

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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

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**PROCEDURAL ORDER NO. 15**

**Claimants' Request for Reconsideration of Procedural Order No. 13**

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. On 23 November 2014, Churchill Mining Plc and Planet Mining Pty Ltd (the “Claimants”) filed a request to reconsider the Tribunal’s decision in Procedural Order No. 13 (“PO13”) and reinstate Procedural Order No. 12 (“PO12”), thereby reversing the bifurcation of the forgery issue (the “Request”).
2. On 24 November 2014, the Tribunal invited the Republic of Indonesia (“Indonesia” or the “Respondent”) to submit its comments on the Request by 1 December 2014. More specifically, the Tribunal invited Indonesia (i) to comment on whether PO13 should be reconsidered and (ii) in the event that the Tribunal were to reconsider its order, to comment on the Claimants’ submissions in support of not bifurcating the forgery allegations.
3. The Respondent filed its comments on 1 December 2014. On 2 December 2014, the Claimants requested that the Tribunal afford each side an additional opportunity to comment, which the Tribunal did by inviting the Claimants to submit any further comments by 8 December 2014 and the Respondent to do so by 12 December 2014.
4. The Claimants filed their additional comments on 8 December 2014 and the Respondent its further comments, accompanied by one annex, on 12 December 2014.

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

### **1. Position of the Claimants**

5. The Claimants urge the Tribunal to reconsider PO13 and to reinstate PO12. For the Claimants, PO13 is legally unjustified and was issued “in clear contravention of the Claimants’ due process rights”.<sup>1</sup> In essence, the Claimants’ arguments are that (i) Indonesia never met the legal standard for bifurcating the forgery issue, (ii) the Tribunal ruled correctly in PO12 that several merits issues would survive a ruling upholding Indonesia’s forgery allegations, and (iii) the issuance of PO13 violates the Claimants’ fundamental rights to be heard and treated equally.

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<sup>1</sup> Claimants’ letter of 23 November 2014, p. 1.

6. Relying on cases, the Claimants argue first that Indonesia did not satisfy the legal standards for bifurcating the forgery issue, since resolution of the forgery issue “is *not* dispositive of the case”.<sup>2</sup> Stressing that the Tribunal has not yet been fully briefed on the fate of the claims in case of a finding of forgery, the Claimants note that they have on various occasions explained that bifurcation would not serve efficiency<sup>3</sup> since an additional merits phase would in any event be required. For instance, the Claimants explained at the telephone hearing on 21 October 2014 that (i) third party wrongdoing regarding the licenses would not necessarily dispose of the licenses under Indonesian or international law; (ii) many documents relied upon by the Claimants, in particular the exploitation licenses, were not impugned by Indonesia; and (iii) good faith investments are in any event recoverable. The Claimants further state that they also raised their estoppel argument at the telephone hearing, which they again reiterated in their letter of 10 November 2014 responding to Indonesia’s request for reconsideration of PO12.<sup>4</sup> For the Claimants, bifurcation would also be inefficient in light of the inextricable link between their estoppel and good faith arguments and the “legitimacy of the underlying licenses and with complex merits defences that Indonesia is bound to raise to such arguments”.<sup>5</sup>
7. According to the Claimants, Indonesia “offered *no answer*” on any of these issues and the Tribunal “simply ignored” the Claimants’ unchallenged positions when issuing PO13, relying instead on the table appended to Indonesia’s letter of 3 November 2014. That table only addresses the claims as they were formulated in the Request for Arbitration and Memorial on the Merits prior to Indonesia’s submissions on forgery. Accordingly, the Claimants disagree with the Tribunal’s conclusion in PO13 that they did not address the Tribunal’s question about the fate of their claims in the event that the forgery allegations are ultimately upheld. For the Claimants, the Tribunal apparently ruled on the matters in dispute “after a single round of correspondence

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<sup>2</sup> *Id.*, pp. 2-3, referring to *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, para. 12; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, para. 10; and *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on the Respondent’s Request for Bifurcation under Article 41(2) of the ICSID Convention, 2 November 2012, para. 30.

<sup>3</sup> The Claimants point to their letter of 26 September 2014, p. 3; and to the telephone hearing on 21 October 2014.

<sup>4</sup> Claimants’ letter of 23 November 2014, pp. 3-4, referring to Claimants’ letter of 10 November 2014, p. 3.

