

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)
Annulment Proceeding**

PROCEDURAL ORDER NO. 1

Members of the ad hoc Committee

Judge Dominique Hascher, President of the *ad hoc* Committee
Professor Dr. Karl-Heinz Böckstiegel, Member of the *ad hoc* Committee
Professor Jean Kalicki, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Laura Bergamini

July 14, 2017

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Introduction

The first session of the *ad hoc* Committee was held on June 20, 2017, at 9am (Washington time), by telephone conference. The session was adjourned at 10.37am (Washington time).

An audio recording of the session was made and deposited in the archives of ICSID. The recording was distributed to the Members of the Committee and the parties.

Participating in the conference were:

Members of the *ad hoc* Committee

Judge Dominique Hascher, President of the *ad hoc* Committee

Professor Dr. Karl-Heinz Böckstiegel, Member of the *ad hoc* Committee

Professor Jean Kalicki, Member of the *ad hoc* Committee

ICSID Secretariat:

Ms. Laura Bergamini, Secretary of the *ad hoc* Committee

Participating on behalf of Churchill Mining Plc and Planet Mining Pty Ltd:

Mr. David Quinlivan, Churchill Mining Plc

Mr. Russell Hardwick, Churchill Mining Plc

Mr. Nicholas Smith, Churchill Mining Plc

Mr. Audley Sheppard QC, Clifford Chance

Dr Sam Luttrell, Clifford Chance

Dr Romesh Weeramantry, Clifford Chance

Ms. Clementine Packer, Clifford Chance

Participating on behalf of Republic of Indonesia:

Mr. Freddy Harris, Ministry 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

Mr. Ardiningrat Hidayat, Ministry of Law and Human Rights of the Republic of Indonesia

Mr. Agvirta Armilia Sativa, Ministry of Law and Human Rights of the Republic of Indonesia

Ms. Dinda Kartika, Ministry of Law and Human Rights of the Republic of Indonesia

Ms. Claudia Frutos-Peterson, Curtis, Mallet-Prevost, Colt & Mosle LLP

Mr. Mark H. O'Donoghue, Curtis, Mallet-Prevost, Colt & Mosle LLP

Mr. Marat Umerov, Curtis, Mallet-Prevost, Colt & Mosle LLP

The Committee and the parties considered the following:

- The Draft Agenda circulated by the Secretary of the Committee on June 4, 2017;
- The Draft Procedural Order circulated by the Secretary of the Committee on June 4, 2017; and
- The parties' comments on the Draft Agenda and the Draft Procedural Order received on June 16, 2017, indicating the items on which they agreed and their respective positions regarding the items on which they did not agree.

Following the session, the Committee now issues the present Order:

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Order

Pursuant to ICSID Arbitration Rules 19 and 53, this first Procedural Order sets out the Procedural Rules that the parties have agreed and the Committee has determined that shall govern this annulment proceeding. The timetable is attached as **Annex A**.

1. Applicable Arbitration Rules

Convention Article 44 and Arbitration Rule 53

1.1. These proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of April 10, 2006. In accordance with Arbitration Rule 53, the Arbitration Rules apply, *mutatis mutandis*, to annulment proceedings.

2. Constitution of the Committee and the Committee Members' Declarations

Convention Article 52(3); Arbitration Rules 6 and 52

2.1. The Committee was constituted on May 15, 2017 in accordance with the ICSID Convention and the ICSID Arbitration Rules. The parties confirmed that the Committee was properly constituted and that no party has any objection to the appointment of any Member of the Committee.

2.2. The Members of the Committee timely submitted their signed declarations in accordance with ICSID Arbitration Rule 6(2). Copies of these declarations were distributed to the parties by the ICSID Secretariat on May 15, 2017.

2.3. The Members of the Committee confirmed that they have sufficient availability during the next 24 months to dedicate to this case.

3. Fees and Expenses of the Committee Members

Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees

3.1. The fees and expenses of each Member of the Committee shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.

3.2. Under the current Schedule of Fees, each Member of the Committee receives:

3.2.1. US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or *pro rata*; and

3.2.2. subsistence allowances, reimbursement of travel, and other expenses pursuant to ICSID Administrative and Financial Regulation 14.

3.3. Each Member of the Committee shall submit his/her claims for fees and expenses to the ICSID Secretariat on a quarterly basis.

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3.4. Non-refundable expenses incurred by the Members of the Committee in connection with a hearing as a result of a postponement or cancellation of the hearing shall be reimbursed.

4. Presence and Quorum
Arbitration Rules 14(2) and 20(1)(a)

The presence of all Members of the Committee constitutes a quorum for its sittings, including by any appropriate means of communication.

