

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. 5

Request for Document Production

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

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Mr. Magnus Jesko Langer

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I. The Request for Production of Documents

1. On 1 March 2013, the Arbitral Tribunal held a common session by video link with the Parties during which the Republic of Indonesia (the “Respondent”) informed the Tribunal on the one hand, and Churchill Mining PLC and Planet Mining Ltd (the “Claimants”) on the other, that it intended to submit a request for production of documents (the “Request”) regarding the Claimants’ allegation that they held, through PT ICD, a controlling interest in the four disputed mining licenses. The Tribunal took note of the Claimants’ agreement to such a request. Accordingly, in its letter of 1 March 2013, the Tribunal set forth the schedule for the Respondent’s Request, whereby the Respondent shall file its Request by 6 March 2013, the Claimants shall state their response and any objections to the Request by 11 March 2013, and the Respondent shall respond to the Claimants’ objections by 14 March 2013.
2. In accordance with the abovementioned schedule, the Respondent sent its Request on 6 March 2013, set forth in a Redfern Schedule divided into 10 categories of documents. On 11 March 2013, the Claimants submitted their response whereby they totally object to the production of all categories of documents. The Respondent submitted its response to the Claimants’ objections on 15 March 2013. Therein, the Respondent asked the Tribunal that the Claimants be ordered to disclose all documents responsive to the categories of documents sought in the request.
3. Addressing in this Order the Respondent’s Request, the Tribunal will first determine the applicable standards, and then issue its decision on the Request.

II. Applicable Standards

4. At the outset, the Tribunal notes that this arbitration is governed by (i) the ICSID Convention, (ii) the 2006 ICSID Arbitration Rules (hereinafter the “Arbitration Rules”), and (iii) the Procedural Rules as set out in Procedural Order No. 1 (hereinafter “PO1”), which the Parties and the Tribunal have agreed to extend to ICSID Case No. ARB/12/40, as recorded in Procedural Order No. 4. Furthermore, paragraph 15.3 of PO1 states that “[a]rticles 3 and 9 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) shall guide the Tribunal and the parties regarding document production” (hereinafter the “IBA Evidence Rules”).

5. Under the ICSID Convention and the Arbitration Rules, the parties have ample freedom to determine the applicable procedure with respect to the taking of evidence. Should the parties fail to agree on the applicable procedure, the Tribunal enjoys an equally ample freedom to establish the applicable procedure. With respect to document production, Article 43 of the ICSID Convention provides in its relevant part that:

“Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings, (a) call upon the parties to produce documents or other evidence [...]”.

6. In the same vein, Rule 34(2) of the Arbitration Rules provides in its relevant part that:

“The Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts [...]”.

7. Pursuant to paragraph 15.3 PO1, the Tribunal will seek guidance from the IBA Evidence Rules, which in any event it considers to reflect the current practice in international arbitration. For the purposes of this Order, the following are the relevant provisions of the IBA Evidence Rules:

- (i) Article 3.3:

“A Request to Produce shall contain:

- (a) (i) a description of each requested Document sufficient to identify it, or
- (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
- (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
- (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and

(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party”.

(ii) Article 3.4:

“Within the time ordered by the Arbitral Tribunal, the Party to whom the Request to Produce is addressed shall produce to the other Parties and, if the Arbitral Tribunal so orders, to it, all the Documents requested in its possession, custody or control as to which it makes no objection”.

(iii) Article 3.5:

“If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or a failure to satisfy any of the requirements of Article 3.3”.

(iv) Article 3.7:

“Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection. The Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied. Any such Document shall be produced to the other Parties and, if the Arbitral Tribunal so orders, to it”.

(v) Article 9.2:

“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

- (a) lack of sufficient relevance to the case or materiality to its outcome;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the Document that has been shown with

reasonable likelihood to have occurred;

- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
- (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling”.

8. Accordingly, the Tribunal will apply the following standards to rule on the Requests for Production of Documents:

Specificity: The Request must identify each document or category of documents with precision.

Relevance: The Request must establish the relevance of each document or category of documents to factual obligations in the submissions and to the case. For purposes of this Order, the term “relevance” encompasses both the term “relevance” and “materiality”. At this stage of the proceedings, the Tribunal is only in a position to assess the *prima facie* relevance of the documents requested, having regard to the factual allegations the Parties made heretofore. This *prima facie* assessment does not preclude a different assessment at a later point of the arbitration, with the benefit of the entire evidentiary record.

Possession, custody or control: The Request must show that it is more likely than not that the requested documents exist, that they are within the possession, power or control of the other party, and that they are not within the possession, custody or control of the requesting party.

Counterbalancing interests: Where appropriate and upon reasoned application, the Tribunal will balance the legitimate interests of the requesting party with those of the requested party, taking into account all relevant circumstances, including any legal privileges applicable to certain types of communications, the need to safeguard confidentiality, and the proportionality between the convenience of revealing potentially relevant facts and the burden imposed on the requested party.

III. Order

9. For the reasons set forth in the Redfern Schedule attached as Annex A to this Order, the Tribunal:
 - A. Partially grants the Respondent's requests Nos. 1, 2, 4, 5, 7, and 8, as specified in the Redfern Schedule.
 - B. Denies all other requests.
 - C. Requests the Claimants, in accordance with the directions of the Tribunal set forth in its letter of 1 March 2013, to produce the available documents responsive to the Respondent's requests Nos. 1, 2, 4, 5, 7, and 8, by **22 March 2013**.
 - D. Further requests the Claimants to produce any outstanding final awards or decisions, as specified in the Redfern Schedule, as soon as they are made available to them.

For and on behalf of the Tribunal

[Signed]

Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 19 March 2013