

**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)**

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**PROCEDURAL ORDER NO. 12**

**Procedural Treatment of the Respondent's Application for Dismissal of Claims**

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

*Assistant to the Tribunal*

Mr. Magnus Jesko Langer

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## **I. PROCEDURAL BACKGROUND**

1. The present order deals with the procedural treatment of an Application for Dismissal of Claimants' Claims Based on the Forged and Fabricated Ridlatama Mining Licenses (the "Application") filed by the Republic of Indonesia ("Indonesia" or the "Respondent") on 24 September 2014, by which the Respondent requests that the Tribunal:
  - a. order the modification of the procedural timetable to schedule an immediate hearing on the forgery issues within the next 30 days, or sooner if feasible, to resolve the forgery allegations as a discrete issue;
  - b. dismiss the Claimants' claims as inadmissible by reason of their invalidity and illegality; and
  - c. order the Claimants to pay the legal fees, expenses and other costs incurred by Respondent in connection with this Arbitration.<sup>1</sup>
2. To put the Application in context, it is useful to recall certain events preceding the filing of the Application. On 29 August 2014, a document inspection took place in Singapore pursuant to Procedural Order No. 10 whereby the Respondent's forensic experts inspected 31 original documents handed over by the Claimants, and the Claimants' forensic experts inspected 6 original documents handed over by the Respondent.
3. On 15 September 2014, the Respondent filed the Second Forensic Handwriting Examination Report by Mr. Gideon Epstein. That report states that the signatures of the Regent of East Kutai, Mr. H. Awang Faroek Ishak, on disputed mining licenses were not written by hand but were the result of a mechanical process named "autopen signature". The report also indicates that the disputed signatures of Mr. H. Isran Noor on the so-called reenactment letters were also created through "autopen" technology.
4. In this context, the Respondent informed the Tribunal that it intended to supplement Mr. Epstein's report with witness statements of Messrs. Ishak and Noor, and other Government officials, providing additional evidence showing that the Ridlatama

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<sup>1</sup> Application, ¶¶ 2, 47.

mining licenses were forged in an effort “to cover up and perpetuate the fraudulent scheme”.<sup>2</sup> The Respondent further stated that, in its view, the “only proper course” to ensure the integrity of these proceedings and “to avoid the expense and delay of proceeding on the existing calendar” was to address the forgery issue as a preliminary issue at a hearing “to be scheduled within 30 days after the submission of the additional witness statements”.<sup>3</sup>

5. By letter dated 17 September 2014, the Centre invited the Claimants to file by 26 September 2014 their observations on the Respondent’s request to hold a hearing within 30 days to address the forgery issues.<sup>4</sup> The letter further indicated that the Tribunal would provide further directions to the Parties after receipt of the Claimants’ observations.
6. It is thereafter that, on 24 September 2014, the Respondent filed the Application, together with 7 witness statements and 2 preliminary expert reports on quantum.
7. On 26 September 2014, the Claimants filed their observations to the Respondent’s letter of 15 September 2014 regarding the opportunity of holding a hearing within 30 days of reception of the Application.<sup>5</sup>
8. On 30 September 2014, the Respondent requested leave to comment on the Claimants’ observations of 26 September 2014.<sup>6</sup> On 2 October 2014, the Tribunal invited the Respondent to submit any comments by 9 October 2014, to which the Claimants could reply by 16 October 2014.<sup>7</sup>
9. On 3 October 2014, the Claimants responded negatively to the Respondent’s invitation contained in its 30 September 2014 letter to disclose any information on the work performed by the Claimants’ forensic experts since the document inspection. They stated that the conclusions of their experts would be submitted “in due course, in

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<sup>2</sup> Respondent’s letter to the Tribunal, 15 September 2014, p. 4.

<sup>3</sup> *Id.*, p. 5.

<sup>4</sup> Centre’s letter to the Parties, 17 September 2014.

<sup>5</sup> Claimants’ letter to the Tribunal, 26 September 2014.

