Additionally we should point out to the Indonesians that the text of the UK Article 7 has been approved by the Centre and indeed is based on ICSID’s own model arbitration clauses”.<sup>291</sup>

217. A few months later, in November 1974, Indonesia submitted a second counter-proposal, in which Article 7 read as follows:

“Each Contracting Party hereby irrevocably and anticipatory [sic] gives its consent to submit to conciliation and arbitration any dispute relating to a measure contrary to this Agreement, pursuant to the Convention of Washington of 18 March 1965, to the International Center for the Settlement of Investment Disputes at the initiative of a national or legal person of the other Contracting Party, who considers himself to have been affected by such a measure.

This consent implies renunciation of the requirement that the internal administrative or judicial resorts should be exhausted”.<sup>292</sup>

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<sup>289</sup> United Kingdom, FCO, Model Investment Protection Agreement, 7 July 1972 (**Exh. CLA-160**).

<sup>290</sup> Preparatory Materials FCO 59/1190, at 101 (**Exh. C-363**).

<sup>291</sup> Preparatory Materials FCO 59/1190, at 58-59 (**Exh. C-363**).

<sup>292</sup> Preparatory Materials FCO 59/1191, at 26 (**Exh. C-364**).

218. This second counter proposal was accompanied by (i) a copy of the UK Model BIT dispute settlement clause with the “hereby consents” language,<sup>293</sup> and (ii) a copy of the Indonesia-Belgium BIT containing a nearly identical dispute settlement provision to the one submitted by Indonesia in its second proposal.<sup>294</sup>

219. Mr. Kerr, who had “a strong preference for our longer draft which has been cleared with ICSID”,<sup>295</sup> reiterated the British Government’s preference for the draft based on the UK Model BIT in a communication to the British Embassy in Jakarta:

“The FCO prefer the longer version of this Article which was proposed in their original draft. They would be prepared to amend that Article to provide for references of disputes to ICSID for settlement by conciliation and by arbitration, but they would be reluctant to relinquish their original wording which was agreed by ICSID (and recently accepted by the Singapore Government). They would appreciate an explanation of the intention behind the Indonesian proposal and its reconsideration in the light of these comments”.<sup>296</sup>

220. Still negotiating on the basis of Indonesia’s second proposal, in February 1975, Mr. Kerr sought the advice of the Office’s Legal Adviser, Ms. Densa:

“[...]”

2. As regards Article 8 of the revised model Agreement, the position is that we have agreed to provide for conciliation by ICSID when the other Government with which we are negotiating wants this. But we have not so far done the necessary drafting and I should be grateful for your advice on how we should tackle this.

3. I have made some draft manuscript amendments to the existing version of Article 8 to provide for conciliation as well as arbitration. I should be grateful for your comments on these suggested amendments. I would also value your views whether it would not both be better and simpler to totally change this Article and replace it by a much shorter Article on the lines of that which appears in the 1968 Netherlands Agreement with Indonesia. This reads:

“The Contracting Party in the territory of which a national or the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such

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<sup>293</sup> Preparatory Materials FCO 59/1191, at 27 (**Exh. C-364**).

<sup>294</sup> Preparatory Materials FCO 59/1191, at 41 (**Exh. C-364**).

<sup>295</sup> Telegram from Mr. Kerr to Mr. Torry (United Kingdom Embassy, Jakarta), 29 November 1974, Preparatory Materials FCO 59/1191, at 17 (**Exh. C-364**).

<sup>296</sup> Telegram from Mr. Kerr to Mr. Torry (United Kingdom Embassy, Jakarta), 6 January 1975, Preparatory Materials FCO 59/1292, at 181 (**Exh. C-362**).

national and any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of March 18, 1965, any dispute that may arise in connection with the investment”.

4. I incline myself to prefer this shorter version. Certainly the Indonesians are mystified by our present version which seems to them to suffer from reproducing too much of the content of the Washington Convention. We are at the moment arguing for the retention of our present version, but I am not at all sure that we are wise to do so. Would we lose anything were we to substitute the precise language of the Netherlands Agreement with Indonesia?”<sup>297</sup>

221. Several other internal notes discuss various points of contention raised by Indonesia with respect to the draft dispute settlement provision. For instance, Mr. Kerr wrote to Mr. Crowson in Jakarta on 13 June 1975 that the British Government was actively considering agreeing to Indonesia’s request to include a reference to conciliation:

“This revision makes provision for conciliation as well as arbitration, which is something on which the Indonesians were keen. If you were to pass this on it might serve the purpose of showing the Indonesians that we are doing our best to meet their points. The revised Article has been agreed with ICSID”.<sup>298</sup>

222. On the eve of the in-person negotiations on 29 September 1975, Indonesia, through Mr. Salim, submitted a third counter proposal, mirroring its first one, which in pertinent part read as follows:

“The Department would like to propose a version which it has with other countries such as the Netherlands instead of using the longer version of the UK’s draft. It reads as follows:

“The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such

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<sup>297</sup> Telegram from Mr. Kerr to Ms. Densa (Legal Advisers Office), 12 February 1975, Preparatory Materials FCO 59/1292, at 172 (**Exh. C-362**). The following day, Mr. Kerr forwarded Indonesia’s second draft proposal to Ms. Densa, commenting that “[t]he English is a little odd but the sense is clear” and adding that “there might be some advantage in attempting to add to it the second and last sentences of our wording of Article 8(1)” dealing with standing of locally incorporated but foreign-controlled companies. See Telegram from Mr. Kerr to Ms. Densa (Legal Advisers Office), 13 February 1975, Preparatory Materials FCO 59/1292, at 171 (**Exh. C-362**).

<sup>298</sup> Telegram from Mr. Kerr to Mr. Crowson (British Embassy, Jakarta), 13 June 1975, Preparatory Materials FCO 59/1292, at 167 (**Exh. C-362**). On the question of the inclusion of a reference to conciliation, see *also* the comments of the Financial Relations Department of the Foreign & Commonwealth Office: Preparatory Materials FCO 59/1292, at 142 and 148 (**Exh. C-362**).

national and any such national shall comply with any request of the former Contracting Party, to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of March 18, 1965 any dispute that may arise in connection with the investment”.<sup>299</sup>

223. Mr. Kerr’s response to Mr. Salim regarding the latest proposal reads as follows:

“This Article should deal both with the cases of nationals and companies. We would insert the words ‘or company’ after ‘national’ in the first two cases where the word occurs. We are, however, doubtful whether we can agree that nationals or companies should be obliged to refer disputes to ICSID upon the volition of the Contracting Parties. We wish to discuss this point. We do not think this requirement appears in other Agreements, nor, as far as we are aware, do we have authority to commit British nationals or companies in this sense.

We also propose the reinstatement of the second sentence of the United Kingdom draft which would cover the cases of locally-incorporated companies in Indonesia or the United Kingdom where the majority of the shares were owned by the nationals of the other State, as envisaged in the ICSID Convention. Without this provision, in view of the requirements of the Foreign Capital Investment Law No. 1 of 1967, the Article could not be invoked in respect of an approved investment in Indonesia”.<sup>300</sup>

224. Negotiations then took place in Jakarta between 29 September and 3 October 1975.<sup>301</sup>

Following the initialing of the authentic text, an internal British note reported that on balance the result of the negotiations was satisfactory.<sup>302</sup> More specifically, it stated:

“2. The Agreement with Indonesia differs a little in its Articles 2, 4, 7 and 8 from the Agreements with Singapore and Egypt. [...]

21. The Indonesians insisted on the short version of this Article which appears in the first paragraph. This is similar to that adopted in their Agreements with other Western European countries. We argued the toss on this for a little time but spent most effort on securing the second paragraph of the Article which *will enable British majority shareholders in locally-incorporated companies in Indonesia (almost all our investment being in this category) to refer disputes with Indonesia to ICSID*. Because companies are defined in Article 1 in terms of their place of incorporation, it was essential to obtain this if

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<sup>299</sup> Telegram from Mr. Salim to Mr. Crowson (British Embassy, Jakarta), 29 September 1975, Preparatory Materials FCO 59/1292, at 127 (**Exh. C-362**).

