

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia
(ICSID Case No. ARB/12/14 and 12/40)

PROCEDURAL ORDER NO. 8

Professor Gabrielle Kaufmann-Kohler, President of the Tribunal

Mr. Michael Hwang S.C., Arbitrator

Professor Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal

Mr. Paul-Jean Le Canu

Assistant to the Tribunal

Mr. Magnus Jesko Langer

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I. Introduction

1. By letter dated 7 March 2014, the Tribunal invited the Parties to confer and, if possible, agree on a schedule for the merits phase. On 24 March 2014, the Parties informed the Tribunal that they had not been able to agree on a schedule. In addition, the Claimants informed the Tribunal that they disagree with the Respondent's proposal to bifurcate the merits phase into liability and quantum.

II. Position of the Parties

a. Position of the Respondent

2. In its letter of 24 March 2014, the Respondent argues that the bifurcation in a liability phase and a quantum phase is appropriate in the present circumstances. In essence, were the Tribunal to find in favor of the Respondent on liability, the Respondent would not have to spend the time and resources "necessary to examine the complex technical, economic and financial aspects of the claims or to decide on the proper application of legal principles to the question of quantum".¹
3. For the Respondent, the Claimants confirmed the complexities surrounding quantum (i) in their Memorial on Jurisdiction and Merits (the "Memorial") and (ii) in their unsolicited supplemental memorial on quantum and damages dated 9 May 2013 (the "Supplemental Memorial"). First, for reasons related to the "technical complexity of valuing an asset, the EKCP",² the Claimants sought leave in their Memorial "to present fully the quantification of their loss by a date to be fixed by the Tribunal after consultation with the Parties".³ Second, in a letter of 9 May 2013 accompanying the Supplemental Memorial, the Claimants informed the Tribunal that supporting documentation of two expert reports had yet to be filed.⁴ Third, the Claimants indicated in their Supplemental Memorial that as the proceedings advance they may file new valuations based on a different valuation date,⁵ including possibly a new DCF analysis.⁶

¹ Respondent's letter to the Tribunal dated 24 March 2014, p. 1.

² *Id.*, p. 2; referring to Mem., ¶ 398.

³ *Id.*, p. 2; referring to Mem., ¶ 397.

⁴ *Id.*, p. 2; referring to the Claimants' letter to the Tribunal dated 9 May 2013.

⁵ *Id.*, p. 2; referring to Supp. Mem., ¶ 29.

⁶ *Id.*, p. 2; referring to Supp. Mem., ¶ 14.

4. As a result, the Respondent submits that it should not be required to expend significant resources and time on issues of quantum as long as there is no finding of liability. It estimates that a 10-day hearing will be necessary on liability and, if applicable, a 3-4 day-hearing on quantum.
5. As regards the schedule for the liability phase, the Respondent notes that it will need more than 5 months for its Counter-Memorial on the Merits and 4 months for its Rejoinder. In addition, the Respondent requests a document production phase prior to its Counter-Memorial on the Merits.
6. Accordingly, the Respondent proposes the following schedule:

Dates	Submission
14 April 2014	Requests to produce documents
5 May 2014	Production of documents and objections to Requests to produce, if any
19 May 2014	Responses to objections to Requests to produce, if any
2 June 2014	Request to Tribunal for rulings on objections to Requests to produce
16 June 2014	Tribunal's ruling on Requests to produce
30 June 2014	Production pursuant to Tribunal's ruling on Requests to produce
3 November 2014	Respondent's Counter-Memorial on Liability
3 February 2015	Claimants' Reply
4 May 2015	Respondent's Rejoinder
May/June 2015	Pre-hearing Conference
August/September 2015 in Singapore	Hearing on Liability (approximately 10 days)