<sup>6</sup> Respondent’s letter to the Tribunal, 30 September 2014.

<sup>7</sup> Centre’s letter to the Parties, 2 October 2014.

accordance with the procedural schedule, and in conjunction with the rest of the Claimants' case on the merits".<sup>8</sup>

10. On 9 October 2014, the Respondent filed its additional comments.<sup>9</sup>
11. By letter of 15 October 2014, the Respondent informed the Tribunal that one of the Claimants, Churchill Mining PLC, had released its annual report showing that its cash on hand, as of 30 June 2014, was US\$ 3.01 million, potentially leaving the Respondent with "no recourse to recover the additional millions it will have to expend over the next year to complete the scheduled rounds of briefing, disclosure and hearings on the merits and quantum".<sup>10</sup>
12. On 14 October 2014, the Respondent filed the Third Forensic Handwriting Examination Report by Mr. Gideon Epstein.
13. In light of the Parties' submissions, the expedience of the matter, and given the geographic distribution of the Parties, counsel and arbitrators, the Tribunal decided on 14 October 2014 to hold a hearing by telephone on 21 October 2014 at 1:00 pm CET to deal, *inter alia*, with the procedural treatment of the Respondent's forgery allegations. The Tribunal circulated the hearing agenda to the Parties.
14. On 17 October 2014, the Claimants filed their additional comments.
15. On 21 October 2014, the Parties and the Tribunal held the hearing via teleconference as scheduled. During the hearing, the Tribunal put several questions to the Parties to which they responded. Thereafter, the Parties were provided the opportunity to present their final arguments.

## **II. POSITIONS OF THE PARTIES**

### **1. Position of the Respondent**

16. The Respondent filed the Application on the ground that the mining undertaking licenses and related approvals on which the Claimants rely in the present proceedings and which allegedly constitute the basis for the Claimants' investment in the East Kutai

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<sup>8</sup> Claimants' letter to the Tribunal, 3 October 2014.

<sup>9</sup> Respondent's letter to the Tribunal, 9 October 2014.

<sup>10</sup> Respondent's letter to the Tribunal, 15 October 2014.

Coal Project (“EKCP”) “were forged and fabricated”. Accordingly, an immediate hearing to resolve the forgery issue as a discrete matter is necessary in light of the latest evidence submitted by the Respondent in the form of forensic expert reports of Mr. Gideon Epstein and witness statements appended to the Application.

17. According to the Respondent, such evidence establishes “beyond any doubt” that (i) all of the Ridlatama Companies’<sup>11</sup> general survey and exploration mining licenses of 2007-2008 “were fabricated”,<sup>12</sup> (ii) the upgrading of those “non-existent” licenses to exploitation mining licenses in March 2009 was obtained through “deception and fraud”, (iii) the “Borrow-for-Use Permit” recommendation letters purportedly signed by Mr. Ishak in March 2010 were forged and fabricated, and (iv) the “Reenactment Decrees” purportedly signed by Mr. Noor in May 2010 were also forged and fabricated. According to the Respondent, this shows that the Claimants engaged in a “massive, systematic and sophisticated scheme to defraud the Republic”.<sup>13</sup> Furthermore, the Respondent has identified additional “suspect documents”, more specifically letters that the Ridlatama Companies purportedly sent to Mr. Bambang Setiawan, former Director General of Mineral, Coal and Geothermal of the Ministry of Energy and Natural Resources. These letters have identical signatures and their reference numbers were used in other letters for other addressees in respect of other matters.<sup>14</sup> These letters reveal that the scope of the forgery is much wider than initially assumed, since the forgery extends to documents allegedly issued at the level of the local, provincial and central Governments.<sup>15</sup> In sum, according to the Respondent, “the evidence of forgery and fraud by the Ridlatama Companies is clear cut, and it leaves the Tribunal with no option other than to dismiss the claims asserted against Respondent in this Arbitration”.<sup>16</sup>
18. The Respondent acknowledges that its request is “unusual” and that it will require a modification of the procedural timetable. However, the circumstances of the case

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<sup>11</sup> The “Ridlatama Companies” refers to PT Ridlatama Tambang Mineral (“PT RTM”), PT Ridlatama Trade Powerindo (“PT RTP”), PT Investmine Nusa Persada (“PT INP”) and PT Investama Resources (“PT IR”). Respondent’s letter to the Tribunal, 9 October 2014, p. 1, n. 1.

