INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Churchill Mining PLC and Planet Mining Pty Ltd

The Claimants

v.

Republic of Indonesia

The Respondent

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

Award

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
Dr. Magnus Jesko Langer

Date of dispatch to the Parties: 6 December 2016

REPRESENTATION OF THE PARTIES

Representing the Claimants:

Dr. Sam Luttrell
Clifford Chance
Level 7, 190 St Georges Terrace
Perth, Western Australia, 6000
Australia

and

Mr. Audley Sheppard, QC
Clifford Chance LLP
10 Upper Bank Street
London E14 5JJ
United Kingdom

and

Mr. Nish Shetty
Mr. Matthew Brown
Clifford Chance Pte. Ltd.
12 Marina Boulevard
25th Floor Tower 3
Marina Bay Financial Centre
Singapore 018982

and

Dr. Romesh Weeramantry
Ms. Montse Ferrer
Clifford Chance
27th Floor, Jardine House
One Connaught Place
Central, Hong Kong

Representing the Respondent:

Dr. Yasonna H. Laoly, S.H., M. Sc.
Minister of Law and Human Rights
Mr. Cahyo R. Muzhar
Ministry of Law and Human Rights
Jl. H.R. Rasuna Said Kav. 6-7
Kuningan Jakarta 12940
Indonesia

and

Mr. Didi Dermawan
Jl. Cipinang Cempedak I No. 23D
Jakarta 13340
Indonesia

and

Mr. Richele S. Suwita
Ms. Deila Taslim
Ms. Dwina Oktifani
Mr. Wemmy Muharamsyah
Mr. Richard Yapsunto
Armand Yapsunto Muharamsyah &
Partners (AYMP)
Permata Kuningan, Penthouse Floor
Jl. Kuningan Mulia Kav. 9C
Jakarta 12980
Indonesia

and

Ms. Claudia Frutos-Peterson
Mr. Marat Umerov
Curtis, Mallet-Prevost, Colt & Mosle LLP
1717 Pennsylvania Ave NW Suite 1300,
Washington, D.C. 20006
U.S.A.

and

Mr. Mark H. O'Donoghue
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, New York 10178
U.S.A.

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ABBREVIATIONS

AIM	Alternative Investment Market of the London Stock Exchange
Application for Dismissal	Respondent's Application for Dismissal of Claimants' Claims based on the Forged and Fabricated Ridlatama Mining Licenses dated 24 September 2014 and filed on 25 September 2014
BEM	Bara Energi Makmur
BIT	Bilateral Investment Treaty, specifically, without further designation, the United Kingdom-Indonesia BIT ("UK-Indonesia BIT") and the Australia-Indonesia BIT
BPK	Financial Auditor Body (*Badan Pemeriksa Keuangan*)
Churchill	Churchill Mining Plc
Claimants	Churchill Mining Plc and Planet Mining Pty Ltd
C-Answers	Claimants' Answers to the State's Comments on Document Inspection and Other Documents Obtained through Document Production of 3 July 2015
C-Comments	Claimants' Comments on the Second Document Inspection of 12 June 2015
C-Comments on Minnotte	Claimants' Submissions on *Minnotte v. Poland* dated 23 September 23
C-Reply on Minnotte	Claimants' Reply Submissions on *Minnotte v. Poland* dated 11 October 2016
C-PHB1	Claimants' first Post-Hearing Brief of 20 October 2015
C-PHB2	Claimants' second Post-Hearing Brief of 17 November 2015
DPR	Document Production Request
EKCP	East Kutai Coal Project
ER1	First Expert Report

ER2	Second Expert Report
Exh. C-	Claimants' Exhibits
Exh. CLA-	Claimants' Legal Authorities
Exh. P-	Planet's Exhibits
Exh. R-	Respondent's Exhibits
Exh. RLA-	Respondent's Legal Authorities
FET	Fair and Equitable Treatment
Hearing on Document Authenticity	Hearing in Singapore from 3 through10 August 2015
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration (2010)
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Indonesia	Republic of Indonesia
IUP	Mining Undertaking License (*Izin Usaha Pertambangan*)
KP	Mining Authorization (*Kuasa Pertambangan*)
KPK	Indonesian Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*)
Mem.	Claimants' Memorial on Jurisdiction and the Merits of 13 March 2013
MEMR	Indonesia's Ministry of Energy and Mineral Resources
Planet	Planet Mining Pty Ltd
PO	Procedural Order
PT	Limited liability company (*Perseroan Terbatas*)
PT ICD	PT Indonesian Coal Development
PT INP	PT Investmine Nusa Persada

PT IR	PT Investama Resources
PT RP	PT Ridlatama Power
PT RS	PT Ridlatama Steel
PT RTM	PT Ridlatama Tambang Mineral
PT RTP	PT Ridlatama Trade Powerindo
PT TCUP	PT Techno Coal Utama Prima
Reply	Claimants' Reply to the State's Application for Dismissal of the Claimants' Claims based on Forged and Fabricated Ridlatama Mining Licenses of 29 May 2015
Respondent	Republic of Indonesia
RMOJ	Respondent's Memorial on Objections to Jurisdiction of 8 April 2013
R-Answers	Respondent's Answers to Claimants' Comments on Document Inspection and Other Documents Obtained through Document Production of 6 July 2015
R-Comments 1	Respondent's Comments on Document Inspection and Other Documents Obtained through Document Production of 29 May 2015
R-Comments 2	Respondent's Comments on Third and Fourth Reports of Dr. Steven J. Strach of 22 July 2015
R-Comments on Minnotte	Comments on *Minnotte v. Poland* as per the Tribunal's Request dated 27 September 2016
R-Reply on Minnotte	Reply to Claimants' Submissions on *Minnotte v. Poland* dated 11 October 2016
R-PHB1	Respondent's first Post-Hearing Brief of 20 October 2015
R-PHB2	Respondent's second Post-Hearing Brief of 17 November 2015
SIG	Geographic Information System (*Sistem*

	Informasi Geografis)
SKIP	Permit for Preliminary Survey (*Surat Keterangan Izin Peninjauan*)
STP	Sondong, Tampubolon & Partners
Tr. [date, page:line]	Transcript of the hearing on document authenticity of 3-10 August 2015
WS1	First Witness Statement
WS2	Second Witness Statement

I. PROCEDURAL HISTORY

A. Introduction

1. The procedural history leading up to the Tribunal's Decisions on Jurisdiction of 24 February 2014 is set out in full in those Decisions, which are made part of the present Award.[1] However, prior to summarizing the procedural history relevant to the document authenticity phase, the Tribunal will recall the main procedural steps of the earlier phase of this arbitration. Abbreviations used in the Tribunal's Decisions on Jurisdiction are equally deemed repeated and incorporated into the present Award, to the extent not explicitly set out.

2. As recorded in the Decision on Jurisdiction between Churchill Mining Plc ("Churchill") and the Republic of Indonesia ("Indonesia"),[2] the dispute in this case was initially submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments dated 27 April 1976 (the "UK-Indonesia BIT", the "Treaty", or the "BIT"), which entered into force on 24 March 1977, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "ICSID Convention"). As recalled below, another ICSID proceeding was subsequently initiated on the basis of the ICSID Convention and the Agreement between the Government of Australia and the Government of the Republic of Indonesia for the Promotion and Protection of Investments dated 17 November 1992 (the "Australia-Indonesia BIT", the "Treaty", or the "BIT").[3]

3. 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. The request concerned a dispute between Churchill and Indonesia arising out of Churchill's alleged investment in Indonesian companies in the coal

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1 Decision on Jurisdiction in ICSID Case No. ARB/12/14 and 12/40 between Churchill Mining Plc and the Republic of Indonesia ("Churchill Decision on Jurisdiction"), ¶¶ 48-76; Decision on Jurisdiction in ICSID Case No. ARB/12/14 and 12/40 between Planet Mining Pty Ltd and the Republic of Indonesia ("Planet Decision on Jurisdiction"), ¶¶ 48-76.

2 Churchill Decision on Jurisdiction, ¶ 48 and note 84.

3 Churchill Decision on Jurisdiction, ¶ 48; Planet Decision on Jurisdiction, ¶ 48.

mining industry. In the request, Churchill invoked Articles 3(2) and 5(1) of the UK-Indonesia BIT. According to Churchill, Indonesia had taken measures against its investment in violation of these provisions of the BIT.

4. On 22 June 2012, the Secretary-General of the Centre registered Churchill's Request for Arbitration pursuant to Article 36(3) of the ICSID Convention under ICSID Case No. ARB/12/14. An Arbitral Tribunal comprised of Prof. Gabrielle Kaufmann-Kohler (President), Prof. Albert Jan van den Berg, and Mr. Michael Hwang S.C. was constituted in accordance with Article 37(2)(b) of the ICSID Convention, and the proceedings commenced on 3 October 2012.

5. On 26 November 2012, Planet Mining Pty Ltd ("Planet") filed a Request for Arbitration with ICSID pursuant to Article 36 of the ICSID Convention and the Australia-Indonesia BIT. This request, which concerned a dispute between Planet and Indonesia arising out of Planet's alleged investment in Indonesian companies in the coal mining industry, was expressly made in connection with that filed by Churchill against Indonesia on 22 May 2012. As noted in the Decisions on Jurisdiction, the facts upon which both requests are based are essentially the same.[4]

6. On 26 December 2012, the Secretary-General of the Centre registered Planet's Request for Arbitration pursuant to Article 36(3) of the ICSID Convention under ICSID No. ARB/12/40. On 22 January 2013, pursuant to the Parties' agreement, an Arbitral Tribunal also comprised of Prof. Gabrielle Kaufmann-Kohler (President), Prof. Albert Jan van den Berg, and Mr. Michael Hwang S.C. was constituted in accordance with Article 37(2)(a) of the ICSID Convention, and the proceedings commenced on that date.

7. Having agreed in principle that the two disputes would be heard in a consolidated case, Churchill, Planet, and Indonesia agreed at a common session on 1 March 2013 to join the two proceedings in all respects, but disagreed as to whether the Tribunal should render one joint decision/award in respect of both Churchill and Planet or two separate decisions/awards, one in respect of each claimant.[5] In Procedural Order No. 4 of 18 March 2013, the Tribunal confirmed the content of the common session and noted

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4 Churchill Decision on Jurisdiction, ¶ 48; Planet Decision on Jurisdiction, ¶ 48.

5 Churchill Decision on Jurisdiction, ¶ 58; Planet Decision on Jurisdiction, ¶ 59.

that it would decide whether to render one or two decisions/awards at a later stage, after consultation with the Parties.[6]

8. In paragraph 14.1 of Procedural Order No. 1, as amended by the Tribunal's letter of 21 February 2013, and recorded in Procedural Order No. 4, the Tribunal set a schedule for the jurisdictional phase of the case.[7]

9. The Parties having filed their written submissions on jurisdiction, the Tribunal held a hearing on jurisdiction in Singapore on 13-14 May 2013.[8]

10. On 24 February 2014, the Tribunal issued two Decisions on Jurisdiction, one in respect of Churchill and Indonesia and the other in respect of Planet and Indonesia. In both Decisions, the Tribunal decided that it had jurisdiction over the dispute submitted to it in this arbitration and reserved its decision on costs.[9]

11. By letter of 7 March 2014, the Parties were invited by the Tribunal to confer and make their best efforts to agree on a schedule for the merits phase of this arbitration and to revert to the Tribunal by 24 March 2014.

12. On 24 March 2014, the Parties informed the Tribunal that they were unable to agree on a schedule for the merits phase and each made a proposal.

13. On 27 March 2014, the Claimants filed an Application for Provisional Measures, alleging that "Indonesia is seeking to usurp the jurisdiction of this Tribunal and destabilise the Claimants' witnesses and potential witnesses by the threat of criminal sanction".[10] Following an exchange of correspondence between the Parties and the Tribunal,[11] the Respondent was invited to

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6 Churchill Decision on Jurisdiction, ¶¶ 59-60; Planet Decision on Jurisdiction, ¶¶ 60-61.

7 Churchill Decision on Jurisdiction, ¶ 61; Planet Decision on Jurisdiction, ¶ 62. With regard to the modalities of the consolidated proceedings, the Tribunal decided in Procedural Order No. 4 that the procedural calendar under Annex 3 to Procedural Order No. 1, amended by letter of 21 February 2013 and supplemented by letter of 1 March 2013, would govern; that the Tribunal's orders issued as of the date of the common session would apply to all three Parties, with the exception of Procedural Order No. 3 dealing with Indonesia's request for provisional measures in ICSID Case No. ARB/12/14; and that the Centre would maintain only one case account, the case number being ICSID No. ARB/12/14 and 12/40.

8 Churchill Decision on Jurisdiction, ¶¶ 61-70; Planet Decision on Jurisdiction, ¶¶ 62-70.

9 Churchill Decision on Jurisdiction, ¶ 319; Planet Decision on Jurisdiction, ¶ 298.

10 Claimants' Application for Provisional Measures dated 27 March 2014, ¶ 1.

11 *See* letters from the Tribunal dated 2 and 11 April 2014; letter from the Respondent dated 7 April 2014; and letter from the Claimants dated 10 April 2014.

submit its Response to the Claimants' Application for Provisional Measures by 25 April 2014.

14. In its Procedural Order No. 8 of 22 April 2014, the Tribunal decided not to bifurcate the proceedings between liability and quantum, as proposed by the Respondent, and established a calendar for the merits phase of the arbitration.

15. On 25 April 2014, the Respondent filed its Response to Claimants' Application for Provisional Measures.

16. On 12 May 2014, the Claimants submitted their Reply to Indonesia's Response to Claimants' Application for Provisional Measures.

17. On 16 May 2014, the Respondent filed a Request for Inspection of Claimants' Original Documents, along with a List of Disputed Documents and Mr. Gideon Epstein's Forensic Handwriting Examination Report dated 9 May 2014.

18. On 19 May 2014, following an exchange of correspondence with the Parties,[12] the Tribunal issued an amended schedule for the merits phase of the proceeding.

19. On 27 May 2014, the Respondent filed its Rejoinder to Claimants' Application for Provisional Measures dated 27 May 2014.

20. On 28 May 2014, the Claimants submitted comments on the Respondent's Request for Inspection of Original Documents dated 16 May 2014. On 6 June 2014, the Respondent submitted comments on the Claimants' letter of 28 May 2014, to which the Claimants responded on 20 June 2014. The Claimants stated *inter alia* that, if the Tribunal were inclined to order the inspection of any of the original documents identified by the Respondent, the Tribunal should also order the Respondent to produce for inspection the originals identified by the Claimants in its response.

21. On 18 June 2014, following an exchange of correspondence with the Parties,[13] the Tribunal issued a further amended schedule for the merits phase of this proceeding. On the same date, the Claimants filed a second Supplemental Memorial on Quantum and Damages, along with the Second

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12 *See* letters from the Claimants dated 2 and 14 May 2014; letters from the Respondent dated 8 and 15 May 2014.

13 *See* emails from the Parties of 13 and 17 June 2014.

Witness Statement of Mr. David Francis Quinlivan, and the expert reports of FTI Consulting, SRK Consulting, and B&H Strategic Services, and other supporting documentation.

22. On 8 July 2014, the Tribunal issued Procedural Order No. 9, which rejected the Claimants' Application for Provisional Measures of 27 March 2014.

23. On 9 July 2014, the Respondent submitted comments on the Claimants' letter of 20 June 2014 in connection with the Respondent's Request for Inspection of Original Documents.

24. On 11 July 2014, following an exchange of correspondence with the Parties regarding the Respondent's request to obtain missing documents relied upon by the Claimants' experts on quantum,[14] the Tribunal informed the Parties of its finding that the Claimants had satisfactorily responded to the Respondent's request for documents, which the Respondent alleged were missing from the Claimants' filing of 18 June 2014.

25. On 22 July 2014, the Tribunal issued Procedural Order No. 10, which recorded the Tribunal's decision on the Parties' Requests for Inspection of Original Documents. The Tribunal ordered each Party to make the requested originals available for inspection, and requested the Parties to comply with the directions on the logistics of the inspection set forth in its order.

26. On 18 August 2014, following an exchange of correspondence with the Parties regarding the organization of the document inspection,[15] the Tribunal informed the Parties of its decision that the inspection would take place in Singapore the week of 25 August 2014 under the supervision of Ms. Angela Ting of ICSID. On 21 August 2014, after a further exchange between the Parties,[16] the Tribunal issued Procedural Order No. 11 concerning the organization of, and rules governing, the document inspection. On 26 August 2014, following a further exchange of correspondence regarding an

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14 *See* letters from the Respondent dated 20 and 23 June and 3 July 2014; letters from the Claimants dated 27 June and 9 July 2014 regarding the Respondent's request to obtain missing documents relied upon by the Claimants' experts on quantum.

15 *See* emails from the Claimants dated 8 and 13 August 2014; email from the Respondent dated 13 August 2014.

16 *See* emails from the Claimants dated 19 and 20 August 2014; email from the Respondent dated 19 August 2014.

inspection protocol proposed by the Claimants,[17] the Tribunal specified a number of rules laid down in Procedural Order No. 11.[18]

27. On 27 August 2014, following an exchange between the Parties further to a request from the Respondent for production of English translations of certain exhibits submitted by the Claimants,[19] the Tribunal issued a ruling on the Respondent's request.

B. Pre-hearing phase

28. On 29 August 2014, a document inspection took place at Maxwell Chambers, Singapore, under the supervision of ICSID.[20]

29. On 2 September 2014, the Claimants filed an Application for Provisional Measures, alleging that the Respondent had "sought to destabilise the Claimants' witnesses and access to evidence, circumvent the agreed document disclosure process, and ultimately usurp the jurisdiction of the Tribunal".[21]

30. On 15 September 2014, the Respondent submitted its Observations to Claimants' Request for Provisional Measures dated 2 September 2014, together with the Second Forensic Handwriting Examination Report of Mr. Gideon Epstein dated 15 September 2014.

31. On 15 September 2014, in response to the Tribunal's ruling of 27 August 2014, the Claimants filed translations of certain exhibits and requested that they be allowed to submit the remaining translations by 26 September 2014 owing to a police raid on PT Indonesian Coal Development's ("PT ICD") premises on 29 August 2014.

32. On 25 September 2014, Indonesia filed an Application for Dismissal of Claimants' Claims Based on the Forged and Fabricated Ridlatama Mining

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17 *See* letter from the Claimants dated 21 August 2014; letter from the Respondent dated 23 August 2014.

18 *See* also email from the Tribunal regarding the order of inspection of 28 August 2014; emails from the Parties of the same date in response thereto; email from the Tribunal regarding Mr. Henderson's power of attorney, also of 28 August 2014; Power of Attorney appointing Mr. Alastair Henderson submitted by the Claimants on the same date.

19 *See* letters from the Respondent dated 21 July and 18 August 2014; letters from the Claimants dated 7, 8 and 22 August 2014.

20 On the same date, the Secretariat circulated to the Parties and the Tribunal an electronic copy of the documents that were submitted by the Parties for inspection.

21 Claimants' letter of 2 September 2014, p. 2.

Licenses (the "Application for Dismissal"), appending witness statements of Messrs. Ishak, Noor, Ordiansyah, Armin, Ramadani, Sianipar, and Ms. Nurohmah, as well as the preliminary expert reports of Econ One Research and Bara Consulting.[22] Indonesia requested that the Tribunal (i) modify the procedural calendar to organize an immediate hearing (within three weeks) to address the authenticity of the disputed documents, and ultimately (ii) dismiss all of the Claimants' claims as inadmissible.

33. On 26 September 2014, the Claimants provided their comments on the Application for Dismissal, opposing the request for an immediate hearing. On the same date, the Claimants also submitted the remaining translations of their exhibits and their Reply to Indonesia's Observations of 15 September 2014 regarding the Claimants' Application for Provisional Measures dated 2 September 2014 ("Claimants' Reply on Provisional Measures").

34. On 30 September 2014, the Respondent suggested that it would be helpful for the Tribunal to receive the Claimants' comments on the Respondent's proposal of 15 September that the Claimants disclose the conclusions of their forensic experts following the August document inspection. On 3 October 2014, the Claimants opposed the Respondent's "request for information on the work that has been performed by the Claimants' forensic experts to date", and indicated it would present its expert evidence in accordance with the procedural calendar, with its case on the merits.[23]

35. On 6 October 2014, the Respondent submitted its Rejoinder to the Claimants' Reply on Provisional Measures of 26 September 2014.

36. On 9 October 2014, Indonesia provided further comments on its Application for Dismissal, reiterating its prior requests.

37. On 13 October 2014, the Respondent submitted Mr. Gideon Epstein's Third Forensic Handwriting Examination Report.

38. On 15 October 2014, the Respondent wrote to the Tribunal to reiterate its concern that the Claimants would be unlikely to be able to pay any adverse

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22 The Application for Dismissal is dated 24 September 2014.

23 Letter from the Claimants dated 3 October 2014, p. 1.

award on costs if the Ridlatama mining undertaking licenses and other documentation were found to have been forged and fabricated.[24]

39. On 17 October 2014, the Claimants submitted further comments on the Respondent's letter of 9 October 2014 in connection with the Application for Dismissal.

40. On 21 October 2014, the Tribunal held a hearing by telephone conference on the Claimants' Application for Provisional Measures and the procedural treatment of the Respondent's forgery allegations.

41. On 27 October 2014, the Tribunal issued Procedural Order No. 12 ("PO12"), rejecting Indonesia's request for the immediate adjudication of the forgery issue. However, the Tribunal decided to bifurcate the proceedings between a liability and a quantum phase, with the then-existing timetable applying to the liability phase.

42. Following a request for reconsideration filed by Indonesia on 3 November 2014 and the Claimants' comments thereon of 10 November 2014, the Tribunal issued Procedural Order No. 13 ("PO13") on 18 November 2014, which granted Indonesia's request for reconsideration, and decided to address the authenticity of the disputed documents as a matter of priority. The Tribunal determined that the scope of the authenticity phase would extend to "all factual aspects relating to forgery as well as the legal consequences of a finding of forgery". PO13 added that this was not meant to prevent the Parties from addressing other matters which they might deem appropriate in connection with the forgery allegations and arguments. The Tribunal also ruled that the decision in PO12 regarding bifurcation between liability and quantum would remain in abeyance, and would be considered if and when appropriate.

43. On 22 December 2014, the Tribunal issued Procedural Order No. 14, which rejected the Claimants' Application for Provisional Measures. However, in light of the possibility of obtaining evidence through the Indonesian criminal investigation, the Tribunal ordered Indonesia to request leave before filing any evidence obtained by way of the criminal investigation into the alleged forgery issue.

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[24] *See* also Application for Dismissal, ¶ 7.

44. Following a request for reconsideration of PO13 filed by the Claimants on 23 November 2014 and the Parties' comments thereon of 1, 8, and 12 December 2014, the Tribunal issued Procedural Order No. 15 ("PO15") on 12 January 2015, which reaffirmed PO13. The Tribunal set out a new procedural calendar and contemplated a new document inspection. It also specified the scope of the document authenticity phase as being limited to (i) the factual question whether the impugned documents were 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).[25]

45. Following correspondence from the Parties of 19 and 26 January 2015, the Tribunal proposed hearing dates, amended the deadlines for document production and denied the Respondent's request to be afforded additional time to rebut the Claimants' witness statements and expert reports prior to the hearing.[26]

46. By letter of 3 February 2015, Clifford Chance informed the Tribunal that they had been appointed as the Claimants' legal representatives in these arbitration proceedings, replacing the Claimants' previous legal counsel, Quinn Emanuel Urquhart & Sullivan LLP.[27] By email of the same date, the Claimants requested an extension of the deadline to file the Parties' document production requests, and informed the Tribunal of their unavailability on the proposed hearing dates. By letter of the same date, the Respondent objected to the requested extension and reserved its right to request an order for security for costs in light of what it perceived as a sign of further deterioration of Churchill's finances. By letter of 4 February 2015, the Claimants responded to the Respondent's letter of 3 February. By letter of 6 February 2015, the Tribunal granted the requested extension of the deadline to file the Parties' document production requests and proposed new hearing dates.

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25 Procedural Order No. 15, ¶ 34.

26 *See* letter from the Tribunal dated 29 January 2015.

27 *See* Powers of attorney dated 2 February 2015. By letter of 5 February 2015, Quinn Emanuel Urquhart & Sullivan LLP informed the Centre that "the record should be amended to reflect that Claimants' counsel of record in these proceedings is now Clifford Chance".

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

48. By letter of 4 March 2015, the Tribunal confirmed the schedule for the document authenticity phase of this arbitration.

49. By letter of 11 March 2015, the Respondent filed a request for leave to submit new evidence – Recommendation No. 522.21/5213/Ek from the Governor of East Kalimantan, H. Awang Faroek Ishak, to the Minister of Forestry, dated 29 December 2009, regarding Utilization of Forest Area in the name of PT Ridlatama Tambang Mineral (the "Recommendation") – and advised the Tribunal that it would file additional and supplementary witness statements and an additional report from Mr. Epstein "in relation to two other sets of suspicious documents on the record".[28]

50. On 13 March 2015, the Parties exchanged their requests for document production and physical inspection of original documents. On the same date, pursuant to Article 43 of the ICSID Convention, the Claimants filed an application for the production of certain stamps and ink pads, which they requested should be made available for inspection and sampling at the document inspection.

51. On 18 March 2015, the Claimants filed their comments on the Respondent's letter of 11 March 2015. By letter of 20 March 2015, the Tribunal ruled *inter alia* on the Respondent's 11 March request, granting the Respondent leave to file the additional materials subject to certain conditions.

52. On 27 March 2015, the Respondent submitted comments on the Claimants' application for the production of certain stamps and ink pads and on certain specific observations made in their letter of 18 March 2015.

53. Having exchanged their responses to each other's requests for document production and physical inspection of original documents on 24 March 2015, each Party submitted their replies on 30 and 31 March 2015.[29]

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[28] Letter from the Respondent dated 11 March 2015, p. 4.

[29] *See* the Parties' agreement on the amended schedule for document production recorded in the Claimants' email of 20 March 2015 and confirmed in the Tribunal's letter of the same date. *See* also the Respondent's email of 22 March 2015; Tribunal's email of 26 March 2015.

54. On 3 April 2015, further to its letter of 11 March 2015 and subsequent correspondence, [30] the Respondent submitted the Recommendation, additional and supplementary witness statements,[31] and other supporting documents. The Respondent also reiterated its concern (in light of an interim report from Churchill) that it would not be able to recover a potential award of costs and again reserved its rights to request security for costs. On the same date, the Respondent submitted further comments on the Claimants' application for the production of certain stamps and ink pads.

55. On 6 April 2015, the Tribunal issued Procedural Order No. 16 ("PO16"), which addressed the Parties' document inspection and document production requests. By letter of 15 April 2015, the Parties were also advised of further rules that would apply to the document inspection.

56. On 8 April 2015, the Claimants submitted comments on the Respondent's letters of 27 March and 3 April 2015 regarding the Claimants' application for the production of certain stamps and ink pads. The Claimants invited the Respondent to "unequivocally" confirm that it no longer had in its possession, custody or control any stamps and ink pads used by the Regency of East Kutai or the Governor of East Kalimantan between 1 January 2007 and 30 June 2010. They also accepted the Respondent's offer to inspect current stamps and ink pads used by the Regency and Governor's office since 2010. Upon the Tribunal's invitation, the Respondent submitted on 10 April 2015 its comments on certain matters raised by the Claimants in their letter of 8 April. In view of the Respondent's confirmation that it no longer has any stamps and ink pads used during the relevant period, the Tribunal considered that the issue whether such stamps and ink pads should be inspected had become moot.

57. Further to a request from the Claimants seeking an extension of the deadline to produce documents as ordered by the Tribunal, and subsequent

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30 Claimants' letter dated 18 March 2015; Tribunal's letter dated 20 March 2015, ¶ 1; Respondent's email of 23 March 2015 recording the Parties' agreement.

31 The Respondent submitted:

1) the Second Witness Statement of Mr. H. Awang Faroek Ishak dated 31 March 2015;
2) the Second Witness Statement of Dra. Luluk Nurohmah dated 31 March 2015;
3) the Witness Statement of Mr. Bambang Setiawan dated 31 March 2015; and
4) the Witness Statement of Mr. Chaerul Anwar Djalil dated 31 March 2015.

correspondence between the Parties,[32] the Tribunal confirmed on 13 April 2015 the extension to 20 April of the time limit for document production (other than documents for the inspection scheduled on 16-17 April), it being specified that the Tribunal might allow the production of specific documents until 27 April upon a reasoned request explaining why a given document could not be produced within the extended time limit of 20 April.[33]

58. On 16-17 April 2015, a second document inspection took place in Maxwell Chambers, Singapore, under the supervision of ICSID.[34]

59. On 21 April 2015, the Respondent requested that the Tribunal order the Claimants to enter into a confidentiality agreement covering the "Third Party Documents", i.e. certain mining undertaking license and borrow-for-use permit applications and other documents that, in the Respondent's view, contain commercial information of third parties, on the terms proposed by the Respondent or such other terms and conditions as the Tribunal deems appropriate ("Respondent's Request for a Confidentiality Order").[35] The Respondent also requested the Tribunal to order the Claimants to abide by the terms of the Respondent's proposed confidentiality agreement pending the Tribunal's decision on its other request.

60. On the same date, the Respondent also asked the Tribunal to reconsider its order in PO16 requiring production of certain documents requested by the Claimants or, in the alternative, not to draw any adverse inference against the Respondent for failure to produce the requested documents ("Respondent's Request for Reconsideration of Certain Production Orders").[36]

61. On 24 April 2015, the Claimants submitted comments on the Respondent's Request for a Confidentiality Order and Request for Reconsideration of Certain Production Orders.

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32 Claimants' emails of 10 and 11 April 2015; Respondent's emails of 10 and 13 April 2015.

33 The Tribunal added that such request should only be filed if the Parties were unable to agree on production after 20 April. If so, the request should be filed as soon as possible and in any event prior to 20 April.

34 At the document inspection, the Claimants indicated, *inter alia*, that it would not conduct an inspection of the stamps the Respondent brought to the document inspection and noted that the stamps of the relevant period were unavailable.

