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

BETWEEN

Churchill Mining Plc

Planet Mining Pty Ltd

CLAIMANTS/APPLICANTS

AND

The Republic of Indonesia

RESPONDENT

Application for Annulment

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31 March 2017

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Pursuant to Article 52 of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (**ICSID Convention**) and Rule 50 of the Rules of Procedure for Arbitration Proceedings (**ICSID Arbitration Rules**), Churchill Mining Plc (**Churchill**) and Planet Mining Pty Ltd (**Planet**) (together, the **Claimants**) hereby submit this Application for Annulment (**Application**) of the Award rendered on 6 December 2016 (the **Award**) in the matter of *Churchill Mining Plc & Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40.[1]

2. The Claimants invested in a coal exploration project located in the Regency of East Kutai (the **East Kutai Coal Project** or the **EKCP**), in the Republic of Indonesia (**Indonesia** or the **State**). The Claimants invested in partnership with a local mining exploration company, the Ridlatama Group (**Ridlatama**). The Claimants' dispute with Indonesia arose out of the 2010 revocation of the long-term Exploitation Licences for the EKCP, for supposed violations of forestry regulations. This application is for the annulment of the Award that the Tribunal made at the end of what it described as the "*document authenticity phase*" of the arbitration (the **Document Authenticity Phase**), the focus of which was the question of whether the signatures on certain mining licences and approvals for the EKCP were forged.[2]

3. The Award is the product of a process that was tainted by a range of serious departures from fundamental rules of procedure and manifest excesses of power. As explained further below:

   (a) Long after all of the evidence was filed and over a year after the document authenticity hearing, the Tribunal requested new submissions on a legal

[1] The references in this Application to Exhibits A- and ALA- respectively refer to documents and legal authorities submitted for the first time by the Claimants (now the Applicants) in these annulment proceedings.

[2] In this Application, the Claimants take issue with numerous aspects of the Award. The Claimants do not accept the Tribunal's conclusion that the Disputed Documents (as defined below) were forged. However, the Claimants acknowledge that Article 52 of the ICSID Convention does not permit *de novo* re-trial of the issues that were before the Tribunal in the Document Authenticity Phase. Accordingly, the Claimants will limit themselves to the grounds of annulment set out in Article 52. That should not be taken as any admission on the part of the Claimants that the Disputed Document were forged or that the signatures on them were not authorised.

authority that neither side had relied upon. The Tribunal precluded the parties from introducing new evidence, even though the new legal authority gave rise to a distinct legal framework which clearly raised new issues of fact. The Tribunal eventually disposed of the case on the basis of this new legal framework.

(b) The Tribunal re-admitted (without notice) the witness evidence of the State's key witness, Mr Isran Noor (the Regent of East Kutai), despite having previously struck his testimony from the record because he outright refused to attend the hearing to face questions, even via video-link from his city of residence. The Tribunal relied on Mr Noor's evidence as part of applying the new legal framework it introduced *ex officio*.

(c) The Tribunal dismissed the Claimants' claims in respect of the Exploitation Licences for the EKCP without giving the Claimants the right to be heard on (and without applying) Indonesian law, which was critical to determining the validity of these title instruments (in respect of which no allegations of forgery were made by the State). The Tribunal did this even though, after the importance of this Indonesian law issue was emphasised by the Claimants at the hearing, the Tribunal expressly carved it out from the scope of the parties' post-hearing briefs.

(d) The Tribunal committed a range of other annullable errors, including failing to state the reasons on which the Award was based.

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

II. THE DISPUTE

5. Churchill is a British company listed on the Alternative Investment Market (**AIM**) of the London Stock Exchange. Planet is an Australian subsidiary of Churchill. Churchill and Planet are therefore covered by different investment treaties: Churchill is covered

by 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 27 April 1976 (the **UK-Indonesia BIT**); Planet is covered by the *Agreement between the Government of Australia and the Government of the Republic of Indonesia for the Promotion and Protection of Investments* dated 17 November 1992 (the **Australia-Indonesia BIT**).

6. In 2005, when the Claimants invested in the EKCP, Indonesia's mining law regime was decentralised, with the head of each Regency (the Regent or "*Bupati*") having the power to licence and regulate coal exploration and mining in his or her territory. There were three main licences for coal exploration and mining in Indonesia: a **general survey licence** (which allows the holder to carry out a range of mapping and sampling activities); an **exploration licence** (which lets the holder carry out the full range of exploration activities, including drilling); and, finally, an **exploitation licence**, which lasts 30 years and gives the holder the right to move into actual mine development and production.[3]

7. Working with Ridlatama, the Claimants indentified two prospective locations for coal exploration. Although exploration work undertaken at the first prospective location did identify some narrow coal seams, the thickness of the coal seams was such that mining did not, at that time, appear commercially viable. In the second prospective location (which became known as the EKCP) a number of minor "coal shows" visible in some existing road excavations and creek beds were identified during initial drives through the area. The existence of these coal shows indicated that further exploration expenditure would be warranted. Exploration rights over this area had been previously held by a powerful Indonesian conglomerate called the Nusantara Group (**Nusantara**), controlled by retired special forces general (and then Indonesian Presidential candidate) Prabowo Subianto. However, no exploration work was conducted by Nusantara during the period it held these rights.[4] After confirming with East Kutai

[3] Due to problems like those encountered by the Claimants, this decentralised system was overhauled in 2009 and the power to regulate coal mining was reclaimed by the central Government. But, for most of the period in question, the decentralised (Regency-controlled) system was in place.

[4] The parties disagreed as to whether Nusantara's title to the EKCP had expired when Ridlatama's General Survey Licences were granted in 2007. The Claimants submitted that they had expired as a matter of Indonesian law and practice as described by the State's witnesses (see Claimants' Post-Hearing Brief, paras. 89-94, **Exhibit A-36**), whereas the State claimed they were extended by the Regent using his discretion (State's Post-Hearing Brief, para. 144, **Exhibit A-37**).

Regency officials that the EKCP area was open for mining, Ridlatama applied to the Regency for four separate general survey licences to allow for some non-ground disturbing geological reconnaissance work to be conducted. At this time, the Regent of East Kutai was a man called Awang Faroek Ishak (who later became the Governor of East Kalimantan Province) and his deputy was Mr Noor. Between May 2007 and November 2007, general survey licences (the **General Survey Licences**) bearing Mr Ishak's signature were granted to various Ridlatama entities – or, at least, the Claimants believed they were granted – and the Claimants began investing money and applying technical know-how to the first stage of exploration and advancement of the EKCP.[5]

8. In March 2008, after the Claimants concluded that further (higher-impact, more expensive) exploration work was justified within the EKCP area, Ridlatama applied for exploration licences and the following month these licences were issued by the Regency (the **Exploration Licences**).[6] This triggered an intensification of the Claimants' work and expenditure on the EKCP. It bears noting here that, until a mine is up and running, the main thing mining investors like the Claimants produce is intellectual property (**IP**) – beginning with data from the geological work they conduct to establish the precise parameters (grade, length, depth, etc.) of the minerals and resources they discover and culminating in feasibility studies that show the authorities and other investors how the project can be taken into production. Under most mining law regimes, and Indonesia is no exception, the investor must report its progress to the government. Consistent with the terms of the Exploration Licences, the Claimants (through Ridlatama) gave the Regency and other branches of the State their results on a quarterly basis under the understanding that the State would keep its side of the bargain and allow the Claimants to mine what they discovered.

9. In 2009, after the Claimants had proven the existence of a globally-significant coal resource at the EKCP, Ridlatama applied to the Regency for exploitation licences over the EKCP. In March 2009, the new Regent (Mr Noor) granted Ridlatama four

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5 Claimants' Reply Memorial, paras. 77-97 (**Exhibit A-26**); Claimants' Post-Hearing Brief, para. 46 (**Exhibit A-36**).

6 Claimants' Reply Memorial, paras. 98-111 (**Exhibit A-26**); Claimants' Post-Hearing Brief, para. 48 (**Exhibit A-36**).

exploitation licences (the **Exploitation Licences**).[7] Mr Noor signed those licences personally (this was undisputed). As a publicly listed company on the AIM, Churchill was required to announce this major development and also the scale and quality of the coal resource it had discovered. Churchill did so through a series of announcements in 2009, the most significant of which was its announcement of 18 May 2009 that it had proven the existence of a JORC[8]-compliant resource of 3.18 billion Mt of thermal coal at the EKPC. This made the EKCP the third largest coal resource in Indonesia and the seventh largest in the world.

10. Over the next twelve months, the Claimants continued their work on the EKCP, engaging with multiple branches of the Indonesian Government to obtain the approvals, permissions and permits needed to develop and operate a major coal mine.[9] These included approvals for the infrastructure that would be needed to get the coal from the mine to the coast, such as a railway and an export terminal. Then, without any prior notice, the Regent (Mr Noor) issued decrees on 10 May 2010 revoking the Exploitation Licences. The stated basis for the revocation at the time was that Ridlatama did not have the permits needed to operate in an area zoned as forest.[10] The Claimants attempted to ascertain the status of their investments, working with Ridlatama to engage with the relevant authorities. Ridlatama applied for an order quashing the revocation of the Exploitation Licences, but (following an irregular procedure) the Administrative Court dismissed that application; Ridlatama appealed all the way to the Supreme Court of Indonesia, without success.[11] The EKCP was finished and the Claimants' investments were destroyed.

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7 Claimants' Reply Memorial, paras. 112-125 (**Exhibit A-26**); Claimants' Post-Hearing Brief, para. 48(g) (**Exhibit A-36**).

8 JORC is the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, a professional code of practice that sets minimum standards for public reporting.

9 A table summarising the vast body of evidence for the Claimants' extensive engagement with the Indonesian authorities was submitted by the Claimants as "Updated Annex B" to the Claimants' Post-Hearing Brief (**Exhibit A-36**).

10 Claimants' Memorial on Jurisdiction and the Merits, paras. 20-21 and 226-227 (**Exhibit A-02**); Claimants' Post-Hearing Brief, para. 38(d) (**Exhibit A-36)**.

11 Claimants' Memorial on Jurisdiction and the Merits, paras. 26-29 (**Exhibit A-02**).

III. THE ARBITRATION

a. ***Jurisdiction Phase***

11. On 22 May 2012, Churchill filed a Request for Arbitration with ICSID pursuant to Article 36 of the ICSID Convention and the UK-Indonesia BIT, alleging that Churchill's investments had been unlawfully expropriated and treated in a manner that violated the Fair and Equitable Treatment (**FET**) standard of the BIT.[12] Factually, Churchill's claim was focused on the 2010 revocation of the Exploitation Licences by Mr Noor.

12. The Secretary-General of ICSID registered Churchill's Request for Arbitration on 22 June 2012. A Tribunal comprising Professor Gabrielle Kaufmann-Kohler (President), Professor Albert Jan van den Berg (appointed by Churchill) and Judge Michael Hwang SC (appointed by the State) was then constituted. The arbitral proceedings commenced on 3 October 2012. On 26 November 2012, Planet filed a Request for Arbitration with ICSID pursuant to the Australia-Indonesia BIT. Planet and Indonesia agreed to the constitution of a tribunal comprised of the same arbitrators as appointed in Churchill's case. The *Planet v Indonesia* arbitration commenced on 22 January 2013. As the claims of Planet and Churchill arose from essentially the same facts, the Claimants and Indonesia eventually agreed to consolidate the two arbitrations. The Claimants claimed over USD 1.3 billion in damages for the State's treaty violations.

13. Indonesia objected to jurisdiction on various grounds, including that the Claimants' investments were illegal and, in the case of Planet, that Indonesia had not consented to arbitration. After written submissions, the Tribunal held a hearing on jurisdiction in Singapore on 13 and 14 May 2013. The Claimants were alarmed by the Tribunal's apparent tolerance for misconduct by the State – in particular, the Tribunal did nothing when counsel for Indonesia (Mr Didi Dermawan of the firm DNC Advocates at Work) threatened one of the Claimants' witnesses.[13] Of particular significance is the

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[12] Churchill's Request for Arbitration (**Exhibit A-01**).

[13] At the hearing on jurisdiction, Mr Dermawan said as follows: "*I got the blessing* [to commence criminal proceedings] *from the Minister already, and also from the Regent, we will commence that – we will use all the legal avenue to pursue this, including, without limitations, the mutual legal assistances in criminal proceedings, so you better tell your clients to prepare for that and it is on the record, we do this in compliance to what you want. And we hope that we get your cooperations because after this then, yes, from our side there will be witness and of course from your side also. So my regards to Mr Paul Benjamin to be*

fact that, at the hearing on jurisdiction, counsel for Indonesia alleged that the Claimants had committed fraud and that the licences for the EKCP were forged (without filing any written submissions on this point).

14. On 24 February 2014, the Tribunal issued two Decisions on Jurisdiction, one in respect of *Churchill v Indonesia* and the other in respect of *Planet v Indonesia*. In both Decisions, the Tribunal upheld its jurisdiction. The parties were unable to agree on a schedule for the merits phase of the arbitration. In Procedural Order No. 8 of 22 April 2014, the Tribunal declined the State's request for bifurcation of liability and quantum and established a calendar for the merits phase of the arbitration.

b. ***Forgery Dismissal Application***

15. On 16 May 2014, the State filed a "*Request for Inspection of Claimants' Original Documents*", along with a list of disputed documents and a forensic handwriting examination report. The Claimants asked the Tribunal to order the State to produce certain original documents for inspection as well. On 22 July 2014, the Tribunal issued Procedural Order No. 10, directing the parties to make the requested original documents available for inspection. The inspection was conducted in Singapore on 29 August 2014, under the supervision of ICSID.

16. On 24 September 2014 Indonesia filed an "*Application for Dismissal of Claimants' Claims Based on the Forged and Fabricated Ridlatama Mining Licenses*" (the **Forgery Dismissal Application**)[14], in which the State asked the Tribunal for a hearing within three weeks to address the authenticity of the disputed documents and "*an award dismissing Claimants' claims as inadmissible by reason of their invalidity and illegality*".[15]

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prepared because we get on the record now that he is the one who arrange control all of the quote unquote production of that document. We will start" (Claimants' Reply Post-Hearing Brief, footnote 33, **Exhibit A-38**).

[14] Forgery Dismissal Application, para. 2 (**Exhibit A-05**).

[15] The State's Forgery Dismissal Application was supplemented by a letter dated 11 March 2015 in which the State requested leave to submit new evidence and advised the Tribunal that it would file additional and supplementary witness statements and an additional report from their handwriting expert "*in relation to two other sets of suspicious documents on the record*" (page 4) (**Exhibit A-17**). In the spirit of good faith, the Claimants did not oppose the State's request for leave to amend its case.

17. The Forgery Dismissal Application focused on the licences and permits for the EKCP, alleging that the signatures on the General Survey Licences and Exploration Licences (as well as other supporting documents issued by various government agencies) were forged. Although Indonesia conceded the authenticity of the signatures on the EKCP Exploitation Licences, the State alleged that the official who signed those critical licences – Mr Noor – signed them in circumstances in which he was deceived by a senior member of his own staff.

18. Accordingly, the Forgery Dismissal Application comprised two main limbs:

    (a) forgery – the basis on which 34 documents were impugned (the **Disputed Documents)**[16]; and

    (b) fraud – the basis on which the Exploitation Licences signed by Mr Noor were impugned (as being "*secured through deception and fraud*").[17]

19. The materials that the State filed with the Forgery Dismissal Application included:

    (a) a witness statement signed by Mr Noor's predecessor Regent, Mr Ishak, in which he alleged he had never signed or authorized the General Survey and Exploration Licences (or certain other Disputed Documents);

    (b) a handwriting expert's examination report claiming that the signatures on the Disputed Documents were a product of a mechanical device; and

    (c) a witness statement signed by Mr Noor, in which he alleged (in material part) that he signed the Exploitation Licences but would not have signed them if he knew they were based on forged documentation.[18]

20. At this point, Indonesia had still not filed its Defence (nor did it at any point in the proceedings).

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[16] In addition to the General Survey and Exploration Licences, the Disputed Documents include supporting permits and authorizations issued by various branches of the Indonesian Government (see Claimants' Reply Memorial, Annex A: Disputed Documents (**Exhibit A-26**)). Following the Hearing, there were two additional documents impugned by the State (the Ridlatama spatial analyses submitted by the Claimants immediately prior to the Hearing, see Claimants' Post-Hearing Brief, paras. 22-23 and 46(c) (**Exhibit A-36**); Claimants' Reply Post-Hearing Brief, paras. 9-10 (**Exhibit A-38**)).

[17] Forgery Dismissal Application, para. 3 (**Exhibit A-05**).

[18] Mr Noor WS, paras. 10 and 11 (**Exhibit A-04**).

c. *Programming of the "forgery issue"*

21. Indonesia requested that the Tribunal bifurcate the issues of forgery and fraud from the merits. The State contended that "*a decision adverse to Claimants on the authenticity of the Ridlatama Companies' licenses will compel the dismissal of all claims asserted by Claimants*".[19] The Claimants argued that a number of their claims and defences, which were unrelated to the fraud issues (such as whether the State was estopped from alleging forgery), were "*inextricably intertwined*" with the merits defence that the State was due to submit and thus argued against bifurcation.[20]

22. On 27 October 2014, the Tribunal issued Procedural Order 12 (**PO12**) rejecting Indonesia's request for the immediate adjudication of the forgery issue and deciding to bifurcate liability and quantum.[21] In making its decision, the Tribunal said:

> The Tribunal is not convinced that a decision in favour of the Respondent on document authenticity would lead to a complete dismissal of the claims before it. While it is true that the document authenticity issue may go to the heart of the question whether the revocation of the mining licences was wrongful, other claims regarding, for instance, the alleged denial of justice before Indonesian courts would *prima facie* survive.[22]

23. By letter dated 3 November 2014, Indonesia filed a request for reconsideration of PO12.[23] The State argued that a finding of forgery would result in the dismissal of all claims, and so the issue of document authenticity should be bifurcated. The State attached a table titled "*Exhibit A - Non-Viability of Claimants' Claims Based on Finding of Forgery of Ridlatama Licences*" (**State's claim impact table**),[24] summarising the State's position on how each of the Claimants' claims would be rendered inadmissible. The Claimants opposed Indonesia's motion for reconsideration, noting (*inter alia*) that the Tribunal's decision *not* to bifurcate (i.e. PO12) was made with due process and that Indonesia was improperly seeking to re-argue the merits of bifurcation.[25] The Claimants also submitted that Indonesia should be estopped from

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19 State's letter to the Tribunal dated 3 November 2014, page 6 (**Exhibit A-09**).