<sup>12</sup> Respondent’s letter to the Tribunal, 9 October 2014, p. 2.

<sup>13</sup> Application, ¶ 3.

<sup>14</sup> Respondent’s letter to the Tribunal, 9 October 2014, p. 3, n. 12, referring to Exh. C-252 to C-255, see also Exh. R-139.

<sup>15</sup> Respondent’s letter to the Tribunal, 9 October 2014, p. 3, n. 12.

<sup>16</sup> Application, ¶ 35.

themselves are extraordinary and require immediate action to resolve the forgery issue as a preliminary and discrete matter. In addition, the interests of justice and integrity of the ICSID system are also at stake and would be undermined were the proceedings to continue in a “business as usual” manner.<sup>17</sup>

19. For the Respondent, the issue of forgery is a central question that needs to be addressed immediately, even if it implies a modification of the procedural calendar.<sup>18</sup> Delay in addressing the issue of forgery would not benefit any Party, since it would only subject the Parties to “another year or more of extensive briefing, document production and hearings on a multitude of disputed issues that ultimately will prove to be irrelevant to the outcome, all at enormous expense”.<sup>19</sup> Far from seeking to avoid to confront the evidence put into the record, as the Claimants now argue, Indonesia “is challenging the authenticity and validity of the supposed ‘authorizations and licenses’ on which Claimants base their claims, and which are at the heart of the dispute between the parties”.<sup>20</sup>
20. According to the Respondent, the Claimants are wrong when arguing that the Respondent would not be prejudiced by adhering to the existing timetable since the Respondent must already be well advanced in the preparation of its Counter-Memorial due on 12 November 2014. The Respondent has had to (i) brief two applications for provisional measures, (ii) respond to the Claimants’ efforts to block the document inspection, and (iii) prepare witness statements and other evidence accompanying the Application.
21. Furthermore, considerable cost will be expended to have the Respondent’s quantum experts rebut “each and every one of the mistakes, misstatements and unsupported assumptions” made by the Claimants’ quantum experts, especially because the Tribunal decided not to bifurcate the case between a liability and a quantum phase.<sup>21</sup> For all these reasons, the Respondent has not completed the factual and legal analysis

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<sup>17</sup> Application, ¶ 4.

<sup>18</sup> Respondent’s letter to the Tribunal, 9 October 2014, p. 2.

<sup>19</sup> Application, ¶ 6.

<sup>20</sup> Respondent’s letter to the Tribunal, 9 October 2014, p. 3.

<sup>21</sup> Application, ¶ 39; Respondent’s letter to the Tribunal, 9 October 2014, p. 7. In this regard, the Respondent filed two preliminary quantum expert reports identifying “errors and unfounded assumptions” and demonstrating that the Respondent will have to present a “comprehensive set of reports” to rebut the Claimants’ evidence. See the Bara Preliminary Report and the Econ One Research Preliminary Report filed together with the Application.

of other aspects of its defense and does not anticipate to be in a position to comply with the 12 November 2014 deadline “particularly with the change in administration of the Republic’s Central Government”. In any event, a decision on the merits dismissing the claims would relieve the Respondent “of the unwarranted, and hugely expensive, task of presenting detailed expert reports substantiating the uneconomic nature of the Claimants’ supposedly ‘world class’ project”.<sup>22</sup>

