

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

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**Planet Mining Pty Ltd**

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 Australia–Indonesia BIT
BKPM	Indonesian Investment Coordinating Board
BPK	Financial Auditor Body ( <i>Badan Pemeriksa Keuangan</i> )
Claimant	Planet Mining Pty Ltd
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 Planet Mining Pty Ltd, a proprietary limited company incorporated in Australia on 19 August 2005 (“Planet” or the “Claimant”). It is a wholly-owned subsidiary of Churchill Mining Plc, a public limited company incorporated in England and Wales (“Churchill”). Planet 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 Planet, 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 stated, the facts are undisputed.
6. Pursuant to Procedural Order No. 4 of 18 March 2013, the present arbitration was consolidated with ICSID arbitration ARB/12/14 initiated 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.

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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).



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 (“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

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<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**).

<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/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.

convention on the settlement of disputes between States and Foreign Citizen regarding investment in accordance with Law Number 5 Year 1968".<sup>13</sup>

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>

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

<sup>14</sup> Decree of the Minister of Justice and Human Rights No. C-34768 HT.01.01.TH.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. 578/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**).

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.

**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 Planet, 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 Planet had expired in March 2006), so no dispute arose between the Parties over these two concessions.<sup>24</sup>

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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

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 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

<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-12**).

<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.

Agreements served as security for the contractual rights enshrined in the Cooperation and Investors Agreements.<sup>33</sup>

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

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<sup>33</sup> Mem., ¶ 81, n. 34.

<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, and 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, and 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. Ani Setiawan dated 31 March 2008 (**Exh. C-88**); Pledge of Shares between PT ICD, Investama Resources, Ms. Florita and Ms. Ani Setiawan (**Exh. C-89**), both dated 31 March 2008.

generated from mining operations in the areas covered by the licenses held by PT IR and PT INP.<sup>42</sup>

#### **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 resource”.<sup>46</sup>

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<sup>42</sup> Mem., ¶ 85.

<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, Ridlatama Mineral (**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).

## 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 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>

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<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”].

<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.

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>
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

<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 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



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 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

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(**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 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> P-RFA, ¶ 20; Mem., ¶ 90; Quinlivan WS, ¶¶ 53-54; Witness Statement of Russell Paul Hardwick ("Hardwick WS"), ¶ 35; RMOJ, ¶ 166.

<sup>64</sup> Mem., ¶¶ 250-276.

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 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

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<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 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.

<sup>67</sup> 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.

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>
44. PT ICD then filed a claim of unlawful act 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 for unlawful act with the District Court of South Jakarta against PT ICD, PT TCUP, PT RTM and

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<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**).

<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, ICC Case No. 18141/CYK (c. 18142/CYK) dated 21 March 2013 (**Exh. C-355**).

<sup>79</sup> RMOJ, ¶ 133.

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>

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 Planet 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 Australia and the Government of the Republic of Indonesia for the Promotion and Protection of Investments dated 17 November 1992 (the “Australia-Indonesia BIT”, the “Treaty”, or the “BIT”).<sup>84</sup> A parallel ICSID arbitration was initiated by Churchill, a British mining company, against Indonesia essentially regarding the same set of facts. That dispute is brought under the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Indonesia for the Promotion and

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<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.

<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 Australia and the Government of the Republic of Indonesia for the Promotion and Protection of Investments (“Australia-Indonesia BIT”) (**Exh. PLA-1; Exh. CLA-19; Exh. R-002**). The BIT entered into force on 29 July 1993.

Protection of Investments dated 27 April 1976 (the “UK-Indonesia BIT”). Eventually, the parties to these two proceedings agreed to consolidate the two arbitrations (see below ¶ 59).

49. For purposes of clarity, the present section will first address the initiation of ICSID Case No. ARB/12/40 by Planet, followed by a brief outline of the initiation of ICSID Case No. ARB/12/14 by Churchill, and then conclude with the procedural steps involved in the decision to consolidate both cases.

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

50. On 4 October 2012, Planet sent a Notification of Dispute to the Republic of Indonesia.<sup>85</sup> Therein, Planet proposed to Indonesia to agree (i) that the Tribunal appointed in ICSID Case No. ARB/12/14 between Churchill and Indonesia also resolve the dispute submitted by Planet, and (ii) that both disputes be resolved in consolidated proceedings. The notification letter remained without response.<sup>86</sup>
51. On 26 November 2012, Planet filed a Request for Arbitration with ICSID pursuant to Article 36 of the ICSID Convention and the Australia-Indonesia BIT. Planet invoked breaches of Articles II(2), II(3), IV and IV of the BIT and claimed financial compensation to be specified in due course.<sup>87</sup>
52. Planet also reiterated its proposal that the Tribunal constituted in the arbitration initiated by Churchill resolve the present dispute and that the proceedings be consolidated.<sup>88</sup>
53. 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. On 8 January 2013, Indonesia informed the Centre that it agreed to Planet’s proposal that Churchill’s and Planet’s claims be heard by the same Tribunal. On 11 January 2013, the Centre took note of the Parties’ confirmations of their agreement on the constitution of the Tribunal, *i.e.*, that the Tribunal was to be constituted in accordance with Article 37(2)(a) of the ICSID Convention and shall consist of Professor Albert van den Berg, a Dutch national, Mr. Michael Hwang S.C., a Singaporean national, and Professor Gabrielle Kaufmann-

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<sup>85</sup> **Exh. P-74.**

<sup>86</sup> P-RFA, ¶¶ 35, 50.

<sup>87</sup> P-RFA, ¶¶ 33, 34.

<sup>88</sup> P-RFA, ¶ 51.

Kohler, a Swiss national, as the President of the Tribunal. On 22 January 2013, the Secretary-General of the Centre informed the Parties that Professor Gabrielle Kaufmann-Kohler, Mr. Michael Hwang S.C., and Professor Albert Jan van den Berg, had accepted their appointments as arbitrators and the Tribunal had been duly constituted in Case No. ARB/12/40. On the same date, the Centre designated Mr. Paul-Jean Le Cannu as Secretary of the Tribunal.

## **2. Initiation of ICSID Case No. ARB/12/14**

54. On 22 May 2012, Churchill filed a Request for Arbitration with ICSID pursuant to Article 36 of the ICSID Convention and the UK-Indonesia BIT. 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, Indonesia requested that the Arbitral Tribunal in that case be constituted pursuant to the formula provided by Article 37(2)(b) of the ICSID Convention. On 19 September 2012, Professor van den Berg accepted his appointment as the Claimant-appointed arbitrator, followed by Mr. Michael Hwang's acceptance as the Respondent-appointed arbitrator on 21 September 2012 and Professor Kaufmann-Kohler's acceptance as President of the Tribunal on 3 October 2012. 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 through its Secretary by letter of 5 February 2013 that the appointment of Mr. Magnus Jesko Langer as Assistant to the Tribunal had become effective.
55. On 27 November 2012, the Tribunal and the Parties held the first session by video link. 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.
56. On 5 February 2013, the Tribunal issued Procedural Order No. 2 denying a petition by the Government of the Regency of East Kutai to be joined to the proceedings. On 22 November 2012, Indonesia filed a Request for Provisional Measures and a Document

Production Request in connection with jurisdiction. On 4 March 2013, the Tribunal issued Procedural Order No. 3 denying the provisional measures sought by Indonesia.

57. With respect to the Document Production Request, Churchill undertook to produce the requested documents with its first memorial. Having heard the Parties, the Tribunal ordered Churchill to produce the requested documents together with an explanatory note by 17 December 2012, which Churchill did.
58. On 27 February 2013, Churchill submitted to the Tribunal an amended Request for Arbitration seeking to add PT Indonesia Coal Development (PT ICD) as a claimant in ICSID Case No. ARB/12/14. On 4 March 2013, the Tribunal denied Churchill's request to join PT ICD to the proceedings.

### **3. Consolidation**

59. The Tribunal and the Parties in ICSID Cases No. ARB/12/14 and 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>89</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.
60. 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 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

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<sup>89</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.

one case account; and that Mr. Magnus Jesko Langer would serve as Assistant to the Tribunal in the consolidated proceedings.

61. Further, the Tribunal noted that it would decide whether to render one or two decisions/awards at a later stage, after consultation with the involved parties.

**B. WRITTEN PHASE ON JURISDICTION**

62. 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.

63. 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.



64. 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.
65. On 13 March 2013, Churchill and Planet filed their Memorial on Jurisdiction and the Merits, enclosing 348 exhibits and 69 legal exhibits.
66. On 8 April 2013, the Respondent filed its Memorial on Objections to Jurisdiction, enclosing 101 exhibits and 77 legal exhibits.
67. On 30 April 2013, 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.
68. On 6 May 2013, the Respondent filed its Rejoinder on Objections to Jurisdiction, enclosing 9 exhibits and 28 legal exhibits.
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 Planet
    - Mr. Stephen Jagusch, Quinn Emanuel Urquhart & Sullivan UK LLP
    - Mr. Anthony Sinclair, Quinn Emanuel Urquhart & Sullivan UK LLP

- 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 Planet; 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 Planet'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, Planet 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 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. Planet (and Churchill) enclosed 6 exhibits and 26 legal exhibits to its first submission and 3 legal exhibits to its second submission. Indonesia enclosed 5 exhibits and 3 legal exhibits to its first submission and 1 exhibit and 18 legal exhibits to its second submission.

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76. Having deliberated, the Tribunal renders the present decision on jurisdiction.<sup>90</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 (Section VI).

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

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

77. In its submissions, Indonesia raised the following objections to the jurisdiction of this Tribunal with regard to Planet:

- (i) The Respondent has not provided its consent in writing to submit the disputes encompassed in the Requests for Arbitration to ICSID;
- (ii) Planet's alleged investments do not fall within the scope of investments protected under the Australia-Indonesia BIT, because (i) Planet violated the terms of the investment approvals by engaging in activities not contemplated in the approvals, including using PT ICD as an investment vehicle; (ii) Planet, 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>

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

- (i) decline jurisdiction in the present case; and
- (ii) order Planet 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>92</sup>

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<sup>90</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).

<sup>91</sup> Rejoinder, ¶ 135.

<sup>92</sup> Rejoinder, ¶ 136.

## **B. THE CLAIMANT'S POSITION**

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

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

- 1) Reject all jurisdictional objections raised by Indonesia; and
- 2) Declare that it has jurisdiction under the Australia-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.<sup>93</sup>

## **V. ANALYSIS**

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

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<sup>93</sup> Reply, ¶ 200.

## **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 will resolve it.<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 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 by stating 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 rulings, the present one concerning 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.

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

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

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

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

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.

### 3. Legal framework

86. The Tribunal's jurisdiction is contingent upon the provisions of the ICSID Convention on the one hand, and of the Australia-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.

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<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”. The Respondent also indicated that it is for the Tribunal to make its own assessment of the authorities submitted by the Parties, see Tr. 13052013, 139:22-140:16.

<sup>99</sup> **Exh. PLA-1; Exh. CLA-19; Exh. R-002.**

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

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



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 (B. below).

### 3.2 Jurisdictional requirements under the BIT

90. Article XI of the BIT reads in relevant part as follows:

1. In the event of a dispute between a Party and an investor of the other party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.
2. In the event that such a dispute cannot be settled through consultations and negotiations, the investor in question may submit the dispute, for settlement:
  - a. in accordance with the laws and regulations of the Party which has admitted the investment to the competent judicial or administrative bodies of that Party; or
  - b. to the International Centre for the Settlement of Investment Disputes (“the Centre”) for the application of the conciliation or arbitration procedures provided by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the Convention”).

[...]

4. Where a dispute is referred to the Centre pursuant to subparagraph 2(b):
  - a. where that action is taken by an investor of one Party, the other Party shall consent in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor; or
  - b. if the parties to the dispute cannot agree whether conciliation or arbitration is the more appropriate procedure, the investor affected shall have the right to choose.

91. It is undisputed that Indonesia is a Contracting Party of the BIT, and that Planet qualifies as an “investor of the other party”, *i.e.* of Australia. It is equally undisputed that the dispute is “relating to an investment”.

92. It is further common ground that Article III(1)(a) of the BIT sets out two additional requirements for jurisdiction, namely (i) the investment must have been made in the territory of Indonesia, and (ii) it must have been granted admission under relevant foreign investment legislation. It does so in the following terms:

1. This Agreement shall apply to:

(a) investments of investors of Australia in the territory of the Republic of Indonesia which have been granted admission in accordance with the Law No. 1 of 1967 concerning Foreign Investment or with any law amending or replacing it.

93. In this latter respect, the Tribunal notes that the 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. While it is undisputed that Planet made an investment in the territory of Indonesia, the Parties diverge on the fulfillment of the second requirement contained in Article III(1)(a), which is the subject of Indonesia’s second jurisdictional objection (C. below).

### 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 (see below ¶¶ 147-151).

### 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.

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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**).

## 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 Australia-Indonesia BIT.<sup>104</sup> 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 XI of the Australia-Indonesia BIT does not provide consent to ICSID arbitration with respect to Planet's claims (1.3. below). More specifically, Indonesia contends that the wording "shall consent in writing [...] within forty-five days" contained in Article XI(4) shows that a subsequent act is required to achieve consent and that Indonesia legitimately withheld its consent (1.4. below). 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 Planet (1.5. below), and that, in any event, they do not extend to Planet (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>105</sup> State consent cannot be presumed; it must be established by definitive evidence.<sup>106</sup> In the framework of ICSID, "consent must be supplied by a written manifestation of consent".<sup>107</sup>

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<sup>104</sup> It should be noted that in its submissions on Article XI of the Australia-Indonesia BIT Indonesia essentially relies on its analysis developed on Article 7(1) of the UK-Indonesia BIT, as well as on the legal authorities provided in the context of ICSID Case No. ARB/12/14 between Churchill Mining Plc and Indonesia. See Rejoinder, ¶¶ 38-39 ("Therefore, the analysis that Respondent developed regarding Article 7(1) of the UK-Indonesia BIT [in the context of ICSID Case No. ARB/12/14] is applicable here with equal, if not greater, force because a treaty provision which requires that consent be given within a specific timeframe at the request of the investor after the emergence of the dispute cannot reasonably be construed as supplying that very consent. The legal authorities that Respondent provided regarding the proper interpretation of Article 7(1) of the UK-Indonesia BIT are also all relevant here"). Accordingly, some of the references below are taken from Indonesia's submissions on the "shall assent" clause filed in the context of ICSID Case No. ARB/12/14.

<sup>105</sup> RMOJ, ¶¶ 142-143; Tr. 13052013, 131:21-133:4.

<sup>106</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 a state [...] Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence". **Exh. RLA-020**, ¶ 175.

<sup>107</sup> RMOJ, ¶ 146.