20 Unofficial transcript of the telephone conference held on 21 October 2014, page 10 (**Exhibit A-07)**.

21 PO12, para. 52 (**Exhibit A-08**).

22 PO12, para. 47 (emphasis added) (**Exhibit A-08)**.

23 State's letter to the Tribunal dated 3 November 2014 (**Exhibit A-09**).

24 State's letter to the Tribunal dated 3 November 2014, Exhibit A (**Exhibit A-09**).

25 Claimants' letter to the Tribunal dated 10 November 2014 **(Exhibit A-10)**.

alleging forgery and that, even if the Claimants were not compensated based on the value of the EKCP, they would still be entitled to recover the vast amount of money they spent on the EKCP (almost USD 70 million).[26]

24. On 18 November 2014, the Tribunal issued Procedural Order 13 (**PO13**), acceding to Indonesia's request and reversing PO12 to rule that the authenticity of the disputed documents would be addressed as a matter of priority (thereby delaying the merits phase). The Tribunal's main reason for reversing PO12 appears to have been that, in the Tribunal's view, the Claimants had not engaged with the content of the State's claim impact table.[27] The Claimants pause here to note that, in subsequent pleadings, they demonstrated why the State's claim impact table was obviously flawed.[28]

25. For the purpose of this Application, the most important part of PO13 is paragraph 28, where the Tribunal stated:

> in the context of the document authenticity phase, the Parties are to address in their written submissions and at the hearing all factual aspects relating to forgery as well as the legal consequences of a finding of forgery on each claim. This is not meant to prevent the Parties from addressing any other matters which they deem appropriate in connection with the forgery allegations and arguments.[29]

26. The Claimants urged the Tribunal to reconsider PO13 and to reinstate PO12.[30] The State objected.[31] On 12 January 2015, the Tribunal rejected the Claimants' request, issuing Procedural Order 15 (**PO15**) which reaffirmed PO13.

27. PO15 was critical because it was the instrument by which the Tribunal scoped the Document Authenticity Phase, in both legal and factual terms. The following extracts of PO15 are of particular significance:

> The submissions filed subsequent to PO13 tend to show that the bifurcation of forgery issues may not dispose of the entire case. At the same time, they demonstrate that reaching clarity on the forgery issues is likely to significantly

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[26] Claimants' letter to the Tribunal dated 10 November 2014, page 3 (**Exhibit A-10)**.

[27] PO13, paras. 25-26 (**Exhibit A-11)**.

[28] See Claimants' Reply Memorial, paras. 238-257 (**Exhibit A-26)**.

[29] PO13, para. 28 (**Exhibit A-11)**, emphasis added.

[30] Claimants' letter to the Tribunal dated 23 November 2014 (**Exhibit A-12)**.

[31] State's letter to the Tribunal dated 1 December 2014 (**Exhibit A-13)**. Both parties also made second round submissions on this issue, see Claimants letter to the Tribunal dated 8 December 2014 (**Exhibit A-14);** and State's letter to the Tribunal dated 12 December 2014 (**Exhibit A-15)**.

> simplify the issues before the Tribunal. This simplification will benefit both sides and the Tribunal, especially if it can be gained within a relatively short time period and with clear limits being set to its scope in terms of substance of the issues to be addressed.
>
> [...]
>
> It results from this analysis that the scope and nature of the dispute before the Tribunal are *prima facie* likely to be at least partially different if the Tribunal were to find that the litigious documents are forged. As mentioned earlier, the Tribunal sees substantial benefit for the conduct of the arbitration in gaining clarity on the existence of forgery and thus on the claims before it.
>
> 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).[32]

28. This last part of the extract above (paragraph 38 of PO15) represents the legal framework of the Document Authenticity Phase.

29. Consistent with PO15, the Claimants limited their submissions to (i) the factual question of authenticity and (ii) the legal consequences of a finding of forgery. The Claimants refer the Committee to their Reply Memorial submitted on 29 May 2015 (**Claimants' Reply Memorial**). The Committee will see that the Claimants' Reply Memorial was clearly structured to address the questions posed by the Tribunal in paragraph 38 of PO15.

30. The Claimants specifically refer the Committee to paragraph 204(c) of the Claimants' Reply Memorial:

> the State has not filed its Counter-Memorial on Merits, and so the Claimants do not yet know the defensive case they will face on the merits. This puts the Claimants in a difficult position, as they are now required to explain not only how each of the disputed documents relates to their positive claims against the State, but also to speculate how the disputed documents may relate to counter-

[32] PO15, paras. 27 and 33-34 (internal citations omitted, emphasis added) (**Exhibit A-16**).

arguments the Claimants might make to defences that may be raised by the State. There is, therefore, a significant risk of unfairness in the Claimants having to explain what they consider to be the legal consequences of a finding that one or more of the disputed documents were forged. [33]

31. The Claimants also refer the Committee to paragraph 233 (*et seq*) of the Claimants' Reply Memorial, where the Claimants addressed the State's claim impact table and explained how it was "*immediately obvious that the vast majority of* [the Claimants'] *investments will remain legally valid investments (as defined in the respective BITs) even if a finding of forgery is made*".[34]

d. *The Document Authenticity Hearing*

32. The hearing on document authenticity (the **Hearing**) took place from 3 to 10 August 2015 in Singapore. Consistent with PO15, the focus was squarely on the question of document authenticity, namely:

(a) how the Disputed Documents were signed (i.e. the kind of mechanical device used);

(b) whether the Regency of East Kutai had an established (or "*fixed*") licensing procedure, which went to (*inter alia*) the question of whether the Disputed Documents were processed; and

(c) whether the signatures on the Disputed Documents were *authorised*.

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[33] Claimants Reply Memorial, para. 204(c) (**Exhibit A-26**).

[34] Claimants Reply Memorial, para. 233 (**Exhibit A-26**):

"(a) all of the shares will remain legally valid securities (there is no dispute about this: the State has positively stated "*Claimants' intermediate investments in PT ICD and PT TCUP* […] *were not terminated or abrogated by actions of Respondent*"), only their value could change;

(b) the contractual interests that the Claimants acquired in the Ridlatama entities and the EKCP will remain legally valid contractual interests, only their value could change;

(c) the feasibility studies and other intellectual property created in connection with the project will remain legally valid (again, the State accepts this), only their value could change;

(d) the amounts the Claimants invested through PT ICD for planning and preparations for the extraction of the resource obviously will not change in any way (money is money) and these sums will remain recoverable by the Claimants; and

(e) the Claimants' goodwill will also remain, the question will just be how much the goodwill was worth if the licences were forged (by someone other than the Claimants)."

(internal citations omitted)

33. The most significant development that occurred at the Hearing was that Mr Noor – a central figure in the *dramatis personae* of the State's case its only witness on the fraud side of its case – refused to attend. The State did not provide any reasons for Mr Noor's refusal or why he could not participate by video link.[35] Prior to the Hearing, the Claimants repeatedly sought confirmation that Mr Noor would be attending, but the State was evasive, only confirming his non-attendance on the second day of the Hearing.[36] During the Hearing, Mr Ishak repeatedly called on Mr Noor to answer questions about events that took place while he was Regent,[37] demanded that Mr Noor be brought before the Tribunal "*in the name of justice*", and expressed his difficulty in understanding how Mr Noor could afford a private jet.[38] In light of his refusal to attend, following a motion from the Claimants, the Tribunal decided "*to disregard Mr. Noor's witness statement*".[39]

34. The full scope of issues debated at the Hearing is beyond the scope of this Application. However, to give the Committee the necessary context, the parties agreed that the signatures on the disputed documents had been applied using some form of mechanical device. The Hearing was largely unsatisfactory in terms of identifying who applied the signatures to the disputed documents and why. The parties each advanced their theories. In closing submissions, the State "*infer*[red] *that there was*

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35 Hearing Transcript – Day 2, pages 1/10 to 2/13 (**Exhibit A-29**). As President Kaufmann-Kohler stated: "*the hearing has been scheduled for quite some time. The respondent has known for quite some time as well that Mr Noor's attendance for cross-examination was being requested. The tribunal has insisted on his presence by communication a few days ago. We have inquired yesterday. We have again enquired today about the reason. We have even suggested a video conference. And in spite of these efforts and the notice, we have heard no reasons why Mr Noor could not be present today*" (Hearing Transcript – Day 2, pages 8/25 to 9/10 (**Exhibit A-29**)).

36 In its Forgery Dismissal Application, the State said that it would present Mr Noor for cross-examination (para. 21, (**Exhibit A-5**)). From 5 March 2015 onwards, the Claimants requested confirmation that Mr Noor would indeed be present at the Hearing – requests the State evaded (see Claimants Amended Costs Submissions, footnote 19, (**Exhibit A-40**)). It was not until the second day of the Hearing that the State finally gave notice that Mr Noor would not be attending (Hearing Transcript – Day 2, page 1/10-18, (**Exhibit A-29**)). The State offered no explanation or attempted justification for his refusal to attend – indeed, Governor Ishak suggested that Mr Noor was available to attend the Hearing and had the means to do so (using his private jet) (Ishak, Hearing Transcript – Day 3, page 57/10-19, (**Exhibit A-30**)).

37 See Claimants' Post-Hearing Brief, para. 1(b) (**Exhibit A-36**); Hearing Transcript – Day 3, pages 34/9-12, 57/11, 76/13, 81/22-23, 82/17 and 97/14 (**Exhibit A-30**).

38 See Claimants' Post-Hearing Brief, paras. 82-83 (**Exhibit A-36**); Hearing Transcript – Day 3, pages 81/22-25, 97/14-15 and 106/9-13 (**Exhibit A-30**).

39 President Kaufmann-Kohler, Hearing Transcript – Day 2, page 8/19-24 (**Exhibit A-29**); Award, para. 84. The Tribunal stated that it had disregarded this evidence in accordance with paragraph 16.9 of the Procedural Order No 1 and, by analogy, Article 4.7 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010).

pressure on Ridlatama to secure that area for coal exploration",[40] that Ridlatama was compensated for securing the permits,[41] and that the Claimants made the mistake of relying on Ridlatama.[42] The Claimants contended that there was ample evidence the disputed licences were authorised, howsoever they were signed, but that there were three "counterfactuals" open to the Tribunal as to why the signatures were mechanically affixed to the disputed documents:[43] a scam by the Regency,[44] a scam by Nusantara,[45] or a scam by Ridlatama.[46] The parties agreed that an "*insider*" within the Regency government was involved no matter which scenario actually occurred. Mr Ishak said he thought "[t]*here's some kind of corruption, some kind of nepotism between* [Mr Putra, former head of the Mining Bureau, and Ridlatama]",[47] and raised questions regarding the conduct of his successor Regent, Mr Noor.[48] In its Post-Hearing Brief, the State positively accused Mr Putra.[49]

35. The Hearing showed that piecing together what happened in a remote part of Indonesia almost a decade earlier would be difficult, if not impossible. This was

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40 Mr O'Donoghue, Hearing Transcript – Day 7, page 155/7-9 (**Exhibit A-34**).

41 Mr O'Donoghue, Hearing Transcript – Day 7, page 159/7-11 (**Exhibit A-34**).

42 Mr O'Donoghue, Hearing Transcript – Day 7, page 156/1-10 (**Exhibit A-34**).

43 For a full account see Mr Sheppard QC, Hearing Transcript – Day 7, pages 188/14 to 190/15 (**Exhibit A-34**).

44 See Claimants' Post-Hearing Brief, para. 7 (**Exhibit A-36**). Under this counterfactual the Regency intentionally made the licences "*plausibly deniable*": to flaw them in a subtle but arguably fatal way so that, if Ridlatama (backed by the Claimants' capital and exploration expertise) later found a commercially viable quantity of coal (which it did), the Regency could deny it ever granted Ridlatama exploration rights and offer to re-licence the proven ground to Nusantara (or any other party) – for a price. The Claimants referred to this counterfactual as "bad faith authorisation".

45 See Claimants' Post-Hearing Brief, paras. 87-88 (**Exhibit A-36**). Under this counterfactual either (i) Nusantara lost interest in the EKCP, its licences lapsed and then, when the Claimants announced significant coal discoveries, Nusantara re-gained interest and took steps to incentivise Regency officials to remove Ridlatama, or (ii) Nusantara conspired with Regency officials to induce Ridlatama and the Claimants to do the work for them – in other words, a "piggyback farm-in".

46 See Claimants' Post-Hearing Brief, para. 74 (**Exhibit A-36**). Under this counterfactual Ridlatama's motive was to entice Churchill into paying them $750,000 and to fund exploration and to get around Nusantara's interests. The Claimants' doubted this counterfactual for a number of reasons, principally that: (i) Ridlatama signed cooperation agreements which financially wedded them to the Claimants, so they would have been scamming themselves; (ii) when Ridlatama was alleged to have engaged in forgery to secure licences to the EKCP, Nusantara's licences had already expired and so the area was open; and (iii) if, *arguendo*, Nusantara's licences had not expired, stealing from General Prabowo, the principal of Nusantara, was objectively very dangerous.

47 Mr Ishak, Hearing Transcript – Day 3, page 104/24-25 (**Exhibit A-30**).

48 See Claimants' Post-Hearing Brief, paras. 82-85 (**Exhibit A-36**).

49 State's Reply Post-Hearing Brief, para. 41 ("*There is little doubt that Ridlatama's principals had assistance from Mr. Putra in implementing their scheme*") (**Exhibit A-39**).

especially so given that much of the State's case was focused on what happened inside the Regency government, where, as the former Regent (Mr Ishak) said, "*anything can happen*".[50] Certainly, the last-minute withdrawal of Mr Noor and the absence of Mr Putra made it impossible to determine the true circumstances in which the Exploitation Licences were signed – whether or not there was deceit and the extent to which Mr Noor had exercised his discretion to grant the Exploitation Licences notwithstanding the forgery of earlier permits (if indeed this did occur).

36. As was to be expected, at the Hearing, the substantive discussion of "*legal consequences*" was very limited: the parties understood that they were being asked to *identify* (rather than expand on) the legal doctrines and principles (such as estoppel) that could be engaged if there was a finding of forgery. This understanding was confirmed by the Tribunal: at the conclusion of the Hearing, the President said that the Tribunal did not want to hear submissions "*at this stage*" in respect of estoppel and "*similar doctrines*", and that these issues were "*not part of this debate, except to canvas what the legal consequences could be*".[51]

37. Overall, what *was* clear was that even if the question of document authenticity was resolved, many important questions would remain to be adjudicated – just as the Tribunal had originally forecast in PO12 and clarified in PO15.

38. In particular, the Claimants emphasised that the Indonesian law question of whether the Exploitation Licences were stand-alone legal title instruments – a "*major, major issue*"[52] for the Claimants – needed to be programmed. The Claimants refer to this issue as the "**Infection Issue**" (this is discussed in detail below). The parties had previously acknowledged this to be a matter of Indonesian law,[53] although it was not addressed in substantive submissions during the Hearing.

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50 Mr Ishak, Hearing Transcript – Day 3, page 113/22 (**Exhibit A-30**).

51 Hearing Transcript – Day 7, pages 217/19 to 218/5, and 215/14-18 (**Exhibit A-34**).

52 Mr Sheppard QC, Hearing Transcript – Day 7, pages 213/9 to 214/1 (**Exhibit A-34**).

53 Claimants' letter to the Tribunal dated 23 November 2014, page 11 (**Exhibit A-12**); State's letter to the Tribunal dated 1 December 2014, page 14 (**Exhibit A-13**).

e. *The Minnotte direction*

39. On 9 September 2016 (more than a year after the conclusion of the Hearing and prior to issuing the Award), the Tribunal informed the parties that "*in the course of finalising its deliberations*",[54] it had come across the case of *Minnotte v Poland*[55] (***Minnotte***). The Tribunal invited the parties to comment on specific points of international law arising from *Minnotte*, namely:

(a) the admissibility in international law of claims tainted by fraud or forgery where the alleged perpetrator is a third party;

(b) the lack of due care or negligence of the investor to investigate the factual circumstances surrounding the making of an investment; and

(c) the deliberate "closing of eyes" to indications of serious misconduct or crime, or an unreasonable failure to perceive such indications (the ***Minnotte* direction**).

However, the Tribunal limited the parties to submissions of fact "*on the basis of the evidence on the record*".[56] The Tribunal also limited submissions to 15 pages for comments and eight pages for replies.

40. The *Minnotte* direction was immediately troubling to the Claimants because the scoping of the Document Authenticity Phase was such that the evidence on the record was focused on the authenticity of the Disputed Documents – not whether the Claimants (i) lacked due care or were negligent in investigating the factual circumstances surrounding the making of their investment and (ii) deliberately closed their eyes to indications of serious misconduct or crime or unreasonably failed to perceive such indications (the ***Minnotte* factors**).

41. Further, the *Minnotte* direction surprised the Claimants as they were being asked to present a *new* legal framework (which had the potential to be dispositive of their case),

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54 The *Minnotte* direction (**Exhibit A-41**).

55 *David Minnotte & Robert Lewis v Republic of Poland*, ICSID Case No. ARB(AF)/10/1 (**Exhibit ALA-01**).

56 The *Minnotte* direction (**Exhibit A-41**).

without the benefit of a correspondingly *new* factual record. In the submissions filed in response to the *Minnotte* direction, the Claimants protested:

> The parties are now debating factual and legal issues that are well outside the intended scope of this phase. In the Claimants' view, the volume and nature of these issues is such that they can only be properly briefed, investigated and determined in a full merits phase.[57]

The Award makes no mention of this protest despite its obvious significance in the proceedings.

f. *The Award*

42. On 6 December 2016 the Tribunal rendered the Award finding that the Disputed Documents were not authentic and not authorised[58] and that the perpetrator was "*most likely*" the Claimants' local partner, Ridlatama,[59] "*who benefited from the assistance from an insider*"[60] in the Regency government.

43. While the Tribunal ultimately concluded that "*the evidence on record is insufficient to establish that the issuance of the disputed documents involved corrupt practices*",[61] the Tribunal suggested that a number of factors pointed towards the involvement of Mr Putra, the Head of the Mining and Energy Bureau.[62] The Tribunal also acknowledged Mr Ishak's implication that Mr Noor was involved in the scheme (at the Hearing, Mr Ishak commented that "*suddenly the Regent has a private jet*").[63] Obviously, these findings raise the question of State responsibility (one of the alternative BIT claims advanced by the Claimants).[64]

44. Although the Tribunal found the evidence was "*insufficient to reach a definitive finding that the Claimants were the authors or instigators of the forgeries and the*

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57 Claimants' Reply Submissions on *Minnotte*, para. 4 (emphasis added) (**Exhibit A-44**).

58 Award, paras. 353, 359, 360, 377, 382, 404, 425 and 438.

59 Award, para. 476.

60 Award, para. 476.

61 Award, para. 466.

62 Award, paras. 459-461.

63 Award, para. 463.

64 See section V.B.b ('The Tribunal failed to apply the international law of State responsibility') below.

fraud",[65] the Tribunal dismissed the Claimants' claims anyway because the Tribunal found the Claimants failed to conduct adequate due diligence on their investments "*when 'indications of forgery' first came to light*".[66] According to the Tribunal, "*claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy*".[67] On this novel basis, the Tribunal held that the Claimants' claims were barred on the international plane because the Claimants "*deliberately or unreasonably ignored*" fraud and forgery (the Claimants will refer to this as the ***Minnotte* bar**).