22. While delay would be “grossly unfair” to the Respondent, so say the latter, an immediate hearing would be “eminently fair” to the Claimants. On the one hand, it would be grossly unfair to the Respondent, especially in light of the fact that the Claimants have no business or assets “other than the prosecution of their claims in this Arbitration”, and that the latest annual report of Churchill shows a diminution of available cash to US\$ 3.01 million. While the annual report indicates that Churchill may secure additional funding until 2015, the Respondent argues that the Claimants “will not seek funds beyond what they need to pursue this Arbitration”, thus leaving the Respondent with no recourse to recover “the additional millions it will have to expend over the next year to complete the scheduled rounds of briefing, disclosure and hearings on the merits and quantum”.<sup>23</sup>
23. On the other hand, so argues the Respondent, an immediate hearing would be “eminently fair” to the Claimants. Since the Claimants strenuously defend the authenticity of the license, they “should welcome the opportunity to dispel any doubts” in that regard.<sup>24</sup> Furthermore, the Claimants have sought to block the Respondent’s request for a document inspection on the grounds that without the testimony of Messrs. Ishak and Noor, any forensic finding about the origin of the signatures on the disputed mining licenses would be “a costly and fruitless endeavour”.<sup>25</sup> Now that the Respondent has submitted witness statements by Messrs. Ishak and Noor and other officials, the Claimants may now indeed test the veracity of their statements during cross-examination at the requested hearing.

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<sup>22</sup> Application, ¶ 39.

<sup>23</sup> Respondent’s letter to the Tribunal, 15 October 2014, p. 2, referring to Churchill Mining PLC, *Full Year Report for the 12 months ended 30 June 2014*, dated 15 October 2014, p. 4 (**Exh. R-141**). See also Application, ¶ 7.

<sup>24</sup> Application, ¶ 8.

<sup>25</sup> Referring to the Claimants’ letter to the Tribunal, 28 May 2014, pp. 2-3.

24. The Respondent further submits that the Tribunal has the power to make orders regarding the conduct of the proceedings and can “vary any time limit that it may fix”.<sup>26</sup> The Tribunal should exercise its “sound discretion” to ensure an efficient, economical and fair process. The proper conduct in the present circumstances requires an immediate hearing, since a speedy determination of the forgery allegations is “unquestionably the most efficient way of addressing the disputed issues in this Arbitration”.<sup>27</sup> A hearing on the question of forgery would allow the Tribunal “to render a decision that will either end the case altogether or eliminate the need to brief a number of legal and factual issues that might otherwise remain in play in the absence of such decision”.<sup>28</sup> At the hearing of 21 October 2014, the Respondent stated that a finding of forgery would dispose of all of the claims. Moreover, whatever the outcome, a preliminary determination of the forgery allegations would be “more economical for both parties”.<sup>29</sup>
25. The Respondent also argues that the Claimants’ “indicative list of 7 steps”, including a “clearly overbroad” document production phase, new expert reports, a further document inspection, a hearing of 5 days or more with more than ten witnesses solely to address the authenticity issue, is no more than an attempt to draw out the proceedings. The Claimants fail to explain the need for these steps, especially in light of the fact that the resolution of the forgery issue “is simple due to the method used in the forgery and fabrication of the relevant documents, i.e. identical signatures”.<sup>30</sup> In any event, the Respondent “should not be obligated to respond to what will evidently be a protracted, burdensome and expensive disclosure process for all issues in this case if Claimants insist on disclosure of documents over a 14-year period from 2000 to the present, as presented in their 7-step plan”.<sup>31</sup>
26. For the Respondent, it would be “inefficient and extremely unfair” to order the Respondent to file a full-fledged counter-memorial on the merits when the Claimants base their case on forged documents. As was held in *Gustav Hamester v. Ghana*, the substantive protections of the BITs do not apply to investments created in violation of

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<sup>26</sup> Application, ¶ 36.

<sup>27</sup> Application, ¶ 37.

<sup>28</sup> Application, ¶ 37.

<sup>29</sup> Application, ¶ 38.

<sup>30</sup> Respondent’s letter to the Tribunal, 9 October 2014, p. 3.

