INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceedings between

CHURCHILL MINING PLC AND PLANET MINING PTY LTD

Applicants

and

REPUBLIC OF INDONESIA

Respondent

ICSID Case No. ARB/12/14 and ARB/12/40

ANNULMENT PROCEEDINGS

DECISION ON ANNULMENT

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

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

Date of dispatch to the Parties: March 18, 2019

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

A-[#]	Applicants' exhibit from the annulment proceedings
ALA-[#]	Applicants' legal authority from the annulment proceedings
Applicants or the Claimants	Churchill Mining Plc and Planet Mining Pty Ltd
Annulment Application	Applicants' Application for Annulment registered on April 11, 2017
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Award	Award of the Tribunal dated December 6, 2016 in the arbitration proceedings *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40)
BITs	The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments dated April 27, 1976, and the Agreement between the Government of Australia and the Government of the Republic of Indonesia for the Promotion and Protection of Investments dated November 17, 1992
C-[#]	Applicants' exhibit from the original arbitration
CLA-[#]	Applicants' legal authority from the original arbitration
Churchill	Churchill Mining Plc
Committee	*Ad hoc* Committee constituted on May 15, 2017

Counter-Memorial	Respondent's Counter-Memorial on Annulment dated October 20, 2017
2015 Hearing	Hearing on document authenticity held in Singapore from August 3 to 10, 2015
Hearing on Annulment	Hearing on annulment held from July 16 to July 17, 2018
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Observations	Respondent's Observations on the Applicants' Stay Request dated June 12, 2017 (amended June 13, 2017)
Planet	Planet Mining Pty Ltd
R-[#]	Respondent's exhibit from the original arbitration
R-ANN-[#]	Respondent's exhibit from the annulment proceedings
Rejoinder	Respondent's Rejoinder on Annulment dated April 10, 2018
Reply	Applicants' Reply on Annulment dated February 15, 2018
Respondent or the State	Republic of Indonesia
RLA-[#]	Respondent's legal authority from the original arbitration
RLA-ANN-[#]	Respondent's legal authority from the annulment proceedings
Stay Request	Applicants' Application for Continued Stay of Enforcement dated May 29, 2017
Termination Application and Security Request	Respondent's Request to Terminate the Stay of Enforcement of the Award and Request for Security of Costs dated April 13, 2018

Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing on Annulment
Tribunal	Arbitral tribunal in the arbitration proceedings *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40)

I. INTRODUCTION

1. This case concerns an application for annulment (the "Annulment Application") of the award rendered on December 6, 2016 (the "Award") in the arbitration proceedings (ICSID Case No. ARB/12/14 and 12/40) between Churchill Mining Plc and its wholly owned subsidiary, Planet Mining Pty Ltd ("Churchill" and "Planet," together, the "Applicants" or the "Claimants") and the Republic of Indonesia (the "Respondent" or the "State," and together with the Applicants, the "Parties").

2. The Award was rendered by a tribunal composed of Professor Gabrielle Kaufmann-Kohler (President), Mr. Michael Hwang S.C. and Professor Albert Jan van den Berg (the "Tribunal").

3. The dispute in the original proceeding was initially submitted to the International Centre for Settlement of Investment Disputes ("ICSID") on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments dated April 27, 1976 (the "UK-Indonesia BIT"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "ICSID Convention"). Another ICSID proceeding was subsequently initiated on the basis of 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 November 17, 1992 (the "Australia-Indonesia BIT," and together with the UK-Indonesia BIT, the "BITs"). The Parties subsequently agreed to join the two proceedings.

4. The dispute related to the East Kutai Coal Project (the "EKCP"), a mining project developed by the Applicants through an Indonesian company, PT Indonesian Coal Development ("PT ICD") in partnership with a number of Indonesian companies ("Ridlatama Companies"), in the Regency of East Kutai on the island of Kalimantan in Indonesia. The Applicants and the Ridlatama Companies decided to focus their activities on the EKCP after a first project in Sendawar had proved unsuccessful. However, the

surveys by two of the Ridlatama Companies, PT Ridlatama Steel ("PT RS") and PT Ridlatama Power ("PT RP") in the area proved equally disappointing with the exception of the southern border of the PT RP block, where the identified coal reserves extended into a concession area held by an Indonesian conglomerate ("Nusantara"). Four of the Ridlatama Companies, PT Ridlatama Tambang Power ("PT RTM"), PT Ridlatama Trade Powerindo ("PT RTP"), PT Investmine Nusa Persada ("PT INP") and PT Investama Resources ("PT IR"), applied for mining licenses over this same area on the assumption that the Nusantara's licenses had expired. The regulatory system regarding coal exploration and mining in Indonesia provides for a process of upgrading licenses corresponding to each period of project development, from a general survey business license to an exploration license and then to an exploitation license, which were, according to Churchill and Planet, successively secured by the four Ridlatama Companies on May 24 and November 29, 2007, April 9, 2008, and March 27, 2009. However, the Ridlatama exploitation licences (the "Exploitation Licenses") were revoked on May 4, 2010, because the Ridlatama Companies did not have the permits to operate in a forest zone. The Ridlatama Companies unsuccessfully applied to the Indonesian administrative courts for an order quashing the revocation decision.

5. In the arbitration, the Applicants claimed protection for their investments in Indonesia, namely (i) their shares and interests in the Indonesian companies through which the EKCP was being carried out, (ii) the mining rights in connection with the EKCP, (iii) the feasibility studies that had been carried out in connection with the EKCP and the intellectual property which had been provided to the local government, (iv) the amounts invested for planning and in preparation of the extraction, and (v) the goodwill in the Indonesian mining services market lost as a result of the State's actions. The Applicants alleged that the State expropriated their investments in breach of its international obligations, failed to accord to them fair and equitable treatment ("FET") and full protection and security, and failed to ensure that their investments were not impaired by unreasonable and discriminatory measures. The Applicants also brought a claim for denial of justice.

6. In the Award, the Tribunal decided that Churchill and Planet's claims were inadmissible because 34 disputed documents, including the licenses relating to the EKCP, were not authentic and not authorized. The Tribunal also ordered that Churchill and Planet pay the costs and expenses incurred by the Tribunal and the ICSID administrative fees (for a maximum amount of USD 800,000) and reimburse the State USD 8,646,528 for legal costs and expenses.

7. The Applicants have compendiously invoked three grounds for annulment of the Award: (i) that the Tribunal seriously departed from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention); (ii) that the Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention); and (iii) that the Tribunal failed to state the reasons on which the Award was based (Article 52(1)(e) of the ICSID Convention).

II. PROCEDURAL HISTORY

8. On March 31, 2017, Churchill and Planet filed with ICSID the Annulment Application pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"). The Annulment Application contained a request for the stay of the enforcement of the Award pursuant to Article 52(5) of the ICSID Convention and Arbitration Rule 54(2).

9. On April 11, 2017, the Secretary-General of ICSID registered the Annulment Application and notified the Parties that the enforcement of the Award was provisionally stayed pursuant to Arbitration Rule 54(2).

10. On May 15, 2017, the *ad hoc* Committee (the "Committee") was constituted in accordance with Article 52(3) of the ICSID Convention. Its members are: Judge Dominique Hascher (French), serving as President, Professor Dr. Karl-Heinz Böckstiegel (German) and Ms. Jean Kalicki (U.S.). All members were appointed by the Chairman of the Administrative Council.

11. On May 23, 2017, the Committee invited the Parties to confer and agree upon a briefing schedule to address the Applicants' request for stay of enforcement of the Award.

12. By communications of May 24, 26 and 27, 2017, the Parties transmitted to the Committee an agreed briefing schedule, which included one round of written submissions and oral arguments at the first session of the Committee.

13. On May 29, 2017, the Applicants filed their application for continued stay of enforcement of the Award along with exhibit A-47 and legal authorities ALA-23 through ALA-29 (the "Stay Request").

14. On May 31, 2017, the Committee took note of the Parties' agreement on the briefing schedule and decided to hold the first session on June 20, 2017, by telephone conference. In light of the agreed timetable, the Committee also invited the Parties to confirm that they agreed to extend the provisional stay of enforcement of the Award and the 30-day time limit set forth in Arbitration Rule 54(2) until the date of the first session.

15. On June 1 and 5, 2017, the Parties confirmed that they agreed to extend the provisional stay of enforcement of the Award and the time limit for the decision on the Stay Request until June 20, 2017.

16. On June 12, 2017, the Respondent submitted its observations on the Stay Request along with exhibits R-269 through R-282, legal authorities RLA-272 through RLA-276, and selected exhibits from the arbitration proceedings.

17. On June 13, 2017, the Respondent submitted an amended version of its observations on the Stay Request.

18. As required by Arbitration Rules 13 and 53, and by agreement of the Parties, the first session was held on June 20, 2017, by telephone conference, from 9am until 10:37am (Washington, D.C. time). Participating in the session were:

> Members of the *ad hoc* Committee:
> Judge Dominique Hascher, President of the Committee
> Prof. Dr. Karl-Heinz Böckstiegel, Member
> Ms. Jean Kalicki, Member
>
> ICSID Secretariat:
> Ms. Laura Bergamini, Secretary of the Committee

Representing Churchill and Planet:
Mr. Audley Sheppard QC, Clifford Chance LLP
Dr. Sam Luttrell, Clifford Chance LLP
Dr. Romesh Weeramantry, Clifford Chance LLP
Ms. Clementine Packer, Clifford Chance LLP
Mr. David Quinlivan, Churchill Mining Plc
Mr. Russell Hardwick, Churchill Mining Plc
Mr. Nicholas Smith, Churchill Mining Plc

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Ms. Claudia Frutos-Peterson, Curtis, Mallet-Prevost, Colt & Mosle LLP
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Mr. Marat Umerov, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Freddy Harris, Ministry of Law and Human Rights of the Republic of Indonesia
Mr. Cahyo R. Muzhar, Ministry of Law and Human Rights of the Republic of Indonesia
Mr. Ardiningrat Hidayat, Ministry of Law and Human Rights of the Republic of Indonesia
Ms. Agvirta Armilia Sativa, Ministry of Law and Human Rights of the Republic of Indonesia
Ms. Dinda Kartika, Ministry of Law and Human Rights of the Republic of Indonesia

19. During the session, the Committee and the Parties discussed a number of procedural matters, including the schedule for the written pleadings. The Parties confirmed their agreement on certain procedural matters and made oral submissions on certain points of disagreement. The Parties also presented oral pleadings on the continuation of the stay of enforcement of the Award, which were recorded.

20. On June 20, 2017, having deliberated by telephone call, the Committee ruled that the stay of enforcement was to continue until it issued a final determination on the matter.

21. On June 27, 2017, the Committee issued a Decision on the Stay Request (the "Stay Decision") by which it decided that the stay of enforcement would continue pending a decision on the Annulment Application provided that the Applicants use their best efforts to pledge a property located in the East Kalimantan Province (Indonesia) (the "Port Land").

22. On July 11, 2017, the Applicants provided an update on the actions taken to pledge the Port Land.

23. On July 14, 2017, the Committee issued Procedural Order No. 1 providing *inter alia* directions on the subsequent conduct of the annulment proceedings and setting forth the procedural calendar of the proceedings.

24. By letter of the same date, the Committee informed the Parties that the hearing on annulment would take place in Singapore and proposed possible hearing dates.

25. On July 23, 2017, the Applicants provided a further update on the execution of the pledge and inquired after Respondent's availability for executing the pledge through a power of attorney to sell and transfer the Port Land (the "POA").

26. On July 24, 2017, the Respondent requested further information from the Applicants on the POA and indicated that, absent adequate responses, the POA could not be deemed to produce effects under Indonesian law.

27. On July 25, 2017, the Applicants responded to the Respondent's letter of July 24, 2017, attaching documents concerning the purchase of a parcel of the Port Land. On the same date, the Applicants indicated that they were transmitting the files containing the transaction documents for all parcels comprising the Port Land to the Respondent via an online sharing platform.

28. On July 26, 2017, the Respondent informed the Applicants *inter alia* that it could not access the documents shared via the online platform.

29. On July 27, 2017, the Applicants confirmed that the documents relating to the Port Land were uploaded to the online platform indicated by the Respondent.

30. On the same date, the Applicants filed a copy of a deed poll made under Australian law to execute the POA (the "Deed Poll") and a witness statement from Mr. David Quinlivan. The Applicants requested that the Committee either (i) confirm that the stay of enforcement of the Award remain in place (being the condition set forth in paragraph 42 of the Stay Decision met), or (ii) extend the stay until the Committee rule on the Applicants' compliance with paragraph 42 of the Stay Decision.

31. On July 27, 2017, the Committee invited the Respondent's comments on the Applicants' request and temporarily extended the stay of the enforcement.

32. On July 27, 2017, the Respondent responded to the Applicants' email of July 25, 2017 and submitted exhibit R-ANN-283.

33. In light of the Parties' unavailability on the hearing dates proposed by the Committee, on July 31, 2017, the Committee proposed additional hearing dates.

34. On August 2, 2017, the Respondent submitted its observations on the Applicants' request of July 27, 2017 together with exhibits R-ANN-284 to R-ANN-289, R-80, R-86, R-226, and C-257.

35. On August 3, 2017, the Committee decided that, by signing the Deed Poll, the Applicants had met the condition in paragraph 42 of the Stay Decision, and thus the stay of enforcement of the Award would continue pending a decision on the Annulment Application.

36. On August 3 and 4, 2017, the Parties confirmed their availabilities on the additional hearing dates proposed by the Committee.

37. On August 10, 2017, the Committee confirmed that the hearing on annulment would take place on July 16 and 17, 2018.

38. On October 20, 2017, the Respondent filed its Counter-Memorial on Annulment (the "Counter-Memorial") along with annex A, exhibits R-ANN-290 through R-ANN-311, legal authorities RLA-ANN-277 through RLA-ANN-309 and selected exhibits and legal authorities from the arbitration proceedings.

39. On December 22, 2017, the Parties agreed upon a few changes to the procedural calendar, subsequently approved by the Committee.

40. On February 15, 2018, the Applicants filed their reply on annulment (the "Reply") along with exhibit A-48, annex A to Procedural Order No. 16 from the arbitration proceedings, and legal authorities ALA-30 and ALA-31.

41. On April 10, 2018, the Respondent filed its rejoinder on annulment (the "Rejoinder") along with exhibits R-ANN-312 through R-ANN-329 and legal authorities RLA-ANN-307, RLA-ANN-310 through RLA-ANN-338.

42. On April 13, 2018, the Respondent filed a request to terminate the stay of enforcement of the Award and a request for security for costs (the "Termination Application and Security Request") together with the expert report of Professor Ida Nurlinda, exhibits R-ANN-330 through R-ANN-353, legal authorities RLA-ANN-339 through RLA-ANN-376, and selected exhibits from the arbitration proceedings.

43. On April 23, 2018, the Applicants filed their observations on the Termination Application and Security Request together with exhibits A-49 through A-52 and legal authorities ALA-32 through ALA-35.

44. On May 7, 2018, the Respondent filed a reply on the Termination Application and Security Request together with exhibits R-ANN-354 and R-ANN-355, and legal authorities RLA-ANN-377 through RLA-ANN-385.

45. On May 24, 2018, the Parties advised the Committee on the agreements they were able to reach on the schedule of the hearing and its organization.

46. On June 11, 2018, the President of the Committee held a pre-hearing organizational meeting with the Parties by telephone conference.

47. On June 19, 2018, the Committee issued Procedural Order No. 2 providing directions on the organization of the hearing.

48. The hearing on annulment was held in Singapore on July 16 and 17, 2018 (the "Hearing on Annulment"). The following persons were present at the Hearing:

> Members of the *ad hoc* Committee:
> Judge Dominique Hascher, President of the *ad hoc* Committee
> Prof. Dr. Karl-Heinz Böckstiegel, Member
> Ms. Jean Kalicki, Member
>
> ICSID Secretariat:
> Ms. Laura Bergamini, Secretary of the *ad hoc* Committee

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Mr. David Quinlivan, Churchill Mining Plc
Mr. Nikita Rossinsky, Churchill Mining Plc
Mr. Nicholas Smith, Churchill Mining Plc

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Mr. Soenardi Pardi, Hendra Soenardi
Mr. Victor Ricardo, Hendra Soenardi
Mr. Yasonna H. Laoly, Minister of Law and Human Rights of the Republic of Indonesia
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Mr. Cahyo R. Muzhar, Ministry of Law and Human Rights of the Republic of Indonesia
Ms. Agvirta Armilia Sativa, Ministry of Law and Human Rights of the Republic of Indonesia
Ms. Dinda Kartika, Ministry of Law and Human Rights of the Republic of Indonesia
Mr. Evren Gilbert, Ministry of Law and Human Rights of the Republic of Indonesia
Ms. Margaretha Pakpahan, Ministry of Law and Human Rights of the Republic of Indonesia
Ms. Rani Yulianti, Ministry of Law and Human Rights of the Republic of Indonesia
Ms. Dora Hanura, Ministry of Law and Human Rights of the Republic of Indonesia
Mrs. Adhyanti S. Wirajuda, Embassy of the Republic of Indonesia in Singapore
Mr. Tjoki Siregar, Embassy of the Republic of Indonesia in Singapore

Expert:
Prof. Ida Nurlinda, Faculty of Law, University of Padjadjaran

Court Reporters:
Ms. Katherine Anne O'Brien, EPIQ
Ms. Sue-Ann Chin, EPIQ

49. At the Hearing, the Parties presented oral pleadings on the Annulment Application, the Termination Application and the Security Request. The Hearing was recorded. A verbatim transcript was made and circulated to the Parties.

50. The Committee met to deliberate in Singapore on July 18, 2018 and continued its deliberations thereafter by various means of communication.

51. On August 10, 2018, the Respondent, also on behalf of the Applicants, submitted joint corrections to the transcript of the Hearing.

52. On August 31, 2018, the Applicants and the Respondent filed their respective statements on costs.

53. On September 11, 2018, a finalized version of the transcript of the Hearing was transmitted to the Parties and the Committee.

54. In accordance with Arbitration Rules 53 and 38(1), the annulment proceedings were declared closed on March 5, 2019.

55. On March 18, 2019, the Committee issued the decision on the Termination Application and Security Request.

III. THE AWARD

A. THE PROCEDURE BEFORE THE TRIBUNAL

56. The Committee will briefly summarize in this section certain relevant aspects of the procedural background of the arbitration proceedings, which are elaborated in paragraphs 1 to 99 of the Award.

57. On February 24, 2014, the Tribunal issued two decisions (one in respect of the *Churchill v. Indonesia* case and the other in respect of the *Planet v. Indonesia* case) upholding its jurisdiction over the dispute. Following these decisions, the Parties were invited to agree on a schedule for the merits phase of the arbitration, which they could not do.

58. On April 22, 2014, the Tribunal issued Procedural Order No. 8, declining the State's request for bifurcation between liability and *quantum* and establishing a calendar for the merits phase of the arbitration.

59. On May 16, 2014, the State filed a request for inspection of documents along with a list of disputed documents and a forensic handwriting examination report from Mr. Gideon Epstein.

60. On July 22, 2014, the Tribunal issued Procedural Order No. 10, ordering the Parties to make certain documents available for inspection. The inspection was conducted in Singapore on August 29, 2014 under the supervision of ICSID.

61. On September 25, 2014, the Respondent filed an application for dismissal of the Claimants' claims based on allegations that the Ridlatama mining licenses were forged and fabricated (the "Forgery Dismissal Application"),[1] appending several witness statements (including those of Messrs. Ishak and Noor)[2] and expert reports from Econ One Research and Bara Consulting. The Respondent asked the Tribunal for a hearing within three weeks to address the authenticity of 34 disputed documents relating to licenses and permits for the EKCP and an award dismissing all of the Claimants' claims as inadmissible by reason of the invalidity and illegality of the disputed Ridlatama licenses.

62. On September 26, 2014, the Claimants provided their preliminary comments on the Forgery Dismissal Application and opposed the request for an immediate hearing.[3]

63. On October 21, 2014, following further exchanges on the Forgery Dismissal Application, the Parties and the Tribunal held a hearing by telephone conference.[4]

[1] Exhibit A-05.

[2] Exhibit A-04 (Mr. Noor's witness statement). The Parties have not submitted Mr. Ishak's witness statement as an exhibit in the annulment proceedings. However, the day before the Hearing, the Respondent submitted (also on behalf of the Applicants) USB drives containing the entire record of the arbitration proceedings.

[3] Exhibit A-06.

[4] Exhibit A-07.

64. On October 27, 2014, the Tribunal issued Procedural Order No. 12 ("PO12") rejecting the State's request for immediate adjudication of the forgery issue.[5] The Tribunal also decided to bifurcate the proceedings between a liability and a *quantum* phase.