5. Rulings of the Committee
Convention Article 48(1); Arbitration Rules 16, 19 and 20

5.1. Decisions of the Committee shall be taken by a majority of the Members of the Committee.

5.2. ICSID Arbitration Rule 16(2) applies to decisions taken by correspondence except that where the matter is urgent, the President may decide procedural matters without consulting the other Members, subject to possible reconsideration of such decision by the full Committee.

5.3. The Committee will draft all rulings, including its final decision, within a reasonable time period. If a ruling has not been issued within three months after the final submission on a particular matter, the Committee will provide the parties with status updates every two months.

5.4. The President is authorized to issue procedural orders on behalf of the Committee.

5.5. The Committee's rulings on procedural matters may be communicated to the parties by the Secretary of the Committee in the form of a letter or email.

6. Power to Fix Time Limits
Arbitration Rule 26(1)

6.1. The President may fix and extend time limits for the completion of the various steps in the proceeding.

6.2. In exercising this power, the President shall consult with the other Members of the Committee. If the matter is urgent, the President may fix or extend time limits without consulting the other Members, subject to possible reconsideration of such decision by the full Committee.

7. Secretary of the Committee
Administrative and Financial Regulation 25

7.1. The Secretary of the Committee is Ms. Laura Bergamini, Legal Counsel, ICSID, or such other person as ICSID may notify the Committee and the parties from time to time.

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- 7.2. To send copies of communications by email, mail, and courier/parcel deliveries to the ICSID Secretariat, the contact details are:

Ms. Laura Bergamini
ICSID
MSN J2-200
1818 H Street, N.W.
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Tel.: + 1 (202) 473-6183
Fax: + 1 (202) 522-2615
Email: lbergamini@worldbank.org
Paralegal email: estarkey@worldbank.org

- 7.3. For local messenger deliveries, the contact details are:

Ms. Laura Bergamini
701 18th Street, N.W. ("J Building")
2nd Floor
Washington, D.C. 20006
Tel.: + 1 (202) 458-4567

8. Representation of the Parties
Arbitration Rule 18

- 8.1. Each party shall be represented by its respective counsel (below) and may designate additional agents, counsel, or advocates by notifying the Secretary of the Committee promptly of such designation.

For the Applicants

Dr. Sam Luttrell
Mr. Ben Luscombe
Ms. Clementine Packer
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and
Mr. Audley Sheppard, QC
Clifford Chance LLP
10 Upper Bank Street

For the Respondent

Dr. Yasonna H. Laoly, S.H., M. Sc.
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Mr. Freddy Harris
Mr. Cahyo R. Muzhar
Mr. Ardiningrat Hidayat
Mr. Agvirta Armilia Sativa
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Ms. Claudia Frutos-Peterson
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and

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8.2. Churchill Mining Plc and Planet Mining Pty Ltd will be designated as the Applicants and the Republic of Indonesia will be designated as the Respondent.

9. Apportionment of Costs and Advance Payments to ICSID
Convention Article 61(2); Administrative and Financial Regulation 14; Arbitration Rule 28

9.1. In accordance with Administrative and Financial Regulation 14(3)(e), the Applicants shall be solely responsible for making the advance payments requested by the ICSID Secretariat to cover the costs following the Committee's constitution. This is without prejudice to the Committee's final decision as to the allocation of costs.

9.2. By letter of May 17, 2017, the Centre requested the Applicants to make an advance payment of US\$250,000, to cover the initial costs of the proceeding. The Centre received the Applicants' payment on May 22 and June 1, 2017.

9.3. ICSID shall request further advances as needed. Such requests shall be accompanied by a detailed interim statement of account.

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10. Place of Proceeding
Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)
 - 10.1. Paris or Singapore shall be the place of the proceeding.
 - 10.2. The Committee may hold hearings at any other place that it considers appropriate if the parties so agree.
 - 10.3. The Committee may deliberate at any place it considers convenient.

11. Procedural Language, Translation and Interpretation
Administrative and Financial Regulation 30(3) and (4); Arbitration Rule 20(1)(b) and 22
 - 11.1. English is the procedural language of the arbitration.
 - 11.2. Documents filed in any other language must be accompanied by a translation into English.
 - 11.3. If the document is lengthy and relevant only in part, it is sufficient to translate only relevant parts, provided that the Committee may require a fuller or a complete translation at the request of any party or on its own initiative.
 - 11.4. Translations need not be certified unless there is a dispute as to the content of a translation provided and the party disputing the translation specifically requests a certified version.
 - 11.5. The costs of any interpreter(s) will be paid from the advance payments made by the Applicants, without prejudice to the decision of the Committee as to which party shall ultimately bear those costs.