<sup>31</sup> Respondent’s letter to the Tribunal, 9 October 2014, pp. 7-8.

the law, and therefore the Respondent should not be put in a position to have to present a complete defense on the merits without a previous decision from the Tribunal on the forgery issue.<sup>32</sup>

27. Finally, the Respondent points to three additional factors having a bearing on the fairness of altering the procedural calendar. First, to deny the Application because it was made less than two months before the 12 November 2014 filing date for its Counter-Memorial on the Merits would be to reward the Claimants' obstructive behavior when opposing, and effectively drawing out, the document inspection. Second, addressing the forgery issue now would lower the risk of the Claimants' continued attempts to halt the police investigation through requests for provisional measures. Indeed, these requests carry the risk of the Tribunal recommending that the Indonesian police desist from its investigation, something with which the executive branch of the Indonesian Government could not comply.<sup>33</sup> Third, the continuation of the proceedings for another year would almost certainly exhaust the Claimants' assets "leaving the Respondent with no recourse to collect the costs of this proceeding as part of an award in its favor".<sup>34</sup> The Claimants' current financial position allows them "to gamble on a large award without any real risk apart from the costs of litigation".<sup>35</sup> That unfair advantage could be offset through an expeditious hearing on the forgery issues. In any event, the Respondent reserves its rights to seek security for costs.
28. In conclusion, the Respondent requests the Tribunal to issue (i) an order modifying the procedural timetable to resolve the forgery issue as a preliminary, discrete matter, and (ii) an award dismissing the Claimants' claims as "inadmissible by reason of their invalidity and illegality".<sup>36</sup>

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<sup>32</sup> Respondent's letter to the Tribunal, 9 October 2014, p. 8, referring to *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶ 123-124; *Europe Cement Investment and Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, ¶ 180; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, ¶ 157.

<sup>33</sup> Application, ¶ 44.

<sup>34</sup> Application, ¶ 45.

<sup>35</sup> *Ibid.*

<sup>36</sup> Respondent's letter to the Tribunal, 9 October 2014, p. 8.

## 2. Position of the Claimants

29. The Claimants urge the Tribunal to reject the Application and to direct Indonesia to file its arguments on forgery with its other defenses on the merits in the Counter-Memorial due on 12 November 2014.
30. For the Claimants, the Application is no more than “a baseless diversionary practice” meant to “derail the procedural timetable in the arbitration proceedings as a whole”.<sup>37</sup> Indonesia had 18 months to consider the merits of the Claimants’ case, including the forgery issue. Instead of filing the Counter-Memorial on 12 November 2014 in accordance with the procedural schedule set on 18 June 2014, Indonesia now seeks to avoid confronting the “voluminous evidence of its own wrongdoing” put into the record by the Claimants.
31. According to the Claimants, a determination on the Application cannot be achieved without upsetting the procedural calendar. It would require various procedural steps, specifically “document disclosure, several rounds of submissions accompanied by expert reports and witness statements, and almost certainly an additional document inspection exercise”.<sup>38</sup> Consequently, it is “plainly unrealistic” to expect a resolution of the forgery issue “and other merits defences” contained in the Application within 30 days as suggested by Indonesia. In addition, the witnesses to be heard on the forgery issue are the same as those giving evidence on the treaty breaches.

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<sup>37</sup> Claimants’ letter to the Tribunal, 26 September 2014, p. 2; Claimants’ letter to the Tribunal, 17 October 2014, p. 1.