65. On November 3, 2014, the Respondent submitted a request for reconsideration of PO12[6] and a table titled "Non-Viability of Claimants' Claims Based on Finding of Forgery of Ridlatama Licenses"[7] detailing the reasons why, in its view, a finding on forgery would render inadmissible each of the Claimants' claims.

66. On November 10, 2014, the Claimants opposed the Respondent's request for reconsideration of PO12.[8]

67. On November 18, 2014, the Tribunal issued Procedural Order No. 13 ("PO13") granting the Respondent's request for reconsideration and deciding to address the authenticity of the disputed documents as a matter of priority. The Tribunal determined that the scope of the authenticity phase would extend to "all factual aspects relating to forgery as well as the legal consequences of a finding of forgery," and specified that the Parties were not prevented from addressing other appropriate matters in connection with the forgery allegations and arguments.[9]

68. On November 23, 2014, the Claimants requested that the Tribunal reconsider PO13 and reinstate PO12.[10]

69. On December 1, 2014, the Respondent opposed the Claimants' request for reconsideration of PO13.[11] The Claimants and the Respondent filed further submissions on the Claimants' request on December 8 and 12, 2014, respectively.[12]

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[5] Exhibit A-08.
[6] Exhibit A-09(1).
[7] Exhibit A-09(2).
[8] Exhibit A-10.
[9] Exhibit A-11.
[10] Exhibit A-12.
[11] Exhibit A-13.
[12] Exhibits A-14, A-15(1) and A-15(2).

70. On January 12, 2015, the Tribunal issued Procedural Order No. 15 ("PO15") denying the Claimants' request for reconsideration and reaffirming PO13.[13] At paragraph 34 of PO15, the Tribunal described the scope of the document authenticity phase as follows:

> The Tribunal is also mindful of the Claimants' argument that their allegedly surviving claims are intertwined with the forgery allegations. At this stage of the proceedings, it appears correct that for instance the facts in support of estoppel overlap with the facts of the expropriation and fair and equitable treatment claims. However, these overlapping facts are not meant to be part of the bifurcated issues. Indeed, paragraph 28 of PO13 defines the scope of the authenticity phase as comprising (i) the factual aspects of forgery and (ii) the legal consequences of a finding of forgery. Accordingly, the document authenticity phase was defined as being limited to (i) the factual question whether the impugned documents are authentic or not (including especially who signed the documents and how) and (ii) legal submissions on the positions in law in a scenario where there would be forgery (including for instance the legal requirements for estoppel, as opposed to the facts allegedly justifying a finding of estoppel).

The Tribunal also set forth a revised calendar for the document authenticity phase.

71. On February 3, 2015, Clifford Chance informed the Tribunal that they had been appointed to represent the Claimants in the arbitration.

72. On February 13, 2015, the Respondent informed the Tribunal of the Parties' agreement to conduct a second document inspection the week of April 13, 2015.

73. On March 13, 2015, the Parties exchanged their requests for production and inspection of documents.

74. Following further exchanges between the Parties, on April 6, 2015, the Tribunal issued Procedural Order No. 16 ("PO16"), addressing the Parties' requests for production of documents and inspection.[14] In particular, the Tribunal granted the Claimants' requests

[13] Exhibit A-16.

[14] Exhibits A-19(1) and A-19(2).

Nos. 11 and 16 (requesting the production of investigative material, the "Police Files") and dismissed the Respondent's objection based on the confidentiality of such documents.[15]

75. On April 16 and 17, 2015, a second document inspection took place in Singapore under the supervision of ICSID.

76. On April 20, 2015, the State requested, *inter alia*, that the Tribunal reconsider its decisions in PO16 requiring the production of the Police Files or, in the alternative, that the Tribunal not draw any adverse inferences from the Respondent's failure to produce these documents.[16]

77. On April 24, 2015, the Claimants opposed the Respondent's request for reconsideration and argued that the State was hampering their ability to rebut the State's serious allegations of fraud and limiting the Tribunal's ability to make an informed and fair decision.[17]

78. On April 29, 2015, the Claimants wrote to the Tribunal pointing out that the time limit to produce documents had lapsed without the requested documents being produced and soliciting the Tribunal's decision on the Respondent's request for reconsideration of PO16 with respect to the Police Files.[18]

79. On April 30, 2015, the Respondent replied to the Claimants' latest submissions and reiterated its request for reconsideration of PO16, also stating that the Police Files could not be produced while the police investigation was ongoing.[19] The Claimants responded to the Respondent's letter on May 5, 2015.[20]

80. On May 12, 2015, the Tribunal decided on a few pending issues, including the Respondent's request for reconsideration of PO16. The Tribunal took note of the non-production of the Police Files and the Parties' positions as to the justification (or lack of

[15] Exhibit A-19(2), para. 6.
[16] Exhibit A-20.
[17] Exhibit A-21.
[18] Exhibit A-22.
[19] Exhibit A-23.
[20] Exhibit A-24 (this letter is incorrectly dated April 5, 2015).

justification) for the non-production and adverse inferences. The Tribunal noted that it would "take these matters into consideration if and when relevant to the assessment of the evidence before it, being specified that the Parties may further address these matters in their post-hearing briefs if they so wish."[21]

81. On May 29, 2015, the Claimants filed their reply to the Forgery Dismissal Application along with supporting documentation.[22]

82. On July 14, 2015, the President of the Tribunal and the Parties held a pre-hearing telephone conference to discuss the organization of the hearing on document authenticity.

83. On July 30, 2015, following the Respondent's indication that Mr. Noor would not be available to testify at the hearing, the Claimants requested that (i) the Tribunal disregard Mr. Noor's witness statement; (ii) Mr. Noor's witness statement be struck from the record; and (iii) the State's submissions relying upon Mr. Noor's witness statement be disregarded.

84. On August 1, 2015, the Tribunal advised the Parties that it had questions for Mr. Noor and invited counsel for the Respondent to inform Mr. Noor that the Tribunal would appreciate the opportunity of hearing him at the hearing.

85. On August 2, 2015, a third document inspection took place in Singapore under the supervision of ICSID.

86. The hearing on document authenticity took place from August 3 to 10, 2015 in Singapore (the "2015 Hearing").[23] Mr. Noor did not appear and the Tribunal, after hearing the Parties, decided to disregard his witness statement.[24] On the last day of the 2015 Hearing, the Tribunal and the Parties discussed the way forward and the questions to be addressed in the post-hearing briefs.

[21] Exhibit A-25.

[22] Exhibits A-26, A-26(1), A-26(2), A-26(3) and A-26(4).

[23] The 2015 Hearing transcripts have been submitted into the record as Exhibits A-28 through A-34.

[24] Exhibit A-29, [Kaufmann-Kohler] [8:19] to [8:24].

87. On August 20, 2015, the Tribunal issued Procedural Order No. 20 ("PO20") dealing with post-hearing matters.[25] The Tribunal invited the Parties to address a few questions in their post-hearing briefs[26] and stated that:

> Having considered the positions set forth by the Parties at the end of the hearing, the Tribunal confirms that the Parties are to address matters falling within the scope of Procedural Order No. 15 especially paragraph 34. In other words, the Parties shall address (i) the factual question whether the impugned documents are authentic or not and (ii) the legal consequences of a finding of forgery. Matter (i) includes the question whether, if they were not handwritten, the impugned signatures were affixed with authority. Matter (ii) about the legal position in the event of forgery does not cover the effect of the possible invalidity of the survey and exploration licenses on the exploitation licenses. The present directions come in lieu of any different comments made by the Tribunal at the hearing.[27]

88. On October 20, 2015, the Parties filed their post-hearing briefs.[28] The Parties filed their replies to the post-hearing briefs on November 17, 2015[29] and then exchanged their submissions on costs.

89. On September 9, 2016, the Tribunal invited the Parties to provide their views on paragraph 163 of the *Minnotte v. Poland* award ("*Minnotte*") in connection with three specific issues ("*Minnotte* Direction"). *Minnotte* was a decision dealing with the consequences of third party fraud on which none of the Parties had previously relied. The Tribunal authorised the Parties to submit their comments (limited to 15 pages) with supporting legal authorities, and reply submissions (limited to 8 pages) without legal authorities. It further specified that "[i]f the parties consider it useful to refer to facts in addressing the issues set out above, they shall do so on the basis of the evidence in the record," and that "[o]nce it has

[25] Exhibit A-35.

[26] Exhibit A-35, para. 6.

[27] Exhibit A-35, para. 5.

[28] Exhibits A-36(1) and A-36(2) and Exhibit A-37.

[29] Exhibits A-38, A-39(1) and A-39(2).

deliberated on these additional submissions, the Tribunal expects to be in a position to issue its decision(s)/award(s)."[30]

90. On September 23, 2016, the Claimants filed their comments on *Minnotte* with the Secretariat. On the same day, the Respondent requested a one-week extension to file its comments.

91. On September 24, 2016, the Tribunal extended the time limit for the Parties' comments on *Minnotte* until September 27, 2016 and for the reply submissions until October 11, 2016.

92. The Parties timely filed their comments on *Minnotte*[31] and their reply submissions[32] and consented to the issuance of one decision/award for the two joined arbitration cases.

93. The proceedings were closed on December 6, 2016.

B. THE RESPONDENT'S POSITION BEFORE THE TRIBUNAL

94. The Respondent's position before the Tribunal is set out in detail in paragraphs 100, 101, and from 106 to 176 of the Award.

95. In short, the State claimed that the mining licenses and related approvals held by the Ridlatama Companies (which constituted the basis for the Claimants' investments in EKCP) were forged and fabricated as part of "a massive, systemic and sophisticated scheme to defraud the Republic of Indonesia." Specifically, the Respondent disputed the authenticity of 34 documents listed in paragraph 108 of the Award and argued that the upgrading of the non-authentic survey and exploration licenses to exploitation mining licenses in March 2009 was secured through deception and fraud.

96. The State argued that a finding of forgery and fraud would dispose of the Claimants' entire case because the Claimants' investments depend entirely on the rights conveyed by the licenses allegedly held by the Ridlatama Companies.

[30] Exhibit A-41.

[31] Exhibits A-42 and A-43.

[32] Exhibits A-44 and A-45.

97. Accordingly, the Respondent requested that the Tribunal issue an award:

(i) Deciding that the Ridlatama Companies' mining licenses for general survey and exploration upgrades were forged;

(ii) Deciding that the other impugned documents were forged;

(iii) Dismissing all claims asserted by the Claimants; and

(iv) Ordering the Claimants to pay the legal fees, expenses and other costs incurred by the Respondent in connection with the arbitration.[33]

98. In its reply post-hearing brief, the Respondent requested that the Tribunal:

(a) Find that the Ridlatama Companies' mining undertaking licenses for general survey and exploration were not authentic;

(b) Find that the other impugned documents were not authentic;

(c) Issue an award dismissing all of the claims asserted by the Claimants;

(d) Order the Claimants to pay the legal fees, expenses and other costs incurred by the Respondent in connection with the arbitration; and

(e) Order such other relief as it deemed appropriate.[34]

C. THE CLAIMANTS' POSITION BEFORE THE TRIBUNAL

99. Churchill and Planet's position before the Tribunal is described in paragraphs 102, 103, and from 177 to 227 of the Award.

100. The Claimants maintained that the State failed to provide "clear and convincing evidence" that the disputed documents were forged and fabricated by Ridlatama, or of the existence of a massive, systematic and sophisticated scheme to defraud the Respondent. They further

[33] Award, para. 100.

[34] Award, para. 101.

claimed that the signatures on the 34 documents were authorised and hence the documents were validly issued.

101. The Claimants submitted that the legal consequences of a finding of forgery or fraud would be very limited as the majority of the Claimants' investments would in any event remain legally valid. They further argued that the State failed to provide cogent reasons why a finding of forgery would lead to the dismissal of the Claimants' case and admitted, at the 2015 Hearing, that a factual finding of forgery would not determine the legal question of the validity of the disputed licenses nor of the Exploitation Licenses under Indonesian law (on which no arguments or expert evidence was presented to the Tribunal). Churchill and Planet also argued that Mr. Noor's refusal to attend the 2015 Hearing and the exclusion of his witness statement disposed of the Respondent's case on the Exploitation Licenses, which the Parties did not dispute he had signed by hand.

102. In any event, according to the Claimants, a finding of forgery would not affect their case considering the following legal arguments: estoppel, acquiescence, legitimate expectations, unjust enrichment, and internationally composite wrongful act.

103. Accordingly, the Claimants requested that the Tribunal dismiss the Forgery Dismissal Application and order that the Respondent pay the Claimants' legal costs in full.[35]

D. THE ANALYSIS OF THE TRIBUNAL

104. The Tribunal began its analysis by addressing a few preliminary issues, including the scope of the Award, the applicable law to the merits, and the burden and standard of proof.[36] As to the burden and standard of proof, the Tribunal found that:

> It is a well-established rule in international law that each Party bears the burden of proving the facts which it alleges (*actori incumbit onus probandi*). Since the Respondent alleges that the Survey and Exploration Licenses and related documents are forged and that the Exploitation Licenses

[35] Exhibit A-26(1), para. 260.

[36] Award, paras. 228-253.

> were obtained through deception, the Respondent bears the burden of proving its allegations of forgery and deception.
>
> […] the Respondent carries the burden of proving forgery and fraud, which proof will be measured on a standard of balance of probabilities or *intime conviction* taking into account that more persuasive evidence is required for implausible facts, it being specified that intent or motive need not be shown for a finding of forgery or fraud but may form part of the relevant circumstantial evidence. The Tribunal will assess all the available evidence on record and weigh it in the context of all relevant circumstances.[37]

105. The Tribunal went on to examine the factual aspects of the documents' authenticity, concluding that the general survey licenses, the exploration licenses and the ancillary documents were neither authentic nor authorized.[38]

106. The Tribunal then turned to the question of the authorship of the disputed documents[39] and found that: (i) there was insufficient evidence to uphold the Claimants' theory that State officials had deliberately used signature methods that would allow them later to deny authorization, in the event the State eventually wished to award valuable licenses to another party (the "Bad Faith Authorization Theory"); (ii) a number of facts demonstrated that "someone within the Regency assisted in the process of introducing the fabricated documents into the Regency's database and archives, thereby assisting in creating an appearance of legitimacy to the fraudulent scheme;"[40] and (iii) there was insufficient evidence to establish that corruption was involved in the issuance of the disputed documents.[41]

107. The Tribunal further examined the role of Ridlatama and the Claimants in the forgery and the fraud and found that: (i) evidence on the record pointed to Ridlatama's involvement;[42] and (ii) while a few elements suggested the Claimants' involvement in the fraud, they were

[37] Award, paras. 238 and 244.

[38] Award, paras. 254-444.

[39] Award, paras. 445-477.

[40] Award, paras. 458-462.

[41] Award, paras. 463-466.

[42] Award, paras. 467-472.

insufficient to reach a definite finding that the Claimants were the authors or instigators of the forgery and the fraud.[43] The Award summarizes the Tribunal's findings as follows:

> In summary, the Tribunal is of the view that the forgeries and the fraud were orchestrated by author(s) outside of the Regency, most likely Ridlatama, who benefited from the assistance from an insider to introduce the fabricated documents into the Regency's databases and archives. While the record points towards Ridlatama rather than the Claimants in relation to the forgery of the contentious documents, the Tribunal does not need to make a definitive finding to draw the proper legal consequences as the analysis below will show. It suffices for present purposes that, on the basis of the record, there is no conceivable author other than Ridlatama.[44]

108. The Tribunal finally addressed the legal consequences of its findings of fraud and forgery.[45] After recalling the positions of the Parties[46] and setting out the applicable legal framework,[47] the Tribunal examined whether the Claimants' claims qualified for protection or should be dismissed.

109. The Tribunal found that claims arising from rights based on fraud or forgery that a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy, as contended by the Respondent,[48] and must be dismissed "on the ground of a threshold bar, without entering into an analysis of the alleged treaty violations."[49]

110. The Tribunal then elaborated on the seriousness of the fraud tainting the entire EKCP.[50] In particular, in paragraphs 512 and 515 of the Award, the Tribunal noted as follows:

> The facts suggest that the motive driving the fraud was to extend Ridlatama's mining rights in the EKCP beyond the

[43] Award, paras. 473-475.
[44] Award, para. 476.
[45] Award, paras. 478-532.
[46] Award, paras. 478-486.
[47] Award, paras. 488-506.
[48] Award, para. 508.
[49] Award, para. 507.
[50] Award, paras. 509-515.

> unpromising tenements of PT RP and PT RS, and especially to access the PT RTM block which contains 95% of the coal reserves discovered in the EKCP. To this end, forged licenses and related documents were fabricated to give an impression of lawful entitlement. That false impression was then used to obtain hand-signed Exploitation Licenses issued on the misguided assumption that the entire operation rested on valid mining rights. The fraud was then later perpetuated with the forgery of the Re-Enactment Decrees after the Exploitation Licenses had been revoked. […]
>
> In sum, the Tribunal finds that the acts of forgery brought to light in these proceedings are of a particularly serious nature in light of the number and nature of forged documents and of the aim pursued, namely to orchestrate, legitimize and perpetuate a fraudulent scheme to gain access to valuable mining rights.[51]

111. The Tribunal also explained the reasons why it was not persuaded by the Claimants' contention that they had conducted an "extensive" and "exhaustive" due diligence when verifying the authenticity of the disputed mining licenses.[52]

112. The Tribunal's findings on the legal consequences of the forgery and fraud are summarized in a few paragraphs[53] that are worth quoting in full as they have been debated between the Parties in these annulment proceedings:

> 528. In conclusion, the Tribunal cannot but hold that all the claims before it are inadmissible. This conclusion derives from the facts analyzed above, which demonstrate that the claims are based on documents forged to implement a fraud aimed at obtaining mining rights. The author of the forgeries and fraud is not positively identified (although indications in the record all point to Ridlatama possibly with the assistance of a Regency insider). Notwithstanding, the seriousness, sophistication and scope of the scheme are such that the fraud taints the entirety of the Claimants' investment in the EKCP. As a result, the general principle of good faith and the prohibition of abuse of process entail that the claims before this Tribunal cannot benefit from investment

[51] Award, paras. 512 and 515 (footnotes omitted).

[52] Award, paras. 516-527.

[53] Award, paras. 528-532.

protection under the [BITs] and are, consequently, deemed inadmissible.

529. The inadmissibility applies to all the claims raised in this arbitration, because the entire EKCP project is an illegal enterprise affected by multiple forgeries and all claims relate to the EKCP. This is further supported by the Claimants' lack of diligence in carrying out their investment.

530. The conclusion reached by the Tribunal is within the scope of the present phase of the arbitration as it was circumscribed in Procedural Orders Nos. 13, 15 and 20. In this context, the Tribunal notes in particular that it arrived at this outcome without there being a need to address the validity of the Exploitation Licenses as a matter of Indonesian law (see above paragraphs 232-233). Indeed, whatever their validity under municipal law, the Exploitation Licenses were embedded in a fraudulent scheme, being surrounded by forgeries. Forged documents preceded and followed them in time with the Re-Enactment Decrees, which under a non-authentic signature purported to revoke the revocation of the Exploitation Licenses. The accumulation of forgeries both before and after the Exploitation Licenses show that, irrespective of their lawfulness under local law, the entire EKCP was fraudulent, thereby triggering the inadmissibility of the claims under international law.

531. The Tribunal further observes that, in light of the declaration of inadmissibility of all the claims, it can dispense with ruling on the Claimants' alleged substitute causes of action. Such causes of action exclusively relate to the Claimants' investments in the EKCP. Since the latter are tainted by the fraud, so are the substitute claims by force of consequence.

532. Since all the claims are held inadmissible, the Tribunal considers that these proceedings have reached their conclusion and therefore turns to the allocation of costs.[54] [Footnotes omitted.]

[54] Award, paras. 528-531.

113. After addressing the costs,[55] the Tribunal decided as follows:

> (1) The Decisions on Jurisdiction of [February 24, 2014] are incorporated by reference into this Award;
>
> (2) The 34 disputed documents listed in paragraph 108 of this Award are not authentic and unauthorized;
>
> (3) The claims brought in this arbitration are inadmissible;
>
> (4) The Claimants shall bear the fees and expenses of the Arbitral Tribunal as well as ICSID's administrative fees and thus pay to the Respondent USD 800,000 or any lower amount that may arise out of ICSID's final statement of account;
>
> (5) The Claimants shall bear 75% of the expenses incurred by the Respondent in connection with these proceedings and thus pay to the Respondent USD 8,646,528;
>
> (6) All other claims and requests are dismissed.[56]

IV. GROUNDS FOR ANNULMENT

A. THE APPLICANTS' SUBMISSIONS

114. As noted in paragraph 7 above, the Applicants argue that the Award should be annulled on three grounds: (i) Article 52(1)(d) of the ICSID Convention, (ii) Article 52(1)(b) of the ICSID Convention, and (iii) Article 52(1)(e) of the ICSID Convention.

i. Article 52(1)(d) of the ICSID Convention: Serious departure from a fundamental rule of procedure

115. The Applicants argue that right to be heard, treatment of evidence, equal treatment of the parties and burden of proof are fundamental rules of procedure whose breach may lead to an annulment under Article 52(1)(d) of the ICSID Convention.[57] According to the

[55] Award, paras. 533-556.