12. Routing of Communications
Administrative and Financial Regulation 24
 - 12.1. The ICSID Secretariat shall be the channel of written communications between the parties and the Committee.
 - 12.2. Each party's written communications shall be transmitted by email or other electronic means to the opposing party and to the Committee Secretary, who shall send them to the Committee.
 - 12.3. Electronic versions of communications ordered by the Committee to be filed simultaneously shall be transmitted to the Committee Secretary only, who shall send them to the opposing party and the Committee.
 - 12.4. The Committee Secretary shall not be copied on direct communications between the parties when such communications are not intended to be transmitted to the Committee.

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13. Number of Copies and Method of Filing of Parties' Pleadings
Administrative and Financial Regulation 30; Arbitration Rules 20(1)(d), 23 and 53
- 13.1. By the relevant filing date, the parties shall submit by email to the Committee Secretary and the opposing party an electronic version of the pleading and a list of documents,¹ and upload the pleading with the supporting documentation to the file sharing platform that will be created by ICSID for purposes of this case.
- 13.2. On the day following the electronic filing, the parties shall courier to the Committee Secretary:
- 13.2.1. one unbound hard copy in A4/Letter format² of the entire submission, including signed originals of the pleading, together with documents (but not including legal authorities); and
- 13.2.2. two unencrypted USB drives with full copies of the entire submission, including the pleading, documents, and legal authorities.
- 13.3. Also on the day following the electronic filing, the parties shall courier to the opposing party at the address(es) indicated at §8.1 above³ and to each Member of the Committee at the addresses indicated at §13.4 below:
- 13.3.1. for Judge Hascher: one hard copy in A5 format double-sided of the entire submission including the pleading and documents (but not including legal authorities);
- for Professor Böckstiegel: one hard copy in A4 format double-sided of the pleading, and in A5 format double-sided of the other documents (but not including legal authorities);
- for Professor Kalicki: one hard copy in A5 format double-sided of the entire submission including the pleading and documents (but not including legal authorities);
- for the Respondent: one hard copy in Letter format of the entire submission including the pleadings and documents (but not including legal authorities); and
- 13.3.2. one unencrypted USB drive (compatible with MacOS and Windows) for each Member of the Committee and each party with a full copy of the entire submission, including the pleading, documents, and legal authorities.
- 13.4. The addresses of the Committee Members are as follows:

¹ Please note that the World Bank server does not accept emails larger than 25 MB.

² The A4/Letter format is required for ICSID's archiving.

³ The Applicants do not wish to receive hard copies of submissions; the USB drives addressed by the Respondent to the Applicants shall be couriered only to the office of Clifford Chance in Perth. The hard copies and USB drives addressed by the Applicants to the Respondent shall be couriered only to the office of Curtis, Mallet-Prevost, Colt & Mosle LLP in Washington D.C.

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- 13.5. Legal authorities shall be submitted in electronic format only, unless a hard copy is specifically requested by the Committee.
- 13.6. Electronic versions of a pleading shall be text searchable (i.e., OCR PDF or Word).
- 13.7. Pleadings shall be accompanied by an index hyperlinked to the supporting documentation.
- 13.8. The official date of receipt of a pleading or communication shall be the day on which the electronic version is sent to the Secretary of the Committee.
- 13.9. A filing shall be deemed timely if sent by a party by midnight, Washington, D.C. time, on the relevant date.
14. Number and Sequence of Pleadings
Arbitration Rules 20(1)(e), 29, 31 and 53
- A full procedural timetable, which includes written submissions and hearing(s), is in **Annex A**.
15. Evidence: Supporting Documentation
Convention Article 44; Administrative and Financial Regulation 30; Arbitration Rule 24
- 15.1. The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the parties, including exhibits and legal authorities. Further documentary evidence relied upon by the parties in rebuttal shall be submitted with the Reply and Rejoinder.
- 15.2. Given the nature of an annulment proceeding, the Committee expects that the parties will primarily refer to the evidentiary record of the arbitration proceeding and it does not expect to receive new witness or expert testimony.
- 15.3. In principle, no new evidence shall be admitted in this proceeding. Should either party wish to introduce new documents or other evidence, other than legal authorities, that party shall file a request to the Committee to that effect. The Committee will promptly decide on the admissibility of the new documents and/or evidence, after hearing from the other party.
- 15.4. Any documents introduced as exhibits in this annulment proceeding shall be labelled with numbers, and shall be organized in a clear order. Exhibits and legal authorities already included in the evidentiary record of the arbitration proceeding shall be labelled and referred to using the same numbering as in the arbitration proceeding.

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New exhibit and legal authority numbering shall continue from the numbering used in the underlying arbitration. Each Party shall number the accompanying documentation consecutively throughout the entire annulment proceeding and shall number the paragraphs of each of its written pleadings. The Applicants will use “A-” and “ALA-” respectively to refer to documents and legal authorities submitted in the annulment proceedings. The Respondent will use “R-ANN-” and “RLA-ANN-” respectively to refer to documents and legal authorities submitted in the annulment proceedings.