<sup>5</sup> Claimants’ letter of 23 November 2014, p. 5.

concerning a challenge to a procedural order”, thus depriving the Claimants of their due process right to be heard and to make their case.<sup>6</sup>

8. More specifically, given the “limited procedural purpose of the enquiry” and the Claimants’ statement that they would further elaborate in due time on the survival of their claims, the Claimants could not have been expected to provide more detailed explanations before their Reply Memorial. According to the Claimants, their “legitimate procedural expectation was that they would only be required to address the forgery allegations, absent determination that it should be addressed as a preliminary issue, following receipt of the Respondent’s pleading on the matter”.<sup>7</sup>
9. The Claimants further substantiate the submission that their case remains to be determined even if there were a finding of forgery. While rejecting Indonesia’s forgery allegations and calling into doubt the veracity of the testimony of Indonesia’s witnesses, the Claimants provide the following non-exhaustive bases for their claims in case of forgery: (i) estoppel, (ii) right to recovery of good faith investments, (iii) validity of exploitation licenses, and (iv) fair and equitable treatment.
10. *First*, Indonesia should be estopped from arguing that the Claimants’ mining rights are invalid or that the Claimants are otherwise “barred from presenting their treaty claims or claims to compensation in respect of their investments”.<sup>8</sup> The Claimants are “good faith investors” that invested large sums of money into Indonesia “with clean hands”.<sup>9</sup> The Claimants stress that, in making and further pursuing their investment, they relied in good faith on the following facts and documents: (i) the Bawasda report,<sup>10</sup> (ii) the investigation discharge of the Indonesian police,<sup>11</sup> (iii) the signed and stamped receipts in respect of work plans, budgets, and quarterly reports,<sup>12</sup> (iv) the SKIP permits, permission for the port terminal, as well as the presence of officers at the mining project,<sup>13</sup> (v) the 2007 Staff Analysis and letter from the Ministry of Energy and

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<sup>6</sup> *Id.*, p. 5.

<sup>7</sup> *Id.*, p. 4.

<sup>8</sup> *Id.*, p. 7.

<sup>9</sup> *Id.*, p. 6.

<sup>10</sup> Claimants’ letter of 23 November 2014, p. 7; Claimants’ letter of 8 December 2014, pp. 6-8.

<sup>11</sup> Claimants’ letter of 23 November 2014, p. 7; Claimants’ letter of 8 December 2014, pp. 8-10.

<sup>12</sup> Claimants’ letter of 23 November 2014, pp. 7-8; Claimants’ letter of 8 December 2014, p. 10.

<sup>13</sup> Claimants’ letter of 23 November 2014, p. 8.

Mineral Resources,<sup>14</sup> and generally (vi) the conduct of the Regent of East Kutai, in particular in his approval of feasibility studies and issuance of the exploitation licenses.<sup>15</sup> Indonesia makes “a distinction without a difference” when arguing that the representations were not directed at the Claimants, but at the Ridlatama companies, since the Claimants were entitled to rely on them.<sup>16</sup> In sum, Indonesia’s conduct “cumulatively and consistently” confirms that the Claimants’ mining rights were valid and any finding of forgery would leave these claims unaffected. Accordingly, estoppel “bars claims of forgery at their inception”.<sup>17</sup>

11. *Second*, the Claimants argue that they would in any event be entitled to recover their good faith investments on the basis of the principle of unjust enrichment. Indonesia cannot be allowed “to reap substantial benefits” despite having committed various treaty breaches.<sup>18</sup>
12. *Third*, Indonesia does not dispute the validity of the exploitation licenses, arguing only that they have been “issued due to deceit”. In this respect, the Claimants reiterate that it is not established as a matter of Indonesian or international law that third party wrongdoing invalidates the exploitation licenses. In any event, any alleged deceit was, if at all, carried out by Indonesia’s public servant, Mr. Djaja Putra, not by the Claimants. The latter were entitled to rely on the validity of the governmental act in issuing the exploitation licenses.<sup>19</sup>
13. *Fourth*, the Claimants contend that their fair and equitable treatment claim would survive any finding of forgery since Indonesia’s conduct created legitimate expectations that led the Claimants to disburse funds over several years “in a context where the forgeries had nothing to do with Claimants or their employees”.<sup>20</sup> In this respect, the Claimants in particular argue that the Bawasda report and the East Kutai police reports constitute definitive, unambiguous and repeated assurances that no forgery existed.<sup>21</sup> Indonesia’s “multifaceted supportive conduct” generated

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<sup>14</sup> Claimants’ letter of 23 November 2014, pp. 8-9; Claimants’ letter of 8 December 2014, pp. 10-11.