[56] Award, para. 557.

[57] Annulment Application, paras. 82-86.

Applicants, based on this provision, *ad hoc* committees have found that tribunals cannot "surprise" the parties with issues that neither of them has invoked, argued or reasonably anticipated,[58] nor conduct factual investigations on issues that may prove determinative of the outcome of the case without re-opening the proceedings.[59] The Applicants further argue that ICSID case law requires tribunals to grant the parties a full opportunity to be heard if they wish to apply a legal framework different from that argued by the parties.[60]

116. The Applicants claim that a breach of a fundamental rule of procedure is "serious" if the violation is substantial and such as to deprive the complainant of the protection that the rule was intended to provide.[61]

a. The *Minnotte* Direction

117. The Applicants claim that, by not allowing evidence relevant to the legal framework introduced by the *Minnotte* Direction, the Tribunal deprived them of a full opportunity to present their case on a novel legal framework that the Award found decisive.[62]

118. According to the Applicants, PO15 and PO20 limited the scope of the factual inquiry in the document authenticity phase to the issue of whether the impugned documents were authentic.[63] In the Applicants' view, by signalling that it did not want to hear about the facts allegedly justifying a finding of estoppel, the Tribunal excluded from the scope of the document authenticity phase the factual aspects of any legal theory in which evidence of good faith was required (including the theory underlying *Minnotte*).[64] However, the Applicants note, more than one year after the 2015 Hearing, the Tribunal introduced *ex officio Minnotte*, which raised issues very different than those addressed in the document authenticity phase (including lack of due care or negligence of the investor to investigate

[58] Annulment Application, para. 84.

[59] Annulment Application, para. 84; see also Tr. Day 2 [Luttrell] [37:19] to [37:25] and [41:2] to [43:20].

[60] Annulment Application, para. 84; see also Tr. Day 2 [Luttrell] [37:19] to [37:25] and [41:2] to [43:20].

[61] Annulment Application, paras. 85 and 86.

[62] Annulment Application, paras. 87-104; Reply, paras. 28-68; Tr. Day 1 [Sheppard] [47:1] to [53:17] and Tr. Day 2 [Luttrell] [43:21] to [45:25].

[63] Annulment Application, para. 88; Tr. Day 1 [Sheppard] [47:9] to [47:12].

[64] Reply, para. 37.

the factual circumstances surrounding the making of the investment, and the deliberate closing of the eyes to an indication of serious misconduct or crime).[65] According to the Applicants, with the *Minnotte* Direction, the Tribunal surprised the Parties with a legal theory that was not subject to debate and that the Parties could not anticipate.[66] At that time, the Applicants had not led (and could not have led) evidence in relation to the factors relevant to the *Minnotte* test because neither of the Parties had relied upon this decision or anticipated the case.[67] However, in the *Minnotte* Direction, the Tribunal limited the Parties' submissions to the existing evidence in the record, thereby precluding them from filing evidence necessary to address the *Minnotte* factors and denying them the opportunity to present their case,[68] as the Applicants promptly protested.[69] Furthermore, the Tribunal eventually decided to dismiss the case based on the novel legal framework.[70]

119. According to the Applicants, the matters identified in the *Minnotte* Direction were not part of the Respondent's theory in the document authenticity phase (as the Respondent had consistently claimed that the Claimants' good faith and state of mind were not relevant).[71] The Applicants accept that the arbitration record included some evidence on such issues, but highlight that this evidence was not exhaustive.[72] Specifically, the Applicants contend that the evidence relevant to the first *Minnotte* factor (due diligence) was partial because it had been submitted "incidentally" (in support of their estoppel claim and in response to a specific part of the State's case) and not to prove the *Minnotte* factor.[73] In this regard, they note that, for instance, no evidence had been submitted on the due diligence practices of investors generally in the Indonesian mining sector in the relevant period, evidence which in their view would be required to assess the adequacy of their own diligence.[74] The Applicants further argue that the arbitration record contained virtually no evidence on the

[65] Annulment Application, paras. 91-104; Tr. Day 1 [Sheppard] [47:20] to [48:4].
[66] Annulment Application, paras. 98-104.
[67] Tr. Day 1 [Sheppard] [47:13] to [47:17].
[68] Annulment Application, paras. 93-104; Tr. Day 1 [Sheppard] [48:5] to [48:13].
[69] Annulment Application, para. 93; Reply, paras. 6, and 28-47.
[70] Annulment Application, para. 95.
[71] Reply, para. 29.
[72] Annulment Application, paras. 89-91; Tr. Day 1 [Sheppard] [48:18]
[73] Annulment Application, paras. 89-91; Tr. Day 1 [Sheppard] [48:21] to [49:17].
[74] Annulment Application, para. 92.

second *Minnotte* factor (deliberate closing of eyes) because this factor was not relevant to the document authenticity phase as scoped by the Tribunal.[75] In this respect they note that, for instance, no evidence had been presented on the Applicants' reasonable reliance on the State's assurances.[76]

120. The Applicants further argue that the breach of due process was serious because the *Minnotte* factors were dispositive (as the overall structure of the Award shows) and the new evidence that they could have proffered (including the testimony of Mr. Mazak) could have impacted the Award.[77]

121. At the Hearing, the Applicants also argued that the Tribunal breached due process by making a decision on admissibility without previously informing the Parties that international public policy and principles of good faith were issues to be addressed in the document authenticity phase.[78] According to the Applicants, it was improper for the Tribunal to introduce an argument that wholly favoured one side (the State) and make a finding on admissibility without hearing arguments and evidence on all of the arguments in the round (including the Applicants' counter-arguments).[79] The Applicants also argued that the Tribunal did not treat the Parties equally as it applied "good faith […] asymmetrically, only to the Claimants."[80] According to the Applicants, having explored the good faith of Churchill under *Minnotte*, it was incumbent on the Tribunal to also weigh the good faith and the role of the State when making its finding on admissibility.[81]

[75] Tr. Day 1 [Sheppard] [49:18] to [49:22].
[76] Tr. Day 1 [Sheppard] [50:15] to [50:20].
[77] Annulment Application, paras. 94 and 95; Reply, paras. 46-57, and 58-68; Tr. Day 1 [Sheppard] [51:16] to [52:25].
[78] Tr. Day 1 [Sheppard] [40:14] to [53:17].
[79] Tr. Day 1 [Sheppard] [46:8] to [46:13].
[80] Tr. Day 1 [Sheppard] [57:18] to [57:22].
[81] Tr. Day 1 [Sheppard] [53:18] to [60:9].

b. The re-admission of Mr. Noor's evidence

122. The Applicants contend that the Tribunal denied their right to be heard on whether Mr. Noor's, the former Regent of East Kutai, evidence should be effectively (even if not formally) re-admitted and given weight.[82]

123. According to the Applicants, the State's main use of Mr. Noor's testimony was to prove that the Exploitation Licenses were void even if they were not forged.[83] In spite of its decision to disregard Mr. Noor's witness statement (paragraph 84 of the Award), the Tribunal referred to Mr. Noor's testimony in paragraph 165 of the Award and gave weight to it at paragraph 512 when concluding that the hand-signed Exploitation Licenses were issued on the "misguided assumption" that the entire operation rested on valid mining rights.[84] In the Applicants' view, the only evidence the Tribunal could possibly have relied upon in making this finding was Mr. Noor's witness statement.[85]

124. The Applicants further argue that, by effectively readmitting Mr. Noor's evidence without prior notice, the Tribunal left them "with no ability to rebut the presumption which had been formed in the [T]ribunal's mind that the [E]xploitation [L]icenses had been signed on a misguided assumption" since they could no longer cross-examine Mr. Noor.[86] They further argue that this decision, compared with the way the Tribunal treated the Police Files, shows that the Tribunal treated the Parties unequally.[87]

125. According to the Applicants, the breach of their procedural rights had a material impact upon the outcome of the Award as it led to the effective re-admission of Mr. Noor's evidence, which then was critical for the Tribunal's finding on fraud under the *Minnotte* test.[88]

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[82] Annulment Application, paras. 105-112; Reply, paras. 90-102.

[83] Reply, paras. 91 and 92.

[84] Annulment Application, paras. 105-112.

[85] Reply, paras. 97-99.

[86] Tr. Day 1 [Sheppard] [66:1] to [66:10].

[87] Tr. Day 1 [Sheppard] [66:18] to [67:23].

[88] Annulment Application, para. 112.

c. The reversal of the burden of proof in relation to fraud and deception and to the *Minnotte* factors

126. Churchill and Planet claim that, notwithstanding the finding in paragraph 238 of the Award, the Tribunal reversed the burden of proof in breach of the principle *actori incumbit probatio* and put the burden of proof on the Claimants, including with respect to fraud and deception.[89]

127. The Applicants point to paragraph 522 of the Award to argue that the Tribunal placed on the Claimants the burden to *disprove* forgery.[90] They further refer to paragraph 512 of the Award and argue that the finding therein can only be explained by a reversal of the burden to prove deception.[91] According to the Applicants, this paragraph suggests that the Tribunal (i) placed on them the burden of proving that Mr. Noor did not hand-sign the Exploitation Licenses due to the "false impression" of their lawful entitlement, and (ii) found that they had not met their burden. In the Applicants' view, however, it was for the party asserting deception (the State) to prove that the "false impression" created by the forged documents was "used" to influence Mr. Noor to sign the Exploitation Licenses.[92] Since the evidence relied upon by the State (Mr. Noor's testimony) to this purpose was struck from the record, the Tribunal had no reason to require the Claimants to disprove deception.[93]

128. The Applicants further state that this unlawful allocation of the burden of proof had a major impact on the outcome of the case because the Applicants could not discharge the burden placed upon them without cross-examining Mr. Noor.[94] The Applicants argue that the overall procedural treatment of Mr. Noor's evidence (including the Tribunal's refusal to

[89] Annulment Application, paras. 123-127; Reply, paras. 103-106.

[90] Para. 522 of the Award reads in its relevant part as follows: "the Claimants did not seek to ascertain the means of signing mining licenses in Indonesia […] although that information would have been readily available." The Applicants further note that the Tribunal's condemnation in paragraph 522 cannot square with the admission of the former Regent, Mr. Ishak, who acknowledged that "anything can happen" inside the Regency (Annulment Application, para. 126, fn. 185).

[91] Reply, para. 105.

[92] Reply, para. 105.

[93] Reply, para. 105.

[94] Annulment Application, paras. 125 and 127; Reply, paras. 105 and 106.

draw adverse inferences from his non-appearance) may call into question the impartiality of the Tribunal.[95]

129. Finally, the Applicants allege that the Tribunal reversed the burden to prove the *Minnotte* factors.[96] According to the Applicants, it was for the State (who had asserted fraud and forgery) to submit evidence on what a "reasonable investor in the Indonesian mining sector" would have done in the circumstances of the case because they could not possibly bear the burden of proving the benchmark against which their own conduct was to be tested.[97] As the State brought no evidence on the due diligence standards, the burden of proof on this point could never have shifted on the Claimants.[98]

d. The Infection Issue

130. The Applicants argue that the Tribunal denied their right to be heard on whether the Exploitation Licenses were stand-alone legal title instruments that, under Indonesian law, remained valid even if the underlying documents were forged (the "Infection Issue").[99] According to the Applicants, this breach is a consequence of the primary violation of due process consisting in denying them the right to be heard on the *Minnotte* factors.[100]

131. Having found that the *Minnotte* bar rendered all of the Claimants' claims inadmissible, the Tribunal concluded that it did not need to hear the Parties on the Infection Issue and dismissed the case without admitting submissions on the validity of the Exploitation Licences under Indonesian law. According to the Applicants, the Tribunal did so although (i) the Infection Issue had been carved out from the document authenticity phase (in PO15 and PO20) on the common understanding that it would be addressed in a later phase of the proceedings;[101] (ii) the Claimants had pointed out that they considered the Infection Issue

[95] Reply, para. 105.
[96] Annulment Application, paras. 128-133.
[97] Annulment Application, para. 129.
[98] Annulment Application, para. 132.
[99] Annulment Application, paras. 113-122; Reply, paras. 100, and 110-115; Tr. Day 1 [Sheppard] [67:24] to [69:7].
[100] Reply, para. 112.
[101] Annulment Application, paras. 63-69, 115, and 118-121.

as a "major" issue;[102] and (iii) the importance of the Infection Issue had been "elevated" following the Tribunal's decision to exclude Mr. Noor's evidence at the 2015 Hearing.[103] The Applicants argue that, by its decision, the Tribunal deprived the Claimants of the ability to make submissions (and provide expert evidence) on how their investments – the Exploitation Licenses – would have a legal existence notwithstanding a finding of forgery.[104]

132. Responding to the argument that nothing in PO13, PO15 or PO20 prevented them from elaborating on the Infection Issue, the Applicants note that, throughout the document authenticity phase, "they simply did not have a case to answer" on that issue, and the significance of the Infection Issue was elevated by the exclusion of Mr. Noor's evidence.[105]

e. Denial of justice

133. In their Reply, the Applicants claim that they were not given the opportunity to brief the question of whether they suffered a denial of justice before the Indonesian courts.[106] Specifically, according to the Applicants, the Tribunal denied them due process by dismissing their denial of justice claim (without reasons and against a previous finding in PO12) while the evidentiary record on it was "virtually non-existent," due to the fact that in PO15 the Tribunal had directed them not to submit at that stage evidence supporting their claim or on why their claim could survive a finding of forgery.[107]

f. State responsibility

134. The Applicants allege that they were never given an opportunity to present a full case to support their arguments on State responsibility.[108] In particular, the Applicants argue that,

[102] Annulment Application, para. 115.

[103] Annulment Application, paras. 115, 116, and 63 (noting that without Mr. Noor's witnessing that he was deceived into signing the Exploitation Licenses, the State needed "the law to do the work that the facts could not do" and show that, by operation of Indonesian law, the Exploitation Licenses were "infected" by the forgery of the general survey and exploration licenses).

[104] Annulment Application, para. 117.

[105] Reply, para. 115.

[106] Reply, para. 124.

[107] Reply, para. 124.

[108] Reply, paras. 87-89; Tr. Day 1 [Sheppard] [53:18] to [60:9].

if allowed to do so, they could have provided "further evidence to demonstrate the full scale of the State's involvement in the fraudulent scheme that the Tribunal found," and developed arguments on how the "State-orchestrated fraud gives rise to substantive liability" under international law.[109] According to the Applicants, having found that someone inside the Regency was likely complicit in the fraud, the Tribunal was required to address the legal consequences of that finding on the State and on its objection to the admissibility of the Claimants' claims.[110] In particular, the Applicants argue that, if the Tribunal was to apply international law to the conduct of Churchill (as it purported to do in applying *Minnotte*), it also should have applied the international law principles of State responsibility enshrined in Article 7 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "ILC Articles"). According to the Applicants, the Tribunal's one-sided application of general principles of international law amounts to a breach of the Applicants' right to be heard and an unequal treatment of the Parties.[111]

135. According to the Applicants, the breach of their right to be heard had an impact on the outcome of the Award because had the Tribunal applied the law of State responsibility and found that the State was precluded from arguing *Minnotte*, there would not have been an award but a decision to conclude the document authenticity phase, with directions for how the State responsibility and other legal consequences should have been briefed in a subsequent phase.[112]

ii. Article 52(1)(b) of the ICSID Convention: Manifest excess of powers

136. According to the Applicants, a failure to apply the proper law to the case may give ground for annulment under Article 52(1)(b) of the ICSID Convention if it is "manifest" (meaning "obvious, clear, easily recognizable" or "clearly capable of making a difference to the result").[113] At the Hearing on Annulment, the Applicants clarified that ICSID committees

[109] Reply, para. 88.

[110] Tr. Day 1 [Sheppard] [53:18] to [53:24] and [60:4] to [60:9].

[111] Tr. Day 1 [Sheppard] [58:19] to [59:1].

[112] Reply, para. 89.

[113] Annulment Application, paras. 134 and 135; see also Tr. Day 2 [Weeramantry] [7:15] to [7:22].

have read the term "manifest" as meaning "easily perceived, obvious or flagrant, and without requiring an outcome analysis,"[114] and found that serious and obvious errors of law may be relevant in the context of Article 52(1)(b).[115]

137. In their written submissions, the Applicants claim that the Tribunal manifestly exceeded its powers because it failed to: (i) apply Indonesian Law to the Infection Issue,[116] (ii) apply the international law of State responsibility when deciding the case,[117] and (iii) address the Claimants' unjust enrichment claim and apply the international law of unjust enrichment.[118]

138. On point (i) above, the Applicants argue that, under Article 42(1) of the ICSID Convention, the validity of the Exploitation Licences (which created property rights) was to be determined under Indonesian law (being the law of the host State). The Applicants then point to paragraph 530 of the Award, which expressly indicates that the Tribunal did not apply Indonesian law to the Infection Issue, and argue that, by failing to apply the proper law, the Tribunal manifestly exceeded its powers.[119] The Applicants also argue that the Tribunal would have exceeded its powers even if their claims were inadmissible due to the *Minnotte* bar because, under Article 42 of the ICSID Convention, the Tribunal should have, in any event, applied Indonesian law to determine whether there was a lacuna or a conflict between local and international law.[120]

139. On issue (ii) above, the Applicants recall that, in the arbitration, they pointed out that, if the fraud alleged by the State existed, the State's own officials would be implicated, and consequently "the State would be responsible for the criminal wrongdoing of its public officials" pursuant to Article 7 of the ILC Articles.[121] The Applicants further note that, when the Tribunal introduced the *Minnotte* framework, they not only continued to argue

[114] Tr. Day 2 [Weeramantry] [8:6] to [8:9].
[115] Tr. Day 2 [Weeramantry] [8:11] to [10:8].
[116] Annulment Application, paras. 136-146; Reply, paras. 69-86.
[117] Annulment Application, paras. 147-158; Reply, paras. 116-119.
[118] Annulment Application, paras. 159-167; Reply, para. 122.
[119] Annulment Application, paras. 136-146; Reply, paras. 116-119.
[120] Annulment Application, para. 146; Reply, paras. 117 and 118.
[121] Annulment Application, paras. 148-155; Reply, paras. 69-74.

State responsibility but also submitted that, if State officials had facilitated the fraud and forgery, the State could not rely on its own unlawful conduct to mount an admissibility objection to the investors' claims.[122]

140. The Applicants further note that in the Award (paragraph 476), the Tribunal found that "an insider" had assisted Ridlatama in the fraud. However, despite finding that the State's officials had probably done wrong, the Award makes no mention of Article 7 of the ILC Articles and the Claimants' argument that an admissibility objection predicated on lack of good faith cannot be made by a party that breached good faith itself.[123] The Applicants argue that, faced with the State's admissions of criminal wrongdoing by its own senior officials and the Applicants' submissions on its legal consequences, the Tribunal's complete failure to engage on and apply the international law of State responsibility is inexplicable and constitutes a manifest excess of power.[124] The Applicants further note that their arguments on State responsibility were potentially determinative in the legal framework applied by the Tribunal to dismiss the Claimants' case:[125] if the Tribunal had applied the law of State responsibility there would not have been a *Minnotte* bar at all.[126]

141. On point (iii) above, the Applicants reiterate that they took on significant risk in funding general survey, exploration and exploitation activities in EKCP, investing approximately USD 70 million.[127] They further note that, thanks to their investments, the State learned of the location of major natural resources and sources of revenue through the transfers of intellectual property which had been generated for the EKCP.[128] The Applicants also recall that, in the arbitration, they argued that "illegality may operate as a defence to unjust enrichment […] only where the illegal act was done by the party that brings the unjust enrichment claim."[129] However, despite no finding of fraud or forgery attributable to the

[122] Reply, paras. 75 and 76.
[123] Annulment Application, paras. 156 and 157; Reply, paras. 76 and 77.
[124] Reply, para. 77.
[125] Reply para. 79.
[126] Reply, para. 82.
[127] Annulment Application, para. 160.
[128] Annulment Application, paras. 161 and 162
[129] Annulment Application, para. 165.

Applicants themselves, the Tribunal did not address the Claimants' unjust enrichment claim[130] and failed to apply the international law of unjust enrichment.