<sup>300</sup> Telegram from Mr. Kerr to Mr. Salim, 29 September 1975, Preparatory Materials FCO 59/1292, at 117-118 (**Exh. C-362**).

<sup>301</sup> Report on the United Kingdom-Indonesia BIT, October 1975, Preparatory Materials FCO 59/1292, at 8-14 (**Exh. C-362**).

<sup>302</sup> *Id.*, at 14 (**Exh. C-362**).

the Article were to be capable of application. A very long time was spent on this point and we were obliged at one stage, when the Indonesians objected that none of our European colleagues had either requested or obtained such a provision, to describe the ICSID Articles in their Agreements as meaningless since they did not give ICSID jurisdiction in the case of foreign-controlled locally-incorporated companies. The point went home, and this was the final major matter to be covered in the negotiation”.

“The balance of the Agreement as a whole is satisfactory to us. It gives our investors assurance of the future admission of their investment to Indonesia, its equitable treatment there and fair compensation in the event of expropriation. It provides a sound framework within which further investment can take place and affords adequate protection for approved existing and future investment”.<sup>303</sup>

225. This review shows several crucial elements at odds with Indonesia’s argument. First, Indonesia submitted three drafts of the investor-State dispute settlement provision. The first and third replicated the dispute settlement provision which Indonesia had concluded with the Netherlands in 1968, while the second reproduced the clause agreed with Belgium in 1970. Interestingly, Indonesia’s second draft contained a proposal of unconditional advance consent to ICSID arbitration, i.e. “hereby irrevocably and anticipatory [sic] gives its consent”. While it is true that the final text does not contain the unequivocal formula of the second draft, the fact that Indonesia made a proposal of such content demonstrates that it had no difficulty giving English investors unconditional access to ICSID arbitration.
226. Second, Indonesia’s first and third drafts contain an element of reciprocity which was contentious. The draft provides that each Contracting State “shall assent” to any request coming from the foreign investor and that the latter “shall comply” with any request coming from the host State to submit to ICSID arbitration. The British negotiators could not accept that formulation because they felt that the State cannot force its citizens to accept arbitration. That divergence hinged on the *investor’s* not the State’s consent.
227. Third, Indonesia objected to the 1972 UK model clause because it did not provide for conciliation. It insisted on the inclusion of conciliation in the dispute settlement clause. The United Kingdom apparently modified its model clause in 1975 and added conciliation. Here again, the divergence had nothing to do with the host State’s consent.

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<sup>303</sup> Report on United Kingdom-Indonesia BIT, October 1975, Preparatory Materials FCO 59/1292, at 9, 11-13 (**Exh. C-362**).

228. Fourth, the real stumbling block in the negotiations did not turn on standing consent, but on the right for locally incorporated investment vehicles under foreign control to initiate ICSID arbitration in accordance with Article 25(2)(b) of the ICSID Convention. It is difficult to envisage that the negotiators would have fought for and against this right had they thought that its very existence was conditional on the will of the respondent State.
229. As the Claimant puts it “[i]f Article 7 in the First Counter-Draft had required an additional act of consent, the British negotiators should have considered the proposed Article 7 in the Second Counter-Draft as a positive step towards the binding consent established under the United Kingdom Model BIT, and one would have expected a favourable or congratulatory remark of the negotiators”.<sup>304</sup> Yet, the British negotiators do not appear to have considered the “shall assent” in the first counter-draft to be a step backwards compared to the British model clause. Nor did they regard the “hereby irrevocably and anticipatory [sic] gives its consent” language of the second counter-draft as a step forward or the return to “shall assent” in the third counter-proposals as a new step back. The materials show that these changes were regarded as indifferent. While the preparatory materials on record may not be complete, the same indifference appears to have existed among Indonesia's negotiators. They were mainly concerned because (i) the British proposal was too long and reproduced too many elements mentioned in Article 25 of the ICSID Convention, and (ii) no conciliation was provided. There is no trace of an intent to grant consent on a case-by-case basis, let alone to institute a so-called two-step procedure as presently alleged by the Respondent. They apparently had no difficulty proposing wording expressly providing unconditional consent. Nor did they seem to oppose shifting back and forth from explicitly unconditional language to the “shall assent” clause. In the exchange with Mr. Kerr on the eve of the meeting in Jakarta, Mr. Salim says nothing about “shall assent” being different from Indonesia’s second counter-draft or from the British draft.
230. For all these reasons, the Tribunal comes to the conclusion that the treaty drafters considered the “shall assent” language as functionally equivalent to “hereby consents” or similar wording. Accordingly, the Tribunal holds that Indonesia has given its advance consent to arbitrate the dispute presently before it.

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<sup>304</sup> C-PHB1, ¶ 98.

#### 4. Conclusion

231. In light of the foregoing, the Tribunal finds that Article 7(1) contains a standing offer to arbitrate any dispute that may arise in connection with an investment before ICSID. Churchill was therefore entitled to submit its Request for Arbitration directly to the Centre and no further act was required from Indonesia for this Tribunal to have jurisdiction.

232. For the sake of completeness, the Tribunal mentions that it would also have found consent to ICSID arbitration in the BKPM Approvals, had it held, *quod non*, that an additional expression of consent was required under the BIT.

233. Section IX(4) the 2005 BKPM approval, as translated by the Claimant, reads as follows:

“In the event of a dispute between the company and the Government of the Republic of Indonesia that cannot be resolved by consensus, the Government of Indonesia [is] willing to follow the settlement according to the provisions of the Convention on the settlement of disputes between States and Foreign Citizen regarding investments in accordance with Law Number 5 Year 1968”.<sup>305</sup>

234. Indonesia’s version reads:

“In the event of dispute between the company and the Government of the Republic of Indonesia which cannot be settled by consultation/deliberation, the Government of Indonesia is prepared/ready to follow settlement according to the provisions of the convention on the settlement of disputes between States and Foreign Citizen regarding investments in accordance with Law Number 5 Year 1968”.<sup>306</sup>

235. In its original wording, Section IX(4) reads as follows:

“Dalam hal terjadi perselisihan antara perusahaan dengan Pemerintah Republik Indonesia yang tidak dapat diselesaikan secara musyawarah, Pemerintah Indonesia bersedia mengikuti penyelesaian menurut ketentuan konvensi tentang penyelesaian perselisihan antara Negara dan Warga Negara Asing mengenai penanaman modal sesuai dengan Undang-undang Nomor 5 Tahun 1968”.

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<sup>305</sup> Foreign Capital Investment Approval for PT ICD, Decision No. 1304/I/PMA/2005 (with Certificate of Translation) (**Exh. C-17**).

<sup>306</sup> BKPM Foreign Investment Approval Letter No. 1304/I/PMA/2005 dated 23 November 2005 (**Exh. R-003**).

236. The 2006 BKPM Approval, sanctioning the acquisition of PT ICD by Churchill and Planet incorporates by reference the content of the 2005 Approval.<sup>307</sup>
237. Indonesia has essentially objected that (i) the BIT only contemplates the possibility to grant consent after the filing of a request of arbitration, (ii) that the BKPM lacks authority to grant consent to ICSID arbitration, (iii) that the word *bersedia* in Section IX(4) of the 2005 BKPM approval merely denotes a willingness to consider ICSID procedures, not consent, and (iv) that Section IX(4) only extends to PT ICD and not its shareholders.
238. The Tribunal finds these objections ill-founded. First, as regards the timing of consent, Article 7(1) of the BIT contains no language precluding a host State from granting its consent to ICSID arbitration prior to the filing of a dispute by an investor. Second, the Tribunal finds that the words *bersedia mengikuti*, correctly translated as “readiness/preparedness/willingness to follow” the settlement provisions of the ICSID Convention are an expression of consent satisfying the ICSID requirement of consent in writing. Third, the Tribunal holds that Section IX(4) extends to PT ICD’s shareholders because (i) PT ICD is a mere instrumentality of the Claimant, who had no choice but to structure its investment through a local vehicle,<sup>308</sup> (ii) the dictionary on record does not translate the word *perusahaan* as company or corporation, but gives it the broader meaning of business or enterprise,<sup>309</sup> (iii) the word *perseroan* is employed in the 2005 BKPM Approval when specifically targeting PT ICD as a corporation,<sup>310</sup> while the word *perusahaan* is used in various contexts suggesting that it has a broader meaning, in particular in the 2006 BKPM Approval in the context of the obligation to sell shares of PT ICD to Indonesian nationals.<sup>311</sup> Finally, the Tribunal is of the view that the BKPM has the power to grant consent to ICSID arbitration, since it is a government body reporting directly to the President and vested with authority to handle foreign investments.<sup>312</sup> Had the

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<sup>307</sup> Approval of Changes in Participation Within the Company’s Capital for PT ICD, Decision No. 579/III/PMA/2006 dated 8 May 2006 (**Exh. C-24**).