<sup>38</sup> Claimants’ letter to the Tribunal, 26 September 2014, p. 2. The Claimants provide an “indicative list of steps” needed to resolve the forgery issue, which reads as follows:

- i. disclosure, *inter alia*, of all licenses and other signed and stamped documents issued by the Bupati’s office between 2000 and the present, including the original and “revived” Nustantara licenses;
- ii. disclosure, *inter alia*, of appropriations logs for the Bupati’s office between 2000 and the present, including with respect to the software used for creating and the paper used for printing official documents, and the office equipment used to print copies of official documents;
- iii. disclosure, *inter alia*, of all information collected during prior investigations, including those already referenced in the record the conclusions of which being that there was no impropriety, regarding the authenticity of the Claimants’ licenses, including by the East Kutai Police;
- iv. several witness statements by persons affiliated with the East Kutai Coal Project (**EKCP**) or otherwise familiar with the practice of the East Kutai Regency in issuing licenses and other documentation;
- v. expert reports on various aspects of the documents at issue and those produced in disclosure, including but not limited to the paper and ink used, and any signature duplication technologies employed. Such reports could follow a further inspection of original documents;
- vi. rounds of submissions; and
- vii. a hearing of five or more days, including the cross-examination of several witnesses whose evidence is also central to the merits of this case (already it is clear that there will likely be more than 10 witnesses”. *Id.*, pp. 2-3. See further, Claimants’ letter to the Tribunal, 17 October 2014, p. 2.

32. In fact, to resolve the forgery issue separately would require “discarding the carefully considered procedural schedule”, including the hearing on merits. Moreover, it would “prejudice severely the Claimants’ ability to present their case in a timely manner, and would cater to Indonesia’s scattergun attempts” to introduce disruption and delay, thus rendering the proceedings more burdensome.<sup>39</sup>
33. For the Claimants, Indonesia’s “stalling tactics” become apparent from the timing of the Application, which was filed less than two months before the due date of the Counter-Memorial. Indonesia has been aware of the forgery investigations since 2009, has been in possession of copies of the allegedly forged documents since the Requests for Arbitration in 2012, and advanced forgery allegations during the Hearing on Jurisdiction in May 2013. No valid explanation is provided for the delay of several years to “discover” the so-called forgery shortly before its Counter-Memorial is due. The Tribunal should not allow such procedural tactics.<sup>40</sup>
34. According to the Claimants, since the Application was made less than two months before the scheduled filing of the Counter-Memorial, the Respondent must presumably already be well advanced in its preparation so the Claimants, having already incurred most of the expense and effort to plead its defense. Furthermore, the Claimants point to the fact that the present procedural schedule already accommodates a critically important document disclosure phase and that the hearing on the merits as scheduled provides sufficient time to address all the issues raised in the Application.<sup>41</sup>
35. More generally, the issues in the Application “are not suited to be heard distinct from the remainder of the merits”, since they are “inextricably tied to” and “obviously intertwined with” the merits.<sup>42</sup> For instance, the disputed decrees signed by Mr. Ishak are “at the very origin of Indonesia’s indirect expropriation”; the evidence tendered by Dra. Nurohmah regarding the issuance of Borrow-for-Use permits is “patently relevant to, and interconnected with, the wider merits of this dispute”; Mr. Sianipar’s evidence

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<sup>39</sup> Claimants’ letter to the Tribunal, 26 September 2014, p. 3.

<sup>40</sup> Claimants’ letter to the Tribunal, 17 October 2014, p. 2.

<sup>41</sup> *Id.*, p. 3.

<sup>42</sup> Claimants’ letter to the Tribunal, 17 October 2014, pp. 1-3.

is also “clearly intertwined” to the wider merits of the case; and Mr. Odiansyah’s evidence too is linked to the merits of the case.<sup>43</sup>