<sup>15</sup> Claimants’ letter of 23 November 2014 p. 9; Claimants’ letter of 8 December 2014, pp. 11-12.

<sup>16</sup> Claimants’ letter of 8 December 2014, p. 5.

<sup>17</sup> *Id.*, p. 3.

<sup>18</sup> Claimants’ letter of 23 November 2014, p. 10.

<sup>19</sup> *Id.*, pp. 10-11.

<sup>20</sup> *Id.*, pp. 11-12.

<sup>21</sup> Claimants’ letter of 8 December 2014, p. 14.

expectations that were unfairly and inequitably frustrated when it proceeded to revoke the mining licenses “on legal pretexts unrelated to forgery”.<sup>22</sup> Accordingly, even if forgery were made out, “the conduct of Indonesian state bodies specifically representing otherwise will independently have given rise to valid legitimate expectations on the part of the Claimants that their mining rights would not later be impugned”.<sup>23</sup> Moreover, the Claimants argue that the Indonesian judiciary committed a denial of justice when it validated the revocation of the licenses.<sup>24</sup>

14. According to the Claimants, these arguments were raised by the Claimants prior to PO12 and remained un rebutted by Indonesia. For the Claimants, these are “self-standing legal bases on which all or most remaining merits issues in the case will have to be adjudicated, *irrespective of whether* forgery took place or not”.<sup>25</sup>
15. *Finally*, the Claimants argue that the manner in which PO13 has been issued violates their due process rights. In particular, they assert that they have been treated “unequally and unfairly” when the Tribunal reversed PO12 “without affording the Claimants adequate opportunity to comment”.<sup>26</sup> First, the Tribunal incorrectly summarized the record when stating that the Claimants were offered two opportunities to address the fate of their claims, but failed to do so. The Claimants *did* address the fate of their claims twice and reserved their right to further elaborate on these issues.<sup>27</sup> By contrast, Indonesia failed to address the Claimants’ arguments on estoppel, unjust enrichment and good faith prior to the issuance of PO13, although it had the burden of showing that a finding of forgery would be dispositive of the case.<sup>28</sup> Second, had the Tribunal intended to revisit the merits of PO12, it should have expressly afforded the Claimants with an opportunity to state their case. Since they had prevailed in PO12, the Claimants “did not understand the Tribunal’s invitation to comment on Indonesia’s reconsideration application to contain an implicit ruling that the merits of bifurcation had been reopened”.<sup>29</sup>

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<sup>22</sup> *Ibid.*

<sup>23</sup> Claimants’ letter of 8 December 2014, p. 13.

<sup>24</sup> *Ibid.*

<sup>25</sup> Claimants’ letter of 8 December 2014, p. 3.

<sup>26</sup> Claimants’ letter of 8 December 2014, p. 3.

<sup>27</sup> Claimants’ letter of 23 November 2014, p. 13.

<sup>28</sup> Claimants’ letter of 23 November 2014, p. 13; Claimants’ letter of 8 December 2014, p. 3.

<sup>29</sup> Claimants’ letter of 23 November 2014, p. 13.

## 2. Position of the Respondent

16. The Respondent contends in the first place that the reasons advanced by the Claimants do not warrant the reconsideration of PO13. For Indonesia, the procedure followed in issuing PO13 was “eminently fair” to the Claimants. They were offered two opportunities to address the fate of their claims if the forgery allegations were upheld, but declined to do so. Hence, there can be no question of a violation of their due process rights since the Claimants have “no one but themselves to blame for their current situation”.<sup>30</sup> In any event, the Tribunal’s willingness to afford the Claimants two further rounds of briefing in the context of the present Request moots the Claimants’ allegation of procedural unfairness.<sup>31</sup> Therefore, Indonesia argues that a “decision on Claimants’ request for reconsideration will remove any basis to complain of procedural unfairness and unequal treatment”.<sup>32</sup>
17. In the event that the Tribunal were to entertain the Claimants’ arguments, the Respondent submits that the Tribunal should uphold its ruling in PO13. Crucially, the Claimants “largely ignore” the Respondent’s analysis of their claims as set out in their letter of 3 November 2014.<sup>33</sup> As to the Claimants’ “non-exhaustive” list of liability theories – i.e. estoppel, unjust enrichment, validity of exploitation licenses, and fair and equitable treatment – none of them would survive a finding of forgery.
18. *First*, the estoppel argument is flawed since the Claimants’ reliance on various reports or events to invest into the mining project was unreasonable. Indonesia did not encourage the Claimants to invest in the country and the Claimants must bear the risks involved in their choice of local partners.<sup>34</sup> None of the reports or events upon which the Claimants allegedly relied constitute clear and unambiguous statements justifying an estoppel, all the more so as they were not directed at the Claimants but at the Ridlatama companies, if at all. Hence, the Claimants relied on representations made by their business partners, not on governmental actions.