<sup>308</sup> See Article 3(1) of Law No. 1 on Foreign Investment (1967) (**Exh. CLA-2**; **Exh. RLA-006**). See also: *Amco*, *supra* note 196, ¶ 24 (**Exh. CLA-38**).

<sup>309</sup> J. Echols and H. Shadily, *Kamus Indonesia-Inggris: An Indonesian-English Dictionary* (1989) (**Exh. CLA-141**), p. 607.

<sup>310</sup> Foreign Capital Investment Approval for PT ICD, Decision No. 1304/I/PMA/2005 (**Exh. C-17**); BKPM Foreign Investment Approval Letter No. 1304/I/PMA/2005 (**Exh. R-003**), Section VII(3) and (4), both dated 23 November 2005.

<sup>311</sup> Approval of Changes in Participation Within the Company’s Capital for PT ICD, Decision No. 579/III/PMA/2006 dated 8 May 2006 (**Exh. C-24**).

<sup>312</sup> See Article 1 of Presidential Decree No. 33 of 1981 Regarding the Capital Investment Coordinating Board (**Exh. C-366**); Article 1(2) of Presidential Decree No. 29 of 2004 Regarding the



President, who was copied on the 2005 BKPM Approval, deemed that the BKPM had overstepped its authority, then he would or should have intervened to rectify such mistake. Having failed to do so, Indonesia cannot now argue that the BKPM lacked authority to give consent to ICSID proceedings.

239. Having held that Article 7(1) contains Indonesia's consent to arbitration, the Tribunal will now assess whether that consent extends to Churchill's investment in light of Indonesia's second preliminary objection relating to Article 2(1) of the BIT.

### **C. SECOND OBJECTION: THE CLAIMANT'S INVESTMENTS ARE NOT PROTECTED UNDER THE BIT**

#### **1. The Respondent's position**

240. Indonesia submits two related arguments with regard to the admission requirement. First, Indonesia contends that it legitimately withheld its consent because the BIT expressly limits its scope to investments having been granted admission in accordance with the 1967 Foreign Capital Investment Law. Second, Indonesia submits that, even if *arguendo* the Tribunal were to find that Indonesia consented to ICSID arbitration as a general matter, the Tribunal would still lack jurisdiction because the Claimant's investments fall outside the scope of protected investments under the BIT.

##### 1.1 The investments fall outside the scope of Article 2(1) of the UK-Indonesia BIT

241. Article 2(1) of the UK-Indonesia BIT provides that the treaty shall only apply to those investments that have been granted admission in accordance with the 1967 Foreign Capital Investment Law.<sup>313</sup> According to Indonesia, this "admitted investments" clause limits the scope of protected investments under the BIT, even if the Tribunal were to find that Indonesia gave its consent to ICSID arbitration.<sup>314</sup> In this case, Indonesia contends that Churchill must be denied protection because it has not been granted admission pursuant to the 1967 law or any law amending or replacing it.

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Implementation of Capital Investment Within the Framework of Foreign Capital Investment and Domestic Capital Investment Through the One-Roof Service System (**Exh. C-361**).

<sup>313</sup> UK-Indonesia BIT, *supra* note 84 (**Exh. R-001**).

<sup>314</sup> RMOJ, ¶ 218.

## 1.2 The stringent threshold requirement of the “admitted investments” clause

242. For the Respondent, the admission clause is very important for developing countries such as Indonesia, as it allows them to screen foreign investments and thereby safeguard their strategic natural resources.<sup>315</sup> Its primary effect is to condition “the extension of treaty protections on prior approval of specified investments”.<sup>316</sup>
243. Relying on *Mytilineos v. Serbia and Montenegro*, Indonesia argues that Article 2(1) sets a higher standard than more conventional legality clauses.<sup>317</sup> Indonesia therefore invites the Tribunal to follow other arbitral tribunals and to dismiss Churchill’s case *ab initio*.<sup>318</sup>

## 1.3 The investments have not been granted admission in accordance with the 1967 Foreign Capital Investment Law

244. At the hearing, the Respondent highlighted the fact that the BKPM did not have the opportunity to review PT ICD’s articles of association before granting its approval on 23 November 2005, although the Respondent acknowledged that PT ICD was granted admission in accordance with the 1967 Foreign Investment Law and that the BKPM approved the Churchill’s and Planet’s acquisition of PT ICD in 2006.<sup>319</sup>
245. Indonesia interprets the admission requirement not as a threshold whereby once admission has been granted the requirement is fulfilled, but as a continuous process whereby a foreign investor violates the admission requirement when engaging in activities that are not covered by the terms of the BKPM approval.<sup>320</sup> In particular, the Respondent argues that (i) by entering into a series of agreements,<sup>321</sup> especially by concluding the

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<sup>315</sup> Rejoinder, ¶ 68.

<sup>316</sup> RMOJ, ¶ 218.

<sup>317</sup> RMOJ, ¶ 218, citing *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and the Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006 (“*Mytilineos*”), ¶¶ 137-144 (**Exh. RLA-071**).

<sup>318</sup> RMOJ, ¶ 220.

<sup>319</sup> Tr. 13052013, 24:25 ff., esp. 33:4-34:8; Rejoinder, ¶¶ 86-88; RMOJ, ¶ 48 (“On 23 November 2005, PT ICD received an approval from BKPM to be a *Penanaman Modal Asing* (PMA – foreign direct investment) company, operating as a *Perseroan Terbatas* (PT – limited liability company)”).

<sup>320</sup> Rejoinder, ¶ 69 (“Investors must also remain in compliance with the terms of their admission as reflected in their approvals in order to remain admitted in Indonesia and to continue benefiting from protections afforded under the respective BITs”).

<sup>321</sup> RMOJ, ¶ 237.

Deed of Beneficial Control and Ownership,<sup>322</sup> the Claimant violated Article 33 of the 2007 Investment Law; and (ii) by engaging in mining activities and not confining itself to providing mining services, the Claimant violated the terms of its admission.<sup>323</sup>

246. In connection with the first argument, the Respondent seeks to rebut the Claimant's submission that the Bupati of East Kutai authorized it to enter into legal relationships with the Ridlatama companies.<sup>324</sup> According to the Respondent, the Bupati's authorization was given on condition of abiding with prevailing laws, which the Claimant did not do because it engaged in mining activities.

247. Furthermore, the Respondent expanded during the hearing on what it called "indications of forgery" in its previous submissions.<sup>325</sup> It argued that there were many irregularities in certain important documents submitted by the Claimant, including the KP Exploration Licenses and the maps annexed thereto.<sup>326</sup> Asked to elucidate the link between the forgery accusations and its jurisdictional objection, the Respondent answered as follows:

"[Tribunal:] Before that, what is the link between this issue and your jurisdictional objection?

[Respondent:] This is basically to show that there is no interest whatsoever that the claimant has with respect to the substance matter, that is, the revocations of KP".<sup>327</sup>

248. With respect to the Respondent's second argument related to mining activities, the Respondent states that Churchill announced on 5 April 2007 and 23 May 2007 that they made a promising coal discovery, 95% of which being situated in the PT RTM block.<sup>328</sup> Stressing that PT RTM allegedly received a mining undertaking license for general survey on 24 May 2007 only, that is after the announcements, the Respondent contends that

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<sup>322</sup> Deed of Beneficial Control and Ownership between (1) PT Ridlatama Steel, PT Ridlatama Power, PT Ridlatama Tambang Mineral, PT Ridlatama Trade Powerindo and PT Techno Coal Utama Prima and (2) PT Indonesia Coal Development dated 22 May 2007 (**Exh. P-17**).