35 The Respondent's request was dated 20 April 2015.

36 The Respondent's letter was dated 20 April 2015.

62. On 27 April 2015, the Respondent filed Mr. Gideon Epstein's Fourth Forensic Handwriting Examination Report regarding the materials mentioned in Respondent's 11 March 2015 Application to file the Recommendation.

63. On 28 April 2015, the Respondent responded to the Claimants' comments of 24 April regarding the Respondent's Request for a Confidentiality Order.

64. On 30 April 2015, the Respondent responded to the Claimants' comments of 24 April on the Respondent's Request for Reconsideration of Certain Production Orders.[37] The Claimants submitted a response to the Respondent's letter of 30 April on 5 May 2015.

65. By email of 4 May 2015, the Respondent informed the Tribunal that the Parties had reached an agreement with respect to the Confidentiality Agreement proposed by the Respondent in connection with Third Party Documents produced by the Respondent in the case. The Parties' Confidentiality Agreement and the accompanying Confidentiality Undertakings were filed together with the Respondent's communication.

66. On 12 May 2015, the Tribunal noted with approval the Confidentiality Agreement and ruled, *inter alia*, on the Respondent's Request for Reconsideration of Certain Production Orders.

67. On 29 May 2015, the Claimants filed a redacted version of their Reply to the Respondent's Application for Dismissal, along with the Report of Dr. Steven J. Strach on Documents Produced at the First Document Inspection, additional and supplementary witness statements,[38] and other supporting documentation. A non-redacted version was circulated to the Tribunal and to those persons who, according to the Claimants' understanding, had signed Confidentiality Undertakings.

68. On 30 May 2015, in accordance with PO15, the Respondent filed its Comments on Document Inspection and Other Documents Obtained through Document Production.

69. On 2 June 2015, following an exchange of submissions between the Parties regarding the Claimants' second request for production of documents in the

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37 The Respondent also commented on a letter from the Claimants dated 29 April 2015 regarding the production of documents ordered by the Tribunal in PO16.

38 The witness statements of Messrs. Rudy Kurniawan and Hari Kiran Vadlamani and the third witness statement of Mr. David Quinlivan.

document authenticity phase,[39] the Tribunal issued Procedural Order No. 17, which dealt with this second request.

70. On 11 June 2015, further to the Tribunal's letter of 1 June 2015, the Respondent's comments and requests of 3 June 2015,[40] and the Claimants' responses thereto of 9 June 2015, the Tribunal issued directions and orders addressing the Respondent's comments and requests.[41]

71. On 12 June 2015, further to the Claimants' request for an extension of its filing deadline and subsequent correspondence between the Parties and the Tribunal,[42] the Claimants filed their Comments on the Second Document Inspection, along with the Second Report of Dr. Steven J. Strach on Documents Produced at the Second Document Inspection and other supporting documentation.

72. On 16 June 2015, the Respondent requested that the Tribunal issue an order precluding the Claimants and Dr. Strach from testifying about certain impugned documents, which the Claimants had not yet provided to its expert. On 19 June 2015, the Claimants submitted comments on the Respondent's request of 16 June. On 22 June 2015, in response to these comments, the Respondent reiterated its request of 16 June and maintained its reservation of rights to supplement the record. On 24 June 2015, the Tribunal ruled on the Respondent's request of 16 June, and allowed the Claimants to file an additional expert report on the impugned documents by 1 July 2015 and the Respondent to comment (without expert report) on such report by 15 July 2015, it being understood that the Parties would then

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39 Claimants' second request for production of documents in the document authenticity phase of 29 April 2015 ("second request"); Respondent's comments on the Claimants' second request of 4 May 2015; Tribunal's letter of 12 May 2015; Respondent's comments and objections to the second request of 19 May 2015; Claimants' reply to the Respondent's objections of 26 May 2015.

40 In its letter of 3 June 2015, the Respondent (i) reserved the right to request time to supplement the record in response to the Claimants' Reply to the Respondent's Application for Dismissal, (ii) requested the Tribunal to order the forensic experts to confer for the purposes of formulating a joint report identifying their disagreements, and (iii) requested that the Claimants produce certain documents and a witness statement by Mr. Kurniawan affirming that he has no other documents relating to the issues in this arbitration.

41 On 17 June 2015, in response to the Tribunal's order of 11 June 2015, the Claimants filed Mr. Kurniawan's Second Witness Statement.

42 Claimants' email of 29 May 2015; Tribunal's letter of 1 June 2015; Respondent's letter of 3 June 2015; Claimants' letter of 9 June 2015; and Tribunal's letter of 11 June 2015.

address these matters further in oral arguments and in testimony at the hearing.

73. On 1 July 2015, the Claimants filed the Third Report of Dr. Steven J. Strach on the originals of the documents exhibited as C-252, C-253, C-254, C-255, and requested an extension of time until 8 July for Dr. Strach to file a further report with respect to certain documents he did not have time to analyze. Having received the Respondent's views on the Claimants' extension request on 3 July 2015, the Tribunal granted the requested extension on 6 July 2015, with the Respondent being allowed to comment on Dr. Strach's further report by 22 July and Dr. Epstein being allowed to do so at the hearing.

74. On 6 July 2015, following an exchange of submissions between the Parties regarding the Respondent's Request to Produce Documents from the EKCP Archive of Rudy Endang Kurniawan,[43] the Tribunal issued Procedural Order No. 18, which dealt with the Respondent's additional document production request.

75. On 7 July 2015, the ICSID Secretariat circulated to the Parties and the Tribunal the Claimants' Answers to the State's Comments on Document Inspection and Other Documents Obtained through Document Production, together with the Second Witness Statement of Paul William Benjamin and other supporting documentation, and the Respondent's Answers to Claimants' Comments on Document Inspection and Other Documents Obtained Through Document Production, which had been filed without copying the Party.

76. On 8 July 2015, the Claimants filed the Fourth Report of Dr. Steven J. Strach.

77. On 14 July 2015, the President of the Tribunal and the Parties held a pre-hearing telephone conference to discuss the organization of the Hearing on Document Authenticity, in particular the hearing's location, schedule, attendance, documentary evidence, format of witness testimony and order of appearance of witnesses and experts and other logistical matters.

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43 On 9 June 2015, the Claimants provided the Respondent with a list of the documents received by the Claimants from Rudy Kurniawan in relation to the EKCP. *See*: Respondent's Request to Produce Documents from the EKCP Archive of Rudy Endang Kurniawan dated 22 June 2015; Claimants' responses thereto filed on 29 June 2015; Respondent's replies to the Claimants' responses filed on 2 July 2015.

Thereafter, the Tribunal issued Procedural Order No. 19 setting out the points discussed during the telephone conference.

78. On 22 July 2015, the Respondent filed its Comments on the Third and Fourth Reports of Dr. Steven J. Strach, to which the Claimants responded by email of 24 July 2015.

79. On 25 July 2015, the Respondent filed additional factual and legal exhibits.[44]

80. On 30 July 2015, following the Respondent's indication that Mr. Isran Noor would not be available to testify at the hearing, the Claimants made an "application pursuant to paragraph 16.9 of Procedural Order No. 1 that (i) the Tribunal disregard Mr. Noor's witness statement dated 23 September 2014; (ii) Mr. Noor's witness statement be struck from the record; and (iii) the State's submissions be disregarded in so far as those submissions rely upon Mr. Noor's witness statement".[45] On 1 August 2015, the Tribunal advised the Parties that it had questions to put to Mr. Noor and, while noting the Respondent's statement regarding Mr. Noor's availability, invited Counsel for the Respondent to inform Mr. Noor that the Tribunal would appreciate the opportunity of hearing Mr. Noor in the course of the document authenticity hearing.

81. Further to the Respondent's request for a document inspection[46] and with the Claimants' consent,[47] a third document inspection took place under the supervision of ICSID at Maxwell Chambers, Singapore, on 2 August 2015, in accordance with the Tribunal's directions of 27 and 30 July and 1 August 2015.

C. Hearing on Document Authenticity

82. The Hearing on Document Authenticity took place from 3 to 10 August 2015 at Maxwell Chambers, Singapore.

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44 Respondent's letter of 24 July 2015.

45 *See* also Claimants' email of 2 August 2015.

46 Respondent's Comments on the Third and Fourth Reports of Dr. Steven J. Strach, ¶ 38.

47 Claimants' email of 24 July 2015.

83. The following persons attended the hearing in whole or in part:

Tribunal	
Professor Gabrielle Kaufmann-Kohler	President
Michael Hwang S.C.	Co-arbitrator
Professor Albert Jan van den Berg	Co-arbitrator
ICSID Secretariat	
Paul-Jean Le Cannu	Secretary of the Tribunal
Assistant to the Tribunal	
Magnus Jesko Langer	
Assistant to Mr. Hwang S.C.	
Aloysius Chang	Michael Hwang Chambers LLC
For the Claimants	
Counsel	
Audley Sheppard QC	Clifford Chance LLP
Robert Richter QC	William Crockett Chambers
Ben Luscombe	Clifford Chance
Dr. Sam Luttrell	Clifford Chance
Dr. Romesh Weeramantry	Clifford Chance
Montse Ferrer	Clifford Chance
Clementine Packer	Clifford Chance
Dezi Kirana	Linda Widyati & Partners
Salma Izzatti	Linda Widyati & Partners
Parties	
David Quinlivan (also a witness)	Churchill Mining Plc
Russell Hardwick (also a witness)	Churchill Mining Plc
Nicholas Smith	Churchill Mining Plc
Fara Luwia	Churchill Mining Plc
Nikita Rossinsky	Churchill Mining Plc
Hari Kiran Vadlamani (also a witness)	Cause First Ventures Ltd.
John Nagulendran	Pala Investments Ltd.

Witnesses	
Paul Benjamin	Consultant (previously employed by PT ICD)
Rudy Kurniawan	Consultant (previously employed by Ridlatama)
Brett Gunter	(by videoconference from the World Bank's office in Jakarta)[48]
Expert	
Dr. Steven J. Strach	Forensic Document Services Pty Ltd
For the Respondent	
Counsel	
Claudia Frutos-Peterson	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mark H. O'Donoghue	Curtis, Mallet-Prevost, Colt & Mosle LLP
Marat Umerov	Curtis, Mallet-Prevost, Colt & Mosle LLP
Didi Dermawan	
Wemmy Muharamsyah	DNC Advocates at Work
Dwi Deila Wulandari Taslim	DNC Advocates at Work
Dwina Oktifani	DNC Advocates at Work
Alvian Permana Putera	DNC Advocates at Work
Benjamin Augusta	DNC Advocates at Work
Parties	
Yasonna H. Laoly	Ministry of Law and Human Rights of the Republic of Indonesia
Aidir Amin Daud	Ministry of Law and Human Rights of the Republic of Indonesia
Cahyo Rahadian Muzhar	Ministry of Law and Human Rights of the Republic of Indonesia

[48] Mr. Gunter was joined in Jakarta by Mr. Martin Octavianus of DNC Advocates at Work and Mr. Gideon Manullang of the firm Linda Widyati & Partners in association with Clifford Chance.

Freddy Harris	Ministry of Law and Human Rights of the Republic of Indonesia
Ardiningrat Hidayat	Ministry of Law and Human Rights of the Republic of Indonesia
Agvirta Armilia Sativa	Ministry of Law and Human Rights of the Republic of Indonesia
Hairita	Ministry of Law and Human Rights of the Republic of Indonesia
Dimitri Bhisma	Ministry of Law and Human Rights of the Republic of Indonesia
Riyatno	Indonesia Investment Coordinating Board
Teuku Machmud	Indonesia Investment Coordinating Board
Nova Erlangga Masrie	Indonesia Investment Coordinating Board
Ricky Kusmayadi	Indonesia Investment Coordinating Board Representative Office in Singapore
Ully Artha Ferbrianti	Ministry of Energy and Mineral Resources
Desty Ratnasari	Ministry of Energy and Mineral Resources
Andri Hadi	Ambassador Extraordinary and Plenipotentiary Embassy of the Republic of Indonesia in Singapore
Tjoki Aprianda Siregar	Embassy of the Republic of Indonesia in Singapore
Muhammad Hayat Henry	Embassy of the Republic of Indonesia in Singapore
Adhyanti Sardanarini Wirajuda	Embassy of the Republic of Indonesia in Singapore
Susanto	Assistant to H. Awang Faroek Ishak
Endra Wibisono	Personal Doctor of H. Awang Faroek Ishak
Yohanes Bulung	Medical Personnel of H. Awang Faroek Ishak

Bahrul Ilmi	Medical Personnel of H. Awang Faroek Ishak
Hafiderdata Derajat	Therapist of H. Awang Faroek Ishak
Amir Syamsudin	Former Minister of Law and Human Rights in the Republic of Indonesia
Marisa Iskandar	Assistant to Amir Syamsudin

Witnesses

Governor H. Awang Faroek Ishak
Ir. Ordiansyah, MP
Armin N., S.T., M.M.
Nora Ramadani, SH, MH
Bambang Setiawan, Ph.D.
Chaerul Anwar Djalil
Osten Sianipar, SH, MSi
Dra. Luluk Nurohmah

Expert

Gideon Epstein

84. Mr. Noor, who had given a witness statement on behalf of the Respondent and whose cross-examination had been requested, did not appear. Having heard the Parties on the Claimants' application of 30 July 2015,[49] the Tribunal informed the Parties at the hearing of its decision to disregard Mr. Noor's witness statement in accordance with paragraph 16.9 of the Procedural Order No 1 and, by analogy, Article 4.7 of the IBA Rules.[50]

85. The hearing was recorded and transcribed in real time.

D. Post-hearing phase

86. After the hearing, the Tribunal issued Procedural Order No. 20 ("PO20") on 20 August 2015 dealing with post-hearing matters, setting time limits for the submission of (i) corrections to the hearing transcript, (ii) two rounds of post-hearing briefs, and (iii) costs submissions. In addition, the Tribunal put various questions to the Parties to be addressed in the post-hearing briefs. The Tribunal confirmed that the scope of the post-hearing briefs extended to

[49] *See* Tr. (Day 1), 8-12; (Day 2), 1-8.

[50] *See* Tr. (Day 2), 8-9.

"(i) the factual question whether the impugned documents are authentic or not and (ii) the legal consequences of a finding of forgery". It further specified that "[m]atter (i) includes the question whether, if they were not handwritten, the impugned signatures were affixed with authority" and that "[m]atter (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".

87. On 24 September 2015, the Parties jointly filed corrected versions of the transcripts. On 2 October 2015, they filed further joint corrections to the transcripts.

88. On 20 October 2015, the Parties simultaneously filed their first Post-Hearing Briefs, and on 17 November 2015, their Reply Post-Hearing Briefs.

89. On 11 December 2015, the Parties simultaneously filed their Costs Submissions and on 23 December 2015 their comments on the other Parties' Costs Submissions.

90. On 28 March 2016, following a request of 11 February 2016 by the Centre addressed to both Parties for a fifth advance payment, and the receipt of the Claimants' share as confirmed by the Centre's letter of 9 March 2016, the Centre notified the Respondent's default to the Parties and invited either Party to pay the outstanding amount by 12 April 2016. On 13 April 2016, the Centre informed the Parties that the Claimants had paid the fifth advance payment in full.

91. By letter of 13 April 2016, the Claimants alleged that the Respondent's failure to pay its share of the fifth advance was in violation of the ICSID Convention, the Administrative and Financial Regulations, Procedural Order No. 1, and the UK-Indonesia and Australia-Indonesia BITs and reserved their rights as to these violations. The Claimants further invited the Tribunal to infer from the Respondent's behavior that it had deliberately failed to pay; sought leave to amend their Costs Submissions to take into account the impact of the Respondent's default on the fifth advance; put the Respondent on notice that if it "brings any further application in this arbitration, the Claimants will ask the Tribunal to direct that the State pay the entirety of any advance payment requested by ICSID in respect of such application"; and invited the Respondent "to provide unequivocal confirmation that it is still participating in these proceedings". Finally, the Claimants stated that if no

confirmation was provided by 20 April, the Claimants would put the Respondent on notice that the Claimants "will bring an application under Rule 42 of the ICSID Arbitration Rules" and "ask the Tribunal to fix a schedule for the completion of this case without the participation of the State".

92. On that same date, the Tribunal granted leave to the Claimants to amend and update their Costs Submissions by 20 April 2016, which they did. In addition, the Claimants filed an Application under Rule 42, requesting the Tribunal to notify the Respondent of the Claimants' Application; continue to proceed to render a "fully-reasoned decision" on the Respondent's Application for Dismissal; order the Respondent to provide a written explanation for its default on the fifth advance payment; failing which, grant leave to file a request for "programming orders"; and make any further appropriate orders.[51]

93. By letter of 25 April 2016, the Tribunal indicated that the Respondent had been given notice of the Claimants' Application, confirmed that it was deliberating and working on its ruling on the Respondent's Application for Dismissal, and invited the Respondent to provide an explanation for its failure to pay its share of the fifth advance payment as well as to make any comments it might have on the Claimants' Application by 9 May 2016.

94. On 4 May 2016, the Centre confirmed receipt of the payment of the Respondent's share of the fifth advance, and indicated that it would refund to the Claimants the amount they had paid on behalf of the Respondent. In addition, the Centre conveyed the Tribunal's understanding that, in light of the Respondent's payment of its share, the Claimants' Application under Rule 42 (as well as the invitation made to the Respondent to respond to this Application by 9 May 2016) had become moot.

95. By email of 6 May 2016, the Claimants expressed their concern as to the Tribunal's understanding that their Application had become moot, since the Respondent still had not provided any explanation for failing to pay its fifth advance on time and the Claimants had incurred "considerable costs as a consequence of the State's default". Accordingly, the Claimants requested that the Respondent provide an explanation for its default and confirm that it intended to continue to participate in this arbitration. The Claimants also

51 Claimants' Application under Rule 42, ¶ 8.

requested that the Tribunal make an order that, in any event and regardless of the payment of the fifth advance, the Respondent pay the costs incurred by the Claimants as a consequence of the Respondent's default.

96. On 18 May 2016, the Tribunal invited the Respondent to submit by 30 May 2016 any comments it may have had on the Claimants' Application under Rule 42. The Claimants were also invited to update within the same time limit their costs submissions to the extent that additional costs were incurred since their amended costs submissions of 20 April 2016.

97. The Respondent filed its comments on 30 May 2016 and the Claimants filed their updated costs submissions on the same day.[52]

98. On 9 September 2016, the Tribunal invited the Parties to comment on *Minnotte v. Poland*,[53] a decision dealing with the consequence of third party fraud, an issue which it considered potentially relevant to its decision. The Tribunal further invited the Parties to state whether they would consent to the issuance of one decision or award.

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[52] On 1 December 2016, the Tribunal drew the Parties' attention to the discrepancy between the total amount of the advance payments made by each Party as recorded by ICSID (USD 800,000) and as reflected in the Parties' costs submissions (USD 600,000). Noting that this discrepancy was most likely due to the timing of the cost submissions and of the last advance payments, the Tribunal advised the Parties that it would understand the costs submissions to refer to a total amount of USD 800,000 per Party, unless advised otherwise by 5 December 2016. On 2 December 2016, the Respondent confirmed that its advance payments to ICSID amounted to USD 800,000. The Claimants did not advise the Tribunal of any different amount by the deadline set by the Tribunal. For the sake of good order, the Tribunal recalls that the Secretariat acknowledged receipt of the following payments from the Parties:

1. USD 100,000 from the Claimants on 18 October 2012;
2. USD 100,000 from the Respondent on 6 November 2012;
3. USD 150,000 from the Claimants on 2 May 2013;
4. USD 150,000 from the Respondent on 2 May 2013;
5. USD 200,000 from the Claimants on 31 March 2014;
6. USD 200,000 from the Respondent on 7 April 2014;
7. USD 150,000 from the Claimants on 7 July 2015;
8. USD 150,000 from the Respondent on 25 August 2015;
9. USD 200,000 from the Claimants on 9 March 2016; and
10. USD 200,000 from the Respondent on 4 May 2016.

The letters acknowledging receipt of the Parties' advance payments were attached to the Tribunal's letter of 1 December 2016 for the Parties' convenience.

[53] *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014 (**Exh. CLA-255**).

99. On 23 September 2016, while the Claimants filed their first submission on *Minnotte* with the Secretariat, the Respondent requested a one-week extension to file its comments. On 24 September 2016, after having heard the Claimants' position, the Tribunal extended the time limit for the first submission on *Minnotte* until 27 September 2016 and for the Parties' second submission until 11 October 2016. The Parties filed their submissions on these dates[54] and gave their consent to the issuance of one decision/award. The proceeding was closed on 6 December 2016.

II. REQUEST FOR RELIEF

A. Respondent's Request for Relief

100. In the Application for Dismissal, which is the subject matter of this Award, the Respondent has requested the issuance of an award:

(i) deciding that the Ridlatama Companies' mining undertaking licenses for general survey and exploration upgrades were forged,
(ii) deciding that the other impugned documents were forged,
(iii) dismissing all of the claims asserted by Claimants, and
(iv) ordering Claimants to pay the legal fees, expenses and other costs incurred by the Respondent in connection with this arbitration.[55]

101. In its Reply Post-Hearing Brief, the Respondent requested that the Tribunal:

(a) "find that the Ridlatama Companies' mining undertaking licenses for general survey and exploration are not authentic;
(b) find that the other impugned documents are not authentic;
(c) issue an award dismissing all of the claims asserted by Claimants;
(d) order Claimants to pay the legal fees, expenses and other costs incurred by Respondent in connection with this Arbitration; and
(e) order such other relief as it deems appropriate".[56]

B. Claimants' Request for Relief

102. The Claimants have asked the Tribunal to:

(i) dismiss the Respondent's Application, and
(ii) order the Respondent to pay the Claimants' legal costs of responding to its Application in full.[57]

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54 Each Party's first submission on *Minnotte* was transmitted to the other Party and the Tribunal on 27 September 2016, once both submissions had been received by the Secretariat.

55 Respondent's Application for Dismissal of Claimants' Claims Based on the Forged and Fabricated Ridlatama Mining Licenses, 24 September 2014, ¶ 47; R-PHB1, ¶ 147.

56 R-PHB2, ¶ 50.

103. These requests have remained unchanged.

III. THE FACTS

104. The relevant facts are discussed in detail in the course of this Award. In addition, the Tribunal refers back to the facts set out in the Decisions on Jurisdiction, which are incorporated here by reference.

IV. POSITIONS OF THE PARTIES

105. This section is meant to provide an overview of the Parties' positions, which are elaborated upon if and when useful in the context of the Tribunal's analysis (Section IV).

A. The Respondent's Position

106. Indonesia requests that the Tribunal dismiss all of the Claimants' claims on the ground that the mining undertaking licenses and related approvals allegedly constituting the basis of the Claimants' investment in the EKCP "were forged and fabricated".[58] In addition, Indonesia submits that the upgrading of these non-existent licenses to exploitation mining licenses was secured through "deception and fraud".[59] For Indonesia, since the Claimants rely on the validity of the mining licenses held by Ridlatama, a finding that such licenses are invalid because they were forged would undermine the Claimants' entire case.

107. The Tribunal will first briefly summarize Indonesia's position on the facts and the evidence (1) and then continue with its main legal arguments (2).

1. On the facts

108. Indonesia disputes the authenticity of the following 34 documents, which are set out in the following table prepared by the Tribunal for ease of reference (the "Document Table"):

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57 Claimants' Reply to the State's Application for Dismissal of the Claimants' Claims Based on Forged and Fabricated Ridlatama Mining Licenses, ¶ 260.

58 Respondent's Application for Dismissal of Claimants' Claims Based on the Forged and Fabricated Ridlatama Mining Licenses, 24 September 2014, ¶ 1.

59 *Id.*, ¶ 3.

No.	Date	Document	Document Reference No.	Exhibit No.
I.	**Survey Licenses**			
1.	24 May 2007	RTM's KP General Survey Licenses issued by Regent of East Kutai	210/02.188.45/HK/V/2007	P-18, C-40
2.	24 May 2007	RTP's KP General Survey License issued by Regent of East Kutai	211/02.188.45/HK/V/2007	P-19, C-41
3.	29 Nov 2007	IR's KP General Survey License issued by Regent of East Kutai	248/02.188.45/HK/XI/2007	C-66
4.	29 Nov 2007	INP's KP General Survey License issued by Regent of East Kutai	247/02.188.45/HK/XI/2007	C-65
II.	**Payment Requests**[60]			
5.	4 Dec 2007	Request from Regent of East Kutai to IR for "Payment of Provisioning of Territory Fixed Contribution and Capability Security" for IR	173/02.188.45/XII/2007	C-92
6.	4 Dec 2007	Requests from Regent of East Kutai to INP for "Payment of Provisioning of Territory Fixed Contribution and Capability Security"	174/02.188.45/XII/2007	C-93
III.	**Cooperation Letters**[61]			
7.	8 Apr 2008	Statement Letter from Regent of East Kutai re. Approval on Cooperation between RTM and PT ICD	38/02.188.45/HK/IV/2008	P-45, C-351
8.	8 Apr 2008	Statement Letter from Regent of East Kutai re. Approval on Cooperation between RTP and PT ICD	39/02.188.45/HK/IV/2008	P-46, C-352
9.	8 Apr 2008	Statement Letter from Regent of East Kutai re. Approval on Cooperation between IR and PT ICD	37/02.188.45/HK/IV/2008	P-48, C-350
10.	8 Apr 2008	Statement Letter from Regent of East Kutai re. Approval on	40/02.188.45/HK/IV/2008	P-47, C-353

60 The Respondent also refers to the documents in categories II, III, and IV as "ancillary documents".

61 The Respondent also refers to the documents in categories II, III, and IV as "ancillary documents".

No.	Date	Document	Document Reference No.	Exhibit No.
		Cooperation between INP and PT ICD		
IV.	**Legality Letters**[62]			
11.	8 Apr 2008	Letter of Regent of East Kutai re. Legality Explanation Letter on behalf of IR	94/02.188.45/HK/IV/2008	C-98
12.	8 Apr 2008	Letter of Regent of East Kutai re. Legality Explanation Letter on behalf of RTM	95/02.188.45/HK/IV/2008	C-96
13.	8 Apr 2008	Letter of Regent of East Kutai re. Legality Explanation Letter on behalf of RTP	96/02.188.45/HK/IV/2008	C-95
14.	8 Apr 2008	Letter of Regent of East Kutai re. Legality Explanation Letter on behalf of INP	98/02.188.45/HK/IV/2008	C-97
V.	**Exploration Licenses**			
15.	9 Apr 2008	RTP's KP Exploration License issued by Regent of East Kutai	36/02.188.45/HK/IV/2008	P-50, C-101
16.	9 Apr 2008	RTM's KP Exploration License issued by Regent of East Kutai	37/02.188.45/HK/IV/2008	P-49, [63] C-102
17.	9 Apr 2008	INP's KP Exploration License issued by Regent of East Kutai	38/02.188.45/HK/IV/2008	P-51, [64] C-99
18.	9 Apr 2008	IR's KP Exploration License issued by Regent of East Kutai	39/02.188.45/HK/IV/2008	P-52, [65] C-100
VI.	**Borrow-for-Use Recommendations**			
19.	29 Dec 2009	Letter from Governor of East Kalimantan re. Borrow-for-Use of Forest Area in the name of RTM	522.21/5213/Ek	R-144

62 The Respondent also refers to the documents in categories II, III, and IV as "ancillary documents".

63 The Tribunal notes that the decree reference number in the English version of Exhibit P-49 does not correspond to the Indonesian version.

64 The Tribunal notes that the decree reference number in the English version of Exhibit P-51 does not correspond to the Indonesian version.

65 The Tribunal notes that the decree reference number in the English version of Exhibit P-52 does not correspond to the Indonesian version.

No.	Date	Document	Document Reference No.	Exhibit No.
20.	29 Dec 2009	Letter from Governor of East Kalimantan re. Borrow-for-Use of Forest Area in the name of RTP	522.21/5214/Ek	R-145
21.	11 Mar 2010	Letter from Governor of East Kalimantan re. Borrow-for-Use of Forest Area in the name of IR	522.21/3192/Ek	C-220
22.	11 Mar 2010	Letter from Governor of East Kalimantan re. Borrow-for-Use of Forest Area in the name of INP	522.21/3193/Ek	C-220
23.	22 Mar 2010	Letter from Governor of East Kalimantan re. Borrow-for-Use of Forest Area in the name of RTP	522.21/3217/Ek	C-220
24.	22 Mar 2010	Letter from Governor of East Kalimantan re. Borrow-for-Use of Forest Area in the name of RTM	522.21/3219/Ek	C-220
VII. Re-Enactment Decrees				
25.	14 May 2010	Decree signed by Regent of East Kutai re-enacting *Decree of the Regent of East Kutai No. 188.4.45/116/HK/III/2009* (concerning IR Exploitation License)	540.1/K.463/HK/V/2010	R-068
26.	14 May 2010	Decree signed by Regent of East Kutai re-enacting *Decree of the Regent of East Kutai No. 188.4.45/117/HK/III/2009* (concerning INP Exploitation License)	540.1/K.464/HK/V/2010	R-069
27.	14 May 2010	Decree signed by Regent of East Kutai re-enacting *Decree of the Regent of East Kutai No. 188.4.45/118/HK/III/2009* (concerning RTM Exploitation License)	540.1/K.465/HK/V/2010	R-070
28.	14 May 2010	Decree signed by Regent of East Kutai re-enacting *Decree of the Regent of East Kutai No. 188.4.45/119/HK/III/2009* (concerning RTP Exploitation License)	540.1/K.466/HK/V/2010	R-071
VIII. Technical Recommendations				
29.	22 Sep 2010	Letter from Bambang Setiawan (MEMR) to the Ministry of Forestry relating to technical considerations for IR's Borrow-	2977/30/DJB/2010	C-253

No.	Date	Document	Document Reference No.	Exhibit No.
		for-Use permit application		
30.	22 Sep 2010	Letter from Bambang Setiawan (MEMR) to the Ministry of Forestry relating to technical considerations for INP's Borrow-for-Use permit application	2976/30/DJB/2010	C-252
31.	22 Sep 2010	Letter from Bambang Setiawan (MEMR) to the Ministry of Forestry relating to technical considerations for RTM's Borrow-for-Use permit application	2979/30/DJB/2010	C-255
32.	22 Sep 2010	Letter from Bambang Setiawan (MEMR) to the Ministry of Forestry relating to technical considerations for RTP's Borrow-for-Use permit application	2978/30/DJB/2010	C-254
IX. Gunter Documents				
33.	24 May 2007	RTM's KP General Survey Licenses issued by Regent of East Kutai (including spatial analysis of Planology Office of 21 May 2007)	210/02.188.45/HK/V/2007	R-264
34.	24 May 2007	RTP's KP General Survey Licenses issued by Regent of East Kutai (including spatial analysis of Planology Office of 21 May 2007)	211/02.188.45/HK/V/2007	R-265

109. Furthermore, Indonesia contends that the PT Ridlatama Tambang Mineral ("PT RTM"), PT Ridlatama Trade Powerindo ("PT RTP"), PT Investmine Nusa Persada ("PT INP") and PT Investama Resources ("PT IR") exploitation licenses issued on 27 March 2009 (the "Exploitation Licenses"),[66] the authenticity of which is not challenged, were the product of deception or fraud.