b. Position of the Claimants

7. In their letter of 24 March 2014, the Claimants stress that they are keen to proceed to the merits without delay.⁷ They oppose the Respondent's proposed bifurcation and schedule.⁸
8. According to the Claimants, the Respondent's proposal of bifurcation is unjustified and designed to introduce delay. Regarding the Respondent's proposed schedule, the Claimants argue that the Respondent has been in possession of the Claimants' Memorial since 13 March 2013, and that it would be reasonable to expect the Respondent to produce its Counter-Memorial promptly. Accordingly, the Claimants propose to grant the Respondent 3 months from the Tribunal's Decisions on Jurisdiction dated 24 February 2014, which would give the Respondent a total of 14 months to prepare its Counter-Memorial from the filing of the Claimants' Memorial.⁹
9. Furthermore, the Claimants propose to hold a document production phase 3 weeks after the filing of the Respondent's Counter-Memorial, giving the Parties 3 weeks to respond to the respective request, and then 2 weeks to the Tribunal to make a decision on any outstanding objections. Thereafter, the Claimants would have 2 months to file their Reply and the Respondent 2 months to file its Rejoinder. The hearing on the merits should be held at the earliest possible opportunity, possibly 6 weeks after the filing of the Rejoinder. The hearing should last between 7 and 10 days.
10. Consequently, the Claimant proposed the following schedule:

Dates	Submission
27 May 2014	Respondent's Counter-Memorial
17 June 2014	The Parties exchange Requests for the Production of Documents
8 July 2014	The Parties respond to each other's Requests for the Production of Documents
15 July 2014	The Parties produce documents in respect

⁷ Claimants' letter to the Tribunal dated 24 March 2014, p. 1

⁸ *Id.*

⁹ *Id.*, p. 2.

	of Requests to which there is no objection
22 July 2014	The Tribunal issues ruling on disputed Production Requests
5 August 2014	The Parties produce documents pursuant to Tribunal's ruling
6 October 2014	Claimants' Reply
5 December 2014	Respondent's Rejoinder
January-February 2015	Hearing on the Merits

III. Discussion

11. The present order addresses (a) the bifurcation request and (b) the calendar.
 - a. Bifurcation
12. It is common ground, and rightly so, that the decision to bifurcate ICSID proceedings falls within the procedural powers of the Tribunal. While Article 41(2) of the ICSID Convention is not applicable in the present instance, Article 44 of the ICSID Convention endows the Tribunal with the discretionary power to decide any question of procedure not covered by the ICSID Convention, the ICSID Arbitration Rules, or an agreement of the Parties.
13. While the Claimants oppose bifurcation on the grounds that it is “unjustified and plainly designed to introduce delay”, the Respondent argues that bifurcation is appropriate in the present circumstances since (i) it would be unduly burdensome to require the Respondent to address quantum-related issues when liability is not established, and (ii) it would be premature to examine quantum in light of the Claimants' incomplete submissions and their acknowledgement of the complexities involved in presenting their damages.
14. While it understands the Respondent's concerns, the Tribunal does not believe they are justified and is disinclined to bifurcate liability and quantum for the following reasons. First, if bifurcation of liability and quantum were accepted and liability established at the end of the liability phase, there would be a need for a further phase dealing with quantum, with the result that the totality of the two merits phases would

be significantly longer and more expensive than non-bifurcated merits proceedings. By contrast, if liability is not established in non-bifurcated proceedings, any additional costs which the Respondent may have incurred as a result of the absence of bifurcation may be taken into account when the Tribunal makes its decision on costs. In addition, the quantum part, even if complex, appears to require significantly fewer resources than the part on liability (among other elements, this can be shown by reference to the number of hearing days requested by the Respondent).

15. These efficiency concerns are particularly relevant where, as here, there has already been a separate phase on jurisdiction, meaning that the bifurcation would in reality be trifurcation prolonging already relatively long proceedings even more.
16. Second, the Claimants' damage case as it arises from the Supplemental Memorial on Quantum, filed on the eve of the hearing on jurisdiction, is already extensively pleaded and accompanied by two expert reports. It is true that the Claimants have reserved the possibility of filing a DCF valuation based on another production quantity (paragraphs 14 and 139 of the Supplemental Memorial) and noted in their letter of 9 May 2013 that documentation in support of the damage expert reports would still need to be filed. In order to ascertain that the Respondent can fully defend itself in respect of damages in its two memorials, the Tribunal is minded to give the Claimants time to supplement their memorial in respect of these two damage-related items before the Respondent's Counter-Memorial. This appears unobjectionable in light of the very short time within which the Claimants filed their Memorial and will give even more time to the Respondent to prepare its defense on liability, on which it can start without having to wait for the Claimants' supplementation on damages.
17. Third and finally, the Tribunal is of the view that the solution thus reached is in line with the Parties' expectations towards time-efficient and cost-effective proceedings, on the one hand, and their due process rights, on the other, including in particular the right of defense of the Respondent.