<sup>323</sup> RMOJ, ¶¶ 56-58.

<sup>324</sup> RMOJ, ¶ 241.

<sup>325</sup> RMOJ, ¶¶ 81-102.

<sup>326</sup> Tr. 13052013, 212:14-233:19.

<sup>327</sup> Tr. 13052013, 222:12-17.

<sup>328</sup> Churchill website, *Discovery made at East Kutai coal project in Kalimantan*, Indonesia, dated 5 April 2007 (**Exh. R-013**); Churchill website, *Further Coal Intercepts at the East Kutai Project in Kalimantan*, Indonesia, dated 23 May 2007 (**Exh. R-014**).

“Churchill and/or PT RTM and/or PT RTP illegally undertook such mining survey activities as drilling in the areas for which they did not hold a license”.<sup>329</sup>

#### 1.4 PT ICD’s business field only covers mining support services

249. Indonesia acknowledges that the Claimant’s investments took the form of ownership of PT ICD, a local subsidiary, which received approval to operate as a foreign direct investment company under Indonesian law.<sup>330</sup> However, PT ICD’s business field was described in the 2005 BKPM Approval as “General Mining Support Services”.<sup>331</sup> Similarly, PT ICD’s Articles of Association define the company’s “objective and purpose” as “business of geological and mining services”.<sup>332</sup>

250. In support of this argument, the Respondent confronted Dr. Makarim in cross-examination with one of his articles published in the Jakarta Post.<sup>333</sup> In this article, referring to PMA companies in general and not to PT ICD in particular, Dr. Makarim had expressed the following opinion:

“Also, the company’s articles of association must have contained Objectives and Purposes clauses which would most likely limit its activities to mining services, not mining activities. Conducting activities that may be constructed as mining would be beyond its corporate authorization and therefore susceptible to nullification actions”.<sup>334</sup>

251. On that basis, the Respondent argues that “in order to achieve that purpose and objective, and of course if the activity [...] is interpreted that it is a mining activities [sic], it will be illogical that you can do mining activities to achieve the purpose and objective of undertaking mining supporting services”.<sup>335</sup>

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<sup>329</sup> RMOJ, ¶ 58.

<sup>330</sup> RMOJ, ¶ 222.

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*

<sup>333</sup> Nono Anwar Makarim, *The Risk of Convenient Alternatives*, The Jakarta Post, 1 August 2012 (**Exh. R-101**).

<sup>334</sup> Tr. 13052013, 36:11-18.

<sup>335</sup> Tr. 13052013, 106:17-24.

1.5 The Claimant could only engage in mining activities by concluding a contract of work or a coal cooperation agreement (PKP2B) with the Indonesian Government

252. Under the 1967 Mining Law and the 1980 Regulation No. 27 on Categorization of Extractive Materials, coal is classified as a strategic natural resource regulated through a multi-step application process for obtaining mining authorizations.

253. According to the Respondent, the Claimant could only engage in mining activities such as exploitation of a mining site by obtaining a PKP2B – a so-called coal cooperation agreement – which the Claimant should have concluded with the Government.<sup>336</sup> However, neither PT ICD, nor the Claimant, nor PT TCUP in which the Claimant acquired a majority in 2010, ever applied for a PKP2B.<sup>337</sup>

254. Specifically, under the 1967 Foreign Investment Law, foreign investors can only engage in the field of mining on the basis of direct cooperation with the Government. Article 8(1) of this act provides that “[f]oreign capital investment in the field of mining shall be based on a cooperation with the Government on the basis of a contract of work (*‘kontrak karya’*) or other form in accordance with applicable laws and regulations”.<sup>338</sup>

255. Under Article 1(1) of the 2004 Decree of the Minister of Energy and Mineral Resources No. 1614,<sup>339</sup> the contract of work just referred to is defined as “an agreement between the Government of the Republic of Indonesia with Indonesian legal entity company in the framework of Foreign Investment to conduct extractive materials mining undertaking, excluding petroleum, natural gas, geothermal, radio active and coal”.

256. According to Article 1(2) of Decree No. 1614, a coal cooperation agreement is an “agreement between the Indonesian Government with Indonesian legal entity company in the framework of Foreign Investment to conduct extractive material coal mining undertaking”.<sup>340</sup>

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<sup>336</sup> RMOJ, ¶ 228.

<sup>337</sup> RMOJ, ¶¶ 230, 238.

<sup>338</sup> Law No. 1 on Foreign Investment (1967), Art. 8(1) (**Exh. RLA-006**).

<sup>339</sup> RMOJ, ¶¶ 32-33; Minister of Energy and Mineral Resources Decree No. 1614 Year 2004 concerning Guidelines for Processing Applications of Contracts of Work and Coal Cooperation Agreement in the framework of Foreign Investment (Excerpts), Art. 1(1) (**Exh. RLA-005**).

<sup>340</sup> *Id.*, Art. 1(2).

257. As mentioned in the Respondent's submission, the Claimant could only have engaged in mining activities (as opposed to mining services) by entering into a PKP2B with the central Government. Under Decree No. 1614 just referred to, the role of the BKPM is merely to forward the foreigner's investment application to the relevant ministries and the President, who must approve the coal cooperation agreement. Article 24 of such decree states that a draft PKP2B "that has obtained recommendation from BKPM and has been consulted with the House of People's Representatives of the Republic of Indonesia is therefore submitted by the Minister for approval to the President".<sup>341</sup> Once approval has been obtained from the President, Article 25 of Decree No. 1614 directs that the PKP2B must be signed by the Minister "on behalf of the Government".<sup>342</sup>

258. In sum, the BKPM Approvals did not allow PT ICD or Churchill to engage in mining activities *per se*. By doing so Churchill failed to observe the limits set forth in the BKPM Approvals.<sup>343</sup>

#### 1.6 The Claimant circumvented the law by securing beneficial ownership in the Ridlatama licenses

259. Indonesia advances that only Indonesian nationals or companies can obtain KP licenses to engage in mining activities. PMAs such as PT ICD and foreign investors cannot obtain KP licenses.<sup>344</sup>

260. Indonesia further submits that Article 33 of the 2007 Investment Law, promulgated on 26 April 2007<sup>345</sup> and replacing the 1967 Foreign Capital Investment Law<sup>346</sup> prohibits beneficial ownership by declaring that ownership and benefits associated with it are indivisible.<sup>347</sup> Article 33(1) stipulates that "domestic investor and foreign investor which undertake capital investment in the form of a limited liability company are prohibited from making any agreement and/or statement which confirms that ownership of share(s) in a limited liability company is for and on behalf of other party". Article 33(2) then declares any

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<sup>341</sup> *Id.*, Art. 24.

<sup>342</sup> *Id.*, Art. 25.

<sup>343</sup> RMOJ, ¶¶ 55-58, 63, 226.

<sup>344</sup> RMOJ, ¶ 229.

<sup>345</sup> Law No. 25 on Investment, with Elucidation (2007) (**Exh. RLA-009**).

<sup>346</sup> RMOJ, ¶ 41. Law No. 1 on Foreign Capital Investment (1967) (**Exh. RLA-006**).

<sup>347</sup> RMOJ, ¶ 236.

such agreement null and void by operation of law.<sup>348</sup> For the Respondent, various arrangements entered into by PT ICD on behalf of the Claimant violate Article 33 and are therefore null and void. Therefore, the Claimant should be denied protection under the BITs.