[66] Exploitation Business License for Ridlatama Trade, Decision No. 188.4.45/119/HK/III/2009, 27 March 2009 (**Exh. C-146**); Exploitation Business License for Ridlatama Mineral, Decision No. 188.4.45/118/HK/III/2009, 27 March 2009 (**Exh. C-147**); Exploitation Business License for Investama Resources, Decision No. 188.4.45/116/HK/III/2009, 27 March 2009 (**Exh. C-148**); Exploitation Business License for Investmine Persada, Decision No. 188.4.45/117/HK/III/2009, 27 March 2009 (**Exh. C-149**).

110. Indonesia contends that the authenticity of other documents is "questionable", such as the 2007 Staff Analysis prepared by Mr. Putra, which reached the conclusion that Nusantara's licenses had lapsed and that the blocks were available.[67]

111. The Respondent notes that the disputed documents bear two sets of identical signatures of Mr. Ishak (as Regent and as Governor); one set of identical signatures of Mr. Noor; and one set of identical signatures of Mr. Bambang Setiawan. In addition, the signature of Mr. Ishak on the Gunter Documents was copied and pasted from the PT RP Survey License.

112. The Respondent notes that documents nos. 1 to 18 in the Document Table bear the identical signature of Mr. Ishak in his capacity as Regent of East Kutai[68] and that documents nos. 19 to 24 in the Document Table bear the identical signature of Mr. Ishak in his capacity as Governor of East Kalimantan.

1.1. **Method employed to forge the documents**

113. For Indonesia, the signatures in documents nos. 1-32 in the Document Table were produced "by a piece of very sophisticated technology, most probably an autopen device".[69] Indonesia's expert, Mr. Epstein, confirmed in his reports and at the hearing that Messrs. Ishak, Noor and Setiawan did not sign the disputed documents and that their signatures had been affixed with a so-called "autopen".[70] An autopen uses a master signature that is programed through a smart card or flash drive so as to produce identical signatures in ink.[71]

114. Indonesia notes that the Claimants admit that the disputed documents were not signed by hand and that identical signatures were reproduced within certain sets of documents.[72] It notes that the Claimants' expert, Dr. Strach,

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67 Staff Analysis by Mining & Energy Bureau, Regency of East Kutai, 26 February 2007 (**Exh. C-34**).

68 The Respondent indicates that the 8 Mining Licenses contain 39 forged signatures, all of which were generated by the same master signature. Tr. (Day 1), 28:17-19 (Opening, O'Donoghue).

69 R-PHB1, ¶ 4.

70 Application for Dismissal, ¶ 23; Tr. (Day 1), 28:20 (Opening, O'Donoghue); Epstein ER1, pp. 6-7; Epstein ER2, p. 8.

71 Application for Dismissal, note 27; Epstein ER2, p. 8.

72 R-Answers, ¶ 2; R-PHB1, ¶ 3.

accepted that autopen technology could be an explanation, although he was more inclined to admit that a high quality stamping or printing technology produced the signatures, he was unable to identify any technology that could achieve such high quality stamp impressions.[73] In contrast to Mr. Epstein, who has extensive experience with autopen technology, consulted with senior personnel of the Autopen Company, and acknowledged that the signatures might have been produced by a different technology, Indonesia emphasizes that Dr. Strach has close to no experience with autopen technology and only inferred from some dots and fine marks on the PT RTM and PT RTP Survey Licenses (documents nos. 1 and 2 in the Document Table) that all other signatures could not have been produced by autopen technology. Mr. Epstein, so states Indonesia, explained that the dots and fine marks were more likely the cause of a malfunction of the autopen.[74] In any event, Indonesia emphasizes that both experts "agree that the re-produced signatures were of a very high quality, which could not be achieved by typical stamps".[75]

115. The Respondent further observes that the two Gunter Documents (documents nos. 33-34 in the Document Table) contain identical signatures of Mr. Ishak from the PT RP license of 12 February 2007.[76] Both experts confirmed that the signatures were affixed on the second version of the PT RTM and PT RTP Survey Licenses by using a "relatively unsophisticated 'copy and paste' method".[77] This leads Indonesia to conclude that this "leaves little doubt that someone associated with Ridlatama, or someone who had access to that unique license, had a hand in the forgery".[78]

116. For Indonesia, the fact that the disputed documents were not signed by hand is "very strong evidence" that forgery occurred, notably because both the Respondent's and the Claimants' witnesses testified at the hearing that mining licenses are signed by hand only.[79] Mr. Gunter, a witness presented

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73 R-PHB1, ¶ 23.

74 R-PHB1, ¶ 26.

75 Tr. (Day 1), 28:23-25 (Opening, O'Donoghue).

76 Tr. (Day 1), 29:8-12 (Opening, O'Donoghue).

77 R-PHB1, ¶¶ 7, 20.

78 Tr. (Day 1), 29:15-17 (Opening, O'Donoghue).

79 R-PHB1, ¶ 13. For the Respondent's witnesses, *see*: Ishak WS1, ¶ 10; Setiawan WS, ¶ 9; Tr. (Day 5), 74:20-75:7 (Tribunal, Setiawan); Ordiansyah WS, ¶ 37; Ramadani WS, ¶ 17; Tr. (Day 4), 148:7-8 (Direct, Ramadani); Tr. (Day 5), 61:15-18 (Tribunal,

by the Claimants, confirmed that the signature was the "last bastion of power", further stating that using digital signatures would be "dangerous", and concluding that "[i]t should have been all original signatures".[80] Similarly, Mr. Benjamin, another of the Claimants' witnesses, confessed that he was not aware that the disputed signatures were not handwritten and that he would have been concerned if he had known this to be the case.[81]

117. Indonesia submits that the Claimants failed to provide any evidence supporting their contention that Mr. Ishak did not always follow the practice of signing official documents by hand.[82] In particular, the identical signatures on the licenses of PT Swasembada Bara and PT Swasembada Energi dated 9 April 2008 are unhelpful, since these two companies are also controlled by Mr. Mudjiantoro and other Ridlatama principals, thus reinforcing the conclusion that Ridlatama is involved in the forgery.[83] In addition, Dr. Strach was unable to identify any other identical signatures of Mr. Ishak (2849 pair comparisons) or Mr. Noor (297 pair comparisons).[84]

118. As to the "clerical errors" identified by the Claimants on the documents produced by the Respondent for purposes of comparison, these are mere typographical errors or results of an imperfect filing system, they do not compare to the "grave defects" found in the disputed documents, in particular the mining licenses.[85]

1.2. Elements of forgery identified by Indonesia's experts and witnesses

119. Indonesia points to the following irregularities on the disputed documents that support its claim that they were forged or fabricated.

Ramadani); Armin WS, ¶ 27; Djalil WS, ¶ 14, 16; Tr. (Day 5), 90:2-14 (Tribunal, Djalil). For the Claimants' witnesses, *see*: Tr. (Day 7), 34:23-35:12 (Cross, Gunter), 57:20-58:14 (Tribunal, Gunter); Tr. (Day 7), 97:1-19 (Cross, Benjamin).

80 R-PHB1, ¶ 13, note 25.

81 R-PHB1, ¶ 14.

82 R-PHB1, ¶ 15.

83 R-Answers, ¶¶ 3-4; R-PHB1, ¶ 15.

84 R-PHB1, ¶ 16.

85 R-Answers, ¶¶ 17, 105.

a) Survey Licenses

120. As a general matter, Indonesia relies on Mr. Epstein's expertise to argue that Mr. Ishak's signature on all disputed Survey Licenses was not handwritten, but the product of autopen technology. In addition, Mr. Epstein found that a master signature was used to produce documents 1 to 18 in the Document Table. Finally, Indonesia submits that the PT RTM and PT RTP Survey Licenses (document nos, 1 and 2 in the Document Table) contain special features not otherwise present on documents 3 to 18 in the Document Table. More specifically, Indonesia points to the following irregularities with respect to each specific license.

(i) PT RTM Survey License

121. According to Indonesia, the protuberances, angular features, voids, width variations, small spots and dots, smudge marks and faint marks are the result of a malfunction of the autopen device.[86] In fact, the Claimants and Dr. Strach fail to explain why these features reoccur in the same position, whereas the marks associated with the stamp impressions vary. [87] Furthermore, the maps appear to have been produced by a "trickster",[88] since they contain the following defects:[89] (i) the inset in the legend showing the message "I Lover You" and "Oh yes/no", [90] (ii) the map lacks Mr. Ordiansyah's initials, (iii) latitudinal and longitudinal numbers are only on two sides instead of all four sides, in addition to being in the incorrect numerical order,[91] and (iv) the legend does not define "HP" (*hutan produksi* or production forest).

122. Additional anomalies highlighted by Indonesia include: the draft decree was issued on the same date as the license;[92] the map attached to the draft decree was not issued by the Planology Office (no longitudinal and latitudinal graticules;[93] Mr. Putra's instead of Mr. Ordiansyah's initials) and

86 R-Answers, ¶¶ 44-47.

87 R-Answers, ¶ 48.

88 R-Answers, ¶ 63.

89 *See* table R-Answers, p. 32.

90 R-Answers, ¶ 72, and p. 30, Image 3.

91 R-Answers, p. 28, Image 2.

92 R-Answers, ¶ 65.

93 The longitudinal and latitudinal graticules form the grid of a coordinate system, such as in maps.

differs from the map in the license;[94] the license and draft decree are based on a 20 March 2007 application, but the records only contain a 23 February 2007 application;[95] the area in the application is different from the area granted in the license;[96] and Mr. Kurniawan's list contains no application dated 20 March 2007.[97]

123. Indonesia also highlights that Mr. Ishak testified that he did not sign the license and that the Regency never used an autopen, [98] which Messrs. Armin, Ramadani and Ordiansyah confirmed. Mr. Armin testified that the archives of the Mining and Energy Bureau contain no originals or copies of the disputed license.[99] Messrs. Ordiansyah and Ramadani further confirmed that the Planology Office did not issue the map, and that the map is not in the standard format for 2007 maps, and was never registered in the SIG database.[100]

(ii) PT RTP Survey License

124. Indonesia raises the same concerns about the PT RTP license as for the PT RTM license, save for the following: (i) the map depicts a white area in the south of the PT RTP block, although it is actually in a production forest;[101] and (ii) the map was designed by a certain Chand, and Mr. Gunter conceded that it was generated by GMT.[102]

(iii) PT INP Survey License

125. Indonesia observes that the PT INP license (i) is not registered in the Regency's registration book; [103] (ii) the document number belongs to a document issued in June 2007;[104] (iii) the map attached was generated by

94 R-Answers, ¶¶ 68-69.

95 R-Answers, ¶ 77.

96 R-Answers, ¶ 79. Compare Exh. C-32 with Exh. C-40.

97 R-Answers, ¶ 78.

98 Ishak WS1, ¶¶ 12-13. *See* also: Tr. (Day 1), 29:18-20 (Opening, O'Donoghue).

99 Armin WS, ¶ 25.

100 Ordiansyah WS, ¶ 26; Ramadani WS, Annex. SIG stands for *Sistem Informasi Geografis* or Geographic Information System.

101 R-Answers, p. 32, table.

102 R-Answers, p. 33, Image 4.

103 R-Answers, ¶ 81.

104 R-Answers, ¶ 81; Ramadani WS, Annex (**Exh. NR-01**).

an entity called "ADH";[105] (iv) the map does not bear the initials of Mr. Ordiansyah;[106] (v) the map only has graticules on two sides instead of four; (vi) the map shows no forestry area; (v) the map's inset covers all of East Kalimantan when it should only cover the Regency of East Kutai; (vii) the map is not properly oriented; (viii) the map was taken from PT INP's application;[107] and (ix) the map legend contains a word in English.[108]

(iv) PT IR Survey License

126. Indonesia has the same observations on the PT IR license as those raised in connection with the PT INP license.[109]

b) Exploration Licenses

127. In general, Indonesia contends that the signatures on the disputed Exploration Licenses were not freely handwritten and were affixed by using autopen technology. More specifically, the Respondent raises the following concerns:

(i) PT RTP Exploration License

128. The decree number does not comply with the official format for 2008 decrees, since it should be located in the middle, not at the beginning of the document number, as other entries in the 2008 registration book show.[110] In addition, the document number belongs to a different document.[111] Finally, the "Having in Mind" section contains various irregularities, such as multiple references to the same regulations, wrong names and years of regulations.[112]

129. With respect to the attached maps, they bear none of the characteristics of official Regency maps, since (i) there are three maps instead of one; (ii) they were compiled by "ADH" on 11 June 2007 and are copyrighted; (iii) they show no forestry area; (iv) the legends are in English instead of Bahasa;

105 R-Answers, ¶ 63.

106 Ordiansyah WS, ¶ 29.

107 R-Answers, p. 34, Image 5. Compare with Exh. C-55.

108 R-Answers, p. 32, table, p. 36, Image 7.

109 *See*: R-Answers, p. 32, table, p. 35, Image 6, p. 36, Image 7.

110 Ramadani WS, Annex, items 5-16.

111 R-Answers, ¶ 82; Ramadani WS, Annex, items 5-16.

112 Ramadani WS, Annex, item 13.

(iv) they do not contain Mr. Ordiansyah's initials; (v) the Regent's signature is outside the maps instead of inside the legend column; (vi) the graticules are only on two instead of four sides; (vii) the maps are not properly oriented; (viii) they contain insets whereas official maps of 2008 do not have such insets; and (ix) the maps are scaled 1:50,000 instead of 1:250,000.[113]

(ii) PT RTM Exploration License

130. Indonesia makes the same comments on the PT RTM Exploration License as those for the PT RTP Exploration License. In addition, it notes that the decree number is the same as the one used for the April 2008 legality explanation letter for PT RTM (document no. 12 in the Document Table).

(iii) PT INP Exploration License

131. The Respondent makes the same contentions about the PT INP license as for the PT RTP and PT RTM licenses. With respect to the maps, it points out that (i) there are two maps instead of one; (ii) the situation map is identical to the one attached to PT INP's application for general survey; and (iii) the maps were compiled on 22 February 2008.

(iv) PT IR Exploration License

132. Indonesia puts forward the same concerns for the PT IR license as for the PT RTP, PT RTM and PT INP licenses. With respect to the maps, Indonesia states that the situation map is identical to the map attached to PT IR's application for general survey.

c) Payment Requests

133. Indonesia essentially claims that the signatures of Mr. Ishak were not freely handwritten on the payment letters (documents nos. 5-6 in the Document Table) and that they were produced using an autopen.[114] Mr. Epstein confirmed that the signature of Mr. Ishak stems from the same model as the one in documents 1 to 18 in the Document Table.

134. The Respondent also emphasizes that Mr. Ishak gave evidence that he never issued requests for payment of dead rents or seriousness bonds.[115]

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113 R-Answers, ¶ 88 and pp. 44-48; Ordiansyah WS, ¶ 26; Ramadani WS, Annex, item 13.

114 Epstein ER4.

115 Ishak WS2, ¶ 11.

d) Cooperation and Legality Letters

135. Indonesia submits that Mr. Ishak did not sign the Cooperation and Legality Letters (documents nos. 7-14 in the Document Table) by hand and that the signature was produced by an autopen. It also insists that Mr. Ishak testified that he had no knowledge of PT ICD or the Claimants at the time, and that he was unaware of their cooperation with Ridlatama.[116] Mr. Armin confirmed that the Regency never issued Legality Letters, and that the Regency's archives contain no original or copy of these letters.[117] In addition, the Respondent notes the following anomalies on these letters: (i) the decree numbers are the same as the corresponding numbers of the disputed Exploration Licenses; (ii) the decree numbers are not in the format of official 2008 decrees, since they should be placed in the middle and not at the beginning.[118]

e) Borrow-for-Use Recommendations

136. The Respondent further argues that the two sets of Borrow-for-Use Recommendations are forged (documents nos. 19-24 in the Document Table). Indonesia points to the fact that the 29 December 2009 and 11 March 2010 letters are essentially identical as to their content, that Mr. Ishak's signatures are identical and were produced using an autopen, and that Mr. Ishak testified that he did not sign or authorize these documents.[119] In this context, Mr. Epstein clarified that Mr. Ishak's signature is a different master signature than the one used for documents nos. 1 to 18 in the Document Table and that this second master signature was used to produce his signatures on documents nos. 19 to 24 in the Document Table.

f) Technical Considerations

137. The Respondent further challenges the authenticity of four Technical Considerations of the Ministry of Energy and Mineral Resources ("MEMR") dated 22 September 2010 (documents nos. 29-32 in the Document Table). It relies on the following evidence to substantiate its position. The Respondent's expert, Mr. Epstein, confirmed that Mr. Setiawan's signature

116 Ishak WS1, ¶ 20.

117 Armin WS, ¶ 26.

118 Ramadani WS, Annex.

119 Ishak WS1, ¶ 15; Epstein ER2.

was affixed using an autopen.[120] He further testified that Mr. Setiawan's signatures on all the disputed technical consideration letters are identical and were produced with the same master signature. Mr. Setiawan also gave evidence that he did not recall signing these letters, but that he signed all letters by hand.[121] Similarly, Mr. Djalil confirmed that Mr. Setiawan always signed his letters by hand and that the MEMR does not use autopen devices. Both Mr. Setiawan and Mr. Djalil further pointed to various oddities in the Technical Considerations confirming that they were forged, such as the use of an incorrect NIP, incorrect initials and an incorrect stamp.

g) Re-Enactment Decrees

138. According to the Respondent, the Re-Enactment Decrees dated 14 May 2010 were also forged (documents nos. 25-28 in the Document Table). Indonesia contends that, in contrast to the revocation decrees dated 4 May 2010 containing Mr. Noor's handwritten signature (the "Revocation Decrees"),[122] the signature of Mr. Noor on the Re-Enactment Decrees was not freely handwritten and was produced with an autopen. Mr. Epstein confirmed that Mr. Noor's signature was identical on all disputed documents, since a master signature was employed. Mr. Epstein indicated that the small dot appearing below the signature is "probably an ink spot on the master".[123] Mr. Noor indicated in his witness statement that he did not sign or authorize these documents,[124] and that he always signs official documents by hand.[125]

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120 Epstein ER3.

121 Setiawan WS, ¶ 9.

122 Decree of the Regent of East Kutai No. 540.1/K.443/HK/V/2010, concerning Revocation of Decree of the Regent of East Kutai No. 188.4.45/118/HK/III/2009, concerning Mining Undertaking License (IUP) for Exploitation to PT RTM, 4 May 2010 (**Exh. R-062**); Decree of the Regent of East Kutai No. 540.1/K.444/HK/V/2010, concerning Revocation of Decree of the Regent of East Kutai No. 188.4.45/119/HK/III/2009, concerning Mining Undertaking License (IUP) for Exploitation to PT RTP, 4 May 2010 (**Exh. R-063**); Decree of the Regent of East Kutai No. 540.1/K.442/HK/V/2010, concerning Revocation of Decree of the Regent of East Kutai No. 188.4.45/117/HK/III/2009, concerning Mining Undertaking License (IUP) for Exploitation to PT INP, 4 May 2010 (**Exh. R-064**); Decree of the Regent of East Kutai No. 540.1/K.441/HK/V/2010, concerning Revocation of Decree of the Regent of East Kutai No. 188.4.45/116/HK/III/2009, concerning Mining Undertaking License (IUP) for Exploitation to PT RTM, 4 May 2010 (**Exh. R-065**).

123 Epstein ER2, ¶ 3.

124 Noor WS, ¶ 19.

125 Noor WS, ¶ 21.

1.3. **The use of Mr. Ishak's signature was not authorized**

139. It is the Respondent's submission that, since it is undisputed that the signatures on the impugned documents were not signed by hand but applied mechanically, the question boils down to whether these mechanical signatures were authorized or not. For Indonesia, the evidence establishes that Mr. Ishak did not authorize the placement of his signature on the disputed documents (documents nos. 1 to 18 in the Document Table).[126] When Mr. Ishak was away, Mr. Noor would sign for him, but in his capacity as Deputy Regent, not with Mr. Ishak's name.[127] According to Indonesia, the following elements corroborate this conclusion.

a) Numerous irregularities in the Licenses

140. In addition to the testimony of Mr. Ishak stating that he did not sign or authorize the Survey and Exploration Licenses, Indonesia points to a series of "glaring indicia" corroborating its case: (i) the insets on the maps attached to the PT RTM and PT RTP Survey Licenses contain the inscriptions "I Lover You" and "Oh Yes/no" in addition to other "nonsensical" words in Indonesian such as "Del. Guablik Benga" and "Nganyuk"; (ii) the maps of the PT INP and PT IR Survey Licenses were copied and pasted from the applications and their legends are in English; (iii) the Exploration Licenses contain three copyrighted maps compiled by ADH and the maps are in portrait instead of landscape format; and (iv) none of the maps contain latitudinal and longitudinal numbers on all four sides.[128]

b) Application process

141. Messrs. Ordiansyah and Armin gave evidence that they did not process the PT RTM and PT RTP general survey applications, so insists Indonesia, since they overlapped with Nusantara Wahau Coal ("NWC") and Kaltim Nusantara Coal ("KNC") Exploration Licenses.[129]

142. The Respondent also emphasizes that the spatial analyses contained in the Gunter Documents (documents nos. 33-34 in the Document Table) show

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126 R-PHB1, ¶ 29; Ishak WS1, ¶¶ 12-13; Ishak WS2, ¶ 10; Tr. (Day 3), 35:14-15 (Tribunal, Ishak).

127 R-PHB1, ¶ 29, n. 55. Tr. (Day 3), 84:2-8 (Cross, Ishak).

128 R-Answers, ¶ 177.

129 R-PHB1, ¶ 30; Ordiansyah WS, ¶ 26; Armin WS, ¶ 21; Tr. (Day 3), 144:4-14 (Direct, Ordiansyah); Tr. (Day 4), 131:12-132:5 (Tribunal, Armin).

that NWC and KNC held valid exploration licenses, as indicated by the abbreviation "*Eks.*", which means *eksplorasi* and not "Ex" (i.e. former) as suggested by the Claimants.[130]

143. Further, according to the Respondent, the 26 February 2007 Staff Analysis is unreliable and does not support the contention that the areas applied for by PT RTM and PT RTP were open and available. Most importantly, it refers to the MEMR letter of 23 March 2007 which postdates the staff analysis, suggesting that it was backdated. Mr. Ishak denied ever seeing it, it does not contain any *disposisi* (orders/directions), and it is inconsistent with Mr. Putra's staff analysis of 19 May 2008 where Nusantara's application was deemed timely.[131]

144. As for the 23 March 2007 MEMR letter, so adds the Respondent, it only states that the concession areas would become open if Nusantara's concessions had expired and no extension had been requested, but it does not say that the areas were open, a point conceded by Mr. Quinlivan at the hearing.[132]

145. With respect to the draft decrees (Exh. C-383 and Exh. C-384), Indonesia questions their authenticity for various reasons: (i) it is unclear how Mr. Kurniawan obtained these documents; (ii) since they were issued on the same date as the original decrees, it is unclear why Mr. Wirmantono obtained these draft decrees if the purpose was to reassure him that the process was progressing well; (iii) Mr. Armin testified that he did not prepare the draft decrees, and Mr. Ordiansyah testified that the maps were not issued or approved by the Planology Office; and (iv) Mr. Benjamin had no knowledge of the draft decrees.[133] Ultimately, the draft decrees do not prove that Mr. Ishak authorized his signature to be placed on the PT RTM and PT RTP licenses, since it was within Mr. Ishak's discretion to sign or not, as Mr. Quinlivan acknowledged.[134] Mr. Ishak actually explained that he checked whether Nusantara still had valid licenses, and "that is why perhaps I did not

130 R-PHB1, ¶ 30.

131 R-PHB1, ¶ 32.

132 R-PHB1, ¶ 33; Tr. (Day 6), 53:3-13 (Cross, Quinlivan).

133 R-PHB1, ¶ 34.

134 Tr. (Day 6), 56:17-20 (Cross, Quinlivan): ("If Ridlatama applied for them, the discretion to appoint them was the Regent's").

sign the letter, because there was something there at the time that had not been fulfilled, and I think – I'm certain it was that".[135]

c) Maps attached to the Mining Licenses

146. According to Indonesia, maps issued by the Planology Office contain handwritten signatures of the Regent. None of the maps attached to the disputed licenses were signed by the Regent, as they contain the same identical signature as on the other disputed documents. Other elements prove that the maps were not issued by the Planology Office: (i) the PT RTP Survey License map was designed by someone called "Chand"; (ii) the PT INP and PT IR Survey License maps were copied and pasted from the applications; (iii) Mr. Gunter confirmed that the Exploration License maps were compiled by GMT and should not have been part of the official licenses; (iv) the PT RTM and PT RTP map insets "I Lover You" and "Oh Yes/no" are nonsensical;[136] (v) the PT INP and PT IR maps are upside down; (vi) the PT INP and PT IR Survey License maps contain English text; and (vii) the Exploration Licenses contain three types of maps prepared by GMT instead of one map prepared by the Planology Office. In addition, these peculiarities are unique to Ridlatama licenses and appear nowhere else.[137]

d) Documents not registered

147. It is the Respondent's further submission that, save for the PT RTM and PT RTP Survey Licenses, none of the disputed documents issued by the Regency was properly registered, in addition to bearing decree numbers assigned to other unrelated decrees.[138] With regard to the registration of the PT RTM and PT RTP Survey Licenses, Mr. Ramadani testified that Mr. Putra instructed the registrar to register them, promising her to provide the originals, which he never did.[139] In the end, so writes the Respondent,

135 R-PHB1, ¶ 35; Tr. (Day 3), 15:25-16:21 (Direct, Ishak).

136 R-Answers, ¶ 3.

137 R-PHB1, ¶ 39.

138 R-PHB1, ¶ 40.

139 R-PHB1, ¶ 43; Tr. (Day 5), 36:10-21 (Re-direct, Ramadani).

"[r]egistration of fictitious or falsified documents does not make them authentic",[140] but demonstrates "the extent and reach of the scheme".[141]

e) No handover ceremonies

148. For Indonesia, Mr. Quinlivan's reliance on official ceremonies to deliver the licenses was shown to be wrong at the hearing, Mr. Ishak denying ever presiding over such ceremonies, a point that Mr. Kurniawan confirmed. Mr. Quinlivan conceded that, if Mr. Mazak's account of handover ceremonies was untrue, then it could be possible that the licenses were invalid after all.[142]

1.4. Other circumstantial evidence relied upon by the Claimants was created to establish a record of legitimacy

149. To support its case of a massive fraud scheme, Indonesia further argues that Ridlatama produced and sought to obtain from various agencies a series of documents so as to establish a record of legitimacy. Indonesia points to the following elements: (i) the MEMR maps do not prove the authenticity of the disputed mining licenses, and MEMR has no authority to issue licenses;[143] (ii) the acknowledgements on Ridlatama's courier slips only confirm receipt of documents sent by Ridlatama, but do not show that the licenses were valid;[144] (iii) as Mr. Gunter testified, the dead rent payments were insignificant and the seriousness bonds hardly ever paid;[145] (iv) as Mr. Armin confirmed, the MEMR checklist of April 2009 provides no support for the valid registration of the purported licenses at the Regency, since the MEMR officer's function was limited to checking documents

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140 R-PHB1, ¶ 43.

141 Tr. (Day 1), 30:2-9 (Opening, O'Donoghue).

142 R-PHB1, ¶ 47; Tr. (Day 6), 35:12-20, 36:11-25 (Cross, Quinlivan).

143 R-PHB1, ¶ 48, item 1; Ministry of Energy and Mineral Resources, Map of Kutai Mining Area, 25 June 2007 (**Exh. C-50)**; Ministry of Energy and Mineral Resources, Map of Kutai Mining Area, 10 December 2007 **(Exh. C-68)**; Ministry of Energy and Mineral Resources, Map of Kutai Mining Area, 21 May 2008 **(Exh. C-105**).