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

99. Indonesia argues that Article XI 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, does not justify disregarding the words themselves.<sup>108</sup> Indonesia also claims that “interpretation of a treaty cannot amount to its revision”.<sup>109</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 XI of the BIT does not provide consent

100. Indonesia submits that the “shall consent in writing” clause in Article XI does not provide “automatic” consent to ICSID arbitration. It finds that Planet’s position regarding the interpretation of Article XI of the Treaty has been “characterized by a series of volte-faces and vacillations”.<sup>110</sup> In its Request for Arbitration, Planet sought to ground the Tribunal’s jurisdiction exclusively on the alleged consent in Article XI of the Treaty.<sup>111</sup> Then, in its Memorial, Planet conceded that Article XI requires an additional act of consent and argued that this additional consent was to be found in the BKPM approvals.<sup>112</sup> And yet again in its Reply and at the hearing, Planet contended that the Australia-Indonesia BIT enshrines Indonesia’s advance consent.<sup>113</sup>

101. According to the Respondent, 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, Indonesia advances essentially six arguments: first, the ordinary meaning of the terms

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<sup>108</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>109</sup> RMOJ, ¶ 175; Rejoinder, ¶ 17; Tr. 13052013, 137:5-7.

<sup>110</sup> Rejoinder, ¶ 35; Tr. 13052013, 151:10-152:4. See also: Tr. 14052013, 136:4-8.

<sup>111</sup> Rejoinder, ¶ 35, referencing to P-RFA, ¶ 49.

<sup>112</sup> RMOJ, ¶ 207; Rejoinder, ¶ 35, referencing to Mem., ¶ 337 (“Unlike Article 7(1) of the UK-Indonesia BIT, the clause that Indonesia ‘shall consent in writing to the submission of the dispute to the Centre within forty-five days’ appears to require an additional act of consent on the part of Indonesia”).

<sup>113</sup> Rejoinder, ¶ 35, referencing to Reply, ¶¶ 132-133.

contained in Article XI(4) is clear – the terms require an additional act of consent to be submitted within forty-five days of the filing of the request for arbitration; second, the structure of the Australia-Indonesia BIT, in particular the link between Articles XI and III(1), confirms the ordinary meaning of “shall consent in writing”; 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, doctrinal writings support Indonesia’s understanding of Article XI; and sixth, third-party treaties concluded by Australia confirm Indonesia’s position.

102. First and foremost, Indonesia argues that the ordinary meaning of the expression “shall consent in writing [...] within forty-five days” in Article XI(4) of the BIT cannot be understood as conferring automatic jurisdiction to the Tribunal. This provision expresses a *pactum de contrahendo* whereby the Contracting State must and can only give its consent within 45 days after the filing of a request by a qualifying investor.<sup>114</sup> Indonesia contrasts this clause with the “hereby consents” or similar clauses found in the other BITs.<sup>115</sup> The latter provide *ex ante* consent, while the former envisages *ex post* consent to be provided on an *ad hoc* basis.<sup>116</sup> Therefore, in the absence of a subsequent declaration, the Tribunal cannot but deny its jurisdiction.<sup>117</sup>
103. Second, the structure of the dispute settlement provision and the link to other jurisdictional requirements confirm Indonesia’s position. Article XI(4) establishes a two-step mechanism whereby the investor first submits a request and the host State thereafter has 45 days to provide its consent.<sup>118</sup> “Obviously, a treaty provision which states that a consent shall be given within a specific timeframe at the request of the investor cannot reasonably be interpreted as supplying the very consent”.<sup>119</sup> Indonesia accordingly refutes Planet’s submission that Article XI(2) of the Treaty already contains the Contracting States’ advance consent, since Article XI(4) expressly refers back to and thus qualifies Article XI(2). Indeed, Article XI(4) is “part and parcel” and does not fall outside the “four corners of the operative dispute settlement arrangements” as argued by the Claimant.<sup>120</sup> Article XI(2)

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<sup>114</sup> RMOJ, ¶ 151.

<sup>115</sup> Rejoinder, ¶ 45.

<sup>116</sup> Rejoinder, ¶ 39.

<sup>117</sup> RMOJ, ¶ 208; Tr. 13052013, 158:13-16.

<sup>118</sup> Tr. 13052013, 150:25-151:5.

<sup>119</sup> Tr. 13052013, 151:5-9.

<sup>120</sup> Rejoinder, ¶¶ 46-48.

contains a generic reference to ICSID and Article XI(4) specifies how consent in writing shall be provided.<sup>121</sup>

104. Indonesia also rejects Planet’s argumentation on Article XI(5). Article XI(4) and Article XI(5) both refer back to Article XI(2) and the link between paragraphs 5 and 2 is “premised on the assumption that such an action can be taken pursuant to the mechanism laid down in Article XI(4) because Article XI(4) specified the modus operandi by means of which a dispute can be submitted to ICSID arbitration”.<sup>122</sup>
105. The Respondent further contrasts the language employed in paragraph 4 from the one in paragraph 3, the latter providing “consent to UNCITRAL arbitration by stating ‘shall be bound to submit’, but Article XI(4) does not employ that kind of language, and instead refers to an obligation to consent in the future to the referral of a dispute to ICSID”.<sup>123</sup>
106. For Indonesia, the two-step mechanism contained in Article XI(4) of the Treaty entails that Indonesia may refuse to consent if other jurisdictional requirements are not fulfilled,<sup>124</sup> in particular, if the investment has not been granted admission in accordance with Indonesia’s Foreign Investment Law as required by Article III(1) of the BIT.<sup>125</sup> In this context, Indonesia 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 treaty”.<sup>126</sup> The tribunal, which expressly referred to the Australia-Indonesia BIT,<sup>127</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>128</sup>

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<sup>121</sup> Rejoinder, ¶ 48.

<sup>122</sup> Tr. 13052013, 157:9-158:9. See also: Rejoinder, ¶ 52.

<sup>123</sup> R-PHB2, ¶ 27.

<sup>124</sup> Tr. 13052013, 134:11-16.

<sup>125</sup> RMOJ, ¶ 186; Tr. 13052013, 149:21-24.

<sup>126</sup> *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 (“*Desert Line*”), ¶ 108 (**Exh. RLA-061**). Tr. 13052013, 170:12-20.

<sup>127</sup> *Id.*, ¶ 110.

<sup>128</sup> *Id.*, ¶ 108.

107. Third, Indonesia contends that “an interpretation based upon the object and purpose cannot go against the plain language of the treaty”.<sup>129</sup> The encouragement and protection of foreign investments is not the sole purpose of investment treaties 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>130</sup>
108. The Respondent further argues that, even if the object and purpose of the BIT were limited to the promotion and protection of foreign investments, it cannot defeat the clear language of Article XI(4) of the Treaty.<sup>131</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>132</sup>
109. Fourth, Indonesia asserts that the BIT must be interpreted according to the principle of contemporaneity, which requires interpreting a treaty by reference to the understanding of its terms at the time when it was concluded.<sup>133</sup>
110. Fifth, Indonesia relies on various doctrinal writings echoing its interpretation of Article XI of the Treaty. For instance, referring to the Australia-Indonesia BIT, Michael Pryles and Richard Garnett write that Australia’s BITs “require the host State to consent in writing to the submission of the dispute to ICSID (usually within 30 or 45 days)” and that “[w]ithout such consent an ICSID arbitral tribunal will not have jurisdiction”.<sup>134</sup> In addition, Indonesia

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<sup>129</sup> RMOJ, ¶ 155.

<sup>130</sup> RMOJ, ¶ 154.

<sup>131</sup> Tr. 13052013, 137:5-7.

<sup>132</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>133</sup> Tr. 13052013, 176:26-177:6.

<sup>134</sup> Michael Pryles & Richard Garnett, “Australia”, in Michael Pryles (ed), *Dispute Resolution in Asia* (Kluwer Law, 2006), p. 82 and n. 174 (**Exh. RLA-083**). Indonesia also seeks support from: Jason Webb Yackee, *Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital* (Chapel Hill, 2007), p. 33 (**Exh. RLA-084**); Jason Webb Yackee, “Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties”, 33 *Brooklyn Journal of International Law* 405 (2008), p. 426 (**Exh. RLA-069**); and a UNCTAD Study commenting on a similar provision in the Australia-Lithuania BIT: UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (United Nations, New York and Geneva, 2007), pp. 106-107 (**Exh. RLA-086**).

refers to scholarly writings it filed in ICSID Case No. ARB/12/14 in support of its interpretation of Article 7(1) of the UK-Indonesia BIT.<sup>135</sup> These opinions underline that a promise to consent does not provide the investor with an immediate right to resort to international arbitration.<sup>136</sup>

111. Sixth and last, the Respondent finds support for its reading of Article XI in BITs concluded by Australia with third parties. For its argument that Article XI(4)(a) cannot be dissociated from Article XI(2), Indonesia relies on Australia's treaties with the Czech Republic, Hungary, and Poland, which articulate the abovementioned two-step procedure in a single paragraph.<sup>137</sup> For instance, Article 11(3)(a) of the Australia-Czech Republic BIT provides as follows:

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<sup>135</sup> Rejoinder, ¶ 39; see RMOJ, ¶¶ 159-169.

<sup>136</sup> 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**); 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**); Antonio R. Parra, *The History of ICSID* (Oxford University Press, 2012), p. 133, n. 96; 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; Schreuer *et al.*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 208-209; and Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff, 1995), pp. 133-134; 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; Antonio R. Parra, *The History of ICSID* (Oxford University Press, 2012), p. 133, n. 96 (**Exh. RLA-037**); 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**); Schreuer *et al.*, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009), pp. 208-209 (**Exh. RLA-022**); Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff, 1995), pp. 133-134 (**Exh. RLA-041**); Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012), p. 258 (**Exh. RLA-039**); 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; Jean-Pierre Lavie, *Protection et promotion des investissements. Etude de droit international économique* (Presses Universitaires de France, 1985), p. 278 (**Exh. RLA-044**); 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**); 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**).

<sup>137</sup> Rejoinder, ¶¶ 43-44, referring to the Agreement between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments, Art. 11(3)(a) (**Exh. RLA-087**); Agreement between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of



“(3) Either party to a dispute may take the following action irrespective of whether any local remedies available pursuant to action under paragraph (2) of this Article have already been pursued or exhausted:

(a) if both Contracting Parties are at that time party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (“the Convention”), refer the dispute to the International Centre for the Settlement of Investment Disputes (“the Centre”) for conciliation or arbitration pursuant to Article 28 or 36 of the Convention. Where this action is taken by an investor of one Contracting Party the other Contracting Party shall consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor”.<sup>138</sup>

112. Australia’s BITs with Argentina and Turkey also confirm Indonesia’s interpretation as they expressly incorporate the Contracting States’ advance consent, thus showing that Australia is aware of the difference between consent and a promise to consent.<sup>139</sup> Finally, the Australia-Sri Lanka BIT serves to refute Planet’s submission that Article XI(4)(a) of the Treaty serves no other purpose than “administrative convenience”. That treaty makes it clear that a subsequent act is required in order to access ICSID, failing which consent is deemed to exist for non-institutional arbitration as provided in that treaty.<sup>140</sup>

113. Moreover, Planet’s reliance on National Interest Analyses (“NIAs”) prepared since 1996 by the Australian Government sheds no light on the present issue. The fact that some NIAs mention that Australia may have to bear the costs of an arbitration is inconclusive.<sup>141</sup> Planet’s argument that where NIAs are silent on consent then the underlying treaty must be understood to contain binding consent is belied by the NIA prepared for the Australia-

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Investments, Art. 12(3)(a) (**Exh. RLA-088**); Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments, Art. 13(3)(a) (**Exh. RLA-089**). See also: Tr. 13052013, 154:26-155:20.

<sup>138</sup> **Exh. RLA-087**.

<sup>139</sup> Rejoinder, ¶ 45, referring to the Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol, Art. 13(4) (**Exh. RLA-090**); Agreement between Australia and the Republic of Turkey on the Reciprocal Promotion and Protection of Investments (with protocol), Art. 13(5) (**Exh. RLA-091**).

<sup>140</sup> Rejoinder, ¶¶ 49-50, referring to the Agreement between the Government of Australia and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments, Art. 13(4) (**Exh. RLA-092**). See also: Tr. 13052013, 153:22-154:12.

<sup>141</sup> R-PHB2, ¶ 28, referring to Australia-Peru BIT National Interest Analysis (“NIA”), p. 2 (**Exh. CLA-154**); Australia-Pakistan BIT NIA, p. 2 (**Exh. CLA-155**); Australia-Lithuania BIT NIA, p. 2 (**Exh. CLA-156**); Australia-Egypt BIT NIA, p. 3 (**Exh. CLA-157**).

Sri Lanka BIT, which does not mention the requirement for additional consent, although Planet acknowledged that such treaty did so require.<sup>142</sup>

#### 1.4 Indonesia legitimately exercised its right to withhold consent

114. Article III(1) of the Australia-Indonesia BIT limits protection to investments that have been granted admission in accordance with the 1967 Foreign Investment Law or any successor legislation.<sup>143</sup> Indonesia considers that Planet'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>144</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>145</sup>

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

116. 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>146</sup> and not "is willing" as proposed by the Claimant;<sup>147</sup> (iii) in any event, Section IX(4) of the 2005 BKPM approval only extends to PT ICD and not to the Claimant,<sup>148</sup> and (iv) the Australia-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>149</sup>

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<sup>142</sup> R-PHB2, ¶ 29, referring to Australia-Sri Lanka BIT NIA, ¶ 23 (**Exh. RLA-113**).

<sup>143</sup> RMOJ, ¶¶ 210-213; Rejoinder, ¶¶ 64-66.

<sup>144</sup> RMOJ, ¶ 212.

<sup>145</sup> Rejoinder, ¶¶ 65-66.

<sup>146</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>147</sup> RMOJ, ¶¶ 195-197.

<sup>148</sup> Rejoinder, ¶¶ 62-63; R-PHB1, pp. 6-8; R-PHB2, ¶¶ 10-18.

<sup>149</sup> RMOJ, ¶ 206; Tr. 13052013, 160:3-14.

117. 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>150</sup> According to Indonesia, the BKPM's "preparedness" can only mean that, if an investor raises a dispute with the BKPM or any other agency of the Government, 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>151</sup>
118. Upon a question from the Tribunal at the hearing, the Respondent specified that Article 2 of Law No. 5 of 1968,<sup>152</sup> read in combination with the Indonesian constitution,<sup>153</sup> provides that only the Government, *i.e.* the President, has the authority to grant ICSID consent.<sup>154</sup>
119. 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>155</sup> In this context, Indonesia criticizes Planet for relying merely on Dr. Makarim who adopts a literal translation of the word *bersedia*.<sup>156</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>157</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>158</sup>
120. Responding to Planet'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>159</sup>

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<sup>150</sup> Tr. 13052013, 97:25-106:16. See *also*: R-PHB1, pp. 5-6; R-PHB2, ¶¶ 1-9.

<sup>151</sup> Tr. 13052013, 106:13-15.