261. In this context, Indonesia emphasizes that Dr. Makarim fails to address Article 33 of the 2007 Investment Law in his first expert report, but has acknowledged in a recent press article that Indonesian law prohibits arrangements of beneficial ownership.<sup>349</sup>

262. Indonesia claims that Churchill, through PT ICD, has entered into a series of arrangements with the Ridlatama companies and their owners which breach the 2007 Investment law by providing beneficial ownership to PT ICD, and thus ultimately to Churchill itself. Specifically, it makes the following assertions:<sup>350</sup>

- The 22 May 2007 Deed of Beneficial Control and Ownership between PT ICD and PT RS, PT RP, PT RTM, PT RTP and PT TCUP violates Article 33 as it provides for PT ICD's 75% beneficial ownership and control of these companies.<sup>351</sup>
- The 25 May 2007 agreements (the cooperation agreement, the investors agreement, the pledge of shares agreements, and the powers of attorney) were concluded to allow the Claimant to engage in mining activities going beyond mere mining services and to obtain 75% of the mining revenue. Therefore they violated the 2007 Investment Law.<sup>352</sup>
- The 28 November 2007 agreements (the second cooperation agreement, the second investor's agreement, the new pledge of shares agreements) also sought to

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<sup>348</sup> RMOJ, ¶ 234.

<sup>349</sup> RMOJ, ¶ 236; Tr. 13052013, 38:25-40:3. Nono Anwar Makarim, *The Risk of Convenient Alternatives*, The Jakarta Post, 1 August 2012 (**Exh. R-101**).

<sup>350</sup> RMOJ, ¶ 237.

<sup>351</sup> Deed of Beneficial Control and Ownership between (1) PT Ridlatama Steel, PT Ridlatama Power, PT Ridlatama Tambang Mineral, PT Ridlatama Trade Powerindo and PT Techno Coal Utama Prima and (2) PT Indonesia Coal Development dated 22 May 2007, Art. 4.1 (**Exh. P-17**).

<sup>352</sup> Cooperation Agreement between PT ICD and TCUP, Ridlatama Mineral, Ridlatama Trade, Ridlatama Steel and Ridlatama Power dated 25 May 2007 (**Exh. C-43**); Power of Attorney from PT Ridlatama Tambang Mineral to PT Indonesia Coal Development (**Exh. P-24**); and Power of Attorney from PT Ridlatama Trade Powerindo to PT Indonesia Coal Development (**Exh. P-25**).

secure PT ICD's benefits accruing from the KP licenses, thus violating the 2007 Investment Law.<sup>353</sup>

- The 31 March 2008 agreements between PT ICD and PT IR and PT INP as well as with Mmes. Florita and Setiawan also breached the 2007 Investment Law.<sup>354</sup>

263. Indonesia believes that Churchill knew that it was prohibited to own shares in Indonesian companies holding KP licenses, as Article 5.7 of the 25 May 2007 Cooperation Agreement states that "if there is any change in the law of the Republic of Indonesia which allows ICD to hold TCUP's shares in each of the KP Holders, TCUP and the KP Holders shall provide all necessary assistance ... to ensure that such shares are transferred to ICD".<sup>355</sup>

264. Finally, Indonesia explains that it was not aware of these agreements because the Claimant operated under confidentiality agreements. However, when the Regent of East Kutai became aware in 2009 of the beneficial control exerted by the Claimant, most notably through Churchill's press releases in which it claimed to have become the owner of the EKCP coal reserves, he immediately requested clarification from Churchill and the London Alternative Investment Market ("AIM").<sup>356</sup> The Regent also informed the Claimant that it could not own any interests in Indonesian companies holding KP licenses, and that he had never issued a PKP2B or a KP license to them or to PT ICD or PT TCUP.<sup>357</sup>

265. In any event, the Claimant's interest in PT TCUP cannot find protection under the BIT, so the Respondent submits, because it was obtained after the revocation decrees of 4 May 2010. According to the Respondent, PT TCUP amended its articles of association on 16 April 2010 to authorize a capital increase and issue new shares. That amendment was approved by the Minister of Law and Human Rights on 15 June 2010, and only thereafter did PT ICD obtain a 99.01% direct interest in PT TCUP and Churchill the remaining 0.99%.

266. Thus, the Claimant is barred from invoking any rights in respect to its interest in PT TCUP as it acquired the shares in PT TCUP when the mining licenses were already revoked.

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<sup>353</sup> Second Cooperation Agreement between PT ICD and Ridlatama Mineral, Ridlatama Trade, Ridlatama Steel and Ridlatama Power dated 28 November 2007 (**Exh. C-56**).

<sup>354</sup> Cooperation Agreement between PT ICD and Investama Resources and Investmine Persada (**Exh. C-86**); Investors Agreement between PT ICD, Investmine Persada, Investama Resources, Ms. Florita and Ms. Ani Setiawan (**Exh. C-90**), both dated 31 March 2008.

<sup>355</sup> RMOJ, ¶ 237, n. 334.

<sup>356</sup> RMOJ, ¶ 238.

<sup>357</sup> *Id.*



## 2. The Claimant's position

2.1 The Claimant's investments have been admitted in accordance with the BIT

267. For the Claimant, Indonesia fails to explain the content of the admission requirement under the BIT and conflates that requirement with the larger legality requirement.<sup>358</sup>

2.2 The meaning of the "admission" requirement

268. The Claimant submits that, in ordinary usage and in light of the context in the UK-Indonesia BIT, the term "admitted" means "allowed" or "approved for entry".<sup>359</sup> Therefore, the admission requirement is applicable at the time when making the investment and, once approved, the investment is covered by the BIT.<sup>360</sup>

269. To support its interpretation of the term "admitted", the Claimant relies on similarly worded provisions in the Australia-New Zealand-ASEAN FTA<sup>361</sup> and the ASEAN Comprehensive Investment Agreement.<sup>362</sup> The Claimant also relies on *Desert Line Projects v. Yemen*, where the tribunal found that, in the absence of a specifically defined manner of certifying acceptance, a general endorsement of the investment at the highest level of the State satisfies the admission requirement.<sup>363</sup> Finally, the Claimant disputes Indonesia's reliance on *Gruslin v. Malaysia* and *Yaung Chi Oo Trading Pte Ltd v. Myanmar*, because the facts underlying the present dispute are different.<sup>364</sup>

270. The Claimant rejects the Respondent's expansive reading of the admission requirement, which it seemingly convolutes with the "in accordance with the law" requirement: "[I]t is our submission that once this admission is granted, the investment activity can commence within Indonesia without the need for further admissions. Indeed the whole point of admission is a singular act. If separate admissions were required for all investments subsequently, this would amount to a compliance with law requirement, which has been

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<sup>358</sup> Reply, ¶ 166. See also: Tr. 13052013, 9:7-13.

<sup>359</sup> Reply, ¶ 167. See also: Tr. 14052013, 76:22-24.

<sup>360</sup> Reply, ¶ 168.

<sup>361</sup> Reply, ¶¶ 169-171.

<sup>362</sup> Reply, ¶ 172.

<sup>363</sup> Reply, ¶ 174. *Desert Line*, supra note 116, ¶¶ 92, 98 (**Exh. RLA-061**).

<sup>364</sup> Reply, ¶¶ 177-178.

explicitly distinguished by authorities and also, of course, by a plain meaning of the term”.<sup>365</sup>

271. Therefore, relying on *Hamester v. Ghana*, the Claimant insisted on the distinction between “legality at the time of the initiation of the investment” and “legality during the performance of the investment”,<sup>366</sup> the first aspect relating to jurisdiction and the second one to the merits.

### 2.3 All investments were granted admission in accordance with the 1967 Foreign Capital Investment Law and the 2007 Investment Law

272. According to the Claimant, all of its investments have been established in accordance with the relevant foreign investment laws and granted admission by the competent authorities. PT ICD was granted a BKPM Approval in 2005 and received a Permanent Business License in 2007. After PT ICD’s acquisition by Churchill and Planet in 2006, BKPM again granted its approval. All further investment activities also received authorization by the relevant authorities.