142. At the Hearing on Annulment, the Applicants also argued that the Tribunal manifestly exceeded its powers by making a finding of inadmissibility outside the scope of its previous directions in PO15 and PO20[131] and by introducing a new legal framework (*Minnotte*), whose factual foundation had not been part of the 2015 Hearing.[132]

iii. Article 52(1)(e) of the ICSID Convention: Failure to state reasons

143. According to the Applicants, a failure to state reasons occurs when a tribunal does not address all of the parties' arguments that were accepted as relevant for the decision or were rejected but would have changed the decision, had they been accepted. The Applicants also argue that a breach of Article 52(1)(e) of the ICSID Convention occurs if a tribunal fails to address (or ignores) highly relevant evidence which had the potential to be relevant to the outcome of the case, or if it provides reasons which are contradictory or frivolous.[133]

144. The Applicants argue that the Award is inconsistent as to whether Mr. Noor's evidence was disregarded. The Applicants point to paragraph 84 of the Award, which states that Mr. Noor's witness statement was disregarded, and argue that this statement is contradicted by paragraphs 165 and 512 of the Award, whose wording (and similarity with the text of Mr. Noor's witness statement) shows that the Tribunal in reality considered Mr. Noor's evidence.[134]

145. The Applicants further claim that the Award failed to state the reasons for which:

a. The Tribunal readmitted (or did not disregard) Mr. Noor's evidence (paragraphs 165 and 512);[135]

[130] Annulment Application, paras. 159-167; Reply, para. 122.
[131] Tr. Day 1 [Sheppard] [40:20] to [42:4] and Tr. Day 2 [Weeramantry] [10:9] to [11:17].
[132] Tr. Day 1 [Sheppard] [42:5] to [53:17] and Tr. Day 2 [Weeramantry] [10:9] to [11:17].
[133] Annulment Application, paras. 168-170.
[134] Annulment Application, paras. 171-178; Reply, paras. 107-109.
[135] Annulment Application, para. 179; Reply, paras. 107-109; Tr. Day 1 [Sheppard] [73:11] to [73:16].

b. The Tribunal concluded that the Infection Issue was moot (paragraph 530); in particular, the Applicants argue that the Tribunal should have explained the reasons why the Exploitation Licenses were invalid under Indonesian law and/or why international law should override national law;[136]

c. The Tribunal found that the Applicants' due diligence was defective (paragraph 504); in particular, according to the Applicants, the Tribunal failed to state the benchmark against which it assessed their due diligence (which makes the Award arbitrary on this point);[137]

d. The Tribunal reversed its order for the production of the Police Files (accepting the Respondent's argument on privilege) without drawing adverse inferences against the State (paragraph 249);[138]

e. Their arguments on State responsibility were dismissed (paragraphs 529 and 530);[139]

f. Their unjust enrichment claim was dismissed (paragraphs 529 and 530) without applying the three-step analytical enquiry of the *Minnotte* test set forth in paragraph 503;[140]

g. Their intellectual property claim was dismissed (paragraphs 529 and 530) notwithstanding the argument that this claim would survive a finding of forgery;[141] and

h. Their denial of justice claim was dismissed (paragraphs 529 and 530).[142]

[136] Annulment Application, paras. 180-185; Reply, paras. 116-119; Tr. Day 1 [Sheppard] [73:17] to [74:5].
[137] Annulment Application, paras. 186-192; Tr. Day 1 [Sheppard] [72:7] to [72:19].
[138] Annulment Application, paras. 193-197.
[139] Annulment Application, paras. 198 and 199; Tr. Day 1 [Sheppard] [72:20] to [73:10].
[140] Annulment Application, paras. 200-205; Reply, paras. 120 and 121.
[141] Annulment Application, paras. 206-212. Reply, para. 123.
[142] Annulment Application, paras. 213-217. Reply, para. 124.

146. At the Hearing on Annulment, the Applicants specified that the Tribunal failed to explain the reasons for dismissing all of their alternative claims because it did not explain the nexus between the *Minnotte* factors and each of these claims.[143]

147. During the first day of the Hearing on Annulment, the Applicants further argued that the Tribunal failed to state the reasons for its finding in paragraph 508, namely that international public policy was engaged on the facts it found.[144] According to the Applicants, the Tribunal created its own notion of international public policy without proper reasoning and failed to explain why the *Minnotte* factors were part of the international public policy (an argument which the Respondent never made) and how the Claimants' conduct amounted to deliberately or unreasonably ignoring fraud or forgery.[145] According to the Applicants, while they were found guilty of lack of diligence, this is not the same as a finding that they had unreasonably ignored fraud.[146]

B. THE RESPONDENT'S SUBMISSIONS

i. Article 52(1)(d) of the ICSID Convention: No serious departure from a fundamental rule of procedure

148. The Respondent argues that Article 52(1)(d) of the ICSID Convention provides for a high threshold for annulment, requiring both that the rule breached be "fundamental" and that the breach be "serious."[147]

149. The Respondent does not contest that a breach of the right to be heard and a clear violation of a rule of evidence (such as the reversal of the burden of proof) may, in specific circumstances, be relevant under Article 52(1)(d) of the ICSID Convention. The Respondent however notes that the ICSID jurisprudence relied upon by the Applicants has recognized that tribunals can choose the bases for their decisions without breaching the parties' right to be heard (provided that these bases fall within the legal framework of the

[143] Tr. Day 1 [Sheppard] [74:6] to [74:25].
[144] Tr. Day 1 [Sheppard] [69:19] to [69:22].
[145] Tr. Day 1 [Sheppard] [69:19] to [72:6].
[146] Tr. Day 1 [Sheppard] [71:18] to [71:22].
[147] Counter-Memorial, paras. 125 and 126; see also paras. 127-144.

dispute and do not consist of issues that were not invoked, argued or anticipated by the parties).[148] The Respondent further notes that no award has ever been annulled due to a reversal of the burden of proof, and that ICSID committees have found that a mere disagreement or dissatisfaction with the tribunal's evaluation of the evidence cannot be a basis for finding a serious departure from a fundamental rule of procedure.[149]

150. The Respondent claims that, in order to be "serious," a breach must have had a material impact on the outcome of the award, meaning that it must have caused the tribunal to reach a result substantially different from that it would have awarded had the rule been observed.[150]

151. The Respondent further argues that no serious breach of due process occurred in the present case because the Tribunal gave the Parties a full, fair and equal opportunity to present their case (and produce evidence) and based the Award on a theory that the Parties had discussed in the document authenticity phase.[151]

a. The *Minnotte* Direction

152. According to the Respondent, the Tribunal did not deny the Applicants the right to be heard when it invited the Parties' comments on *Minnotte* without authorizing the submission of new evidence.[152]

153. The Respondent argues that the *Minnotte* Direction did not raise new issues outside of the scope of the document authenticity phase as shaped by PO13, PO15 and PO20.[153] In particular, in the Respondent's view, the *Minnotte* test was part of the State's case throughout the document authenticity phase,[154] since both "due diligence" and "deliberate closing of eyes" were factors encompassed in the broader concept of good faith that was at

[148] Counter-Memorial, paras. 128-136.
[149] Counter-Memorial, paras. 137-141.
[150] Counter-Memorial, paras. 142-144.
[151] Counter-Memorial, paras. 131 and 136.
[152] Counter-Memorial, paras. 145-163; Rejoinder, paras. 13-75.
[153] Counter-Memorial, paras. 104-109; Rejoinder, paras. 47-52.
[154] Counter-Memorial, paras. 110-115, and para. 149; see also Annex A to the Counter-Memorial.

the basis of the Claimants' defence to the Forgery Dismissal Application,[155] and that was addressed in the document authenticity phase as part of the "legal consequences" of forgery.[156] The Respondent argues that, in the document authenticity phase, the Applicants submitted substantial evidence on their due diligence (on which they thereafter relied in their briefs on *Minnotte*), and at no time did they indicate that they wished to submit additional evidence (or seek leave to reopen the proceedings or supplement their submissions).[157] In the Respondent's view, by the *Minnotte* Direction, the Tribunal simply sought the Parties' views on a legal authority that was not cited by them, but that was consistent with other authorities on the record.[158]

154. According to the Respondent, the Applicants concede that, in the arbitration, they submitted evidence regarding their good faith and the subsidiary issues of due diligence and failure to perceive the fraud.[159] The Respondent argues that the Applicants never protested that they had made only a limited showing regarding the issue of due diligence. Rather, they presented evidence allegedly confirming their extensive due diligence, the Respondent rebutted this evidence and submitted evidence confirming that the Claimants were either complicit or at least knew (or should have known) of the fraud. Based on the evidence on the record, the Tribunal concluded that Ridlatama was the author of the forgery and the fraud.[160] According to the Respondent, the Applicants cannot now relitigate the Tribunal's factual finding.[161]

155. Furthermore, the Respondent argues that the Applicants' proffer of Mr. Mazak's testimony is belated (as is their offer to submit expert testimony regarding the due diligence exercised by a reasonable investor in the Indonesian mining sector) given that they could have called Mr. Mazak as a witness in the arbitration (or presented expert witnesses) but chose not to

[155] Rejoinder, paras. 47-65.
[156] Rejoinder, paras. 49, 50, and 53.
[157] Counter-Memorial, paras. 145, and 150-156; Rejoinder, paras. 53-65; see also paras. 66-75.
[158] Rejoinder, para. 66.
[159] Rejoinder, para. 54.
[160] Rejoinder, paras. 54-57.
[161] Rejoinder, para. 57.

do so.[162] The Respondent further claims that Mr. Mazak's testimony is duplicative and partial, and the proposed expert testimony would not have been material to the outcome of the case.[163]

156. In any case, according to the Respondent, the *Minnotte* factors (due diligence and closing of the eyes) were not dispositive to the case as the Tribunal reached its finding on inadmissibility based only on the seriousness and extent of the forgery, the general principle of good faith and the prohibition of abuse of process.[164] The Respondent further argues that the Tribunal did not adopt (or decide based on) the *Minnotte* test (proposed by the Claimants),[165] and that the same finding would have been reached based on numerous authorities relied upon by the Respondent.[166]

157. The Respondent further argues that the *Minnotte* Direction did not change the applicable legal framework.[167] The Respondent also claims that the Applicants not only argued that the *Minnotte* Direction was within the analytical framework of the admissibility phase, but also asserted that the evidentiary record in the arbitration established that they were good faith investors under *Minnotte*. Since Churchill and Planet chose not to raise an objection to the *Minnotte* Direction with the Tribunal, they have waived their right to raise this objection as a ground for annulment.[168]

b. The re-admission of Mr. Noor's evidence

158. The Respondent argues that the Tribunal did not readmit Mr. Noor's witness statement and that the Applicants misread the Award in connection to Mr. Noor's evidence.[169]

159. The Respondent notes that, in paragraph 84 of the Award, the Tribunal expressly stated that it disregarded Mr. Noor's witness statement. The reference to Mr. Noor's testimony in

[162] Rejoinder, paras. 58-64.
[163] Rejoinder, paras. 59-64.
[164] Counter-Memorial, paras. 157-159.
[165] Rejoinder, paras. 70-74.
[166] Rejoinder, paras. 66-74.
[167] Counter-Memorial, paras. 148-150; Rejoinder, paras. 39-52.
[168] Rejoinder, paras. 20-38.
[169] Counter-Memorial, paras. 164-170; Rejoinder, paras. 113-116.

paragraph 165 of the Award does not show that the Tribunal relied upon this testimony but merely that the State referred to it in support of its arguments on the invalidity of the upgrades.[170] Furthermore, in the Respondent's view, the wording "misguided assumption" in paragraph 512 of the Award can be explained in light of the fact that the Tribunal had found that the forged documents were fabricated to give an impression of lawful entitlement and this false impression was then used to obtain the Exploitation Licenses.[171] The Respondent objects to the Applicants' statement that, without Mr. Noor's testimony, no evidence existed on the impact of the forged documents on his state of mind, and argues that, in light of the established forgery, the only plausible conclusion was that the exploitation upgrades were granted on the erroneous assumption that the mining licences were valid.[172]

160. In any event, the Respondent argues that, in light of the Tribunal's finding in paragraph 530 of the Award (namely that the Exploitation Licenses were embedded in a fraudulent scheme), Mr. Noor's state of mind was irrelevant to the question of admissibility.[173]

c. The reversal of the burden of proof in relation to fraud and deception and to the *Minnotte* factors

161. The Respondent claims that the Tribunal did not reverse the burden of proof nor put on the Applicants the burden of proving forgery, deception or the *Minnotte* factors.[174]

162. The Respondent argues that the Tribunal did not require the Applicants to *disprove* that the exploitation upgrades were the product of deception.[175] According to the Respondent, the finding in paragraph 522 of the Award can be explained in the context of the Tribunal's assessment of the Claimants' conduct in supervising the licensing process and is based on Messrs. Quinlivan, Benjamin, and Gunter's testimonies as well as on the Respondent's

[170] Counter-Memorial, paras. 164-170.
[171] Rejoinder, paras. 113-116.
[172] Rejoinder, para. 115.
[173] Rejoinder, para. 116.
[174] Counter-Memorial, paras. 181-189.
[175] Counter-Memorial, paras. 181-186.

arguments.[176] In particular, the finding on the existence of a fraudulent scheme permeating the Claimants' investments in the EKCP was based on the Tribunal's assessment of the evidence on record and not on a reversal of the burden of proof.[177]

163. The Respondent further argues that the Tribunal put on it the burden of proving the *Minnotte* factors. Specifically, the Respondent points to paragraph 244 of the Award, wherein the Tribunal stated that the Respondent carried the burden to prove its case on forgery and fraud, and notes that the *Minnotte* factors were part of its case. The Respondent further argues that, in the arbitration, it elaborated a benchmark to assess the Claimants' conduct, which the Tribunal accepted. By applying this standard to the facts of the case, the Tribunal found that the Claimants lacked diligence in overseeing the licensing process and investigating the allegations of forgery (paragraphs 504, 506, 508-509, and 516-527 of the Award).[178]

d. The Infection Issue

164. The Respondent denies that the Tribunal breached the Applicants' right to be heard on the Infection Issue.[179]

165. According to the Respondent, the Tribunal placed no restrictions on the Parties' submissions on the validity of the Exploitation Licenses under Indonesian law[180] (and no common understanding existed that the Tribunal would reserve judgment on this issue until a later stage of the proceedings).[181] The Respondent argues that nothing in PO13, PO15 or PO20 prevented the Applicants from rebutting the Respondent's argument that under Indonesian law a forged mining license cannot be upgraded[182] or required that the Infection Issue be addressed in a subsequent phase. In particular, while PO20 directed the Parties not to address the Infection Issue in the post-hearing briefs, it also indicated that the Parties

[176] Counter-Memorial, paras. 182-184.
[177] Counter-Memorial, para. 186.
[178] Counter-Memorial, paras. 187-189.
[179] Rejoinder, para. 99.
[180] Counter-Memorial, para. 176.
[181] Rejoinder, paras. 43, 44, 101 and 102.
[182] Counter-Memorial, paras. 173, and 175-179; Rejoinder, para. 103.

could address all matters which they deemed appropriate to further their positions.[183] In the Respondent's view, the Applicants made the decision ("no doubt after careful consideration") not to address the Respondent's argument (or present evidence on the operation of the Indonesian mining law and the general principles of Indonesian law) and to argue for deferring that issue to a later phase, and they cannot now complain of it.[184]

166. The Respondent also claims that the Applicants fail to explain how they were injured by the Tribunal's decision not to address the Infection Issue.[185] In the Respondent's view, in light of the Tribunal's finding in paragraph 530 of the Award (namely, that claims based on the Exploitation Licenses are not entitled to protection as a matter of international law), the Infection Issue was immaterial to the outcome of the case.[186] The Respondent further notes that the Applicants themselves argued, in the arbitration, that international law was determinative if the exploitation upgrades were found invalid under Indonesian law.[187]

e. Denial of justice

167. According to the Respondent, the fact that the Claimants were not given the chance to brief their claim for denial of justice is not a breach of the right to be heard but the natural consequence of the dismissal of the Claimants' claims due to their inadmissibility. In particular, the Respondent notes that the Tribunal decided to resolve the threshold issue of admissibility in a preliminary phase exactly to avoid the need to adjudicate claims that could not, as a matter of law, survive a finding of forgery.[188]

f. State responsibility

168. According to the Respondent, the Applicants' argument on State responsibility "comes far too late" because, during the arbitration, they never protested that they were denied the

[183] Counter-Memorial, paras. 173, and 177-179.
[184] Counter-Memorial, para. 173; Rejoinder, para. 104.
[185] Counter-Memorial, para. 180.
[186] Counter-Memorial, para. 180; Rejoinder, para. 105.
[187] Counter-Memorial, para. 180; see also paras. 101 and 102.
[188] Rejoinder, para. 121.

opportunity to adduce evidence on the State's involvement in the fraud.[189] In the Respondent's view, the Applicants had every opportunity in the arbitration to provide evidence supporting their theory about the State's alleged bad faith. Accordingly, while the Applicants "may regret having poorly prosecuted their case," this cannot be a ground for annulment of the Award.[190]

ii. Article 52(1)(b) of the ICSID Convention: No manifest excess of powers

169. The Respondent agrees that the term "manifest" in Article 52(1)(b) of the ICSID Convention means "obvious, clear or easily recognizable," but argues that a manifest excess of powers only warrants annulment if it was "serious or material to the outcome of the case."[191] The Respondent also points out that in ICSID practice, a failure to apply the law chosen by the parties can give rise to annulment under Article 52(1)(b), while a misapplication or erroneous interpretation of that law cannot.[192]

170. The Respondent responds to the three main arguments under Article 52(1)(b) of the ICSID Convention put forward in the Applicants' written briefs as follows.

171. First, the Respondent denies that the Tribunal manifestly exceeded its powers by not deciding the Infection Issue.[193] The Respondent points to paragraph 235 of the Award wherein the Tribunal ruled that, pursuant to Article 42(1) of the ICSID Convention, it was for it to determine what issues were governed by national or international law.[194] The Respondent further points to paragraph 488 of the Award, wherein the Tribunal ruled that the consequences of the forgery and fraud were to be assessed in light of the "principles of international law,"[195] as the Applicants also argued in the arbitration.[196] Applying these principles – the Respondent states – the Tribunal found that, as a matter of international

[189] Rejoinder, para. 96.
[190] Rejoinder, para. 97.
[191] Counter-Memorial, paras. 192-194; Tr. Day 2 [Frutos Peterson] [90:12] to [90:14].
[192] Counter-Memorial, paras. 195-197. Tr. Day 2 [Frutos Peterson] [90:14] to [90:17].
[193] Counter-Memorial, paras. 198-212; Rejoinder, paras. 105-111.
[194] Counter-Memorial, para. 209.
[195] Counter-Memorial, para. 209.
[196] Rejoinder, para. 106.

law, the Claimants could not claim protection for investments tainted by fraud and forgery. In this context, the validity of the exploitation upgrades under Indonesian law was irrelevant to the Tribunal's finding on inadmissibility, and deciding the Infection Issue would not have changed the outcome of the Tribunal's analysis.[197] According to the Respondent, the Applicants' argument is nothing more than a disagreement with the Tribunal's application of the law, which is not a ground for annulment,[198] and the Committee cannot second guess the Tribunal's legal theory on forgery (nor the Tribunal's application of this theory).[199] The Respondent further argues that, in any event, the Tribunal's interpretation of international law would have overridden a potential conclusion that the Exploitation Licenses were valid under Indonesian law.[200]

172. Second, the Respondent denies that the Tribunal manifestly exceeded its powers by failing to apply State responsibility. According to the Respondent, the Tribunal properly applied the relevant principles of international law when it found that the Claimants' claims were inadmissible.[201] The Respondent argues, in particular, that Article 7 of the ILC Articles was not applicable to the case given that this provision only concerns the *liability* of the State for internationally wrongful acts committed by its organs or agents,[202] and the Tribunal rejected the Claimants' bad faith and corruption theories on factual grounds[203] (identifying Ridlatama as the author of the forgeries with the assistance of a mid-level Regency official).[204]

173. In the Respondent's view, Article 7 of the ILC Articles does not apply to the threshold question of whether the investor's claims are admissible, and international tribunals (including *Metal-Tech* and *World Duty Free*) have found that the State's involvement in a wrongdoing does not preclude a finding of inadmissibility.[205] The Respondent further

[197] Counter-Memorial, para. 210; Rejoinder, paras. 106-111.
[198] Counter-Memorial, para. 208.
[199] Counter-Memorial, para. 211.
[200] Counter-Memorial, para. 208; Rejoinder, paras. 107-112.
[201] Counter-Memorial, paras. 82-93; Rejoinder, paras. 76-81.
[202] Rejoinder, paras. 84 and 85.
[203] Rejoinder, para. 83.
[204] Rejoinder, paras. 77-81
[205] Rejoinder, paras. 86-92.

contends that, even if the relevance of Article 7 of the ILC Articles were debatable, this would not be sufficient to demonstrate that the Tribunal manifestly exceeded its powers by failing to apply this provision.[206] In any event, even if the entire dismissal of the Claimants' case benefited the Respondent, an award cannot be annulled based on the (un)fairness or the (in)correctness of the legal principles applied by the Tribunal.[207]