45. In its findings on the Claimants' due diligence, the Award contains a number of unqualified and unsupported conclusions:

(a) "*the Claimants did not engage in proper due diligence in their dealings with their partners* [and] *failed to exert due diligence when choosing Ridlatama*";[68]

(b) "*the Claimants' supervision of the licensing process was deficient in several aspects*";[69]

(c) "*the Claimants did not seek to ascertain the means of signing mining licenses in Indonesia*";[70]

(d) "*the Claimants' conduct was not diligent in ensuring that Nusantara was no longer interested in its mining rights*";[71] and

(e) "*the Claimants failed to exercise due diligence when 'indications of forgery' first came to light in the BPK report of 23 February 2009*".[72]

46. These were key factual predicates to the *Minnotte* bar. But, as noted above, when the Tribunal raised this possible theory of dismissal long after the Hearing, the Tribunal

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65 Award, para. 475.

66 Award, para. 524.

67 Award, para. 508.

68 Award, para. 518.

69 Award, para. 519.

70 Award, para. 522.

71 Award, para. 523.

72 Award, para. 524.

prevented the parties from filing any new factual material (even though the Tribunal had confirmed at the Hearing that it had "*not, at least in the tribunal's understanding, heard evidence on whether someone relied, rightly or not, on some assertion, some assurance given*"[73]).

47. Having found the *Minnotte* bar, the Tribunal evidently felt it was able to deal with the Exploitation Licences (and thus the Infection Issue) in the most cursory fashion. The relevant paragraphs of the Award (529 and 530) are extracted below:

> 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.
>
> 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[74]

48. These paragraphs clearly show the link between the *Minnotte* bar and the Tribunal's conclusion that the Infection Issue was moot and it was unnecessary to consider *any* of the Claimants' "substitute" claims. They also contain an open admission by the Tribunal that it had not applied Indonesian law, as required by Article 42(1) of the ICSID Convention.[75]

49. These paragraphs are also as close as the Tribunal came to giving reasons for its dismissal of the Claimants' many other claims.

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[73] President Kaufmann-Kohler, Hearing Transcript – Day 7, page 205/17-20 (**Exhibit A-34**).

[74] Award, paras. 529-530 (emphasis added, internal citations omitted).

[75] The State recognised that Indonesian law was central to the Infection Issue. For example, the State submitted that, if the General Survey Licences and Exploration Licences were forged, this would have "*the legal consequence of rendering the exploitation upgrades null and void*" (State's Post-Hearing Brief, para. 68, **Exhibit A-37**), which is a clear demonstration of how Indonesian law was critical to the State's case.

50. In relation to costs, the Tribunal stated that "[t]*hese proceedings based on forged documents should not have been brought in the first place*"[76] and ordered the Claimants to pay 75% of the State's costs in the sum of USD 8.6 million – an order that the Tribunal admitted "*may seem harsh*".[77]

IV. MAIN PROCEDURAL ERRORS IN THE DOCUMENT AUTHENTICITY PHASE

a. ***The Tribunal failed to define the expression "legal consequences"***

51. Many (but not all) of the Tribunal's annullable errors stem from the way the Tribunal managed the Document Authenticity Phase, which was problematic from the outset.

52. As is clear from the discussion below, one of the main challenges the parties faced was understanding what the Tribunal meant by "*legal consequences*" – an expression the Tribunal was still trying to explain some 21 months after it was first used in PO13.[78]

53. As noted above, in PO12 the Tribunal initially declined Indonesia's request for bifurcation. In PO13, the Tribunal reversed PO12 and ordered bifurcation, directing (*inter alia*) 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*".[79]

54. Two months after PO13 was issued, and in response to the Claimants' motion for re-instatement of PO12 (i.e. the Claimants' request for a reversal of bifurcation), the

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[76] Award, para. 550.

[77] Award, para. 552.

[78] See Procedural Order No. 20 of 20 August 2015 (**Exhibit A-35**). In PO20, the Tribunal tried – yet again – to shed some light on the meaning of "legal consequences": "*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*" (para. 5) (**Exhibit A-35**).

[79] PO13, para. 28 (emphasis added) (**Exhibit A-11**).

Tribunal issued PO15, suggesting that bifurcation would assist to "*significantly simplify the issues before the Tribunal*".[80]

55. PO15 clarified that the Document Authenticity Phase was:

> 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).[81]

In relation to the Exploitation Licences specifically, the Tribunal noted that, "*the original claims are likely to be narrowed down or reshaped in case of a finding of forgery*"[82].

56. When presenting their submissions and preparing for the Hearing, the Claimants understood that, in the context of "legal consequences" they were being asked to *identify* (rather than expand on) the legal doctrines and principles (such as estoppel) that could be engaged if there was a finding of forgery. As mentioned above, this understanding was confirmed by the Tribunal at the Hearing, when the President said that, in respect of estoppel and "*similar doctrines*",[83] the Tribunal did not want to hear submissions "*at this stage*"[84] and that these issues were "*not part of this debate, except to canvas what the legal consequences could be*".[85]

57. However, at the end of the Hearing, questions remained, which is clear from the transcript of the discussion that took place in the final hour of the last day (the Claimants invite the Committee to read the Hearing Transcript – Day 7 from page 200/9 to page 219/16, the key parts of which are extracted below). The first question was how the Claimants' reliance on Ridlatama would be addressed. The second question was how the Infection Issue would be dealt with.

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80 PO15, para. 27 and 33-34 (**Exhibit A-16**).

81 PO15, paras. 34 (**Exhibit A-16**).

82 PO15, para. 30 (**Exhibit A-16**).

83 President Kaufmann-Kohler, Hearing Transcript – Day 7, page 215/14-18 (**Exhibit A-34**).

84 President Kaufmann-Kohler, Hearing Transcript – Day 7, pages 217/19 to 218/5 (**Exhibit A-34**).

85 President Kaufmann-Kohler, Hearing Transcript – Day 7, page 215/14-18 (emphasis added) (**Exhibit A-34**).

58. Regarding the first question, it was common ground amongst all participants that the Document Authenticity Phase did *not* address the reasonableness of the Claimants' reliance on representations made by Ridlatama and the State. Prior to the *Minnotte* direction, these issues simply were not part of the Document Authenticity Phase (in fact, in its Forgery Dismissal Application, the State said that the Claimants "*state of mind*" was "*not relevant*" to its application[86]). Issues of reliance and representation were live only to the extent that they were flagged as part of the Claimants' submissions on estoppel, acquiescence and preclusion (and, in PO15, the Tribunal had expressly requested that the parties only make submissions on the *legal* requirements for estoppel, as opposed to the facts allegedly justifying a finding of estoppel[87]). In this context, the Claimants introduced evidence of the myriad representations made by the State that the Claimants possessed valid licences and that the EKCP project had the support of the Indonesian government.[88]

59. However, as is clear from the transcript below, questions regarding whether the Claimants' reliance on Ridlatama was reasonable only arose at the conclusion of the Hearing.

(a) Counsel for the State, Mr O'Donoghue, first voiced the State's concern that the question of whether a forgery occurred had been conflated with the question of whether it was reasonable for the Claimants to rely on their local partner, Ridlatama.[89] As Mr O'Donoghue explained:

> that's a very, very important distinction, if Mr Quinlivan [CEO of Churchill], for example, believed what his people told him, and we don't have to get into an argument about whether or not he exercised due diligence or acted as a reasonable investor would act, or did all the kinds of things he would do, but he genuinely believed that he was not involved in any deliberate, improper activity. That belief is really irrelevant to whether there was a forgery.[90]

(b) When Mr O'Donoghue was subsequently questioned by the Tribunal as to what a finding of forgery would mean, he answered as follows:

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86 Forgery Dismissal Application, para. 5 (**Exhibit A-5**).

87 PO15, paras. 27 and 33-34 (**Exhibit A-16**).

88 See Claimants' Post-Hearing Brief, Updated Annex B (**Exhibit A-36**).

89 Mr O'Donoghue, Hearing Transcript – Day 7, page 201/2-7 (**Exhibit A-34**).

90 Mr O'Donoghue, Hearing Transcript – Day 7, page 201/8-16 (emphasis added) (**Exhibit A-34**).

> We believe, from our standpoint, that there is nothing to be added to the record that would sustain any claim of acquiescence or estoppel as a matter of law. But we understand that this hearing was focused on authenticity, and that that is an issue that the tribunal has to be mindful of once it crosses that bridge [...] once you cross the bridge into the land of forgery [...] the question is, what does that leave the claimants with, if anything, under those circumstances?[91]

(c) Subsequently, in relation to the issues that had been carved-out of the Document Authenticity Phase (such as the "*overlapping facts*"[92] of estoppel), President Kaufmann-Kohler stated: "*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*"[93] (emphasis added). The President went on to explain that when the Tribunal had invited submissions on legal consequences it was "*kind of an add-on to the factual authenticity question*"[94] and the reason for asking this question was "*so* [the Tribunal] *could see where we were going if we have no authenticity*".[95] The President later suggested that legal consequences under international law (e.g. estoppel and "*similar doctrines*"[96]) were "*not part of this debate, except to canvas what the legal consequences could be*".[97]

(d) Counsel for the Claimants (Mr Sheppard QC) stated that "*it turned out, that the factual enquiry into simply that, were they authorised, is more complex than might have been expected and then the legal consequences are kind of open-ended. I don't think you could decide* [the State's strike-out application] *now because you can't close down any legal arguments*".[98]

60. There was also an important discussion of how issues regarding reasonable reliance and good faith should be dealt with procedurally:

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91 Mr O'Donoghue, Hearing Transcript – Day 7, pages 207/24 to 208/13 (emphasis added) (**Exhibit A-34**).`

92 PO15, para. 34 (**Exhibit A-16**).

93 President Kaufmann-Kohler, Hearing Transcript – Day 7, page 205/17-20 (emphasis added) (**Exhibit A-34**).

94 President Kaufmann-Kohler, Hearing Transcript – Day 7, page 205/21-24 (**Exhibit A-34**).

95 President Kaufmann-Kohler, Hearing Transcript – Day 7, page 206/5-7 (**Exhibit A-34**).

96 President Kaufmann-Kohler, Hearing Transcript – Day 7, page 215/14-18 (**Exhibit A-34**).

97 President Kaufmann-Kohler, Hearing Transcript – Day 7, page 215/14-18 (**Exhibit A-34**).

98 Mr Sheppard QC, Hearing Transcript – Day 7, page 204/3-20 (**Exhibit A-34**).

(a) The State requested a "*partial summary judgment on* [the issue of authenticity] *which would then clarify the parties' positions and narrow the issues for the next phase, whether they're factual or legal in nature*"[99], "*as opposed to having things kind of drag on into the next phase*".[100.] The State later clarified it was not seeking a bifurcation of a bifurcation "*but rather a sequencing of the decision*"[101] (emphasis added).

(b) Mr Sheppard QC opposed "*a bifurcation of a bifurcation*"[102] and argued it would be easier for the parties to "*move on and brief the legal consequences of* [a finding of forgery] *within a fuller factual context of a merits hearing*".[103]

61. While the Claimants and the State each had a preference, there was implicit agreement between the parties that either of these courses of action – "*partial summary judgment*" or further briefings in the merits – would have respected the parties' rights to be heard of the remaining issues of reliance and good faith. Both sides knew these issues were important and wanted to be heard on them accordingly.

62. Obviously, the State's references to the "*the next phase*" and "*partial summary judgment*" show that the State, like the Claimants, did not think the Tribunal could dispose of the case without hearing the parties on these important issues.

63. Regarding the second question, the Claimants emphasised that the validity of the Exploitation Licences as a matter of Indonesian law (i.e. the Infection Issue) was critical and remained to be addressed. The significance of the Infection Issue was elevated at the Hearing due to Mr Noor's refusal to attend: once Mr Noor's evidence was excluded by the Tribunal, the only way the Exploitation Licences could have been voided would have been if it was established that, by operation of Indonesian law, they were "infected" by the forgery of the prior General Survey and Exploration Licences. Put another way, without Mr Noor to testify he was deceived into signing the Exploitation Licences, the State needed the law to do the work that the facts could

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99 Mr O'Donoghue, Hearing Transcript – Day 7, pages 202/23 to 204/4 (emphasis added) (**Exhibit A-34**).

100 Mr O'Donoghue, Hearing Transcript – Day 7, page 202/19-20 (emphasis added) (**Exhibit A-34**).

101 Mr O'Donoghue, Hearing Transcript – Day 7, pages 206/25 to 207/6 (emphasis added) (**Exhibit A-34**).

102 Mr Sheppard QC, Hearing Transcript – Day 7, pages 204/24 to 205/2 (**Exhibit A-34**).

103 Mr Sheppard QC, Hearing Transcript – Day 7, pages 203/22 to 204/2 (emphasis added) (**Exhibit A-34**).

not (the State's post-Hearing brief shows how its case evolved in this way[104]). The discussion at the end of the Hearing was as follows:

(a) Mr Sheppard QC voiced the Claimants' concerns in no uncertain terms:

> what causes me confusion is if one goes into the bigger legal ramifications, and you've heard my point that we will say that the exploitation agreement perfects any previous flaws, and I expect Mr O'Donoghue will disagree with that. But I wouldn't be expecting you to decide that in this phase. But if you are expecting to decide that, you should let us know, because I think that that becomes rather a difficult issue on a whole different set of pleadings, there's no expert evidence before you, or counsel evidence before you on Indonesian law of such a thing. That's a big issue. [105]
>
> [...]
>
> If you were to think that – if there was a finding of forgery on either document, then the effect of that "infection" is going to be critical, whether you are comfortable deciding that on the basis of submissions and post-hearing briefs. It may – or whether – because if you were then to conclude, yes, it did infect the Exploitation Licence and that died, then that would clearly have a substantial effect on the whole claim. In other sets of proceedings, that would be a major, major issue, not something that's addressed in post-hearing briefs after an authenticity hearing. And therefore I would need to talk to my colleagues, but I'm sure my clients would want that you have before you the very best legal evidence, whether that be through eminent Indonesian counsel or through an expert – I know you don't want expert reports on legal matters, but you would want the best opinion. [106]

(b) Counsel for the State responded:

> We believe that [Mr Sheppard QC] will probably be able to find a lawyer who will say that [exploitation agreement perfects any previous flaws], and we have no doubt that there will be many Indonesian lawyers who will support our position. Frankly, if the tribunal feels it needs legal opinions on that, I would say that we might as well give it to you now, rather than go through the whole briefing process and be told that this is an issue that you want to hear on. [107]

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[104] The State submitted: "*As to the exploitation upgrades, Mr. Noor did testify that he signed the 27 March 2009 exploitation upgrades on the assumption that the proper steps had been taken by the Mining and Energy Bureau, which he later learned was not true. Disregarding Mr. Noor's evidence on this point, however, does not affect the objective fact that Ridlatama never acquired mining undertaking licenses for general survey and exploration, and that the upgrades he signed were null and void. That is, whatever his state of mind, Mr. Noor had no power to issue the upgrades for Ridlatama because Ridlatama had no mining undertaking licenses, for general survey or for exploration, that were capable of being upgraded*." (State's Post-Hearing Brief, para. 114 (emphasis original) (**Exhibit A-37**)).

[105] Mr Sheppard QC, Hearing Transcript – Day 7, page 210/8-19 (emphasis added) (**Exhibit A-34**).

[106] Mr Sheppard QC, Hearing Transcript – Day 7, pages 213/9 to 214/1 (emphasis added) (**Exhibit A-34**).

[107] Mr O'Donoghue, Hearing Transcript – Day 7, page 212/6-13 (emphasis added) (**Exhibit A-34**).

(c) The State went on to argue that "[t]*his has been on the table from the beginning, from our standpoint*".[108]

64. There was then a revealing exchange with (and within) the Tribunal:

> Professor Van den Berg: I'm not protracting enormously the proceedings, I thought this issue was all done here.
>
> Mr Sheppard QC: We clearly don't want –
>
> Professor Van den Berg: It was all the time here before us, is this issue. You answered it now, you now say, but wait a minute, I want to have further legal experts testifying on this. Isn't it somewhat late in the game, Mr Sheppard?
>
> Mr Sheppard QC: No, because you've just heard the most high-level legal argument as to what the consequences would be without it being set out in any way in the respondent's submissions. We don't know what we're answering on their case as to what the legal consequences would be. You've seen various arguments that have been put forward in prior submissions by us. So we weren't expecting for you to be ruling whether arguments of perfection of title, estoppel, acquiescence, other legal doctrines were available or not available to us as a result of a finding of –
>
> President Kaufmann-Kohler: To me there are different levels of legal consequence that we are discussing here. If the documents are forged and there are no licences, then the question arises, what arguments does the claimants have? It could, for instance, have an estoppel argument that the State cannot raise the invalidity of the licences. It is a different question to examine and decide whether the forgery of certain licences has a direct effect on the validity of others. To me, this is – I understood this so far to be part of this debate here. The estoppel was for – and similar doctrines were not part of this debate, except to canvas what the legal consequences could be. Do I distinguish too much?
>
> Mr Sheppard QC: I think I'm hearing you say – which may be incorrect – is that you want to have submissions on the effect of forgery on the Exploitation Licence but not a wider population of international law doctrines.
>
> Professor Van den Berg: That is a legal consequence directly flowing, or maybe, we don't know because we have not yet made up our minds, of the impossible finding of forgery of the survey or the exploration licence. A different matter says that you say, assuming now there would be a forgery, what – are there still arguments to be made because – they can still – they, the State, can still not rely on it because either the State is estopped from invoking it, or has acquiesced in it, et cetera, but those are alternative arguments rather than what we are discussing here is, what I believe is all the time before us, is the consequence of a finding of forgery of certain licences on the Exploitation Licence.
>
> Mr Sheppard QC: We're completely ad idem. I'm sorry if I was confused and I didn't have the history of the discussion you had previously with prior counsel.

[108] Mr O'Donoghue, Hearing Transcript – Day 7, page 214/2-3 (**Exhibit A-34**).

Mr Hwang: Could I ask you, you've actually already addressed this issue about the consequences – assuming, contrary to your arguments, that there is a finding of forgery, you've got a very full account of what the other positions that your clients could adopt in your reply of 29 May. Would you be adding much to that?

Mr Sheppard QC: Depending on what the tribunal would like.

Mr Hwang: But you know what the evidence is. I don't know whether you've broken it up in your submission into – well, assuming this document is forged but not the others, what are the consequences. So maybe you need to expand that argument. But the essential arguments are there, the heads that you rely on are there, so they know what you're going to be saying. That's why I asked you earlier – well, anyway, that is your latest position and that's the target for them to aim at, is it?

Mr Sheppard QC: Right. I am confused again now. Because in my dialogue with Professor van den Berg, I thought we were getting to the point that the legal consequences are the legal consequences of the survey licence and/or the exploration licence being forged on the Exploitation Licence, stop. I addressed it in my opening because it was in prior submissions, the other aspect of, what is the legal consequence of the claimants' claims under the investment treaty? And I thought Professor van den Berg was clarifying to me, no, that's not what we're looking for.

