

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

PROCEDURAL ORDER NO. 17

Claimants' Second Document Production Request

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

Secretary of the Tribunal

Mr. Paul-Jean Le Cannu

Assistant to the Tribunal

Mr. Magnus Jesko Langer

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I. PROCEDURAL BACKGROUND

1. With reference to their reservation of rights in their letter of 18 March 2015, on 29 April 2015, the Claimants filed a Second Request for Production of Documents in Document Authenticity Phase (the “Second Request”). On 30 April 2015, the Tribunal invited the Respondent to provide its views on the admissibility of the Second Request by 4 May 2015, which it did. While agreeing to produce documents responsive to requests Nos. 2 and 6, as well as documents from the Nusantara Group responsive to requests Nos. 1, 3, and 4, the Respondent objected to the admissibility of the Second Request essentially because it was untimely, as the Claimants had sufficient knowledge of the facts at issue to ask for these documents in their first document production request (the “First Request”). The Respondent also objected that the requested documents are broad and thus too burdensome.
2. Having considered the elements on record, the Tribunal (i) reserved its decision on the admissibility of the Second Request, and (ii) invited the Parties to address the merits of the requests and, in this context, add any further observations they deemed appropriate on timeliness, especially on whether the Claimants could have made these requests in the First Request.
3. In accordance with the directions of the Tribunal, the Respondent filed its objections on 19 May 2015 and the Claimants their replies on 25 May 2015.
4. The present Order deals with the Second Request and addresses first its admissibility (II) and then the applicable standards (III), before reaching its decision (IV).

II. ADMISSIBILITY

5. The Tribunal notes that, on 11 March 2015, two days before the Claimants submitted their First Request to the Respondent, the Respondent requested leave to file additional evidence into the record, including new documentation, new witness statements and a new expert report. While the Claimants agreed to that course of action, they reserved their rights to file additional document production requests in their letter of 18 March 2015. The Respondent filed its additional witness statements on 3 April 2015 and the

additional expert report on 27 April 2015. The Claimants filed their Second Request on 29 April 2015.

6. This sequence shows that the Claimants filed the Second Request without delay following the filing of the Respondent's additional witness statements and expert reports. That said, it remains to be seen whether the documents sought in the Second Request could have been requested as part of the First Request. The Tribunal will review this issue on a case by case basis taking into account the reasons for not having requested the documents in the First Request. The Tribunal's findings in that regard are set forth in Annex A of the present Order.

III. APPLICABLE STANDARDS FOR DOCUMENT PRODUCTION

7. The Tribunal incorporates by reference the standards for document production set out in Section II of Procedural Order No. 5. Accordingly, the Tribunal will seek guidance from the 2010 IBA Rules on the Taking of Evidence in International Arbitration. In particular, the Tribunal will rule on the Parties' requests taking into account (i) the *prima facie* relevance of the request (which includes the relevance to the dispute and materiality to the outcome); (ii) the specificity of the request, (iii) whether the requested documents are likely to exist and to be within the possession, custody or control of the requested Party; and (iv) any counterbalancing considerations, such as legal privileges, confidentiality, and the burden which production would impose on the requested Party.
8. The Claimants' document production requests are addressed in Annex A of the present Order.

IV. ORDER

9. In the application of the relevant standards and for the reasons set forth in the Redfern Schedule attached as Annex A, the Tribunal:

- (1) Takes note that no decision is required regarding the Claimants' requests Nos. 1, 2, and 7;
- (2) Grants the Claimants' requests Nos. 3, 4, 5, 6, and 8, with the scope specified in the Redfern Schedule attached as Annex A; and
- (3) Denies all other requests.

On behalf of the Tribunal

[Signed]

Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 2 June 2015