273. In support, the Claimant recalls that under both the 1967 Foreign Capital Investment Law<sup>367</sup> and the 2007 Investment Law which replaced it,<sup>368</sup> the BKPM is the agency with authority to grant admission to foreign investors in Indonesia.<sup>369</sup>

274. Relying on the 2005 BKPM Approval, the Claimant further submits that PT ICD received the authorization to engage in mining activities for a period of 30 years. In that regard, Dr. Makarim points out that “once the BKPM issued its 2006 Approval and the MEMR issued a Mineral, Coal and Geothermal Mining Business License, PT ICD was admitted into Indonesia under the 1967 Foreign Capital Investment Law”.<sup>370</sup> Dr. Makarim further states that none of PT ICD’s subsequent investment activity required additional approvals to fulfill the admission requirement under the BIT.<sup>371</sup>

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<sup>365</sup> Tr. 14052013, 85:1-10. See also: Tr. 14052013, 82:6-11.

<sup>366</sup> Tr. 14052013, 80:21-23.

<sup>367</sup> Law No. 1 on Foreign Investment (1967) (**Exh. RLA-006**).

<sup>368</sup> Law No. 25 on Investment (2007) (**Exh. RLA-009**).

<sup>369</sup> Reply, ¶ 181; Makarim ER2, p. 5.

<sup>370</sup> Reply, ¶ 182; Makarim ER2, p. 12.

<sup>371</sup> Reply, ¶ 182; Makarim ER2, p. 7.

275. In any event, according to the Claimant, it received all the necessary authorizations and approvals, in particular:

- The 2006 BKPM Approval;
- The 2006 Mineral, Coal and Geothermal Mining Business License from the Ministry of Energy and Mineral Resources;
- The 2007 BKPM Permanent Business License; and
- The 2011 Mineral, Coal and Geothermal Mining Business License from the Ministry of Energy and Mineral Resources.<sup>372</sup>

276. In each of these approvals or licenses, PT ICD's foreign shareholding is explicitly mentioned, a clear recognition by Indonesia that these approvals concerned an investment by foreigners.<sup>373</sup>

277. In addition to disputing that it engaged in mining activities *per se* in violation of the relevant mining licenses, the Claimant argues that Indonesia's allegation that it circumvented the law by restructuring the investment – besides being wrong – has no bearing on the fulfillment of the admission requirement.

278. Furthermore, the Claimant disputes that PT ICD could only engage in mining activities in the coal sector by concluding a PKP2B with the Government;<sup>374</sup> that PT ICD's mining license only covered mining services in a limited sense;<sup>375</sup> that Churchill engaged in mining activity without permission;<sup>376</sup> and that the contractual arrangements with the Ridlatama companies violated Article 33 of the 2007 Investment Law.<sup>377</sup>

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<sup>372</sup> Reply, ¶ 183.

<sup>373</sup> Reply, ¶ 184.

<sup>374</sup> Reply, ¶ 188.

<sup>375</sup> Reply, ¶ 190.

<sup>376</sup> Reply, ¶ 189.

<sup>377</sup> Reply, ¶ 191.

2.4 The Claimant's investments have otherwise been made in accordance with Indonesian law

2.4.1 The UK-Indonesia BIT contains no legality requirement

279. The Claimant stresses that Indonesia does not contest that the UK-Indonesia BIT contains no express legality requirement.<sup>378</sup> In the absence of such requirement, the Claimant puts forward that Indonesia “cannot claim plausibly that any illegality in the Claimant[’s] investment, other than lack of proper admission, would deprive this Tribunal of jurisdiction”.<sup>379</sup> The Claimant also notes that Indonesia has failed to substantiate its position with a single authority, except for references where the definition of investment included a legality requirement.<sup>380</sup>

2.4.2 Churchill never performed mining *per se*

280. The Claimant challenges Indonesia’s allegations that it engaged in mining operations without the necessary authorizations. There is no evidence showing what activities qualify as mining services as opposed to actual mining: “Where in the process from prospecting for coal [...] to the extraction and sale of coal, can it be said that mining services starts or stops; or which activities within the process from start to finish are services as opposed to actual mining?”<sup>381</sup>

281. In any event, the Claimant denies having performed mining *per se*, save for drilling in conformity with the KP Exploration Licenses granted to the Ridlatama companies.<sup>382</sup> At the hearing, it recalled that the licenses were revoked when only 20 percent of the territory [covered by them] had been fully explored. No mine was ever opened. No mine was ever operational. No coal was ever mined from the East Kutai Coal Project”.<sup>383</sup>

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<sup>378</sup> Reply, ¶ 197, referring also to RMOJ, ¶ 248.

<sup>379</sup> Reply, ¶ 198.

<sup>380</sup> Reply, ¶ 198.

<sup>381</sup> Tr. 14052013, 119:21-120:2.

<sup>382</sup> Reply, ¶ 189.

<sup>383</sup> Tr. 14052013, 120:9-16.

2.4.3 The Respondent's accusations of document forgery are not supported by evidence

282. The Claimant strongly rejects the Respondent's accusations raised during the hearing regarding allegedly forged documents in the record. It explains that some document irregularities may be due to clerical errors made by officials in the Regency of East Kutai. Notwithstanding, the fact that the Respondent has not acted on these accusations much earlier is sufficient to rebut them.<sup>384</sup>

2.4.4 The Respondent's objection could only have a bearing on the merits, not on jurisdiction

283. Finally, the Claimant contends that Indonesia's reliance on *World Duty Free v. Kenya* and *Plama v. Bulgaria* is misleading to the extent that its introduction of the legality requirement at the jurisdictional stage conflates jurisdiction with admissibility, which is a merits issue.<sup>385</sup> The Tribunal should not refuse to afford Churchill a forum to adjudicate its claims. In any event, Indonesia has not reserved admissibility as a preliminary question, which could therefore only affect the merits if at all.

### 3. Analysis

284. Having determined that Indonesia has given its advance consent to ICSID arbitration under Article 7(1) of the UK-Indonesia BIT, the Tribunal must now determine the scope of Indonesia's consent in light of Indonesia's second jurisdictional objection. It must in particular determine whether Churchill's investment is covered by the Treaty.

285. In light of the Parties' arguments, the Tribunal will first analyze Article 2(1) of the Treaty so as to determine the meaning of the words "granted admission" (3.1.). Thereafter, it will turn to the Indonesian Foreign Capital Investment Law referred to in Article 2(1) of the BIT (3.2.) and to the BKPM Approvals (3.3.).

#### 3.1 The admission requirement under Article 2(1) of the BIT

286. Article 2(1) of the UK-Indonesia BIT reads as follows:

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<sup>384</sup> Tr. 14052013, 104:18-105:4.

<sup>385</sup> Tr. 14052013, 77:20-25.

“This Agreement shall only apply to investments by nationals or companies of the United Kingdom in the territory of the Republic of Indonesia which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it”.<sup>386</sup>

287. It is common ground that Article 2(1) limits the application of the BIT to investments that have been granted admission in accordance with the 1967 Foreign Capital Investment Law (or any successive statute). By contrast, the Parties are in disagreement on the temporal scope of application of Article 2(1), i.e. whether the requirement implies admission once upon entry into the country, as argued by the Claimant, or whether it extends through the entire duration of the investment operation, as advocated by the Respondent.
288. In accordance with the rules of treaty interpretation, the Tribunal will start by ascertaining the ordinary meaning of the terms of Article 2(1). This provision requires an investment to “have been granted admission” by Indonesia under the 1967 Foreign Capital Investment Law. According to the Oxford Dictionary of English, the verb “to admit” means “to allow” or “to accept”.<sup>387</sup> That same dictionary defines the noun “admission” as “the process or fact of entering or being allowed to enter a place or organization”.<sup>388</sup>
289. The content of this definition and the observation that the admission must “have been granted” by the host State, leads the Tribunal to understand that the admission requirement set forth in Article 2(1) is a one-time occurrence, a gateway through all British investors must pass once.
290. The context confirms this understanding. Article 2 is entitled “Scope of the Agreement”, implying that investments that do not meet the requirements under Article 2 will not find protection under the UK-Indonesia Treaty, even if the underlying operation qualifies as an investment under Article 1(1). The admission requirement is consequently of jurisdictional nature. As such, it necessarily applies at the time of entry into the country and not during the entire operation of the project. This conclusion is further confirmed by previous arbitral decisions.<sup>389</sup>

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<sup>386</sup> UK-Indonesia BIT, *supra* note 84 (**Exh. CLA-18; Exh. R-001**).