- 15.5. The parties shall include all of the evidence on which they intend to rely, including documents, legal authorities, and other evidence in whatever form, with their written submissions.
- 15.6. Duly certified copies of documents are not required unless the authenticity of the copy is contested and the Committee deems the certification necessary.
- 15.7. Demonstrative exhibits (such as PowerPoint slides, charts, tabulations, etc.) may be used at any hearing, provided they contain no new evidence. Each party shall number its demonstrative exhibits consecutively, and indicate on each demonstrative exhibit the number of the document(s) from which it is derived. The party submitting such exhibits shall provide them in hard copy to the other party, the Committee Members, the Secretary, the court reporter(s) and interpreter(s) at the hearing at a time to be decided at the pre-hearing organizational meeting.

16. Pre-Hearing Organizational Meetings
Arbitration Rule 13

If the Committee decides that a pre-hearing organizational meeting is needed, such a meeting shall be held at least 4 to 6 weeks before the hearing, at a date determined by the Committee after consultation with the parties, between the Committee, or its President, and the parties in order to resolve any outstanding procedural, administrative, and logistical matters in preparation for the hearing. The pre-hearing organizational meeting may be conducted by video or telephone conference.

17. Hearings
Arbitration Rules 20(1)(e), 32 and 53

- 17.1. The oral procedure shall consist of oral arguments.
- 17.2. The hearing shall be held at a place to be determined in accordance with §10 above.
- 17.3. The hearing shall take place on the date indicated in **Annex A**.
- 17.4. The Members of the Committee shall endeavor to reserve at least one day after the hearing to determine the next steps and to hold deliberations.
- 17.5. The parties shall be allocated equal time at the hearings. Further details can be decided at the pre-hearing organizational meeting.

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17.6. Pursuant to Arbitration Rule 32(2) the hearing shall be closed to the public, unless the parties agree otherwise.

18. Records of Hearings and Sessions

Arbitration Rules 13 20(1)(g) and 53

18.1. Sound recordings shall be made of all hearings and sessions. The sound recordings shall be provided to the parties and the Committee Members.

18.2. Verbatim transcript(s) in the procedural language shall be made of any hearing and session other than sessions on procedural issues. Unless otherwise agreed by the parties or ordered by the Committee, the verbatim transcripts shall be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the parties and the Committee on a same-day basis.

18.3. The parties shall agree on any corrections to the transcripts within 14 days of the later of the dates of the receipt of the sound recordings and transcripts. The agreed corrections may be entered by the court reporter in the transcripts (“revised transcripts”). The Committee shall decide upon any disagreement between the parties and any correction adopted by the Committee shall be entered by the court reporter in the revised transcripts.

19. Post-Hearing Memorials and Statements of Costs

Convention Article 44; Arbitration Rule 28(2)

Parties shall submit post-hearing pleadings and statements of costs, in accordance with Annex A or as decided at the Hearing by the Committee in consultation with the Parties.

20. Publication

Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4) and 53

The parties consent to ICSID publication of the decision on annulment and any order or decision issued in the present proceeding.

21. Stay of Enforcement

21.1. Pursuant to the parties’ agreed schedule, the Applicants have filed a request for continued stay of enforcement of award on May 29, 2017 and the Respondent has filed its Observations on June 12, 2017.

21.2. At the first session, the parties have presented their oral pleadings on the continuation of the stay of enforcement.

21.3. After having heard the parties’ arguments, the Committee has informed the parties that the provisional stay would continue until the Committee issues a determination on the request

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for continued stay of enforcement.

[Signed]

Judge Dominique Hascher
President of the Committee
Date: July 14, 2017

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Annex A - Procedural Calendar

Procedural Step	By	Date
First Session and Hearing on Stay of Enforcement of the Award	All	June 20, 2017
Decision on Stay of Enforcement of the Award	Committee	
Memorial on Annulment ⁴	Applicants	
Counter-Memorial on Annulment	Respondent	October 20, 2017
Reply on Annulment	Applicants	December 22, 2017
Rejoinder on Annulment	Respondent	February 28, 2018
Pre-Hearing Organizational Meeting	All	4 to 6 weeks before the Hearing
Hearing on Annulment	All	[TBD] - not less than two months after the Rejoinder on Annulment
Post-Hearing Submissions	Both Parties	[TBD] - four weeks after the Hearing ⁵
Costs Submissions	Both Parties	[TBD] - two weeks after the Post-Hearing Submissions
Decision on Annulment	Committee	[TBD]

⁴ Pursuant to the parties' agreement, the Application for Annulment dated March 31, 2017, shall be treated as Memorial on Annulment.

⁵ Subject to possible extension in light of §18.3 above.