President Kaufmann-Kohler: That's what I was trying to say as well.

Mr Sheppard QC: But you mentioned estoppel in your procedural order, so are you agreeing with Professor van den Berg or with Mr Hwang? One is legal consequences on the exploitation agreement, which must be an Indonesian law issue; the other is what are the legal consequences of that then on –

President Kaufmann-Kohler: Under international law which includes, in my mind, estoppel.

Mr Sheppard QC: So you would like to hear submission on that as well?

President Kaufmann-Kohler: Not on the international law parts at this stage.

Mr Sheppard QC: I don't think that's what Mr Hwang was saying. Because he was saying, "Look, you've addressed those in your opening, why don't you just clarify those".

Mr Hwang: (Inaudible - microphone not switched on).

Professor Van den Berg: (Inaudible - microphone not switched on).

President Kaufmann-Kohler: I thought this would be a good time to have a break. Absolutely. Let's take a break.[109]

65. This exchange demonstrates three things:

[109] Hearing Transcript – Day 7, pages 214/12 to 218/12 (**Exhibit A-34**).

(a) first, the confusion – both on the part of the Claimants and within the Tribunal – that flowed from the Tribunal's use of the term "*legal consequences*" in the procedural orders it issued to manage the Document Authenticity Phase;

(b) second, the fact that the Claimants put the Tribunal on notice that the Infection Issue was "*a big issue*"[110] on which the Claimants wanted and expected to be heard; and

(c) third, that the Tribunal did not want to hear submissions "*on the international law parts*" of legal consequences.

66. When the arbitrators returned from their adjournment, they reassured the parties as follows:

> We have in mind to give you some clarification of PO 15, paragraph 34, specifically the part on the legal consequences, but after having tried to do so, we think it is late in the day and we would very much like to have a chance to think it over and then send it to you in writing.
>
> We will issue a procedural order in any event after this hearing just summarising the procedural discussions, and so we can do this more carefully than what we could do now. [111]

67. Shortly after the Hearing on 20 August 2015, the Tribunal issued Procedural Order No. 20 (**PO20**), in which the Tribunal put various questions to the Parties and set out the scope of the post-Hearing briefs:

> 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.[112]

68. PO20 therefore clarified that the post-Hearing briefs should *not* address the Infection Issue. In no way can this exclusion be taken as having put the parties on notice that the Tribunal intended to decide the Infection Issue. Quite the opposite: PO20

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[110] Mr Sheppard QC, Hearing Transcript – Day 7, page 210/8-19 (**Exhibit A-34**).

[111] President Kaufmann-Kohler, Hearing Transcript – Day 7, page 218/20-219/4 (emphasis added) (**Exhibit A-34**).

[112] PO20, para. 5 (emphasis added) (**Exhibit A-35**).

indicated that the Infection Issue was reserved for subsequent consideration. This interpretation is obviously consistent with the President's assurance that the legal consequences of forgery – including estoppel and the Infection Issue – "*are delicate issues and we're very much aware of this, and you are as well*"[113].

69. The Claimants continued to trust in the Tribunal, believing that the arbitrators would take care to ensure that the Claimants were not put at a disadvantage due to Mr Noor's refusal to attend and that no violations of due process would flow from the evident confusion regarding the scope of the Document Authenticity Phase.

b. ***The Tribunal changed the legal framework in the Minnotte direction***

70. In accordance with PO20, the parties' post-Hearing briefs were finalised in November 2015. In June 2016 the Tribunal advised the parties it would issue a decision in September. Then, on 9 September 2016, the Tribunal issued the *Minnotte* direction, inviting the parties to comment on specific points of international law arising out of this authority, but only "*on the basis of the evidence on the record*" (and subject to a 15-page limit). [114]

71. The Claimants were alarmed. According to PO15, the Document Authenticity Phase was focused on "*the factual question whether the impugned documents are authentic or not (including especially who signed the documents and how)*".[115] The Claimants promptly voiced their concerns regarding what they perceived to be a radical change to the scope of the Document Authenticity Phase:

> the State has changed its case over the past two years (multiple times), the Tribunal and the Claimants have been dragged further and further off the course charted in Procedural Order No. 15. The parties are now debating factual and legal issues that are well outside the intended scope of this phase. In the Claimants' view, the volume and nature of these issues is such that they can only be properly briefed, investigated and determined in a full merits phase.[116]

72. The *Minnotte* direction contradicted the case presented by the State. Factually, *Minnotte* is all about the investor's state of mind – what they knew or did not know as

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[113] President Kaufmann-Kohler, Hearing Transcript – Day 7, page 211/14-15 (**Exhibit A-34**).

[114] The *Minnotte* direction (**Exhibit A-41**).

[115] PO15, paras. 27 and 33-34 (**Exhibit A-16**).

[116] Claimants' Reply Submissions on *Minnotte*, para. 4 (**Exhibit A-44**).

a result of their due diligence and whether the investor's state of mind was reasonable. Recall that the State had positively asserted that the Claimants' "*state of mind*" was "*not relevant*" given that "*the only question* [was whether the Disputed Documents] *were forged and fabricated*".[117] The State's Forgery Dismissal Application made no mention of due diligence or wilful blindness (i.e. the *Minnotte* factors), and on the last day of the Hearing, the State was saying the issue was *forgery*, not due diligence.[118] Even when the State later criticised the Claimants' due diligence (*after* the Hearing), the State did *not* argue that the Claimants' claims could be barred in circumstances where the Claimants were innocent of fraud and forgery and connected to the wrongdoing only by virtue of their failure to detect or investigate it. The State's post-Hearing contention was that the Claimants *were* culpable and that this, together with the Claimants' alleged failure to conduct due diligence, meant their "*alternative legal theories like estoppel and acquiescence*" could not be "*resuscitate*[d]".[119] The element of direct culpability makes that submission by the State very different to the Tribunal's *ex officio* legal theory based on *Minnotte*. On the State's case, the Tribunal needed to find the Claimants guilty of fraud and forgery, which it did not.

73. There can be no question that the *Minnotte* direction introduced a new legal framework that was distinct from the legal framework established by the parties and the Tribunal in PO15.

c. *The Tribunal failed to properly deal with the impact on the Claimants of Mr Noor's refusal to attend the Hearing*

74. Mr Noor was the key State witness who contemptuously refused to attend the Hearing without notice or justification. For the benefit of the Committee, below is a brief (and by no means exhaustive) overview of Mr Noor's significance to the dispute:

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[117] Forgery Dismissal Application, para. 5 (**Exhibit A-5**).

[118] Mr O'Donoghue, Hearing Transcript – Day 7, page 201/8-16 (**Exhibit A-34**) ("*we don't have to get into an argument about whether or not* [Churchill's CEO] *exercised due diligence or acted as a reasonable investor would act, or did all the kinds of things he would do, but he genuinely believed that he was not involved in any deliberate, improper activity. That belief is really irrelevant to whether there was a forgery*.")

[119] State's Post-Hearing Brief, para. 69 (**Exhibit A-37**).

(a) He was Deputy Regent in the period during which the General Survey and Exploration Licences were allegedly forged. He approved internal drafts of the General Survey Licences.[120]

(b) He wrote instructions on the Exploitation Licence applications for Mr Putra to process them and the Regional Secretary to convene a meeting about them.[121]

(c) He attended a number of meetings between Ridlatama and other Regency officials regarding the Exploitation Licences.[122]

(d) After he issued the Exploitation Licences, he issued a raft of related licences for the EKCP (including for feasibility studies and plans to build a hauling road and ocean going terminal).[123]

(e) He signed two undisputed letters signed *on the same day*, one which denounced Churchill to the AIM and another which endorsed Ridlatama's applications for forestry permits for the EKCP.[124]

(f) He signed the decrees that revoked the Exploitation Licences for alleged forestry breaches.[125]

75. The absence of Mr Noor had a dramatic impact on the case the Claimants were facing.

(a) First, without Mr Noor's evidence, there was no evidence to substantiate the State's factual contention that the Exploitation Licences were "*secured through deception and fraud*".[126] This meant that the Infection Issue became pivotal: without evidence that the Exploitation Licences were fraudulent, the State's case on the Exploitation Licences shifted from a case based on *fact* (deceit of the signatory) to a case based purely on *Indonesian law* (whether the

[120] Claimants' Post-Hearing Brief, para. 46(d) (**Exhibit A-36**).

[121] Claimants' Post-Hearing Brief, para. 46(d) (**Exhibit A-36**).

[122] Claimants' Post-Hearing Brief, para. 48(g) (**Exhibit A-36**).

[123] Claimants' Post-Hearing Brief, Updated Annex B (**Exhibit A-36**).

[124] Claimants' Post-Hearing Brief, para. 38(f) (**Exhibit A-36**).

[125] Claimants' Post-Hearing Brief, para. 38(d) (**Exhibit A-36**).

[126] Claimants' Post-Hearing Brief, para. 38(a) (**Exhibit A-36**).

Exploitation Licences perfected previous flaws in the licensing chain, if the law recognised such a chain). This sudden shift only occurred at the Hearing.

(b) Second, the Claimants had a vast number of questions that they intended to ask Mr Noor. He was everywhere in the State's case. Without the opportunity to question Mr Noor, the Claimants' ability to ventilate the issues listed above was much reduced (and this, in turn, made the Claimants even more dependent upon the Tribunal to use the tools at its disposal, such as adverse inferences or, at the very least, proper policing of the burden of proof).

(c) Third, Mr Noor was (according to the State) the key source of evidence on Indonesian law and practice as regards the Regent's discretion to grant mining licences (the Tribunal heard evidence of the Regent's broad discretion from other State witnesses at the Hearing[127]). Due to Mr Noor's absence, the Claimants were deprived of their opportunity to cross-examine him on (*inter alia*) the practice of granting Exploitation Licences in Indonesia, the discretion of the Regent, and the factors that the Regent would take into account in determining whether to grant an application for a mining licence (e.g. whether substantial foreign investment in East Kutai was an important factor in his decision to sign the Exploitation Licences).

76. Mr Noor's last-minute and unexplained refusal to attend the Hearing took the Claimants by surprise. The Claimants moved for the exclusion of Mr Noor's testimony and the Tribunal granted this motion.[128]

77. The Claimants took some comfort from the Tribunal's decision to exclude Mr Noor's evidence, but they were still dependant on the Tribunal to ensure that the State did not

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[127] For example, the State's witness, Mr Ramadani (who is the current Head of the Legal Section at the Regency of East Kutai) was questioned regarding the rules for renewal of mining licences. At various points in his answers, Mr Ramadani indicated that the Regent's practice was as (if not more) important than the written law (Hearing Transcript – Day 5, pages 13/16 to 30/12 (**Exhibit A-32**)). Another example is the State's witnesses Mr Armin, who worked at the Regency's Mining and Energy Bureau. Mr Armin originally claimed to have never processed any of Ridlatama's licences and later admitted he re-registered the Exploitation Licences under the new mining law. When he was cross-examined as to whether he raised any concerns about these licences he testified that he "*could not reject it because I know it was already signed by the Regent*" (see Claimants' Post Hearing Brief, para. 48(g) (**Exhibit A-36**)). The most telling evidence came from the former Regent Mr Ishak, who, when cross-examined about to how mining licensing was conducted at the Regency, stated "*anything can happen*" (Hearing Transcript – Day 3, page 113/22 (**Exhibit A-30**); Claimants' Reply Post Hearing Brief, para. 13 (**Exhibit A-38**)).

[128] Hearing Transcript – Day 2, pages 2/15 to 6/5 and 8/19 to 9/11 (**Exhibit A-29**).

gain an unfair advantage from the absence of its key witness. The Award shows, however, that the Tribunal failed to discharge the duties it owed the Claimants.

78. Events that took place after the Award was issued leave little doubt that Mr Noor's refusal to attend the hearing was a calculated decision. The day after the issuance of the Award, Mr Noor hosted a press conference in which he accepted congratulations for the Tribunal's decision and stated: "[w]*e won an arbitration dispute in an international tribunal. This is proof of our sovereignty over the management of Indonesia's natural resources*".[129]

V. GROUNDS FOR ANNULMENT

79. The errors that the Tribunal made in respect of the scoping of the Document Authenticity Phase, the *Minnotte* direction, the re-admission of Mr Noor's evidence and the treatment of the Infection Issue constitute:

(a) serious departures from several fundamental rules of procedure (warranting annulment under Article 52(1)(d) of the ICSID Convention); and

(b) manifest excesses of the Tribunal's powers (warranting annulment under Article 52(1)(b) of the ICSID Convention).

80. The Tribunal also failed to State the reasons on which the Award was based, including by giving reasons that were contradictory (warranting annulment under Article 52(1)(e) of the ICSID Convention).

81. The Claimants expand on each of these grounds of annulment below.

A. THE TRIBUNAL SERIOUSLY DEPARTED FROM A FUNDAMENTAL RULE OF PROCEDURE

82. Fundamental rules of procedure identified by ICSID annulment committees include:

(a) the right to be heard;

(b) the treatment of evidence and burden of proof; and

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[129] Tempo.Co, '*Indonesia Wins International Tribunal against Churchill Mining*' (8 December 2016) (**Exhibit A-46**).

(c) the equal treatment of the parties.[130]

83. There are many annulment decisions dealing with the situation we have in this case, where a tribunal bases its award on a theory that the parties have not fully discussed.[131] The right to be heard is the common theme of this jurisprudence. It is fundamental that "*each party must have the opportunity to address every formal motion before the tribunal and every legal issue raised by the case*".[132] As stated by the committee in *Victor Pey Casado v Chile*:[133]

> there is a departure from the right to be heard, which is a fundamental rule of procedure, when a party is not given a full, fair, or comparatively equal opportunity to state its case, present its defense, or produce evidence regarding every claim and issue at every stage of the arbitral proceeding.[134]

84. While it is accepted that, in drafting their awards, tribunals are not restricted to the arguments presented by the parties,[135] a tribunal cannot "*surprise*" the parties "*with an issue that neither party has invoked, argued or reasonably could have anticipated during the proceedings*".[136] In this situation, the pivotal question is whether or not the tribunal has applied the legal framework established by the parties.[137] The jurisprudence identifies two important principles:

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130 *Tulip Real Estate and Development Netherlands BV v Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment, 30 December 2015 (***Tulip v Turkey***), para. 84 (**Exhibit ALA-02**).

131 See, for example, *Tulip v Turkey*, para. 81 (**Exhibit ALA-02**); *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais S.A.* (ICSID Case No. ARB/81/2), Decision on Annulment, 3 May 1985 (***Klöckner I***), paras. 89-91 (**Exhibit ALA-03**); *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002 (***Vivendi I***), paras. 82- 85 (**Exhibit ALA-04**); *Caratube International Oil Company LLP v The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision on Annulment, 21 February 2014 (***Caratube v Kazakhstan***), paras. 90-96 (**Exhibit ALA-05**).

132 *Tulip v Turkey*, para. 80 (**Exhibit ALA-02**).

133 *Victor Pey Casado and President Allende Foundation v Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Application for Annulment of the Republic of Chile, 18 December 2012 (***Victor Pey Casado v Chile***) (**Exhibit ALA-06**).

134 *Victor Pey Casado v Chile*, para. 184 (emphasis added, internal citations omitted) (**Exhibit ALA-06**).

135 *Caratube v Kazakhstan*, para. 92 (**Exhibit ALA-05**).

136 *TECO Guatemala Holdings LLC v Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016 (***TECO v Guatemala***), para. 184 (**Exhibit ALA-07**).

137 *Klöckner I*, para. 91 (**Exhibit ALA-03**); *Caratube v Kazakhstan*, paras. 93-94 (**Exhibit ALA-05**); *TECO v Guatemala*, para. 184 (**Exhibit ALA-07**).

(a) first, if a tribunal prefers to use a distinct legal framework, different from that argued by the parties, it must grant the parties the opportunity to be heard;[138] and

(b) second, the tribunal ought not to conduct a factual investigation on an issue which may prove determinative of the outcome of the case without re-opening the proceedings.[139] As held by the annulment committee in *Fraport v Philippines*:

> where a factual investigation [involving new evidence] was conducted on an issue which proved determinative in the outcome of the case, while the deliberative process had already been underway for some months, the Committee considers that the Tribunal ought not to have continued its deliberations. Rather, it ought to have re-opened the proceedings.[140]

85. As to the Article 52(1)(d) qualifier that the departure must be "*serious*", the committee in *MINE v Guinea*[141] found that "*serious*" means that the departure must be substantial and must be such as to deprive the complainant of the benefit or protection which the fundamental rule in question was intended to provide.

86. As held by the committee in *TECO v Guatemala*:

> in order for a departure from a fundamental rule of procedure to be serious, an applicant is not required to show that, if the rule had been respected, the outcome of the case would have been different or that it would have won the case. What an applicant must show is that the departure may have had an impact on the award.[142]

a. *The Tribunal denied the Claimants the right to be heard in the Minnotte direction*

87. As Professor Schreuer notes:

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138 *Caratube v Kazakhstan*, paras. 93-94 (**Exhibit ALA-05**).

139 In the case of *Fraport AG Frankfurt Airport Services Worldwide v The Philippines* (ICSID Case No ARB/03/25), Decision of the Annulment Committee, 23 December 2010 (***Fraport v Philippines***), the tribunal made extensive use of material produced after the oral procedure and did not permit submissions on it (paras. 129, 178-179 and 224). The committee found that the tribunal's treatment of that new evidence deprived the applicant (Fraport) of its right to be heard and granted the annulment in its entirety (paras. 218-219 and 247) (**Exhibit ALA-08**).

140 *Fraport v Philippines*, para. 231 (**Exhibit ALA-08**).

141 *Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on the Annulment Application of Caratube International Oil Company LLP, 14 December 1989 (***MINE v Guinea***), para. 5.05 (**Exhibit ALA-09**).

142 *TECO v Guatemala*, para. 193 (emphasis added) (**Exhibit ALA-07**).

> The principle that both sides must be heard on all issues affecting their legal position is one of the most basic concepts of fairness in adversarial proceedings. It is expressed in the Latin maxim *audiatur et altera pars*. It is reflected through the ICSID Arbitration Rules [...][143]

88. The *Minnotte* direction was issued over a year after the Hearing, at the closure of a "phase" that was (according to PO15) focused on "*the factual question whether the impugned documents are authentic or not (including especially who signed the documents and how)*",[144] not the factual question of whether the Claimants fell afoul of the *Minnotte* factors.

89. The evidence before the Tribunal did include some documents and testimony concerning due diligence. For example, with their Memorial on Jurisdiction and the Merits, the Claimants filed a witness statement of Mr Paul Benjamin, who was the president/director of the Claimants' Indonesian subsidiary PT ICD, which included an account of his review of the Disputed Documents (before they were disputed). During the Document Authenticity Phase, the Claimants also filed a witness statement of Mr Quinlivan (Churchill CEO), in which brief references to due diligence were made. Additionally, the Claimants filed the due diligence reports of several lawyers and law firms (including the State's own lawyers in the arbitration). The Claimants also referred to some due diligence materials in their Reply Memorial.[145]

90. Other than the evidence incidentally filed in the jurisdiction phase, the Claimants filed these materials in the Document Authenticity Phase for two purposes.