174. Third, the Respondent argues that the Tribunal did not manifestly exceed its powers by failing to address the Applicants' claim on unjust enrichment.[208] According to the Respondent, the Tribunal did not need to examine the merits of this claim because it had already ruled that the Claimants were not good faith investors under international law and their unjust enrichment claim was therefore inadmissible.[209] The Respondent argues that a disagreement with the Tribunal's finding cannot constitute a ground for annulment under Article 52 of the ICSID Convention and a Tribunal's finding on a point of law cannot be subject to reconsideration by the Committee.[210]

iii. Article 52(1)(e) of the ICSID Convention: No failure to state reasons

175. According to the Respondent, Article 52(1)(e) of the ICSID Convention sets forth a very high threshold to annul an award and does not permit any inquiry into the quality or persuasiveness of the reasons provided in it.[211] In particular, the Respondent argues that an award cannot be annulled if the reader can understand the facts and the law applied by the tribunal in coming to its conclusion.[212] In the Respondent's view, tribunals need not address every single argument raised by the parties, and a committee cannot transform a review under Article 52(1)(e) of the ICSID Convention into a re-examination of the correctness of the factual and legal premises on which an award is based.[213] Finally, the Respondent notes that, while a breach of Article 52(1)(e) may occur if a tribunal fails to address (or ignores)

[206] Rejoinder, para. 93.
[207] Rejoinder, para. 90.
[208] Counter-Memorial, paras. 219-222; Rejoinder, paras. 118 and 119.
[209] Counter-Memorial, para. 220; Rejoinder, paras. 118 and 119.
[210] Counter-Memorial, para. 222.
[211] Counter-Memorial, para. 225.
[212] Counter-Memorial, paras. 226 and 227.
[213] Counter-Memorial, paras. 228, 229 and 231.

highly relevant evidence, this circumstance is irrelevant to the present case as the Applicants have not alleged that the Tribunal failed to address relevant evidence on which they had placed significant emphasis.[214]

176. According to the Respondent, the Applicants illegitimately endeavour to reargue the merits of arguments raised during the document authenticity phase.[215] The Respondent further contends that:

a. The Tribunal did not readmit the witness statement of Mr. Noor nor give weight to it; accordingly, the Award does not fail to provide reasons nor contain contradictory reasons in this regard;[216]

b. In paragraph 530 of the Award, the Tribunal explained the reasons why there was no need to determine the validity of the Exploitation Licenses under Indonesian law; these reasons are sufficient to understand the premise for the Tribunal's finding that the Infection Issue was moot;[217]

c. In paragraphs 504 and 506 of the Award, the Tribunal formulated the benchmark against which the Claimants' due diligence was to be assessed; based on this benchmark and the evidence in the record, the Tribunal explained why it was not persuaded that the Applicants had conducted an extensive and exhaustive due diligence (paragraphs 517 to 527); accordingly, the Tribunal's finding in this regard is not arbitrary;[218]

d. The Tribunal could legitimately reconsider its decision on the production of the Police Files (considering that the Claimants had not objected to its decision of May 12, 2015, and that a tribunal may reconsider its previous decisions); furthermore, the Tribunal provided reasons for not drawing adverse inferences from the non-production of the Police Files as it stated that these documents were covered by the secrecy of criminal investigations (paragraphs 245 to 250 of the

[214] Counter-Memorial, para. 230.
[215] Counter-Memorial, paras. 223 and 224.
[216] Counter-Memorial, para. 232; Rejoinder, paras. 113-116.
[217] Counter-Memorial, paras. 233 and 234; Rejoinder, para. 112.
[218] Counter-Memorial, paras. 235-237.

Award); the Respondent further argues that tribunals are the judges of the admissibility, relevance and weight of the evidence and their decisions cannot be revaluated by *ad hoc* committees; in any event, according to the Respondent, the adverse inferences requested by the Claimants (prior to and after the 2015 Hearing) were not supported by the evidence on record;[219]

e. The Applicants have failed to establish that the Award should be annulled for failure to state reasons on State responsibility; according to the Respondent, the Tribunal did not need to decide issues regarding the attribution of an official's conduct to the State given that it dismissed the Applicants' claims due to inadmissibility; furthermore, the Tribunal had no obligation to address Article 7 of the ILC Articles because this provision is irrelevant to the question of admissibility;[220]

f. In paragraph 531 of the Award, the Tribunal provided reasons for the dismissal of the unjust enrichment claim and addressed the question of nexus; in particular, according to the Respondent, the Tribunal's reasoning (while succinct) can be followed in its progress from point to point because the Tribunal explained (also in paragraphs 474-477, 488-508, and 510-531 of the Award) that: (i) the EKCP was tainted by fraud and forgery; (ii) all Claimants' claims related to the EKCP; and therefore (iii) all Claimants' claims were inadmissible as a matter of international law;[221]

g. In paragraphs 507, 528 and 529 of the Award, the Tribunal provided reasons for disposing of the IP claim, noting that this claim derived from the EKCP, which was coated in forgery and fraud and for this reason was inadmissible;[222] and

h. The Tribunal provided reasons to dismiss the Claimants' claim on denial of justice as mentioned in sub-point g above; furthermore, the Respondent notes that this claim referred to proceedings instituted by Ridlatama before the Samarinda Administrative Court in connection with the revocation of the mining licenses and

[219] Counter-Memorial, paras. 238-244.

[220] Counter-Memorial, para. 245; Rejoinder, paras. 94 and 95.

[221] Counter-Memorial, paras. 246-251.

[222] Counter-Memorial, paras. 252 and 253.

to which the Applicants were not parties.[223]

V. THE COMMITTEE'S ANALYSIS

A. ARTICLE 52(1)(D) OF THE ICSID CONVENTION: SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

177. There is no question that 'equal treatment of the parties' and 'the right to be heard' are both fundamental rules of procedure which are part and parcel of the right to a fair trial, and the Parties also agree that the 'burden of proof' may constitute another fundamental rule of procedure for purposes of Article 52(1)(d) of the ICSID Convention. For the most part, however, the Parties' dispute does not turn on how these fundamental rules are interpreted as a matter of theory, but rather how they were applied by the Tribunal on the specific facts of this case. The only area in which there appeared to be some difference at the level of theory is with respect to the *scope* of the right to be heard. At the Hearing on Annulment, the Committee asked the Parties in particular whether for purposes of the ICSID Convention the standard should be seen as requiring a "full opportunity" or simply a "reasonable opportunity" to be heard, bearing in mind the shift in Article 17 of the UNCITRAL Arbitration Rules from the former to the latter.[224] In the Applicants' view, the scope of the right to be heard within both the UNCITRAL and ICSID systems must be understood at the fuller end of the scale, namely as ensuring a full opportunity for the parties to present their case.[225] According to the Respondent, the expression "full opportunity" indicates that a party must be granted a "reasonable opportunity" to be heard, and not that a party is entitled to present as many arguments and much evidence as it sees fit.[226] In any case, in the Respondent's view, even if the two standards were different, both tests would be met in this case as the Applicants had a "genuine opportunity to be heard" during the arbitration.[227]

[223] Counter-Memorial, paras. 254-257; Rejoinder, para. 120.

[224] Article 17 of UNCITRAL Arbitration Rules as revised in 2010; Tr. Day 1 [Kalicki] [196:25] to [197:21].

[225] Tr. Day 2 [Luttrell] [37:19] to [45:4].

[226] Tr. Day 2 [Frutos Peterson] [72:11] to [74:18].

[227] Tr. Day 2 [Frutos Peterson] [73:14] to [73:16].

178. In the view of this Committee, Article 52(1)(d) of the ICSID Convention does not stand alone but can be interpreted in light of other sources. This includes Article 17 of the 2010 UNCITRAL Arbitration Rules, which contains a principle which reflects a general standard.[228] In any case, the principle of "full opportunity" to be heard, which is favoured by the Applicants, would still need to be interpreted reasonably, namely as requiring tribunals to provide each party with an adequate opportunity to be heard but not necessarily with an unlimited opportunity to present its case. In this perspective, the right to be heard is commonly considered as not absolute, but rather subject to possible limitations, provided that they are reasonable and proportional to the aim to be achieved.

179. The Committee also notes that the *ad hoc* Committee in *Fraport v. Philippines* ("*Fraport*") referred to international human rights instruments as a source of content of the right to be heard, and recalled that international courts have found that the right to present one's case "require[s] the tribunal to afford both parties the opportunity to make submissions where new evidence is received and considered by the tribunal to be relevant to its final deliberations."[229] Even if *ad hoc* committees operate within the ICSID Convention, the reference to the jurisprudence of specialized courts which are an integral part of human rights treaties fosters the consistency of the content of the right to be heard and strengthens the effectiveness of this concept. It also enhances the legitimacy of the interpretation by linking it to the broader body of international law. The substance of the right to be heard has been described in terms that are commonly accepted by the *ad hoc* committee in *Wena v. Egypt* ("*Wena*"):

> [Article 52(1)(d) of the ICSID Convention] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows

[228] Tr. Day 1 [Kalicki] [196:25] to [197:21]; Tr. Day 2 [Luttrell] [37:19] to [45:25].

[229] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Decision on Annulment, December 23, 2010, para. 202 (Exhibit ALA-08).

> each party to respond adequately to the arguments and evidence presented by the other.[230]

180. With this understanding of the right to be heard, the Committee also observes that Article 52(1)(d) of the ICSID Convention requires a "serious departure" from that right. The Committee agrees with the *ad hoc* committee in *Mine v. Guinea* that under this formulation, "the departure must be substantial and be such as to deprive a party of the benefit of the protection which the rule was intended to provide"[231]. In the context of the right to be heard, however, this does not require a finding that the deprivation of the right necessarily led to a different outcome in the case. Article 52(1)(d) provides a remedy for procedural injustice that can be triggered for a material breach. The right to be heard guarantees participation in the administration of evidence, irrespective of the Applicant's chances of obtaining a different result. The test turns on the fundamental nature of the rule of procedure and the seriousness of its violation. A grave violation of a fundamental rule is likely to more or less automatically result in an injury, inasmuch as such party is deprived of the due process protections which the rule is intended to provide.

i. The *Minnotte* Direction

181. As a threshold issue, the Respondent contends that, in accordance with Arbitration Rule 27, the Applicants are estopped from raising any impropriety pertaining to the *Minnotte* Direction as they failed to raise any objection with the Tribunal that *Minnotte* raised issues that were outside the scope of the document authenticity phase.[232] The Applicants stress that the impropriety arose not from the Tribunal's invitation to comment on *Minnotte*, but from ignoring their protest that further evidence would be needed and disposing of the claims without giving them an opportunity to present their case on the facts relevant to the *Minnotte* test.[233]

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[230] *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, December 8, 2000, para. 57 (RLA-ANN-288).

[231] *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment, December 22, 1989, para. 5.05 (Exhibit ALA-09).

[232] Rejoinder, paras. 20-38.

[233] Reply, para. 42.

182. The *ad hoc* Committee in *Fraport* recognized that Arbitration Rule 27 on waiver to object illustrates a more general rule, common to all award control systems, that a party forfeits its right to seek annulment if it has failed to raise promptly its objection to the tribunal's procedure upon becoming aware of it.[234] The Committee notes that Churchill and Planet discussed the *Minnotte* invitation without objection in the first place, but this fact cannot be taken as a waiver of their right to try to demonstrate later that the Tribunal committed annullable error in *the particular way* it ultimately applied the *Minnotte* factors in its Award, to support a decision of inadmissibility. In their reply submission on *Minnotte* of October 11, 2016, Churchill and Planet did declare that the Respondent had changed its case multiple times over the two previous years, and that they had been dragged with the Tribunal further and further off the course charted in PO15.[235] Moreover, the Applicants had made an early, albeit unsuccessful, complaint about the management of the document authenticity phase, when they objected that PO13 violated their fundamental due process rights and constituted unequal treatment of the Parties.[236] For these reasons, the Committee accepts that the Applicants are not barred from challenging the Award under Article 52(1)(d) of the ICSID Convention.[237]

183. In the course of its deliberations after the 2015 Hearing, the Tribunal issued the *Minnotte* Direction instructing the Parties to comment on specific points of international law arising out of this authority, but only on the basis of the evidence in the record and subject to a 15-page limit. These specific points were identified as follows:

> (i) the admissibility in international law of claims tainted by fraud or forgery where the alleged perpetrator is a third party, (ii) the lack of due care or negligence of the investor to investigate the factual circumstances surrounding the

[234] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No. ARB/03/25), Decision on Annulment, December 23, 2010, paras. 204-208 (Exhibit ALA-08).

[235] Exhibit A-44, para. 4.

[236] "It is patently violative of Claimants' right to due process for the Tribunal to reopen a decided issue on the merits without notifying the Claimants of its intention to do so, or inviting Claimants to address the substance of that issue," Exhibit A-12, p. 13.

[237] The Committee notes that, at the end of the 2015 Hearing, following the President's statement that "this is the time to complain about the conduct of this arbitration", the Parties confirmed that they had no complaints. In the Committee's view, the Applicants' statement must be interpreted as an expression of satisfaction about the way the 2015 Hearing was conducted and not as an abandonment of their grievances (Exhibit A-34, [Kaufmann-Kohler] [221:3] to [221:13]).

> making of an investment, and (iii) the deliberate closing of the eyes to indications of serious misconduct or crime, or an unreasonable failure to perceive such indications.[238]

184. As mentioned above, Churchill and Planet declared in their reply submissions of October 11, 2016 on *Minnotte* that the Respondent's motion no longer could be labelled as a mere admissibility challenge, but had evolved to become "an omnibus objection comprising elements of jurisdiction, liability and quantum, underpinned by baseless allegations of forgery, fraud, and corruption; bad faith; misconduct on foreign stock exchanges; and misleading and deceptive behaviour by the Claimants and their counsel."[239] In support of this statement, Churchill and Planet referred to all of the State's post-hearing submissions,[240] including but not limited to the State's submission of September 27, 2016 on *Minnotte*.[241] They concluded that the Parties were now debating factual and legal issues well outside the intended scope of the document authenticity phase, and the volume and nature of these issues were such "that they can only be properly briefed, investigated and determined in a full merits phase."[242]

185. Directions made within its discretion by an arbitral tribunal regarding the scope and admission of evidence have an impact on the discharge of the burden of proof. The Applicants essentially argue that the Tribunal limited the Parties to the old factual record[243] when the *Minnotte* factors, due care and deliberate closing of the eyes, were determinative of the outcome of the Award. In their view, it was thus unfair to hold them to the existing record when the Tribunal entered into a factual inquiry that had never been part of the document authenticity phase.[244] Notwithstanding the Applicants' contention that the Tribunal exercised its power in a manner that limited their freedom of action, the Committee finds that the Applicants could present their case on the *Minnotte* factors

[238] Exhibit A-41, p. 2.
[239] Exhibit A-44, para. 1.
[240] Exhibit A-44, fn. 2-8.
[241] Exhibit A-43.
[242] Exhibit A-44, para. 4.
[243] Tr. Day 1 [Sheppard] [48:5] to [48:10].
[244] Tr. Day 1 [Sheppard] [39:17] to [39:19].

without their right to produce evidence in support of their contentions have been impaired as will be now examined.

186. The Applicants contend that the State's Forgery Dismissal Application made no mention of due diligence or willful blindness and that, throughout the arbitration, the State had repeatedly contended that the state of mind and good faith of the Claimants were not relevant.[245] The Applicants further contend that the Parties did not file evidence, which they contend was critical, on the due diligence practice of investors in the Indonesian mining sector in 2006-2010. They admit that they nonetheless did present arguments on due diligence, but allege that these were made for different purposes than addressing the *Minnotte* factors, including in support of their claim for estoppel based on the State's alleged recognition of the validity of the disputed licenses.[246] However, the Applicants cannot object belatedly to the Tribunal's evaluation of the evidence they presented on the basis that they now wish they might have submitted more. The fact that Churchill and Planet did submit evidence and arguments on due care reflects the fact that they evidently had the opportunity to do so.

187. Pleadings cannot be ignored in deciding whether a party has been able to discharge the burden of proof. In their first submission on *Minnotte* of September 23, 2016, Churchill and Planet discussed the issue of due diligence in the factual circumstances surrounding the making of the investments. They declared that the scope of due diligence is a matter for the business concerned and that, where the level of due diligence is at issue, the appropriate measure must be what a reasonably prudent investor would do in the circumstances. Here, they said, the record showed that they conducted extensive due diligence on their investments, both prior to making those investments and during the course of their operation and, in contrast to the investors in *Minnotte*, they were active and visible on the ground. They added, however, that forged signatures were not a foreseeable risk when they made their investments.[247]

[245] Reply, para. 5.

[246] Tr. Day 1 [Sheppard] [48:8] to [49:7]; Annulment Application, paras. 89-91; see also Exhibit A-26(1), paras. 126-131.

[247] Exhibit A-42, paras. 11, 12, and 16.

188. The Applicants contend that, in the arbitration record, there was virtually no evidence as to the second factor (deliberate closing of eyes) given that this factor had not been relevant in the document authenticity phase.[248] However, the Award evaluates the standard of "willful blindness" (or deliberate closing of the eyes) by focusing on the level of institutional control and oversight exercised by Churchill and Planet in relation to the licensing process, whether they were put on notice by evidence of fraud that a reasonable investor in the Indonesian mining sector should have investigated, and whether or not they took the appropriate corrective steps.[249] The Tribunal held that, in light of the heightened degree of diligence that one would expect of an investor in the risky coal mining environment in Indonesia, of which the Claimants were aware, there was evidence on record confirming that Churchill and Planet had not verified the representations made by Ridlatama; that, notably, no one performed any oversight function of the licensing process; that the Claimants failed to exercise due diligence when indications of forgery first came to light in the BPK 2009 public audit report; and that verification of the Ridlatama licenses by the Indonesian law firm of STP, which was hired to conduct due diligence, did not assess the authenticity of the signatures.[250] In reaching these conclusions, the Tribunal attached to the evidence on record the probative value it believed that evidence deserved. Questions relating to the evaluation of evidence are subject to the primacy of the arbitrators' judgment and are not reviewable by *ad hoc* committees under Article 52 of the ICSID Convention.

189. The Applicants add that good faith is the operative principle in the *Minnotte* test in connection with the admissibility in international law of claims tainted by fraud or forgery.[251] However, they say, any evidence on good faith was excluded by the Tribunal in PO15 when it made clear that the facts allegedly justifying estoppel were not to be addressed during the document authenticity phase.[252] It is trite law that, in order to exercise its fact-finding power, a tribunal may request the parties to produce documents or provide

[248] Tr. Day 1 [Sheppard] [49:18] to [49:22].

[249] Award, para. 504.

[250] Award, paras. 517-527.

[251] Reply, para. 37; see Exhibit A-42, paras. 2-7.

[252] Reply, para. 37; see Exhibit A-16, paras. 34 and 35.

explanations or use expert opinions. Contrary to what the Applicants allege,[253] the Tribunal did not have to allow new evidence on the standards of due diligence of a reasonable investor in the Indonesian mining sector or to determine the factual aspects of *Minnotte* in a subsequent phase or with the merits. The Tribunal found in the record what it believed to be sufficient evidence of Churchill and Planet's absence of diligence. True, before the *Minnotte* direction, the evidence on record could not be used in support of the specific inquiries raised in there by the Tribunal, but this is precisely the reason why the Tribunal, respectful of the Parties' rights of defense, consulted them on *Minnotte* and asked them to use the evidence in the record if they wished to refer to facts in addressing the Tribunal's questions. The Applicants have not demonstrated that the Tribunal's use of its authority to investigate the facts and weigh the evidence flouted the equality of the Parties or their right to present their defenses. Allegations that the Tribunal's approach was driven by a concern about further delaying its deliberations after a year already had expired since the 2015 Hearing, or by embarrassment at the prospect of reopening the document authenticity phase to take new evidence on the *Minnotte* factors which would have shown its earlier scoping of this phase to have been flawed,[254] are unfounded assumptions on the part of the Applicants.

190. The Applicants now suggest that there is "a raft of witness and documentary evidence" that they could have adduced but did not, principally including the testimony of Mr. Mazak, then managing director of Churchill.[255] In their reply submission on *Minnotte* of October 11, 2016, Churchill and Planet objected that the State had raised fresh allegations of bad faith and forgery against them and Mr. Mazak despite giving no indication prior to the 2015 Hearing that it had questions for Mr. Mazak; they labelled this approach "prosecutor ambush."[256] Churchill and Planet had not presented Mr. Mazak as a witness, the Award notes, "since they offered the most appropriate witnesses to respond to Indonesia's case on authenticity as it stood prior to the hearing, i.e. that the Claimants were dupes fooled by

[253] Annulment Application, para. 98.