<sup>152</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>153</sup> 1945 Constitution of the State of the Republic of Indonesia (Excerpts, Revised Version), Ch. III, Art. 4(1) (**Exh. RLA-001**).

<sup>154</sup> Tr. 13052013, 110:4-25. See *also*: R-PHB1, pp. 5-6.

<sup>155</sup> RMOJ, ¶ 198.

<sup>156</sup> Rejoinder, ¶¶ 55-56.

<sup>157</sup> *Id.*, ¶ 57.

<sup>158</sup> *Id.*, ¶ 58.

<sup>159</sup> RMOJ, ¶ 203. See *also*: Rejoinder, ¶ 63; Tr. 13052013, 161:25-163:7.

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

121. Indonesia contends that both Churchill and Planet knew that the dispute settlement clause in Section IX(4) of the 2005 BKPM did 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>160</sup> The word "perusahaan" is correctly translated as "company", *i.e.* PT ICD, and not as "business" as contended by the Claimant.<sup>161</sup>

## 2. The Claimant's Position

122. In addition to stressing that it is an investor and that all other jurisdictional requirements are met,<sup>162</sup> the Claimant essentially submits that Indonesia has consented to ICSID arbitration under the BIT. First, it outlines the relevant rules on treaty interpretation (2.1. below); second, it elaborates on its main argument pursuant to which Indonesia consented to ICSID arbitration by ratifying the BIT (2.2. below); third, it analyzes other BITs concluded by Australia (2.3. below); and fourth, it challenges various authorities cited by the Respondent (2.4. below). However, in the event that the Tribunal were to hold that the BIT requires additional consent, Planet submits that Indonesia has provided such consent by issuing the BKPM Approvals (2.5. below).

123. 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>163</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>160</sup> RMOJ, ¶ 189; Rejoinder, ¶¶ 62-63; Tr. 14052013, 141:3-143:7; R-PHB1, pp. 6-8; R-PHB2, ¶¶ 10-18.

<sup>161</sup> R-PHB1, pp. 7-8; R-PHB2, ¶ 15.

<sup>162</sup> Mem., ¶¶ 301-310; Reply, ¶¶ 87-90. For fulfillment of the requirements under the ICSID Convention: Mem., ¶¶ 312-315.

<sup>163</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 Treaty interpretation rules

124. According to Planet, 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>164</sup> Supplementary means can only come into play if the meaning of the terms is not clear.<sup>165</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>166</sup>

## 2.2 Indonesia's consent is located in Article XI(2)

125. Planet argues that the language of Article XI(2) is unequivocal and that it "is the beneficiary of a legally binding right, at its election, to refer disputes to ICSID for arbitration".<sup>167</sup> The Claimant relies in particular on cases where the wording "the investor may submit the dispute" was consistently construed as providing the investor "a legally enforceable right" to initiate arbitration.<sup>168</sup> Indonesia's consent to ICSID arbitration is unambiguous and unqualified.<sup>169</sup> Paragraph 2 of Article XI makes no reference to paragraph 4 and requires no further action. In Planet's view, "[a]ny 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>170</sup> and the Tribunal should retain jurisdiction.

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<sup>164</sup> Reply, ¶ 93.

<sup>165</sup> C-PHB1, ¶ 35.

<sup>166</sup> Reply, ¶ 92.

<sup>167</sup> C-PHB1, ¶ 54.

<sup>168</sup> Tr. 14052013, 46:10-47:1, where the Claimant referred to the following cases: *Chemtura Corporation (formerly Crompton Corporation) v. Government of Canada*, Ad Hoc NAFTA Arbitration, Award, 2 August 2010; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001; *International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA, Arbitral Award, 26 January 2006; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011 (these authorities have not been put on record and were referred to for the first time at the hearing). See also: Reply, ¶ 139, referring to: *American Italian Pasta Co. v. Austin Co*, 914 F.2d 1103 at 1104-5, 8th Cir. 1990 (**Exh. CLA-121**); *Calberson International v. Société Schenker*, 15 October 1996, Ire Ch. D, ¶ 2 (**Exh. CLA-122**); *Canada: Canadian National Railway Co v. Lovat Tunnel Equipment Inc*, 174 D.L.R. 4th 385, Ontario Court of Appeal, 8 April 1999 (**Exh. CLA-125**); *Lobb Partnership Ltd v. Aintree Racecourse Company Ltd* [2000] C.L.C. 43, at 5 (**Exh. CLA-126**); *WSG Nimbus Pie Ltd v. Board of Control for Cricket in Sri Lanka* [2002] SGHC 104, ¶ 22 (**Exh. CLA-127**).

<sup>169</sup> Tr. 14052013, 46:10-12.

<sup>170</sup> Tr. 13052013, 9:20-25.

126. The structure of Article XI confirms this reading. First, paragraph 3 indicates (i) that the disputing parties may agree to *ad hoc* arbitration, and (ii) that in the absence of an agreement within three months, the dispute is to be submitted to an UNCITRAL tribunal. However, paragraph 3 only applies where one or both of the Contracting States are not ICSID members. Hence, UNCITRAL arbitration is unavailable if Indonesia and Australia are parties to the ICSID Convention, with the absurd result that Australia’s investors “would be able to enforce BIT protection through UNCITRAL, but they would lose recourse to any enforceable mechanism if Australia became an ICSID contracting state”.<sup>171</sup>
127. Second, paragraph 5 confirms Planet’s interpretation since it cannot have been the drafters’ intention to preclude diplomatic protection if the investor’s access to ICSID arbitration were not “absolutely assured”.<sup>172</sup> Diplomatic protection by the investor’s home State is precluded once “an action referred to in paragraph 2 has been taken”, *i.e.* once a dispute has been submitted to ICSID. There is no reference to paragraph 4 or to any additional action required from the host State.
128. Third, Planet argues that paragraph 4 finds application where a dispute has already been referred to ICSID pursuant to paragraph 2. Hence, Article XI(4)(a) is not concerned with obtaining the host State’s consent, since that consent is already provided under Article XI(2).<sup>173</sup> For Planet “Article XI(4) does not in terms impinge upon an agreement to arbitrate arising under Article XI(2)”.<sup>174</sup> Paragraph 4 “falls outside the four corners of the operative dispute settlement arrangements” of paragraph 2,<sup>175</sup> since it deals with procedural matters and does not “address the existence of an arbitration agreement *per se*”.<sup>176</sup>
129. Fourth, pointing to other treaties concluded around the same time and containing similar “anachronistic references”,<sup>177</sup> Planet contends that the drafters of Article XI(4)(a) were

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<sup>171</sup> Tr. 14052013, 51:2-7.

<sup>172</sup> Tr. 14052013, 52:4-9.

<sup>173</sup> Reply, ¶ 148.

<sup>174</sup> Reply, ¶ 147.

<sup>175</sup> Reply, ¶ 135; Tr. 14052013, 55:16-19.

<sup>176</sup> Reply, ¶ 150.

<sup>177</sup> Reply, ¶ 150, referring to the 2004 United States Model Treaty, Art. 26(2) (**Exh. CLA-94**); Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Indonesia on the Promotion and Protection of Investments, Art. 8(3) (**Exh. CLA-89**); Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, Art. 8(1) (**Exh. CLA-81**); Treaty between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment, Art. VII (**Exh. CLA-82**);

struggling to find ways to evidence “consent in writing” as required by Article 25(1) of the ICSID Convention. In its submission, Article XI(4)(a) is thus best understood “as a matter of administrative convenience and good housekeeping for the benefit of the ICSID Secretariat”.<sup>178</sup> In any event, the use of the mandatory word “shall” leaves no room for maneuver to Indonesia, which cannot disregard its duty under that provision.<sup>179</sup>

130. Fifth, Planet stresses that several other features of paragraph 4 are “curious”. The wording “where that action is taken by an investor of one party” in subparagraph (a) gives the impression that such an action could also be taken by the host State, when investment treaty obligations fall upon the host State and the right to initiate arbitration is normally bestowed on investors only.<sup>180</sup> Further, Planet notes that paragraph 4 is not formulated in a cumulative manner. Subparagraph (b) is introduced by the word “or” and therefore covers an alternative situation. Under subparagraph (b), the investor ultimately chooses between arbitration and conciliation. Hence, even if the host State fails to comply with its duty under subparagraph (a), the investor can pursue the proceedings by choosing between arbitration and conciliation under subparagraph (b).

131. Planet claims that its interpretation of Article XI is also supported by the object and purpose of the BIT, which is to promote investments and stimulate investors’ business activities.<sup>181</sup>

### 2.3. A comparison with other BITs concluded by Australia confirms Planet’s interpretation

132. According to Planet, the wording “shall consent in writing to the submission of the dispute to the Centre” appears in thirteen of the twenty-two BITs concluded by Australia since

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<sup>178</sup> Treaty between the United States of America and Ukraine concerning the Encouragement and Reciprocal Protection of Investment, Art. VI(4) (**Exh. CLA-79**). See also: Tr. 14052013, 54:3-55:3. Reply, ¶ 150. At the hearing, Planet submitted that subparagraph (a) is ambiguous as to whether consent in writing is to be furnished to the investor or to ICSID (Tr. 14052013, 53:12-14). In its Reply, Planet was more assertive when it stated that “[t]he consent in writing referred to in Article XI(4)(a) is addressed ‘to the Centre’ (emphasis added), not to the investor. The obligation created by Article XI(4)(a) is to furnish *the Centre* with a copy of the host State’s ‘consent in writing to the submission of the dispute to the Centre’, not to provide such consent *to the investor*” (¶ 149).

<sup>179</sup> Tr. 14052013, 55:22-56:3.

<sup>180</sup> Tr. 14052013, 52:20-53:9.

<sup>181</sup> Tr. 14052013, 45:10-16.

1988.<sup>182</sup> Therefore Article XI of the Treaty constitutes standard Australian practice.<sup>183</sup> If the Tribunal were to accept Indonesia's self-serving interpretation "it would in practice undermine the procedural protections contained in the majority of Australian BITs".<sup>184</sup> In support, Planet relies on the ruling on interim measures in *Tethyan Copper v. Pakistan*, where the tribunal held on a *prima facie* basis that the "shall consent in writing" language of the Australia-Pakistan BIT "*per se* constituted binding written consent to ICSID arbitration, without requirement of any further act of consent on the part of Pakistan".<sup>185</sup> In any event, counsel for Pakistan raised numerous jurisdictional objections but did not argue that the BIT did not provide Pakistan's binding consent.<sup>186</sup>

133. Similarly, Planet argues that Australian treaty drafters employ very different language when requiring an additional act of consent, as the dispute settlement provision of Australia's BITs with India and Sri Lanka.<sup>187</sup> The first reads as follows:

"if [...] both Parties to the dispute consent in writing to submit the dispute to [ICSID] such a dispute shall be referred to the Centre".<sup>188</sup>

134. And the second reads in relevant part:

"(a) where that action is taken by an investor of one Party, the other Party should consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor. Such consent shall not be unreasonably withheld".<sup>189</sup>

135. As regards Article 12(2) of the Australia-Vietnam BIT, ICSID jurisdiction is predicated on the ratification of the ICSID Convention by both States, but it does not require an additional act of consent. According to Planet, Article 12(2) of that treaty covers three possibilities:

"i. both State Parties have ratified the ICSID Convention (Article 12(2)(b));

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<sup>182</sup> C-PHB1, ¶ 58 ("The requirement in Article XI(4) of the Australia-Indonesia BIT that the host State 'shall consent in writing to the submission of the dispute to the Centre' appears in identical form in 11 other Australian BITs spanning the decade between 1991 and 2001. It was incorporated in approximately two-thirds of Australian BITs signed between 1988 and 1995, and appears in over half of Australia's total portfolio of BITs", references omitted).

<sup>183</sup> C-PHB1, ¶ 58; C-PHB2, ¶ 13(ii).

<sup>184</sup> C-PHB1, ¶ 58.

<sup>185</sup> C-PHB2, ¶ 13(iv); C-PHB1, ¶¶ 73-75. See **Exh. CLA-159**.

<sup>186</sup> C-PHB1, ¶ 75.

<sup>187</sup> C-PHB1, ¶¶ 69-70; C-PHB2, ¶ 13(iii).

<sup>188</sup> C-PHB1, ¶ 69; C-PHB2, ¶ 13(iii).

<sup>189</sup> C-PHB1, n. 76; **Exh. RLA-092**, Art. 13(3)(a).



- ii. *neither* State Party has ratified the ICSID Convention (Article 12(2)(c), subordinate clause 1); or
- iii. *either* the investor does not consent to ICSID arbitration, although its State of nationality has ratified the ICSID Convention, *or* the State party to the dispute has not ratified the ICSID Convention (Article 12(2)(c), subordinate clause 2)".<sup>190</sup>

136. The National Interest Analyses (NIAs) prepared by the Australian Government in connection with BITs discussed in the Australian parliament confirm that Article XI of the Treaty contains Indonesia's advance consent. The NIAs issued in conjunction with the BITs concluded by Australia with Peru, Pakistan, Lithuania and Egypt contain dispute settlement provisions that are identical to those of the Australia-Indonesia BIT. None of these NIAs mention the necessity of an additional act of consent by the host State, but rather work on the assumption that the investor has discretion to refer a dispute to ICSID.<sup>191</sup> For instance, the NIA to the Australia-Peru BIT observes the following:

"It is also possible, given that Australia and Peru are both party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States as specified in Article 13.2.b, that a Peruvian investor may refer a dispute relating to an investment with Australia to the International Centre for Settlement of Investment Disputes (ICSID) (Article 13.2.b). In this case, Australia may be required to bear all or part of the cost of arbitration, subject to the discretion of the tribunal".<sup>192</sup>

137. Where the treaty drafters however wished to require an additional act of consent, this issue was specifically identified as the NIA for the Australia-India BIT demonstrates:

"Under Article 12.3, the option of referring a dispute between a contracting Party and an investor of the other contracting Party to the [ICSID] was, at India's request, made subject to the agreement of both Parties to a dispute. As India is not a Party to the ICSID Convention, this formulation was necessary to provide that the agreement referred to in ICSID in accordance with the Australian Model Text would only operate if India were to agree to submit a dispute to that forum".<sup>193</sup>

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<sup>190</sup> C-PHB1, ¶ 79.

<sup>191</sup> C-PHB1, ¶¶ 59-68; C-PHB2, ¶ 13(ii).

<sup>192</sup> Australia-Peru BIT NIA (**Exh. CLA-154**). Planet also refers to: Australia-Lithuania BIT NIA (**Exh. CLA-156**); Australia-Egypt BIT NIA (**Exh. CLA-157**); and Australia-Pakistan BIT NIA (**Exh. CLA-155**).

<sup>193</sup> **Exh. CLA-158**.

