

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. 13

Respondent's Request for Reconsideration of Procedural Order No. 12

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

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I. PROCEDURAL BACKGROUND

1. On 3 November 2014, the Republic of Indonesia (“Indonesia” or the “Respondent”) filed a Request to reconsider the Tribunal’s decision in Procedural Order No. 12 (“PO12”) and order an expedited hearing on the alleged forgery of the mining licenses and other documentation relied upon by the Claimants (the “Request”). The Request enclosed two exhibits.¹
2. On 4 November 2014, the Tribunal invited the Claimants to respond to the Request by 10 November 2014, which they did.
3. The Tribunal recalls that on 29 August 2014, a document inspection took place in Singapore pursuant to Procedural Order No. 10. Relying on the second expert report by Mr. Epstein, the Respondent informed the Tribunal on 15 September 2014 that it would provide additional evidence that the Ridlatama mining licenses were forged and would request a hearing “within 30 days after the submission of the additional witness statements” leading to the dismissal of the Claimants’ claims. On 26 September 2014, the Claimants filed observations, opposing the request for a hearing within 30 days of receipt of the Application.
4. Two days earlier, on 24 September 2014, the Respondent had filed an Application for the dismissal of Claimants’ claims based on the forged and fabricated Ridlatama mining licenses (the “Application”), together with 7 witness statements and 2 preliminary expert reports on quantum.
5. On 9 October 2014, the Respondent filed additional comments, and submitted a third expert report by Mr. Epstein on 14 October 2014. For their part, the Claimants filed additional comments on 17 October 2014.
6. A procedural hearing was held by telephone on 21 October 2014 dealing, *inter alia*, with the procedural treatment of the Respondent’s forgery allegations. PO12 was issued on 27 October 2014. It essentially held that it was preferable that the forgery issue be part of the merits phase, which it divided into liability and quantum.

¹ An unofficial transcript of the telephone conference held on 21 October 2014 (**Exh. R-142**) and a table analyzing the linkage between the claims alleged in the Requests for Arbitration and the Memorial on the Merits and the alleged forgery (**Exh. A**).

7. The present order deals with Indonesia's Request for the reconsideration of PO12 by which Indonesia seeks to have the forgery issue resolved as a preliminary matter.

II. POSITIONS OF THE PARTIES

1. Position of the Respondent

8. For the Respondent, the Tribunal's determination in PO12 that a separate procedural phase on document authenticity would not be dispositive of the entire case if the Respondent prevailed on that issue and would thus be inefficient and costly is (i) clearly erroneous, (ii) unsupported by the record, and (iii) violative of the Respondent's right to obtain a reasoned decision by the Tribunal.
9. In PO12, the Tribunal considered that the test to decide on the bifurcation of the forgery issue was whether the latter would dispose of all of the claims if upheld. Yet, the Tribunal failed to properly apply this test. For the Respondent, the answer is unequivocally affirmative in that a finding of forgery would result in the dismissal of all the claims.
10. Asked to comment on this test at the telephone hearing of 21 October 2014, the Claimants indicated that they had not undertaken a review of that issue and only made assertions that did not answer the Tribunal's question as to the effect of a forgery finding on the case. When the President of the Tribunal mentioned certain claims that may possibly survive, the Claimants did not comment nor did they identify any surviving claim.
11. According to the Respondent, when mentioning in PO12 the denial of justice claim as potentially surviving, the Tribunal did not consider that such claim was predicated on the validity of the mining licenses. The same can be said of the "threat of use of force" claim mentioned by the President of the Tribunal during the hearing, as well as of any other substantive claim forwarded by the Claimants. In support, the Respondent enclosed a table analyzing the impact of a forgery finding on each claim alleged in the Claimants' Requests for Arbitration and Memorial on the Merits, leading to the

“inescapable” conclusion that such a finding would “compel the dismissal of all claims asserted by Claimants”.²