    (a) First, the Claimants filed this evidence to show that there was a foundation to their estoppel claim and that the State was aware of their rights in the EKCP and had extensively recognised the validity of the disputed licences. The Claimants referred to this part of their case as "State Recognition" (the Claimants' table of these and other items of evidence for State recognition were included in an annex to the Claimants' Reply Memorial [146]). Fundamentally, the Claimants' point was simply that the State's allegations of

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143 Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2013) (***Schreuer***), page 987 (**Exhibit ALA-10**).

144 PO15, paras. 27 and 33-34 (**Exhibit A-16**).

145 Claimants Reply Memorial, paras. 126-131 (**Exhibit A-26**).

146 Updated Annex B is the most recent version of this table (**Exhibit A-26**).

forgery and fraud were undermined by the breadth of the State's recognition of the EKCP and the Disputed Documents.

(b) Second, the Claimants filed these due diligence materials to respond to a specific part of the State's case. The State contended that the task force from Indonesia's Regional Supervisory Agency (**Bawasda**) – which was tasked with investigating the potential forgery of mining licences in East Kutai – was *wrong* in finding the EKCP licences were "*legal and accountable*".[147] A major part of the Claimants' case was that Bawasda was *right*. The Claimants argued that the due diligence materials – "*professional, third-party examinations of the Ridlatama licences*" – supported Bawasda's conclusion,[148] which "*favours the authorisation of the Ridlatama licences*".[149]

91. These materials – which were by no means exhaustive – were *not* filed to address the *Minnotte* factors because those factors were not part of the State's case or within the scope of the Document Authenticity Phase as fixed by PO15. Had the Claimants been afforded the opportunity to respond to the *Minnotte* factors by supplementing the factual record, they would have introduced additional evidence.

92. Critically, the Claimants did not file evidence on the due diligence practice of investors in the Indonesian mining sector in 2006-2010. Nor did the State.

93. Thus, when the Tribunal limited to the parties' submissions on *Minnotte* to "*evidence on the record*", it denied the Claimants the opportunity to present their case on the *Minnotte* factors. As noted above, the Claimants protested. [150]

94. The Award shows that the *Minnotte* factors were dispositive. It also shows the breadth of the evidence that would have been needed to address the *Minnotte* factors. The Claimants obviously did not have the evidence they needed, which the Claimants made clear when they protested the *Minnotte* direction: as the Claimants said, "*the*

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147 Claimants' Post-Hearing Brief, para. 50 (**Exhibit A-36**); Claimants' Submissions on *Minnotte*, para. 20 (**Exhibit A-42**).

148 Claimants' Reply Memorial, para. 130 (**Exhibit A-26**).

149 Claimants' Post-Hearing Brief, para. 50 (**Exhibit A-36**).

150 Claimants' Reply Submissions on *Minnotte*, para. 4 (**Exhibit C-44**).

volume and nature of these issues is such that they can only be properly briefed, investigated and determined in a full merits phase".[151]

95. The due process impact that the *Minnotte* direction had on the Claimants is clear on the face of the Award. For example, at paragraph 518, the Tribunal found "*there is no evidence on record that the Claimants verified the representations made by Ridlatama*".[152] Indeed there was not. Before the *Minnotte* direction, the President of the Tribunal had confirmed (at the Hearing) that the Tribunal had "*not, at least in the tribunal's understanding, heard evidence on whether someone relied, rightly or not, on some assertion, some assurance given*".[153] But in the Award the Claimants were punished for not having introduced this very evidence.

96. So there can be no doubt that the Tribunal's departure from the fundamental rule of *audiatur et altera pars* was "*serious*" for the purposes of Article 52(1)(d) of the ICSID Convention, as the departure was substantial and did deprive the Claimants of the benefit or protection which the right to be heard is intended to provide.

97. When it issued the *Minnotte* direction, the Tribunal was in the process of "*finalizing its deliberations*",[154] so the Tribunal must have appreciated the materiality of the facts to which the Claimants were referring in their protest.

98. As recognised by the Annulment Committees in *Fraport v Philippines* [155] and *Caratube v Kazakhstan,*[156] the Tribunal should have respected fundamental rules of procedure and:

    (a) at the very least, re-opened the Document Authenticity Phase to allow the parties to file new evidence on the *Minnotte* factors and the applicable

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151 Claimants' Reply Submissions on *Minnotte*, para. 4 (**Exhibit C-44**).

152 Award, para. 518.

153 President Kaufmann-Kohler, Hearing Transcript – Day 7, page 205/17-20 (**Exhibit A-34**).

154 The *Minnotte* direction (**Exhibit A-41**).

155 Fraport v Philippines, para. 231 (**Exhibit ALA-08**).

156 *Caratube v Kazakhstan*, paras. 93-94 (**Exhibit ALA-05**).

standard of due diligence of (in the Tribunal's words) "*a reasonable investor in the Indonesian mining sector*"[157];

(b) alternatively, done what the State suggested at the end of the Hearing, treating the Forgery Dismissal Application as a motion for "*partial summary judgment*"[158] and then "*sequencing of the decision*"[159] so as to include the factual aspects of *Minnotte* in a subsequent phase (along with other critical matters, such as the Infection Issue); or

(c) ideally, done what the Claimants suggested in their protest: properly brief, investigate and determine the factual aspects of *Minnotte* in a full merits phase.[160]

99. The Tribunal did none of these things.

100. The Claimants note paragraph 236 of the Award, which says as follows:

> When applying the law (whether national or international), the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. The principle *iura novit curia* – or better, *iura novit arbiter* – allows the Tribunal to form its own opinion of the meaning of the law, provided that it does not surprise the Parties with a legal theory that was not subject to debate and that the Parties could not anticipate.

101. The Tribunal certainly did "*surprise the parties*" with the *Minnotte* direction. As the State noted in its comments on *Minnotte* (filed 27 September 2016), "*the Minnotte decision was not called to* [the Tribunal's] *attention or relied upon in the Parties' written submissions before or after the Hearing*".[161]

102. While *iura novit curia* did allow the Tribunal to raise the *Minnotte* case *ex officio*, it did not relieve the Tribunal of its due process obligation to allow the Claimants the opportunity to present their case on matters of fact material to the new legal theory raised (i.e. the *Minnotte* factors).

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157 Award, para. 504.

158 Mr O'Donoghue, Hearing Transcript – Day 7, pages 202/23 to 204/4 (**Exhibit A-34**).

159 Mr O'Donoghue, Hearing Transcript – Day 7, pages 206/24 to 207/6 (**Exhibit A-34**).

160 Claimants' Reply Submissions on *Minnotte*, para. 4 (**Exhibit C-44**).

161 State's Submission on *Minnotte*, para. 2 (**Exhibit A-43**).

103. The following considerations appear to have influenced the Tribunal's decision to ignore its due process obligations and push on to dismiss the case on the basis of the *Minnotte* bar:

(a) First, the Tribunal was clearly concerned by delay. By the time of the *Minnotte* direction, the Document Authenticity Phase had been going on for almost two years and suffered from a number of setbacks. The Tribunal had been inundated with submissions (the State alone made 50 submissions[162]). Following the Hearing in August 2015 and the post-Hearing briefs in November, seven months elapsed before the Tribunal informed the parties it would issue a decision in September 2016. Then, in September 2016, the Tribunal advised the parties that "[w]*hile regretting the delay*", it was appropriate for parties to make two further rounds of submissions on *Minnotte*.[163] When the parties submitted their Reply Submissions on *Minnotte*, it had already been two years and eight months since the Tribunal had rendered its Decision on Jurisdiction. The question of expediency appears to have informed the Tribunal's decision not to engage in the further factual inquiries required to respect the Claimants' right to due process. As Professor Van den Berg said in response to the parties' suggestions for how the Infection Issue should be programmed after the issues of document authenticity were decided: "*I'm not protracting enormously the proceedings*".[164]

(b) Second, re-opening the Document Authenticity Phase to take new evidence on the *Minnotte* factors would have embarrassed the Tribunal. Recall that, in late 2014, the Tribunal had flip-flopped on the issue of bifurcation of the forgery issue, first deciding *against* bifurcation (see PO12) and then (on the State's motion for reconsideration) deciding *for* bifurcation (see PO13). The Claimants protested that, in reversing its earlier order against bifurcation, the Tribunal was not affording the Claimants a right to be heard or treating the

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[162] See State's Reply Post-Hearing Brief, Annex A (**Exhibit A-39**): List of Respondent's Submissions Related to the Issue of Document Authenticity, which lists 45 "submissions", exclusive of the State's Reply Post-Hearing Brief, the State's Costs Submissions, the State's Reply Costs Submissions, the State's Submission on *Minnotte* and the State's Reply Submission on *Minnotte*.

[163] The *Minnotte* direction (**Exhibit A-41**).

[164] Professor van den Berg, Hearing Transcript – Day 7, pages 214/12 to 218/12 (**Exhibit A-34**).

parties equally.[165] The Tribunal ultimately settled on a scope for the Document Authenticity Phase which the Tribunal thought would assist to "*significantly simplify the issues before the Tribunal*".[166] To have re-opened the proceedings (i.e. bifurcate the bifurcation) to take new evidence for *Minnotte* purposes would have been a concession that the scoping of the Document Authenticity Phase was seriously flawed (which, on any view, it was).

104. Regardless of the Tribunal's motivation, a serious departure from a fundamental rule of procedure occurred and the Award is therefore a nullity under Article 52(1)(d) of the ICSID Convention.

b. *The Tribunal denied the Claimants the right to be heard on whether Mr Noor's evidence should be re-admitted and given weight*

105. As noted above, the *Minnotte* bar operates where there is a lack of due care or negligence on the part of the investor to investigate the factual circumstances surrounding the making of an investment or a deliberate "*closing of eyes*" to indications of "*serious misconduct or crime*", or an unreasonable failure to perceive such indications.

106. The "*serious misconduct or crime*" alleged by Indonesia was of two main forms: forgery and fraud. The State did not allege that the all-important Exploitation Licences were forged, but rather that they were the product of their signatory, Mr Noor, being deceived.

107. The relevant paragraphs of Mr Noor's witness statement read as follows:

> 10. I recall that, when I became the Regent of East Kutai, Mr. Djaja Putra (the Head of the Mining and Energy Bureau at that time) visited my office and asked me to sign several decrees granting mining undertaking licenses for exploitation in certain areas of East Kutai to some companies belonging to the Ridlatama Group and some other documents (I do not recall what those documents were but certainly they were not decrees). This happened during the very beginning of my tenure as Regent. 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.

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[165] Claimants' letter to the Tribunal dated 23 November 2014 urged the Tribunal to reconsider PO13 and to reinstate PO12, arguing that the issuance of PO13 "*violates the Claimants' fundamental rights to be heard and treated equally*" (page 1 (**Exhibit A-12**); see also PO15, para. 5 (**Exhibit A-16**)).

[166] PO15, para. 27 (**Exhibit A-16**).

> 11. However, later (around early September 2009), it was discovered that their applications were based on forged documentation, 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 applied for by the Ridlatama companies.[167]
>
> (emphasis added)

108. In the Award, the Tribunal said it decided "*to disregard Mr. Noor's witness statement*".[168] So the evidence above was not (or *should not have been*) before the Tribunal when it wrote the Award. But, in setting out the State's case in the Award, the Tribunal noted that "[w]*hile Mr. Noor testified that he did sign the Exploitation Licenses, he did so on the assumption that all proper steps had been taken by the Mining and Energy Bureau*".[169] The Tribunal cited the State's Post-Hearing Brief, which erroneously claimed that Mr Noor had testified to Mr Putra's deception (which he clearly had not – Mr Noor refused to testify). This reference to excluded evidence was obviously improper and should have had no place in the Award.

109. Critically, the Tribunal went on to conclude that:

> [the] 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.[170]

110. This is not a mere recitation of the State's position: it is instead part of the Tribunal's *actual reasoning*. The Tribunal's conclusion that a "*misguided assumption*" led to the issuing of the EKCP Exploitation Licences shows that the Tribunal gave weight to paragraph 10 of Mr Noor's witness statement.

111. The Tribunal did not notify the parties, let alone give the Claimants the opportunity to comment on whether the Tribunal could re-admit Mr Noor's evidence and, if it could, the weight that it should give to that re-admitted evidence. This was a major departure from a fundamental rule of procedure (*audiatur et altera pars*), which warrants the annulment of the Award under Article 52 of the ICSID Convention.

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167 Witness Statement of H. Isran Noor (**Exhibit A-04**).

168 Award, para. 84.

169 Award, para. 165.

170 Award, para. 512 (emphasis added).

112. There can be no doubt that this departure from the right to be heard was "*serious*" for the purposes of Article 52(1)(d) of the ICSID Convention. The departure led to the re-admission of Mr Noor's evidence, which was critical to the fraud premise of the *Minnotte* bar (and thus the outcome of the case). The departure was substantial and certainly did deprive the Claimants of the benefit or protection which the right to be heard is intended to provide.

c. *The Tribunal denied the Claimants the right to be heard on the Infection Issue*

113. On the basis of the Tribunal's (unreasoned) conclusion that the *Minnotte* bar rendered all of the Claimants' claims inadmissible, the Tribunal wrongly concluded that it did not need to hear the parties on (or decide) the Infection Issue. Thus, the denial of the Claimants' right to be heard on the Infection Issue occurred – in the Tribunal's own words – by "*force of consequence*".[171]

114. If the Committee finds that there was a violation of due process in the *Minnotte* direction or the re-admission of Mr Noor's evidence (essential to the finding of a *Minnotte* bar), then it equally follows by "*force of consequence*"[172] that the Claimants were improperly denied the opportunity to present their case on the Infection Issue, because there was no lawful basis for the Tribunal's finding that there was no "*need to address the validity of the Exploitation Licenses as a matter of Indonesian law*".[173]

115. The record shows that the Tribunal was on notice that the Claimants considered the Infection Issue to be a "*major, major issue*".[174] The significance of the Infection Issue was elevated by the exclusion of Mr Noor's evidence. After the Hearing, in PO20 the Tribunal expressly carved-out the Infection Issue from the parties' post-Hearing briefs.[175] The Claimants understood that, as discussed at the Hearing, the Infection Issue would be addressed in a later phase. This understanding was consistent with comments made by the Tribunal in PO15.[176] The Claimants understood that once a

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171 Award, para. 531.

172 Award, para. 531.

173 Award, para. 530

174 Mr Sheppard QC, Hearing Transcript – Day 7, pages 213/9 to 214/1 (**Exhibit A-34**).

175 PO20, para. 5 (**Exhibit A-35**).

decision of forgery was made, they would have an opportunity to "*frame their arguments*" in relation to the Exploitation Licences.

116. But the Claimants were not given the opportunity to frame their *Indonesian law* arguments on the Exploitation Licences. This "*big issue*"[177] was instead disposed of in the most perfunctory fashion by the Tribunal, without notice (or reasons).

117. It is clear from the record and the Award that this further departure from *audiatur et altera pars* was "*serious*" for the purposes of Article 52(1)(d) of the ICSID Convention. It deprived the Claimants of the benefit or protection which the right to be heard is intended to provide – in this instance, the ability to make submissions (and lead expert evidence) on how the "*investments*" at the heart of their claim (the Exploitation Licences) would still have a legal existence notwithstanding the Tribunal's findings regarding the forgery of prior licences.

118. The Award leaves no doubt that the Tribunal knew the risk it was taking here and tried to protect itself from the consequences of its radical decision. The Tribunal specifically referred to paragraph 28 of PO13, which provided that:

> in the context of the document authenticity phase, the Parties are to address in their written submissions and at the hearing all factual aspects relating to forgery as well as *the legal consequences of a finding of forgery on each claim*. This is not meant to prevent the Parties from addressing any other matters which they deem appropriate in connection with the forgery allegations and arguments.[178] (emphasis added)

119. This underlined wording in PO13 is recited in paragraph 42 of the Award (which sets out the procedural history), referenced in paragraph 232 (which relates to the scope of the award) and – most significantly – referenced in paragraph 530 (the part of the Award where the Tribunal dismissed the Claimants' claim based on the Exploitation Licences and deemed the Infection Issue moot).

120. However, the Tribunal's repeated reliance on paragraph 28 of PO13 cannot excuse its gross procedural violations or justify its apparent disregard of the Claimants' protests.

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[176] PO15, para. 30 (**Exhibit A-16**) ("*the manner in which the Parties will frame their arguments in relation to any surviving claims in connection with the exploitation licenses would appear dependent on whether the underlying survey and exploration licenses and related documents were forged or not*.").

[177] Mr Sheppard QC, Hearing Transcript – Day 7, page 210/8-19.

[178] **Exhibit A-11**.

Although PO13 was effectively affirmed by PO15, it was also clarified (and hence *superseded*) by PO15: PO15 specified what was beyond the scope of the Document Authenticity Phase, namely the facts that would justify its position in a scenario where forgery was found.[179] The very reason the Tribunal sought to clarify paragraph 28 of PO13 was because it was so vague. The Tribunal cannot later exploit that same vagueness to insulate itself against annulment.

121. Further, to the extent that the Tribunal's references to paragraph 28 of PO13 are insinuations that the Claimants should have brought expert evidence of Indonesian law and Regent practice in relation to the Infection Issue, the Tribunal seems to have forgotten that:

(a) it excluded from the Document Authenticity Phase the facts that would justify the Claimants' position in the event of a finding of forgery; and

(b) it previously acknowledged that Infection Issue was one of the "*bifurcated issues*".[180]

122. The Tribunal's attempts to protect itself by referring to paragraph 28 of PO13 should be given no credit by the Committee. The Tribunal had no excuse for denying the Claimants the opportunity to present their case on the Infection Issue.

d. *The Tribunal reversed the burden of proof in relation to fraud and deception*

123. According to the committee in *Tulip v Turkey*, "*a clear violation of a rule of evidence, such as the reversal of the burden of proof, may amount to a serious violation of a fundamental rule of procedure*".[181]

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[179] PO15, para. 34 (**Exhibit A-16**) ("*paragraph 28 of PO13 defines the scope of the authenticity phase as comprising (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)*").

[180] PO15, para. 30 (**Exhibit A-16**) ("*the manner in which the Parties will frame their arguments in relation to any surviving claims in connection with the exploitation licenses would appear dependent on whether the underlying survey and exploration licenses and related documents were forged or not*").

[181] *Tulip v Turkey*, para. 84 (**Exhibit ALA-02**).