<sup>387</sup> Oxford Dictionary of English (2010), at 22 (**Exh. CLA-113**).

<sup>388</sup> *Ibid.*

<sup>389</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶ 345 (**Exh. CLA-131**); *Gustav F W Hamester GmbH &*

291. Having reached this conclusion, the Tribunal addresses certain additional arguments and cases which the Parties invoked. In this context, it agrees with the Claimant that the admission requirement embodied in Article 2(1) is narrower than a traditional legality requirement in the sense that it only demands admission in accordance with the relevant domestic laws and not general compliance with the host State's legislation.
292. Contrary to the Respondent's position, the Tribunal does not find that *Mytilineos*, *Gruslin*, and *Yaung Chi Oo* support the Respondent's argument. In *Mytilineos*, the tribunal was called upon to interpret a general "in accordance with the legislation" provision contained in the Greece-Yugoslavia BIT and the tribunal expressly mentioned that the treaty did not require any registration of investments.<sup>390</sup>
293. The *Gruslin* decision is also inapposite here. It is true that the Belgium-Malaysia Intergovernmental Agreement under scrutiny there required that the assets be invested in Malaysia in an "approved project" classified as such by the relevant Ministry.<sup>391</sup> The sole arbitrator found that this requirement was not satisfied through a general approval of the business activity, but that the specific "project" needed approval.<sup>392</sup> In the view of the Tribunal, *Gruslin* must be distinguished, since the thrust of Indonesia's argument is that Churchill violated Indonesian laws after the approval of its investment, not in the making of the investment.
294. Finally, in *Yaung Chi Oo*, the tribunal refused jurisdiction on the ground that the investment had not obtained an additional approval in line with the requirements of the 1987 ASEAN Agreement.<sup>393</sup> It held that all investors, including those who were already admitted in Myanmar prior to the entry into force of the ASEAN Agreement, had to apply for approval in conformity with Article II(3) of that treaty to benefit from treaty protection.<sup>394</sup> The investor failed to do so and, hence, jurisdiction was denied.<sup>395</sup>

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*Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 127 (**Exh. RLA-058**).

<sup>390</sup> *Mytilineos*, *supra* note 317, ¶¶ 140, 146 (**Exh. RLA-071**).

<sup>391</sup> *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 28 November 2000 ("*Gruslin*"), ¶ 9.2 (**Exh. RLA-062**).

<sup>392</sup> *Id.*, ¶ 25.5.

<sup>393</sup> *Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar*, ASEAN Case No. ARB/01/1, Award, 31 March 2003 ("*Yaung Chi Oo*"), ¶ 58 (**Exh. RLA-062**).

<sup>394</sup> *Id.*, ¶ 62.

<sup>395</sup> *Id.*, ¶ 63.

295. In sum, none of these cases support Indonesia's argument that the admission requirement extends throughout the duration of the investor's activity. In other words, the admission requirement under Article 2(1) of the treaty is restricted to the time of the initiation of the investment. The Tribunal must thus analyze the content of the admission requirement under the relevant legislation.

### 3.2 The Indonesian Foreign Investment Law

296. Foreign investment in Indonesia is governed by the 1967 Foreign Investment Law.<sup>396</sup> This law was amended in 1970 in respect of matters of no relevance here,<sup>397</sup> and then replaced on 26 April 2007 by the Investment Law No. 25 ("2007 Investment Law").<sup>398</sup> As to the 2007 Investment Law, the Respondent acknowledges that it does not diverge significantly from its predecessor, save for the addition of Article 33.<sup>399</sup>

297. It is common ground that Churchill acquired its interests in PT ICD on 24 April 2006 and that it obtained the BKPM Approval for this acquisition on 8 May 2006,<sup>400</sup> i.e. before the entry into force of the 2007 Investment Law. The Tribunal will thus assess the present objection by application of the 1967 Foreign Investment Law.

298. Article 1 of the 1967 Foreign Investment Law provides that it applies to "direct foreign capital investment" made in Indonesia.<sup>401</sup> Article 2 defines foreign capital investment as including (a) foreign exchange, (b) equipment, and (c) transferable profits used to finance an enterprise in Indonesia.<sup>402</sup> Article 3 defines an enterprise as understood in Article 2 as a legal entity organized under Indonesian law and domiciled in Indonesia. Under Articles 4 and 5 of the 1967 Foreign Investment Law, the Indonesian Government is empowered to determine the operating area for foreign capital and the fields of activity which are open to foreign investment.

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<sup>396</sup> Law No. 1 on Foreign Investment (1967) (**Exh. CLA-2; Exh. RLA-006**). See RMOJ, ¶ 41. The Parties submitted different English versions of the 1967 Foreign Capital Investment Law. However, neither Party indicated that there is any material difference between the two translations.

<sup>397</sup> **Exh. CLA-3.**

<sup>398</sup> Law No. 25 on Investment (2007) (**Exh. CLA-4; Exh. RLA-009**).

<sup>399</sup> RMOJ, ¶ 47.

<sup>400</sup> RMOJ, ¶¶ 50, 223.

<sup>401</sup> Law No. 1 on Foreign Investment (1967), Art. 1 (**Exh. CLA-2; Exh. RLA-006**).

<sup>402</sup> *Id.*, Art. 2(a)-(c).



299. Regarding the field of mining activities, Article 8(1) of the law requires cooperation with the Government by way of a work contract or otherwise:

“Foreign investment in the field of mining shall be carried out in cooperation with the Government on the basis of a work contract (“*kontrak karya*”) or other form in accordance with prevailing [sic] regulations”.<sup>403</sup>

300. Finally, about the implementation of the law, Article 28(1) provides for coordination in the following terms:

“Provisions of this Law shall be implemented by coordination among the Government agencies concerned in order to ensure harmonization of Government policies regarding foreign capital”.<sup>404</sup>

301. Article 28(2) specifies that further provisions will be adopted in respect of procedures for the coordination contemplated in paragraph 1. The elucidation to Article 28, which is appended to the law, contemplates the creation of a coordination body. It states that the “execution of the Law involves the domains of several Department [sic]. For that reason it is necessary to have a simple coordination body which may take the form of a council consisting of the Ministers concerned”.<sup>405</sup>

302. This being so, the 1967 Foreign Investment Law does not specify the procedures for a foreign investor to obtain the governmental approval contemplated in Article 2(1) of the UK-Indonesia BIT, nor does it designate an authority in charge of implementing the law. The Parties agree that the BKPM, the Indonesian Investment Coordinating Board, is the responsible authority to grant the investment approvals contemplated in Article 2(1) of the UK-Indonesia BIT.<sup>406</sup>

303. In this respect, the Tribunal notes that, according to the Respondent, the BKPM was only created in 1973.<sup>407</sup> It further notes that, under the 1981 Presidential Decree No. 33 regarding the Capital Investment Coordinating Board, the BKPM has the duty to assist

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<sup>403</sup> Law No. 1 on Foreign Investment (1967) (**Exh. CLA-2**), Art. 8(1). See also: **Exh. RLA-006**, Art. 8(1).

<sup>404</sup> Law No. 1 on Foreign Investment (1967) (**Exh. CLA-2**), Art. 28(1).

<sup>405</sup> Law No. 1 on Foreign Investment (1967) (**Exh. CLA-2**), Elucidation Article by Article, Art. 28.

<sup>406</sup> RMOJ, ¶ 42; Reply, ¶ 181.

<sup>407</sup> R-PHB 2, ¶ 2. It appears that the BKPM was created under the 1973 Presidential Decree No. 20. This Decree was not put into evidence by either Party.