12. Similarly, the Respondent objects to the Tribunal’s opinion that a separate procedural phase on authenticity would be inefficient and uneconomical, since a finding of forgery would result in a dismissal of all claims and thus no witness would need to testify more than once. Even if certain “residual claims” might survive, it is not certain that any of the witnesses called to testify on forgery would be called for a subsequent phase.
13. Continuing to believe that an expedited hearing on the forgery issue is possible, the Respondent proposes the following schedule:

21 November 2014	Simultaneous Requests to produce documents
12 December 2014	Simultaneous voluntary production of responsive documents and/or objections to requests to produce documents, if any
22 December 2014	Simultaneous Replies to objections to requests to produce, if any
9 January 2015	Tribunal’s ruling on outstanding objections to requests to produce documents, if any
23 January 2015	Production of any outstanding documents for which no objections is sustained by the Tribunal
2 February 2015	Claimants’ Response on Respondent’s Application for Dismissal
23 February 2015	Respondent’s Reply on Respondent’s Application for Dismissal
16 March 2015	Claimants’ Rejoinder on Respondent’s Application for Dismissal
20 March 2015	Identification of witnesses and experts to be cross-examined at the Hearing
25 March 2015	Pre-Hearing Conference Call
The week of 20 April 2015	Hearing on Respondent’s Application for Dismissal

14. Should the Tribunal not accept to reconsider its decision in PO12, the Respondent indicates that it will need an extension for the filing of its Counter-Memorial.³ The Respondent also proposes a schedule for this event. Moreover, the Respondent objects

² Respondent’s letter to the Tribunal, 3 November 2014, p. 6.

³ *Id.*, pp. 8-9.

to the Tribunal's amendment of Procedural Order No. 8 and its decision to bifurcate the proceedings between liability and quantum.⁴

15. The Respondent also remains concerned about the financial situation of the Claimants and reserves its right to request security or other assurances to ensure that the Respondent may recover its costs in the event it prevails in the present arbitration.⁵

2. Position of the Claimants

16. For the Claimants, Indonesia's position should be rejected on all counts and the Tribunal should confirm its decision denying bifurcation of the forgery issue. Indonesia's request is unfounded because it falls within the Tribunal's powers to grant or deny bifurcation and because the Tribunal reached its decision by following due process and carefully considering the issues raised in the Respondent's request for bifurcation.⁶ In particular, the Tribunal rightfully found that several of the Claimants' claims would survive a finding of forgery and that it would be inefficient and costly to bifurcate the forgery issue. Also, the Respondent's reliance on its right to a reasoned decision is ill-founded since this right applies only to awards, not to procedural orders.
17. The Tribunal rightly dismissed Indonesia's argument that its actions giving rise to treaty violations would somehow be "exculpated *ex post* by a finding of forgery".⁷ For the Claimants, none of Indonesia's actions leading to the loss of the investment was based on a forgery; they were based on purported violations of forestry law and purported overlapping licenses. Hence, Indonesia is estopped from raising forgery *vis-à-vis* good faith investors. The Claimants also submit that they would remain entitled to recover at the very least the "substantial amounts" which they invested in good faith in the East Kutai Coal Project. In any event, the Claimants intend to address Indonesia's arguments "at the appropriate time in these proceedings".⁸
18. As to the Tribunal's decision to bifurcate liability and quantum, it was meant to address the "unsubstantiated" and "unfounded concerns regarding the Claimants' ability to

⁴ *Id.*, p. 8.

⁵ *Ibid.*

⁶ Claimants' letter to the Tribunal, 10 November 2014, p. 2.

⁷ *Id.*, p. 3.

⁸ *Ibid.*

finance the costs of this arbitration”.⁹ Furthermore, Indonesia’s “belated” request for an extension of time for its Counter-Memorial in the event that the Tribunal would not amend PO12 should be denied.¹⁰

III. ANALYSIS

1. Legal Framework

19. 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.

2. Discussion

20. It is common ground that Article 44 of the ICSID Convention vests the Tribunal with the discretionary power to decide matters of procedure not covered by the ICSID Convention, the ICSID Arbitration Rules, or an agreement between the Parties. This power encompasses the possibility to re-open and, if appropriate, amend previous procedural orders. The question here is whether the Tribunal should amend PO12 because it wrongly assumed that certain claims may survive a finding of forgery and therefore there was no reason to amend the existing procedural structure.