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<sup>30</sup> Respondent’s letter of 1 December 2014, p. 4.

<sup>31</sup> Respondent’s letter of 12 December 2014, p. 2.

<sup>32</sup> *Id.*, p. 3.

<sup>33</sup> Respondent’s letter of 1 December 2014, p. 4; Respondent’s letter of 12 December 2014, p. 1.

<sup>34</sup> Respondent’s letter of 1 December 2014, p. 12.

19. *Second*, the unjust enrichment argument is unavailing since the Claimants “do not link this remedy to any specific treaty violations that are independent of the legality and validity of the Ridlatama Companies’ mining licenses”.<sup>35</sup> The license revocation did not enrich Indonesia and the Claimants must bear “the consequences of their association with, and reliance on, the Ridlatama Companies’ forged licenses”.<sup>36</sup>
20. *Third*, the Claimants’ arguments resting on the validity of the exploitation license is ill-founded. Within the framework of a mining undertaking license, the validity of the exploitation license is predicated on the validity of the exploration license.<sup>37</sup> The Regent upgraded the license “in line with the principle that the holder of a KP is guaranteed to get an extension or upgrade of its KP” before he became aware of the forgery.<sup>38</sup> Hence, the exploitation licenses were obtained through deceit and do not provide the Claimants with a valid claim.
21. *Finally*, the Claimants’ “half-hearted” fair and equitable treatment claim improperly rests on the conduct of Indonesian officials that could not create legitimate expectations.<sup>39</sup> The Claimants could not reasonably expect to be insulated from the misdeeds of their business partners. The BITs are no partner risk insurance and the Claimants could not legitimately expect that the Indonesian authorities would not be deceived or misled by their business partner.<sup>40</sup>

### III. ANALYSIS

#### 1. Legal Framework

22. Like for the previous ones, the relevant legal basis for this order is Article 44 of the ICSID Convention, which reads as follows:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of

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<sup>35</sup> *Id.*, p. 12.

<sup>36</sup> Respondent’s letter of 12 December 2014, p. 7.

<sup>37</sup> Respondent’s letter of 1 December 2014, p. 14.

<sup>38</sup> *Ibid.*

<sup>39</sup> Respondent’s letter of 12 December, pp. 5-7.

<sup>40</sup> Respondent’s letter of 1 December 2014, p. 17.

procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

## 2. Discussion

23. It is a well-established principle that Article 44 of the ICSID Convention empowers the Tribunal to re-open and amend a procedural order. When the Tribunal invited the Claimants to comment on the Respondent's request for reconsideration of PO13, which addressed both the admissibility and the merits of the reconsideration, the Claimants were expected to reply on the entirety of the request. The Respondent's request included a table setting out the Respondent's position on the fate of the Claimants' claims in the event of a finding of forgery. Moreover, as it was clear from the discussion during the telephone hearing of 21 October 2014, the Tribunal considered the fate of the Claimants' claims to be a relevant issue. Being invited to comment on Indonesia's request for reconsideration, the Claimants limited their comments to a mention of estoppel and of their right to recover amounts invested in good faith.<sup>41</sup>
24. The Tribunal considers that it fully respected the Claimants' due process rights in connection with the issuance of PO13, by giving the Claimants an opportunity to be heard, which opportunity was not subject to any limitation as to its scope. This being so, the Tribunal agreed to entertain the Request, thereby granting the Claimants a renewed opportunity to make their case on bifurcation in two additional submissions.<sup>42</sup>
25. Before addressing the merits of the reconsideration sought, it may be useful to restate the parameters of the decision on bifurcation. The Claimants argue that Indonesia has not discharged the "burden of showing" or "burden of proof" that a finding of forgery would dispose of the case.<sup>43</sup> They also submit that the Tribunal has prejudged issues

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<sup>41</sup> "Among other counter-arguments, Indonesia could and should be estopped from taking such a position in respect of good faith investors such as the Claimants. Moreover, as the Claimants repeatedly have stated, even if they were not compensated based on the value of the EKCP, which is the applicable measure of compensation, they would remain eligible to recover at least the substantial amounts – almost USD 70 million – they invested in good faith in the EKCP. To the extent they may be relevant at all, which turns on a factual assumption that is not accepted, the Claimants will address the Tribunal on Indonesia's arguments at the appropriate time in these proceedings" (footnotes omitted) (Claimants' letter of 10 November 2014, p. 3).