[254] Annulment Application, para. 103.

[255] Reply, paras. 58-68.

[256] Exhibit A-44, fn. 24.

Ridlatama, not that they were fraudsters as Indonesia now contends."[257] The Committee notes that, even after Churchill and Planet (prior to the 2015 Hearing, in their reply to the Forgery Dismissal Application) described the State's case as one alleging fraud rather than forgery,[258] they still did not present Mr. Mazak as witness to rebut these allegations, notwithstanding every opportunity they had to do so. In these circumstances, the Applicants may not posit at the annulment stage an alternate factual record which might have existed, composed of evidence which could have been – but was not – submitted to the Tribunal for consideration.

191. The Applicants also allege that the *Minnotte* Direction changed the legal framework of the document authenticity phase, which the Tribunal managed in a way that was the source of many annullable errors.[259] The Applicants declare that the Tribunal failed to define the expression "legal consequences" that first appeared in PO13, which reconsidered PO12 and decided to address document authenticity issues as a matter of priority.[260]

192. The Tribunal remarked in PO13 that Churchill and Planet, although twice invited to do so,[261] had chosen not to address the question about the fate of their claims in case of a finding of forgery.[262] The Tribunal determined that the issue of the document authenticity should be addressed as a preliminary matter and "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."[263] The Tribunal added that these directions did "not mean to prevent the Parties from addressing any other matters which they deem appropriate in connection with the forgery allegations and arguments."[264] Churchill and Planet applied for reconsideration on November 23, 2014 on the grounds that PO13 violated their

[257] Award, para. 206.

[258] Exhibit A-26(1), para. 10.

[259] Reply, paras. 40-47.

[260] Annulment Application, paras. 52-62; see also Exhibit A-8, paras. 47, 49, 50, and 52.

[261] Exhibits A-7 (Telephone conference of the Tribunal with the Parties of October 21, 2014) and A-10 (Churchill and Planet's letter of November 10, 2014 to the Tribunal).

[262] Exhibit A-11, para. 26.

[263] Exhibit A-11, paras. 27, 28, and 33.

[264] Exhibit A-11, para. 28.

fundamental due process rights and constituted unequal treatment of the Parties.[265] On January 12, 2015, the Tribunal rejected their request in PO15, and reaffirmed PO13 on the scope of the authenticity phase:

> as comprising (i) the factual aspects of forgery and (ii) the legal consequences of a finding of forgery. Accordingly, the document authenticity phase was defined as being limited to (i) the factual question whether the impugned documents are authentic or not (including especially who signed the documents and how) and (ii) legal submissions on the positions in law in a scenario where there would be forgery (including for instance the legal requirements for estoppel, as opposed to the facts allegedly justifying a finding of estoppel).[266]

193. In PO15, the Tribunal stated that it considered that it had "fully respected the Claimants' due process rights in connection with the issuance of PO13, by giving the Claimants an opportunity to be heard, which […] was not subject to any limitation as to its scope," and that Churchill and Planet had limited their comments to a mention of estoppel and of their right to recover amounts invested in good faith.[267]

194. "Legal consequences" were again considered at the end of the 2015 Hearing on certain procedural aspects of the questions to be addressed in post-hearing briefs. The President explained that:

> [t]he point for asking legal consequences, which was a kind of add-on to the factual authenticity question, was that we heard very divergent views from the parties […] So that is why we wanted you to canvas the legal consequences so we could see where we were going if we have no authenticity, or we have authentic documents.[268]

[265] "It is patently violative of Claimants' right to due process for the Tribunal to reopen a decided issue on the merits without notifying the Claimants of its intention to do so, or inviting Claimants to address the substance of that issue," Exhibit A-12, p. 13.

[266] Exhibit A-16, para. 34.

[267] Exhibit A-16, para. 23.

[268] Exhibit A-34, [Kaufmann-Kohler] [205:21] to [206:7].

195. The President of the Tribunal clarified as follows with regard to one of the questions to be addressed in the post-hearing briefs regarding the legal consequences on each Party's case in the event the signatures on the general survey and exploration license, as well as on other official documents, were not handwritten or not authorized:

> it is not whether […] if the document is null and void or forged, whether then you can say there is unjust enrichment, or acquiescence. That is not at all what we had in mind […] The Tribunal would simply try and understand if it has to be written [and signed by hand] and [if] it's not hand signed, what is [sic] the legal consequences if it is not authentic, because it's a forged document?[269]

196. The President of the Tribunal prefaced her conclusion of the discussion with the statement that:

> the tribunal must stick to the definition of the phase like it described it in its procedural order, and that was the authenticity as a matter of fact, factual question of whether the impugned documents are authentic or not, who signed them and how, "how" was meant in very broad fashion, about the circumstances, authority and so on. And then legal submissions on the position in law in a scenario where there would be forgery, including, for instance, the legal requirement for estoppel, as opposed to the facts allegedly justifying a finding of estoppel. For instance, we have not, at least in the tribunal's understanding, heard evidence on whether someone relied, rightly or not, on some assertion, some assurance given.[270]

197. When the discussion resumed at the end of the 2015 Hearing about the availability of estoppel, acquiescence and other legal doctrines as a result of a finding of forgery, the President of the Tribunal further explained:

> there are different levels of legal consequences that we are discussing here. If the documents are forged and there are no licenses, then the question arises, what arguments does [sic] the claimants have? It could, for instance, have an estoppel argument that the State cannot raise the invalidity of the

[269] Exhibit A-34, [Kaufmann-Kohler] [209:18] to [210:2].

[270] Exhibit A-34, [Kaufmann-Kohler] [205:6] to [205:20].

> licenses. It is a different question to examine and decide whether the forgery of certain licenses has a direct effect on the validity of others […] I understood this so far to be part of this debate here. The estoppel […] and similar doctrines were not part of this debate, except to canvas what the legal consequences could be.[271]

198. In reply to Churchill and Planet's counsel, the President of the Tribunal declared that the Tribunal did not want to hear submissions on "the international law parts," including estoppel, at that stage.[272]

199. On August 20, 2015, the Tribunal issued PO20 inviting, as discussed at the 2015 Hearing, the Parties to address in their post-hearing briefs *inter alia* the consequences of disregarding Mr. Noor's evidence and, assuming that the Tribunal were to conclude that the impugned documents were not authentic or not authorized, what issues would remain to be resolved in fact and law. The Tribunal confirmed in PO20:

> that the Parties are to address matters falling within the scope of Procedural Order No. 15 especially paragraph 34. In other words, the Parties shall address (i) the factual question whether the impugned documents are authentic or not and (ii) the legal consequences of a finding of forgery. Matter (i) includes the question whether, if they were not hand-written, the impugned signatures were affixed with authority. Matter (ii) about the legal position in the event of forgery does not cover the effect of the possible invalidity of the survey and exploration licenses on the exploitation licenses. The present directions come in lieu of any different comments made by the Tribunal at the hearing.[273]

200. Organization and control of the presentation of pleadings and evidence by laying down guidelines, such as the questions identified in PO20 for the post-hearing briefs,[274] are within a tribunal's mission and powers. The Applicants say they understood that PO13 and PO15 asked them simply to identify the legal principles, such as estoppel, that could be

[271] Exhibit A-34, [Kaufmann-Kohler] [215:6] to [215:18].

[272] Exhibit A-34, [Kaufmann-Kohler] [218:4].

[273] Exhibit A-35, para. 5.

[274] Exhibit A-35, para. 6.

engaged if there was a finding of forgery, but with the further understanding that they would be allowed to expand on these issues at a later stage.[275] The Committee considers that a combined reading of PO15 and PO20 shows that the Tribunal did not wish to inquire about the facts on estoppel, and made no ruling on estoppel in the Award. Instead, the Tribunal accepted in the Award the State's argument that failure to conduct proper diligence precluded Churchill and Planet from even *invoking* estoppel (or acquiescence): "the general principle of good faith and the prohibition of abuse of process entail that the claims before this Tribunal cannot benefit from investment protection under the [BITs] and are, consequently, deemed inadmissible."[276] Fraud infected every aspect of the investment.[277] Given the seriousness of the forgery, the Tribunal found no need to delve into the estoppel issue. The Committee's conclusion on estoppel also applies to all legal theories based on the same facts, which included good faith.

201. The Applicants also aver that the Parties implicitly agreed towards the end of the 2015 Hearing that the case would continue on the remaining issues of reliance and good faith, and did not expect that the Tribunal could dispose of the case without hearing the Parties on these important issues.[278] The transcripts of the 2015 Hearing mention that Churchill and Planet's counsel, in reaction to the State's proposal to the Tribunal for a partial summary judgment which would clarify and narrow the issues for the next phase,[279] declared that if the State "withdrew their application for a strike-out of the whole claim, things would be much easier because the scope would then be on forgery and authenticity of these documents, and we would move on and brief the legal consequences of that within a fuller factual context at a merits hearing."[280] The necessity of dialogue and cooperation in international arbitration between the parties and the tribunal cannot be the pretext for curtailing the freedom of the tribunal to organize the proceedings. Here, it is difficult to

[275] Annulment Application, paras. 53-56.

[276] Award, para. 528.

[277] Award, para. 509.

[278] Annulment Application, paras. 60-62.

[279] Exhibit A-34, [O'Donoghue] [202:23] to [203:4].

[280] Exhibit A-34, [Sheppard] [203:22] to [204:2].

analyse these exchanges as a joint proposal for the future of the process, and less a binding agreement between the Parties on procedure that the Tribunal subsequently violated.

202. The Applicants contended at the Hearing on Annulment that the Tribunal breached due process by making a decision on inadmissibility without previously informing the parties that international public policy and the principle of good faith were to be addressed and by introducing an argument that favoured one side without hearing the evidence and arguments from all the parties.[281] Without any regard to the distinctive grounds of Article 52 of the ICSID Convention, the first complaint which is made here under Article 52(1)(d) is indistinctly made under the ground of Article 52(1)(b) and will be examined below. The second ground is an affirmation unsupported by evidence and fails.

203. As the Applicants point out with some relevance, demonstration of the denial of their right to be heard does not require, however, that they would have won or even that the exclusion of further evidence under the *Minnotte* framework was decisive for the outcome of the Award.[282] In their view, the Tribunal did not reject the three-step inquiry which Churchill and Planet had propounded in their submission of September 23, 2016 on *Minnotte*.[283] According to the Applicants, the first element (whether there was wrongdoing by a third party) had already been addressed in prior pleadings,[284] but the second element (whether that third-party wrongdoing was connected to the investor's claims, the nature of this connection and the extent to which it impacts upon the investor's good faith) were considered by the Tribunal in examining the seriousness of the forgeries and fraud and Churchill and Planet's alleged lack of diligence.[285]

204. There is no need for the Committee to second guess the final issue that the Parties have debated, namely whether *Minnotte*, which was one among the twenty investment cases on which the Tribunal relied in charting the legal framework addressing the consequences of

[281] See para. 121 above.
[282] Reply, paras. 58-68.
[283] Award, para. 503.
[284] Exhibit A-42, paras. 4 and 5.
[285] Reply, para. 50.

unlawful conduct by a claimant or its business associate,[286] was or was not dispositive in its decision. As discussed above, where there has been a grave violation of a fundamental rule of procedure, including denial of a reasonably full opportunity to be heard, the injury is inherent in the due process violation, without the need to demonstrate that the outcome of the case would have been different otherwise. Here, however, the Committee has found no such violation.

ii. Whether Mr. Noor's evidence was re-admitted and given weight

205. As the Applicants present the issue, there were only two possible explanations for Mr. Noor's signing the Exploitation Licenses in 2009: he was either duped into doing so, in the belief that the earlier foundational survey and exploration licenses were valid, or he was complicit in the underlying scheme. In his witness statement of September 23, 2014, Mr. Noor explained the circumstances in which, soon after taking over as Regent of East Kutai, he signed several decrees granting mining rights to companies of the Ridlamata Group:

> I assumed that all the steps of the regular process had been duly taken by the Head of the Mining and Energy Bureau and I therefore signed such decrees and those other documents on 27 March 2009. However, later (around early September 2009), it was discovered that their applications were based on forged documents, i.e, based on forged mining undertaking licenses for exploration. If I had been informed of such matters, I would not have signed the mining undertaking licenses for exploitation and those other documents on 27 March 2009.[287]

206. At the 2015 Hearing, the Tribunal excluded the evidence of Mr. Noor on Churchill and Planet's motion.[288] The Award recapitulates Indonesia's arguments that included reference

[286] Award, paras. 488-506.

[287] Exhibit A-4, paras. 10 and 11.

[288] Exhibit A-28, [Sheppard] [10:24] to [11:25]; Exhibit A-29, [Sheppard] [2:23] to [6:5] and [Kaufmann-Kohler] [8:19] to [9:11].

to Mr. Noor's deception[289] and further concludes on the seriousness of the forgeries and fraud:

> The facts suggest that the motive driving the fraud was to extend Ridlatama's mining rights in the EKCP […] To this end, forged licenses and related documents were fabricated to give an impression of lawful entitlement. That false impression was then used to obtain hand-signed Exploitation Licenses issued on the misguided assumption that the entire operation rested on valid mining rights.[290]

207. In the Applicants' view, this reference to a "misguided assumption" necessarily equates to the effective readmission of Mr. Noor's witness statement into evidence, without prior notice to or consultation with the Parties. Further, the Applicants contend that they could only have rebutted the presumption thus created in the Tribunal's mind about Mr. Noor's state of mind by cross-examining him, which they were unable to do. The Committee is unable to agree with the Applicants' first argument, however, which makes the second one unnecessary to address.

208. The Tribunal's analysis of the facts led to its conclusion in the Award that the survey licenses procured by the Ridlatama Companies were not authentic,[291] and that the same conclusion had to be made regarding the exploration licenses as well as the ancillary documents issued at three levels of the Indonesian Government: the Regency of East Kutai, the Province of East Kalimantan and the Central Government in Jakarta.[292] However unable the Tribunal was to make a finding of corruption,[293] it found that the facts revealed the existence of a large-scale fraudulent scheme intentionally implemented to obtain coal mining concessions areas in the EKCP exploited by Nusantara. The Tribunal remarked that Ridlatama sent copies of the forged licenses to affected governmental departments for the express purpose to "ensure that our licenses were officially recognized at all governmental levels," thus building a "*façade*" or providing a "mantle" of legitimacy to an illegal

[289] Award, para. 165.

[290] Award, para. 512.

[291] Award, paras. 353 and 359.

[292] Award, paras. 365, 382, 408, and 426.

[293] Award, para. 466.

enterprise.[294] Even if this was not Churchill and Planet's stated aim, it nevertheless remains that Mr. Benjamin, the Director of PT ICD, also sent the forged documents to various agencies of the Indonesian Government.[295] Other passages in the Award relate to the building of this façade: "Ridlatama, not the Regency, circulated the disputed licenses and related documentation to governmental agencies allegedly to ensure that they received all relevant documentation in case the Regency failed to provide it."[296]

209. In the context of these findings, the Committee considers that the Tribunal could well have reached its view in paragraph 512 of the Award, as to the "misguided assumption" of valid mining rights, simply by virtue of the conduct of Ridlatama, which the Tribunal evidently considered to have been patently *aimed* at creating that very assumption. Given the breadth of the Ridlatama scheme, these actions do not appear to have been aimed solely at Mr. Noor, and therefore his personal state of mind (*i.e.*, whether dupe or co-conspirator) was not essential to the Tribunal's conclusion that any grant of mining rights necessarily would flow from the deceit practiced by Ridlamata. The Committee thus does not share the Applicants' conclusions that the only way the Tribunal could have reached this view would be by resorting to Mr. Noor's witness statement. Accordingly, there is no need to address the Applicants' arguments about an alleged lack of prior notice to or consultation with the Parties regarding the alleged readmission of that statement.

210. The Applicants further assert that the Tribunal's handling of Mr. Noor's evidence, constituted unequal treatment, in light of the Tribunal's decision to accept Indonesia's privilege objection with respect to the Police Files on the forgery issue, which it refused to produce. The Applicants argued at the Hearing on Annulment that the decision on the secrecy of the Police Files taken in the Award was unexpected, unfair and in breach of their right to be heard as the Tribunal earlier had rejected Indonesia's objection based on the confidentiality of those documents, when ruling on document production requests.[297] The

[294] Award, paras. 510, 511, and 426.

[295] Exhibit A-26(1), para. 94.

[296] Award, para. 472.

[297] Tr. Day 1 [Sheppard] [66:18] to [67:23].

Committee does not see the two issues as comparable, however, and therefore no question of equal treatment arises in connection with Mr. Noor's witness statement.

211. With respect to the Police Files, the Committee recognizes that the obligation of the parties to cooperate with each other and with the tribunal in the production of evidence is a general principle of international arbitration. The duty to disclose evidence is however not absolute, and national law concerns, such as the secrecy of criminal investigations relied on by Indonesia, can be put forward to limit full adversarial proceedings.[298] Indeed, the IBA Rules on the Taking of Evidence in International Arbitration[299] place the issue of State secrecy squarely within the tribunal's discretion in weighing objections to document requests.[300] The Tribunal was thus well within its discretion in first ordering production of the Police Files, and later in apparently accepting the State's stated impediment to complying. In ultimately accepting the Respondent's claim of privilege in relation to the Police Files, the Committee finds that the Tribunal did not unduly limit Churchill and Planet's right to present their case. Nor did it breach the procedural equality of the Parties, on the Police Files issue alone or in asserted comparison with its handling of the excluded Mr. Noor's witness statement. Accordingly, no departure from a fundamental procedural rule has been demonstrated on this basis.

iii. The burden of proof in relation to fraud and deception and to the *Minnotte* factors

212. On September 24, 2014, Indonesia filed a Forgery Dismissal Application asking the Tribunal for a hearing within three weeks to address the authenticity of 34 disputed documents relating to licenses and permits for the EKCP as well as an award dismissing Churchill and Planet's claims as inadmissible by reason of their invalidity and illegality.[301] The Tribunal placed on the State the burden of proving its allegations of fraud and forgery:

> It is a well-established rule in international law that each party bears the burden of proving the facts which it alleges (*actori incumbit onus probandi*). Since the Respondent

[298] Award, para. 251.

[299] Exhibit A-3.

[300] IBA Rules on the Taking of Evidence in International Arbitration, 2010, Article 9(2)(f).

[301] Exhibit A-5.

> alleges that the Survey and Exploration Licenses and related documents are forged and that the Exploitation licenses were obtained through deception, the Respondent bears the burden of proving its allegations of forgery and deception.[302]

213. The Applicants contend that notwithstanding the Tribunal's stated allocation of the burden of proof, in reality the Tribunal placed the burden on them to disprove deceit after the exclusion of Mr. Noor's witness statement. The Applicants point to the following passage of paragraph 522 of the Award: "the Claimants did not seek to ascertain the means of signing mining licenses in Indonesia […] although that information would have been readily available." This, they aver, cannot square with the oral testimony of the Regent, Mr. Ishak, that anything can happen inside the Regency.[303] The Applicants further contend that the Tribunal's conclusion in paragraph 512 of the Award, that a "false impression" of lawful entitlement created by the forgeries and fraud "was then used to obtain hand-signed Exploitation Licenses issued on the misguided assumption that the entire operation rested on valid mining rights," can only be explained by a reversal of the burden to proof. In their view, the impossibility of proving that Indonesia was complicit without cross-examining Mr. Noor aggravated the unfairness of their situation.[304] The Applicants further allege that, although the Award does not state which Party bore the burden of proving the *Minnotte* factors, it should have been incumbent on Indonesia, and not on them, to bring evidence of what a reasonable investor would have done in the same circumstances. Instead, they claim that the Tribunal made them bear the burden of proving the benchmark against which their own conduct was to be tested, which according to paragraph 504 of the Award was "whether the Claimants were put on notice by evidence of fraud that a reasonable investor in the Indonesian mining sector should have investigated, and whether or not they took the appropriate corrective steps."

214. The *ad hoc* committee in *Continental Casualty v. Argentina* recognized that:

> the ICSID Convention and the Arbitration Rules contain no provisions with respect to the burden of proof or standard of

[302] Award, para. 238.

[303] Annulment Application, para. 126, fn. 185.

[304] Reply, para. 103.

> proof. Accordingly, there cannot be any requirement that a tribunal expressly apply a particular burden of proof or standard of proof in determining the dispute before it. Indeed, the tribunal is not obliged expressly to articulate any specific burden of proof or standard of proof and to analyse the evidence in those terms, as opposed simply to making findings of fact on the basis of the evidence before it.[305]

215. The Committee admits, as an accepted principle of international law regarding the allocation of the burden of proof between the parties, that each party has the onus of proving the facts relied on in support of its case.[306] But it is equally well accepted that placing the initial onus on a party presenting an application does not obviate the requirement, once it adduces proof of the facts on which its claims are based, that the opposing party present proof to the contrary, supporting its denial of the claim. In this case, it is entirely consistent with these shifting burdens of proof that Indonesia was required to prove forgery, yet the Tribunal thereafter may have looked to Churchill and Planet to demonstrate why the multiple forgeries thus demonstrated should not impact the admissibility of their case. Churchill and Planet introduced evidence of their supposed due diligence, but the Tribunal evidently found this evidence insufficient to surmount the inadmissibility challenge. In so finding, the Tribunal considered the evidence that both Parties contributed, and whether they had discharged their respective burdens of proof.