21. In PO12, the Tribunal noted that “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”.¹¹ While acknowledging that the document authenticity issue “may go to the heart of the question whether the revocation of the mining licenses was wrongful”, the Tribunal held that “other claims, for instance the alleged denial of justice before Indonesian

⁹ *Id.*, p. 4.

¹⁰ *Id.*, pp. 5-6.

¹¹ PO12, ¶ 47.

courts would *prima facie* survive”.¹² Hence, bifurcation would unnecessarily protract the proceedings and create additional costs for all involved. The Tribunal also added that it was likely that several witnesses would have to give evidence at two hearings. Moreover, the document authenticity issue would require a document production phase and possibly a document inspection phase, which would best be handled within the existing schedule on the merits. Finally, the Tribunal bifurcated liability and quantum in light of the Respondent’s concerns regarding the Claimants’ financial situation and its ability to recover its costs in the event that it would prevail.

22. The Tribunal reaffirms that efficiency should be the prevailing test when it comes to case management (it being of course understood that due process must always be complied with, which would be the case in either of the possible scenarios). In the present context, efficiency is primarily dependent on whether the resolution of the forgery issue is dispositive of the case or not.
23. The Tribunal recalls that during the telephone hearing on 21 October 2014, it asked for the Parties’ views on the impact of a finding of forgery, referring in particular to the claims related to the denial of justice and the threat of use of force. The Respondent emphatically declared that this would be the end of the arbitration. The Claimants, for their part, stated that the Tribunal was not yet fully briefed on that question, that they were not in a position to provide a precise answer then, and that it would require a “thorough review of where that would leave our claims”.¹³ They insisted, however, that the forgery issue would not dispose of all claims, arguing that (i) third party wrongdoing regarding the licenses would not necessarily do away with the licenses under Indonesian or international law, (ii) many documents relied upon by the Claimants are not impugned by the Respondent, in particular one specific license and (iii) the Claimants would in any event be entitled to recover the investments made in reliance upon their right to invest in Indonesia.¹⁴
24. In light of the Parties’ submissions at the telephone hearing, the Tribunal came to the conclusion that Indonesia had not sufficiently substantiated its argument that all of the

¹² *Ibid.*

¹³ Unofficial transcript of the 21 October 2014 telephone conference, (1:14:57 – 1:16:13) Mr. Jagusch (**Exh. R-142**). This transcript was provided by the Respondent and remained undisputed by the Claimants.

¹⁴ Unofficial transcript of the 21 October 2014 telephone conference, (1:17:10 – 1:18:44) Mr. Sinclair (**Exh. R-142**).

claims would automatically wither away through a finding of forgery. In consequence, it considered that it would be preferable to maintain the existing calendar and to address the forgery issue in that context.

25. With its Request, the Respondent now provides the Tribunal and the Claimants with a table containing a detailed discussion of the impact of a finding of forgery on each of the claims as formulated in the Requests for Arbitration and Memorial on the Merits. Needless to say, the Tribunal did not have the benefit of this information prior to issuing PO12. When answering the Request, the Claimants did not in any way engage with the content of the Respondent's table, limiting themselves to the arguments mentioned above in paragraph 17, i.e. estoppel and recovery of good faith investments.
26. In other words, the Claimants were afforded two opportunities to address the Tribunal's question about the fate of their claims in case of a finding of forgery. They chose not to do so. By contrast, the Respondent has provided the Tribunal with a detailed submission showing that all the claims would have to be dismissed if it were established that the relevant documents were forged. At this stage of the proceedings and considering the state of the record, it would obviously be premature for the Tribunal to determine whether the Respondent's submissions are correct or not. However, for purposes of case management, these submissions, which remain unrebutted in any specific or detailed fashion, provide a sufficient basis for this Tribunal to reconsider and amend PO12.
27. On this basis, the Tribunal concludes that an amendment of PO12 is warranted in the present circumstances. Accordingly, the Tribunal determines that the document authenticity issue be dealt with as a preliminary matter, subject to the following indications.
28. A separate document authenticity phase would not serve its purpose fully if it were limited to the establishment of facts. Indeed, a separate phase will only be truly efficient if the Tribunal is also in a position to determine the legal consequences of a possible finding of forgery on the claims. Therefore, the Tribunal considers that, in the context of the document authenticity phase, the Parties are to address in their written submissions and at the hearing all factual aspects relating to forgery as well as *the legal consequences of a finding of forgery on each claim*. This is not meant to prevent the