124. As noted by the committee in *Azurix*, it is a general principle of international law that "*who asserts must prove*".[182] The rule at issue here (*actori incumbit probatio*) is therefore fundamental. As the Claimants noted in their Reply Memorial:

> There can be no doubt that, as the party alleging fraud, the State alone bears the burden of proof (*actori incumbit probatio*). It is trite that the burden of proof rests on the party who advances a proposition affirmatively. This general principle has been recognised and applied by ICSID tribunals and *ad hoc* panels constituted under a range of trade and investment treaties.[183]

125. Although the Tribunal found that the State bore the burden of proving its separate allegations of "*forgery and deception*",[184] other parts of the Award clearly show that the Tribunal actually put the burden of proof on the Claimants, including with respect to deception. The unlawful allocation of the burden on this issue had a major impact on the outcome of the case.[185]

126. The low standard of reasoning in the Award makes it hard to know whether the Tribunal improperly allocated the burden of *disproving* deceit to the Claimants from the outset, or whether the Tribunal shifted this burden to the Claimants only after it found that Mr Noor had been deceived (a conclusion tainted by the Tribunal's unlawful re-admission of Mr Noor's testimony, which could never have provided a valid basis for burden shifting). If it was the former, then that was a breach of the fundamental rule of procedure that the burden is on the accuser and not the accused (*actori incumbit probatio*). If it was the latter, the breach of the fundamental rule of procedure was consequential in that, while the burden can of course shift from the accuser to the accused, it cannot do so unless the accuser's burden has first been properly discharged (which, without Mr Noor's testimony on the record, it could not have been).

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[182] *Azurix Corp. v The Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, para. 215 (**Exhibit ALA-11**).

[183] Claimants' Reply Memorial, para 14 (citation omitted) (**Exhibit A-26**).

[184] Award, para. 238.

[185] However, the Claimants note that there are many parts of the Award that suggest the Tribunal also placed the burden on the Claimants to disprove forgery. An example is the Tribunal's conclusion that "*the Claimants did not seek to ascertain the means of signing mining licenses in Indonesia* [...] *although that information would have been readily available*" (Award, para. 522) – condemnation that, even if approached in purely practical terms, is hard to square with the admission of the former Regent (Mr Ishak) that "*anything can happen*" inside the Regency of East Kutai (Hearing Transcript – Day 3, page 113/22) (**Exhibit A-30**).

127. In either case, the departure was "*serious*" for the purposes of Article 52(1)(d) of the ICSID Convention. The misallocation or reversal of the burden of proof on fraud was critical to the Tribunal's finding of the *Minnotte* bar (and thus the outcome of the case). The departure was substantial and certainly did deprive the Claimants of the benefit or protection which the right to be heard is intended to provide: the Claimants could not discharge the burden placed upon them without the ability to cross-examine Mr Noor (the supposed victim of the fraud), whose evidence was accepted *unchallenged* by the Tribunal.

e. *The Tribunal reversed the burden to proof in relation to the Minnotte factors*

128. As noted above, the Tribunal found that burden of proving "*forgery and deception*"[186] was on the State. However, the Award does not state which party bore the burden of proof on the *Minnotte* factors (the deficiencies in the Tribunal's reasoning regarding the *Minnotte* factors are discussed below).

129. Amongst other things, the Tribunal stated (in paragraph 504) that it had taken into account "*whether the Claimants were put on notice by evidence of fraud that a reasonable investor in the Indonesian mining sector should have investigated*".[187] The Tribunal also made a series of (unqualified) conclusions regarding the *Minnotte* factors (see paragraph 45 above).

130. Even if (*arguendo*) the Claimants could have been allocated a burden to prove the reasonableness and adequacy of their *own* due diligence, it is inconceivable that the Claimants could have been allocated the burden of proving the benchmark against which their own conduct was to be tested.

131. It is important to understand that, even though *Minnotte* was raised *ex officio*, it was raised in a phase in which the State was the accuser. If the Tribunal had adhered to fundamental rules of procedure (*actori incumbit probatio*), the Tribunal should have held that, at the very least, it was for the *accuser* – not the accused – to lead evidence on what a "*reasonable investor*" would have done in the circumstances of the case.

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[186] Award, para. 238.

[187] Award, para. 504.

132. As discussed below, the State led no evidence of due diligence standards for investors "*in the Indonesian mining sector*".[188] So the burden could never have shifted to the Claimants on this point.

133. The Tribunal's departure from this fundamental rule of procedure was "*serious*" for the purposes of Article 52(1)(d) of the ICSID Convention, especially considering that, at the same time as the burden was placed on them, the Claimants were *simultaneously* prevented from filing the evidence they needed to discharge their fresh burden (i.e. expert and lay evidence of due diligence standards and practice in Indonesia between 2006 and 2010).

B. THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS

134. As observed by Professor Schreuer, "[t]*here is widespread agreement that a failure to apply the proper law may amount to an excess of powers by the tribunal*".[189]

135. As to the standard required for an excess of powers to be "*manifest*", the two schools of thought are well known. There is the view (expressed for example by the committee in *Tulip v Turkey*) that "[t]*he requirement that an excess of powers must be 'manifest' in order to constitute a ground for annulment means that the excess must be obvious, clear or easily recognizable*".[190] There is also the view of the committee in *Vivendi I* that the excess of power will be "*manifest*" where it is "*clearly capable of making a difference to the result*".[191] In this case the Tribunal's excesses of power qualify on either measure.

a. ***The Tribunal failed to apply Indonesian law to the Infection Issue***

136. The Tribunal did not apply Indonesian law to the Infection Issue.

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188 Award, para. 504.

189 *Schreuer*, page 955 (**Exhibit ALA-10**).

190 *Tulip v Turkey*, para. 56 (**Exhibit ALA-02**).

191 *Vivendi I*, paras. 86 and 115 (**Exhibit ALA-04**).

137. Neither the UK-Indonesia BIT nor the Australia-Indonesia BIT contains an express governing law clause. Thus, as the Tribunal rightly held,[192] the question of what law applied to the merits was controlled by Article 42(1) of the ICSID Convention.

138. The law that is required to be applied under Article 42 of the ICSID Convention is made abundantly clear in the Report of the Executive Directors of the World Bank on the ICSID Convention:

> Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable.[193]

139. In paragraph 235 of the Award, the Tribunal stated:

> The Tribunal is of the view that the second sentence of Article 42(1) of the ICSID Convention does not allocate matters to either law. It is thus for the Tribunal to determine whether an issue is subject to national or international law.

140. This extract appears in a number of awards which are the subject of pending annulment applications, including *Burlington v Ecuador*,[194] *Vestey v Venezuela*[195] and *Quiborax v Bolivia*.[196] It also appeared in the award made in *Venezuela Holdings v Venezuela*,[197] which was partially annulled on 9 March 2017.[198]

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192 Award, para. 234.

193 ICSID Convention, Regulations and Rules, *'Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States'*, International Bank for Reconstruction and Development, 18 March 1965, page 47, para. 40 (**Exhibit ALA-12**).

194 *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012 (***Burlington. v Ecuador***), para. 179 (**Exhibit ALA-13**). The annulment proceedings in *Burlington. v Ecuador* were registered on 14 February 2017.

195 *Vestey Group Ltd. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4), Award, 15 April 2016 (***Vestey v Venezuela***), para. 117 (**Exhibit ALA-14**). The annulment proceedings in *Vestey v Venezuela* were registered on 16 August 2016.

196 *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015 (***Quiborax v Bolivia***), para. 91 (**Exhibit ALA-15**). The annulment proceedings in *Quiborax* were registered on 23 September 2015.

197 *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Award, 9 October 2014 (***Venezuela Holdings v Venezuela* Award**) (**Exhibit ALA-16**).

198 *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Annulment, 9 March 2016 (***Venezuela Holdings v Venezuela* Annulment**) (**Exhibit ALA-17**).

141. The annulment decision in *Venezuela Holdings* provides a useful illustration of the problems that can arise where a tribunal makes the kind of broad statement on applicable law that we find in paragraph 235 of the Award. In *Venezuela Holdings*, the award contained the following findings on applicable law:

> Accordingly, the Tribunal will apply the BIT and the other agreed sources of law where appropriate. Article 9(5) of the Treaty [which designates sources of law to govern disputes under the Treaty] does not allocate matters to any of those laws. Accordingly, it is for the Tribunal to determine whether an issue is subject to national or international law. Further, if and when an issue arises, the Tribunal will determine whether the applicable international law should be limited to general principles of international law under Article 9(5) of the BIT or whether it includes customary international law.
>
> [...]
>
> The Tribunal recalls that it is a fundamental principle of international law that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Under this principle, international obligations arising from a treaty cannot be discarded on the grounds of national law. [...] the Tribunal has no doubt in concluding that this issue must be governed by international law.[199]

142. The annulment committee considered that these paragraphs created a "*penumbra of uncertainty*" [200] and annulled a number of sections of the award, including the paragraphs extracted above, on the basis that the tribunal had manifestly exceeded its powers by failing to apply the proper law.[201]

143. Just like in the case at hand, the law that the *Venezuela Holdings* tribunal failed to apply was the law of the host State. The annulment committee found that the portions of the tribunal's award dealing with compensation were "*so seriously deficient both in their reasoning and in the choice and application of the appropriate sources of law under the governing Bilateral Investment Treaty as to give rise to grounds for annulment under Article 52(1) of the ICSID Convention*".[202] The Claimants note in particular the following part of the committee's decision:

> The Tribunal exceeded its powers by failing to apply the proper law, and the "manifest" nature of this failure is shown by the inadequacies in the Tribunal's

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199 *Venezuela Holdings v Venezuela* Award, paras. 223 and 225 (emphasis added) (**Exhibit ALA-16**).

200 *Venezuela Holdings v Venezuela* Annulment, para. 155 (**Exhibit ALA-17**).

201 *Venezuela Holdings v Venezuela* Annulment, para. 196(3) (**Exhibit ALA-17**).

202 *Venezuela Holdings v Venezuela* Annulment, para. 189 (**Exhibit ALA-17**).

> reasoning for the choice of applicable law, in both its positive (the law chosen) and negative (the law rejected) aspects.[203]

144. In our case, the Tribunal did not apply Indonesian law to the question of whether the Exploitation Licences were valid (the Infection Issue). The Tribunal was open about this:

> The conclusion reached by the Tribunal [that inadmissibility applies to all the claims raised in the arbitration] 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.[204]

145. The Tribunal's failure to apply the proper law was a manifest excess of power under Article 52(1)(b) of the ICSID Convention, as it is "*obvious, clear or easily recognizable*"[205] from paragraph 530 of the Award. The excess was also "*manifest*" in the *Vivendi I* sense, as the application of Indonesian law was "*clearly capable of making a difference to the result*":[206] the "*infection*" (*vel non*) of the Exploitation Licences was critical to the State's fraud case, especially once the evidence of their signatory (Mr Noor) was struck from the record. The "*manifest*" nature of the Tribunal's excess is reinforced by the fact that the need to apply Indonesian law to determine the validity of the Exploitation Licences was obvious because those licences created property rights. The Tribunal's non-application of Indonesian law was simply not tenable. As Professor Douglas has observed:

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[203] *Venezuela Holdings v Venezuela* Annulment, para. 189 (internal citations omitted) (**Exhibit ALA-17**).

[204] Award, para. 530 (emphasis added, citation omitted).

[205] *Tulip v Turkey*, para. 56 (**Exhibit ALA-02**).

[206] *Vivendi I*, paras. 86 and 115 (**Exhibit ALA-04**).

> The law applicable to an issue relating to the existence or scope of property rights comprising the investment is the municipal law of the host state, including its rules of private international law.[207]

146. The Tribunal manifestly exceeded its powers regardless of whether it was right that the Claimants' claims were inadmissible due to the *Minnotte* bar.[208] This is because, even if (*arguendo*) the Tribunal was right that the claims were barred on the international plane, it first had to apply Indonesian law to determine whether there was a lacuna in that law or a conflict between local law and international law (such that the latter would prevail). The Tribunal did not do so.

b. ***The Tribunal failed to apply the international law of State responsibility***

147. In its Forgery Dismissal Application, the State's case was that the disputed documents were "*forged and fabricated as part of a massive, systematic and sophisticated scheme to defraud the Republic* [of Indonesia]".[209]

148. From the outset, the Claimants made the obvious point that, if the mass fraud the State was alleging had in fact occurred, there must have been equally large-scale dereliction of duty at numerous levels of the State's government. In this area, the Claimants emphasised:

(a) the failure of a range of senior Indonesian officials, including Mr Noor (who were all subject to a duty of care consistent with their professional position, expertise and substantial experience) to detect the forgery alleged by the State;[210] and

(b) the responsibility of the Indonesian police and Bawasda[211] (the government agency tasked by the Regency to investigate the indications of forgery) for

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[207] Zachary Douglas, *'The International Law of Investment Claims'* (Cambridge University Press, 2009), page 52 (**Exhibit ALA-18**).

[208] However, if the Committee agrees with the Claimants' contention that the Tribunal did commit annullable errors in the process by which it found the *Minnotte bar*, then the Committee must also find that the Tribunal's manifest excess of powers by non-application of Indonesian law was aggravated by related procedural violations.

[209] Forgery Dismissal Application, para. 3 (**Exhibit A-05**).

[210] Claimants' letter to the Tribunal dated 8 December 2014, pages 5-6 (**Exhibit A-14**).

[211] The Bawasda are Indonesia's Regional Supervisory Agency and were the Indonesian task force charged with following up the BPK Report, which found "indications of forgery" on Ridlatama's licences. See

representations made in their official capacities that no forgery had taken place.[212]

149. In their letter of 8 December 2014, the Claimants observed:

> Indonesia's case of "deceit" does not require mere "mistakes" to have been committed, but utter and reckless disregard for official duty by a host of Indonesian officials, including the entire Regency staff and the Regent himself.[213]

150. The State's case evolved considerably during the course of the Document Authenticity Phase. Essentially, as the Claimants sought particulars of the State's case and pointed to evidence (including internal Regency documents) to corroborate the authenticity and validity of the disputed documents, the State started implicating its own officials to fill the gaps in its case.

151. For example, when the Claimants asked if the State disputed the authenticity of the Regency seals on the disputed documents (applied over the allegedly forged signatures), the State said it did not as it has "*always regarded it as relatively easy* [...] *for an insider to misuse a stamp*".[214] Similarly, after an inspection of the licence registration book maintained by the Legal Section of the Regency revealed that the disputed General Survey licences were registered, the State said that, while it "*cannot explain how the licenses were entered into the 2007 Regency Registration Book, one could assume that Ridlatama had the support of insiders or deceived the relevant officials of the Legal Section into entering the* [...] *general survey licenses into the Registration Book*".[215]

152. The State's slide towards self-incrimination gained pace at the Hearing, where the State's most senior witness (Mr Ishak) thought that "[t]*here's some kind of corruption, some kind of nepotism between* [Mr Putra, former head of the Mining Bureau, and

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Claimants' Reply Memorial, paras. 130-131 (**Exhibit A-26**); Claimants' Post-Hearing Brief, para. 50 and footnote 205 (**Exhibit A-36**); Claimants' Reply Post-Hearing Brief, para. 24(b) (**Exhibit A-38**).

212 Claimants' letter to the Tribunal dated 8 December 2014, pages 6 and 9 (**Exhibit A-14**).

213 Claimants' letter to the Tribunal dated 8 December 2014, page 11. See also pages 5-6 and 9 (**Exhibit A-14**).

214 State's letter of 3 April 2015, page 2 (**Exhibit A-18**).

215 State's Answers to Claimant's Comments on Document Inspection and other Documents obtained through Document Production, submitted 6 July 2015, footnote 94 (**Exhibit A-27**).

Ridlatama]".[216] He also questioned the conduct of Mr Noor.[217] As counsel for the Claimants (Mr Sheppard QC) put it at the end of the Hearing:

> it is our case that even if there was to be a finding of non-authorisation, then the general survey licences and exploration licences do not infect and invalidate the exploration licences which are stand-alone administrative acts, we say that the exploitation licences perfected title, there will be other arguments made that the State is responsible for any wrongful conduct on behalf of the Regency, which is attributable to the State respondent. So if it was also an inside job, there will be legal consequences.[218]

153. In its post-Hearing brief, the State outright accused Mr Putra, saying that "[t]*here is little doubt that Ridlatama's principals had assistance from Mr. Putra in implementing their scheme*".[219] In light of this evidence, the Claimants made the following submission:

> Even if (*arguendo*) the State *had* introduced clear and convincing evidence that Ridlatama forged and fabricated the disputed documents, the State and its witnesses said that this could only have occurred with assistance from an "insider" – the immediate legal consequence being that the State would be responsible for the criminal wrongdoing of its public officials.
>
> [...]
>
> If (*arguendo*) it was found that Ridlatama did act in concert with one or more Regency insiders, the international responsibility of the State would still be engaged. First, good faith lies at the heart of FET: the fraud and forgery in question would (by its very nature) amount to *bad faith* conduct by one or more government officials, which would obviously place the State in breach of the FET standard. Second, the acts in question – and the fact they were able to occur and then go undetected for so long – would demonstrate a serious lack of transparency at the Regency (a further breach of FET). Third, the active participation of government officials in the relevant acts would amount to a clear violation of the Claimants' legitimate expectation (protected by the FET standard) that the public officials responsible for the regulation and administration of their investments in Indonesia would discharge their duties in a lawful fashion.[220]

154. The Claimants' argued that, if an "*insider*" was involved, "*the immediate legal consequence* [would be] *that the State would be responsible for the criminal*

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[216] Mr Ishak, Hearing Transcript – Day 3, page 104/24-25 (**Exhibit A-30**).

[217] See Claimants' Post-Hearing Brief, paras. 82-85 (**Exhibit A-36**).

[218] Mr Sheppard QC, Hearing Transcript – Day 7, page 193/1-11 (**Exhibit A-34**).

[219] State's Reply Post-Hearing Brief, para. 41(**Exhibit A-39**).

[220] Claimants' Post-Hearing Brief, paras. 1(g) and 77 (emphasis added) (**Exhibit A-36**).

wrongdoing of its public officials".[221] The Claimants' cited Article 7 (excess of authority or contravention of instructions) of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (**ILC Articles**),[222] which provides:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[223]

155. In its reply, the State did not deny that the involvement of Regency insiders would engage the international responsibility of the State. Instead, the State argued that, if that were the case, the Claimants would not be able to establish that they had a legitimate expectation protected by the FET standard.[224]

156. Despite the Tribunal finding that State's officials had probably done wrong – "*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*"[225] – the Tribunal did not apply the international law of State Responsibility. In not doing so, the Tribunal exceeded its powers.

157. The excess is manifest because it is "*obvious, clear or easily recognizable*"[226] from paragraph 530 of the Award. The axiomatic nature of the excess is reinforced by the fact that the only place in the Award where the ILC Articles on State Responsibility are referred to is paragraph 227, where the Tribunal recites the Claimants submissions on the legal consequences of a finding of forgery. But that paragraph refers only to Article 15 (composite internationally unlawful act). The Award makes no mention at all of Article 7 (Excess of authority or contravention of instructions), which the Claimants raised in their post-Hearing brief (in response to the evidence of State

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221 Claimants' Post-Hearing Brief, para. 1(g) (**Exhibit A-36**).

222 International Law Commission, *'Draft Articles on Responsibility of States for Internationally Wrongful Acts*', 2008, **Exhibit ALA-19**.