Indonesia's President in formulating investment policies, completing investment approvals and evaluating their implementation, and issuing business licenses.<sup>408</sup>

304. In 2004, a so-called "One-Roof Service System" was established by Presidential Decree No. 29.<sup>409</sup> According to that decree, the BKPM had delegated authority from the relevant Ministries to issue capital investment approvals under the 1967 Foreign Investment Law. Article 3 of the decree provides that:

"Services of capital investment approvals, permits and facilities as referred to in Article 2 letter c within the framework of Foreign Capital Investment and Domestic Capital Investment are carried out by BKPM, based on delegation of authority by the Minister/Head of Non Departmental Government Institution which fosters the relevant lines of business of capital investment through the one-roof service system".<sup>410</sup>

305. Article 4 Decree No. 29 further provides that decentralized governmental bodies may also delegate the authority to grant investment approvals to the BKPM:

"Governor/Regent/Mayor in line with his/her authority may delegate authority in investment approval, licenses and facilities services as meant in Article 2 letter c to BKPM (Investment Coordinating Board) through the one-stop service system".<sup>411</sup>

306. In the field of mining, the Ministry of Mining had delegated its authority to the BKPM in 1978 already.<sup>412</sup> As a result of this delegation and of the powers vested in the BKPM under the Decrees of 1981 and 2004, when Churchill applied for its investment approval, the BKPM was the authority competent to grant that approval.

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<sup>408</sup> Presidential Decree No. 33 of 1981 Regarding the Capital Investment Coordinating Board, Articles 2 and 3(l) (**Exh. RLA-099**; **Exh. CLA-366**).

<sup>409</sup> Presidential Decree No. 29 of 2004 Regarding the Implementation of Capital Investment within the Framework of Foreign Capital Investment and Domestic Capital Investment through the One-Roof Service System (**Exh. C-361**; **Exh. RLA-106**). Article 1(5) of the Decree defines the One-Roof Service System as "a system of the services of granting capital investment approvals and implementation permits carried out by one Government institution charged with responsibilities in the field of capital investment".

<sup>410</sup> *Id.*, Art. 3.

<sup>411</sup> *Id.*, Art. 4.

<sup>412</sup> Decree of Minister of Mining No. 211/Kpts/Pertamb/1978 Year 1978 concerning Delegation of Authority to the Chairman of Investment Coordinating Board to Grant [License to] Undertake Utilization of Extractive Materials and Provide Consultation on the Granting of Investment Facilities in the Field of Non-Oil and Natural Gas Mining and to Grant License to Undertake Mining Supporting Services, Art. 1 (**Exh. RLA-098**).

307. Consequently, the Tribunal must now determine whether Churchill obtained the investment approval from the BKPM in conformity with Article 2(1) of the UK-Indonesia BIT, thus enabling it to benefit from protection under the treaty.

### 3.3 The BKPM Approvals

308. It is undisputed that, pursuant to Article 3 of the 1967 Foreign Investment Law, Churchill could only invest in Indonesia through a local vehicle incorporated and domiciled in Indonesia.<sup>413</sup> It is equally undisputed that foreign investors seeking to invest in the mining sector can only do so through a foreign direct investment company, a so-called *Penanaman Modal Asing* (“PMA”).

309. Churchill invested in Indonesia by acquiring a 95% share in an Indonesian PMA called PT Indonesian Coal Development or PT ICD. PT ICD was initially created by Profit Point Group Ltd, a company incorporated in the British Virgin Islands, and Mr. Andreas Rinaldi, an Indonesian national.<sup>414</sup> Profit Point Group Ltd owned 95% of the shares and Mr. Andreas Rinaldi the remaining 5%.

310. The Respondent acknowledges that PT ICD “received an approval from BKPM to be a *Penanaman Modal Asing* (PMA – foreign direct investment) company, operating as a *Perseroan Terbatas* (PT – limited liability company)”.<sup>415</sup> The BKPM approved the incorporation of PT ICD on 23 November 2005 (the “2005 BKPM Approval”).<sup>416</sup> The preamble of the 2005 BKPM Approval refers to (1) the 1967 Foreign Investment Law, (2) the 1967 Mining Law, (3) the 1981 Presidential Decree No. 33 on the BKPM, (4) the 2004 Presidential Decree No. 29 on the One-Roof Service System, and (5) the 1978 Decree on the delegation of powers from the Ministry of Mining to the BKPM.<sup>417</sup>

311. The text of the 2005 BKPM Approval mentions the identity of the two applicants, the terms of the project, the name of the new company PT ICD, its business field, the initial capital

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<sup>413</sup> RMOJ, ¶ 42; Reply, ¶ 11.

<sup>414</sup> RMOJ, ¶ 48.

<sup>415</sup> *Ibid.*

<sup>416</sup> BKPM Foreign Investment Approval Letter No. 1304/I/PMA/2005 (**Exh. R-003**); Foreign Capital Investment Approval for PT ICD, Decision No. 1304/I/PMA/2005 (**Exh. C-17**), both dated 23 November 2005.

<sup>417</sup> *Ibid.*

contribution of USD 250,000<sup>418</sup> and contains the investment approval in the following terms:

“The Government of the Republic of Indonesia grants investment approval, which is also applicable as Temporary License until the company obtains Permanent Business License”.<sup>419</sup>

312. On 24 April 2006, the owners of PT ICD sold their shares to Churchill (95%) and to Planet (5%).<sup>420</sup> The change in shareholders was approved by the BKPM on 8 May 2006 (the “2006 BKPM Approval”),<sup>421</sup> a fact that the Respondent concedes. Besides requiring that, within fifteen years from the start of commercial operations, PT ICD must sell part of its shares to Indonesian citizens, and that any subsequent change in the share capital must be approved by the BKPM, the 2006 BKPM Approval incorporates by reference the content of the 2005 BKPM Approval.

313. On this basis, and in particular in view of the fact that PT ICD received the necessary approval by the BKPM in 2005 and that the change in PT ICD’s shareholding was subsequently approved by the BKPM in 2006, the Tribunal concludes that Churchill obtained the necessary approval when making its investment in May 2006, thus fulfilling the requirement set in Article 2(1) of the UK-Indonesia BIT.

314. Therefore, the Tribunal denies Indonesia’s second preliminary objection and concludes that it has jurisdiction over the present dispute.

315. The present decision is limited to jurisdiction and does not prejudice any alleged wrongdoing by the Claimant during the operation of the investment, which is a matter for the merits.

## VI. COSTS

316. With regard to costs, the Respondent requested that the Tribunal:

“order [Churchill] to pay the totality of costs relating to this Arbitration, including the fees and expenses of the Members of the Tribunal,

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<sup>418</sup> *Ibid.*

<sup>419</sup> *Ibid.*

<sup>420</sup> Shareholders Resolution Deed No. 17 dated 24 April 2006 (**Exh. R-005**).

<sup>421</sup> RMOJ, ¶¶ 50 and 223. Approval of Changes in Participation Within the Company’s Capital for PT ICD, Decision No. 579/III/PMA/2006 dated 8 May 2006 (**Exh. C-24**).

Respondent's legal fees and all other amounts incurred by Respondent".<sup>422</sup>

317. For its part, the Claimant makes the following requests:

"1) Order that Indonesia pay all fees and costs incurred in connection with the arbitration proceedings, including the costs of the arbitrators and of ICSID as well as legal and other expenses incurred by the [Churchill] on a full indemnity basis, plus interest accrued thereupon at a rate to be determined by the Tribunal from the date on which such costs are incurred to the date of payment; and

2) Award any other relief the Tribunal deems just and appropriate".<sup>423</sup>

318. Having come to the conclusion that it has jurisdiction, the Tribunal deems it appropriate to reserve the decision on costs for a later decision.

## **VII. DECISION**

319. For the reasons set out above, the Arbitral Tribunal decides that:

- a. It has jurisdiction over the dispute submitted to it in this arbitration.
- b. Costs are reserved for a later decision.

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<sup>422</sup> RMOJ, ¶ 257; Rejoinder, ¶ 136.

<sup>423</sup> Reply, ¶ 200, point C.

*[Signed]*

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Mr. Michael Hwang S.C.

Arbitrator

*[Signed]*

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Prof. Albert Jan van den Berg

Arbitrator

*[Signed]*

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Prof. Gabrielle Kaufmann-Kohler

President