144 R-PHB1, ¶ 48, item 2; Tr. (Day 6), 15:20-16:5, 16:24-17:6 (Cross, Quinlivan).

145 R-PHB1, ¶ 48, item 3; Tr. (Day 7), 72:25-74:1 (Tribunal, Gunter). *See*, for instance, Payment by Investama Resources of Dead Rent to the Directorate General of Mineral and Coal, 22 January 2008 **(Exh. C-70)**; Payment by Investmine Persada of Dead Rent to the Directorate General of Mineral and Coal, 22 January 2008 **(Exh. C-71)**; Payment Request for Dead Rent and Seriousness Bond from Mining and Energy Bureau, East Kutai to PT RTM and PT RTP, 14 May 2007 **(Exh. C-457)**.

received by Ridlatama;[146] (v) the 2009 police investigation dealt with trespass, not forgery, and, in any event, was conducted without knowledge of the existence of duplicate PT RTM and PT RTP licenses (Gunter Documents);[147] (vi) the Bawasda team did not conduct forensic examinations and was generally unaware of the Gunter Documents as well as other forged documents;[148] (vii) legal advice from Sondong, Tampubolon & Partners ("STP"), the "illustrative map" from Mr. Soehandjono, and the due diligence report of DNC do not constitute evidence as to the authenticity of the licenses since all the lawyers assumed the authenticity of the licenses;[149] (viii) Churchill's press releases have no bearing on whether Mr. Ishak authorized the issuance of the disputed documents; and (ix) the process of upgrades to exploitation licenses was not properly followed.[150]

1.5. The Claimants failed to prove that the ancillary documents are authentic

150. Indonesia also highlights that the Claimants failed to address at the hearing the authenticity of the so-called ancillary documents (i.e., 2007 Payment Letters (documents nos. 5-6 in the Document Table), 2008 Legality Letters (documents nos. 11-14 in the Document Table), and Cooperation Letters (documents nos. 7-10 in the Document Table)) and admitted that a finding that these documents were forged would support a finding that the licenses were equally forged.[151]

151. To substantiate its contention that the ancillary documents were forged, Indonesia points to the following elements: (i) Mr. Ishak gave evidence that he did not sign them or authorize their issuance; (ii) none of the documents was registered in the Regency Registration Books of Decrees and none contains a unique number; (iii) Mr. Ishak testified that he never issued

146 R-PHB1, ¶ 48, item 4; Tr. (Day 4), 71:23-72:1, 80:7-81:7 (Direct, Armin), 112:17-113:9, 114:1-7, 114:21-115:24, 117:18-25, 118:24-119:10 (Cross, Armin), 129:5-17 (Tribunal, Armin), 127:14-21 (Re-direct, Armin).

147 R-PHB1, ¶ 48, item 5.

148 R-PHB1, ¶ 48, item 6.

149 R-PHB1, ¶ 48, item 7; R-Answers, ¶¶ 10-13.

150 R-PHB1, ¶ 48, item 8.

151 Tr. (Day 1), 29:5-8 (Opening, O'Donoghue); R-PHB1, ¶ 51.

payment or legality explanation letters; and (iv) these documents were created by Ridlatama to appease the Claimants.[152]

1.6. The Borrow-for-Use related documents were also forged

152. The Respondent further asserts that the Claimants also failed to address the authenticity of the Borrow-for-Use related documents (i.e., 2009 Recommendation Letters (documents nos. 19-20 in the Document Table), March 2010 Recommendation Letters (documents nos. 21-24 in the Document Table), and September 2010 Technical Considerations (documents nos. 28-31 in the Document Table)) and instead requested the Tribunal to defer its decision on that issue. Indonesia recalls that these documents "bear the same high quality reproductions of an official's signature and other indicia of forgery".[153]

153. According to Indonesia, the following elements support its contention: (i) Messrs. Ishak and Setiawan testified that they did not sign or authorize these documents; (ii) the two sets of Recommendation Letters are "essentially identical"; (iii) the letter numbers on the Technical Considerations belong to other documents issued by Mr. Setiawan; (iv) they also contain the incorrect NIP of Mr. Setiawan; (v) they use the wrong font and an incorrect stamp; (vi) they should contain either a signature and stamp or a signature and initial, but not all three; (vii) Mr. Setiawan did not recognize the initials; and (viii) the summaries of activities are identical when they should relate to activities in separate blocks.[154]

1.7. The Re-Enactment Decrees are not authentic

154. The Respondent insists on what it calls the Claimants' "change of heart" about the Re-Enactment Decrees when they stated at the end of the hearing that they "don't have a position either way".[155] According to Indonesia, the Claimants provided no evidence of protest by Ridlatama or themselves against the revocation of the Exploitation Licenses on 4 May 2010 and failed to explain the need for local proceedings to revoke the Revocation Decrees,

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152 R-PHB1, ¶ 52.

153 R-PHB1, ¶ 53.

154 R-PHB1, ¶ 54.

155 R-PHB1, ¶¶ 55-56; Tr. (Day 7), 191:25 (Closing, Sheppard).

if the licenses had been re-enacted.[156] Even if Mr. Noor's testimony is discarded, the identical signatures and Mr. Ramadani's testimony that the Legal Section did not draft the decrees are "strong evidence of forgery". In addition, the decrees were never registered and show decree numbers that belong to other decrees. Finally, Indonesia argues that the Claimants had a clear motive to generate the Re-Enactment Decrees in order to avoid public disclosure of the license revocations and having to offer security.[157]

1.8. Ridlatama is responsible for the forgery and Mr. Mazak was aware of the scheme

155. For the Respondent, Ridlatama had the "means, motive and opportunity" to forge the disputed documents.[158] Mr. Ishak testified that Ridlatama was responsible for the forgery, which is corroborated by further evidence in the record, including the two versions of PT RTM and PT RTP licenses, irregular maps, the ancillary and forestry-related documents, and the Re-Enactment Decrees.[159] In addition, Indonesia notes the following factors: (i) the Claimants never contested that only Ridlatama could copy and paste Mr. Ishak's signature from the original PT RP license onto the Gunter documents; (ii) Ridlatama was responsible for obtaining the relevant permits, and Mr. Kurniawan's testimony showed that he played a much smaller role than Messrs. Mudjiantoro and Wirmantono who were not presented as witnesses; (iii) Ridlatama lied about its control over the Swasembada companies, PT Swasembada Energy and PT Swasembada Bara, whose licenses bear the "same non-handwritten signature of Mr. Ishak"; and (iv) Ridlatama had strong economic motive to secure the licenses since it stood to gain more than USD 2 million.[160]

156. Indonesia further accuses Mr. Mazak of being aware of Ridlatama's forgeries. In particular, Mr. Mazak (i) gave Mr. Gunter the PT RTM and PT RTP licenses containing the copy and paste signature of Mr. Ishak taken from the PT RP license; (ii) gave Ridlatama documents to Mr. Benjamin without the "copy and paste licenses"; (iii) told Mr. Quinlivan of fictitious handover ceremonies; (iv) sought STP advice on the bona fides of the

156 R-PHB1, ¶ 56.

157 R-PHB1, ¶ 58.

158 R-PHB2, ¶ 2.

159 R-PHB2, ¶ 15.

160 R-PHB1, ¶¶ 61-64.

licenses; (v) failed to ensure that the licenses were attached to the Cooperation Agreements; (vi) proposed the idea of seeking re-enactment decrees; (vii) re-emerged in April 2015 to arrange for Mr. Kurniawan to testify at the hearing and retrieve Ridlatama documents;[161] and (viii) stood under pressure to produce a viable coal project after the Sendawar project proved a disappointment.[162] For the Respondent, these "damning" revelations refute the Claimants' assertions of good faith and reinforce the argument that a finding of forgery would require the complete dismissal of the case, since it would bar the Claimants from relying on "theories of estoppel, acquiescence and the like".[163]

2. On the law

2.1. Burden and standard of proof

157. For Indonesia, the Claimants bear the initial burden of proving the existence of an investment, including demonstrating the authenticity of the mining licenses.[164] Thus, the Claimants must "establish that the foundational evidence supporting their claims […] inspires at least a 'minimally sufficient degree of confidence in its authenticity'".[165] In view of the "glaring indicia" of forgery and the numerous irregularities, the Claimants have failed to make a *prima facie* case that the disputed licenses are authentic.[166]

158. But even if it were to bear the burden of proving that the disputed documents were forged, the Respondent submits that it produced "sufficient evidence" to support its claims.[167] Therefore, as case law confirms, the burden falls once again on the Claimants "to adduce evidence rebutting these allegations".[168]

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161 R-PHB1, ¶ 66.

162 R-PHB1, ¶ 67; R-PHB2, ¶ 3.

163 R-PHB2, ¶ 3.

164 R-Answers, ¶ 176; Tr. (Day 1), 25:8-12 (Opening, Frutos-Peterson).

165 R-Answers, ¶ 176, citing *Golshani v. Government of the Islamic Republic of Iran,* Iran-U.S. Claims Tribunal Case No. 812, Award No. 546-812-3, 2 March 1993, ¶ 49 (**Exh. RLA-211**); Tr. (Day 1), 26:1-10 (Opening, Frutos-Peterson); Respondent's Opening Statement, Slide 10.

166 R-Answers, ¶ 177.

167 R-Answers, ¶¶ 179-180; Tr. (Day 1), 26:11-17 (Opening, Frutos-Peterson).

168 Tr. (Day 1), 26:11-17 (Opening, Frutos-Peterson); Respondent's Opening Statement, Slide 11, citing *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 236 (**Exh. RLA-215**); *Asian Agricultural Products Ltd. v.*

159. Instead of being "pinned down" by "rigid expressions of the standard of proof", Indonesia invites the Tribunal to exercise its discretion to determine the weight and probative force of the substantial body of evidence in the record.[169] In the end, Indonesia submits that under international law the prevailing standard is flexible, requiring Indonesia only to demonstrate its allegations by the "balance of probabilities" or the "preponderance of the evidence".[170] Accordingly, the application of a heightened standard of "clear and convincing evidence" for the forgery allegations would not preserve due process and equal treatment and is rightly opposed in arbitral case law.[171] But whatever test may apply, Indonesia submits that the "evidence as a whole points directly to Ridlatama as the only party with the means, motive and opportunity to forge the impugned documents".[172] Contrary to the Claimants' assertion that Indonesia must prove intent to defraud, the latter submits that it bears no such burden and that the use of copy and paste signatures and of an autopen is in itself "evidence of an intent to mislead and defraud".[173]

2.2. **The Claimants' theories on authorization must be rejected**

160. According to Indonesia, the Claimants' good and bad faith authorization theories are "implausible and unsubstantiated".[174] First, while their good faith

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Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 56, Rule (L) (**Exh. CLA-145**).

169 R-Answers, ¶ 181; Tr. (Day 1), 25:19-23, 27:4-8 (Opening, Frutos-Peterson); Respondent's Opening Statement, Slide 9, referring to: *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 239 (**Exh. RLA-155**); Florian Haugeneder, Christoph Liebscher, "Chapter V: Investment Arbitration – Corruption and Investment Arbitration: Substantive Standards and Proof", in: *Austrian Yearbook of International Arbitration* (2009), pp. 555-556 (**Exh. RLA-213**).

170 R-Answers, ¶ 182; Tr. (Day 1), 26:18-27:3 (Opening, Frutos-Peterson); Respondent's Opening Statement, Slide 12, referring to: *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 125 (**Exh. RLA-146**); ICC Case No. 12732, Partial Award, February 2007, 22 *ICC International Court of Arbitration* 76 (2011), ¶ 164 (**Exh. RLA-226**); Hilmar Raeschke-Kessler, "Corrupt Practices in Foreign Investment Context", in: Norbert Horn, Stefan Kröll (eds.), *Arbitrating Foreign Investment Disputes* (Kluwer Law International, 2004), p. 497 (**Exh. RLA-220**); Carolyn B. Lamm, Eckhard R. Hellbeck, M. Imad Khan, "Pleading and Proof of Fraud and Comparable Forms of Abuse in Treaty Arbitration", in: Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges* (Kluwer Law International, 2015), p. 573 (**Exh. RLA-232**).

171 R-Answers, ¶ 183; Tr. (Day 1), 24:23-27:14 (Opening, Frutos-Peterson); Respondent's Opening Presentation, Slides 8-13; R-PHB2, ¶ 2, note 2.

172 R-PHB2, ¶ 2.

173 Respondent's letter of 23 March 2015, p. 5, note 26; R-Answers, ¶¶ 189-190; R-PHB1, ¶¶ 59-67; R-PHB2, ¶ 3.

theory might serve to explain the issuance of the disputed documents allegedly issued by Messrs. Ishak and Setiawan, they are of no assistance with respect to the Re-Enactment Decrees.[175] Second, the Claimants' contention that Mr. Ishak authorized the reproduction of his signature is contradicted by the evidence, namely (i) witness testimony and comparator documents show that decrees are always signed by hand, (ii) Mr. Ishak testified that Mr. Noor was only authorized to sign documents in Mr. Noor's own name while Mr. Ishak was away, and (iii) witnesses confirmed that no high quality stamps or autopen devices are used in the Regency apart from the fact that the Claimants were unable to identify a high quality stamp device being able to reproduce the signatures.[176] Third, witness evidence and comparator documents also showed that the MEMR did not have mechanical devices to reproduce signatures.[177]

161. Indonesia further contends that nothing supports the Claimants' bad faith authorization theory, which effectively requires the Tribunal to "find that an unidentified person at the Regency acquired an unidentifiable stamping device to 'subtly' forge Ridlatama's licenses and other documents so that Ridlatama's licenses could be revoked and the rights to the EKCP auctioned to Nusantara or another party".[178] Further, with respect to the Re-Enactment Decrees, the Claimants' theory is "rife with speculation". Indonesia also notes the evolution in the Claimants' argumentation "moving from silence to 'bemusement' to 'confusion' to 'no position' and now to 'bad faith authorization'".[179] It finds that their theory is "inherently incredible", considering that (i) the revocations had been recommended by the Minister of Forestry; (ii) internal procedures to revoke the Exploitation Licenses had been followed; and (iii) Ridlatama initiated court proceedings to challenge the revocations.[180]

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174 R-PHB2, ¶ 5.

175 R-PHB2, ¶ 6.

176 R-PHB2, ¶ 7.

177 R-PHB2, ¶ 9.

178 R-PHB2, ¶ 11.

179 R-PHB2, ¶ 13.

180 R-PHB2, ¶ 13.

2.3. **A finding of forgery requires the dismissal of the claims**

162. Since all of the claims rest on the assumption of the validity of Ridlatama's rights, a finding of forgery of the Survey and Exploration Licenses would render the exploitation upgrades "null and void" and require that the claims be dismissed.[181] In addition, Mr. Mazak's "culpability" and the Claimants' failure to conduct proper due diligence precludes the Claimants from invoking alternative legal theories such as estoppel or acquiescence.

163. The claims in this arbitration relate to Churchill and Planet's purported investment in the EKCP. As Mr. Quinlivan acknowledged, without valid licenses there is no EKCP.[182] While the Claimants argue that "the vast majority" of their investments would remain legally valid notwithstanding a finding of forgery, Indonesia argues that the Claimants have identified no claim unrelated to the EKCP:

(i) With respect to the claim for indirect expropriation, the Claimants concede that the licenses were the only assets of value for PT ICD and PT TCUP. A finding of forgery would render the licenses and thus the companies worthless. Relying on case law, Indonesia submits that no claim based on worthless interests may succeed;[183]
(ii) With respect to the claim that the Nusantara extensions were unlawful, Indonesia argues that the extension of Nusantara's licenses was valid since Ridlatama had no rights over the area;[184]
(iii) With respect to the claim that Indonesia wrongfully engendered doubt about license overlaps and forgery, Indonesia reiterates that the Nusantara extensions were valid and that the Claimants acknowledge that this claim would fall away if forgery is made out to have occurred;[185]
(iv) With respect to the claim that forestry permits were wrongfully declined, Indonesia responds that Ridlatama had no mining rights to begin with;[186]
(v) With respect to the claim of unreasonable, arbitrary and unjustified measures, Indonesia retorts that the measures were related to mining operations lacking valid licenses;[187]

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181 R-PHB1, ¶ 68.

182 R-PHB1, ¶ 74. Tr. (Day 6), 8:16-17 (Cross, Quinlivan).

183 R-PHB1, ¶ 75, item 1, referring to: *Emmis International Holding, B.V., Emmis Radio Operating, B.V. and Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, ¶ 255 (**Exh. RLA-238**); *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, ¶ 185, 188 (**Exh. RLA-239**).

184 R-PHB1, ¶ 75, item 2.

185 R-PHB1, ¶ 75, item 3.

186 R-PHB1, ¶ 75, item 4.

187 R-PHB1, ¶ 75, item 5.

(vi) With respect to the claim of threat of use of force, Indonesia responds that it was proper to require Ridlatama to leave the mining area, since the mining undertaking licenses were forged and Indonesia properly revoked the upgrades;[188]

(vii) With respect to the denial of justice claim, Indonesia argues that the claim arises from the alleged failure to take into account evidence, and thus would fail with a finding of forgery.[189]

164. According to Indonesia, the Claimants' argument that their claims would survive since the licenses were revoked for breaches of forestry law, not forgery, fails since (i) forgery informed the decision to revoke the licenses, and (ii) revocation for a different reason is no reason why forgery would not lead to the dismissal of the claims.[190] Allowing the claims to proceed would reward blatantly illegal conduct and would be contrary to international law, Indonesian law or any other system of law, as well as international public policy.[191] To avoid serious damage being done to the administration of justice, the Tribunal should not allow an investment tainted with forgery to form the basis of its decision.[192]

2.4. **The exploitation upgrades are null and void**

165. According to Indonesia, since the Survey and Exploration Licenses were forged, they are "non-existent", which renders the exploitation upgrades invalid.[193] Therefore, "the Regent's approval for upgrading of fake licenses to exploitation status in 2009 could not cure the fundamental defect caused or created by forgery of the original licenses".[194] This conclusion is supported

188 R-PHB1, ¶ 75, item 6.

189 R-PHB1, ¶ 75, item 7.

190 R-PHB1, ¶ 76.

191 R-PHB1, ¶ 76, referring to: *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶ 242 (**Exh. RLA-056**); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶ 123-124 (**Exh. RLA-058**); *Phoenix v. Czech Republic*, Award, ¶¶ 101-102 (**Exh. RLA-060**); *Plama Consortium Limited v. Republic Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 139 (**Exh. RLA-059**).

192 R-PHB1, ¶ 79, referring to: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, 16 March 2001, ICJ Reports 40 (2001), Separate Opinion of Judge Fortier, at 452 (**Exh. RLA-236**); *Europe Cement Investment and Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, ¶¶ 152, 154, 156, 157, 159, 160 (**Exh. RLA-147**); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 354 (**Exh. RLA-146**); *Golshani v. Government of the Islamic Republic of Iran,* Iran-U.S. Claims Tribunal Case No. 812, Award No. 546-812-3, 2 March 1993 (**Exh. RLA-211**).

193 R-PHB1, ¶ 9.

194 Tr. (Day 1), 28:12-15 (Opening, O'Donoghue).

both by Indonesian and international law.[195] While 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.[196] In other words, Mr. Noor was deceived into signing the exploitation upgrades. In addition, since Ridlatama had no licenses capable of being upgraded to begin with, Indonesia submits that Mr. Noor had "no power to issue the upgrades".[197]

166. Mr. Noor's *disposisi* on the exploitation upgrade applications instructed Mr. Putra to process the applications "in accordance with the prevailing procedures".[198] Mr. Putra did not do so, according to Indonesia, indicating that "something very serious went awry" in the process and that corruption might be involved.[199] As regards the process, the Respondent emphasizes the following discrepancies: [200] (i) Ridlatama submitted two sets of applications (the first requesting upgrades for all areas and the second only for a more limited area); (ii) the licenses referred to the second application, but applied to the area requested in the first application; (iii) Mr. Noor's approval created an overlap with extant Nusantara exploration licenses; (iv) the upgrades contain unusual (and inaccurate) language with respect to forestry areas; (v) the maps were not issued by the Planology Office, which is evidenced by the absence of Mr. Ordiansyah's initials, the graticules only on two sides, the wrong orientation, and the resemblance with those generated by GMT; (vi) the upgrades "were picked up by a Regency employee outside the Mining and Energy Bureau"; [201] and (vii) the attendance sheet for the Ridlatama feasibility study presentation "was dated in a manner to suggest that it occurred prior to, rather than after, issuance of the upgraded licenses".[202]

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195 R-PHB1, ¶ 70; Mining Law 2009, Articles 1, 36, 46 (**Exh. RLA-007**).

196 R-PHB1, ¶ 114.

197 R-PHB1, ¶ 114.

198 R-PHB1, ¶ 115.

199 R-PHB1, ¶ 134.

200 R-PHB1, ¶ 115.

201 R-PHB1, ¶ 115, item 6.

202 R-PHB1, ¶ 115, item 7.

2.5. **The Claimants' legal theories must be rejected**

167. None of the Claimants' theories to continue asserting claims have any merit. These theories are: (i) estoppel, (ii) acquiescence, (iii) fair and equitable treatment ("FET"), including legitimate expectations, (iv) unjust enrichment, and (v) internationally wrongful composite act. As a general matter, the Claimants' lack of good faith, their awareness of the risks of corruption, their willful disregard of corruption, and their continued endorsement of Ridlatama's probity precludes them to rely on estoppel, legitimate expectations, acquiescence and other theories.[203] Finally, while there is "little doubt" that Ridlatama had assistance from Mr. Putra, that would still not change the ultimate conclusion that all of the claims must be dismissed, because forged documents cannot form the basis of investment treaty claims as this would be contrary to international law and international public policy.[204] Moreover, the Claimants were not good faith investors, Ridlatama could in any event not convey valid investment interests on them, and through their beneficial ownership arrangements the Claimants stepped into Ridlatama's shoes and were the "beneficiaries of the forgery".[205]

a) Estoppel

168. The Claimants failed to meet the three criteria of estoppel, so says the Respondent, namely (i) there were no clear and unambiguous representations that the licenses were valid, and silence is not sufficient; (ii) any representations were induced by error and the relevant officials were not authorized to speak for the State; and (iii) the Claimants' lack of due diligence defeats their claim that they relied in good faith and to their detriment on the alleged representations.[206]

169. The hearing, and in particular Messrs. Quinlivan's and Benjamin's testimonies, showed that the Claimants relied on Ridlatama's representations, not those of the State.[207] Finally, Mr. Mazak's handling of duplicate PT RTM and PT RTP licenses as well as his misrepresentations

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203 R-PHB1, ¶ 140.

204 R-PHB, ¶ 76; R-PHB2, ¶ 41.

205 R-PHB2, ¶ 41.

206 R-PHB1, ¶¶ 82-84.

207 R-PHB1, ¶ 85.

regarding handover ceremonies "are sufficient by themselves to bar the Claimants from invoking estoppel".[208]

b) Acquiescence

170. According to Indonesia, the conditions for acquiescence must be interpreted strictly. Consequently, the State is deemed to have consented to a situation "if it failed to object in circumstances where it was reasonably expected to object".[209] Since Indonesia had no knowledge of the facts underlying the forgery, and its purported consent was obtained by error, there can be no acquiescence.[210] In any event, Indonesia's commencement of police investigations once it became aware of the forgery shows that there was no "clear and consistent acceptance" to treat the forged licenses as valid.

c) Legitimate expectations

171. For the Respondent, the Claimants' legitimate expectations argument fails for the same reasons as their estoppel argument. Their lack of due diligence negates any claim based on legitimate expectations.[211]

d) Unjust enrichment

172. If the Claimants' unjust enrichment claim is based on equitable relief unrelated to any substantive protection in the BITs, so argues Indonesia, then it falls outside the Tribunal's competence for lack of *ex aequo et bono* jurisdiction.[212] Attempts to present unjust enrichment as part of the FET standard must equally fail, since the BITs make no reference to unjust enrichment, and "the 'FET standard' is not an amorphous point of entry for any equitable remedy that the Claimants may wish to invoke".[213] In any event, the Claimants have not shown that (i) Indonesia was enriched to the detriment of the Claimants and (ii) there was no just cause for the enrichment. There was just cause to revoke the mining licenses, namely

208 R-PHB1, ¶ 87.

209 R-PHB1, ¶ 90.

210 R-PHB1, ¶ 90.

211 R-PHB1, ¶ 92. *See* also: Respondent's letter dated 1 December 2014, pp. 16-17.

212 R-PHB1, ¶ 93.

213 R-PHB1, ¶ 94.

breach of forestry laws and forgery of licenses, which defeats any unjust enrichment claim.[214]

e) Internationally wrongful composite act

173. The Respondent further submits that the theory on composite violation of FET brought forward by Churchill and Planet must fail, because the notion of composite act "is merely concerned with the time at which a breach occurs", thus adding nothing to Claimants' "baseless FET claim".[215]

2.6. The Claimants are not good faith investors and failed to exercise due diligence

174. It is Indonesia's primary case that Ridlatama forged the disputed documents and that the Claimants were duped[216] and that, even if they were unaware of the forgery, the Claimants bear the burden of engaging business relations with unreliable partners.[217] It is Indonesia's secondary case that Ridlatama forged the disputed documents and that the Claimants were aware of it. In this case, the Claimants' involvement evinces, at the very least, a lack of due diligence, and, in fact, recklessness.[218] Although Indonesia argues that a finding of forgery and the dismissal of the claims does not require proof that the Claimants were "culpable with Ridlatama", it also points to the fact that the Claimants are under investigation at the London Stock Exchange for failure to disclose the revocation of the Exploitation Licenses.[219]

175. According to the Respondent, Mr. Mazak's dissemination of forged documents and dealings with Ridlatama "are *prima facie* evidence of complicity on his part".[220] Until the hearing, Indonesia did not accuse the Claimants of being involved in the forgery scheme. As a result of the evidence taken at the hearing, Indonesia raised accusations with respect to the involvement of Mr. Mazak in the handling of the disputed documents. The hearing showed, so says Indonesia, that Mr. Gunter obtained the second version of the Survey Licenses from Mr. Mazak, which raises

214 R-PHB1, ¶ 96.

215 R-PHB1, ¶ 97.

216 R-PHB1, ¶ 126.

217 R-PHB1, ¶ 130.

218 R-PHB1, ¶ 12.

219 R-PHB1, ¶ 12.

220 R-PHB1, ¶ 99.

questions on Mr. Mazak's role in the forgery. The fact that Mr. Ishak's signature from the PT RP license was copied and pasted onto the PT RTM and PT RTP licenses in Mr. Gunter's possession shows that the forgers of the Gunter Documents were either associated with Ridlatama or had access to that unique license (of PT RP).[221]

176. The Respondent further submits that other instances demonstrate the Claimants' lack of good faith: (i) Mr. Gunter contradicted the Claimants' representation that he verified the expiration of the Nusantara licenses; (ii) Mr. Benjamin admitted he played no part in the Survey License applications in 2007; (iii) the Claimants failed to include the Survey Licenses as attachments to the Cooperation Agreements with Ridlatama; (iv) the 26 February 2007 Staff Analysis and the 23 March 2007 MEMR letter were only received by the Claimants in 2009 or 2010; (v) the Claimants made no attempt to verify the authenticity of the licenses when forgery allegations were first raised in 2009; (vi) they failed to obtain relevant assistance to understand how signatures are placed on mining licenses, despite Messrs. Gunter and Benjamin having such knowledge; (vii) they also failed to verify the accuracy of the 2009 report prepared by Ridlatama (and signed by the Legal Team of PT ICD) to rebut the BPK report, which report did not address the forgery indications and falsely portrayed the Swasembada companies as unrelated to Ridlatama.[222] In sum, so argues the Respondent, the Claimants failed to exercise due diligence to ascertain the soundness of their investment. For Indonesia, "Mr. Quinlivan and Claimants' principals no doubt realized that nothing was to be gained from casting doubt on Ridlatama's probity".[223]

221 R-PHB1, ¶ 8.

222 R-PHB1, ¶¶ 99-103.

223 R-PHB1, ¶ 104.

B. The Claimants' Position

1. On the facts

177. According to the Claimants, Indonesia failed to provide "clear and convincing evidence" that the disputed documents were forged and fabricated by Ridlatama, let alone to prove the existence of a "massive, systematic and sophisticated scheme to defraud" the Respondent.[224] For the Claimants, Indonesia also failed to explain "why the *means* of signature is probative of *who* applied the signatures", or, in other words, why the determination of the means of signature would allow concluding that the signatures were generated by Ridlatama rather than the Regency.[225]

1.1. The issuance of the disputed documents was authorized

178. For the Claimants, the most important issue is not "how" the signatures were affixed on the disputed documents, nor "who" did so, but whether the signatures were authorized.

179. The Claimants start by challenging Indonesia's characterization of Mr. Ishak's testimony. Mr. Ishak did not testify that he did not sign the documents, but made various odd statements casting doubt on his reliability as a witness.[226] For instance, Mr. Ishak's statement that he could not have signed the disputed Survey Licenses because he was not the Regent at the time is clearly incorrect.[227] Further, his statement that "something must have prevented him from signing" the licenses, such as Nusantara's payment of taxes and fulfillment of other obligations, was also incorrect since Nusantara made no payments and fulfilled no obligations until November 2008 when it obtained extensions of its exploration licenses.[228] Moreover, Indonesia's explanation that Mr. Ishak refused to sign as a matter of discretion is speculative and undermined by Mr. Ishak's assertion that "[i]f it is completed, I will sign it".[229] Finally, Indonesia has not been forthcoming on the issue of authorization and whether Mr. Noor would sign decrees in Mr. Ishak's absence. For the Claimants, Mr. Ishak's testimony "illuminated the

224 C-PHB1, ¶ 1.

225 C-PHB2, ¶ 17.

226 C-PHB2, ¶ 18.

227 C-PHB2, ¶ 18.

228 C-PHB2, ¶ 18.

229 C-PHB2, ¶ 18, referring to: Tr. (Day 3), 16:18 (Direct, Ishak).

possibility" that Mr. Noor had authority to apply Mr. Ishak's signature (good faith authorization), or even that Mr. Noor exceeded his authority (bad faith authorization).[230]

180. In any event, the Claimants' main submission is that the signatures were authorized. Evidence gathered at the hearing establishes that decrees were signed mechanically as "a matter of administrative necessity and convenience", due to Mr. Ishak's frequent travels during his campaign for governorship in 2006 to 2008.[231]

181. Mr. Noor was "automatically responsible" when Mr. Ishak was absent, having the authority to "make and sign decrees".[232] The Claimants dispute Mr. Ishak's testimony that Mr. Noor could only sign as Deputy Regent, since the scope of Mr. Noor's authority "is not clear".[233] For the Claimants, Mr. Noor's authority increased during Mr. Ishak's second term as Regent, i.e., during the relevant period and he "clearly had access to original signatures of Mr. Ishak and all other apparatus needed for the creation and recording of official documents".[234] Mr. Noor's wealth and "apparent estrangement from Mr. Ishak" would suggest that he exceeded his authority when personal gain was at stake.