## 2.4 Indonesia's reliance on doctrinal writings is mistaken

138. Planet challenges Indonesia's reliance on doctrinal writings as being "misleading in its breadth and mistaken in its content".<sup>194</sup> Indonesia's interpretation is not substantiated by any *travaux préparatoires* relating to Indonesia's own treaties.<sup>195</sup> Nor do the commentators cited by Indonesia rely on preparatory materials relating to the Australia-Indonesia BIT.<sup>196</sup>
139. For the Claimant none of the authors having analyzed Australian BITs have cited any authority in support of their opinion that Article XI of the Australia-Indonesia BIT only contains a promise to consent. Michael Pryles and Richard Garnett rely on their own reasoning,<sup>197</sup> while Jason Webb Yackee cites Christoph Schreuer's analysis of "shall assent" or similarly worded clauses in support of his interpretation.<sup>198</sup> Like all the other authors relied upon by Indonesia, Schreuer relies on Broches' analysis, who himself cites nothing in support of his view. Through a "citation chain" dating back to Broches,<sup>199</sup> authors have reproduced the same mistaken interpretation. That interpretation has become "conventional wisdom", but is no evidence of the intent of the drafters.<sup>200</sup>

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

140. Should the Tribunal find that the Australia-Indonesia BIT requires an additional act of consent, Planet argues that the Respondent has given such consent in the 2005 BKPM Approval. This consent was transferred to the Claimant upon its acquisition of shares in PT ICD through the 2006 BKPM Approval, which incorporated the 2005 BKPM Approval.
141. The Claimant disputes 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

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<sup>194</sup> Reply, ¶ 113.

<sup>195</sup> Reply, ¶ 115.

<sup>196</sup> *Ibid.*

<sup>197</sup> Tr. 140502013, 44:5-9, referring to **Exh. CLA-083**.

<sup>198</sup> Tr. 14052013, 44:9-45:1, referring to **Exh. CLA-069** (where the author acknowledges in note 64 that his "classification scheme draws heavily" on Schreuer) and **Exh. CLA-084** (where there is no reference supporting the author's interpretation).

<sup>199</sup> Reply, ¶ 118.

<sup>200</sup> Tr. 13052013, 11:7-11.

company could benefit from such consent would be under investment treaties [...] to which it would resort by virtue of its foreign ownership”.<sup>201</sup>

142. Planet 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>202</sup> The Claimant argues that, together with Churchill, it is the driving force behind PT ICD’s activities and that it funded these activities allocating resources to 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>203</sup>
143. The Claimant also relies on evidence of Dr. Makarim, who notes that the inclusion of an ICSID dispute settlement clause in BKPM approvals is not standard practice.<sup>204</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>205</sup>
144. 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>206</sup> Hence, Section IX(4) expresses the willingness to follow the ICSID procedures. Planet also refutes the Respondent’s allegation that the BKPM lacked authority to agree to ICSID arbitration, observing that the BKPM Approval was copied to the President’s office and various other Ministries.<sup>207</sup> Had the BKPM overstepped its authority, the President would presumably have taken appropriate action.

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<sup>201</sup> Reply, ¶ 156.

<sup>202</sup> Reply, ¶¶ 157-158.

<sup>203</sup> Reply, ¶ 159. See also: C-PHB2, ¶¶ 21-27.

<sup>204</sup> Reply, ¶ 155; Makarim ER2, p. 10.

<sup>205</sup> Makarim ER2, p. 10.

<sup>206</sup> Foreign Capital Investment Approval for PT ICD, Decision No. 1304/I/PMA/2005 dated 23 November 2005 (with Certificate of Translation) para. 3 (**Exh. C-17**); Reply, ¶ 154; Tr. 14052013, 67:15-19.

<sup>207</sup> C-PHB1, ¶ 16; C-PHB2, ¶¶ 29-31.

145. Finally, contrary to Indonesia's views, the Claimant submits that no provision in the BIT prevents either State party to provide its consent in advance as it did through the BKPM Approvals.<sup>208</sup>

### 3. Analysis

#### 3.1 Consent to ICSID arbitration in general

146. Article 25 of the ICSID Convention requires consent of 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>209</sup> or that consent must be proven through "affirmative evidence".<sup>210</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

147. The interpretation of the Australia-Indonesia BIT is governed by Articles 31-32 of the Vienna Convention on the Law of Treaties (VCLT),<sup>211</sup> which codify customary international law.<sup>212</sup>

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<sup>208</sup> Reply, ¶ 163; C-PHB2, ¶ 28.

<sup>209</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 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>210</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 175 ("Daimler") (**Exh. RLA-020**).

<sup>211</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 243 (**Exh. CLA-17**).

<sup>212</sup> Mem., ¶ 289; RMOJ, ¶ 149 (referring to *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, ICJ Reports 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

148. 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.

149. 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*:

“[L]ike any other conventions, 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>213</sup>

150. The Parties concur, and rightly so, that the starting point for treaty interpretation is the text.<sup>214</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>215</sup>

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(**Exh. RLA-028**). Australia acceded to the VCLT on 13 June 1974. Indonesia has not ratified the VCLT.

<sup>213</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, Award on Jurisdiction, 25 September 1983, 1 ICSID Reports (1983) 389 (**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>214</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>215</sup> International Law Commission, Draft Articles on the Law of Treaties (1966), Art. 27 and 28, ¶ 18.

151. 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>216</sup>

3.3 Does Article XI of the Australia-Indonesia BIT contain Indonesia's advance consent?

152. Indonesia submits that it has not consented in advance to ICSID arbitration. Article XI of the Australia-Indonesia BIT is not 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 BIT contains a standing offer of ICSID arbitration and only analyze the second objection if necessary.

153. Article XI of the Australia-Indonesia BIT reads as follows:

"1. In the event of a dispute between a Party and an investor of the other Party relating to an investment, the parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations.

2. In the event that such a dispute cannot be settled through consultations and negotiations, the investor in question may submit the dispute for settlement:

a. In accordance with the laws and regulations of the Party which has admitted the investment to the competent judicial or administrative bodies of that Party; or

b. To the International Centre for the Settlement of Investment Disputes ("the Centre") for the application of the conciliation or arbitration procedures provided by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the Convention").

3. If both Parties are not at the same time the dispute arises party to the Convention, the dispute may be submitted to

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<sup>216</sup> *HICEE BV v. Slovak Republic*, Partial Award, 23 May 2011, ¶ 117.

such procedures for settlement as may be agreed between the parties to the dispute. If no such procedures have been agreed within a three month period from written notification of the claim, the parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The arbitral tribunal shall have the power to award interest. The parties to the dispute may agree in writing to modify those Rules.

4. Where a dispute is referred to the Centre pursuant to sub-paragraph 2(b):

- a. Where that action is taken by an investor of one Party, the other Party shall consent in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor; or
- b. If the parties to the dispute cannot agree whether conciliation or arbitration is the more appropriate procedure, the investor affected shall have the right to choose.

5. Once an action referred to in paragraph 2 has been taken, neither Party shall pursue the dispute through diplomatic channels unless:

- a. the relevant judicial or administrative body, the arbitral authority or other body, as the case may be, has decided that it has no jurisdiction in relation to the dispute in question; or
- b. the other Party has failed to abide by or comply with any judgment, award, order or other determination made by the body in question.

6. In any proceeding involving a dispute relating to an investment, a Party shall not assert, as a defence, counter-claim, right of set-off or otherwise, that the investor concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of any alleged loss”.

154. According to Indonesia, Article XI of the Treaty contemplates a two-step process in which the foreign investor first submits a request for arbitration and Indonesia then gives its consent.<sup>217</sup> The natural and ordinary meaning of “shall consent” contained in Article XI(4)(a) implies a future action, a separate, subsequent act of consent each time an investor seeks to engage in ICSID arbitration. Article XI(4) only encompasses a promise to consent or *pactum de contrahendo*.

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<sup>217</sup> Tr. 13052013, 134:11-16.

155. Indonesia acknowledges that in principle it is required to grant its consent.<sup>218</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. In particular, it argues that it is required to give its consent only if it is established (after the filing of the request for arbitration) that the investment was granted admission as required under Article III(1) of the BIT. Since Planet failed to conform to the requirements of Article III(1), Indonesia is entitled to withhold its consent. In any event, even if the Tribunal were to find that the Article III(1) objection is ill-founded, it would lack jurisdiction, because Indonesia has not given its consent.<sup>219</sup> For Indonesia, the inter-State arbitration provided in Article XII of the Treaty is designed to address whether a host State is bound to grant its consent or not.<sup>220</sup>
156. For its part, Planet argues that Article XI(2) fulfills the requirement of consent in writing by the host State under Article 25 of the ICSID Convention. No further action is required from the host State after the request for arbitration. Article XI(4) falls outside the four corners of the arbitration clause found in Article XI(2) and (3). In any event, Article XI(4)(a) imposes an obligation on Indonesia since the ordinary meaning of the word “shall” denotes a legally binding obligation.<sup>221</sup> It was thus the intent of the treaty drafters to provide investors with the certainty of access to ICSID arbitration where both BIT States are ICSID members.
157. The Parties’ disagreement hinges on the interpretation and articulation of paragraphs 2 and 4 of Article XI of the BIT. In a nutshell, the question is whether paragraph 4 qualifies paragraph 2. It is a difficult question that the Tribunal will seek to resolve by relying first on the ordinary meaning of the words before turning to the context and the object and purpose of the Treaty.
158. Before turning to the ordinary meaning of the words, the Tribunal stresses that it is not unusual for States in bilateral investment treaties to qualify the host State’s consent to international arbitration. For instance, some BITs require the investor to exhaust local remedies, or, to the contrary, to waive the right to initiate other proceedings. Others make access to international arbitration contingent upon the lapsing of negotiation or cooling-off periods or upon an attempt to resolve the dispute in court during a certain time. Accordingly, the Tribunal is not minded to accept Planet’s argument as such that Article

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<sup>218</sup> RMOJ, ¶ 187.

<sup>219</sup> Rejoinder, ¶ 66.

<sup>220</sup> Rejoinder, ¶ 65. See *also*: Tr. 13052013, 163:23-165:11.

<sup>221</sup> Reply, ¶ 95.



XI(4) falls outside the operative dispute settlement arrangements contained in the two previous paragraphs, all the more so that Article XI(4) expressly refers to Article XI(2)(b).

159. The ordinary meaning of the words used in paragraph 2 appears clear. In the absence of an amicable solution, “the investor in question may submit the dispute for settlement to [the local courts or] to the International Centre for the Settlement of Investment Disputes [...]”. The word “may” seems to indicate that the investor is entitled to institute ICSID proceedings if it so chooses. The right of initiative rests with the foreign investor and there is no limitation placed on this right in this paragraph.
160. The difficulty in this case arises from the context of paragraph 2 and specifically from paragraph 4. Under that paragraph, if a dispute is referred to the Centre under paragraph 2(b), the host State “shall consent in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor”.
161. The words employed in paragraph 4(a) are also clear. If the host State “shall consent in writing within 45 days” after the investor’s request, it follows that consent cannot be located in the Treaty itself and that a separate act is needed. The words used in paragraph 4(a) call for a number of comments.
162. First, “shall consent in writing to the submission of the dispute to the Centre within forty-five days” implies a time sequence. The phrase lends support to the view that the investor must first file a request and only thereafter will the host State “consent” within 45 days. The Tribunal will revert below to the question whether under the Treaty the host State can only provide its consent after the filing of a request for arbitration or whether such consent can also be provided in a separate act in advance of the request (see below ¶¶ 200-202).
163. As to the word “shall”, it can either imply an obligation (suggesting that the Respondent’s submission to ICSID is mandatory) or refer to a future action (suggesting the contrary). Be this as it may, even if “shall” expresses an obligation of the State to give its consent, the sanction for a failure to do so would not be to supply the missing consent or to deem that constructive consent exists. Hence, whatever the meaning of “shall”, it does not advance the analysis.
164. Second, Article XI(4)(a) provides that the host State shall “consent in writing”. On the one hand, one can place the emphasis on “consent”, which favors the Respondent’s thesis.

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. On the other hand, one can focus on the words “in writing”, which would support the Claimant’s view to a certain extent. One possibility may be that the drafters of the Australia-Indonesia BIT were grappling with ways to prove the Contracting Parties’ consent to ICSID arbitration. Indeed, Article 25(1) of the ICSID Convention, just as Rule 2(2) of the Institution Rules, require consent to be expressed in writing. The treaty drafters may have sought to devise ways to secure such consent in writing, not being certain that consent in the BIT met the writing requirement. The Claimant insists that this was a “feature of the time at which the BIT was drafted”, and points to other BITs concluded by other States which expressly state that the expression of consent contained in these treaties fulfills the requirement of consent in writing under the ICSID or other frameworks.<sup>222</sup> The Tribunal finds reliance on BITs concluded by other States inapposite here since they all use language which is lacking in Article XI(4) of the Treaty.

165. Third, “[w]here a dispute is referred to the Centre” and “that action is taken by an investor”, Article XI(4)(a) sets a time limit for the host State to give its consent “within forty-five days of receiving such request from the investor”. In other words, the 45 day time period runs from the initiation of the arbitration procedure. Article XI(4)(a) is specific in providing the time limit, the date when it starts, and the action expected from the host State within this time.
166. The mechanism contemplated in Article XI(4) poses a difficulty in the ICSID framework. Indeed, in the ICSID regime, consent must exist on the day of the filing of the request for arbitration.<sup>223</sup> This derives from Institution Rule 2(1)(c) which provides that the request for arbitration must indicate the date of consent,<sup>224</sup> and from Institution Rule 2(2) which requires consent to be documented. Further, Article 36(3) of the ICSID Convention directs the Secretary-General to refuse to register a request for arbitration when consent is manifestly lacking. To achieve consent on the day of filing, the investor would have to seek consent before it files its request. Although this solution is conceivable, it does not reflect

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<sup>222</sup> Reply, ¶ 150, n. 178-179.

<sup>223</sup> Report of the Executive Directors on the Convention, ¶ 24 (“Consent of the parties must exist when the Centre is seized (Art. 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given”).

<sup>224</sup> Rule 2(3) defines the “date of consent” as “the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted”.

what Article XI(4) says. This difficulty could be seen as an indication that Article XI(4) is “a matter of administrative convenience and good housekeeping for the benefit of the ICSID Secretariat” to use the Claimant’s words.<sup>225</sup> However, the Claimant has provided no authority or evidence supporting this view. Moreover, the characterization as a mere formality would have to be read into the provision, which does not use words suggesting a formality, quite to the contrary. Further, the very existence of a time limit for the performance of an act would rather weigh against a matter of convenience and in favor of a requirement conditioning the Centre’s action.

167. In sum, the ordinary meaning of paragraphs 2 and 4 of Article XI(4) is clear for each provision taken separately. It is their interaction which creates some uncertainty. However, lacking any further indication on the common intention of the Contracting States beyond the text of the Treaty, the Tribunal is inclined to conclude at this stage that Article XI does not express Indonesia’s advance consent to ICSID proceedings. It would be doing violence to the clear terms of Article XI(4)(a) to reduce this clause to a mere administrative formality for ICSID.