216. Paragraph 522 of the Award, to which the Applicants object, discusses and evaluates the evidence of Churchill and Planet's witnesses: "Mr Quinlivan stated that '[w]e didn't know how Bupati [i.e. the Regent] or various people fit their signature to various documents', although that information would have been readily available. Indeed, Messrs. Benjamin and Gunter testified that they would have been very concerned had they known that the licenses were not hand signed by Mr. Ishak, which shows that they knew that mining licenses were hand-signed." While the Applicants may disagree with the Tribunal's evaluation of this evidence, the task certainly was within the Tribunal's discretion. Similarly, the Tribunal exercised its discretion in assessing the evidence regarding the due

[305] *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Annulment, September 16, 2011, para. 135 (ALA-20).

[306] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Annulment, September 1, 2009, para. 215 (ALA-11).

care of Churchill and Planet in the licensing upgrade process.[307] Tribunals have broad discretion in the weighing of evidence, although that discretion certainly must be exercised within the limits of good faith, impartiality and equality of the parties which mark the proper exercise of the function of judging.

217. The Applicants also rely on paragraph 512 of the Award (which reads in pertinent part that "forged licenses […] were fabricated to give an impression of lawful entitlement. That false impression was then used to obtain hand-signed Exploitation Licenses issued on the misguided assumption that the entire operation rested on valid mining rights") to argue that the Tribunal reversed the burden of proof with regard to deception, placing on them the onus of disproving that Mr. Noor was labouring under a "false impression" when he hand-signed the Exploitation Licenses.[308] However, as the Committee observed above, the reference in this passage to forgeries having been "*used to*" obtain licenses issued on a "misguided assumption" equally may be explained as referring to Ridlatama's evident *intention and purpose* of creating such a false impression of legality. Nothing in this phrase mandates a conclusion that Churchill and Planet were expected to prove anything with respect to Mr. Noor's personal state of mind. Rather, it appears that the Tribunal ultimately felt it unnecessary, given the massive scope of the fabrications and the purpose to which their dissemination was put – which called into play international law doctrines of admissibility of claims – to determine whether (and if so, at what level) some State official(s) may have been complicit in the scheme.

218. The Committee finds that this approach does not reflect an alteration of the normal balance in the proving of facts by the Parties to the detriment of the Applicants. Nor have they substantiated their suggestion that the Tribunal's treatment of Mr. Noor's evidence calls into question its underlying impartiality.[309] It is true that the Tribunal found that someone within the Regency most likely had assisted in the process of introducing the fabricated documents into the databases and archives, thereby contributing to create an appearance of legitimacy to the fraudulent scheme. At the same time, the Tribunal also found that nothing

[307] Award, paras. 516-527.

[308] Reply, para. 105.

[309] Reply, para. 105.

in the record supported Churchill's "Bad Faith Authorization Theory,"[310] which speculated that Indonesian officials may have intentionally accepted documents they knew to be forged as part of a scheme to reap the benefits of foreign investment while preserving an ability to repudiate the licenses if that later proved convenient. These two findings are not inconsistent, and the Tribunal was within its power to make both findings based on the record before it, without thereby "reversing" any burdens of proof.

219. The Applicants also question the Tribunal's decision not to draw an adverse influence of complicity from the non-appearance of Mr. Noor. The State explained at the 2015 Hearing that Mr. Noor was now a private citizen residing in Australia, over whom the Government had no control. Indonesia declared that it had informed Mr. Noor about the 2015 Hearing and believed until the last moment that he would be attending, when he communicated that, because of travelling engagements, he could not participate.[311] The Tribunal obviously could not have foreseen the later press report after the Award, citing Mr. Noor's statement that "[w]e won an arbitration dispute in an international tribunal. This is proof of our sovereignty over the management of Indonesia's natural resources,"[312] and therefore could not have considered this in evaluating Indonesia's contention at the time that neither it nor the Tribunal could compel him to attend the 2015 Hearing.

220. In any event, whatever the Tribunal may have felt about Indonesia's explanation for Mr. Noor's absence, it evidently considered the circumstances sufficient to strike his witness statement, but insufficient to support the further relief of an adverse inference about his complicity in the underlying illegality, in the absence of other evidence to that effect. This was within its discretion to conclude: while adverse inferences are tools available for tribunals to deter parties from refusing to comply with their orders about the production of evidence, nothing requires that a tribunal grant such inferences. Moreover, the Tribunal evidently considered it unnecessary to apply the sanction of adverse inferences, when, as

[310] Award, paras. 459 and 476.

[311] Exhibit A-29, pp. 1, 2, 6 and 7.

[312] Exhibit A-46.

noted above, it was able to base its finding that the forgeries and fraud created an environment of apparent legality on evidence other than Mr. Noor's.

221. Finally, the Applicants cannot demonstrate annullable error on the basis of the Tribunal's failure to draw adverse inferences in response to Indonesia's non-production of the police report into the alleged forgeries. The Tribunal weighed these reasons.[313] As discussed above, tribunals have discretion to draw adverse inferences when a party declines to produce certain evidence, but they have no obligation to do so. In the Committee's view, it was not unreasonable for the Tribunal to find that drawing an adverse influence was not the appropriate solution in response to Indonesia's stated constraints based on the secrecy of criminal investigations.

iv. The Infection Issue

222. The Applicants describe the Infection Issue as one of two questions (the other being the issue of their reasonable reliance on Ridlatama) as to which there remained procedural uncertainty after the 2015 Hearing, because of the Tribunal's failure to define the scope of the "legal consequences" of a finding of forgery that the Tribunal had directed be addressed in the document authenticity phase.[314] The Respondent contends that the Applicants have waived any argument that they were denied the right to be heard on the Infection Issue because they had every opportunity to present evidence on Indonesian law on that issue.[315] As the State points out,[316] the Parties discussed the validity of the Exploitation Licenses on the occasion of the reconsideration of PO13.[317] However, the Applicants' grievance is essentially that the proceedings of the document authenticity phase developed after PO13, which was affirmed by PO15, in a manner that ruled out any possibility of addressing the Infection Issue before the Award, despite their having stressed their perceived importance of the issue at the end of the 2015 Hearing.[318] Moreover, Churchill and Planet did object

[313] Award, para. 250.

[314] Annulment Application, para. 57.

[315] Rejoinder, para. 99.

[316] Counter-Memorial, para. 120.

[317] Exhibit A-12, pp. 10 and 11; Exhibit A-13, pp. 13-16.

[318] "That would be a major, major issue, not something that's addressed in post-hearing briefs after an authenticity hearing" (Exhibit A-34, [Sheppard] [213:18] to [213:20]). See Annulment Application, para. 115.

to PO13 in the underlying proceedings.[319] In these circumstances, they cannot be deemed to have waived the possibility to challenge the Award on Article 52(1)(d) grounds, with respect to PO13 or other procedural steps taken thereafter in the ensuing proceedings.[320]

223. The Tribunal indicated that PO20, paragraph 5, confirmed PO15, paragraph 34, and PO13, paragraph 28[321] on the scope of the authenticity phase and of the Award. The Applicants interpret PO20, which, at paragraph 5, clarified that the term "legal consequences" of a finding of forgery "does not cover the effect of the possible invalidity of the survey and exploration licenses on the exploitation licenses,"[322] as an indication that the Infection Issue was reserved for subsequent consideration.[323] In both their post-hearing briefs, Churchill and Planet, in answering PO20 question e) ("[s]ubject to paragraph 5 above, in the event that the signatures on (i) the survey and exploration licences […] are not handwritten or not authorized, what would be the legal consequences on each Party's case?"), declared that the State had not explained why, as a matter of Indonesian law, it was necessary to have valid survey and exploration licenses to obtain valid exploitation licenses.[324] The Applicants reiterated in their first submission of September 23, 2016 on *Minnotte* that the Tribunal still had not heard evidence on Indonesian law as to how the Exploitation Licenses had been infected by the invalidity of the underlying survey and exploration licenses.[325]

224. Even if, as alleged by Churchill and Planet, the President of the Tribunal agreed with them about the Infection Issue at the 2015 Hearing that "these are delicate issues and we're very much aware of this,"[326] the Tribunal thereafter decided in the Award that its inadmissibility conclusion:

> is within the scope of the present arbitration as it was circumscribed in Procedural Orders Nos. 13, 15 and 20. In this context, the Tribunal notes in particular that it arrived at

[319] Annulment Application, para. 120.

[320] Exhibit A-12, pp. 12-14.

[321] Award, para. 232.

[322] Exhibit A-35, para. 5.

[323] Annulment Application, paras. 57 and 66-68.

[324] Exhibit A-36(1), paras. 57-59; Exhibit A-38, para. 26.

[325] Exhibit A-42, para. 6; Tr. Day 1 [Luttrell] [162:23] to [163:19].

[326] Exhibit A-34, [Kaufmann-Kohler] [211:14] to [211:15].

> this outcome without there being a need to address the validity of the Exploitation Licenses as a matter of Indonesian law.[327]

225. The Committee does not accept the Applicants' contention that the inadmissibility conclusion is the result of a confluence of annullable errors, including denial of the right to be heard, on the Infection Issue.[328] Because there was no violation of due process on the *Minnotte* factors, the Committee concludes that, even if Churchill and Planet were unable, as they declare, to present evidence before the Award on Indonesian law regarding the Infection Issue – and even if they expected to be able to do so in a subsequent phase of the proceedings – this alleged violation is immaterial. The Tribunal did not decide the substance of the Infection Issue; rather, it held that the issue was irrelevant given the Tribunal's overarching finding about inadmissibility of the claims under international law. Specifically, the Tribunal explained that "[t]he accumulation of forgeries both before the and after the Exploitation Licenses show that, *irrespective of their lawfulness under local law*, the entire EKCP was fraudulent, thereby triggering the inadmissibility of the claims under international law."[329] As the Tribunal thus decided the case on grounds for which evidence of Indonesian law was not needed, there could be no violation of the right to be heard by its not first allowing submissions on the subject it deemed unnecessary to its decision.

v. Denial of justice

226. The same conclusion applies to the Applicants' complaint that they were never given a chance to brief the question of whether they suffered a denial of justice in the hands of the Indonesian judicial system, which they characterize as simply dismissed *in limine*.[330] The Tribunal decided that it could dispense with ruling on this claim, because like Churchill and Planet's other claims, it was tainted as a consequence of the fraudulent nature of the EKCP to which it related.[331] Given the Tribunal's findings about the inadmissibility of the

[327] Award, para. 530.

[328] Reply, para. 115.

[329] Award, para. 530 (emphasis added).

[330] Reply, para. 124.

[331] Award, para. 531.

claim under international law, it was not obliged to allow further briefing on the substance of the claim. Moreover, the Committee concludes that it was within the Tribunal's discretion to approach the inadmissibility issue on a global basis, addressing *all* of the Claimants' claims together (which it viewed as each predicated on the same fraudulent investment project) rather than re-opening briefing to see if the Claimants' could differentiate their denial of justice claim from the others that could not survive a finding of forgery. The Claimants did not have a fundamental right to brief admissibility of the denial of justice claim separately, and the Tribunal accordingly did not violate such a right.

vi. State responsibility

227. The Applicants allege that if they had been given the opportunity to present their case on State responsibility, they could have marshalled further evidence to demonstrate the full scale of the State's involvement in the fraudulent scheme found by the Tribunal. Indonesia argues that the Applicants have waived any objection because, during the proceedings, they did not complain that they were being denied the opportunity to adduce evidence regarding Indonesia's involvement in the fraud.[332] The Committee disagrees. Nothing in the Award (or in the record) indicates that Churchill and Planet have unequivocally waived their right to attack the Award on this count.

228. At the same time, the record does not support the Applicants' contention that they were precluded from submitting such evidence on this issue as they might have wished. While the original scoping of the document authenticity phase was undoubtedly focused on the issue of forgery, it did not affirmatively restrict either party from presenting evidence on comparative responsibility for whatever forgeries might be demonstrated, or from directly arguing that particular additional fact-finding was needed to establish State complicity. The Tribunal held in the Award that there was insufficient evidence before it in support of Churchill and Planet's Bad Faith Authorization Theory or of a finding of corruption.[333] Regarding the issue of complicity short of corruption or "bad faith authorization," the Tribunal found only that an insider must have assisted to introduce into Regency databases

[332] Rejoinder, para. 96.

[333] Award, paras. 458 and 466.

and archives the forgeries and fraud that were orchestrated by authors outside the Regency, most likely Ridlatama.[334] These findings were made after an evidentiary phase in which Churchill and Planet were alive to the potential consequences of proving broader complicity, as they contended in their post-hearing brief of October 20, 2015, that the State would be responsible for the criminal wrongdoing of its officials.[335] With respect to those post-hearing briefs, the Tribunal had authorized the Parties in paragraph 3 of PO20 to append new documents "with prior leave of the Tribunal. Nothing precluded the Applicants from seeking such an opportunity to present further evidence on complicity, or from presenting further arguments on State responsibility at that time.

229. The Committee concludes that the document authenticity phase was not managed in violation of Churchill and Planet's right to be heard, and the Applicants have not proven that they were deprived of an opportunity to present their case on State responsibility. Moreover, because the Tribunal considered Ridlatama the principal actor in the fraud, and evidently did not consider the possible assistance of a Regency insider of sufficient magnitude to excuse the taint over the whole investment, it was not required to work through a systematic analysis of international law of State responsibility, or invite a supplementary round of pleadings focused on that issue. While the Applicants now contend that they could have developed other arguments on the preclusive effects of State responsibility on the Respondent's admissibility objection that would have impacted the outcome of the Award, they cannot set the clocks back to the time before the Award. Certainly, after the Award, it is too late to develop arguments that could have – perhaps – influenced the Tribunal's decision. The right to be heard in arbitration proceedings does not extend to challenging an Award on the basis of arguments that were not made, but that could have been made, before the Tribunal.

B. ARTICLE 52(1)(B) OF THE ICSID CONVENTION: MANIFEST EXCESS OF POWERS

230. The Applicants argue that, without Mr. Noor's evidence about his state of mind when signing the Exploitation Licenses, the Infection Issue shifted from a factual question on

[334] Award, paras. 476.

[335] Exhibit A-36(1), fn. 16.

whether he was defrauded in doing so, to a purely legal question of Indonesian law, namely whether the Exploitation Licenses perfected previous flaws in the licensing chain.[336] They note that the Tribunal however did not apply Indonesian law to this issue. The Applicants also object that the Tribunal did not apply the law of State responsibility to consider whether alleged complicity by State officials should bar the Respondent from asserting admissibility objections, and did not consider whether illegalities likely attributable to a third party (Ridlatama) rather to the Claimants could bar them from proceeding with their unjust enrichment claim, seeking return of the USD 70 million invested in EKCP. The Applicants conclude that in each of these says, the Tribunal manifestly exceeded its powers to decide the dispute in accordance with the applicable law under Article 42 of the ICSID Convention, which the Tribunal determined in general to be the BITs, Indonesian law and international law.[337]

231. Article 42(1) of the ICSID Convention, which is one of the provisions in Section 3 relating to the powers and functions of the tribunal, requires the tribunal:

> to decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

The discretion accorded to tribunals under Article 42(1) of the ICSID Convention when determining the applicable rules of law does not square with an extensive power of *ad hoc* committees to check the determination, application and content of the law applied by the tribunals. This has been recognized, with a few exceptions,[338] by *ad hoc* committees.[339]

[336] Annulment Application, para. 75.

[337] Award, paras. 234-236.

[338] Decisions on Annulment in *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), June 29, 2010 (Exhibit RLA-ANN-331) and *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), July 30, 2010 (Exhibit RLA-ANN-287).

[339] Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016 (RLA-ANN-277).

232. As noted above, the Award decides that:

> inadmissibility applies to all the claims raised in this arbitration, because the entire EKCP project is an illegal enterprise affected by multiple forgeries and all claims relate to the EKCP. This is further supported by the Claimants' lack of diligence in carrying out their investment.[340]

233. The Award consequently did not decide the Infection Issue ("without there being a need to address the validity of the Exploitation Licenses as a matter of Indonesian law"),[341] nor the Claimant's "substitute claims" (including unjust enrichment),[342] because, finding the entire investment to be fatally tainted by use of forgery, it considered all claims relating to that investment to be inadmissible as a matter of international law.[343] This is not a failure to *apply* Indonesian law after having first found it to be applicable to a particular issue, but rather a decision that Indonesian law *was not applicable* in this context, given the Tribunal's view of an overarching international law principle. The same is true for the Applicants' alternative argument that the Tribunal manifestly exceeded its powers because it still should have examined Indonesian law to determine whether there was a lacuna or conflict between local and international law. Under the guise of an argument based on a manifest excess of powers, this criticism seeks to challenge the Tribunal's core decision on applicable law, which is not reviewable by the Committee according to Article 52 of the ICSID Convention.

234. With respect to the issue of State responsibility, the Applicants contend that had the Tribunal applied Article 7 of the ILC Articles or decided to reserve its decision on State responsibility, their claims would have survived, because assistance of a State official in Ridlatama's scheme would be attributable to the State, and would have barred it from succeeding on an inadmissibility objection predicated on the investment's illegality. The Applicants assert in addition that if one or more State officials had facilitated the fraud and forgery, then the *Minnotte* analysis could not have resulted in dismissal, because the State

[340] Award, para. 529.

[341] Award, para. 530.

[342] Exhibits A-06, p. 3; A-10, p. 3; A-12, p. 10; A-14, pp. 14-16; A-26(1), paras. 219-221; A-38, para. 27.

[343] Award, para. 531.

could not rely on inadequate due diligence by the Claimants to support an admissibility objection in circumstances of its own complicity. According to the Applicants, the Tribunal therefore should have addressed and applied the international law on State responsibility, before reaching its ultimate decision on admissibility.

235. The Committee is not insensitive to the question of whether, and to what extent, the widespread scheme of forgery might have involved the support of one or more State officials. However, it was for the Tribunal, and not the Committee, to determine the relevance of this issue. The Tribunal concluded that the widescale use of forgeries to obtain EKCP licenses rendered any claims for interference with the EKCP investment inadmissible, as a fundamental matter of international law. Although the Tribunal did not expressly discuss in this context the implications of its finding about the involvement of a Regency insider, evidently the Tribunal did not consider that finding sufficient for it to ignore the sweeping illegalities on which it found the entire EKCP investment to have been based. In this sense the Tribunal appears to have implicitly considered issues of comparative responsibility and rejected the Applicants' arguments in this regard. The Committee views the Applicants' insistence that the Tribunal nevertheless should have addressed the State responsibility arguments expressly rather than by implication, as essentially a challenge to the Tribunal's approach to admissibility. This is not within the Committee's remit to entertain. A finding of inadmissibility is not a manifest excess of powers, and based on the Tribunal's approach to inadmissibility, there was no requirement that it go further to expressly apply doctrines of State responsibility or Article 7 of the ILC Articles.

236. The same answer must be made to the Applicants' further contention that the Tribunal exceeded its powers by not addressing their argument in the arbitration that illegality may operate as a defence to unjust enrichment only where the illegal act was done by the party that brings the unjust enrichment claim, and not by an associated party. While it is true that the Tribunal made no finding of fraud or forgery on the part of Churchill and Planet themselves, it also found that "the seriousness, sophistication and scope of the scheme are

such that the fraud taints the entirety of the Claimants' investment in EKCP,"[344] and that since "all claims relate to the EKCP," the Claimants accordingly could not avail themselves of the BITs to pursue any claims related to "the entire EKCP," which it deemed "an illegal enterprise affected by multiple forgeries."[345] This finding was made in application of what the Tribunal found to be the proper law. Under the cloak of an argument based on the violation of the manifest excess of powers, the Applicants more generally seek here an impermissible challenge to the decision made by the Tribunal.