182. Specifically, the Claimants make the following submissions in relation to each category of disputed documents:

a) Survey Licenses

183. The authenticity of the Survey Licenses (documents nos. 1-4 in the Document Table) is corroborated by the "broadest body of evidence" in the record, including (i) the 23 March 2007 MEMR letter to PT RTM indicating that, if Nusantara licenses expired, the area would become open;[235] (ii) the

230 C-PHB2, ¶ 18.

231 C-PHB1, ¶ 45; Tr. (Day 3), 76:7-8 (Tribunal, Ishak); Kurniawan WS1, ¶ 55. At the hearing, Mr. Ishak testified that he campaigned for two years, starting in 2006. Tr. (Day 3), 77:16 (Tribunal, Ishak).

232 C-PHB1, ¶ 45.

233 C-PHB1, ¶ 45.

234 C-PHB1, ¶ 45.

235 C-PHB1, ¶ 46(a); Letter from Ministry of Energy and Mineral Resources to President Director of Ridlatama Mineral, 23 March 2007 (**Exh. C-37**).

"March 2007"[236] Staff Analysis concluding that the Nusantara's licenses had lapsed and that the mining areas were open;[237] (iii) spatial analyses of 21 May 2007 describing Nusantara's permits as "*Eks*" (or former) licenses, confirming the Staff Analysis according to which the areas were open;[238] (iv) the final draft decrees bearing the undisputed coordination initials of senior Regency officials, none of whom provided evidence in this arbitration, establishing that the internal approval process "progressed without challenge to this penultimate stage" and evidencing that the issuance of the licenses was duly authorized;[239] (v) the Garuda seal on the official licenses, which, according to Dr. Strach, suggested that the seal was affixed after the signatures were placed on the licenses;[240] (vi) 79 separate government acknowledgements of the Survey Licenses;[241] (vii) the MEMR registration of the Survey Licenses, about which the Claimants explained that the MEMR relied on its own maps to issue official documents, and that Mr. Ishak acknowledged the "key role" played by the MEMR, not the Regency, when determining the status of mining areas.[242]

184. In this context, the Claimants rebut Indonesia's arguments on procedural irregularities as follows: (i) the PT RTM and PT RTP licenses were properly registered in the registration book of the Legal Section; (ii) the PT INP and PT IR licenses were also registered albeit under an incorrect date, which appears to be a clerical error also found on other decrees produced by Indonesia; (iii) Indonesia's account that Mr. Putra failed to provide the

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236 Claimants explain the discrepancy in the dates by arguing that the Staff Analysis must have been commenced on 26 February 2007, shortly after receipt of the Ridlatama applications, but was finalized in March 2007 after the MEMR letter of 23 March 2007. C-PHB1, note 153.

237 C-PHB1, ¶ 46(b); Evaluation from Kutai Head of Mining Service Office, 26 February 2007 (**Exh. C-34**).

238 C-PHB1, ¶ 46(c). Claimants point to the fact that Mr. Ishak confirmed that expired licenses are recorded as "*Eks*". Tr. (Day 3), 60:24 (Cross, Ishak). *See*: Gunter's General Survey License for RTM (**Exh. R-264**); Gunter's General Survey License for RTP (**Exh. R-265**).

239 C-PHB1, ¶ 46(d); Draft General Survey Business License for PT RTM, Decree No. 210/02.188.45/HK/V/2007, 24 May 2007 (**Exh. C-383)**; Draft General Survey Business License for PT RTP, Decree No. 211/02.188.45/HK/V/2007, 24 May 2007 **(Exh. C-384**).

240 C-PHB1, ¶¶ 40-44, 46(e).

241 C-PHB1, ¶ 46(g) and Updated Annex B to Reply Memorial (20 October 2015); **Exh. C-07, C-42, C-52, C-67, C-78, C-79, C-390 to C-399, C-547, C-548, C-554 to C-556, C-569, C-580 and C-590**.

242 C-PHB1, ¶ 46(h); Tr. (Day 3), 69:23-70:2 (Cross, Ishak).

original licenses is based on "*aged* hearsay" of Mr. Ramadani, who was not involved in processing mining licenses until 2012;[243] and (iv) with respect to the duplicate PT RTM and PT RTP licenses, Mr. Gunter testified that it is not unusual to have "different generations" of documents and that he saw "a large variety of different types" of licenses, including internal documents, to allow applicants to verify the correctness of the mining area coordinates, which sometimes contained the page with the coordination initials.[244]

b) Exploration Licenses

185. An "expansive body of evidence" supports the contention that the Exploration Licenses (documents nos. 15-18 in the Document Table) were authorized: [245] (i) the official seal on the licenses; (ii) 16 official acknowledgements of the existence of the licenses by the Regency and the MEMR, including Mr. Aspan who had control over the Legal Section register; [246] (iii) quarterly reports, work plans and budgets were acknowledged 89 times by local, regional and central government officials;[247] (iv) MEMR maps show Ridlatama's exploration areas;[248] (v) dead rent and seriousness bond payments; [249] (vi) government awareness of ongoing exploration activities, including through site visits and supervision by officials, including police and army personnel stationed at the site camp; [250] and (vii) the upgrade to Exploitation Licenses, whereby State officials at least became aware of the existence of the Exploration Licenses.[251]

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243 C-PHB2, ¶ 21(b) (emphasis in the original).

244 C-PHB2, ¶ 21(c); Tr. (Day 7), 71:12-72:3, 72:8-15 (Tribunal, Gunter).

245 C-PHB1, ¶ 48.

246 C-PHB1, ¶ 48(b); Receipt of four Decree Letters from Mr. Aspan dated 16 June 2008 (**Exh C-103**).

247 C-PHB1, ¶ 48(c); Updated Annex B to Claimants' Reply (20 October 2015); **Exh. C-412, C-558, C-415, C-411, C-413, C-07, C-591, C-414, C-420, C-421, C-400, C-403, C-402, C-401, C-570, C-419, C-418, C-417, C-416, C-559, C-424, C-560, C-425, C-422, C-559, C-562, C-423, C-426, C-427, C-428, C-570, C-126, C-127, C-128 and C-129**.

248 C-PHB1, ¶ 48(d); **Exh. C-105, C-546, C-155, C-526, C-525, C-238**. *See* also **Exh. C-546**.

249 C-PHB1, ¶ 48(e); **Exh. C-70, C-71, C-92, C-93, C-186 to C-189, C-381, C-457, C-550, C-551, C-564, C-568, C-576, C-584 to C-588**.

250 C-PHB2, ¶ 48(f).

251 C-PHB2, ¶ 48(g).

186. In this context, the Claimants refer to various "key points", including the feasibility study presentation on 9 February 2009; the *disposisi* on the exploitation applications (including a second *disposisi* on the PT RTM application); Mr. Noor's approval of the feasibility studies; the meeting at the Regency on 27 March 2009; and the 29 April 2009 meeting for the re-registration of the licenses under the new mining law which was attended by Messrs. Armin and Ordiansyah. Mr. Armin confirmed that, on that day, Mr. Ariyadi compiled a checklist of Ridlatama's documents confirming that PT RTM, PT RTP, PT INP, and PT IR had received general survey and exploration licenses.[252]

c) Payment Requests

187. Various elements support the contention that the Payment Requests (documents nos. 5-6 in the Document Table) are authentic:[253] (i) the official seals on the letters;[254] (ii) the fact that the authenticity of the copy of the Legal Section register book on record is questionable, since, on the date when the seriousness bonds were presumably recorded, the register book shows a large blank space;[255] (iii) in any event, no other valid decrees have been registered; (iv) Indonesia refused to produce the original of the register book, thus rendering it impossible to know with certainty if the letters were registered or not; and (v) Indonesia provided no explanation as to the motive for forging such letters.[256]

d) Cooperation and Legality Letters

188. The Legality and Cooperation Letters (documents nos. 7-14 in the Document Table) are not licenses with the result that it is less probable that there would have been direct evidence of their authorization,[257] which is compounded by the lack of comparator documents. Nevertheless, the Claimants note that the disputed documents bear the official seal, and that the certificates of legality have been acknowledged 38 times by three levels of government (there is no such acknowledgement of the Cooperation

252 C-PHB2, ¶ 48(g). **Exh. C-381 and C-584**. Tr. (Day 4), 119:6 (Tribunal, Armin).

253 C-PHB1, ¶ 47.

254 **Exh. C-92 and C-93**.

255 C-PHB1, ¶¶ 12(c), 13 and 47; C-PHB2, ¶ 21(b). **Exh. C-478(b)**, p. 74.

256 C-PHB1, ¶ 47.

257 C-PHB1, ¶ 51.

Letters).[258] As to the absence of registration, the Claimants reiterate their reason to doubt the reliability of the copy of the registration book produced by Indonesia, further pointing to possible modifications in the entries on 8 and 9 April 2008.[259]

e) Borrow-for-Use Recommendations

189. The Claimants stress that the Borrow-for-Use Recommendations (documents nos. 19-24 in the Document Table) bear the official seal of the Governor of East Kalimantan.[260] The Claimants provide two explanations for the identical signatures, namely the good faith authorization (different levels of government use mechanical devices to reproduce signatures) and the bad faith authorization (disputed documents are the product of an internal scam created by the Regency to keep Ridlatama believing that the project was progressing). [261] With respect to Indonesia's argument that the December 2009 Borrow-for-Use Recommendations are "virtually identical" to the March 2010 Borrow-for-Use Recommendations,[262] the Claimants point to Mr. Benjamin's explanation that the two sets of recommendations dealt with different subject matters, the former being for the "use of land above the surface" and the latter for "the use (or lease) of the land above *and below* the surface".[263]

f) Technical Considerations

190. The Claimants also signal that the Technical Considerations (documents nos. 29-32 in the Document Table) bear MEMR's official seal.[264] As with the Borrow-for-Use Recommendations, the Claimants provide two explanations for the identical signatures – good faith and bad faith authorization – and argue that the Regency had access to a master signature of Mr. Setiawan, since the Technical Recommendations the latter issued were systematically

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258 C-PHB1, ¶ 51(b). **Exh. C-404, C-409, C-410, C-557, C-405, C-407, C-408, C-571, C-581, C-406 and C-549**.

259 C-PHB1, ¶ 52.

260 C-PHB1, ¶ 53.

261 C-PHB1, ¶ 53.

262 Compare **Exh. R-144** and **Exh. R-145** with **Exh. C-220**.

263 C-Answers, ¶ 10; Benjamin WS2, ¶¶ 12-14.

264 C-PHB1, ¶ 53.

copied to the Regency.[265] The Claimants also indicate that Dr. Strach is more inclined to a view that the signatures are the product of high quality stamp or printing method, rather than an autopen, in particular because of the "presence of the repeated fine marks", for which Mr. Epstein provided no explanation.[266]

g) Re-Enactment Decrees

191. The Re-Enactment Decrees (documents nos. 25-28 in the Document Table) were not orchestrated by Messrs. Mazak and Basrewan[267] and Churchill is not a fraudster. Circumventing the disclosure of the revocation at the AIM would be extremely short-sighted, according to the Claimants. The Tribunal should find that the Re-Enactment Decrees were authorized "but in the bad faith sense".[268] Indeed, they are the only documents that favor Indonesia's contention that Mr. Noor was deceived into signing the Exploitation Licenses.[269]

192. In addition, the Claimants insist on a number of corroborating elements which the Tribunal should also keep in mind: (i) the findings of the 2009 Sangatta police investigation which held that the mining licenses had been properly registered; (ii) the Bawasda report according to which the licenses were "legal and accountable"; (iii) the draft due diligence report of DNC; (iv) the review conducted by Mr. Soehandjono; (v) the due diligence of STP concluding that the licenses were "valid, unencumbered and legally enforceable"; and (vi) the fact that the licenses were revoked for alleged breaches of forestry law, not for forgery.[270]

193. The Claimants further dispute Indonesia's argument with respect to the alleged irregularities on the various maps. Indeed, the Respondent failed to produce a digital database of the Planology Office, despite Mr. Ordiansyah having acknowledged that hard copies of all maps were kept in various offices of the Regency.[271] For the Claimants, (i) the absence of

265 C-PHB1, ¶ 53.

266 C-Answers, ¶¶ 16-42; Strach ER3, ¶ 13.

267 C-PHB2, ¶ 28.

268 C-PHB1, ¶ 69.

269 C-PHB1, ¶ 69

270 C-PHB1, ¶ 50.

271 C-PHB1, ¶ 19; C-PHB2, ¶ 21(d).

Mr. Ordiansyah's initials is not peculiar to the disputed licenses, but is a common "irregularity" in undisputed documents;[272] (ii) Mr. Ordiansyah described an "*ad hoc* map-approval process" which indicates that not all maps were generated by the Planology Office and that "as long as a map was registered in the Planology Office's database, it was an official map";[273] (iii) the English expressions in the maps attached to the PT RTM and PT RTP licenses appear to be the work of high school students having joined the Planology Office, rather than that of sophisticated fraudsters; and (iv) other irregularities may be explained by the then "rudimentary systems" of the Planology Office, as can be seen from the undisputed map attached to the PT Bara Energi Makmur license which was "issued five months before to the RTM and RTP general survey licenses", and which bears no initial of Mr. Ordiansyah, no legend, no scale, no indication of North, unusual insets, no source, and no indication of production forests.[274]

194. All the ancillary documents, which the Respondent misleadingly seeks to discount as "peripheral documents", are "evidence of *process*" confirming that Ridlatama was operating with the "knowledge and consent" of Indonesia.[275] Churchill and Planet therefore reject Indonesia's attempts to fill gaps in its case with allegations of more crime either by an insider of the Regency, or by Ridlatama or Churchill. This is especially true where Indonesia did not produce any report of its police investigations and thus puts the Tribunal in the position of being requested to make findings that Indonesia's own police have been unable to make.[276]

195. Finally, the Claimants submit that the clerical errors identified on the disputed documents show the lack of "cohesive and administrative process" in the Regency during the relevant period and cannot substantiate a finding of forgery.[277]

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272 According to the Claimants, this occurs in 4 out of 20 maps produced by Indonesia for the years 2007-2008. C-PHB2, ¶ 21(d), note 135. *See* also: C-Reply, ¶ 139 and Annex C: Table of Irregularities.

273 C-PHB2, ¶ 21(d), note 136. *See* also: C-PHB1, ¶ 18, note 113. *See* also: R-Answers, ¶ 112.

274 C-PHB2, ¶ 21(d), note 140, referring to: **Exh. C-496**.

275 C-PHB2, ¶¶ 1-2.

276 C-PHB2, ¶ 2.

277 C-Reply, Annex C, Table of Irregularities.

1.2. The copy and paste signatures on the Gunter Documents could have been generated inside the Regency

196. The Claimants dispute Indonesia's contention that only Ridlatama had access to the original Ishak signature/stamp combinations found on the PT RP license, which were copied and pasted onto the Gunter Documents (documents nos. 33-34 in the Document Table). Indeed, Mr. Ordiansyah testified that the Planology Office made digital copies of final licenses[278] and other witnesses confirmed that the "group of custodians of the relevant Ishak master signature" was much larger than portrayed by Indonesia.[279]

197. The Claimants further highlight the contradiction in Indonesia's case in connection with the Gunter Documents, which are alleged to be both "authentic and forged".[280] On the one hand, the Respondent presents the Gunter Documents as forged and, on the other, it relies on the spatial analyses which they contain to support the validity of the Nusantara licenses.

2. On the law

2.1. Burden and standard of proof

198. The Claimants submit that it is for the Respondent to prove its forgery allegations. In addition, the Claimants argue that the Respondent must provide "clear and convincing evidence" that the disputed documents were forged or fabricated by Ridlatama.

199. If the Tribunal were not minded to draw adverse inferences, it should dismiss the Application for Dismissal "for lack of evidence", Indonesia not having proved its case under either standard: clear and convincing evidence or balance of probabilities.[281]

200. At the hearing, the Claimants also referred to the standard of "cogent evidence" employed by the English High Court and referred to international tribunals, in particular the US-Iran Claims Tribunal.[282] In this context, the Claimants accepted that the documentary record was not perfect, that

278 C-PHB2, ¶ 9; Tr. (Day 3), 151:6-9 and 21-22 (Direct, Ordiansyah).

279 C-PHB2, ¶ 9; Ramadani WS, ¶ 20; Armin WS, ¶ 19.

280 C-PHB2, ¶ 9.

281 C-PHB2, ¶ 5.

282 Tr. (Day 7), 193:22-194:1 (Closing, Sheppard).

certain inconsistencies "cannot be explained", notably because Indonesia did not provide relevant evidence. The resulting "ambiguity or doubt" must be decided against the Respondent, because the evidence as a whole supports the validity of the disputed documents.[283]

2.2. Adverse inferences

201. The Claimants request the Tribunal to draw adverse inferences with respect to the documents that the Respondent was ordered but failed to produce[284] and to Indonesia's failure to present key witnesses, such as Messrs. Zainuddin Aspan, Djaja Putra and Isran Noor.[285]

202. According to Churchill and Planet, since the Respondent has exclusive control over the documents which it did not produce, the Tribunal should adopt a liberal recourse to inferences of fact and circumstantial evidence, as the ICJ did in *Corfu Channel*.[286] In addition, out of 333 documents produced by the Respondent, 251 were Nusantara documents. Further, for 15 categories of documents, the Respondent only produced 45 comparator documents – out of which 25 related to Nusantara and 12 were already in the record.[287]

203. Moreover, so emphasize the Claimants, the testimony of the Respondent's own witnesses confirmed the existence of documents responsive to certain requests. This is particularly the case of the following 5 (sets of) documents:

i. Mr. Ishak confirmed the existence of the application book of the Regent of East Kutai;[288]

ii. Mr. Ordiansyah confirmed the existence of a hard copy of the maps depicting forest and mining areas for the relevant time;[289]

iii. Mr. Ordiansyah confirmed that a copy of the digital database of the Planology Office could be produced;[290]

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283 Tr. (Day 7), 194:2-195:11 (Closing, Sheppard).

284 C-PHB1, ¶¶ 10-30.

285 C-PHB1, ¶¶ 31-37.

286 C-PHB1, ¶ 11(a); C-Reply, ¶¶ 29-31; *Corfu Channel Case*, Merits Judgment, 9 April 1949, ICJ Reports (1949) 4, at 18 (**Exh. CLA-209**).

287 C-PHB1, ¶ 11(b).

288 C-PHB1, ¶ 11(b), note 29, ¶ 12(a); Claimants' First DPR No. 20; Tr. (Day 3), 54:6, 75:8-9, 89:1-3 (Cross, Ishak).

289 C-PHB1, ¶ 11(b), note 29, ¶ 19; Claimants' First DPR No. 26; Tr. (Day 3), 163:25-164:4 (Cross, Ordiansyah).

iv. Mr. Ordiansyah confirmed that his office had the spatial analyses created in relation to Ridlatama's applications;[291]

v. Although Indonesia claimed that the four 3 March 2009 Recommendation Letters did not exist, it belatedly produced them on 6 July 2015.[292]

204. As a consequence, Churchill and Planet request that adverse inferences be drawn in respect of the following documents and facts:

i. Regency register books

a. Application book of the Regent: Mr. Ramadani indicated that applications were registered in that book and Mr. Ishak confirmed its existence at the hearing.

b. Registration book of the Mining and Energy Bureau: In light of Mr. Armin's confirmation of the book's general nature, the Respondent's inability to locate it is "highly improbable".

c. Legal Section register book: the "low-resolution copy" produced causes concern that various relevant entries may not be reproduced faithfully.[293]

Adverse inference: The production of the books just listed would have proved (i) the existence of the Survey and Exploration Licenses, (ii) the regular processing of the Exploitation Licenses and (iii) Nusantara's belated applications for extension.[294]

ii. Comparator mining licenses:

Indonesia only produced 22 documents for the years 2007 and 2008, although it initially objected to the request as overly burdensome

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290 C-PHB1, ¶ 11(b), note 29, ¶ 19; Claimants' First DPR No. 27; Tr. (Day 3), 150:8-14 (Direct, Ordiansyah).

291 C-PHB1, ¶ 11(b), note 29, ¶ 22; Claimants' First DPR No. 26(ii); Tr. (Day 3), 172:11-13 (Cross, Ordiansyah).

292 C-PHB1, ¶ 11(b), note 29. (**Exh. R-219, R-220, R-221, R-222**) Claimants' First DPR Nos. 23 and 25(i); Respondent's Letter to the Tribunal, 20 April 2015, p. 9.

293 C-PHB1, ¶ 12(c). In particular, the Claimants point to differences with two items between the copy on record (**Exh. C-479(b)**, pp. 16-17) and the content of the same volume recorded in the BPK Report (**Exh. R-032**, p. 11), namely (i) decree number 169 (additional notation) and (ii) decree number 171 (change of date).

294 C-PHB1, ¶ 13.

because it involved some 150 documents per year.[295] Of these 22, only 2 were originals and 6 were Nusantara licenses. Mr. Ordiansyah confirmed that a digital copy is made of every mining license, putting to rest Indonesia's excuse that it could not find hard copies.

Adverse inference: The production would not have assisted Indonesia's contention that "the Regent '*always signed decrees by hand*' or that the Ridlatama licenses are irregular in terms of their form".[296]

iii. Comparator legality and Cooperation Letters:

Indonesia's "alternative submission of fact" (i.e., Mr. Ishak never issued such documents, but if they were issued they would be immaterial to forgery) is an admission that such letters were issued by Mr. Ishak.[297] In addition, the certificates that Mr. Noor signed by hand (and which are "in substantially the same form" as the Cooperation and Legality Letters bearing Mr. Ishak's signature) further suggest that the Regency issued such documents.[298]

Adverse inference: The production would not support Indonesia's position that "such letters are never issued or that the Ridlatama legality and cooperation letters were forged".[299]

iv. Planology Office maps:

Indonesia only produced 18 maps attached to the Nusantara's licenses.[300] Mr. Ordiansyah admitted that, for each map, three sheets are produced,[301] that the Planology Office keeps copies of every map,[302] and that the Legal Section and Mining Bureau also keep hard

295 C-Reply, ¶¶ 166-167; C-PHB1, ¶ 14.

296 C-PHB1, ¶ 15.

297 C-PHB1, ¶ 16.

298 C-PHB1, ¶ 16, referring to Certification letters (**Exh. C-151 to C-154**) and Certificates (**Exh. C-165 to C-168**).

299 C-PHB1, ¶ 17.

300 C-PHB1, ¶ 18; Claimants' First DPR No. 26 (forest and mining areas in East Kutai) and First DPR No. 40(i) (maps of East Kutai kept by the East Kutai Mining Agency).

301 Tr. (Day 3), 169:16-18 (Cross, Ordiansyah).

302 Tr. (Day 3), 164:2-4 (Cross, Ordiansyah).

copies.[303] He also conceded that a digital copy of the database could be made.[304]

Adverse inference: The failure to produce existing documents allows the Tribunal to draw adverse inferences that these maps would not have assisted Indonesia's case that "(i) all Planology Office maps complied with the criteria set out by the State's witnesses and (ii) that an inference of forgery can be drawn from any map that does not".[305]

v. MEMR maps:

The significance of the MEMR maps lies in their display of the evolution of title over the EKCP, showing in particular Ridlatama's valid title until 18 May 2010 and the appearance of an overlap with Nusantara only on 13 October 2010.[306] Beyond the maps already in the record, Indonesia failed to produce any further MEMR maps or materials generated by the MEMR in relation to the EKCP.[307]

Adverse inference: The production would not have supported the Respondent's contention that "the Ridlatama licences were never recognized by the State".[308]

vi. Ridlatama spatial analyses:

Indonesia misled the Tribunal when stating that the Planology Office did not write spatial analyses in relation to Ridlatama's applications. Mr. Gunter produced spatial analyses for PT RTM and PT RTP (depicting Nusantara's exploration permits as "*Eks*", i.e. former),[309] and

303 Tr. (Day 3), 164:16-19 (Tribunal, Ordiansyah).

304 Tr. (Day 3), 150:8-14 (Direct, Ordiansyah).

305 C-PHB1, ¶ 19.

306 C-PHB1, ¶ 20, referring to: MEMR map of 25 June 2007 (**Exh. C-50**); MEMR map of 10 December 2007 (**Exh. C-68**); MEMR map of 21 May 2008 (**Ex. C-105**); MEMR map of 17 October 2008 (**Exh. C-546**); MEMR map of 13 April 2009 (**Exh. C-155**); MEMR map of 10 August 2009 (**Exh. C-525 and C-526**); and MEMR map of 18 May 2010 (**Exh. C-238**).

307 Claimants' First DPR No. 36.

308 C-PHB1, ¶ 21.

309 C-PHB1, ¶ 22; Gunter's General Survey License for RTM (**Exh. R-264**); Gunter's General Survey License for RTP (**Exh. R-265**).

Mr. Ordiansyah confirmed that he prepared and signed them, and that he has copies in his office.[310]

Adverse inference: Indonesia did not produce responsive documents because it "considers their content – namely the description of Nusantara permits as '*Eks*' (or 'former') – is unhelpful to its case".[311]

vii. Nusantara spatial analyses:

Indonesia failed to produce any responsive documents, although Mr. Ordiansyah admitted that the Planology Office carried out such an analysis.

Adverse inference: The production would not have supported Indonesia's contention that "the areas for which Nusantara was applying were not already held by Ridlatama".[312]

viii. Police files:

While Indonesia has argued that secrecy governs the investigations of its national police, it has not provided any documents from other police agencies, such as the Sangatta police.

Adverse inference: The Tribunal may infer that it has obtained the best evidence about Ridlatama's involvement and that the content of the police files would not support Indonesia's case of a "massive, systematic and sophisticated scheme to defraud the Republic".[313] None of the investigations has led to any prosecution of Ridlatama personnel.

ix. State investigations into Messrs. Ishak and Noor:

The hearing revealed that corruption may have existed at the Regency during the relevant period.

Adverse inference: The production of the Indonesian Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or "KPK")

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310 Tr. (Day 3), 128:7-10, 134:24-135:4 (Direct, Ordiansyah), 171:11-15 (Cross, Ordiansyah).

311 C-PHB1, ¶ 23.

312 C-PHB1, ¶ 25.

313 C-PHB1, ¶ 27, citing Respondent's Forgery Dismissal Application, ¶ 3.

files would not have supported "Mr. Ishak's credibility as a witness on matters material to the State's case".[314]

205. Moreover, Churchill and Planet seek adverse inferences in relation to Indonesia's failure to offer the following witnesses:

i. Mr. Zainuddin Aspan: the hearing showed that Mr. Ramadani (who worked in the litigation branch of the Legal Section until 2012) was not involved in processing mining applications during the relevant period, and that Indonesia should instead have presented the head of the Legal Section, Mr. Aspan, since he (i) received draft licenses from the licensing subdivision, (ii) put his coordination initials on the PT RTM and PT RTP draft decrees, (iii) supervised the circulation of the drafts to other sections, and (iv) acknowledged Ridlatama's Exploration Licenses by signing and stamping them. Had Mr. Aspan been called as a witness by the Respondent, so say the Claimants, "his evidence would not have supported the State's forgery/fraud case".[315]

ii. Mr. Djaja Putra: Mr. Ishak confirmed Mr. Putra's central role as head of the Mining Bureau in handling mining licenses during the relevant period. Mr. Putra (i) drafted the 2007 Staff Analysis, (ii) co-signed the PT RTM and PT RTP spatial analyses, (iii) initialed the draft PT RTM and PT RTP decrees, (iv) drafted the 2008 Nusantara Staff Analysis, and (v) directly liaised with Mr. Noor. Had Mr. Putra been called as a witness by the Respondent, so say the Claimants, "his evidence would not have supported the State's forgery/fraud case".[316]

206. Finally, the Claimants oppose the adverse inferences sought by Indonesia. They did not present Mr. Mazak as a witness, since they offered the most appropriate witnesses to respond to Indonesia's case on authenticity as it stood prior to the hearing, i.e. that the Claimants were dupes fooled by Ridlatama, not that they were fraudsters as Indonesia now contends.[317]

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314 C-PHB1, ¶ 30.

315 C-PHB1, ¶ 37.

316 C-PHB1, ¶ 37.

317 C-PHB2, ¶¶ 7-8.

2.3. Authorized licenses would prove the validity of all other disputed documents

207. For the Claimants, if the Tribunal finds that the PT RTM and PT RTP Survey Licenses were validly issued, then all other disputed documents bearing the identical signatures would have been validly issued. This applies to the Exploration Licenses, the Payment Requests, the Cooperation Letters and the Legality Letters.[318]

208. By contrast, the Claimants acknowledge that a finding that the Re-Enactment Decrees were not authorized would "add weight to the State's circumstantial case against the other disputed documents".[319]

2.4. Good faith and bad faith authorization

209. It is the Claimants' main submission that the Regency authorized the issuance of the disputed documents, in particular of the Mining Licenses.[320] In support, the Claimants rely on two alternative theories, good faith and bad faith authorization, both of which lead to the conclusion that the disputed documents were authorized.[321]

210. According to the first theory of good faith authorization, Mr. Ishak's signature was regularly applied by one of his subordinates (e.g. Mr. Noor or Mr. Putra) using a high-quality stamp "or some other printing technology" with Mr. Ishak's knowledge and consent.[322] The "natural progression" of the application process supports such a finding (i.e., application, staff analysis, spatial analysis, coordination draft, affixation of the chop, entry in Registration Book of Decrees). The hearing also showed that Mr. Ishak authorized his subordinates to "sign official documents on his behalf" when he was travelling.[323]

211. Under the second theory of bad faith authorization, some insider in the Regency engaged in a "design to make the licences being issued to Ridlatama '*plausibly deniable*'" so as to be able to "illegally revoke" them later once Ridlatama would have found commercially viable quantities of

318 Tr. (Day 1), 129:19-23 and 132:3-6 (Opening, Sheppard).

319 C-PHB1, ¶ 67.

320 C-PHB1, ¶ 4.

321 C-PHB1, ¶ 5.

322 C-PHB1, ¶ 6.

323 C-PHB1, ¶ 6.

coal.[324] In this scenario, Ridlatama and the Claimants are "victims" and Indonesia is bound by the licenses it issued.[325] Churchill and Planet insist in this context that Indonesia has not established that Ridlatama was aware of any such scheme.[326]

2.5. The Tribunal should reject Indonesia's accusations against Mr. Mazak and Indonesia is estopped from further accusing Churchill

212. For the Claimants, Indonesia's contentions that new facts emerged at the hearing justifying accusations against Mr. Mazak should be given short shrift. In March and July 2015, Indonesia stated that it had no accusations against Churchill.[327] Its own police investigations did not reveal any wrongdoing by Mr. Mazak, thus allowing the Tribunal to "assume (logically) or infer (adversely)" that Indonesia knew Mr. Mazak's role in relation to the disputed documents when it made its statements earlier in 2015.[328] In essence, Mr. Mazak is now accused as a result of a process of elimination, since "he is the only person yet to give evidence".[329] In this context, the Claimants highlight that Indonesia never raised issues about Mr. Mazak prior to the hearing and did not put any of these new accusations to the Claimants' witnesses during cross-examinations.[330]

213. Furthermore, Indonesia's new allegation that Churchill structured its investment to facilitate the alleged fraud is "ambush", as the Claimants prepared their defense on the basis of the record as it stood before the hearing and of the representations which Indonesia made in March and July 2015. In this regard, the Claimants also point to Mr. Ishak's apparent apology to Churchill at the hearing.[331]

214. Indonesia's fresh allegations are baseless and should not be entertained. In light of Indonesia's prior representations, the Claimants seek a declaration

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324 C-PHB1, ¶ 7.