168. Turning now to the context of Article XI(2) and (4), the Tribunal does not believe that the use of the word “or” separating Article XI(4)(a) from Article XI(4)(b) is significant. Planet argues that the disjunctive “or” shows that if Indonesia fails to provide its consent in writing within the allocated time, then under sub-paragraph (b) the investor has the right to choose between conciliation and arbitration. A review of Australian BITs containing similar dispute settlement clauses shows that Australia always used the term “and” between these two provisions and that the BIT with Indonesia is the only one where the word “or” appears. Hence, the Tribunal believes that the inclusion of “or” is the result of an infelicitous drafting rather than a deliberate choice entailing specific consequences. In any event, Planet’s argument fails since sub-paragraphs (a) and (b) deal with entirely distinct matters.

169. At the hearing, the Claimant further argued that it would be absurd to allow the investor access to UNCITRAL under Article XI(3) as long as one or both Contracting States are not ICSID members, but to deny the investor access both to UNCITRAL and to ICSID when the Contracting States are ICSID members. Article XI(3) provides that an investor is entitled to refer the dispute to UNCITRAL proceedings (unless another dispute settlement mechanism is agreed) if one or both Contracting States are not ICSID members at the time

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<sup>225</sup> Reply, ¶ 150.

when the dispute arises. Since both Australia and Indonesia were ICSID members at the time of the conclusion of the BIT, Article XI(3) could only come into play if one of them were to denounce the ICSID Convention. It is also noteworthy that a failure to abide by the requirements of Article XI(4)(a) does not open the door to UNCITRAL arbitration as a default mechanism. Thus, if one follows Indonesia's interpretation, Planet could well be barred from ICSID arbitration (because Indonesia does not consent under Article XI(4)(a)) *and* from UNCITRAL arbitration (because both Contracting States are ICSID members). This is undoubtedly a surprising and unsatisfactory result. Yet, it is the result that derives from the text of the Treaty and the Tribunal cannot change the text, especially not in the absence of *travaux* that would shed a different light on the words. As was stated in *Renta 4*, the Tribunal's task is to discover, not to invent, meaning.<sup>226</sup>

170. In the same vein, Article XI(5) does not support the Claimant's interpretation. This provision postulates that the home State is precluded from exercising diplomatic protection "[o]nce an action referred to in paragraph 2 has been taken", *i.e.* once a dispute has been referred to ICSID. It is consistent with Article 27 of the ICSID Convention in precluding diplomatic protection as long as the Centre is seized of a dispute, and therefore sheds no light on the interaction between Article XI(2) and (4). The Tribunal sees no tension between Article XI(4) and (5). The home State cannot exercise diplomatic protection from the time the request is filed with ICSID and the host State must give its consent at the latest 45 days thereafter. If the host State fails to give its consent by that time, the home State's prerogative to use diplomatic means revives once the Secretary-General of the Centre refuses to register the request under Article 36(3) of the Convention or the Tribunal decides that it has no jurisdiction under Article 41 of the Convention.

171. Finally, the Claimant opposes Indonesia's argument that any failure to abide by the requirements of Article XI(4)(a) must be resolved before an inter-State tribunal, because that tribunal could not supply the missing consent. It is correct that an inter-State tribunal would not be in a position to procure Indonesia's missing consent. It could only order specific performance. It would be left to Indonesia to abide by such an order with the result that the investor might still be left without recourse to ICSID arbitration. Consequently, the debate whether Indonesia has discretion to grant consent especially by reference to the admission requirement of the Treaty, as the Respondent argues, or whether it lacks any

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<sup>226</sup> *Renta 4 S.V.S.A. v. The Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Award on Preliminary Objections, 20 March 2009, ¶ 93. See also: *Daimler*, ¶¶ 166-167.

latitude in this respect, as the Claimant submits, does not advance matters much. Its outcome may determine the outcome of an inter-State arbitration. It says nothing about the jurisdiction of an investor-State tribunal. For that tribunal's jurisdiction to exist consent is needed; an obligation to consent is insufficient.

172. After the context, the Tribunal must address the object and purpose of the Treaty. In its view, the object and purpose are neutral for present purposes. The preamble of the Australia-Indonesia BIT states that Australia and Indonesia strive “to create favourable conditions for investments by investors of one Party in the territory of the other Party”.<sup>227</sup> The preamble further provides that both States recognize “that promoting the flow of capital for economic activity and development is important for the expansion of their economic relations and cooperation, the stimulation of their investors’ business initiative and the fostering of prosperity in both countries”.<sup>228</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.
173. In sum, the interpretation of the ordinary meaning of the terms employed in paragraphs (2) and (4) in light of this context leads to the conclusion that Article XI does not contain Indonesia’s advance consent to ICSID proceedings. This is confirmed by the supplementary means of interpretation under Article 32 of the Vienna Convention upon which the Parties relied, *i.e.* doctrinal writings and treaty practice.
174. Indonesia pointed to various commentators defining categories of expressions of consent to international arbitration and making a general distinction between advance consent and a promise to consent.<sup>229</sup> Indonesia also quoted various authors adopting the position that

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<sup>227</sup> Australia-Indonesia BIT, preamble (**Exh. R-002**).

<sup>228</sup> *Ibid.*

<sup>229</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**); 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**). 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**);

the dispute settlement clause in the Australia-Indonesia BIT contains a promise to consent, and that a failure to fulfill this promise can only be resolved through inter-State dispute settlement.<sup>230</sup>

175. Doctrinal writings may indeed provide guidance as to 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 an opinion that is not.

176. Aron Broches appears to be the reference point for most authors relied upon by Indonesia. He sought to distinguish different types of consent, in particular consents given in advance and promises to consent. In doing so, Broches relied on the text of the dispute settlement provisions of several Dutch and English BITs, without referring to *travaux préparatoires* or other documents revealing the intention of the drafters.<sup>231</sup> The same can essentially be said of the other authors whom Indonesia invokes and who ultimately all refer back to Broches.

177. The authors commenting more particularly on Australian BITs, and on the Australia-Indonesia BIT – again without providing evidence of the States’ intention – do provide support for Indonesia’s interpretation. Michael Pryles and Richard Garnett state that:

“[a] further feature of Australia’s BITs is that they require the host State to consent in writing to the submission of the dispute to ICSID (usually within 30 or 45 days). Without such consent an ICSID arbitral tribunal will not have jurisdiction”.<sup>232</sup>

178. Jason Webb Yackee holds the same opinion:

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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>230</sup> See the references *supra* note 134.

<sup>231</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>232</sup> Michael Pryles & Richard Garnett, “Australia”, in Michael Pryles (ed), *Dispute Resolution in Asia* (Kluwer Law, 2006), p. 82 and n. 174 ([Exh. RLA-083](#)) (references omitted).

“Australia’s BITs are very subtle in this regard. They generally contain a comprehensive, effective pre-consent to ad hoc arbitration, *but only if Australia and its treaty partner have not joined the ICSID Convention*. Where they both have done so, the ad hoc pre-consent becomes invalid, leaving the investor with the sole option of seeking ICSID arbitration. But as to ICSID arbitration, each state party to the Australian treaties promises only that it “shall consent in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor” – with the words “shall consent” indicating that the consent has not yet been given, but is only promised”.<sup>233</sup>

179. In a second writing, the same author adds the following:

“[W]hen a state has promised to consent to arbitration in a treaty, a refusal to actually consent when the investor so demands is indeed a breach of the treaty under international law. But in the face of such a refusal, no matter how illegal, an international arbitral tribunal will not exercise jurisdiction over the dispute, because arbitral jurisdiction always and necessarily depends on the actual consent of the parties. This much is quite clear. Less clear is whether the reputational costs of breaching a promise to arbitrate will typically be so great that a promise to consent is for all practical purposes of as much value to the investor as an actual pre-consent”.<sup>234</sup>

180. Indonesia also relied on an UNCTAD study which, on the basis of its analysis of the “shall consent in writing [...] within thirty days” clause contained in the Australia-Lithuania BIT, came to the conclusion that the treaty did not contain an expression of consent and that a refusal to grant consent would “enable the other contracting party to pursue its right under the State-State dispute settlement mechanism”.<sup>235</sup>

181. While the Tribunal has reached its decision irrespective of these writings, which merely rely on the authors’ reasoning without reference to extrinsic materials, it notes that all the authorities support the conclusion it adopted on the basis of the text and context. It also notes that the Claimant failed to submit any authority leading to another conclusion.<sup>236</sup>

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<sup>233</sup> Jason Webb Yackee, *Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital* (Chapel Hill, 2007), p. 33 (**Exh. RLA-084**).

<sup>234</sup> Jason Webb Yackee, “Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties”, 33 *Brooklyn Journal of International Law* (2008), p. 426 (**Exh. RLA-069**) (references omitted).

<sup>235</sup> UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (United Nations, New York and Geneva, 2007), p. 107 (**Exh. RLA-086**).

<sup>236</sup> When asked by a member of the Tribunal whether the Claimant could provide any authority for its interpretation that Article XI(4)(a) is a mere administrative formality, it simply answered that it found

182. The Parties have also relied in varying degrees on the treaty practice of Indonesia and Australia. Treaties on the same subject matter concluded respectively by Australia 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 on the same subject-matter concluded by one disputing party with third States.<sup>237</sup> This approach also found resonance in investment treaty arbitration, for example in *AAPL*<sup>238</sup> or in *Plama*.<sup>239</sup>
183. Prior to the hearing, the Parties had filed a selection of BITs of either Australia 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 Australia and Indonesia with third parties. It circulated that table for the Parties' comments in two rounds of post-hearing submissions.
184. In analyzing these treaties, the Tribunal 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 Australia-Indonesia BIT only.
185. The information on record shows that Indonesia signed 64 BITs, 49 of which are in force.<sup>240</sup> 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.<sup>241</sup>

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nothing that supported its interpretation "other than the logic of our submissions" (Tr. 14052013, 58:2-59:5).

<sup>237</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>238</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>239</sup> *Plama*, ¶ 195 (**Exh. CLA-130**).

<sup>240</sup> In its first post-hearing brief, 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>241</sup> The various formulations are as follows: "hereby consents to submit" (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-



186. The tables also show that in at least 60 out of 64 BITs, Indonesia has given advance consent.<sup>242</sup> These 60 BITs do not include the Australia-Indonesia BIT in dispute in the present proceeding, nor the BIT Indonesia concluded with the United Kingdom which contains the wording “shall assent to any request”, a provision relevant for Churchill in ICSID arbitration ARB/12/14. They do not include the Indonesia-France BIT either, which mandates the inclusion of consent in the investment approval documentation.<sup>243</sup> 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.
187. The tables finally show that since the early 1990s Indonesia has followed a policy of securing access to international arbitration for investors. The only instance since 1990 where it has not done so is the Australia-Indonesia BIT.

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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; “hereby consents to the submission” (Indonesia-Romania BIT, Art. IX(3)); “hereby gives its unconditional consent” (Indonesia-Finland BIT, Art. 9(5)); “hereby irrevocably and anticipatory [sic] gives its consent” (Indonesia-Belgium BIT, Art. 10); “hereby irrevocably consents in advance” (Indonesia-Singapore BIT, Art. VIII(2)(c)); “irrevocably consents in advance” (Indonesia-Croatia BIT, Art. 10(2); the BIT is not in force); “agrees in advance and irrevocably” (Indonesia-Libya BIT, Art. 12(4); Indonesia-Serbia BIT, Art. 11(4); these BITs are not in force); “the investor may refer” (Indonesia-Malaysia, Art. VII(2)); “the investor may submit” (Indonesia-Chile BIT, Art. IX(2); the BIT is not in force); “the investor affected may submit” (Indonesia-South Korea BIT, Art. 9(2)); “the investor concerned may submit” (Indonesia-Bulgaria BIT, Art. VIII(2); Indonesia-Qatar BIT, Art. 9(2); the latter not being in force); “the investor in question may submit” (Indonesia-Italy BIT, Art. 10(2); Indonesia-Norway BIT, Art. IX(2); Indonesia-Hungary BIT, Art. IX(2); Indonesia-Vietnam BIT, Art. IX(2)); “the investor will be entitled to submit” (Indonesia-Cuba BIT, Art. VIII(3)); “the investor shall be entitled to refer” (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 latter not being in force); “the dispute may be submitted” (Indonesia-Spain BIT, Art. X(2)); “the dispute can be submitted” (Indonesia-Morocco BIT, Art. VIII(2); Indonesia-Turkey BIT, Art. VIII(2)); “the dispute shall, at the request of the investor be submitted” (Indonesia-Iran BIT, Art. 11(2)); “the dispute shall, at the request of the investor concerned, be submitted” (Indonesia-Czech Republic BIT, Art. 8(2); Indonesia-Mozambique BIT, Art. VII(2); Indonesia-Philippines BIT, Art. 8(2); the latter not being in force); “the dispute shall, at the request of the investor of the other Contracting Party, be submitted” (Indonesia-Germany BIT, Art. 10(2)); “the dispute shall be submitted” (Indonesia-Argentina BIT, Art. 10(3); Indonesia-Jamaica BIT, Art. IX(5); Indonesia-Guyana BIT, Art. 9(5); the latter two not being in force); “it may be submitted” (Indonesia-China BIT, Art. IX(3); Indonesia-Mauritius BIT, Art. 9(3); Indonesia-Egypt BIT, Art. 9); “such disputes may be submitted” (Indonesia-Russia BIT, Art. 8(2)); “it shall be at the request of the investor filed” (Indonesia-Saudi Arabia BIT, Art. 11(2)); “it shall, upon request of the investor, be submitted” (Indonesia-Poland BIT, Art. IX(2)); and “either party to the dispute may institute” (Indonesia-Tunisia BIT, Art. 10(2)).

<sup>242</sup> It is to be noted that 15 out of these 60 BITs have not entered into force.

<sup>243</sup> Indonesia-France BIT, Art. 3 *cum* Art. 2.

188. A look at Australia's treaty practice shows that the wording of the dispute settlement clause in that latter treaty must have been proposed by the Australian negotiators. Since 1988, Australia signed 23 BITs, all of which are presently in force. They all contain investor-State dispute settlement clauses providing (at least partially) for international arbitration. Australia has a clear preference for ICSID, since only the Australia-Hong Kong BIT does not mention ICSID, providing instead for UNCITRAL arbitration.<sup>244</sup> The Australia-China BIT provides direct access to international arbitration only for several specific claims,<sup>245</sup> while the Australia-Poland and Australia-Hungary BITs make the exhaustion of local remedies a prerequisite for international arbitration.<sup>246</sup> Three BITs contain an unequivocal expression of consent to ICSID proceedings,<sup>247</sup> and another allows the investor to choose between various mechanisms, including ICSID and the Additional Facility mechanism in case one Contracting State is not an ICSID member.<sup>248</sup>
189. Between 1990 and 2002, Australia concluded 12 BITs containing a dispute settlement clause similar to the one of the Treaty with Indonesia, suggesting that this wording corresponds to one of the model clauses employed by the Australian BIT negotiators. These BITs all follow the same basic model providing the investor with a choice between domestic litigation in the host State and ICSID proceedings, to the exclusion of other international remedies as long as both Contracting States are ICSID members. Most of

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<sup>244</sup> Australia-Hong Kong BIT, Art. 10.