237. Under the same head of Article 52 of the ICSID Convention, Churchill and Planet at the Hearing on Annulment further criticized the Tribunal for exceeding the scope of the task it fixed with its own orders.[346] According to the Applicants, the Tribunal made a finding on inadmissibility which was outside the scope of the document authenticity phase, excluded all issues of factual inquiry going to other legal issues such as estoppel, as well as submissions on the Infection Issue, but nevertheless based its decision on inadmissibility on facts revolving around the *Minnotte* question,[347] and relied on principles of good faith and international law as a basis for finding the claims inadmissible, without first making clear that such issues had been included in the scoping of the phase pursuant to PO15 and PO20, or considering the impact of the President's statement at the end of the 2015 Hearing that international law was excluded from the scope of the post-hearing briefs.[348]

238. As discussed above, PO15 noted that the facts in support of the Claimants' estoppel arguments overlapped with the facts of their expropriation and fair and equitable treatment claims, but that overlapping facts were not meant to be part of the bifurcated issues. PO15 also clarified PO13 with regard to the scope of the authenticity phase, as including "legal submissions on the positions in law in a scenario where there would be forgery (including for instance the legal requirements for estoppel as opposed to the facts allegedly justifying a finding of estoppel)."[349] PO20 then restated that "the Parties are to address the matters

[344] Award, para. 528.

[345] Award, para. 529.

[346] Tr. Day 2 [Weeramantry] [10:22] to [11:2].

[347] Tr. Day 1 [Sheppard] [42:5] to [42:8] and [45:13] to [46:22].

[348] Tr. Day 1 [Sheppard] [40:8] to [41:7].

[349] Exhibit A-16, para. 34.

falling within the scope of PO15 especially paragraph 34."[350] The Applicants also remark that submissions on estoppel and on "infection" as a matter of international law were deemed outside the authenticity phase,[351] pursuant to the intervention of the President at the end of the 2015 Hearing: "[n]ot on the international law parts at this stage."[352] The impact of this statement is however to be counterbalanced by the clear statement in PO20 that "[t]he present directions come in lieu of any different comments made by the Tribunal at the [h]earing."[353] As a result, the Infection Issue under Indonesian law, which was considered still to be part of the authenticity phase at the end of the 2015 Hearing, was added to the list of excluded issues by PO20.

239. The notion of "excess of powers" is a reprimand of an exercise of powers by an organ beyond the limits of its constituent instrument. In the circumstances of this arbitration, the powers of the Tribunal flow from the combination of the arbitration clause in the BITs and the ICSID Convention and Arbitration Rules. International arbitrators also possess inherent powers for conducting the arbitration through procedural orders and directions, as recognized by the ICSID Convention. The ICSID Convention includes in Section 3, on the powers and functions of the tribunal, an Article 44 which directs the tribunal to decide any question of procedure not covered by the ICSID Convention or the Arbitration Rules or the agreement of the parties. The silence of fundamental texts on matters of procedure accounts for the flexibility of these issues before arbitral tribunals and for the necessity to give them considerable leeway in this regard, as the ICSID Convention does. In a like fashion to determinations of the applicable law, there is a heavy threshold for demonstrating a manifest excess of powers with respect to the determination, interpretation and application of procedural rules by the tribunal. The *ad hoc* Committees in *Wena* or *Repsol v. Petroecuador* explained that a manifest excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention must be self-evident rather than the result of elaborate

[350] Exhibit A-35, para. 5.

[351] Tr. Day 2 [Sheppard] [20:18] to [20:22].

[352] Exhibit A-34, [Kaufmann-Kohler] [218:4] to [218:5].

[353] Exhibit A-35, para. 5.

interpretation.[354] The Applicants have precisely been trying to demonstrate at great length that the expression "legal consequences" was not understood by the Parties and had to be explained by the Tribunal 21 months after it first appeared in PO13.[355] Their dissatisfaction with the interpretative exercise of the Tribunal in PO15 and PO20 does not amount to a manifest excess of powers.

240. Finally, the Applicants raised at the Hearing on Annulment that the Tribunal manifestly exceeded its powers by introducing a legal framework with the *Minnotte* direction whose factual foundation had not been part of the hearing before the Tribunal in 2015. As discussed above in the context of Article 52(1)(d), however, Churchill and Planet already had presented substantial evidence and argument on issues of due diligence and due care, both prior to making those investments and during the course of their operation. In these circumstances, the Applicants have failed to demonstrate that the Tribunal's consideration of the legal implications of the evidence thus presented – after first alerting the Parties to the *Minnotte* case and inviting their further submissions on the legal issues thus presented – constituted a failure in the conduct of the proceedings beyond the Tribunal's authority and amounting to a manifest excess of powers.

C. ARTICLE 52(1)(E) OF THE ICSID CONVENTION: FAILURE TO STATE REASONS

i. Mr. Noor's evidence

241. The Applicants contend that the Tribunal failed to state the reasons for the readmission of Mr. Noor's witness statement, or was inconsistent as to whether it had disregarded Mr. Noor's evidence. The Committee has already decided, contrary to the Applicants' allegation, that the Tribunal did not use Mr. Noor's evidence, so no failure to state reasons arises, either in the sense of a contradiction in the Tribunal's reasoning, or in the sense of a failure to explain its reasons, for a non-existent procedural step.

[354] *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, February 5, 2002, para. 35 (RLA-ANN-288); *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on Annulment, January 8, 2007, para. 36 (RLA-ANN-296).

[355] Annulment Application, para. 52.

ii. The Infection Issue

242. The Committee refers to the following passage of the decision on annulment of the *Wena ad hoc* committee:

> 81. Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms in the decision. […]
>
> 83. It is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award. The purpose of this particular ground for annulment is not to have the award reversed on the merits. It is to allow the parties to understand the Tribunal's decision. If the award does not meet the minimal requirements as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the *ad hoc* Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the *ad hoc* Committee itself.[356]

243. The Applicants say that the Infection Issue was dismissed on the basis of international law without explanations as to why international law trumped Indonesian law. There is no need for a Tribunal to provide reasons on issues which have become irrelevant to the outcome of the case. The Tribunal agreed with the State that "claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignores are inadmissible as a matter of public international public policy."[357] In these circumstances, there was no necessity to address the validity of the Exploitation Licenses as a matter of Indonesian law, because the forgery was too serious:

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[356] *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, February 5, 2002, paras. 81 and 83 (RLA-ANN-288).

[357] Award, para. 508.

> Indeed, whatever their validity under municipal law, the Exploitation Licenses were embedded in a fraudulent scheme, being surrounded by forgeries. Forged documents preceded and followed them in time with the Re-Enactment Decrees, which under non-authentic signature, purported to revoke the revocation of the Exploitation Licenses. The accumulation of forgeries both before and after the Exploitation Licenses show that, irrespective of their lawfulness under local law, the entire EKCP was fraudulent, thereby triggering the inadmissibility of the claims under international law.[358]

iii. Standard of due diligence

244. The Applicants contend that the Tribunal was arbitrary because the *Minnotte* factors were judged in a vacuum, without explaining the reasons as to how it could reach a view as to what was the appropriate standard of diligence for "a reasonable investor in the Indonesian mining sector" and as to why the Claiamnts' due diligence failed to meet this standard.[359] The Tribunal said that it would assess the standard of willful blindness addressed by *Minnotte* "by focusing on the level of institutional control and oversight deployed by the Claimants in relation to the licensing process."[360] It remarked that investment tribunals have held that investors must exercise "a reasonable level of due diligence, especially when investing in risky business environments."[361] And it clarified in assessing Churchill and Planet's lack of diligence that an investor aware, as they were, of the risks of investing in a certain environment should be expected to be "particularly diligent in investigating the circumstances of its investment," and added that, because the environment of the Indonesian coal mining industry was risky and because Ridlatama showed no record of proven reliability, as acknowledged by Churchill and Planet,[362] an investor should exercise "a heightened degree of diligence." The Tribunal further found that Churchill and Planet's conduct was "not diligent in ensuring that Nusantara was no longer interested in its mining rights" and "failed to exercise due diligence when 'indications of forgery' first came to

[358] Award, para. 530.

[359] Annulment Application, para. 98; Tr. Day 1 [Sheppard] [72:7] to [72:19].

[360] Award, para. 504.

[361] Award, para. 506.

[362] Exhibit A-37, paras. 100-104.

light in the BKP report of 23 February 2009."[363] The standard and the findings were thus explained.

iv. Police Files

245. The Tribunal first ordered the Respondent in PO16 to produce the Police Files relating to the authenticity of the Ridlatama licenses,[364] and then, after the Respondent's request for reconsideration due to the confidentiality of criminal investigations, inviting the Tribunal to refrain from drawing adverse inferences from non-production,[365] the Tribunal decided to "take these matters into consideration if and when relevant to the assessment of the evidence before it, being specified that the Parties may further address these matters in their post-hearing briefs."[366] Churchill and Planet accordingly asked the Tribunal to draw the inference that the information contained in the Police Files would not have supported the forgery and fraud allegations against Ridlatama.[367] The Tribunal arrived at the conclusion in the Award that, on the basis of the evidence on record, it "does not deem it necessary to draw adverse inferences," and added that "it accepts the invocation of privilege by the Respondent in relation to the [P]olice [F]iles concerning investigations into the alleged forgery."[368] As already noted, the reasonableness of adverse inferences depends on the discretion of the tribunal. In light of the consensus of national laws, including Indonesian law, on the confidential nature of criminal inquiries, the Tribunal acknowledged the difficulty to produce the Police Files. There was no need to provide reasons for an assertion which in itself was a sufficient reason.

246. This addresses the Applicants' criticism that the Tribunal did not provide reasons in the Award for its decision to reconsider the earlier ruling on document production.[369] The Applicants further criticize the Tribunal for not having explained in its letter

[363] Award, paras. 517, 518, 519, and 523.
[364] Exhibit A-19(2), Annex A, DPR n° 11.
[365] Exhibits A-20 and A-23.
[366] Exhibit A-25.
[367] Exhibit A-36(1), paras. 26 and 27.
[368] Award, paras. 249 and 250.
[369] Exhibit A-19(1).

of May 12, 2015[370] why it deferred its decision at the time, rather than ruling on the request for reconsideration as and when made. The Applicants do not explain, however, how this had consequences for the alleged lack of reasoning of the Award. This criticism is not within the mandate of the Committee, which is to assess alleged defects in the reasoning of an award and not in the quality of earlier procedural documents.

v. State responsibility

247. The Applicants contend that their arguments on State responsibility were based on the general principle of good faith that no one can benefit from its own wrongdoing, but that the Tribunal did not rule on the matter, dismissing the claim on admissibility grounds without addressing the potential implications of apparent involvement by a Regency insider.[371] The efficiency of annulment proceedings requires that whenever an award is allegedly affected by defects which fall under several grounds under Article 52, the applicant has the obligation to demonstrate, other than by force of consequence, that it has a valid complaint under each separate ground. Each head of annulment raises different issues which must be addressed separately.

248. The Applicants raised an argument according to which, under international law, if a State participates in the wrongdoing, it cannot rely on its wrongdoing for admissibility purposes. The Tribunal did find it likely that there was some "insider" within the Regency who provided "assistance" to the illegal scheme, in the terms below:

> the Tribunal is of the view that the forgeries and the fraud were orchestrated by author(s) outside of the Regency, most likely Ridlatama, who benefited from the assistance of an insider to introduce the fabricated documents into the Regency's databases and archives. While the record points towards Ridlatama rather than the Claimants in relation to the forgery of the contentious documents, the Tribunal does not need to make a definitive finding to draw the proper legal consequences as the analysis below will show. It suffices for present purposes that, on the basis of the record, there is no conceivable author than Ridlatama. […] The author of the forgeries and fraud is not positively identified (although

[370] Exhibit A-25.

[371] Tr. Day 1 [Luttrell] [175:5] to [175:10].

> indications in the record all point to Ridlatama possibly with the assistance of a Regency insider).[372]

249. Implicit in the Tribunal's use of the singular to describe the "insider," and to its description of his role as "possibly [providing] *assistance*," is that the Tribunal did not consider it likely that multiple State officials were involved, nor that the single individual likely involved was the principal driver of the illegal scheme. To the contrary, the Tribunal expressly described the scheme as having been "*orchestrated*" by "author(s) outside of the Regency, most likely Ridlatama." The Tribunal's language thus telegraphed fairly clearly its view of the comparative responsibility of Ridlatama and the individual Regency insider. This context informs the Committee's impression that the Tribunal evidently did not consider the role of the insider to be sufficient to overcome the stark admissibility implications of a sweeping illegal scheme, orchestrated by Ridlatama and tainting the entire EKCP investment on which the Claimants predicated their claims. While the Tribunal did not go through the exercise of an express State responsibility analysis, its views on the matter (to borrow a phrase from the *Wena* committee) were "implicit in the considerations and conclusions contained in the award," which "can reasonably be inferred from the terms in the decision."[373]

vi. IP claim, denial of justice and substitute claims

250. The Applicants submit that, even if some of their licenses were unauthorized, certain claims would survive, not only because of issues of estoppel and acquiescence, but also because those particular claims (*i.e.*, for unjust enrichment, denial of justice and interference with intellectual property) allegedly were independent of the forged licenses.[374] The Applicants argue that the Tribunal failed to provide reasons as to why their alternative claims could not proceed and to explain the nexus between the *Minnotte* factors and each of their alternative claims.

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[372] Award, paras. 476 and 528.

[373] *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, February 5, 2002, paras. 81 and 83 (RLA-ANN-288).

[374] Tr. Day 1 [Sheppard] [9:3] to [9:12] and [74:6] to [74:25]; Exhibit A-26(1), paras. 206-221.

251. In PO12, which bifurcated the proceedings between a liability phase dealing with all liability and authenticity issues and a quantum phase, the Tribunal acknowledged that:

> 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.[375]

252. Thereafter, however, the Tribunal reconsidered PO12, following the Respondent's detailed submission contending that all claims should be dismissed if it were established that the relevant documents were forged. The Tribunal determined in PO13 that the document authenticity issue be dealt with as a preliminary matter in a separate phase. In PO15, which reaffirmed PO13, the Tribunal stated that it was:

> also mindful of the Claimants' argument that their allegedly surviving claims are intertwined with the forgery allegations. At this stage of the proceedings, it appears correct that for instance the facts in support of estoppel overlap with the facts of the expropriation and fair and equitable treatment claims. However, these overlapping facts are not meant to be part of the bifurcated issues.[376]

253. However, as a consequence of the document authenticity phase, the magnitude of the fraud demonstrated was such that the Award ultimately concluded as follows:

> The Tribunal further observes that, in light of the declaration of inadmissibility of all claims, it can dispense with ruling on the Claimants' alleged substitute causes of action. Such causes of action exclusively relate to the Claimants' investments in the EKCP. Since the latter are tainted by the fraud, so are the substitute claims by force of consequence.[377]

254. The Tribunal is entitled to be terse in its reasoning. It is commonly accepted by *ad hoc* committees that tribunals may state their reasons succinctly or at length and that Article

[375] Exhibit A-8, para. 47.

[376] Exhibit A-16, para. 34.

[377] Award, para. 531.

52(1)(e) allows arbitrators a discretion as to the way they express their reasoning.[378] The *Wena ad hoc* committee noted that the ICSID Convention does not prescribe the manner in which the reasons are to be expressed as long as the parties may understand the tribunal's reasoning.[379] The Applicants expected a link to be shown between the Tribunal's inquiry in the document authenticity phase and the dismissal of their unjust enrichment, intellectual property and denial of justice claims. The Committee finds that there is a reasonable connection invoked by the Tribunal (however briefly) in the above cited paragraph of the Award, between the conclusions reached about the fraudulent nature of the EKCP and the dismissal of these claims (along with all others linked to the EKCP) on grounds inadmissibility.

vii. International public policy

255. Finally, at the Hearing on Annulment, the Applicants also argued that the Tribunal failed to state reasons for the finding in paragraph 508 of the Award, namely that international public policy was engaged on the facts it found.

256. Paragraph 508 reads:

> The Tribunal agrees with the Respondent that claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of public policy. For the reasons set out below, the Tribunal disagrees with the Claimants' contention that they conducted "extensive" or "exhaustive" due diligence in verifying the authenticity of the disputed mining licenses, both when the licenses were purportedly issued and when forgery allegations were first brought to their attention.

257. The Tribunal explained through paragraphs 509-527 of the Award the seriousness of the forgeries and fraud and explained the reasons for its findings about Churchill and Planet's lack of diligence. The Committee considers that the reasoning is clear and self-explanatory.

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[378] Updated Background Paper on Annulment for the Administrative Council of ICSID dated May 5, 2016 (RLA-ANN-277).

[379] *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, February 5, 2002, paras. 75-83 (RLA-ANN-288).

It bears recalling that the paragraphs of an award must be read together with the award as a whole.[380] True, Indonesia referred in its comments on *Minnotte* to a universally recognized principle that no party should be allowed to benefit from its own wrongful conduct,[381] but the Applicants focus on one sentence of paragraph 508 considered in isolation. Their challenge is centred on the non-essential expression "matter of public policy," for the Tribunal's core finding on the consequences of fraud and forgery, together with a lack of diligence in connection with such fraud and forgery, for the admissibility of claims. Put in the context of paragraphs 489-500 of the Award, which analyse arbitral jurisprudence on corruption and fraud, the only reasonable meaning of paragraph 508 of the Award is that claims based on rights obtained though fraud are inadmissible as a matter of international public policy and that such violation is compounded by Churchill and Planet's lack of diligence as further exposed at paragraph 516 of the Award. Contrary to the Applicants' affirmations, the Tribunal did not say that the *Minnotte* factors were part of international public policy and had no reasons to give on an issue which is not part of its reasoning. The Tribunal had also no obligation to answer how Churchill and Planet's conduct amounted to deliberately or unreasonably ignoring fraud to ground its reasoning. The Applicants' arguments fail.

VI. COSTS

258. The Applicants and the Respondent each request that the Committee order the other party to pay all of the costs of the annulment proceedings with interest.[382] As agreed at the Hearing on Annulment, the Parties filed their statements of costs on August 31, 2018. The Applicants quantified their costs at USD 771,360 (including the amounts paid to ICSID as advance on costs for these proceedings namely USD 500,000). The Respondent quantified its costs at USD 1,851,140.23 (including the fees and expenses for its counsel, its legal expert Prof. Ida Nurlinda, and the supporting Government's team).

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[380] *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Annulment, September 16, 2011, para. 261 (ALA-20).

[381] Exhibit A-43, para. 41.

[382] Annulment Application, para. 220(c) (the Applicants fail to quantify the applicable interest rate); Counter-Memorial, para. 258, and Rejoinder, para. 122 (the Respondent asks for "interest at a commercial reasonable rate").

259. The costs of the proceedings, including the fees and expenses of the Committee as well as ICSID's administrative fees and direct expenses, amount to USD 397,536.09:

Committee's fees and expenses:	USD 301,786.09
ICSID's administrative fees	USD 74,000.00
Direct expenses[383]	USD 21,750.00
Total	**USD 397,536.09**

260. The above costs have been paid out of the advances made by the Applicants pursuant to Administrative and Financial Regulation 14(3)(e).

261. Article 61(2) of the ICSID Convention provides, in its relevant part, that:

> the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid.

262. Under this provision, applicable to these annulment proceedings by virtue of Article 52(4) of the ICSID Convention, the Committee has broad discretion in allocating the costs of the proceedings and the Parties' legal costs and expenses.

263. The Committee takes note of Section 65 of the ICSID Background Paper on Annulment, which notes a recent trend towards requiring an unsuccessful annulment applicant to bear the costs of the proceedings (*i.e.*, the fees and expenses of the Members of the Committee and the institution fees). The Committee recalls that it reserved its decision on the allocation of costs relating to the Stay Request, the Termination Application and Security Request to the conclusion of the annulment proceedings. The Committee notes that the Applicants acted in the proceedings in a constructive manner; however, the arguments they presented in support of their Annulment Application were rejected. The Committee

[383] This amount includes actual charges relating to the dispatch of this Decision (printing, copying and courier).

decides, in light of the outcome of these proceedings, that the Applicants will bear the costs of these proceedings, which they have thus far advanced *in toto*.[384]

264. In relation to the Parties' respective claims for reimbursement of legal fees and expenses, however, the Committee declines to issue a cost order against the Applicants, leaving each Party to bear its own "party costs," even though the Annulment Application has been unsuccessful. The Applicants' concerns were not frivolous and were presented efficiently and in good faith.

265. The Committee would like to record its appreciation to the Parties' representatives and counsel on both sides which greatly assisted it.

VII. DECISION

266. For the reasons set forth above, the *ad hoc* Committee unanimously decides as follows:

(1) The Annulment Application is dismissed in its entirety;

(2) Pursuant to Article 52(5) of the ICSID Convention and Arbitration Rule 54(3), the Stay of Enforcement of the Award is terminated;

(3) The Applicants shall bear the costs of the proceedings; and

(4) Each Party shall bear its own party costs incurred in connection with these annulment proceedings.

[384] The Centre will reimburse the Applicants any remaining balance in the case account once all costs and expenses have been paid.

[Signed]

Karl-Heinz Böckstiegel
Member

Date: March 5, 2019

[Signed]

Jean Kalicki
Member

Date: March 6, 2019

[Signed]

Dominique Hascher
President of the *ad hoc* Committee

Date: March 11, 2019