325 C-PHB1, ¶ 8.

326 C-PHB1, ¶ 54, note 217.

327 C-PHB2, ¶ 6. The Claimants refer to: Respondent's letter to the Tribunal, 23 March 2015, p. 4; R-Comments 2, ¶ 41.

328 C-PHB2, ¶¶ 4, 8.

329 C-PHB2, ¶ 8.

330 C-PHB2, ¶ 8.

331 C-PHB2, ¶ 6.

that Indonesia is "estopped and precluded from pressing these new allegations against the Claimants".[332] In any event, the coordination initials on the draft decrees establish that the applications were processed until the final stages, thus doing away with Indonesia's contention that Messrs. Armin and Ordiansyah declined to process the PT RTM and PT RTP applications.[333]

2.6. Legal consequences of a finding of forgery

215. For the Claimants, the question of legal consequences is moot if the disputed documents are found not to be forged or fabricated.[334] In the event of a finding of forgery, the Claimants argue that there are distinct legal consequences of forgery or of fraud.[335] In any event, the Claimants submit that the legal consequences would be "very limited" under both scenarios (forgery and fraud), as the "vast majority of the Claimants' investments will remain legally valid".[336]

216. In this context, the Claimants refer to the description of their investments in their Memorial on Jurisdiction and Merits, where they submit that their investments are composed of (i) shares in PT ICD as well as in PT TCUP; (ii) an indirect interest in Ridlatama's shares in PT RTM, PT RTP, PT INP and PT IR; (iii) contractual and shareholding interests, through PT ICD, in the Ridlatama Companies and the EKCP; (iv) Ridlatama's mining licenses; (v) feasibility studies and other intellectual property tied to the EKCP; (vi) monies invested through PT ICD; and (vii) goodwill in the Indonesian mining services market.[337] Thus, even assuming that the licenses were forged, "the vast majority of these investments will remain legally valid *investments*",[338] with the value of certain components changing.

217. Specifically, with the exception of the disputed mining licenses, (i) all shares will remain legally valid securities, although their value might change; (ii) the contractual interests are unaffected, although their value might change;

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332 C-PHB2, ¶ 6.

333 C-PHB2, ¶ 10.

334 Reply, ¶ 202.

335 Reply, ¶ 202.

336 Reply, ¶ 203.

337 Reply, ¶ 231, referring to Claimants' Memorial on Jurisdiction and Merits, ¶¶ 294-295.

338 Reply, ¶ 233.

(iii) the feasibility studies and other intellectual property remain legally valid, their value being susceptible to change; (iv) the amounts invested would not change; and (v) the goodwill would also remain, subject to determining its value, if the licenses were forged by someone other than the Claimants.[339]

218. The Claimants argue that Indonesia failed to provide a cogent legal reason why a finding of forgery would lead to the "drastic conclusion" of dismissal of the entire case.[340] More particularly, they submit the following arguments on the legal consequences of a finding of forgery of the disputed documents:

i. If the Survey and Exploration Licenses are forged or unauthorized, that would not dispose of the validity of the Exploitation Licenses as a matter of Indonesian and international law. Although Indonesia initially contended that a finding of forgery would be dispositive of the claims, it admitted at the hearing that a factual finding of forgery would not determine the legal question of the validity of the disputed licenses, nor of the Exploitation Licenses.[341]

Whether an exploitation license can be issued if preceding licenses were improper is a question of Indonesian law on which Indonesia presented no arguments or expert evidence.[342] As a matter of Indonesian law, the Exploitation Licenses are "stand-alone administrative acts" that perfected Ridlatama's title to the EKCP and superseded all other previous licenses (whether authorized or not).[343] Indonesia's contention that the exploitation licenses are infected with "procedural deviations" is ill-founded since Indonesia's argument rests on an "established" procedure within the Regency, which has proven not to exist. Indeed, Indonesia conceded that it lacked "a well

339 Reply, ¶ 233.

340 Reply, ¶ 204(a).

341 C-PHB1, ¶ 58; Tr. (Day 7), 206:25-207:10 (Tribunal, O'Donoghue).

342 C-PHB2, ¶ 26. The Claimants specify that Indonesia's reference to three articles in the 2009 Mining Law do not support Indonesia's proposition, while Law No. 11 of 1967 on the Basic Provisions of Mining, which applied at the time the disputed licenses were issued, contains not a single provision allowing to conclude that the validity of exploitation licenses depends on the validity of prior licenses. C-PHB2, ¶ 26; **Exh. CLA-5**.

343 C-PHB1, ¶ 59.

established procedure" and Mr. Ishak even testified that "anything can happen".[344]

With respect to the procedural deviations mentioned by Indonesia, the Claimants provide the following responses: (i) the fact that Ridlatama filed multiple applications is irrelevant since Indonesia made no submissions on whether such course of action was possible; (ii) the fact that the upgrades created an overlap with Nusantara's exploration licenses is no proof of deviating procedures in light of Mr. Gunter's testimony that over 5000 overlaps of mining licenses exist in Indonesia, a situation created exclusively by Indonesia and its officials; (iii) Indonesia did not dispute that the Regency drafted and issued the exploitation upgrades and therefore cannot rely on "unusual language" therein to cast doubt on their validity; (iv) the fact that the attached maps have some irregularities cannot be used against the Claimants since other maps also have irregularities and Indonesia did not produce a digital database of the Planology Office; (v) the fact that someone outside the Mining and Energy Bureau picked up the upgrades is irrelevant to the existence of deviations in the issuance of the upgrades; and (vi) Messrs. Armin and Ordiansyah confirmed that they attended the feasibility study presentation on 28-29 April 2009 "in circumstances in which they now say Ridlatama did not hold general survey or exploration licenses for the area the subject of the presentation".[345]

In sum, for the Claimants, Indonesia's contention that something went awry in the processing of the exploitation upgrades is unsubstantiated, just like its argument that corruption may be involved.[346] In addition, Mr. Noor's refusal to attend the hearing and the exclusion of his evidence dispose of the Respondent's case on the Exploitation Licenses, which leads to the conclusion that these licenses must stand.[347]

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344 C-PHB2, ¶ 13, referring to: Respondent's Answers, ¶¶ 106-10; Tr. (Day 3), 113:22 (Tribunal, Ishak).

345 C-PHB2, ¶ 13(a)-(f).

346 C-PHB2, ¶ 14.

347 C-PHB2, ¶ 14, note 84.

ii. With respect to the Legality and Cooperation Letters, Indonesia did not establish the legal consequences which the holder of a mining license incurs in the event that no valid approval has been granted.[348] In any event, it never argued that these ancillary documents have any "direct consequences in terms of dismissal".[349]

iii. Like the previous category, the Borrow-for-Use Recommendations have "no direct value as investments" and no impact on the Claimants' case. As a matter of Indonesian and international law, the absence of borrow-for-use permits, or breaches of forestry law, in no event justify the revocation of the Exploitation Licenses.[350] Ms. Nurohmah confirmed this understanding of Indonesian law when she denied having heard of license revocations as a result of lacking borrow-for-use permits.[351]

iv. The same argumentation applies to the Technical Recommendations.

v. Finally, the Re-Enactment Decrees may well have been authorized in a "bad faith sense" as part of a scheme of Mr. Noor aiming at denying the validity of the Ridlatama licenses.[352] If the Re-Enactment Decrees were forged or unauthorized the only consequence would be that claims for restitution of amounts spent between the re-enactments and the dismissal of the Samarinda court actions would be barred.[353] The allegations that Churchill was implicated in the fraud and sought to avoid disclosure before the AIM is "unbelievable". Such short-sighted conduct would readily be discovered, put the share value of the Claimants at risk and expose their personnel to criminal liability.[354] For

348 C-PHB1, ¶ 62.

349 C-PHB1, ¶ 61.

350 C-PHB1, ¶ 63.

351 C-PHB1, ¶ 65.

352 C-PHB1, ¶ 69. The Claimants add that Mr. Noor had sufficient time to "auction" the rights of the EKCP in the seven months before he notified the Secretary of the Region Province of East Kalimantan that he never issued the Re-Enactment Decrees.

353 C-PBH1, ¶ 68.

354 C-PHB1, ¶ 71, note 231; Tr. (Day 7), 191:10-22 (Tribunal, Sheppard).

the Claimants, the "more plausible explanation" is that someone within the Regency wanted to reverse Mr. Noor's prior mistake of handing the licenses back to Nusantara.[355]

219. In addition, the Claimants invoke various legal doctrines to justify their position that a finding of forgery would not affect their case, in particular (a) estoppel, (b) acquiescence, (c) legitimate expectations, (d) unjust enrichment, and (e) internationally composite wrongful act.

a) Estoppel

220. The Claimants submit that under international law, States are obliged to adopt good faith conduct in their dealings with foreign investors, meaning that they cannot disregard their own words and deeds or benefit from their own inconsistencies.[356] In reliance on international case law and doctrine, the Claimants submit that the "requirements for estoppel are (a) a clear and unambiguous statement of fact; (b) which is voluntary, unconditional and authorized; and (c) which is relied upon by the other party in good faith either to its detriment or which provides an advantage to the party making the statement".[357] Silence and lack of protest, so say the Claimants, can also found estoppel and representations need not be made directly to the party relying upon them.[358] Conditionality and authority require case by case analysis; actual authority is not the test, since representations made by a person "cloaked with the mantle of Governmental authority" may bind the State.[359]

221. The Claimants further submit that Indonesia is estopped from disputing the validity of the licenses. Estoppel derives from the facts that the Regency conducted itself "in a manner that communicated to the Claimants that the Ridlatama licences were valid" and the Claimants detrimentally and

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355 C-PHB1, ¶ 71, note 231; Tr. (Day 7), 191:10-22 (Tribunal, Sheppard).

356 Reply, ¶ 207.

357 Reply, ¶ 209. D.W. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence", 33 *BYIL* (1957), p. 202 (**Exh. CLA-231**).

358 Reply, ¶ 212.

359 Reply, ¶ 213. *Southern Pacific Properties (Middle East) Ltd v. The Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, 8 ICSID Review 328, ¶ 82 (**Exh. CLA-216**).

reasonably relied on the licenses to further invest in the EKCP.[360] Indonesia failed to exercise due care, management and control over the disputed mining areas and the Claimants "relied in good faith on the representations and assurances of the Regency and its officials as to the validity of the licences".[361] If only Ridlatama is found to have engaged in forgery or fraud (to the exclusion of the Claimants and of insiders within the Regency), Indonesia would still be estopped from denying rights under the mining licenses or be held to have acquiesced to their validity. On the other hand, if Ridlatama is held to have operated with the assistance of a Regency insider, the Respondent would have breached the FET standard in the BITs (bad faith conduct, lack of transparency, and breach of legitimate expectations).[362]

b) Acquiescence

222. The Claimants stress that acquiescence and estoppel are not "the same thing" although they are often linked.[363] Thus, the two claims have independent legal foundations.

223. For the Claimants, regardless any *ex post* finding of fraud, Indonesia acquiesced during the relevant period by allowing "an existing legal or factual situation to continue", including by accepting rent payments and being aware of the Claimants' exploration activities in circumstances where it could or should have objected. This is in particular so because Indonesia argues that it allegedly "knew Nusantara was maintaining its title throughout 2007 and 2008".[364]

c) Legitimate expectations / FET

224. According to the Claimants, where an investor invokes estoppel (or acquiescence), there often is a "concurrent (or consequential) claim" under the legitimate expectations component of the FET standard. Relying on case

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360 C-PHB1, ¶ 75; C-PHB2, ¶ 27.

361 C-PHB1, ¶ 75; C-PHB2, ¶ 27, referring to the various representations listed in the Updated Annex. For the Claimants, the Exploitation Licenses "must be treated as representations (by a person who unquestionably had '*competence to speak for the State'*) that were *voluntary, unconditional* and *authorized*".

362 C-PHB1, ¶ 77.

363 Reply, ¶ 215.

364 Reply, ¶ 246.

law, the Claimants therefore argue that there is "commonality between the way an FET-backed legitimate expectation is generated and the way an estoppel arises".[365]

d) Unjust enrichment

225. The Claimants further submit that the FET standard also accommodates "a number of other general principles of international law", including unjust enrichment, as *Saluka* and other decisions confirmed.[366] They concede that illegality may be a bar to an unjust enrichment claim, but only where the illegality is imputed to the party raising the unjust enrichment claim. To the extent that the Respondent does not allege that the Claimants were involved in the alleged forgery, Indonesia may not oppose an illegality defense to the unjust enrichment.[367]

226. Since the Claimants discovered the seventh largest coal field in the world, Indonesia evidently enriched itself by stripping them of their mining rights.[368] The Claimants also contest that an unjust enrichment claim can only be adjudicated if the Tribunal were holding *ex aequo et bono*.[369]

e) Internationally wrongful composite act

227. For the Claimants, Indonesia committed a "composite violation of FET"[370] in the sense of Article 15 of the ILC Articles on State Responsibility. On this basis, Churchill and Planet argue that Indonesia's "pattern of misconduct – including the conduct that underpins the denial of justice claim and the threats of force claim – constitutes a composite internationally wrongful act".[371]

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365 Reply, ¶ 218.

366 Reply, ¶¶ 219-220, referring to: *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶ 499 (**Exh. CLA-223**); *Benjamin Isaiah v Bank Mellat*, Award No. 35-219-2, 30 March 1983, 2 Iran-US CTR 232, p. 237 (**Exh. CLA-211**).

367 Reply, ¶ 221.

368 C-PHB2, ¶ 27.

369 C-PHB2, ¶ 27.

370 Reply, ¶ 222.

371 Reply, ¶ 225.

V. Analysis

228. This part first deals with preliminary matters (A). The Tribunal thereafter goes into a detailed assessment of the Respondent's allegations of forgery and the existence of a fraudulent scheme (B) and then draws the appropriate legal consequences (C). Wherever appropriate, it first sets out the Parties' positions before going into the Tribunal's analysis.

A. Preliminary issues

229. This section addresses whether one or two awards should be rendered (1), the scope of this Award (2), the law applicable to this phase of the proceedings (3), the burden and standard of proof (4), adverse inferences (5), and the relevance of previous decisions or awards (6).

1. One or two award(s)?

230. Procedural Order No. 4 provided that the Tribunal would decide whether to issue one or two awards after further consultation with the Parties. Lacking an agreement on the number of decisions/awards, the Tribunal resolved to issue two decisions on jurisdiction.

231. Following an invitation of the Tribunal to provide their views in relation to the present ruling, the Parties consented on 27 September 2016 to the issuance of a single decision/award. On this basis, the Tribunal renders a single award.

2. Scope of this Award

232. In paragraph 5 of PO20, the Tribunal confirmed its prior directions in paragraph 34 of PO15 and paragraph 28 of PO13, in the following terms:

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

233. Accordingly, this Award deals with (i) the factual aspects of forgery (B) and (ii) the legal consequences of a finding of forgery (C). It is structured accordingly.

3. Applicable law

234. With respect to the law applicable to the merits, the Tribunal must rely on Article 42(1) of the ICSID Convention, which reads as follows:

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

235. The Parties have not agreed on the rules of law that govern the merits of the Respondent's Application for Dismissal.[372] Consequently, the Tribunal shall apply, in addition to the two BITs, Indonesian law and international law when appropriate. 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.[373]

236. 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.[374]

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372 *See*, for instance: C-Reply, ¶¶ 15-18, 23, 206; R-Answers, ¶¶ 182-185, 189-191.

373 *See, e.g.*, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶ 179; *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 117.

374 *See*, e.g., *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, ¶ 295 ("[…] an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it"). *See* also *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Merits, Judgment, 25 July 1974, ¶ 18 ("[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court"); *Albert Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Case, Award, 23 April 2012, ¶ 141; *Metal-Tech Ltd.*

4. Burden and standard of proof

237. The Respondent submits that the Claimants carry the burden of making a *prima facie* showing that the disputed licenses were validly issued. The Respondent further argues that the appropriate standard of proof is the one of balance of probabilities. By contrast, the Claimants reply that the Respondent bears the burden of proving its allegation of forgery. Moreover, for the Claimants, given the seriousness of the allegations, the applicable standard of proof is "clear and convincing evidence".

238. Starting with the burden of proof, the Tribunal deems it appropriate to apply international law to this issue, since the claims brought in this arbitration seek to establish the responsibility of a State for breach of the latter's international obligations.[375] It is a well-established rule in international law that each Party bears the burden of proving the facts which it alleges (*actori incumbit onus probandi*).[376] Since the Respondent alleges that the Survey and Exploration Licenses and related documents are forged and that the Exploitation Licenses were obtained through deception, the Respondent bears the burden of proving its allegations of forgery and deception.

239. The Tribunal then turns to the standard of proof, about which the Parties disagree as well. The Respondent considers that allegations of forgery and of fraud must be shown on a balance of probabilities. By contrast, the

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v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 287 (**Exh. RLA-155**); *Vestey Group Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 118.

375 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICISD Case No. ARB/10/3, Award, 4 October 2013, ¶ 237 (**Exh. RLA-155**).

376 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICISD Case No. ARB/10/3, Award, 4 October 2013, ¶ 237 (**Exh. RLA-155**). *See* also: *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶¶ 110-114 (**Exh. RLA-210**); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶ 438 (**Exh. RLA-146**). And further, for instance: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 437, ¶ 101; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, p. 71, ¶ 162; *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 177; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, UNCITRAL, Interim Award, 1 December 2008, ¶ 138; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.13; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, 25 August 2014, ¶¶ 8.8-8.9.

Claimants are of the view that the highest standard of clear and convincing evidence must apply to prove forgery and fraud.

240. Some tribunals have applied the higher standard of clear and convincing evidence due to the gravity of a finding of forgery or fraud.[377] Others, however, have considered that the common law standard of the balance of probabilities or its civil law counterpart of "*intime conviction"* is sufficiently flexible to assess an act of forgery or fraud in a commercial setting, it being understood that the evidence must be commensurate with the seriousness of the alleged conduct and the overall context. The *Libananco* tribunal for instance manifested this view as follows:

> "[Allegations of fraud] *may* simply require *more persuasive evidence*, in the case of a fact that is *inherently improbable*, in order for the Tribunal to be satisfied that the burden of proof has been discharged".[378]

241. Lord Hoffmann expressed the same idea in an eloquent illustration:

> "[S]ome things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not".[379]

242. In this context, the Claimants assert that the Respondent must prove intent and motive.[380] The Respondent rejects this proposition on the ground that

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377 *See*, for instance: *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 326 (**Exh. CLA-225**); *EDF (Services) Limited. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 221 (**Exh. CLA-226**); *Dadras International and Per-Am Construction Corporation v. The Islamic Republic of Iran and Tehran Redevelopment Company*, Iran-US Claims Tribunal, Award No. 567-213/215-3, 7 November 1995, ¶¶ 123-124 (**Exh. CLA-218**); *Himpurna California Energy Ltd. (Bermuda) v. PT. (Pesero) Perrusahaan Listruik Negara (Indonesia)*, UNCITRAL, Award, 4 May 1999, ¶ 116 (**Exh. CLA-220**).

378 Emphasis added by the Tribunal. *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/7, Award, 2 September 2011, ¶ 125 (**Exh. RLA-146**).

379 *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 (Lord Hoffmann), ¶ 55. See: Tr. (Day 1), 110:20-111:2 and 111:18-112:7 (Tribunal, Sheppard). *See* also: *In Re B (Children) (FC) Appellate Committee* [2008] UKHL 35 (Lord Hoffmann), ¶ 72 **(Exh. RLA-225)**.

380 *See*, for instance: Reply, ¶ 21.

there is no general requirement of *mens rea* or intent in investment treaty practice where a party alleges that a document was forged.[381]

243. While intent and motive may be required for a criminal act of forgery or fraud, the present proceedings are not aimed at establishing criminal liability. Here the Tribunal must determine whether the impugned documents are authentic for purposes of an action seeking to engage the international responsibility of a State. In this context, the Respondent is right that motive and intent are not required, but may form part of the circumstantial evidence to be considered in assessing authenticity.

244. In sum, the Tribunal considers that the Respondent carries the burden of proving forgery and fraud, which proof will be measured on a standard of balance of probabilities or *intime conviction* taking into account that more persuasive evidence is required for implausible facts, it being specified that intent or motive need not be shown for a finding of forgery or fraud but may form part of the relevant circumstantial evidence. The Tribunal will assess all the available evidence on record and weigh it in the context of all relevant circumstances.

5. Document production and adverse inferences

245. Each Party requested that the Tribunal draw adverse inferences from the other Party's failure to produce certain documents contrary to the Tribunal's order or to present witnesses at the hearing. More specifically, the Claimants assert that the Respondent failed to produce a large number of documents. These documents are enumerated in paragraph 204 above, to which the Tribunal refers. The Claimants further seek adverse inferences from the Respondent's failure to present Messrs. Noor, Putra and Aspan as witnesses, as set out in paragraph 205 to which the Tribunal refers.

246. The Respondent responded to the Claimants' requests by stating that no adverse inferences should be drawn and providing various reasons, including the non-existence of certain documents, poor archiving procedures, and privilege. The Respondent also stated that the Tribunal "may draw such inferences as it deems appropriate" from the Claimants' failure to produce a number of "significant documents that should have been

381 *See*, for instance: R-Answers, ¶ 189.

in their possession" and to call Messrs. Basrewan and Mazak as witnesses.[382]

247. The Tribunal starts by noting that Article 34(2)(a) of the ICSID Arbitration Rules empowers it to order the production of evidence, witnesses or experts at any stage of the proceedings. The first sentence of Article 34(3) further states that the Parties "shall cooperate with the Tribunal" in the production of such evidence. Pursuant to the second sentence of Article 34(3), the Tribunal "shall take formal note" of a Party's failure to comply with its obligations in this respect and the reasons provided for such failure. Article 34(3) reads as follows:

> "The parties *shall cooperate* with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal *shall take formal note* of the failure of a party to comply with its obligations under this paragraph *and of any reasons given for such failure*" (emphasis added).

248. As the Tribunal interprets this provision, it (i) enshrines a general obligation to cooperate, (ii) and therefore does not aim at particular failures to comply with particularized disclosure requirements, (iii) provides for the opportunity, under certain circumstances to excuse non-compliance, such as the invocation of privilege, and (iv) does not necessarily imply specific consequences in cases of non-compliance, such as the drawing of adverse inferences.

249. Except where otherwise stated and considering paragraphs 15.3 and 15.9 of PO1 as well as Article 9 of the IBA Rules on the Taking of Evidence, the Tribunal comes to its conclusions on the basis of the evidence on record and does not deem it necessary to draw adverse inferences.

250. This being so, for greater clarity, the Tribunal adds that it accepts the invocation of privilege by the Respondent in relation to the police files concerning investigations into the alleged forgery, and in relation to documents concerning investigations into Messrs. Ishak and Noor by the

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382 According to the Respondent, the Claimants failed to produce the following documents: PT RTM's application dated 20 March 2007 for a General Survey License; Ridlatama's requests for legality explanation letters dated 12 February 2008; Ridlatama's requests for cooperation letters dated 14 February 2008; Ridlatama's requests for the September 2010 technical consideration letters dated 27 May 2010; evidence of protests to Mr. Noor following the Revocation Decrees; Ridlatama's SKIPs; Ridlatama's 29 October 2009 letter to the East Kutai Police; non-confidential documents from Credit Suisse". R-Comments 1, ¶¶ 39-44, 52-60, 69-71; R-Answers, ¶ 142; R-PHB1, ¶ 107, note 268.

anti-corruption agency KPK, since they are covered by the secrecy of criminal investigations. Moreover, considering the evidence given by Mr. Ramadani regarding the (bad) state of the archives at the Regency of East Kutai (and in particular at the Mining and Energy Bureau),[383] the Tribunal appreciates the Respondent's difficulties in locating various documents. As concerns the Planology Office maps, while Mr. Ordiansyah seemed to indicate that his office could produce various maps and a digital database,[384] the analysis below will show that the Tribunal primarily aimed at determining the authenticity of the disputed documents by focusing on the signatures, and that it was able to reach its conclusion on the basis of the maps on the record.

251. Finally, the Tribunal does not deem it warranted to draw adverse inferences from the fact that the Respondent did not present certain individuals as witnesses. The fact that Mr. Noor did not appear for questioning resulted in discarding his witness statement (see paragraph 84 above). As regards Mr. Putra, the Tribunal notes that he is no longer employed by the Indonesian Government. Finally, the Tribunal notes that the Claimants did not request that Messrs. Putra or Aspan be examined, which they could have done by contacting these persons or asking the Tribunal to do so. The same holds true for the fact that the Claimants did not present Messrs. Basrewan and Mazak as witnesses.

6. Relevance of previous decisions or awards

252. Both Parties have relied on previous decisions or awards in support of their positions, either to conclude that the same solution should be adopted in the present case or in an effort to explain why this Tribunal should depart from that solution.

253. The Tribunal considers that it is not bound by previous decisions. At the same time, in its judgment it must pay due consideration to earlier decisions of international tribunals. Specifically, it believes that, subject to compelling grounds to the contrary, it has a duty to adopt principles established in a series of consistent cases. It further believes that, subject always to the text of the BITs and the circumstances of each particular case, it has a duty to contribute to the harmonious development of international investment law,

383 Tr. (Day 4), 145:3-146:3 (Direct, Ramadani).

384 *See*, for instance: Tr. (Day 3), 150:8-14 and 163:25-164:4 (Cross, Ordiansyah).

with a view to meeting the legitimate expectations of the community of States and investors towards legal certainty and the rule of law.

B. Factual aspects of document authenticity

1. Introduction

254. The Respondent disputes the authenticity of the 34 documents listed in the Document Table. The Tribunal will review the allegations regarding each disputed document in the following section. This review will lead to the conclusion that the signatures in the disputed documents are not authentic and not authorized. For greater clarity, the Tribunal already notes here the essential reasons for such conclusion.

255. First, all the signatures in the disputed documents were mechanically reproduced when the record establishes that officials at the relevant levels of the Government signed documents of such nature by hand. Second, the record shows that the Government did not use autopens or similarly sophisticated mechanical devices to reproduce signatures. Third, the same technology was used to reproduce the disputed signatures in documents allegedly issued at three different levels of the Government.

256. Fourth, the record contains three different versions of the PT RTM and PT RTP Survey Licenses of 24 May 2007. The first contains identical signatures of Mr. Ishak most likely reproduced through the use of an autopen; the second comprises "draft decrees" with coordination initials but without any signature from Mr. Ishak; and the third comprises copied and pasted signatures of Mr. Ishak taken from a previous license belonging to PT Ridlatama Power ("PT RP"). The existence of these three different versions of the same documents undermines the Claimants' argument that the application process for the PT RTM and PT RTP Survey Licenses was brought to a successful end. It also casts serious doubt on the validity of the other disputed documents. Finally, the circumstances surrounding the Re-Enactment Decrees which contain identical signatures of Mr. Noor and were inexplicably issued ten days after the revocation of the Exploitation Licenses further buttress the Respondent's case of a scheme to forge documents.

257. Since the Respondent's allegations primarily rest on the lack of authenticity of the licenses, the Tribunal will first deal with these (2.1) and address the remaining or ancillary documents thereafter (2.2). Last, the Tribunal will

ascertain the Parties' involvement in the authorship of the disputed documents (2.3).

2. Survey and Exploration Licenses

2.1. Main features of the disputed documents

258. The Tribunal will address the PT RTM and PT RTP Survey Licenses and the PT IR and PT INP Survey Licenses separately, because they were issued on different dates and because there are three versions of the PT RTM and PT RTP Survey Licenses which requires a particular analysis. The Tribunal will deal with certain other particular features (such as the signature blocks and the maps) in the course of its analysis, whenever appropriate.

a) The PT RTM and PT RTP Survey Licenses

259. The PT RTM and PT RTP Survey Licenses (documents nos. 1-2 in the Document Table) were allegedly issued on 24 May 2007 and bear identical signatures of the then-Regent of East Kutai, Mr. Awang Faroek Ishak. There are three versions of decrees in the record for each license, namely (i) the best copies (and originals inspected during the first document inspection of 29 August 2014) of the licenses originally produced by the Claimants (Exh. C-40 and C-41; Exh. P-18 and P-19), bearing a decree number, signatures identical to those on the PT INP and PT IR Survey Licenses as well as on the four Exploration Licenses, and the official Garuda seal (chop) partly overlapping with the signatures,[385] (ii) the draft decrees without the signature of the Regent but bearing coordination initials (Exh. C-383 and C-384) taken from the so-called Kurniawan archive (see paragraph 74 above) and put on the record in June 2015,[386] and (iii) decrees, which bear copied and pasted signatures of the Regent taken from the PT RP Survey License issued on 12 February 2007 (Exh. R-264 and R-265; documents nos. 33-34 in the Document Table) and provided by Mr. Gunter to the Claimants on 27 July 2015, a few days before the hearing.[387]

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385 The original versions of these decrees were inspected by the Parties' forensic experts during the first document inspection on 29 August 2015. *See*: Epstein ER2, Annex 1, items 1-2.

