

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

PROCEDURAL ORDER NO. 10

Document inspection

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

Secretary of the Tribunal

Mr. Paul-Jean Le Cannu

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Table of Contents

| | | |
|------|--|---|
| I. | The Respondent’s request for document inspection | 1 |
| II. | The Claimants’ request for document inspection | 2 |
| III. | Analysis..... | 3 |
| | 1. Legal Framework | 3 |
| | 2. The Respondent’s request for inspection | 4 |
| | 3. The Claimants’ request for inspection..... | 5 |
| IV. | Logistics of the Inspection | 5 |
| V. | Decision | 6 |

I. The Respondent's request for document inspection

1. On 16 May 2014, Indonesia requested that the Tribunal order the Claimants to present for inspection the originals of 31 documents (the "Respondent's Request", *see also* Annex 1 to the Request entitled "List of disputed documents"). Indonesia explained that the Claimants have relied on the disputed documents to argue that they have a protected right "to survey and explore the land in the Regency of East Kutai". Relying on a forensic expert report of Mr. Epstein dated 9 May 2014 (the "Epstein Report"),¹ the Respondent argued that there is "substantial evidence indicating that the disputed documents are not authentic", including irregularities regarding the signatures of the Regent of East Kutai and the format of the disputed documents.² For the Respondent, an inspection of the disputed documents is thus necessary to determine "the method of affixing the signature" on these documents.
2. In their letter of 28 May 2014, the Claimants objected to the Respondent's request for inspection of the documents on the following grounds. First, the Respondent has failed to meet the burden of showing, even *prima facie*, that the requested documents are "irregular or falsified in any way". For instance, the Respondent has offered no evidence that the "use of a signature stamp or other method of replicating a signature by the Regent" was unusual or otherwise irregular nor did it file a witness statement of the Regent to that effect. As a result, the inspection of the documents is "a costly and fruitless endeavour". Second, the list of disputed documents (see Annex 1 to the Respondent's request) consists of 31 documents, 11 more than the documents identified by Mr. Epstein, without offering any expert evidence or explanation as to the necessity to examine these 11 documents "beyond a vague reference to the 'formatting' of those documents". Third, the Respondent's "sweeping statement" that it does not have any original of the requested documents must be rejected and the Tribunal should direct the Respondent to produce official letters certifying that its agencies and instrumentalities possess no originals.

¹ Forensic Handwriting Examination Report of Mr. Gideon Epstein dated 9 May 2014.

² Referring also to: Respondent's Memorial on Objections to Jurisdiction dated 8 April 2013, ¶¶ 72, 81-82, 85, 96-102; Tr. 13052013, 212:14-221:24, 224:13-15, 225:24-232:13; and the BKP Audit Report dated 23 February 2009 (Exh. R-032).

3. For these reasons, the Claimants asked the Tribunal to deny the Respondent's request absent additional evidence, specifically (i) written testimony of the Regent of East Kutai regarding the disputed signature on the 20 documents listed in the Epstein Report, (ii) appropriate justification for the inspection of the 11 other documents, (iii) certifications of the Respondent's agencies and instrumentalities justifying their alleged inability to locate original documents, and (iv) a list of all other documents in the record (if any) whose validity the Respondent intends to question in these proceedings.
4. Nonetheless, the Claimants submitted that, if the Tribunal were to find it necessary to undertake an inspection of the disputed documents, they would "stand ready to locate and produce such original documents as may be in their possession".
5. In a letter of 6 June 2014, the Respondent rejected the pre-conditions to the inspection of the originals set by the Claimants. Furthermore, it explained that out of the 31 documents listed in Annex 1 to the Respondent's Request, all but 4 had been submitted by the Claimants in support of their claim. These 4 documents had been relied upon by Churchill Mining Plc in its dispute notification letter to the President of Indonesia dated 22 November 2011.³

II. The Claimants' request for document inspection

6. In a letter of 20 June 2014, the Claimants requested that the Tribunal order the Respondent to present for inspection the originals of (i) all revocation decrees issued by the Regent in connection with the Claimants' mining licenses, and (ii) the Nusantara group's license extension applications, in case the Tribunal were minded to entertain the Respondent's request for document inspection at this stage of the proceedings rather than at the hearing on the merits. The Claimants argued that the revocation decrees reveal certain unresolved discrepancies regarding the reference number, signatures and location of the Regent of East Kutai's seal.
7. In its 9 July 2014 letter, the Respondent objected to the Claimants' request for an inspection of documents for the following three reasons. First, the Claimants' request is

³ See. Exh. C-310, p. 5.

a “tit for tat” request asserted conditionally, thus indicating that the Claimants have no other need for the originals. Second, the timing of the Claimants’ request shows that the request is used as a delay tactic. Third, the Claimants’ request fails on its own merits and is unjustified. Hence, the Respondent submits that the request is “frivolous, belated, ill-conceived and baseless”.