223 As cited in Claimants' Post-Hearing Brief, footnote 16 (**Exhibit A-36**).

224 State's Reply Post-Hearing Brief, para. 42 (**Exhibit A-39**).

225 Award, para. 476.

226 *Tulip v Turkey*, para. 56 (**Exhibit ALA-02**).

involvement that emerged at the Hearing). The excess was also "*manifest*" in the *Vivendi I* sense because the application of the international law of State responsibility was "*clearly capable of making a difference to the result*".[227] If the Tribunal applied Article 7 of the ILC Articles, or, alternatively, decided to reserve its decision on the issue of State Responsibility for briefing outside of the strict confines of the Document Authenticity Phase, the Claimants' FET claim would have survived in whole or in part.

158. The annulment decision in *Tulip v Turkey* provides some guidance in this area. In that case, the applicants requested an annulment on the basis that the tribunal failed to apply the ILC Articles (i.e. manifest excess of power) or failed to state reasons for why certain conduct was not attributable to the State (i.e. failure to state reasons). The *ad hoc* committee dismissed this application as it found that the tribunal had expressly discussed whether or not the relevant conduct was attributable to the State and had considered the commentary to the ILC Articles in its award.[228] In the Award at hand, we have neither.

c. *<u>The Tribunal failed to apply the international law of unjust enrichment</u>*

159. In relation to the Claimants' unjust enrichment claim, the Claimants contended that "[t]*he concept of unjust enrichment is recognised as a general principle of international law*"[229] and argued that they were entitled to "*compensation based on the substantial funds and effort the Claimants have invested in good faith in developing the EKCP*".[230] Relevantly, the Claimants submitted that, even in the event of a finding of forgery, "*the claim will survive on the basis that Indonesia was unjustly enriched by the Claimants' significant investment of money and resources that constitute 'investments' for purposes of jurisdiction*".[231]

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227 *Vivendi I*, paras. 86 and 115 (**Exhibit ALA-04**).

228 *Tulip v Turkey*, paras. 211-221 (**Exhibit ALA-02**).

229 Claimants' Reply Memorial, para 220 (**Exhibit A-26**) (citing *Saluka Investments BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 449).

230 Claimants' letter to the Tribunal dated 26 September 2014, page 3 (**Exhibit A-06**). See also Claimants' letter to the Tribunal dated 10 November 2014, page 3 (**Exhibit A-10**); Claimants' letter to the Tribunal dated 23 November 2014, page 10 (**Exhibit A-12**); Claimants' letter to the Tribunal dated 8 December 2014, page 13-16 (**Exhibit A-14**).

231 Claimants' letter to the Tribunal dated 8 December 2014, page 15 (**Exhibit A-14**).

160. The Claimants took on significant risk in funding general survey, exploration and ultimately exploitation activities in EKCP and invested approximately USD 70 million.[232] The Claimants also pointed to the wide range of IP that they had generated for the EKCP, including:

(a) work plans and budgets for general survey, exploration and exploitation/production;

(b) quarterly activity reports, including drilling data and results; and

(c) feasibility studies (which were expressly approved by Mr Noor in his capacity as Regent).[233]

161. As required by the terms of the EKCP licences, over the course of several years, the Claimants dutifully provided this IP to various bodies at three levels of government, including the Regency and the Province of East Kalimantan.[234]

162. The State not only received the benefit of the Claimants' significant investment of money and resources but, through the IP transfer described above, the State learned of the location of a major natural resource and source of revenue and how it may be exploited. Thus, the State was unquestionably enriched.[235]

163. The Claimants submitted that the enrichment of the State was directly at the expense and to the detriment of the Claimants, who took on the risk of investing significant money into Indonesia and finding nothing. The Claimants also emphasised that the State's enrichment was particularly unjust as the State had unlawfully revived Nusantara's expired licenses and wrongfully revoked Ridlatama's licenses (and expropriated the Claimants investments) based on contrived allegations of non-compliance with forestry laws. The Claimants stressed that a *post facto* finding of

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232 Claimants' letter to the Tribunal dated 23 November 2014, page 10 (**Exhibit A-12**); Claimants' letter to the Tribunal dated 8 December 2014, pages 16 (**Exhibit A-14**).

233 Claimants' Reply Memorial, para. 119 (**Exhibit A-26**).

234 These government bodies acknowledged receipt of these documents (see Claimants' Post-Hearing Brief, Updated Annex B) (**Exhibit A-36**).

235 Claimants' letter to the Tribunal dated 23 November 2014, page 10 (**Exhibit A-12**); Claimants' letter to the Tribunal dated 8 December 2014, pages 14-16 (**Exhibit A-14**); Claimants' Reply Post-Hearing Brief, para. 27 and footnote 193 (**Exhibit A-38**).

forgery could not provide a justification for Indonesia's actions at the time.[236] Subsequently, once the State admitted its own officials were involved in the alleged fraudulent scheme,[237] the injustice of the State being enriched became even more apparent.

164. During the debate concerning the scoping of the Document Authenticity Phase, and during the Document Authenticity Phase itself, the Claimants and the State each made numerous submissions on unjust enrichment (the Claimants count at least seven of their own submissions[238] and four submissions by the State[239]). As prescribed by PO15, the Claimants' submissions primarily focussed on the legal requirements of unjust enrichment and the nexus between this claim and the allegations of forgery. The facts that would underpin a finding of unjust enrichment (such as the particulars of the Claimants' expenditure on the EKCP site and details of the State's enrichment) were beyond the scope of the Document Authenticity Phase.

165. The Claimants draw one particular submission to the attention of the Committee:

> illegality may operate as a defence to unjust enrichment – but only where the illegal act was done by the party that brings the unjust enrichment claim. The State is not alleging that the Claimants committed any acts of forgery, so, even if there is a finding of forgery, the State will have no illegality defence to a claim for unjust enrichment.[240]

166. In the Award, the Tribunal made no finding of fraud or forgery on the part of the Claimants.[241] Despite this, and notwithstanding the volume of the parties' submissions on unjust enrichment, the Tribunal failed to address the State's unjust enrichment in the Award and did not apply the international law of unjust enrichment.

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236 Claimants' letter to the Tribunal dated 8 December 2014, pages 14-16 (**Exhibit A-14**).

237 Claimants' letter dated 8 December 2014, pages 4, 15 (**Exhibit A-14**).

238 Claimants' letter to the Tribunal dated 26 September 2014 (**Exhibit A-06**), page 3; Claimants' letter to the Tribunal dated 10 November 2014 ,page 3 (**Exhibit A-10**); Claimants' letter to the Tribunal dated 23 November 2014, page 10 (**Exhibit A-12**); Claimants' letter to the Tribunal dated 8 December 2014, pages 13-16 (**Exhibit A-14**); Claimants' Reply Memorial, paras. 219-221 (**Exhibit A-26**); Claimants' Post-Hearing Brief, para. 96(b), footnote 293 (**Exhibit A-36**); and Claimants' Reply Post-Hearing Brief, para. 27 (**Exhibit A-38**).

239 State's letter to the Tribunal dated 3 November 2014, footnote 9 and Exhibit A, pages 1-2 (**Exhibit A-9**); State's letter to the Tribunal dated 1 December 2014, pages 12-13 (**Exhibit A-13**); State's letter to the Tribunal dated 12 December 2014, pages 7-8 (**Exhibit A-15**); and State's Post-Hearing Brief, paras. 93-96 (**Exhibit A-37**).

240 Claimants' Reply Memorial, para. 221 (**Exhibit A-26**).

241 Award, para. 475.

167. As the Award does not deal with or decide on the unjust enrichment issue (see paragraph 200 *et seq* below), the excess is "*obvious, clear or easily recognizable*"[242] and therefore manifest for the purposes of Article 52(1)(d) of the ICSID Convention.

C. THE TRIBUNAL FAILED TO STATE THE REASONS ON WHICH THE AWARD WAS BASED

168. Professor Schreuer has explained the standard of reasoning required of an ICSID tribunal as follows:

> The reasons are complete if they address all arguments of the parties that were accepted as necessary or relevant for the decision. They must also address all arguments made by the parties that were rejected and which, had they been accepted, would have changed the decision's outcome.[243]

169. ICSID annulment jurisprudence confirms that a failure to state reasons may occur where a tribunal fails to address highly relevant evidence or where the tribunal appears to ignore relevant evidence which at least has the potential to be relevant to the outcome of the case.[244] For example, the committee in *TECO v Guatemala* found that the tribunal's decision was annullable under Article 52(1)(e) because the tribunal "*failed to observe evidence which at least had the potential to be relevant to the final outcome of the case*"[245] and failed to address particular evidence despite the parties' strong emphasis on it,[246] which resulted in the tribunal's line of reasoning being difficult to understand. The *TECO* committee concluded that:

> While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion.[247]

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242 *Tulip v Turkey*, para. 56 (**Exhibit ALA-02**).

243 ICSID Commentary, page 824.

244 *TECO v Guatemala*, para. 138 (**Exhibit ALA-07**).

245 *TECO v Guatemala*, para. 135 (**Exhibit ALA-07**).

246 *TECO v Guatemala*, para. 138 (**Exhibit ALA-07**). The committee took issue with the tribunal's conclusion that there was "*no sufficient evidence*" on a particular issue (paras. 130-131) when evidence on this issue existed, which led the committee to conclude that the tribunal must have ignored the evidence (para. 133).

247 *TECO v Guatemala*, para. 131 (emphasis added) (**Exhibit ALA-07**).

170. Reasons that are "*contradictory or frivolous*"[248] may also breach the minimum requirement to state reasons.

a. *The Award is inconsistent as to whether Mr Noor's evidence was disregarded*

171. In his witness statement, Mr Noor gave an account of the circumstances in which he signed the Exploitation Licences (see extract at paragraph 107 above), including that he "*assumed that all the steps of the regular process had been duly taken by the Head of the Mining and Energy Bureau* [Mr Putra]".[249]

172. In paragraph 84 of the Award, the Tribunal said it decided "*to disregard Mr. Noor's witness statement*". At paragraph 251 of the Award, the Tribunal said "[t]*he fact that Mr. Noor did not appear for questioning resulted in discarding his witness statement*."

173. However, elsewhere in the reasons stated by the Tribunal, Mr Noor's evidence was relied on or referred to by the Tribunal:

(a) Paragraph 165: in setting out the State's case in the Award, the Tribunal noted that "[w]*hile Mr. Noor testified that he did sign the Exploitation Licenses, he did so on the assumption that all proper steps had been taken by the Mining and Energy Bureau*".[250]

(b) Paragraph 512: the Tribunal concluded that "*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*".

174. The recurrence of the use of the verb "*assume*" in these paragraphs of the Award shows that the Tribunal considered (and gave weight) to Mr Noor's evidence. This directly contradicts paragraph 84 of the Award, which says the Tribunal decided "*to disregard Mr. Noor's witness statement*".

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248 *MINE v Guinea*, para. 5.09 (**Exhibit ALA-09**).

249 Witness Statement of H. Isran Noor, para. 10 (emphasis added) (**Exhibit A-04**).

250 Award, para. 165.

175. Indeed, this contradiction is so glaring that it raises the question of whether the person who wrote paragraph 512 of the Award was present at the Hearing, where Mr Noor's evidence was struck from the record.

176. According to the committee in *Continental Casualty v Argentina*:[251]

> [in order] for genuinely contradictory reasons to cancel each other out, they must be such as to be incapable of standing together on any reasonable reading of the decision. An example might be where the basis for a tribunal's decision on one question is the existence of fact A, when the basis for its decision on another question is the non-existence of fact A.[252]

177. Clearly, paragraphs 165 and 512 of the Award are incapable of standing together with paragraph 84.

178. If Mr Noor's evidence was "*disregard*[ed]",[253] it should not have been referred to in the Award *at all*, let alone given weight.

b. *The Award fails to state the reasons on which the Tribunal re-admitted Mr Noor's evidence*

179. In the alternative, if the Tribunal did not give inconsistent reasons regarding whether or not Mr Noor's evidence was on the record, then the Tribunal failed to state the reasons for its decision to re-admit Mr Noor's evidence.

c. *The Award fails to state the reasons on which the Tribunal concluded that the Infection Issue was moot*

180. The Tribunal declared that the Infection Issue was moot, saying (in paragraph 530 of the Award) that "*whatever their validity under municipal law, the Exploitation Licenses were embedded in a fraudulent scheme, being surrounded by forgeries*".[254]

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[251] *Continental Casualty Company v The Argentine Republic* (ICSID Case No. ARB/03/9), Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011 (***Continental Casualty v Argentina***) (**Exhibit ALA-20**).

[252] *Continental Casualty v Argentina*, para. 103 (**Exhibit ALA-20**).

[253] Award, para 84

[254] Award, para. 530.

181. Under Article 42(1), the Tribunal was required to assess the validity of the Exploitation Licenses primarily under Indonesian law and, if applicable, international law. Only if it found that the Indonesian law position was inconsistent with international law was the Tribunal permitted to rely on international law as the basis of its decision.

182. Thus, to dismiss the Infection Issue on the basis of international law, the Tribunal was first required to provide reasons as to whether the Exploitation Licences were valid under Indonesian law. It did not. The recourse to international law by the Tribunal presupposes that there was a conflict between international law and domestic law. A serious deficiency in reasoning exists as to whether there was such a conflict.

183. The Tribunal's decision that the Infection Issue was moot equates to a failure to state its reasons as to the validity of the Exploitation Licenses and why international law over-rode Indonesian law.

184. Further, the Tribunal offered no explanation for its conclusion that "*international public policy*" was engaged to the exclusion of Indonesian law.[255] Needless to say, the idea that due diligence is a matter of international public policy is a radical proposition.

185. As in *Venezuela Holdings*, paragraphs 529 to 531 of the Award are "*so seriously deficient both in their reasoning and in the choice and application of the appropriate sources of law under the governing Bilateral Investment Treaty as to give rise to grounds for annulment under Article 52(1) of the ICSID Convention*".[256]

d. *The Award fails to state the reasons on which the Tribunal found the Claimants' due diligence was defective*

186. In their submissions on *Minnotte*, the Claimants made the following comments regarding due diligence:

> [International] tribunals have found that due diligence conducted by investors may include determining the extent of country risk and regulatory risk,

[255] Award, para. 508.

> conducting thorough background checks before deciding to invest, ensuring that the relevant investment complies with the law, obtaining regulatory assurances from the relevant host government agencies in respect of the investment and any applicable laws and preparing an appropriate business plan. These steps are consistent with commercial practice on due diligence. Risk-based due diligence involves "steps companies should take to identify and address actual or potential risks in order to prevent or mitigate adverse impacts associated with their activities." However, in most cases, the scope of due diligence will be a matter for the business concerned. Where the level of due diligence is at issue, the appropriate measure must be what a reasonably prudent investor would do in the circumstances[257] (internal citations omitted)

187. The legal authorities on which the Claimants relied in the above submission included numerous arbitral awards and also a due diligence guide prepared by the Organisation for Economic Cooperation and Development.[258]

188. While the Claimants did not introduce anything like the volume of evidence on record needed to address the *Minnotte* factors, the Claimants were able to point to the various lawyers and law firms – including the State's own counsel in the arbitration (DNC Advocates at Work) – who had conducted due diligence and note that "[n]*one of these lawyers' due diligence reports refer to forensic examination of licences or other government documents – evidence that shows forgery was not a known business risk at the time* [...]."[259]

189. In its explanation of how it would apply *Minnotte* to the case at hand, the Tribunal said:

> Considering the specific circumstances of the present case, the Tribunal will assess the standard of willful blindness – also referred to as "conscious disregard" or "deliberate ignorance" – by focusing on the level of institutional control and oversight deployed by the Claimants in relation to the licensing process, 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 appropriate corrective steps.[260]

190. The Award states the adverse findings that the Tribunal made concerning the Claimants' due diligence, including that the Claimants' "*supervision of the licensing*

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257 Claimants' Submissions on *Minnotte*, para. 11 (**Exhibit A-42**).

258 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition (OECD, 2016), pages 8 and 13-14 (**Exhibit ALA-12**).

259 Claimants' Submissions on *Minnotte*, para. 14 (**Exhibit A-42**).

260 Award, para. 504 (emphasis added).

process"[261] was deficient and, incredibly, that the Claimants' due diligence did not include an assessment of the "*authenticity of the disputed signatures*".[262]

191. But the Award does not state the benchmark against which the Tribunal assessed the Claimants' due diligence. The State led no evidence of the what the due diligence program of a "*reasonable investor in the Indonesian mining sector*" included at the time the Claimants made their investments, let alone evidence to show that there was a due diligence practice of conducting *forensic examinations* of signatures on official State documents.

192. The Tribunal therefore concluded that the Claimants' due diligence was beneath the standard required of a "*reasonable investor in the Indonesian mining sector*" without evidence of what that standard entailed. The *Minnotte* factors were judged in a vacuum. Accordingly, the Award is arbitrary on this critical point (this is without considering the fact that the Tribunal denied the Claimants the opportunity to present evidence on this standard and the full extent of their actual due diligence program). Arbitrariness of this kind was recognised as a basis for annulment in *Klöckner I.*[263]

e. *The Award fails to state the reasons on which the Tribunal reversed its order that the State produce certain documents*

193. The Claimants requested that the State produce the files created by the police during their investigations into the EKCP. The State opposed on the basis of confidentiality.[264] In Procedural Order No. 16 (**PO16**), the Tribunal rejected that ground of opposition on the basis that the police investigations were directly connected to the relevant issues and ordered production.[265] After being ordered to produce, the State made further objections.[266] Following two rounds of submissions,[267]

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261 Award, para. 519.

262 Award, para. 526.

263 *Klöckner I*, para. 52(e) ("*It is possible to have different opinions in these delicate questions, or even, as do the Applicant for Annulment or the Dissenting Opinion, to consider the Tribunal's answers to them not very convincing, or inadequate. But since the answers seem tenable and not arbitrary, they do not constitute the manifest excess of powers which alone would justify annulment under Article 52(1)(b)*") (**Exhibit ALA-03**).

264 PO16, Annex A, State's Objections to Claimants' DPR No. 11 (**Exhibit A-19**).

265 PO16, Annex A, Tribunal's Decision on Claimants' DPR No. 11 (**Exhibit A-19**).

266 The State called the Tribunal's order "*inappropriate*" and "*unfair*", again cited confidentiality and also claimed that they lacked control of the documents (State's letter to the Tribunal dated 20 April 2015, pages 2-5) (**Exhibit A-20**).

the Tribunal declined to decide the issue, instead suggesting it would take the parties' arguments regarding production and adverse inferences into account "*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*".[268]

194. The Tribunal did not give any reasons for deferring its decision on these key documents. Following Article 3.7 of the IBA Rules, the Tribunal should have ruled on this document production objection in a timely fashion.[269] Without a ruling on these documents, the Claimants were placed in a forensic limbo at the critical pre-Hearing stage of the proceedings.