<sup>42</sup> The submission of 23 November 2014 comprises 14 pages and the one of 8 December 2014 extends over 16 pages.

<sup>43</sup> Claimants' letter of 23 November 2014, p. 2.

pertaining to the merits.<sup>44</sup> The Tribunal considers these arguments to be misconceived. Failing an agreement by the Parties, the organization of the procedure falls within the procedural powers and discretion of the Tribunal under Article 44 of the ICSID Convention. Decisions on the organization of the proceedings often require a preliminary assessment of submissions made by the parties. Such assessments are necessarily *prima facie* and without prejudice of later assessment; in no way can they prejudge the merits. Unlike the establishment of facts on the merits, these procedural assessments are not dependent on a party meeting a burden of proof or burden of showing. Rather, in respect of these procedural issues, there is a burden of persuasion. Having thus considered the Parties' submissions, the Tribunal makes its preliminary assessment on the basis of the record as it is before it at the time of giving the procedural direction.

26. Against this background, the Tribunal turns to the standard for bifurcation. Bifurcation of preliminary issues is within the discretionary power of an ICSID tribunal. An accepted standard for exercising such power in ICSID and other international arbitrations is the furtherance of the efficiency of dispute resolution. In this context, the Tribunal notes that the Claimants rely on three cases, *Glamis Gold*, *Apotex Holdings* and *Tulip Real Estate*. In these cases, the tribunals considered bifurcation to be efficient if it could result in "reducing significantly" the scope and complexity of the dispute,<sup>45</sup> or lead to a "material reduction of the proceedings".<sup>46</sup> In *Apotex Holdings*, the tribunal stated that a decision on bifurcation was the result of "weighing for both sides the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice".<sup>47</sup>
27. 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 simplify the issues before the Tribunal. This simplification will benefit both sides and the Tribunal, especially if it

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<sup>44</sup> Claimants' letter of 23 November 2014, pp. 4-5.

<sup>45</sup> *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on the Respondent's Request for Bifurcation under Article 41(2) of the ICSID Convention, 2 November 2012, para. 30.

<sup>46</sup> *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, para. 12.

<sup>47</sup> *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, para. 10.

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.

28. The core of the Claimants' position is that bifurcation would not serve efficiency, since an additional merits phase would in any event be needed as a finding of forgery would leave their claims unaffected. In support of their argumentation, the Claimants invoke the principle of estoppel, the continued validity of the exploitation licenses, unjust enrichment and their right to recover investments made in good faith. They also submit that their claim for breach of fair and equitable treatment would survive a finding of forgery. This last submission was only made in the context of the present Request, as was the explicit articulation of an unjust enrichment claim. The principle of estoppel and the continued validity of the exploitation licenses were mentioned earlier but significantly expanded upon in the two submissions subsequent to PO13. It is in this light and considering Indonesia's response that the Tribunal will now review each of these arguments.
29. First, the Claimants contend that Indonesia must be estopped from questioning the authenticity of the mining licenses and other related documents. They do so on the understanding that a finding of forgery would leave all of the claims unaffected.<sup>48</sup> This argument rests on the assumption that the estoppel argument is upheld by the Tribunal. By contrast, and subject to the other arguments of the Claimants, the latter implicitly accept that, if the estoppel argument is rejected, their original claims will at least be narrowed down or reshaped. Moreover, although the Claimants state that estoppel bars forgery claims at their inception, as matters are presented at this stage, the estoppel issue, both in terms of legal requirements and facts, would lack relevance if no forgery were found.
30. Second, the Claimants argue that it is not established as a matter of Indonesian or international law that the exploitation licenses would fall away in case of third party wrongdoing prior to the issuance of those licenses. This line of argumentation also indicates that the original claims are likely to be narrowed down or reshaped in case of

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<sup>48</sup> Claimants' letter of 23 November 2014, p. 10 ("Even if there is any finding of forgery, it does not affect the validity of those claims"); Claimants' letter of 8 December 2014, p. 3 ("[T]he principle of estoppel [...] would effect a complete bar to Indonesia's forgery allegations [...]. A finding of estoppel bars claims of forgery at their inception").

a finding of forgery. Indeed, 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.