Parties from addressing any other matters which they deem appropriate in connection with the forgery allegations and arguments.

29. Accordingly, the Tribunal must now amend the procedural calendar. As mentioned earlier, the Respondent has proposed a tentative calendar contemplating a document production phase and a hearing in the course of April 2015. In addition, in their letters of 26 September and 17 October 2014,¹⁵ the Claimants have listed the different steps involved in a separate authenticity phase, emphasizing in particular that they would in all likelihood require a new document inspection phase.
30. On this basis, the Tribunal has drawn up a calendar, which is appended as Annex 1 to this order. It has in particular extended some of the durations contemplated by the Respondent, included a document inspection phase which it considers best inserted after the first round of submissions, and provided for a hearing from 3-7 August 2015 (with 8 August 2015 in reserve) or, if the Parties are not available on such dates, from 10-14 August 2015 (with 15 August 2015 in reserve).
31. The Parties are invited to agree on the dates for the document inspection (see attached calendar) and to state their availability on the hearing dates proposed by 25 November 2014. Subject to any compelling objections which the Parties may raise in respect of the other dates and time limits set out in Annex 1, in which case the Tribunal may reconsider such dates, the attached calendar will thereafter become effective. The Parties are expected to note the initial time limits as of now.
32. The new calendar will replace the calendar adopted by the Tribunal on 18 June 2014. The Tribunal's decision in PO12 regarding bifurcation between quantum and liability is held in abeyance and will be addressed if and when appropriate.

¹⁵ Claimants' letter to the Tribunal, 26 September 2014, p. 2; Claimants' letter to the Tribunal, 17 October 2014, p. 5.

IV. ORDER

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

- (1) The Respondent's request for the reconsideration of PO12 is granted;
- (2) The remaining proceedings shall first address document authenticity, which shall cover issues of fact as well as the consequences of a finding of forgery on each claim as a matter of law;
- (3) The Parties are invited to agree on the dates for the document inspection phase and shall state their availability on the proposed hearing dates by 25 November. Within the same time limit, they may raise any compelling objection which they may have in respect of the other dates and time limits set out in Annex 1;
- (4) The decision in PO12 regarding bifurcation between liability and quantum remains in abeyance and will be considered if and when appropriate;
- (5) Costs are reserved for a later decision or award.

On behalf of the Tribunal

Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 18 November 2014

Annex 1

Tentative schedule for the document authenticity phase

2 December 2014	Simultaneous requests to produce documents
23 December 2014	Simultaneous voluntary production of responsive documents and/or objections to requests to produce documents, if any
9 January 2015	Simultaneous replies to objections to requests to produce documents, if any
23 January 2015	Tribunal's ruling on outstanding objections to requests to produce documents, if any
6 February 2015	Production of any outstanding documents for which no objection is sustained by the Tribunal
27 February 2015	Claimants' Response to Respondent's Application for Dismissal
Between 16 March and 31 March 2015	Possible document inspection (the Parties are invited to agree on dates for (i) requests for original documents, if any (ii) objections, if any, and (iii) decision by the Tribunal on objections, and (iv) date of document inspection
30 April 2015	Respondent's Reply
29 May 2015	Claimants' Rejoinder
5 June 2015	Identification of witnesses and experts to be cross-examined at the Hearing
9-10 June 2015	Pre-hearing conference
3-7 August 2015 (with 8 August in reserve) or from 10-14 2015 (with 15 August in reserve)	Hearing on document authenticity (facts and legal consequences) in Singapore