<sup>245</sup> Australia-China BIT, Art. XII(2)(b). Under this provision, a qualifying investor can only directly seek redress in front of an arbitral tribunal constituted in accordance with Annex A of the treaty if the dispute relates to the amount of compensation in cases of expropriation. For all other claims, the disputing parties need to agree on the dispute settlement mechanism. Interestingly, Art. XII(4) indicates that once both Contracting States become ICSID members, a qualifying investor may refer any dispute to ICSID.

<sup>246</sup> Australia-Poland BIT, Art. 13(4) and Australia-Hungary BIT, Art. 12(4). This requirement does not apply to expropriation claims under Article 7 of these treaties, see respectively Australia-Poland BIT, Art. 13(3) and Australia-Hungary BIT, Art. 12(3).

<sup>247</sup> Australia-Argentina BIT, Art. 13(4) ("Each Contracting Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice made by the investor under paragraph 3(a) or (b) of this Article"); Australia-Chile BIT, Art. 11(2)(a)(i) ("en este caso, cada Parte Contractante por este intermedio otorga su consentimiento previo para someter la diferencia al CIADI"); Australia-Turkey BIT, Art. 13(5)(a) ("Where a dispute is referred to the Centre by an investor pursuant to paragraph 2(a) of this Article: (a) the other Party shall, for the purposes of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, be deemed to have given its consent to the submission of the dispute to the Centre").

<sup>248</sup> Australia-Mexico BIT, Art. 13(4).

these BITs also indicate that the requested host State “shall consent in writing” within 30<sup>249</sup> or 45 days.<sup>250</sup>

190. A chronological perusal of these treaties provides some clarity. The first BIT that employs similar language is the Australia-Papua New Guinea BIT concluded in 1990. Interestingly, this BIT contains no reference to a time limit, nor does it specify that the host State’s consent must be in writing.<sup>251</sup> The “shall consent in writing” language with a time limit was first employed in the following two treaties with Poland and Hungary. In these two BITs, as well as in the treaties with the Czech Republic,<sup>252</sup> the time limit was included in the same paragraph as the one providing for ICSID proceedings. All BITs concluded subsequently by Australia and falling within this category provide for the obligation to provide “consent in writing” in a separate paragraph. The fourth BIT falling in this category is the Australia-Indonesia BIT under scrutiny. The following seven BITs concluded until 2002 contain language that is identical to that of the Australia-Indonesia BIT (with some minor variations as to the choice of the default procedures<sup>253</sup> or the time limit).<sup>254</sup> Finally, the Australia-Uruguay BIT, which entered into force on 12 December 2012, is the last treaty containing the wording “shall consent in writing” within a specified time limit. However, this treaty adopts another structure giving an investor access to the alternative arbitration mechanism even where both Contracting States are ICSID members.<sup>255</sup>

191. The last two remaining BITs have particularly caught the attention of the Tribunal. Article 12 of the Australia-Vietnam BIT contains a dispute settlement clause which is similar in several respects to the one of the Australia-Indonesia BIT, but differs in other important respects. The relevant provisions of Article 12 read as follows:

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<sup>249</sup> Australia-Romania BIT, Art. 9(3)(a); Australia-Czech Republic BIT, Art. 11(3)(a); Australia-Laos BIT, Art. 12(3)(a); Australia-Pakistan BIT, Art. 13(3)(a); Australia-Peru BIT, Art. 13(3)(a); Australia-Lithuania BIT, Art. 13(3)(a); Australia-Egypt BIT, Art. 13(3)(a); Australia-Uruguay BIT, Art. 13(3)(a).

<sup>250</sup> Australia-Philippines BIT, Art. 12(3)(a).

<sup>251</sup> Australia-Papua New Guinea BIT, Art. 14(3)(a) (“Where a dispute is referred to the International Centre for the Settlement of Investment Disputes pursuant to sub-paragraph (2)(b) of this Article: (a) each Contracting Party shall consent to the submission of that dispute to the Centre”).

<sup>252</sup> Australia-Czech Republic BIT, Art. 11(3)(a).

<sup>253</sup> The Australia-Romania, Australia-Laos, Australia-Philippines, Australia-Pakistan, Australia-Peru, and Australia-Lithuania BITs provide for an arbitral mechanism specified in the relevant treaty or an annex thereto. Only the Australia-Indonesia BIT provides for UNCITRAL arbitration as the default procedure, while the Australia-Egypt BIT allows a qualifying investor to choose as the default procedure between referring the dispute to the arbitral mechanism specified in Annex B of the treaty or to the Cairo Regional Centre for International Commercial Arbitration.

<sup>254</sup> See reference *supra* notes 249 and 250.

<sup>255</sup> Australia-Uruguay BIT, Art. 13(2).

“(2) If the dispute in question cannot be resolved through consultations and negotiations, either party to the dispute may:

(a) in accordance with the law of the Contracting Party which has admitted the investment, initiate proceedings before that Contracting Party’s competent judicial or administrative bodies;

(b) if both Contracting Parties are at that time party to the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“the Convention”), refer the dispute to the International Centre for the Settlement of Investment Disputes (“the Centre”) for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention;

(c) if both Contracting Parties are not at that time party to the Convention, or one party to the dispute has not consented to referring the dispute to the Centre, refer the dispute to an Arbitral Tribunal constituted in accordance with Annex B of this Agreement, or by agreement, to any other arbitral authority.

(3) Once an action referred to in paragraph (2) of this Article has been taken, neither Contracting Party shall pursue the dispute through diplomatic channels unless:

(a) the relevant judicial or administrative body, the Secretary-General of the Centre, the arbitral authority or tribunal or the conciliation commission, as the case may be, has decided that it has no jurisdiction in relation to the dispute in question; or

(b) the other Contracting Party has failed to abide by or comply with any judgment, award, order or other determination made by the body in question”.<sup>256</sup>

192. The words “or one party to the dispute has not consented to referring the dispute to the Centre” in Article 12(2)(c) show that Australia contemplates refusing to grant consent. Planet’s argument that these words only refer to the foreign investor refusing to give its consent is contradicted by the clear text. Interestingly, this treaty was concluded in 1991 shortly before the Australia-Indonesia BIT, which demonstrates that at that time Australia had a clear understanding of the difference between advance consent and a promise to consent.

193. A similar solution is contemplated in Article 13 of the Australia-Sri Lanka BIT<sup>257</sup> signed on 12 November 2002 and entered into force on 14 March 2007:

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<sup>256</sup> Australia-Vietnam BIT, Art. 12(2)-(3), pp. 135-137 (**Exh. R-111**).

“(2) If the dispute in question cannot be resolved through consultations and negotiations within 90 days of the commencement of such consultations and negotiations, either party to the dispute may:

(a) in accordance with the law of the Party which admitted the investment, initiate proceedings before that Party’s competent judicial or administrative bodies; or

(b) if both Parties are at that time party to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (“the Convention”), refer the dispute to the International Centre for Settlement of Investment Disputes (“the Centre”) for conciliation or arbitration pursuant to Articles 28 or 36 of the Convention; or

(c) if both Parties are not at that time party to the Convention, refer the dispute to an Arbitral Tribunal constituted in accordance with Annex B of this Agreement, or by agreement, to any other arbitral authority.

(3) Where a dispute is referred to the Centre pursuant to paragraph 2(b) of this Article:

(a) where that action is taken by an investor of one Party, the other Party should consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor. Such consent shall not be unreasonably withheld;

(b) if the parties to the dispute cannot agree whether conciliation or arbitration is the more appropriate procedure, the investor affected shall have the right to choose;

[...]

(4) If the Party to the dispute has not consented to submission of the dispute to the Centre within the time specified in paragraph 3(a) of this Article the Party shall be deemed to have consented to refer the dispute to an arbitral tribunal constituted in accordance with Annex B of this Agreement”.<sup>258</sup>

194. Contrary to the Australia-Indonesia BIT, Article 13(3)(a) states that the host State *should* consent to the submission of the dispute to ICSID and that such consent “shall not be unreasonably withheld”. It also makes the default procedure available where consent is

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<sup>257</sup> Indonesia called the attention of the Tribunal to the fact that Australia announced in 2011 that it would no longer conclude investor-State arbitration provisions in its future investment treaties; R-PHB2, n. 53 (**Exh. CLA-111**).

<sup>258</sup> Australia-Sri Lanka BIT, Art. 13(2)-(4) (**Exh. RLA-092**).

withheld. In other words, the treaty expressly envisages that the host State may refuse its consent.

195. These last two treaties show that Australia deliberately entertains the distinction between advance consent and promise to consent. The foregoing review also demonstrates that Australia concluded BITs with unequivocal expressions of advance consent and thus knows how to express such an intent when it wishes to do so. Hence, the Tribunal is of the opinion that a review of Australia's treaty practice supports the conclusion it reached earlier, *i.e.* that the Australia-Indonesia BIT contains a promise to consent.
196. Furthermore, the Tribunal notes that the recent decision on provisional measures in *Tethyan Copper v. Pakistan* is of no assistance here.<sup>259</sup> That arbitration is brought under Article 13(3)(a) of the Australia-Pakistan BIT, which provides that the host State "shall consent in writing to the submission of the dispute to the Centre within thirty days". The tribunal found that it had *prima facie* jurisdiction since both Parties consented to the jurisdiction of ICSID in accordance with Article 25(1).<sup>260</sup> In addition to being a *prima facie* determination, it appears that Pakistan did not object to jurisdiction for purposes of the provisional measures on the grounds of lack of consent,<sup>261</sup> and it is not known whether it provided its consent within the 45 days or whether another expression of consent applies.
197. Finally, Planet's reliance on various National Interest Analyses (NIAs) prepared since 1996 by the Australian Government in conjunction with proposed new bilateral investment treaties is to no avail in this regard. Indeed, the Tribunal is of the opinion that they are of little help in the present context. First, they all post-date the entry into force of the Australia-Indonesia BIT. Second, the NIAs do not purport to opine on the existence of consent or the modalities of providing consent under the relevant BITs, but merely indicate in a section on costs that the Australian Government may be at risk of assuming costs related to an ICSID arbitration.<sup>262</sup> Accordingly, the Tribunal did not rely on these NIAs.

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<sup>259</sup> *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Claimant's Request for Provisional Measures, 13 December 2012 (**Exh. CLA-159**).

<sup>260</sup> *Id.*, ¶ 129.

<sup>261</sup> *Id.*, ¶ 85.

<sup>262</sup> See, for instance, Australian Department of Foreign Affairs and Trade, Agreement between Australia and the Government of the Republic of Peru on the Promotion and Protection of Investments, and Protocol, done at Lima on 7 December 1995 – National Interest Analysis (**Exh. CLA-154**).

198. In light of the foregoing, the Tribunal holds that Article XI of the Australia-Indonesia BIT contains no standing offer to arbitrate Planet's claims before ICSID. Planet is therefore only entitled to resort to ICSID arbitration if Indonesia's consent was given through a further act. This leads the Tribunal to review whether the BKPM approvals can be construed as containing Indonesia's separate consent to ICSID arbitration.

#### 3.4 Do the BKPM Approvals contain Indonesia's consent?

199. The Claimant argued that if the Tribunal were to find that the BIT contains no standing consent to ICSID proceedings, such consent in writing has been provided by Indonesia in the BKPM Approvals of 2005 and 2006. Indonesia 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.

200. Having determined that the BIT requires a separate act of consent, the Tribunal will first address whether the BIT requires that such consent be necessarily provided after the filing of a request of arbitration, as argued by Indonesia, or whether it can also be provided in advance, as submitted by Planet. For Indonesia, Article XI(4)(a) contemplates a two-step procedure, requiring the investor to first file its request for arbitration, and only then could the host State give its consent.

201. Pursuant to Article XI(4)(a), Indonesia agreed to provide its consent in writing within 45 days from receiving the Claimant's request for arbitration. Indonesia's argument that it has discretion to withhold its consent, in particular if the admission requirement of Article III(1) is not fulfilled, is refuted by the wording of Article XI(4)(a). The use of the word "shall" without a stated exception leaves no doubt that Indonesia was obliged to grant its consent. Further, Article XI contains no link to Article III(1) (or any other provision of the Treaty for that matter), nor does Article III(1) refer to Article XI. While Indonesia's objection under Article III(1) may eventually be well-founded, it is not for Indonesia to make that determination at the level of its consent under Article XI(4)(a), but for this Tribunal ruling on its jurisdiction.

202. Furthermore, the wording of Article XI(4)(a) does not exclude the possibility of providing consent in writing prior to the request for arbitration. The Tribunal understands the 45 day time limit of Article XI(4)(a) as precisely a limit indicating the latest time when consent is due. One cannot read into Article XI(4)(a) a prohibition of advance consent or *a fortiori* to refuse jurisdiction in cases where the advance consent of the host State is established. What matters is not when the State has given its consent, but whether the State *did* consent.

203. Having determined that consent in writing provided prior to the filing of the request for arbitration is compatible with Article XI(4)(a), the Tribunal will now examine whether the BKPM Approvals contain an expression of consent to ICSID arbitration. The Parties provided slightly different unofficial translations of Section IX(4) of the 2005 BKPM Approval. The Claimant's version 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>263</sup> (Emphasis added)

204. 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 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>264</sup> (Emphasis added)

205. 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>263</sup> **Exh. P-3**. The Claimant also relied on two other exhibits containing a translation of this clause, see **Exh. C-6**, and **Exh. C-17** in the parallel case. The translations are identical in all three versions.

<sup>264</sup> **Exh. R-003**.



206. In the course of the proceedings, the Claimant argued that the word *perusahaan* is correctly translated as “enterprise”, not as “company”. The Parties were also in disagreement on the meaning of the word *bersedia*, the Claimant seeing in it an expression of consent, the Respondent merely a disposition to envisage following ICSID procedures.<sup>265</sup>

207. The 2005 BKPM Approval was granted to the founders of PT ICD, *i.e.* to Mr. Rinaldi, an Indonesian national, and Profit Point Group Ltd, a company registered in the British Virgin Islands.<sup>266</sup> Following the acquisition of PT ICD by Churchill and Planet on 24 April 2006, the BKPM issued on 8 May 2006 a new approval incorporating the content of the 2005 approval.<sup>267</sup>

208. Section IX(4) of the 2005 BKPM approval must be considered to contain an expression of consent to ICSID arbitration. The disagreement between the Parties on the correct translation of the word *bersedia* is irrelevant, since even the formulation “is [ready/prepared/willing] to follow settlement according to the provisions” of ICSID expresses consent to submit disputes to ICSID. During cross-examination, the Claimant’s expert convincingly explained that the expression *bersedia mengikuti* is an act of consent:

“DR. MAKARIM: After ‘bersedia’ comes the word ‘mengikuti’. ‘Mengikuti’, in my mind, refers to something that exists, that is already there, which is the dispute settlement between the convention – the provisions of the convention of dispute settlement

Q. Thank you. My understanding is that ‘mengikuti’ – and I don’t know how to speak Indonesian, but my understanding is it is properly translated as ‘to follow’.