36. In addition, the Claimants argue that witness evidence submitted in support of the Application is unreliable and must be tested in cross-examination at the hearing on the merits. Citing various examples casting doubt on the credibility of Indonesia’s witnesses,<sup>44</sup> the Claimants submit that they will further elaborate on these issues in their Reply “after they have been afforded, as is their fundamental due process right, sufficient time to prepare their case”.<sup>45</sup>
37. As regards the Respondent’s mention that it does not anticipate to finalize its Counter-Memorial by 12 November 2014, the Claimants contend that Indonesia should not be allowed to impose a *fait accompli* and “to decide unilaterally that it wishes an extension, especially if any extension threatens the Hearing dates established by the Tribunal”. For the Claimants, Indonesia “deliberately” refrained to prepare its full defense and opted for a partial defense to avoid “the cost and labour of a full defence while creating substantial delay until the full adjudication of the merits”.<sup>46</sup> Indonesia’s assumption that it has a “perpetual licence to file applications for the piecemeal adjudication of the merits” should not be allowed by the Tribunal.<sup>47</sup>
38. The Claimants also dismiss Indonesia’s contention that a decision upholding the forgery allegations would effectively dispose of the entire case. The Claimants point in that regard to their claims for compensation based on the “substantial funds and effort” which the Claimants invested “in good faith” in developing the EKCP.
39. Finally, the Claimants reaffirm their commitment to comply with the procedural schedule currently in force, notwithstanding the fact that the Application requires a “substantial exercise” of investigating the facts and of evaluating the relevant documents by its experts.<sup>48</sup> The Claimants will therefore present the findings of their experts “in due course, in accordance with the procedural schedule, and in conjunction

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<sup>43</sup> Claimants’ letter to the Tribunal, 17 October 2014, pp. 3-4.

<sup>44</sup> Claimants’ letter to the Tribunal, 17 October 2014, pp. 6-8.

<sup>45</sup> Claimants’ letter to the Tribunal, 17 October 2014, p. 8.

<sup>46</sup> Claimants’ letter to the Tribunal, 17 October 2014, pp. 4-5.

<sup>47</sup> Claimants’ letter to the Tribunal, 17 October 2014, p. 5.

<sup>48</sup> Claimants’ letter to the Tribunal, 17 October 2014, pp. 3.

with the rest of the Claimants' case on the merits".<sup>49</sup> As a result, Indonesia's attempts to obtain the Claimants' response on the merits of the Application are "premature and unjustified".<sup>50</sup>

### **III. ANALYSIS**

#### **1. Legal Framework**

40. Article 44 of the ICSID Convention reads as follows:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

41. Furthermore, Rule 19 of the ICSID Arbitration Rules provides that the Tribunal "shall make the orders required for the conduct of the proceeding".

42. As regards the power of the Tribunal to modify time limits it has fixed, Rule 26(2) provides in relevant part that "[t]he Tribunal may extend any time limit that it has fixed".

#### **2. Discussion**

43. The present order deals with the procedural treatment of the Application, in particular with the question whether document authenticity should be dealt with as a preliminary matter. It does not deal with the merits of the Respondent's allegations regarding the authenticity of the documents at issue, most importantly because the Claimants have not yet been afforded the opportunity to address the merits of the forgery allegations.

44. It is undisputed that Article 44 of the ICSID Convention endows the Tribunal with the power to decide any question of procedure not covered by the ICSID Convention, the ICSID Arbitration Rules, or an agreement between the Parties.

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<sup>49</sup> Claimants' letter to the Tribunal, 3 October 2014.

<sup>50</sup> Claimants' letter to the Tribunal, 17 October 2014, p. 3.

45. The Respondent requests that the authenticity of the disputed documents be dealt with as a preliminary matter separate from the other issues pertaining to the merits of the dispute, since a finding of forgery would be dispositive of the entire case and would thus lead to the dismissal of all of the claims. In view of the Claimants' financial situation, proceeding otherwise would jeopardize the likelihood of the Respondent's recovering its costs in the event of a decision in its favor. For the Claimants, the Application is no more than another attempt by the Respondent to derail the arbitration as a whole. The document authenticity issue is not suited to be heard distinctly from the remainder of the merits, since (i) it is inextricably linked to and intertwined with the remainder of the merits and (ii) would not be dispositive of the entire case.
46. The Tribunal first notes that, be it only for practical reasons, it would not be possible to hold a hearing on the forgery issue, which, according to the Claimants, would require five days, within the next 30 days. Indeed, the Application raises complex issues which the Claimants must be able to address being given sufficient time in accordance with their due process rights. The resolution of the issues raised in the Application will require several procedural steps, including briefings, possibly document production and a new document inspection, before the matter can proceed to a hearing. The fact that a hearing is not feasible within the next 30 days does not, however, do away with the more general request to deal with the Respondent's Application as a preliminary issue separate from the remainder of the merits.
47. In terms of efficiency and costs, the advisability of a separate procedural phase on document authenticity essentially depends on whether a decision in favor of the Respondent regarding that issue would be dispositive of the entire case or not. The Tribunal is not convinced that a decision in favor of the Respondent on document authenticity would lead to a complete dismissal of the claims before it. While it is true that the document authenticity issue may go to the heart of the question whether the revocation of the mining licenses was wrongful, other claims regarding, for instance, the alleged denial of justice before Indonesian courts would *prima facie* survive. As a result, bifurcated proceedings on liability would unnecessarily protract the proceedings and create additional costs for all Parties involved.