386 Reply, ¶¶ 83-86; Kurniawan WS1, ¶¶ 41-43. *See* also: Respondent's e-mail of 15 June 2015.

387 Respondent's e-mail of 30 July 2015; Claimants' e-mail of 30 July 2015; and Tribunal's e-mail of 30 July 2015.

260. The first set, i.e. the versions originally filed by the Claimants (Exh. C-40 and C-41), contain four distinct elements, namely (i) a decision letter granting a General Survey License for a period of one year, (ii) an attachment setting out the obligations of the holder of the mining license, (iii) an attachment specifying the coordinates of the mining concession, and (iv) a map indicating the borders of the concession area and applicable land uses. The decision letters contain a letterhead with the emblem of the Regency, bear a decree number, refer to an application letter of PT RTM and PT RTP respectively, and bear the signature of the then-Regent, which partly overlaps with the Garuda seal. The decree numbers are mainly typewritten, except for the first three numbers which were inserted by hand. Similarly, the date is partly written by hand (day) and otherwise typewritten (month and year). The decree number and date are not added to the attachment containing the map.

261. The signatures of the then-Regent are affixed at the end of all four elements and they partly overlap with the Garuda seal. It is undisputed that they are all identical.[388] The following is an image of the signature block taken from the decision letter in the PT RTM Survey License:[389]

262. The following is the signature block taken from the decision letter in the PT RTP Survey License:[390]

388 Strach ER1, Annex B, Charts 1 and 2.

389 RTM's KP General Survey License, Decree 210/02.188.45/HK/V/2007, 24 May 2007 (**Exh. C-40**).

390 RTP's KP General Survey License, Decree 211/02.188.45/HK/V/2007, 24 May 2007 (**Exh. C-41**).

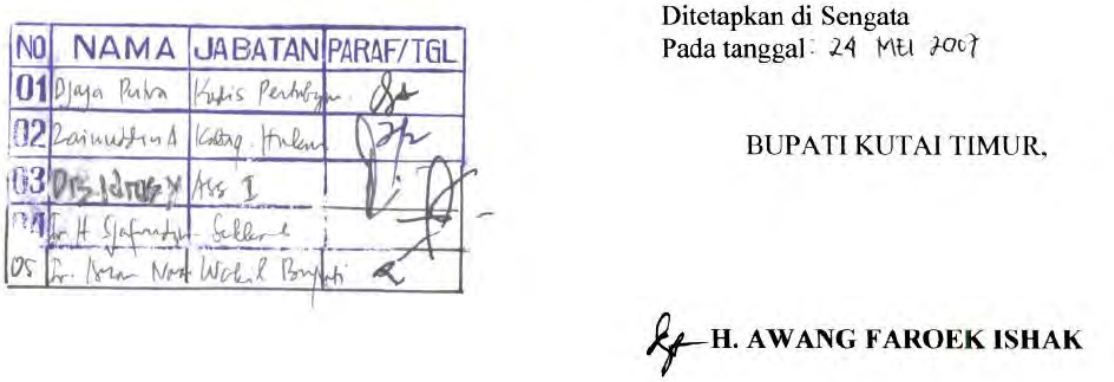
263. The map attached to each license in the first set shows the mining area and the different land uses. The legend column contains five different sections: a general description, an inset showing East Kutai, the legend proper, a signature block containing Mr. Ishak's signature partly overlapping with the official Garuda seal, and the designation of the responsible office in the Regency. All entries are in the Bahasa Indonesian language. The Tribunal will revert to specific features of these maps, and in particular to the "anomalies" on the basis of which the Respondent argues that these maps "have the earmarks of having been produced by a trickster".[391]

264. The second set, namely the draft decrees (Exh. C-383 and C-384), were also allegedly issued on 24 May 2007. They also contain the four elements mentioned above in respect of the first set. The decision letter does not contain a decree number and, in contrast to the original licenses, the date is completely handwritten. In addition, the draft decrees are not signed by the Regent but bear the initials of Mr. Putra next to the Regent's typewritten name. Finally, the decision letter contains a box with the coordination initials of Mr. Putra, the then-Head of the Mining and Energy Bureau, Mr. Zainuddin Aspan, the then-Head of the Legal Section, Mr. Idris Yunus, the then-Assistant 1, Mr. Sjafruddin, the then-Regional Secretary, and Mr. Noor, the then-Deputy Regent.[392]

391 R-Answers, ¶ 63.

392 Tr. (Day 5), 6:19-8:8 (Cross, Ramadani). *See* also: Reply, ¶¶ 80, 83.

265. The following image depicts the box with the coordination initials in the PT RTM draft decree next to the space provided for Mr. Ishak's signature:[393]



NO	NAMA	JABATAN	PARAF/TGL
01	Djaja Putra	Kabis Pertamb	
02	Zainuddin A	Kabag. Hukum	
03	Drs. Idrus Y	Ass I	
04	Ir. H. Sjafruddin	Sekkab	
05	Ir. Isran Noor	Wakil Bupati	

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266. And the following image depicts the box with the coordination initials in the PT RTP draft decree:[394]

NO	NAMA	JABATAN	PARAF/TGL
01	Djaja Putra	Kabis Pertamb	
02	Zainuddin A	Kabag. Hukum	
03	Drs. Idrus Y	Ass I	
04	Ir. H. Sjafruddin	Sekkab	
05	Ir. Isran Noor	Wakil Bupati	

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267. The attachment setting out the obligations of the license holder contains a handwritten decree number, a handwritten date, and the initials of Mr. Putra next to the typewritten name of the Regent, but not the signature of the Regent. The attachment setting out the coordinates of the mining concession contains only a handwritten decree number and date. Both elements bear the same decree number as the licenses analyzed above

393 Draft General Survey Business License for RTM, Decree No. 210/02.188.45/HK/V/2007, 24 May 2007 (**Exh. C-383**).

394 Draft General Survey Business License for RTP, Decree No. 211/02.188.45/HK/V/2007, 24 May 2007 (**Exh. C-384**).

(i.e., 210/02.188.45/KHK/V/2007 for PT RTM and 211/02.188.45/KHK/V/2007 for PT RTP). Finally, the legend column of the map only has the initials of Mr. Putra, next to the typewritten name of the Regent, but not the Regent's signature:[395]

268. Finally, the third set of licenses found in the Gunter Documents also reproduce the content of the PT RTM and PT RTP Survey Licenses, although they show some important differences. First, in addition to the four elements mentioned above, the documents contain a spatial analysis dated 21 May 2007, prepared by the Planology Office of the Regency, specifying the various land uses in the concession area, and signed by Messrs. Ordiansyah and Putra. Second, the decree number and date are always handwritten. Third, the maps are different in significant respects from the ones attached to the documents analyzed above. In particular, the column on the right of the maps does not contain a legend or a box for the Regent's signature, but contains three signatures (of Messrs. Ordiansyah, Putra and Ishak), one identification number (the NIP of Mr. Ordiansyah), and the official Garuda seal partly overlapping with Mr. Ishak's signature. The following image depicts the signature block next to the map in the version of the PT RTM Survey License provided by Mr. Gunter:[396]

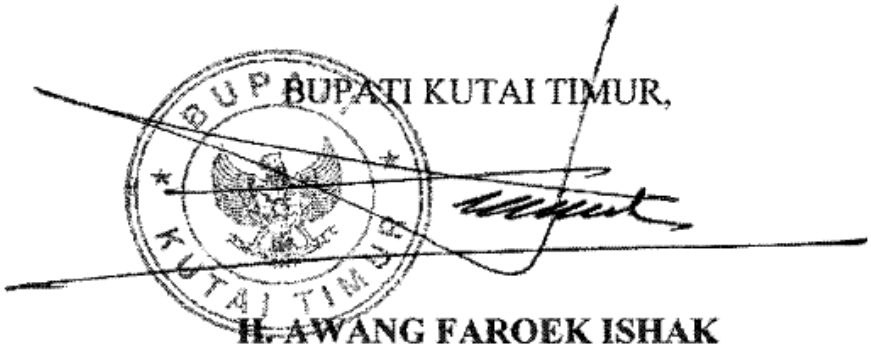
395 Draft General Survey Business License for RTP, Decree No. 211/02.188.45/HK/V/2007, 24 May 2007 (**Exh. C-384**)

396 Gunter's General Survey License for RTM (**Exh. R-264**).

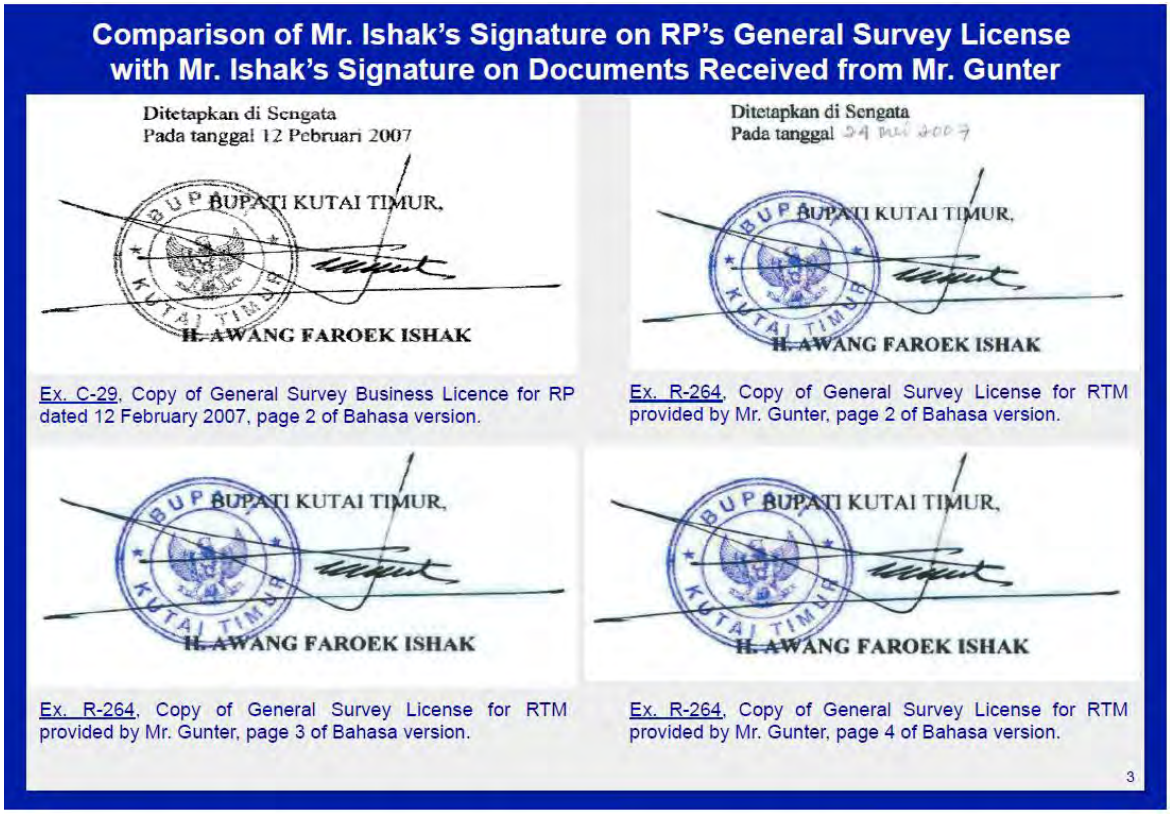
269. And the following image depicts the signature block next to the map attached to the version of the PT RTP Survey License provided by Mr. Gunter:[397]

397 Gunter's General Survey License for RTP (**Exh. R-265**).

270. It is undisputed that Mr. Ishak's signature in these documents is identical to his signature in the PT RP Survey License of 12 February 2007,[398] which is depicted in the image below.[399]



271. The following image compares Mr. Ishak's signature in the PT RP license of February 2007 with his signature as it appears in several places of the PT RTM Survey License received from Mr. Gunter:[400]

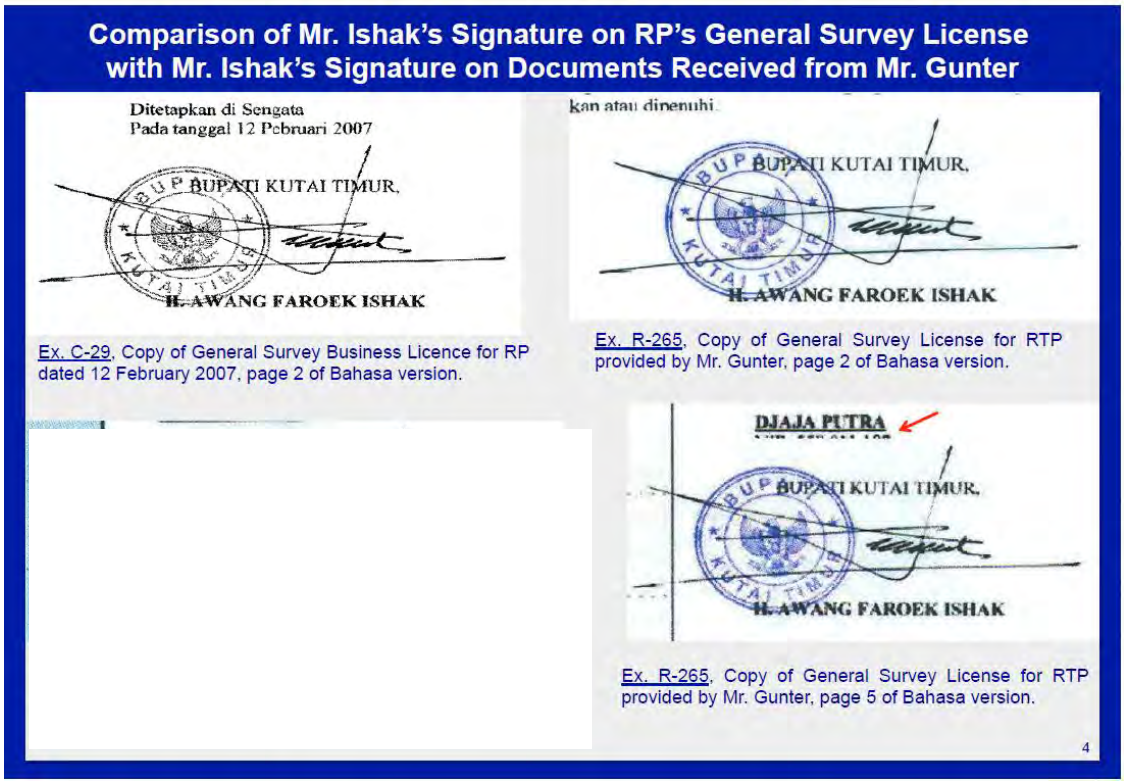


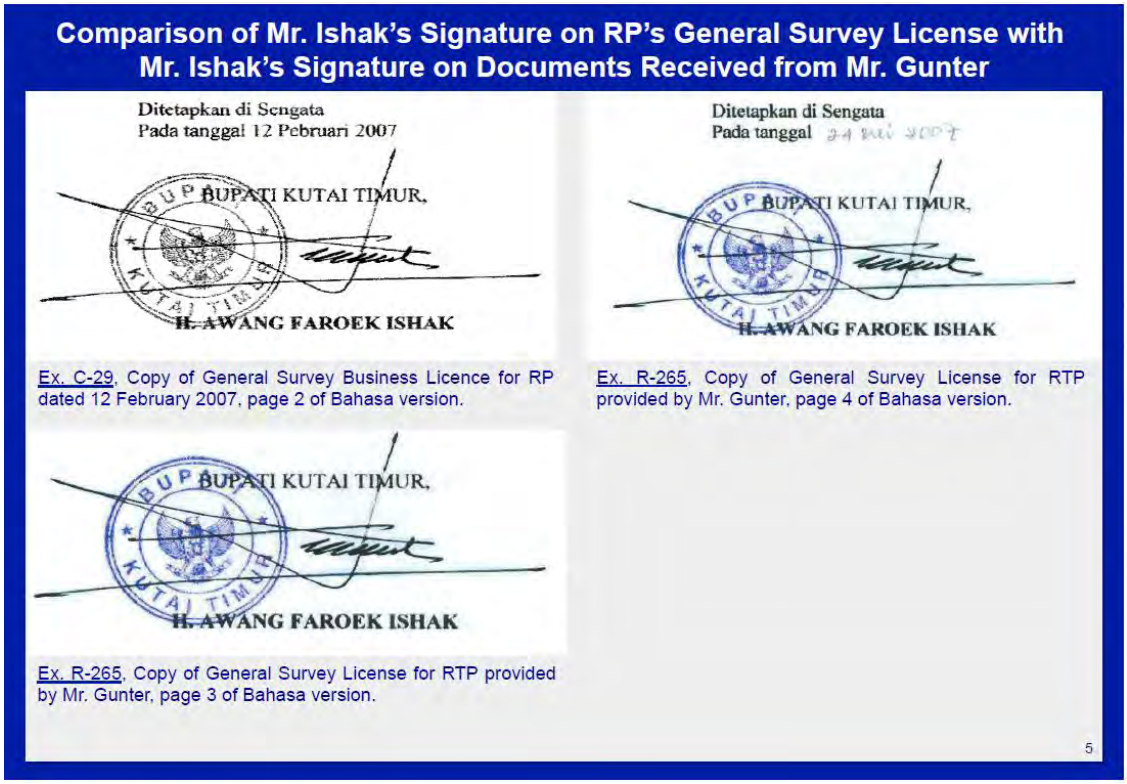
398 *See*, e.g.: Respondent's e-mail of 30 July 2015.

399 RP's KP General Survey License, Decree 53/02.188.45/HK/II/2007, 12 February 2007, p. 2 of Indonesian version (**Exh. C-29**). *See* also: Respondent's Opening Statement, Slide 29.

400 Respondent's Opening Statement, Slides 3 and 42.

272. The following two images compare Mr. Ishak's signature in the PT RP license of February 2007 with his signature in various places of the PT RTP Survey License received from Mr. Gunter:[401]





401 Respondent's Opening Statement, Slides 4-5 and 43-44.

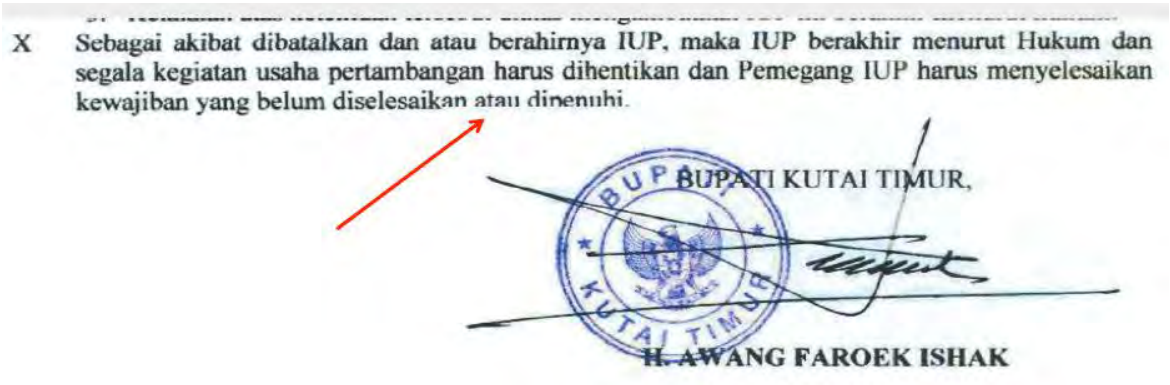
273. The Claimants did not dispute the Respondent's allegation that these signatures were copied and pasted from the PT RP license.[402] The forensic experts from both sides conducted their own examinations prior to the hearing and confirmed this fact.[403] Indeed, this appears quite clearly from the version of the PT RTP license where some printed text below Mr. Putra's name is partly cut off by the overlaying signature block containing Mr. Ishak's signature and the Garuda seal:[404]

402 RP's KP General Survey License, Decree 53/02.188.45/HK/II/2007, 12 February 2007 (**Exh. C-29**).

403 Tr. (Day 2) 55:13-58:10 (Direct, Epstein); Tr. (Day 2), 180:9-18 (Cross, Strach) and 194:12-15 (Tribunal, Strach). *See* also: R-PHB1, ¶ 20.

404 Gunter's General Survey License for RTP, p. 5 of Indonesian version (**Exh. R-265**). Image taken from: Respondent's Opening Statement, Slide 4. *See* also: Respondent's Opening Statement, Slide 45.

274. Similarly, the signature block cuts off a portion of the text in the attachment setting out the obligations of the license holder:[405]


X Sebagai akibat dibatalkan dan atau berahirnya IUP, maka IUP berakhir menurut Hukum dan segala kegiatan usaha pertambangan harus dihentikan dan Pemegang IUP harus menyelesaikan kewajiban yang belum diselesaikan atau dipenuhi.

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b) The PT INP and PT IR Survey Licenses

275. The PT INP and PT IR Survey Licenses (documents nos. 3-4 in the Document Table) were allegedly issued on 29 November 2007, and bear identical signatures of Mr. Ishak (Exh. C-65 and C-66). The originals were inspected by the Parties' forensic experts during the first document inspection on 29 August 2014.

276. The main features of these licenses are similar to those of the PT RTM and PT RTP licenses analyzed above, i.e. they contain four distinct elements (decision letter, attachment with obligations of license holder, attachment with coordinates, and map); bear a decree number of which the first numbers are handwritten; refer to the respective application letters of PT INP (20 November 2007) and PT IR (19 November 2007); bear identical signatures of the Regent which partly overlap with the Garuda seal; and bear a date of which the day is handwritten.[406]

405 Gunter's General Survey License for RTP, p. 2 of Indonesian version (**Exh. R-265**). Image taken from: Respondent's Opening Statement, Slide 46.

406 Strach ER1, Annex B, Charts 3-4.

277. The following image depicts the signature block of the decision letter in the PT INP Survey License:[407]

278. And the signature block in the Survey License of PT IR looks as follows:[408]

279. A distinctive feature is the difference in the maps compared to those in the PT RTM and PT RTP licenses. The maps in the PT INP and PT IR licenses are not only aligned in a different direction than the legend (not in landscape format), but appear more rudimentary since they do not specify the land

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407 INP's KP General Survey License, Decree 247/02.188.45/HK/XI/2007, 29 November 2007 (**Exh. C-65**). Color reproduction taken from: Epstein ER2, Exhibit 3. *See* also: Strach ER1, Annex B, Chart 3.

408 IR's KP General Survey License, Decree 248/02.188.45/HK/XI/2007, 29 November 2007 (**Exh. C-66**). Color reproduction taken from: Epstein ER2, Exhibit 4. *See* also: Strach ER1, Annex B, Chart 4.

uses.[409] In addition, the legend column contains an inset showing all of East Kalimantan, whereas the PT RTM and PT RTP licenses show East Kutai. Finally, the legend is mostly in Bahasa Indonesian language, but the word river appears in English.

c) The Exploration Licenses

280. The Exploration Licenses of PT RTM, PT RTP, PT INP and PT IR (documents nos. 15-18 in the Document Table) were allegedly issued on 9 March 2008 and bear identical signatures of Mr. Ishak (Exh. C-99 to C-102 and Exh. P-49 to P-52). The originals were inspected by the Parties' experts during the first document inspection on 29 August 2014.

281. The Exploration Licenses also contain four elements, namely the decision letter, an attachment setting out the obligations of the license holder, an attachment with the coordinates of the mining area, and a section with maps. The first two numbers of the decree number and the day of the date were inserted by hand. The signatures of Mr. Ishak partly overlap with the Garuda seal. It is undisputed that the Regent's signature in all four Exploration Licenses are identical and that they are identical with those in the four Survey Licenses just described that were originally filed by the Claimants.[410]

282. The following is the signature block of the decision letter in the Exploration License of PT RTM:[411]

409 The Claimants did not dispute that the maps are copies of those attached to the PT INP and PT IR application letters, specifically the Application for General Survey License made by Investama Resources of 19 November 2007, p. 4 (**Exh. C-54**) and the Application for General Survey License made by Investmine Persada of 20 November 2007, p. 4 (**Exh. C-55**).

410 Strach ER1, Annex B, Charts 7-13.

411 RTM KP Exploration License, Decree 37/02.188.45/HK/IV/2008, 9 April 2008 (**Exh. C-102**).


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283. The following is the signature block of the decision letter in the Exploration License of PT RTP:[412]


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284. The following is the signature block of the decision letter in the Exploration License of PT INP:[413]

412 RTP KP Exploration License, Decree 36/02.188.45/HK/IV/2008, 9 April 2008 (**Exh. C-101**).

413 INP KP Exploration License, Decree 38/02.188.45/HK/IV/2008, 9 April 2008 (**Exh. C-99**).

285. The following is the signature block of the decision letter in the Exploration License of PT IR:[414]

286. In contrast to the Survey Licenses above, the Exploration Licenses all contain more than one map, each bearing an identical signature of Mr. Ishak. The PT RTM, PT RTP and PT IR Exploration Licenses have three

414 IR KP Exploration License, Decree 39/02.188.45/HK/IV/2008, 9 April 2008 (**Exh. C-100**). Color reproduction taken from: Epstein ER2, Exhibit 16. *See* also: Strach ER1, Annex B, Chart 12, Doc. 16.

maps, i.e., a situation map, a topographic map and an outcrop map,[415] while the PT INP Exploration License has two maps, there being no outcrop map.[416] Consequently, the first three Exploration Licenses bear six and the PT INP Exploration License bear five identical signatures of Mr. Ishak.[417]

287. General features of the maps attached to the Exploration Licenses are, *inter alia*, that the map and legend are in portrait format, the Regent's signature and the official Garuda seal are below and outside the map, all descriptions are in English, and they use different scales, all of which appear to be different from the one employed in the Survey Licenses.[418]

2.2. **How were the disputed documents signed?**

288. It is undisputed that Mr. Ishak did not sign the Survey and Exploration Licenses by hand.[419] Indeed, the Claimants did not challenge Mr. Ishak's testimony that he did not sign those decrees.[420] More importantly, the experts agree that all the signatures of Mr. Ishak in these eight documents are identical and are therefore reproductions.[421] They also agree that the signatures are high quality reproductions.[422] On this basis, the Tribunal

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415 RTM KP Exploration License, Decree 37/02.188.45/HK/IV/2008, 9 April 2008 (**Exh. C-102**); RTP KP Exploration License, Decree 36/02.188.45/HK/IV/2008, 9 April 2008 (**Exh. C-101**); IR KP Exploration License, Decree 39/02.188.45/HK/IV/2008, 9 April 2008 (**Exh. C-100**).

416 INP KP Exploration License, Decree 38/02.188.45/HK/IV/2008, 9 April 2008 (**Exh. C-99**).

417 *Id*. *See* also: Strach ER1, Annex B, Charts 7-13.

418 The Claimants did not dispute the Respondent's position that the maps are scaled 1:50,000 instead of 1:250,000 (R-Answers, ¶ 88). The Tribunal notes, however, that the situation maps in the exploration licenses use a different and larger scale than the one in the topographic and outcrop maps.

419 The Claimants stated that they and "their expert, Dr. Strach, agree with the State and Mr. Epstein that the signatures on the disputed documents cannot be the product of human handwriting as they are, essentially, identical". Reply, ¶ 51. *See* also: Strach ER1, ¶ 7; Tr. (Day 2) 177:6-11 (Cross, Strach).

420 Ishak WS1, ¶ 12.

421 The Claimants did not challenge the two "well-established principles" put forward by Mr. Epstein that (1) no two people write alike and (2) no one person produces a signature or writing in exactly the same way twice (e.g., Epstein ER2, p. 7). Dr. Strach stated as follow: "These documents contain ink signatures in the name of H. Awang Faroek Ishak which (other than in some very fine detail) are essentially identical to each other. Individually they lack the variation in pen pressure and associated variation in ink line width and impression that is characteristic of handwritten signatures (the ink lines are almost constant width). Collectively their identical nature indicates that they cannot be the product of human handwriting as people cannot and do no replicate their signature exactly from one signature to another" (Strach ER1, ¶ 7).

422 Tr. (Day 2), 177:12-14 (Cross, Strach); Tr. (Day 2), 198:7-9 (Tribunal, Strach).

cannot but find that Mr. Ishak's signatures in the Survey and Exploration Licenses were not written by hand, that they were affixed on the documents by some other means, and that the reproductions are of high quality.[423]

289. The position is less clear-cut when it comes to establishing what technology or method was used to affix Mr. Ishak's signatures on the disputed licenses. The Parties have different views on this issue and each expert could not fully rule out the position adopted by the other. The Respondent relied on Mr. Epstein's evidence to argue that the signatures were affixed through an autopen, while the Claimants relied on Dr. Strach, who was inclined to find that the signatures were produced through a high-quality stamping device. The Claimants also relied on evidence given by Mr. Kurniawan who stated that the Regency was using purple color ink stamps to reproduce the signature of Mr. Ishak, for instance, for "invitations and announcements".[424]

290. In his second report, having confirmed that Mr. Ishak's signatures were not written by hand, Mr. Epstein opined that they were the product of a mechanical process referred to as an autopen signature and defined as follows: "This process uses a master signature that has been programmed into the autopen through a smart card or flash drive. The signature is then reproduced, in ink, exactly the same way each time".[425] Mr. Epstein concluded that one master signature was used to reproduce Mr. Ishak's signature in all eight licenses.[426]

291. By contrast, Dr. Strach considered that "it is not possible to make a definitive or probabilistic determination of the technology or technologies used to produce these signatures".[427] While Dr. Strach conceded that the signatures present some characteristics of an autopen, such as uniform pen pressure, blunt ends and generally smooth appearing lines,[428] he indicated that the

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423 Strach ER1, ¶ 11. *See* also, e.g.: Tr. (Day 2), 158:4-160:2 (Cross, Strach).