195. In their post-Hearing brief, the Claimants requested the Tribunal draw an adverse inference that "[the Tribunal] *has heard the best evidence there is for the involvement of Ridlatama in this affair* [and] *had the State produced the police files, the information contained in those files would not have supported the forgery and fraud allegations the State makes against Ridlatama in this forum*"[270] and that "*no direct evidence of fraud or corruption by Ridlatama has been found*".[271] Indeed, the disadvantage suffered by the Claimants as a result of not having access to the police

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267 The Claimants challenged this objection, stressing that the question of confidentiality was *res judicata* and issue of control was irrelevant given the police were an organ of the State (Claimants' letter to the Tribunal dated 24 April 2015, paras. 2 and 8-12 (**Exhibit A-21**)). The Claimants subsequently noted State's document production window had closed and informed the Tribunal that they were awaiting the Tribunal's decision (and that pending this decision their rights were reserved) (Claimants' letter to the Tribunal dated 29 April 2015, page 2 (**Exhibit A-22**)). The State subsequently objected a second time (State's letter to the Tribunal dated 30 April 2015, pages 2 and 9 (**Exhibit A-23**)) to which the Claimants again responded, referring to their earlier submissions and again reserving their rights (Claimants' letter to the Tribunal dated 5 May 2015, page 6 (**Exhibit A-24**)).

268 Tribunal's letter to the parties dated 12 May 2015, page 2 (**Exhibit A-25**).

269 International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) (**IBA Rules**) (**Exhibit ALA-13**). The Tribunal had previously ordered that Articles 3 and 9 of the IBA Rules shall guide the Tribunal and the parties regarding document production (Procedural Order No. 1, para. 15.3 (**Exhibit A-03**)).

270 Claimants' Post-Hearing Brief, para. 27 (**Exhibit A-36**). The Claimants further explained that Supporting this inference is the fact that the prior investigations conducted by the Sangatta Police into the Ridlatama Group found "*no fraudulent or discrepancies on the legality of the companies' corporate and mining license documents*", and the fact that none of the State's police investigations have led to any prosecution of Ridlatama officers or personnel. See also Claimants' letter to the Tribunal dated 24 April 2015, paras. 12 and 18 (**Exhibit A-21**).

271 Claimants' Post-Hearing Brief, para. 74 (**Exhibit A-36**).

files was a key theme in the Claimants' post-Hearing briefs, especially as the State revised its case and positively accused Churchill of wrongdoing.[272]

196. The Tribunal ultimately declined to draw these (or any) adverse inferences against the State. The Award does not State the reasons for the Tribunal's decision in this regard. Paragraph 249 simply states that the Tribunal "*does not deem it necessary to draw adverse inferences*" (emphasis added). The Tribunal did not state its reasons for why it "*accept*[ed] *the invocation of privilege by the Respondent in relation to the Police files concerning investigations into the alleged forgery* [...]".[273]

197. The Tribunal was bound to state the reasons on which this part of the Award was based in any event. The Tribunal's duty to give reasons was heightened by the fact that, in accepting the State's claim to privilege on these critical documents, the Tribunal was partially reversing PO16.[274]

f. *The Award fails to state the reasons on which the Claimants' State responsibility claim was dismissed*

198. The Tribunal manifestly exceeded its powers by failing to apply the international law of State responsibility. The pleadings show that State responsibility was always part of the Claimants' case and that it came very much into focus when the State began to accuse its own senior officials of involvement in mass fraud.

199. The parties made a number of submissions on this issue, yet the Tribunal completely failed to engage with the Claimants' State responsibility claim in the Award, neglecting to even refer to Article 7 (excess of authority or contravention of instructions) of the ILC Articles in its recitation of the Claimants' case (see paragraph 147 *et seq* above).

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[272] See Claimants' Post-Hearing Brief, para. 85(b) (**Exhibit A-36**) ("*The State's refusal to produce the police and* [corruption commission] *files has severely limited the Tribunal's ability to inquire into the possibility that Regency officials acted in a corrupt fashion in connection with the EKCP*"); Claimants' Reply Post-Hearing Brief, para. 2 (**Exhibit A-38**) ("*In circumstances where the State has refused to produce its police files, its ever-expanding and evolving allegations of mass fraud cannot be taken seriously. The State is effectively asking the Tribunal to make findings that its own police – who the State says have responsibility for 'making the initial determination as to whether criminal prosecution is appropriate' – have been unable to make*"); Claimants' Reply Post-Hearing Brief, footnote 7 (**Exhibit A-38**) ("*The State's claim that 'these matters remain under investigation by the police' is clearly a tactic to delay the admission that the police investigations have yielded no evidence of wrongdoing by Ridlatama or the Claimants*").

[273] Award, para 250.

[274] PO16, Annex A, Tribunal's Decision on Claimants' DPR No. 11 (**Exhibit A-19**).

g. ***<u>The Award fails to state the reasons on which the Claimants' unjust enrichment claim was dismissed</u>***

200. In paragraph 494 of the Award, the Tribunal stated that establishing the "*the nexus between the fraud and the claims*" was part of determining the "*legal consequences of fraudulent conduct*" in an investment treaty arbitration.

201. In paragraph 503 of the Award (in the section of the Award headed "*Assessment*"), the Tribunal said as follows regarding the *Minnotte* bar:

> The Claimants suggested, and the Respondent did not object, that in an admissibility context *Minnotte* spells out a three-step analytical inquiry of whether a wrongdoing was committed by a third party, whether that wrongdoing is connected to the investor's claims, and the "nature of this connection and the extent to which it impacts upon the investor's good faith".[275]

202. While the Award shows that the Tribunal accepted that it was required to conduct this "*three-step analytical inquiry*", the Award also shows that the Tribunal failed to do so.

203. In respect of the Claimants' unjust enrichment claim, the Tribunal simply said this (in paragraph 530 of the Award):

> 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.[276]

204. First, this is the language of assertion, not legal reasoning. It is little more than a mirror of the State's own simplistic case (explained in paragraph 478 of the Award: "*In short,* [the State] *asserts that 'Claimants cannot bring claims on the basis of forged documents'*").

205. Second, paragraph 530 fails to deal with the fundamental question of *nexus*. Applying the "*three-step analytical inquiry*" set out in paragraph 503 of the Award (agreed by the parties) the Tribunal was bound to state (i) how the third-party wrongdoing was connected to Claimants' unjust enrichment claim and (ii) the nature of this connection and the extent to which it impacted upon the Claimants' good faith. Plainly, it was not

[275] Award, para. 503

[276] Award, para. 530.

enough for the Tribunal to simply say that the Claimants' unjust enrichment claims were "*tainted*" by "*force of consequence*".

h. *The Award fails to state the reasons on which the Claimants' IP claim was dismissed*

206. From the beginning of the case, the Claimants emphasised the importance of IP to their business and their claim. In their Memorial on Jurisdiction and the Merits, the Claimants included "*the feasibility studies and other intellectual property created in connection with the* [EKCP]"[277] in the description of the property the subject of their claims, noted that they had "*achieved the discovery and detailed mapping and assessment of the coal resource, and made thorough preparations for its extraction, including a highly detailed feasibility study*",[278] and explained their exploration and feasibility work in detail.

207. The Tribunal upheld its jurisdiction, including its jurisdiction *ratione materiae* with respect to the Claimants' IP investments (one of the classes of "*investment*" protected under the UK-Indonesia BIT and the Australia Indonesia BIT).

208. In the Claimants' Reply Memorial (during the Document Authenticity Phase), the Claimants explained that their IP claim would survive a finding of forgery because the relevant items of IP "*will remain legally valid* [...] *only their value could change*".[279]

209. Counsel for the State conceded that at least one major component of the Claimants' IP claim – their feasibility studies – would survive a finding of forgery ("*the only thing that Claimants will have, if anything, will be their feasibility studies*"[280]).

210. The Award noted the Claimants' argument that their claims in respect of their feasibility studies and other IP would survive a finding of forgery.[281] However, the Award contains nothing further on the Claimants' IP claim. On the Tribunal's own reasoning, it was incumbent on the arbitrators to explain how the "*three-step*

277 Claimants' Memorial on Jurisdiction and the Merits, para 295 (**Exhibit A-02**).

278 Claimants' Memorial on Jurisdiction and the Merits, para 75 (**Exhibit A-02**).

279 Claimants' Reply Memorial, para 233(c) (**Exhibit A-26**).

280 Unofficial Transcript of 21 October 2014 Telephone Conference (Ms. Frutos-Peterson, 1:18:52) (**Exhibit A-07**).

281 Award, para 217.

analytical inquiry" (set out in paragraph 503 of the Award) led to the conclusion that the Claimants' IP claim was barred. The Tribunal did not do so.

211. The Claimants' IP claim was, instead, disposed of as part of the Tribunal's broad conclusion 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*".[282]

212. If that is the standard of reasoning parties should expect from ICSID tribunals, investors – especially those in the mining sector – will rightly lose confidence in the system. The ICSID Convention was intended to promote foreign investment but awards like the one in this case may well deter it, especially in sectors dependent upon technology transfer.

i. ***The Award fails to state the reasons on which the Claimants' denial of justice claim was dismissed***

213. In the Claimants' Reply Memorial, the Claimants argued that their denial of justice claim would survive and remain to be adjudicated:

> The absence of forgery was not a "premise" of the Claimants' action in the Administrative Court. And, even if it was, and the Tribunal was now to find that a forgery occurred, the denial of justice claim would survive. This is because denial of justice is, by its very nature, procedural in focus.
>
> Even if forgery was part of the substantive case put to the administrative court, that would not bear on the key question of whether or not the way the court conducted the proceedings was offensive to prevailing international norms of due process (which it was). Indeed, if an allegation as serious as forgery was part of the substantive case the Indonesian courts were handling, then there was an even greater need for a fair and open process. In other words, if the State is right then that only aggravates the denial of justice that the Claimants received.[283]

214. In paragraph 486 of the Award, the Tribunal noted that the Claimants had argued their denial of justice claim "*would in any event survive a finding of forgery*".

215. However, the Tribunal's reasons (in the section of the Award headed "Assessment") make no mention of the Claimants' denial of justice claim at all. Like the Claimants'

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[282] Award, para 529.

[283] Claimants' Reply Memorial, paras. 254-255 (**Exhibit A-26**).

IP claim, the denial of justice claim instead appears to have been dismissed *en bloc* in paragraph 529 of the Award.

216. If this is the basis for the Tribunal's ruling on the Claimants' denial of justice claim, it is well beneath the standard of reasoning that the Tribunal was bound to provide. It does not address the arguments that the Claimants made in their Reply Memorial. It also does not explain the operation of the *Minnotte* bar, namely (i) how the third-party wrongdoing was connected to denial of justice claim or (ii) the nature of this connection and the extent to which it impacted upon the Claimants' good faith.

217. The absence of reasons for the Tribunal's dismissal of the Claimants denial of justice claim is rendered all the more surprising when one considers what that, in PO12, the Tribunal said "*the alleged denial of justice before Indonesian courts would* prima facie *survive*".[284]

VI. REQUEST FOR STAY OF ENFORCEMENT OF THE AWARD

218. In accordance with Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules, the Claimants request a provisional stay of enforcement of the Award. The Claimants respectfully request that, in accordance with Rule 54(2) of the ICSID Arbitration Rules, the Secretary-General inform Indonesia that the Award has been provisionally stayed.

219. In addition, as will be explained by the Claimants at the appropriate stage of the proceedings, there are reasons justifying an order to continue the provisional stay until the Committee has decided this Application for annulment.

VII. REQUEST FOR RELIEF

220. The Claimants respectfully request that the Committee:

(a) STAY the enforcement of the Award pending the Committee's decision on this Application;

(b) ANNUL the Award in its entirety; and

[284] PO12, para. 47 (**Exhibit A-08**).

(c) ORDER Indonesia to pay all costs of these annulment proceedings, including the costs of the Claimants' legal representation, with interest.

In the meantime, the Claimants reserve their rights to add to, reformulate and expand upon the grounds above and file further authorities in due course.

Respectfully submitted on behalf of the Claimants on 31 March 2017.

Audley Sheppard QC
Ben Luscombe
Ignacio Suarez Anzorena
Dr Sam Luttrell
Dr Romesh Weeramantry
Montse Ferrer
Clementine Packer

VIII. INDEX: CLAIMANTS' FACTUAL EXHIBITS

Exhibit No.	Description of Document	Date
A-1	Churchill's Request for Arbitration	22 May 2012
A-2	Claimants' Memorial on Jurisdiction and the Merits	13 March 2013
A-3	Procedural Order No. 1	6 December 2012
A-4	Witness Statement of H. Isran Noor	23 September 2014
A-5	State's Application for Dismissal of the Claimants' Claims based on Forged and Fabricated Ridlatama Mining Licences (**Forgery Dismissal Application**)	24 September 2014
A-6	Claimants' letter to the Tribunal regarding the State's forgery allegations	26 September 2014
A-7	Unofficial transcript of 21 October 2014 Telephone Conference	21 October 2014
A-8	Procedural Order No. 12 – Procedural Treatment of the State's Application for Dismissal of Claims (**PO12**)	27 October 2014
A-9	State's letter to the Tribunal regarding reconsideration of PO12 Exhibit A: Non-Viability of Claimants' Claims based on Finding of Forgery of Ridlatama Licenses (**State's claim impact table**)	3 November 2014
A-10	Claimants' letter to the Tribunal regarding State's request for reconsideration of PO12	10 November 2014
A-11	Procedural Order No. 13 – State's Request for Reconsideration of Procedural Order No. 12 (**PO13**)	18 November 2014
A-12	Claimants' letter to the Tribunal regarding reconsideration of PO13	23 November 2014
A-13	State's letter to the Tribunal regarding Claimants' request for reconsideration of PO13	1 December 2014
A-14	Claimants' letter to the Tribunal commenting on State's letter of 1 December 2014	8 December 2014
A-15	State's letter to the Tribunal regarding Claimants' request for reconsideration of PO13	12 December 2014

Exhibit No.	Description of Document	Date
	Annex 1: Claimants' Theories of Liability (Estoppel, Good Faith and Unjust Enrichment)	
A-16	Procedural Order No. 15 – Claimants' Request for Reconsideration of Procedural Order No. 13 (**PO15**)	12 January 2015
A-17	State's Request for Leave to file the Purported Recommendation and Supporting Material for Additional Suspect Documents	11 March 2015
A-18	State's letter to the Tribunal regarding official seals	3 April 2015
A-19	Procedural Order No. 16 – Document inspection and document production (**PO16**) Annex A: Tribunal's Decision on Claimants' on request for production of documents in the Document Authenticity Phase	6 April 2015
A-20	State's letter to the Tribunal objecting to the Tribunal's document production orders	20 April 2015
A-21	Claimants' letter to the Tribunal regarding State's objections to the Tribunal's document production orders	24 April 2015
A-22	Claimants' letter to the Tribunal regarding end of document production period	29 April 2015
A-23	State's letter to the Tribunal commenting on Claimants' letters of 24 April 2015 and 29 April 2015	30 April 2015
A-24	Claimants' letter to the Tribunal responding to State's letter of 30 April 2015	5 May 2015
A-25	Tribunal's letter to the parties regarding State's objections to the Tribunal's document production orders	12 May 2015
A-26	Claimants' Reply to State's Application for Dismissal of the Claimants' Claims based on Forged and Fabricated Ridlatama Mining Licences (**Reply Memorial**) Annex A: Disputed Documents Annex B: State Recognition Table Annex C: Table of Irregularities	29 May 2015
A-27	State's Answers to Claimant's Comments on Document Inspection and other Documents obtained through Document Production	6 July 2015

Exhibit No.	Description of Document	Date
A-28	Hearing Transcript – Day 1	3 August 2015
A-29	Hearing Transcript – Day 2	4 August 2015
A-30	Hearing Transcript – Day 3	5 August 2015
A-31	Hearing Transcript – Day 4	6 August 2015
A-32	Hearing Transcript – Day 5	7 August 2015
A-33	Hearing Transcript – Day 6	8 August 2015
A-34	Hearing Transcript – Day 7	10 August 2015
A-35	Procedural Order No. 20 – Post-Hearing Matters (**PO20**)	20 August 2015
A-36	Claimants' Post-Hearing Brief Updated Annex B	20 October 2015
A-37	State's Post-Hearing Brief	20 October 2015
A-38	Claimants' Reply Post-Hearing Brief	17 November 2015
A-39	State's Reply Post-Hearing Brief Annexes	17 November 2015
A-40	Claimants' Amended Costs Submissions	11 December 2015 (as amended on 20 April 2016)
A-41	Tribunal's letter to the parties (***Minnotte* direction**)	9 September 2016
A-42	Claimants' Submissions on *Minnotte v Poland*	23 September 2016
A-43	State's Submissions on *Minnotte v Poland*	27 September 2016
A-44	Claimants' Reply Submissions on *Minnotte v Poland*	11 October 2016
A-45	State's Reply Submissions on *Minnotte v Poland*	11 October 2016
A-46	Tempo.Co, 'Indonesia Wins International Tribunal against Churchill Mining' (8 December 2016)	8 December 2016

IX. INDEX: CLAIMANTS' LEGAL AUTHORITIES

Exhibit No.	Description of Document
ALA-1	*David Minnotte & Robert Lewis v Republic of Poland* (ICSID Case No. ARB (AF)/10/1), Award, 16 May 2014
ALA-2	*Tulip Real Estate and Development Netherlands B.V. v Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment, 30 December 2015
ALA-3	*Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais S.A.* (ICSID Case No. ARB/81/2), Decision on Annulment, 3 May 1985
ALA-4	*Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002
ALA-5	*Caratube International Oil Company LLP v The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision on Annulment, 21 February 2014
ALA-6	*Victor Pey Casado and President Allende Foundation v Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Application for Annulment of the Republic of Chile, 18 December 2012
ALA-7	*TECO Guatemala Holdings LLC v Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016
ALA-8	*Fraport AG Frankfurt Airport Services Worldwide v The Philippines* (ICSID Case No ARB/03/25), Decision of the Annulment Committee, 23 December 2010
ALA-9	*Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on the Annulment Application of Caratube International Oil Company LLP, 14 December 1989
ALA-10	Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2013) (excerpts)
ALA-11	*Azurix Corp. v The Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Application for Annulment of the Argentine Republic, 1 September 2009
ALA-12	ICSID Convention, Regulations and Rules, *'Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States'*, International Bank for Reconstruction and Development, 18 March 1965
ALA-13	*Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012

ALA-14	*Vestey Group Ltd. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/06/4), Award, 15 April 2016
ALA-15	*Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015
ALA-16	*Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Award, 9 October 2014
ALA-17	*Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Annulment, 9 March 2016
ALA-18	Zachary Douglas, *'The International Law of Investment Claims'* (Cambridge University Press, 2009)
ALA-19	International Law Commission, *'Draft Articles on Responsibility of States for Internationally Wrongful Acts'*, 2008
ALA-20	*Continental Casualty Company v The Argentine Republic* (ICSID Case No. ARB/03/9), Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, 16 September 2011
ALA-21	OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition (OECD, 2016)
ALA-22	International Bar Association Rules on the Taking of Evidence in International Arbitration (2010)