48. In addition, it appears that a separate phase on document authenticity would in all likelihood imply that several witnesses would have to give evidence twice at two hearings. Such a course would be inefficient and costly. Further, the resolution of the document authenticity issue may well require a document production phase and possibly even a new document inspection. These steps would be best accommodated within the existing procedural timetable without putting into peril the dates set for the hearing on the merits in October 2015.
49. As a result, the Tribunal comes to the conclusion that, for reasons of efficient and cost-conscious case management, it is best to deal with the authenticity issue together with the other issues pertaining to the merits. This solution not only complies with good case management, it also respects both Parties' due process rights, as both are given a fair opportunity to address the issues relevant to the resolution of this dispute.
50. This said, the Tribunal is also mindful of the Respondent's concerns regarding the financial situation of the Claimants and the risk of not being able to recover its costs if it prevails in this arbitration. It recalls that, in Procedural Order No. 8 ("PO8") it had not granted the Respondent's request for bifurcation of the proceedings between liability and quantum on the grounds, *inter alia*, that bifurcated proceedings would be significantly longer and more expensive than non-bifurcated merits proceedings. It further stated that any additional costs which the Respondent might incur as a result of the absence of bifurcation may be taken into account by the Tribunal when allocating costs. At this juncture, considering in particular the Respondent's assertions on the Claimant's financial resources and its allegations of forgery as well as the fact that the facts related to the authenticity issue overlap with some on liability but not on quantum, the Tribunal is of the view that it would be fairer and more efficient for it to revise PO8 *proprio motu* and to bifurcate the present proceedings between a comprehensive liability phase (i.e. dealing with all liability issues raised in the Memorial and all the issues raised by the Application) and a quantum phase. This would allow the Tribunal to maintain the present procedural calendar without imposing on the Respondent the additional costs associated with the quantum phase while the document authenticity issue is not resolved.

51. Finally, the Tribunal has noted the Respondent's statement that it may have difficulty complying with the time limit for its Counter-Memorial which expires on 12 November 2014 because of the procedural steps that required attention these last months. If this remains so even though the Respondent is relieved of briefing the quantum, the Tribunal will entertain a request for a reasonable extension filed no later than 31 October 2014, it being understood that the hearing dates in October 2015 must remain unaffected and the equal treatment of the parties be preserved.

#### **IV. Order**

52. On this basis, the Arbitral Tribunal issues the following decision:

- (1) The Respondent's request for the immediate adjudication of the forgery issue as a preliminary issue is denied;
- (2) The proceedings are bifurcated between a liability phase and a quantum phase and the existing timetable shall apply to the liability phase;
- (3) The Respondent shall file its Counter-Memorial on the Merits (limited to liability) on 12 November 2014. It may request a reasonable extension no later than 31 October 2014;
- (4) The Tribunal will consult the Parties in due time regarding the calendar of the quantum phase, if necessary;
- (5) Costs are reserved for a later decision or award.

On behalf of the Tribunal

[Signed]

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Gabrielle Kaufmann-Kohler  
President of the Tribunal  
Date: 27 October 2014