31. Third, the Claimants further submit that they would in any event be entitled to recover the investments which they made in good faith. They present their unjust enrichment claim as an “alternative basis of recovery”. In doing so, they appear to acknowledge that a finding of forgery would at least partially reshape their claims. At the same time, this also means that there would be no reason to try this claim in the absence of a finding of forgery.
32. Fourth and last, the Claimants submitted that their fair and equitable treatment claim would survive a finding of forgery mainly because the conduct of Indonesian officials (including conduct denying any forgery) gave independently rise to legitimate expectations. Even if this claim were unaffected by a finding of forgery, which the Respondent disputes, it is likely that the existence or absence of forgery could cast a different light on the disputed conduct of the officials.
33. 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.
34. The Tribunal is also mindful of the Claimants’ argument that their allegedly surviving claims are intertwined with the forgery allegations.<sup>49</sup> 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

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<sup>49</sup> Claimants’ letter of 8 November 2014 p. 3.

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).

35. On this basis, and having duly considered the Claimants' Request, the Tribunal denies the Request and reaffirms its earlier procedural direction pursuant to which bifurcation of the issue of forgery as set out in PO13 is in the interest of procedural efficiency.
36. Having reached this conclusion, the Tribunal must turn to the procedural calendar. A revised calendar is attached as Annex 1. Its content calls for the following comments:
  - (i) First, the calendar takes account of the Claimants' wish to have more time to prepare for the document production phase and of their unavailability for the previously proposed hearing dates ("Claimants' counsel is already committed in August as well in much of July and early September")<sup>50</sup>;
  - (ii) Second, the calendar takes account of the limited scope of the document authenticity phase and the desirability of a prompt resolution of the forgery issue, which elements have an impact in particular on the document production process and the second round of submissions before the hearing;
  - (iii) Third and more specifically, the document production phase is limited to requests for (i) documents for inspection purposes, including original documents to be made available at the time of the document inspection, and (ii) other documents limited to matters of document authenticity;
  - (iv) Fourth, the Parties are invited to state their availability for the proposed hearing dates by 19 January 2015;
  - (v) Fifth, the Parties are invited to agree on the dates for the document inspection by 26 January 2015.
  - (vi) Last, subject to compelling objections which the Parties may raise in respect of the other dates and time limits set out in Annex 1 by 19 January 2015, the

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<sup>50</sup> Letter of 23 November 2014, p. 14.

attached calendar will thereafter become effective and replace the calendar attached to PO13.

#### IV. ORDER

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

- (1) The Claimants' request for the reconsideration of Procedural Order No. 13 is denied;
- (2) Procedural Order No. 13 is reaffirmed, save for the procedural calendar;
- (3) The new procedural calendar is set forth in Annex 1 hereto and will become effective on 19 January 2015 unless, by such date, a Party raises compelling objections to any of the dates or time limits it contains;
- (4) By 19 January 2015, the Parties shall state their availability on the proposed hearing dates;
- (5) By 26 January 2015 the Parties are invited to agree and report on the dates for the document inspection;
- (6) Costs are reserved for a later decision or award.

On behalf of the Tribunal

*[Signed]*

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Gabrielle Kaufmann-Kohler  
President of the Tribunal  
Date: 12 January 2015

**Schedule for the document authenticity phase**

9 February 2015	Simultaneous requests to produce (i) documents for inspection purposes, including original documents to be made available at time of document inspection, and (ii) other documents limited to matters of document authenticity (see PO 15 para. 36(iii))
23 February 2015	Simultaneous voluntary production and/or objections
6 March 2015	Simultaneous replies to objections
18 March 2015	Tribunal's ruling on objections
27 March 2015	Production of documents ordered, save for documents to be made available at document inspection
Between 1 and 15 April 2015 (TBD according to availabilities of the Parties)	Document inspection
6 May 2015	Claimants' (i) Response to Respondent's Application for Dismissal (limited to document authenticity and legal submissions on legal position in case of finding of forgery) and (ii) comments on document inspection and possibly on other documents obtained through document production  Respondent's comments on document inspection and possibly on other documents obtained through document production
27 May 2015	Simultaneous answers to comments on document inspection and other documents
1 June 2015	Identification of witnesses and experts to be cross-examined at the Hearing
8 June 2015	Pre-hearing conference
1 to 4 July 2015, or 6 to 9 or 10 July 2015, or 13 to 16 or 17 July 2015, or 20 to 23 or 24 July 2015	Hearing on document authenticity (4-5 days; exact duration to be set at pre-hearing call)
August 2015 (TBD at pre-hearing call)	Simultaneous post-hearing briefs