b. Calendar

18. Having regard to the Parties' views and in light of the considerations set forth above, the Tribunal considers that the following calendar will combine the Parties' opportunity to be heard and efficiency (see also Annex 1). In this context, the

Tribunal has taken note of the positions of the Parties regarding the appropriate juncture at which the Parties would request document production. In line with common practice in international arbitration, the Tribunal is of the view that the document production phase should take place after the first round of written submissions. This timing will allow each Party to have knowledge of the allegations and documents submitted by the other before seeking specific documents from its opponent. It will also allow the Tribunal to better assess the relevance of documents when ruling on requests for production. Accordingly, the Tribunal sets the calendar as follows:

- 18.1. The Claimants shall file documentation in support of their damage expert reports and any valuation as reserved in their Supplemental Memorial by **23 May 2014**;
- 18.2. The Respondent shall file its Counter-Memorial on Merits by **10 October 2014**;
- 18.3. The Parties shall exchange requests for production of documents simultaneously, if any, by **27 October 2014**. Such requests shall be recorded in the form of a schedule following the format indicated in ¶ 15.6 of Procedural Order No. 1 (“PO1”). Such requests shall not be sent to the Tribunal or the ICSID Secretariat;
- 18.4. Each Party shall produce the requested documents that are in its possession, custody or control and to which it does not object, or submit its objections to a request of the other Party, if any, by **14 November 2014**. Such objections shall be recorded in the form of a joint schedule following the format indicated in ¶ 15.6 of PO1;
- 18.5. Each Party shall respond to these objections, if any, by **24 November 2014**. Each Party shall provide the other Party and the Tribunal with the completed schedule following the format indicated in ¶ 15.6 of PO1;
- 18.6. The Tribunal will then rule on the objections by **8 December 2014**;
- 18.7. Each Party shall produce the documents ordered to be produced by **19 December 2014**;

- 18.8. The Claimants shall file their Reply on Merits by **20 February 2015**;
- 18.9. The Respondent shall file its Rejoinder on Merits by **4 May 2015**;
- 18.10. The Parties shall identify the witnesses and experts whom they intend to cross-examine at the hearing by **22 May 2015**;
- 18.11. The Tribunal (or the President by way of delegation) and the Parties will hold a pre-hearing telephone conference on **1 June 2015 at 14:00 CET**.
- 18.12. The Hearing on the Merits will be held in Singapore on dates which the Tribunal will propose to the Parties shortly.

22 April 2014

[Signed]

Gabrielle Kaufmann-Kohler

President of the Tribunal

ANNEX 1

SCHEDULE OF THE MERITS PHASE	
23 May 2014	Claimants to file any outstanding documentation to their Supplemental Memorial on Quantum
10 October 2014	Respondent's Counter-Memorial on Merits
27 October 2014	Simultaneous Requests to produce documents
14 November 2014	Simultaneous Voluntary production of responsive documents and/or objections to requests to produce documents, if any
24 November 2014	Simultaneous Replies to objections to requests to produce, if any
8 December 2014	Tribunal's ruling on outstanding objections to requests to produce documents, if any
19 December 2014	Production of any outstanding documents for which no objection is sustained by the Tribunal
20 February 2015	Claimants' Reply on Merits
4 May 2015	Respondent's Rejoinder on Merits
22 May 2015	Identification of witnesses and experts to be cross-examined at Hearing on Merits

1 June 2015	Pre-Hearing Conference Call
Dates to be determined shortly in consultation with the Parties	Hearing on Merits in Singapore