III. Analysis

1. Legal Framework

8. The present arbitration is governed by (i) the ICSID Convention, (ii) the 2006 ICSID Arbitration Rules, and (iii) the Procedural Rules as set out in Procedural Order No. 1 (hereinafter “PO1”), the latter extending to ICSID Case No. ARB/12/40 as recorded in Procedural Order No. 4. While containing a provision on document production, PO1 contains no specific provision on document inspection.
9. As a general matter, it is undisputed that the Tribunal has broad procedural powers including in respect of the taking of evidence under Article 44 of the ICSID Convention and Rules 34 ff of the ICSID Arbitration Rules.
10. In addition, as provided in paragraph 15.3 of PO1, this Tribunal will seek guidance, when appropriate, from Articles 3 and 9 of the 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration (hereinafter “IBA Rules”).⁴ The Tribunal considers the IBA Rules to reflect the current general practice in international arbitration, in particular, for the present purposes, Article 3.12 (a) of the IBA Rules, which reads in relevant part as follows:

“12. With respect to the form of submission or production of Documents:

(a) copies of Documents shall conform to the originals and, at the request of the Arbitral Tribunal, any original shall be presented for inspection”.

⁴ Procedural Order No. 1, ¶ 15.3.

11. The possibility for an arbitral tribunal to order the inspection of originals is further contemplated in Article 7 of the IBA Rules, which provides in relevant part that:

“the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any [...] Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection”.

12. Accordingly – and this is not disputed – the Tribunal has the power to order the inspection of originals. However, the Tribunal is of the view that the exercise of this discretion should be informed by the general standard for production of documents set out in Article 3 of the IBA Rules, namely that inspection of an original document is only warranted if (i) the original is identified with sufficient precision, (ii) the inspection of the original is relevant and material to the outcome of the case, (iii) it is likely that the original exists and is within the possession, control or custody of the other Party, and (iv) there is no legitimate countervailing interest militating against the inspection of the original.

2. The Respondent’s request for inspection

13. The Tribunal is of the view that the Respondent’s request meets the above-mentioned requirements. First, the Respondent requests inspection of 31 original documents identified with sufficient precision (see List of disputed documents, Annex 1 to the Respondent’s Request). Second, on the basis of the Tribunal’s understanding of the record, the inspection of the originals may be relevant and material because Indonesia has questioned the authenticity and regularity of the 31 documents and the Claimants rely on them to substantiate their claims in these proceedings. Third, it is undisputed that the requested documents exist and the Claimants have not argued that the documents are not within their possession, custody or control. Fourth, there appears to be no countervailing legitimate interest that would call against inspection of the originals. Finally, the Tribunal does not find the additional evidence requested in the Claimants’ letter of 28 May 2014 to be appropriate or necessary at this juncture.

14. Accordingly, the Tribunal grants the Respondent's requests and orders the Claimants to make the originals available for inspection.

3. The Claimants' request for inspection

15. The Tribunal is of the view that the Claimants' requests also meet the requirements set forth above. First, the originals requested for inspection are identified with sufficient precision as (i) all the revocation decrees issued by the Regent in connection with the Claimants' mining licenses (see copies filed as Exhibits C-230 to C-237), and (ii) the Nusantara group's license extension applications. Second, on the basis of the Tribunal's understanding of the record, the inspection of the originals may be relevant and material because the Claimants have questioned the authenticity of these documents and the Respondent relies on them. Third, it is undisputed that the requested documents exist and are within the Respondent's possession, custody or control. Fourth, there appears to be no countervailing legitimate interest that would call against inspection of the originals.

16. Accordingly, the Tribunal grants the Claimants' requests and orders the Respondent to make the originals available for inspection.

IV. Logistics of the Inspection

17. In order to enable the inspection of the originals to be presented by the Parties, the Tribunal: (i) requests the Parties to make the respective originals available for simultaneous inspection at the World Bank Office in either Washington D.C. or Singapore or Paris, under the supervision of ICSID personnel and in the presence of representatives of both Parties, including their authenticity experts if any, (ii) invites the Parties to agree **by 8 August 2014** on a date/s, time and place (World Bank Office in either Washington D.C. or Singapore or Paris to perform such inspection by **no later than the end of August 2014**, and (iii) requests each Party to provide to the other Party, at least one week in advance of the inspection, a list of the persons who will attend the inspection on its behalf.

V. Decision

18. For the foregoing reasons, the Tribunal (i) orders each Party to make the requested originals available for inspection, and (ii) requests the Parties to comply with the directions on logistics set forth in paragraph 17. All further requests are denied.

On behalf of the Tribunal

[Signed]

Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 22 July 2014