DR. MAKARIM: Yes.

Q. That’s it.

DR. MAKARIM: I know. But to follow means – what do you follow? You don’t follow at random. It is the convention rules”.<sup>268</sup>

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<sup>265</sup> Tr. 14052013, 137:16-138:2.

<sup>266</sup> **Exh. C-6**, point I.

<sup>267</sup> **Exh. C-7** (“This Approval Letter is part and inseparable of Foreign Investment Approval Letter No. 1304/IIPMA/2005 dated 23 November 2005”).

<sup>268</sup> Tr. 13502013, 80:6-19. The translation of the word *mengikuti* as “to follow” is confirmed when consulting English-Indonesian dictionaries. See J. Echols, H. Shadily, *Kamus Indonesia-Inggris: An Indonesian-English Dictionary*, 3<sup>rd</sup> edition (Jakarta, Penerbit PT Gramedia Pustaka Utama, 1989), p. 219 (**Exh. CLA-141**). *Mengikuti* is translated as follows: “1 follow, accompany. *Saya ~ anak saya*

209. Indonesia's argument that the formulation *bersedia mengikuti* merely indicates the BKPM's willingness or preparedness or readiness to bring a hypothetical dispute to the attention of the President of Indonesia and ask him to grant Indonesia's consent to ICSID proceedings does not reflect the content of Section IX(4). There is no mention of the BKPM or the Presidency in Section IX(4), but of the Government of Indonesia which expresses its willingness "to follow settlement according to the provisions" of the ICSID Convention. If Indonesia is ready (or prepared, or willing) to settle the dispute according to the provisions of the ICSID Convention, then it can only mean that Indonesia consented to ICSID jurisdiction.
210. Having determined that Section IX(4) of the 2005 BKPM Approval contains Indonesia's expression of consent to ICSID arbitration, the Tribunal must now determine whether this consent extends only to PT ICD, as argued by Indonesia, or also to its shareholders, as advanced by Planet.
211. The Parties' divergence on this issue hinges on the translation of the word *perusahaan*. While both Parties filed unofficial translations of the 2005 BKPM Approval translating *perusahaan* as "company",<sup>269</sup> the Claimant argued during the hearing and in its later submissions that the word *perusahaan* must be translated as "enterprise".<sup>270</sup> To substantiate its position, the Claimant relied on a dictionary definition of *perusahaan*, which lists "business, enterprise, undertaking, concern"<sup>271</sup> and on *Amco v. Indonesia*. The tribunal there relied on the same definition as the Claimant here and stressed that the term "company" is not listed as a possible translation of *perusahaan*.<sup>272</sup> The Claimant also highlighted that the 2005 BKPM Approval utilizes both terms *perusahaan* and *perseroan*, the latter being correctly translated as "company". On this basis, it argued that the term *perseroan* would have been used if only PT ICD were to benefit from Section IX(4).<sup>273</sup> As a

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I accompanied my son. 2 take, follow a course. *la ~ beberapa kuliah ttg fisika* He attended several lectures on physics. 3 follow a trail. 4 obey. ~ *perintah ayah* follow father's instructions. 5 keep up with (news, etc.). 6 be part of the audience of s.t. –*upacara* participate in a ceremony". Indonesia did not provide any dictionary translation of the word *mengikuti* rebutting the dictionary translation provided by the Claimant.

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**Exh. C-6; Exh. R-003.**

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Tr. 14052013, 65:23-66:14; C-PHB1, ¶¶ 20-23.

271

**Exh. CLA-141**, p. 607.

272

*Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on Jurisdiction, 25 September 1983, ¶ 20 ("*Amco*") (**Exh. CLA-38**).

273

C-PHB1, ¶ 22 ("Sections of the 2005 BKPM Approval that do concern only PT ICD *qua* company, such as those that refer to corporate capital, issued capital, and paid-up capital employ the term *perseroan*", referring to sections VII(3) and (4) of the approval).

result, the Claimant contended that Section IX(4) extends to PT ICD's shareholders, a position rejected by the Respondent.<sup>274</sup>

212. Several elements lead the Tribunal to conclude that Section IX(4) extends to PT ICD's shareholders. First, the dictionary on record does not translate *perusahaan* as company or corporation, but gives it the broader meaning of business or enterprise.<sup>275</sup> It is also noteworthy that PT ICD is a *perseroan terbatas*, that is a limited liability company, further underlining that the word *perusahaan* may have a broader meaning. Second, the 2005 BKPM Approval employs the word *perusahaan* thirteen times in various contexts,<sup>276</sup> while the word *perseroan* appears twice, each time in the context of PT ICD's corporate capital.<sup>277</sup> This suggests that the word *perseroan* is employed in matters relating exclusively to the corporate vehicle, such as the composition of the corporate capital, and that the word *perusahaan* designates the enterprise including its shareholders. Third, a review of the 1967 Foreign Investment Law also indicates that the word *perseroan* is employed when the corporation is targeted exclusively<sup>278</sup> and that *perusahaan* is broad enough to encompass the shareholders. For instance, Article 1 refers to the direct foreign capital investment to be used to run the *perusahaan*, whereby "the owner of the capital directly bears the risk of the investment".<sup>279</sup> While the word *perusahaan* is used in various contexts, the word *perseroan* only appears in the context of corporate tax exemptions, again suggesting that *perseroan* is employed for matters limited to the corporation. Fourth, the Tribunal finds further support for its understanding in the 2006 BKPM Approval, which allowed PT ICD to become wholly owned by foreign investors. While the word *perseroan* is again used in connection with PT ICD's corporate capital, the word *perusahaan* is employed in the context of the obligation to sell shares of PT ICD to Indonesian nationals within 15 years from the start of commercial operations.<sup>280</sup> It is clear that this requirement affects primarily PT ICD's shareholders whose rights of ownership are directly at stake.

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<sup>274</sup> R-PHB2, ¶¶ 10-18.

<sup>275</sup> **Exh. CLA-141**, p. 607. The Respondent only provided the Tribunal with a dictionary definition in Indonesian language of the term *perusahaan*, thus not allowing the Tribunal to elucidate the proper translation of that term in English (see **Exh. RLA-117**).

<sup>276</sup> See, e.g., Sections II(1), IV(1) and (3), VI, VII(5), IX(1)-(5).

<sup>277</sup> See Section VII (3) and (4).

<sup>278</sup> Law No. 1 on Foreign Investment (1967), Art. 15(a)(1) and (3), and 15(b)(1) (**Exh. CLA-2; Exh. RLA-006**).

<sup>279</sup> Law No. 1 on Foreign Investment (1967), Art. 1 (**Exh. CLA-2; Exh. RLA-006**).

<sup>280</sup> **Exh. C-7**, point d.

213. Beyond the words, what is further determinative is that PT ICD is a mere instrumentality of foreign investors, who have no choice but to structure their investment through a local vehicle.<sup>281</sup> The whole purpose of the 2005 BKPM Approval is precisely to approve a foreign investment. In this context, and relying on *Amco Asia*,<sup>282</sup> it makes sense that Section IX(4) was meant to protect the foreign investor, constrained to act through its instrumentality. Accordingly, the Tribunal finds that Section IX(4) of the 2005 BKPM Approval extends to the parent companies of PT ICD. Since the 2006 BKPM Approval expressly incorporates the terms of the 2005 BKPM Approval, the Tribunal is of the view that Section IX(4) extends to Planet.

214. Having found that the BKPM Approvals express consent which is applicable to Planet, the Tribunal must now deal with Indonesia's last argument according to which the BKPM lacks authority to grant consent to ICSID proceedings, since this prerogative rests with the Presidency. Indonesia's contention is based on Law No. 5 of 1968 on the approval to the ICSID Convention, which provides that "[t]he Government has the authority to give consent" to ICSID<sup>283</sup> and on Article 4(1) of Indonesia's Constitution pursuant to which the President holds the "power of governance".<sup>284</sup>

215. In the Tribunal's view, Indonesia's argumentation is founded on an excessively narrow reading of the provisions just referred to. Indeed, the Government of Indonesia cannot be reduced to the Presidency and several texts demonstrate that the BKPM is part of the Government. According to Article 1 of Presidential Decree No. 33 of 1981, the BKPM is a "Non Departmental Government Institution under and accountable directly to the President".<sup>285</sup> Article 1(2) of Presidential Decree No. 29 of 2004 further states that the BKPM is a "Government institution which handles capital investment activities within the framework of Foreign Capital Investment and Domestic Capital Investment".<sup>286</sup> This decree specifies that BKPM's activities include the implementation of capital investment policies and development planning, promotion and cooperation, approvals, permits and facilities, control, and management of information systems. BKPM being a government body vested

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<sup>281</sup> See Art. 3(1) of Law No. 1 on Foreign Investment (1967) (**Exh. CLA-2; Exh. RLA-006**).

<sup>282</sup> *Amco*, ¶ 24.

<sup>283</sup> **Exh. RLA-064**, Art. 2.

<sup>284</sup> **Exh. RLA-001** (revised version filed together with R-PHB1).

<sup>285</sup> **Exh. C-366**.

<sup>286</sup> **Exh. C-361**.

with authority to handle foreign investments, there can be no doubt that it has the power to grant consent to ICSID arbitration under Law No.5 of 1968.

216. This understanding is reinforced by the fact that the 2005 BKPM Approval was copied to the Presidency along with numerous ministries and agencies. Had the President 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 grant consent to ICSID proceedings.

217. To conclude, the Tribunal finds that Section IX(4) of the 2005 BKPM Approval contains an expression of consent to ICSID proceedings and that the consent extends to PT ICD's shareholders, *i.e.* in the present case Planet. Since Section IX(4) is contained in an investment approval, it fulfills the requirement of consent *in writing* under Article XI(4)(a) of the BIT and Article 25(1) of the ICSID Convention.

#### **4. Conclusion**

218. In light of the foregoing analysis, the Tribunal holds that Article XI of the Australia-Indonesia BIT contains no standing offer to arbitrate before ICSID, but that the BKPM Approvals fulfill the requirement of consent in writing under Article XI of the BIT and Article 25(1) of the ICSID Convention. Hence, it must dismiss Indonesia's first jurisdictional objection.

219. The Tribunal will now assess whether Indonesia's consent extends to Planet's investment in light of Indonesia's second objection under Article III(1)(a) of the BIT.

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

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

220. 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 III(1) of the Australia-Indonesia BIT

221. Article III(1) of the Australia-Indonesia BIT provides that the Treaty shall only apply to those investments that have been granted admission in accordance with the 1967 Foreign Investment Law.<sup>287</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>288</sup> In this case, Indonesia contends that Planet must be denied protection because it has not been granted admission pursuant to the 1967 law or any law amending or replacing it.

1.2 The stringent threshold requirement of the "admitted investments" clause

222. 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>289</sup> Its primary effect is to condition "the extension of treaty protections on prior approval of specified investments".<sup>290</sup>

223. Relying on *Mytilineos v. Serbia and Montenegro*, Indonesia argues that Article III(1) sets a higher standard than more conventional legality clauses.<sup>291</sup> Indonesia therefore invites the Tribunal to follow other arbitral tribunals and to dismiss Planet's case *ab initio*.<sup>292</sup>

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

224. 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

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<sup>287</sup>

**Exh. R-001.**

<sup>288</sup> RMOJ, ¶ 218.

<sup>289</sup> Rejoinder, ¶ 68.

<sup>290</sup> RMOJ, ¶ 218.

<sup>291</sup> RMOJ, ¶ 218.

<sup>292</sup> RMOJ, ¶ 220.

admission in accordance with the 1967 Foreign Investment Law and that the BKPM approved the Claimant's acquisition of PT ICD in 2006.<sup>293</sup>

225. 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>294</sup> In particular, the Respondent argues that (i) by entering into a series of agreements,<sup>295</sup> especially by concluding the Deed of Beneficial Control and Ownership,<sup>296</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>297</sup>
226. 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>298</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.
227. Furthermore, the Respondent expanded during the hearing on what it called "indications of forgery" in its previous submissions.<sup>299</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>300</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?"

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<sup>293</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>294</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>295</sup> RMOJ, ¶ 237.

<sup>296</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>297</sup> RMOJ, ¶¶ 56-58.

<sup>298</sup> RMOJ, ¶ 241.

<sup>299</sup> RMOJ, ¶¶ 81-102.

<sup>300</sup> Tr. 13052013, 212:14-233:19.

[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>301</sup>

228. With respect to the Respondent's second argument related to mining activities, the Respondent states that Planet, through 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>302</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 "Churchill [and therefore also Planet] 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>303</sup>

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

229. 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>304</sup> However, PT ICD's business field was described in the 2005 BKPM Approval as "General Mining Support Services".<sup>305</sup> Similarly, PT ICD's Articles of Association define the company's "objective and purpose" as "business of geological and mining services".<sup>306</sup>

230. In support of this argument, the Respondent confronted Dr. Makarim in cross-examination with one of his articles published in the Jakarta Post.<sup>307</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

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<sup>301</sup> Tr. 13052013, 222:12-17.

<sup>302</sup> **Exh. R-013** and **Exh. R-014**.

<sup>303</sup> RMOJ, ¶ 58.

<sup>304</sup> RMOJ, ¶ 222.

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

<sup>307</sup> **Exh. R-101**.



corporate authorisation and therefore susceptible to nullification actions”.<sup>308</sup>

231. 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 of objective of undertaking mining supporting services”.<sup>309</sup>

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

232. 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.

233. 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>310</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>311</sup>

234. 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>312</sup>

235. Under Article 1(1) of the 2004 Decree of the Minister of Energy and Mineral Resources No. 1614,<sup>313</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

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<sup>308</sup> Tr. 13052013, 36:11-18.

<sup>309</sup> Tr. 13052013, 186:17-24.

<sup>310</sup> RMOJ, ¶ 228.

<sup>311</sup> RMOJ, ¶¶ 230, 238.

<sup>312</sup> Law No. 1 on Foreign Investment (1967), Art. 8(1) (**Exh. CLA-2; Exh. RLA-006**).

<sup>313</sup> RMOJ, ¶¶ 32-33; **Exh. RLA-005**, Art. 1(1).

framework of Foreign Investment to conduct extractive materials mining undertaking, excluding petroleum, natural gas, geothermal, radio active and coal”.

236. According to Article 1(2) of Decree No. 1614, a coal cooperation agreement is an “agreement between the Government of the Republic of Indonesia with Indonesian legal entity company in the framework of Foreign Investment to conduct extractive material coal mining undertaking”.<sup>314</sup>

237. 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>315</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>316</sup>

238. In sum, the BKPM Approvals did not allow PT ICD or Planet to engage in mining activities *per se*. By doing so Planet failed to observe the limits set forth in the BKPM Approvals.<sup>317</sup>

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

239. 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>318</sup>

240. Indonesia further submits that Article 33 of the 2007 Investment Law, promulgated on 26 April 2007<sup>319</sup> and replacing the 1967 Foreign Investment Law<sup>320</sup> prohibits beneficial

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<sup>314</sup> *Id.*, Art. 1(2).

<sup>315</sup> *Id.*, Art. 24.

<sup>316</sup> *Id.*, Art. 25.

<sup>317</sup> RMOJ, ¶¶ 55-58, 63, 226.

<sup>318</sup> RMOJ, ¶ 229.

<sup>319</sup> Law No. 25 on Investment (2007) (**Exh. RLA-009**).

<sup>320</sup> RMOJ, ¶ 41. Law No. 1 on Foreign Capital Investment (1967) (**Exh. RLA-006**).

ownership by declaring that ownership and benefits associated with it are indivisible.<sup>321</sup> Article 33(1) stipulates that “[d]omestic 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 such agreement null and void by operation of law.<sup>322</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.

241. 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>323</sup>

242. Indonesia claims that Churchill and Planet, through PT ICD, have 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 and Planet. Specifically, it makes the following assertions:<sup>324</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>325</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>326</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>321</sup> RMOJ, ¶ 236.

<sup>322</sup> RMOJ, ¶ 234.

<sup>323</sup> RMOJ, ¶ 236; Tr. 13052013, 38:25-40:3. For the Dr. Makarim’s article “*The Risk of Convenient Alternatives*”, The Jakarta Post, 1 August 2012 (**Exh. R-101**).

<sup>324</sup> RMOJ, ¶ 237.

<sup>325</sup> Deed of Beneficial Control and Ownership dated 22 May 2007, Art. 4.1 (**Exh. P-17**).

<sup>326</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>327</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>328</sup>

243. Indonesia believes that Planet 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 “[i]f 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>329</sup>

244. 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>330</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>331</sup>

245. 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%. Planet accordingly had an indirect interest in PT TCUP as a shareholder of PT ICD.

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<sup>327</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>328</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>329</sup> RMOJ, ¶ 237, n. 334.

<sup>330</sup> RMOJ, ¶ 238.

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

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

## 2. The Claimant's position

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

247. 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>332</sup>

2.2 The meaning of the "admission" requirement

248. The Claimant submits that, in ordinary usage and in light of the context in the Australia-Indonesia BIT, the term "admitted" means "allowed" or "approved for entry".<sup>333</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>334</sup>

249. To support its interpretation of the term "admitted", the Claimant relies on similarly worded provisions in the Australia-New Zealand-ASEAN FTA<sup>335</sup> and the ASEAN Comprehensive Investment Agreement.<sup>336</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>337</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>338</sup>

250. 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 further 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

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<sup>332</sup> Reply, ¶ 166. See also: Tr. 13052013, 9:7-13.

<sup>333</sup> Reply, ¶ 167. See also: Tr. 14052013, 76:22-24.

<sup>334</sup> Reply, ¶ 168.

<sup>335</sup> Reply, ¶¶ 169-171.

<sup>336</sup> Reply, ¶ 172.

<sup>337</sup> Reply, ¶ 174. *Desert Line*, supra note 126, ¶¶ 92, 98 (**Exh. RLA-061**).

<sup>338</sup> Reply, ¶¶ 177-178.

investments subsequently, this would amount to a compliance with law requirement, which has been explicitly distinguished by authorities and also, of course, by a plain meaning of the term”.<sup>339</sup>

251. Therefore, relying on *Hamester v. Ghana*, the Claimant insisted on the distinction between “legality a[t] the time of the initiation of the investment” and “legality during the performance of the investment”,<sup>340</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

252. 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. In support, the Claimant recalls that under both the 1967 Foreign Investment Law<sup>341</sup> and the 2007 Investment Law which replaced it,<sup>342</sup> the BKPM is the agency with authority to grant admission to foreign investors in Indonesia.<sup>343</sup>

253. 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>344</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>345</sup>

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

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<sup>339</sup> Tr. 14052013, 85:1-10. See also: Tr. 14052013, 82:6-11.

<sup>340</sup> Tr. 14052013, 80:21-23.

<sup>341</sup> Law No. 1 on Foreign Investment (1967) (**Exh. CLA-2; Exh. RLA-006**).

<sup>342</sup> Law No. 25 on Investment (2007) (**Exh. RLA-009; Exh. CLA-4**).

<sup>343</sup> Reply, ¶ 181; Makarim ER2, p. 5.

<sup>344</sup> Reply, ¶ 182; Makarim ER2, p. 12.

<sup>345</sup> Reply, ¶ 182; Makarim ER2, p. 7.

- 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>346</sup>

255. 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>347</sup>

256. 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.

257. 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>348</sup> that PT ICD's mining license only covered mining services in a limited sense;<sup>349</sup> that Churchill or Planet engaged in mining activity without permission;<sup>350</sup> and that the contractual arrangements with the Ridlatama companies violated Article 33 of the 2007 Investment Law.<sup>351</sup>

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

### 2.4.1 The Australia-Indonesia BIT contains no legality requirement

258. The Claimant stresses that Indonesia does not contest that the Australia-Indonesia BIT contains no express legality requirement.<sup>352</sup> In the absence of such requirement, the Claimant puts forward that Indonesia "cannot claim plausibly that any illegality in the

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<sup>346</sup> Reply, ¶ 183.

<sup>347</sup> Reply, ¶ 184.

<sup>348</sup> Reply, ¶ 188.

<sup>349</sup> Reply, ¶ 190.

<sup>350</sup> Reply, ¶ 189.

<sup>351</sup> Reply, ¶ 191.

<sup>352</sup> Reply, ¶ 197. Reference made to RMOJ, ¶ 248.

Claimant[']s investment, other than lack of proper admission, would deprive this Tribunal of jurisdiction".<sup>353</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>354</sup>

#### 2.4.2 Planet never performed mining *per se*

259. 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>355</sup>

260. 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>356</sup> At the hearing, it recalled that "the licenses were revoked when only 20 per cent 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>357</sup>

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

261. 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>358</sup>

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<sup>353</sup> Reply, ¶ 198.

<sup>354</sup> *Ibid.*

<sup>355</sup> Tr. 14052013, 119:21-120:2.

<sup>356</sup> Reply, ¶ 189.

<sup>357</sup> Tr. 14052013, 120:11-16.

<sup>358</sup> Tr. 14052013, 104:18-105:4.



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

262. 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>359</sup> The Tribunal should not refuse to afford Planet 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

263. Having determined that Indonesia's expression of consent in the BKPM Approvals satisfies the requirements of Article XI(4)(a) of the Treaty, 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 Planet's investment is covered by the Treaty.

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

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

265. Article III(1)(a) of the Australia-Indonesia BIT reads as follows:

"1. This Agreement shall apply to:

(a) investments of investors of Australia in the territory of the Republic of Indonesia which have been granted admission in accordance with the Law No. 1 of 1967 concerning Foreign Investment or with any law amending or replacing it".<sup>360</sup>

266. It is common ground that Article III(1) limits the application of the BIT to investments that have been granted admission in accordance with the 1967 Foreign Investment Law (or any successive statute). By contrast, the Parties are in disagreement on the temporal scope of

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<sup>359</sup> Tr. 14052013, 77:20-25.

<sup>360</sup> **Exh. CLA-19.**

application of Article III(1)(a), *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.

267. In accordance with the rules of treaty interpretation, the Tribunal will start by ascertaining the ordinary meaning of the terms of Article III(1)(a). This provision requires an investment to “have been granted admission” by Indonesia under the 1967 Foreign Investment Law. According to the Oxford Dictionary of English, the verb “to admit” means “to allow” or “to accept”.<sup>361</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>362</sup>
268. 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 III(1) is a one-time occurrence, a gateway through which all Australian investors must pass once.
269. The context confirms this understanding. Article III is entitled “Scope of Agreement”, implying that investments that do not meet the requirements under Article III will not find protection under the Australia-Indonesia Treaty, even if the underlying operation qualifies as an investment under Article I(1)(a). 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>363</sup>
270. 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 III(1)(a) 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.

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<sup>361</sup> Oxford Dictionary of English (2010), p. 22 (**Exh. CLA-113**).

<sup>362</sup> *Ibid.*

<sup>363</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 & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 127 (**Exh. RLA-058**).

271. 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>364</sup>
272. 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>365</sup> The sole arbitrator found that this requirement was not satisfied through a general approval of the business activity, since the specific "project" needed approval.<sup>366</sup> In the view of the Tribunal, *Gruslin* must be distinguished, since the thrust of Indonesia's argument is that Planet violated Indonesian laws after the approval of its investment, not in the making of the investment.
273. 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>367</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>368</sup> The investor failed to do so and, hence, jurisdiction was denied.<sup>369</sup>
274. 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 III(1)(a) 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.

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<sup>364</sup> *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and the Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, ¶¶ 140, 146 (**Exh. RLA-071**).

<sup>365</sup> *Philippe Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award, 28 November 2000 ("*Gruslin*"), ¶ 9.2 (**Exh. RLA-062**).

<sup>366</sup> *Id.*, ¶ 25.5.

<sup>367</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>368</sup> *Id.*, ¶ 62 (**Exh. RLA-062**).

<sup>369</sup> *Id.*, ¶ 63.

### 3.2 The Indonesian Foreign Investment Law

275. Foreign investment in Indonesia is governed by the 1967 Foreign Investment Law.<sup>370</sup> This law was amended in 1970 in respect of matters of no relevance here,<sup>371</sup> and then replaced on 26 April 2007 by the Investment Law No. 25 (“2007 Investment Law”).<sup>372</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>373</sup>

276. It is common ground that Planet 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>374</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.

277. Article 1 of the 1967 Foreign Investment Law provides that it applies to “direct foreign capital investment” made in Indonesia.<sup>375</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>376</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.

278. 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 revailing [sic] regulations”.<sup>377</sup>

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<sup>370</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>371</sup> **Exh. CLA-3**.

<sup>372</sup> Law No. 25 on Investment (2007) (**Exh. RLA-009; Exh. CLA-4**).

<sup>373</sup> RMOJ, ¶ 47.

<sup>374</sup> RMOJ, ¶¶ 50, 223.

<sup>375</sup> Law No. 1 on Foreign Investment (1967), Art. 1 (**Exh. CLA-2; Exh. RLA-006**).

<sup>376</sup> *Id.*, Art. 2(a)-(c).

<sup>377</sup> Law No. 1 on Foreign Investment (1967), Art. 8(1) (**Exh. CLA-2**). See also: **Exh. RLA-006**, Art. 8(1).

279. 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>378</sup>

280. 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 this 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>379</sup>

281. 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 III(1)(a) of the Australia-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 III(1)(a) of the Australia-Indonesia BIT.<sup>380</sup>

282. In this respect, the Tribunal notes that, according to the Respondent, the BKPM was only created in 1973.<sup>381</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 Indonesia’s President in formulating investment policies, completing investment approvals and evaluating their implementation, and issuing business licenses.<sup>382</sup>

283. In 2004, a so-called “One-Roof Service System” was established by Presidential Decree No. 29.<sup>383</sup> According to that decree, the BKPM had delegated authority from the relevant

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<sup>378</sup> Law No. 1 on Foreign Investment (1967), Art. 28(1) (**Exh. CLA-2**).

<sup>379</sup> Law No. 1 on Foreign Investment (1967), Elucidation Article by Article, Art. 28 (**Exh. CLA-2**).

<sup>380</sup> RMOJ, ¶ 42; Reply, ¶ 181.

<sup>381</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.

<sup>382</sup> Presidential Decree No. 33 of 1981 Regarding the Capital Investment Coordinating Board, Art. 2 and 3(I) (**Exh. RLA-099; Exh. CLA-366**).

<sup>383</sup> Presidential Decree No. 29 of 2004 on 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

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>384</sup>

284. Article 4 of 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>385</sup>

285. In the field of mining, the Ministry of Mining had delegated its authority to the BKPM in 1978 already.<sup>386</sup> As a result of this delegation and of the powers vested in the BKPM under the Decrees of 1981 and 2004, when Planet applied for its investment approval, the BKPM was the authority competent to grant that approval.

286. Consequently, the Tribunal must now determine whether Planet obtained the investment approval from the BKPM in conformity with Article III(1)(a) of the Australia-Indonesia BIT, thus enabling it to benefit from protection under the Treaty.

### 3.3 The BKPM Approvals

287. It is undisputed that, pursuant to Article 3 of the 1967 Foreign Investment Law, Planet could only invest in Indonesia through a local vehicle incorporated and domiciled in Indonesia.<sup>387</sup> It is equally undisputed that foreign investors seeking to invest in the mining

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implementation permits carried out by one Government institution charged with responsibilities in the field of capital investment”.

<sup>384</sup> *Id.*, Art. 3.

<sup>385</sup> *Id.*, Art. 4.

<sup>386</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**).

<sup>387</sup> RMOJ, ¶ 42; Reply, ¶ 11.

sector can only do so through a foreign direct investment company, a so-called *Penanaman Modal Asing* (“PMA”).

288. Planet invested in Indonesia by acquiring a 5% 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>388</sup> Profit Point Group Ltd owned 95% of the shares and Mr. Andreas Rinaldi the remaining 5%.
289. 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>389</sup> The BKPM approved the incorporation of PT ICD on 23 November 2005 (the “2005 BKPM Approval”).<sup>390</sup>
290. 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>391</sup> 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, and the initial capital contribution of USD 250,000.<sup>392</sup>
291. On 24 April 2006, the owners of PT ICD sold their shares to Churchill (95%) and Planet (5%).<sup>393</sup> The change in shareholders was approved by the BKPM on 8 May 2006 (the “2006 BKPM Approval”),<sup>394</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.

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<sup>388</sup> RMOJ, ¶ 48.

<sup>389</sup> *Ibid.*

<sup>390</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>391</sup> *Ibid.*

<sup>392</sup> *Ibid.*

<sup>393</sup> Shareholders Resolution Deed No. 17 dated 24 April 2006 (**Exh. R-005**).

<sup>394</sup> RMOJ, ¶¶ 50, 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**).

292. 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 Planet obtained the necessary approval when making its investment in May 2006, thus fulfilling the requirement set in Article III(1)(a) of the Australia-Indonesia BIT.

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

294. 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

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

“order [Planet] 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>395</sup>

296. 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 [Planet] 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>396</sup>

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

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<sup>395</sup> RMOJ, ¶ 257; Rejoinder, ¶ 136.

<sup>396</sup> Reply, ¶ 200, point C.



## **VII. DECISION**

298. 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.

[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