424 Kurniawan WS1, ¶¶ 53-54.

425 Epstein ER2, p. 8.

426 Epstein ER2, p. 8.

427 Strach ER1, ¶ 12.

428 Strach ER1, ¶ 8. Dr. Strach also stated that a "reduced amount of ink was noted at the ends of some ink lines", further conceding that "literature indicates that extra ink at the ends of ink lines is sometimes a characteristic of Autopen writing rather than reduced ink".

use of high quality stamp impressions or other types of printing technology "are other explanations" of the origin of the disputed signatures.[429]

292. In respect of the PT RTM and PT RTP Survey Licenses, in particular, Dr. Strach observed that certain features speak in favor of stamp impressions or other printing processes rather than autopen: specifically an angular feature at the bottom left of the relatively long rounded feature in the lower center part of the signature (marked as E in the reproductions below), a slight downward protuberance near the right end of the lowest almost horizontal line of the signature (marked as D in the reproductions below), the width of a small spot to the left of the signature which is smaller than the main signature ink lines (marked as C in the reproductions below),[430] and strings of faint marks near the top right and lower left of the signature (marked as A and B in the reproductions below).[431] The following images depict these features in the PT RTM license:[432]

429 Strach ER1, ¶ 11.

430 Strach ER1, ¶ 8 and App. C.

431 Strach ER1, ¶ 10.

432 Strach ER1, App. C, Chart 17. Dr. Strach provides the following explanations: "The repeating fine features associated with many of the signatures on document 1 to 16 are marked C to E […]. Strings of faint marks that recur with varying degrees of visibility on eight signatures on pages of documents 1 and 2 are marked A and B".

293. Dr. Strach further noted that the blue ink of the circular stamp impression (i.e., the Garuda seal) is strongly visible on the back of the signature page, suggesting "substantial soaking" into the front of the paper, while the signatures present "less substantial soaking".[433] He also observed that, at the intersection between the stamp and the signature, the blue ink of the stamp impression "is either not visible or has substantially reduced visibility", possibly indicating that the stamps were placed on the documents after the signature.[434]

294. With respect to the specific features identified by Dr. Strach, Indonesia responded that protuberances, angular features, voids, width variations, small spots and dots, smudge and faint marks are also associated with

433 Strach ER1, ¶ 24.

434 Strach ER1, ¶ 24 and App. H.

autopens.[435] In particular, Indonesia argued that Dr. Strach failed to explain "why the marks associated with the signatures always recur in the same position" and "why the marks associated with the circular stamp impressions do not".[436]

295. The Tribunal notes that autopens have been commonly used in the United States for several decades, particularly by government agencies, including to reproduce the signature of the President of the United States such as the one of President Eisenhower.[437] By contrast, autopens are much less known in other parts of the world, in particular in South-East Asia and Australia.[438] Dr. Strach, who practices in Australia, stated that such devices are rare in his country and that he personally had never come across one.[439] Although the Claimants dispute the reliability of Indonesia's witnesses on this point, a matter to which the Tribunal will revert, it notes that all the Indonesian witnesses testified that they never heard of autopens and that such devices were not used by the Indonesian authorities, including the Regency of East Kutai, the Governorship of East Kalimantan, and the MEMR.[440] It is also noteworthy that there is no indication in the record whether the Autopen company had sold its devices to the Indonesian Government.[441]

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435 R-Answers, ¶¶ 44-47.

436 R-Answers, ¶ 48.

437 *See*: Stephen Koschal, Andreas Wiemer, *Presidents of the United States, Autopen Guide* (2nd ed., 2011) (**Exh. R-211**). *See* also: Tr. (Day 2), 23:19-24:7 (Direct, Epstein); Tr. (Day 2), 195:24-196:2 (Tribunal, Strach).

438 Dr. Strach stated the following during cross-examination:

"Q. Are autopens utilized in Australia?

A. I don't know the answer to that question.

Q. But in your 25 years of working as a document examiner, you haven't run across autopen signatures or documents in your work?

A. I haven't directly, both in the UK and in Australia". Tr. (Day 2), 155, 3-8 (Cross, Strach).

439 *Ibid*.

440 *See*, in particular: Ishak WS1, ¶ 16; Armin WS, ¶ 27; Ordiansyah WS, ¶ 37; Djalil WS, ¶ 16. Mr. Ramadani did not explicitly refer to autopens, but stated that the Regency "never utilizes an electronic signature, stamp or any mechanical or automated method of affixing the Regent's signature" (Ramadani WS, ¶ 17). The Tribunal further notes that the Claimants' witness, Mr. Kurniawan, had not either heard of autopens until the present proceedings and that he did not know whether such devices were used at the Regency (Kurniawan WS1, ¶ 53).

441 At the hearing, Mr. Epstein testified that he had not enquired whether the Autopen company had sold its machines to the Indonesian Government (Tr. (Day 2), 115:9-13 (Cross, Epstein)). The Claimants do not appear to have made such inquiry either.

296. The Tribunal further notes that Dr. Strach conceded that the signatures on all eight mining licenses are identical in the sense that the same master signature was used.[442] While he opined that the signatures in the PT RTM and PT RTP Survey Licenses might have been produced through a different technology than the other disputed signatures of Mr. Ishak as Regent, he also admitted that the recurrent spots and features "rather strongly" suggest that one single technology was used.[443] Dr. Strach further accepted that the uniform pen pressure, the blunt ends, the smooth lines and extra ink at the end of ink lines are characteristic of autopen technology.[444] He also could not rule out that a faulty autopen produced the specific features he identified.[445] Because the signatures are of such high quality, Dr. Strach ruled out regular stamp impressions, including self-inking stamp impressions, or pre-inked stamps. Asked about self-inking stamp impressions, he answered as follows:

> "Q. Would they fall within what you would call a self-inking or high quality stamp?
>
> A. In terms of the high quality we're seeing in these particular signatures, it is a bit hard to reconcile what I'm seeing with these signatures with a regular stamp impression, including a self-inking stamp impression".[446]

297. And Dr. Strach also seemed to rule out pre-inked stamps:

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442 Strach ER1, ¶ 11.

443 Strach ER1, ¶ 11. Dr. Strach provided the following explanations at the hearing regarding paragraph 11 of his first expert report: "In that paragraph 11 I've put a hypothesis that documents 1 and 2 [in the Document Table above, i.e., the PT RTM and PT RTP Survey Licenses] may have been produced using a different technology used for documents 3 to 18 [in the Document Table above], but then I've sort of self-criticized that by saying that the recurrent spot which occurs on all these signatures, and the other features referred to, the detail within those signatures, recurs throughout all these signatures, so that rather strongly suggests that the one technology or device has been used". Tr. (Day 2), 183:4-12 (Cross, Strach). *See* also: Tr. (Day 2), 203:21-22 (Tribunal, Strach).

444 Strach ER1, ¶ 8. At the Hearing, Dr. Strach stated the following with respect to the disputed signatures:

"Q. At the time you examined the documents in Singapore, what were your initial observations concerning the signatures in terms of their quality and what their provenance might be?

A. That they were remarkably similar and uniform, many produced with what appeared to be uniform pen pressure. But one of the first things I also observed was some of these extra marks that have gone into the first report". Tr. (Day 2), 156:7-14 (Cross, Strach). *See* also: Tr. (Day 2), 160:16-21 (Cross, Strach).

445 Tr. (Day 2), 183:1-2, 185:13-23 (Cross, Strach); Tr. (Day 2), 197:16-18 (Tribunal, Strach). *See* also: Strach ER1, ¶ 22; Strach ER3, ¶ 12; Strach ER4, ¶ 4.

446 Tr. (Day 2), 157:18-24 (Cross, Strach).

> "There are other forms of stamp impressions. Pre-inked stamps, for example, can produce quite reproducible signature images. But again, from what I've seen, not as reproducible as what I'm seeing with these signatures".[447]

298. It is striking that the Claimants' expert was unable to identify any technology able to generate such high quality reproductions, other than autopen devices.[448] After counsel for the Claimants suggested during the cross-examination of Mr. Epstein that metallic stamping devices could possibly be the source of these high quality reproductions, counsel for the Respondent put the same possibility to Dr. Strach, who answered that he was unable to identify any such device and that he was unfamiliar with metallic stamping devices. Dr. Strach could not have been clearer:

> "I've not found anything that reproduces the quality of these particular signature reproductions".[449]

And further:

> "Q. So my question is, as someone who is very familiar with this area [i.e., stamp impressions], can you identify today a high quality stamp that would produce a signature with this quality?
>
> A. I can't specifically state which make of stamp could produce this quality".[450]

299. Moreover, the Tribunal is of the view that there are insufficient elements in the record to follow Dr. Strach when he sought to discard an autopen signature based on the fine outline marks. Indeed, Indonesia pointed to literature demonstrating that the autopen signatures of U.S. Presidents also contain similar fine detail, including reduced amount of ink at the ends of some ink lines, protuberances, angular features, voids, smudge marks, faint marks, spots and dots, and width variation.[451] For instance, the following

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447 Tr. (Day 2), 158:2-6 (Cross, Strach).

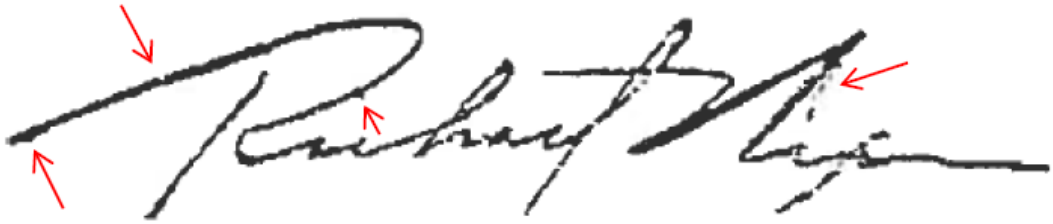
448 *See*, e.g.: Tr. (Day 2), 176:25-177:2 (Cross, Strach).

449 Tr. (Day 2), 158:4-160:2 (Cross, Strach). *See* also: Tr. (Day 2), 197:6-8 (Tribunal, Strach).

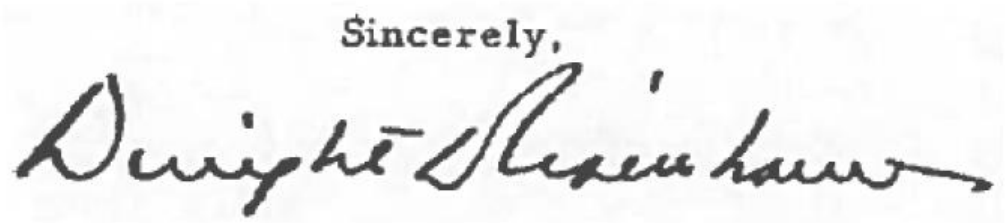
450 Tr. (Day 2), 158:23-159:2 (Cross, Strach). And Dr. Strach added: "So, I mean, there are so many varieties of print technology that all such print technologies would have to be considered. And print technology can reproduce in fine detail aspects of an original image, but I can't be more specific as to what technology". Tr. (Day 2), 163:6-10 (Cross, Strach). *See* also: Tr. (Day 2), 49:18-23 (Direct Epstein).

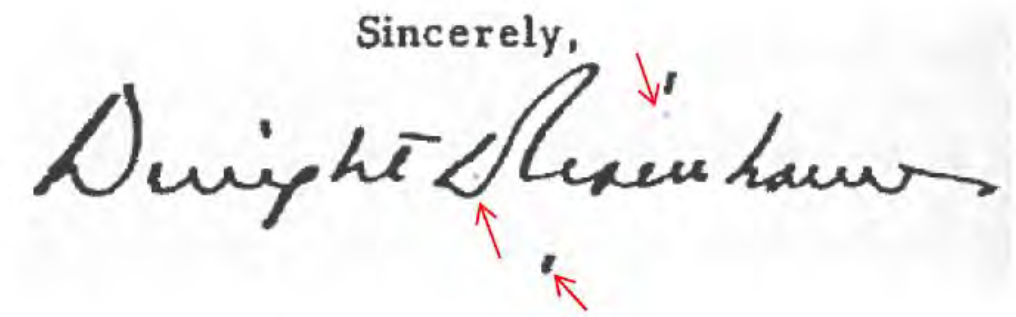
451 R-Answers, ¶¶ 44-46. The literature referred to by the Respondent states the following: "There are many reasons why 'variants' can be produced from the same matrix. Minute differences will appear from the same pattern when the operator moves the paper or item placed on the Autopen. If the pen is not placed tightly in the machine or when a pen runs out of ink, and a different type of pen replaces the old one a 'variant' type of

reproduction of the autopen signature of former President Richard Nixon features protuberances, angular features and voids in the letter R, and smudge or faint marks near the letter N:[452]



300. Similarly, the following two signatures illustrate variants between the autopen signature of former President Dwight D. Eisenhower and the second one features additional spots and dots:[453]





301. Finally, when assessing the weight of expert evidence, the Tribunal also takes into consideration the knowledge and experience of each expert. While Mr. Epstein's second report identified an autopen as the source of the disputed signatures, Dr. Strach had no prior expertise in autopens and did

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signature will be produced". Stephen Koschal, Andreas Wiemer, *Presidents of the United States, Autopen Guide* (2nd ed., 2011), p. 8 (**Exh. R-211**).

452 R-Answers, ¶ 45, referring to Stephen Koschal, Andreas Wiemer, *Presidents of the United States, Autopen Guide* (2nd ed., 2011), p. 34, Autopen Signature of Richard Nixon, # 6 (**Exh. R-211**).

453 R-Answers, ¶ 47, referring to Stephen Koschal, Andreas Wiemer, *Presidents of the United States, Autopen Guide* (2nd ed., 2011), pp. 16-17, Autopen Signatures of Dwight Eisenhower, ## 6 and 7.a-variant (**Exh. R-211**).

not conduct research into autopens.[454] In contrast, Mr. Epstein was confronted throughout his career with autopens, in particular as the Chief Forensic Document Examiner at the Forensic Document Laboratory of the Immigration and Naturalization Service of the United States of America between 1980 and 2000. In that capacity, he regularly reviewed fraudulent signatures that should have been generated by autopens but were instead signed by hand.[455] It is true that he has not kept up with developments in the autopen technology since he left the U.S. Immigration Service. In light of his experience and expertise and considering that there appear to have been no new developments, this is not susceptible of affecting the weight of this evidence. Indeed, Dr. Strach confirmed that most of the scientific literature on autopen was "definitely older", meaning pre-dating the year 2000.[456]

302. In sum, on the basis of the facts and evidence in the record and having assessed the weight of the expert evidence before it, the Tribunal gives the preference to Mr. Epstein's expert opinion according to which Mr. Ishak's disputed signatures on the Licenses were most likely reproduced by an autopen or similarly sophisticated devices. In reaching this conclusion, the Tribunal is mindful that Mr. Epstein indicated a 70% probability that an autopen had been used and that, therefore, no 100% certainty can be asserted.[457] Yet, having pondered all the circumstances, the Tribunal has no

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454 Dr. Strach stated the following during cross-examination:

"Q.[…] did you perform any field research, if you will, to talk to people in the industry?

A. The autopen industry? No, I didn't.

Q. Did you conduct any tests of autopens to see how autopens functioned?

A. No, I've never had access to an autopen machine.

Q. Have you seen an autopen machine?

A. Well, you asked that before. No, I haven't physically seen – I've seen online images of autopens and moving images of autopen devices working.

Q. Do you know how they actually operate?

A. Not in precise detail […]". Tr. (Day 2), 154:12-24 (Cross, Strach). *See* also: Tr. (Day 2), 196:3-13 (Tribunal, Strach).

455 Mr. Epstein's experience as forensic document examiner dates back to 1967. Tr. (Day 2), 21:17-24:15 (Direct, Epstein); Epstein ER1, p. 8.

456 Tr. (Day 2), 161:20-22 (Cross, Strach).

457 Tr. (Day 2), 124:10-18 (Tribunal, Epstein). Mr. Epstein did not exclude the possibility of a fine stamp, although he could not identify any technology able to reproduce such high quality impressions. Tr. (Day 2), 114:18-23 (Cross, Epstein). The Tribunal further notes the following statement of Dr. Strach at the hearing: "Here I have a bit of an inclination one way, but I'm not comfortable saying that it's probably not an autopen". Tr. (Day 2), 183:1-2 (Cross, Strach).

hesitation concluding in favor of the view of the Respondent's expert, which it finds clearly more reliable and robust than the evidence of the Claimants' expert.

2.3. Was the signature of the disputed licenses in Mr. Ishak's name authorized?

303. It is the Respondent's primary case that forgery is established by the very fact that the disputed licenses were not signed by hand. Therefore, so Indonesia contends, the question does not even arise whether there was authority to mechanically reproduce Mr. Ishak's signature. In any event, the Respondent relies on witness evidence to argue that there was no such authority. It also submits that the elements of process highlighted by the Claimants do not support a finding of authorization.

304. The Claimants argue that authorization is the key question in the present context. For them, the record shows that the application process for the Survey and Exploration Licenses was brought to a successful end, and that Mr. Ishak authorized the issuance of the licenses and the mechanical reproduction of his signature (good faith authorization). In the alternative, the Claimants submit that someone within the Regency (possibly Mr. Putra and/or Mr. Noor) conspired to generate fake or "plausibly deniable" licenses in order to preserve the possibility of auctioning off the mining area in favor of a higher bidder once mining deposits would be discovered (bad faith authorization). In particular, the Claimants argue that Mr. Noor was playing off Ridlatama against the Nusantara companies, and vice-versa, so as to obtain the best bargain from the highest bidder for the vast newly discovered coal reserves.

305. The Tribunal will first address the practice of signing mining licenses by hand (a) and then review whether the signature of such licenses in the Regent's name was authorized (b), including the elements of process invoked by the Claimants to support their contention that there was authorization (c).

a) The practice of signing mining licenses by hand

306. Mr. Ishak gave evidence that, as Regent of East Kutai, he always signed decrees by hand, and that he did not authorize anyone to sign the disputed

licenses in his stead.[458] Mr. Armin, member of the staff of the Licensing Subdivision of the Mining and Energy Bureau,[459] and Mr. Ordiansyah, Head of the Planology Office,[460] confirmed that Mr. Ishak always signed decrees by hand. They also testified that the Regency did not use mechanical devices to reproduce the Regent's signature.[461]

307. In his witness statements, Mr. Ishak referred to the "Regulation of Minister of Domestic Affairs Number 3 Year 2005", which provides that Regency documents must be signed by the Regent or a duly authorized official,[462] and testified that: "[m]y understanding, and the understanding of all other officials with whom I have dealt in my capacity as Regent of East Kutai, has always been that this regulation requires official documents to be signed by hand".[463]

308. The Claimants' witnesses Benjamin and Gunter also stressed the importance of signing mining licenses by hand. Mr. Benjamin said that he would have been "concerned" had he known that the mining licenses were not signed by hand.[464] Mr. Gunter, for his part, called the signature the "last

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458 Ishak WS1, ¶¶ 10, 13.

459 Mr. Armin joined the Mining and Energy Bureau of the East Kutai Regency in 2004, as staff of the Licensing Subdivision of the General Mining Division. He was appointed Head of the Licensing Subdivision in 2013. Armin WS, ¶ 5.

460 Mr. Ordiansyah joined the Directorate of Geographic Information System ("SIG") of the Information System Agency of the East Kutai Regency in 2001. From 2006 to 2007, he was the Acting Head of Spatial Layout and Land Utilization Bureau at the Regional Development Planning Board, as well as the coordinator of the SIG. He was appointed on 30 May 2007 as Head of the Planology Office, which took over the functions and databases of the SIG. Ordiansyah WS, ¶ 9.

461 Armin WS, ¶ 27; Ordiansyah WS, ¶ 37. Although at the relevant time (between 2007 and 2008), Mr. Ramadani was working as a lawyer in the Legal Assistance Subdivision of the Legal Section of the Regency Secretariat and dealing mainly with disputes rather than with the approval process for decrees (he only became Head of the Legal Section in 2012), he too gave evidence that the "Regent would sign the originals [i.e., the three versions of final draft decrees of each mining license] by hand". He further stated that the Regency "never utilizes an electronic signature, stamp or any mechanical or automated method of affixing the Regent's signature". Ramadani WS, ¶ 17. With respect to signature stamps, *see* also: Tr. (Day 4), 147:1-5 (Direct, Ramadani).

462 Article 8 reads as follows: "An Official Document in the Sphere of Regency/Municipality Governments shall be signed by Regent/Mayor, Deputy Regent/Deputy Mayor, Head/Deputy of People's Legislative Council as well as official in the Sphere of Regency/Municipality Governments which is authorized [to sign]". Regulation of Minister of Domestic Affairs Number 3 Year 2005, concerning Governance Guidelines of Official Document in Regency/Municipality Governments (**Exh. RLA-158**).

463 Ishak WS1, ¶ 13.

464 Tr. (Day 7), 97:1-19 (Cross, Benjamin).

bastion of power".[465] Questioned by the Tribunal, he responded that "a physical signature is […] the only way it would happen":

> "Q. In your experience, and what I see from your GMT you have lots of experience in Indonesia, in this type of licensing, have you ever seen a license signed by a Bupati, or another official, not in handwriting but by a stamp or some other means?
>
> A. Unfortunately, I only deal with photocopies […] But I know that a signature, a physical signature is, I would think would be the only way it would happen. I've never heard of stamps being used and I've never heard of any other reproduction techniques used by the Bupati himself, because he is presented with a document for signing".[466]

309. The evidence of Mr. Ishak, Regent of East Kutai at the relevant time and presently Governor of East Kalimantan, deserves a mention. While he was clear on the fact that he signed documents by hand, he appeared at times confused about dates and chronology of events during his cross-examination. For instance, he first stated that "at the [relevant] time I was not the Regent" and thereafter that "[t]here must have been something that might have prevented me from signing" the PT RTM and PT RTP Survey Licenses.[467] The Tribunal does not consider that this diminishes the value of this evidence on his signing practice. That evidence is largely corroborated by other witnesses as just described. Moreover, it is recalled that Mr. Ishak attended the hearing while still recovering from a stroke, which may explain his difficulties of situating himself in time and remembering details.[468]

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465 Tr. (Day 7), 35:11 (Cross, Gunter).

466 Tr. (Day 7), 57:20-58:8 (Tribunal, Gunter).

467 Tr. (Day 3), 15:15 and 16:2-3 (Direct, Ishak). *See* also: C-PHB2, ¶ 18.

468 Tr. (Day 3), 17:15-16 (Direct, Ishak). At times, Mr. Ishak also had difficulty remembering the dates of his different offices, stating at one point that he "withdrew from being Regent in 2003, while the licensing and permit was only processed in 2008, if I'm not mistaken", and then later on when confronted with the draft decrees for PT RTM and PT RTP: "How is it possible that – wait a second – 24 May 2007, I signed the document? Because at the time I was not the Regent. That would be impossible. I was already governor. How would it be possible for me to sign a decree based on my position as a Regent?" Tr. (Day 3), 12:6-8, 15:13-18 (Direct, Ishak). According to the information provided in Mr. Ishak's first witness statement, he was Regent of East Kutai for a first term between 1999 and 2003 and for a second term between late 2005 and December 2008, when he was elected Governor of East Kalimantan for a first term. He was reelected for the 2013-2018 term and presently still holds that office. Ishak WS1, ¶ 6.

b) The scope of delegated authority to issue decrees

310. Since the licenses bear Mr. Ishak's signature and it is established that Mr. Ishak signed documents by hand, the question arises whether Mr. Ishak authorized someone to sign his name in his stead.

311. It is common ground that duly authorized officials at the Regency could sign official documents. It is also common ground that, during Mr. Ishak's absence, his deputy, Mr. Noor, would sign official documents such as mining licenses. In this context, the Claimants point to Mr. Ishak's frequent travels during his campaign for the position of Governor of East Kalimantan between 2006 and 2008.

312. Nothing in the record shows that Mr. Noor, as Deputy Regent, would have signed on behalf of Mr. Ishak using Mr. Ishak's name and signature. Mr. Ishak was clear that Mr. Noor was only authorized to sign official documents using his own signature:

> "Q. The question is not what he did. The question is whether he had the authority to sign. [Unclear – simultaneous speaking]
>
> A. He had the authority as deputy, yes, he could.
>
> Q. How would he sign? Would he sign "Isran Noor" or would he sign something else?
>
> A. As Deputy Regent. As Deputy Regent.
>
> Q. He would sign his name?
>
> A. As Deputy Regent, Isran Noor.
>
> Q. He would not have authority to sign your name?
>
> A. Not possible. Not possible".[469]

313. At the end of the hearing, the Tribunal specifically asked the Parties what evidence showed that the issuance of the impugned documents was authorized or not.[470] The Claimants put forward the following elements: (i) Mr. Ishak authorized his subordinates to sign official documents on his behalf, in particular when he was away campaigning for the Governorship of East Kalimantan between 2006 and December 2008; (ii) his deputy at the time, Mr. Noor, was "automatically responsible" during his absence to look after the affairs of the Regency and Mr. Noor had authority to make and sign decrees; (iii) although Mr. Ishak testified that Mr. Noor would sign as Deputy

469 Tr. (Day 3), 83:23-84:8 (Tribunal, Ishak).

470 Procedural Order No. 20, ¶ 6(d).

Regent, Isran Noor, "the scope of Mr. Noor's authority as Deputy Regent is not clear",[471] especially since Mr. Ishak was evasive on that point; and that therefore (iv) "it seems possible that, in his second term as Regent (which included the Relevant Period), Mr. Ishak was more preoccupied with his campaign than serving as Regent, and that he delegated a significant amount of authority to Mr. Noor"; or (v) that Mr. Noor exceeded his delegated authority "when he saw opportunities for personal gain", which would explain his wealth and estrangement from Mr. Ishak.[472]

314. In the Tribunal's opinion, none of these elements show that Mr. Ishak authorized Mr. Noor to issue official documents by reproducing Mr. Ishak's signature or that Mr. Noor exceeded his delegated authority, by affixing Mr. Ishak's signature on the disputed documents. While Mr. Ishak may well often have been away on his election campaign, the record does not show that he was absent at the relevant time, i.e. on 24 May 2007 for the PT RTM and PT RTP Survey Licenses, on 29 November 2007 for the PT INP and PT IR Survey Licenses, and on 9 April 2008 for the Exploration Licenses. More importantly, the Tribunal sees no reason to doubt Mr. Ishak's testimony that, during his absence, Mr. Noor would sign official documents using his own name, not that of Mr. Ishak. There is also nothing in the record suggesting that, in respect of the disputed PT RTM and PT RTP licenses, Mr. Noor exceeded his authority by mechanically reproducing Mr. Ishak's signature. The only evidence in the record showing Mr. Noor's involvement with the disputed PT RTM and PT RTP licenses are his initials affixed, in his capacity as Deputy Regent, in the last line of the coordination box on the draft decrees (see image in paragraphs 265 and 266 above). If anything, this would show that he used his own name or initials rather than the Regent's. The Tribunal notes in this context that the initials of Mr. Putra, not Mr. Noor, appear next to the printed name of Mr. Ishak (see image in paragraph 267 above).

315. The Claimants invited the Tribunal to draw adverse inferences from the fact that the Respondent only produced 22 mining licenses issued in 2007 and 2008. According to the Claimants, "it is impossible to confirm whether Mr. Ishak regularly authorized his subordinates to issue decrees on his behalf, but the adverse inference to be drawn is that, if these documents

471 C-PHB1, ¶ 45; C-PHB2, ¶ 18.

472 C-PHB1, ¶ 45. *See* also: C-PHB2, ¶ 18.

were produced, they would indicate that such a procedure was common at the Regency".[473] The Tribunal is unable to draw such adverse inference in the absence of any indication that Mr. Noor would mechanically reproduce Mr. Ishak's signature instead of signing decrees on behalf of the Regent.

316. In fact, the experts concur that all the licenses produced by the Respondent for purposes of comparison bear non-identical handwritten signatures of Mr. Ishak, as opposed to identical mechanically reproduced signatures such as the ones at issue here. There are two exceptions, however, namely two licenses granted to a company by the name of Swasembada, which is controlled by Ridlatama, a fact to which the Tribunal will revert (see paragraphs 363-364). [474] Dr. Strach examined a total of 2,849 pair comparisons of Mr. Ishak's signature (both on originals and copies) and came to the conclusion that "[n]o further examples of repeating signatures were found in the numerous pair comparisons I have made".[475]

c) Elements of process

317. The Claimants rely on several elements of process both predating and postdating the issuance of the licenses to support the contention that the licenses were issued with proper authorization. These include the Ridlatama applications for mining licenses, staff analyses prepared by the Mining and Energy Bureau, spatial analyses prepared by the Planology Office, draft decrees with coordination initials, register books, actual survey and exploration activities on the ground, compliance with reporting obligations, dead rent payments, various acknowledgments of receipt, and other subsequent conduct of Indonesian officials.[476]

318. The Tribunal will primarily focus on the PT RTM and PT RTP Survey Licenses, since most of the allegations and evidence of process relate to these licenses. Thereafter, it will review the PT INP and PT IR Survey Licenses and the Exploration Licenses. In view of the fact that the same master signature of Mr. Ishak was employed in all cases, a finding of authorization (or lack thereof) with respect to the PT RTM and PT RTP licenses is likely to apply equally to the other disputed licenses. Before

473 C-PHB1, ¶ 45, note 146.

474 Strach ER2, ¶ 7.

475 Strach ER2, ¶¶ 5, 7.

476 *See*, e.g., Reply, ¶¶ 79-90.

turning to the elements of the licensing process invoked by the Claimants, it is useful to set out the main steps of such process.

(i) The licensing procedure in the Regency of East Kutai

319. A mining application is usually submitted to the Regent, with a copy to the Mining and Energy Bureau, or directly to the Mining and Energy Bureau, in which case it will forward the application to the Regent. A mining application addressed to the Regent is first received by the General Affairs Bureau,[477] which Mr. Ramadani accepted to describe as the Regency's mailroom managing the "circulation of destination of letters".[478] The General Affairs Bureau registers the incoming letter in the register book[479] and then forwards it to the Regent,[480] without, however, opening the letter.[481] The General Affairs Bureau only provides a stamped receipt if the applicant so requests.[482]

320. Upon receipt of the application, the Regent writes by hand his instructions (*disposisi* in Indonesian) on the application for the attention of the Mining and Energy Bureau.[483] The Head of the Licensing Subdivision of the Mining and Energy Bureau reviews the documentation accompanying the application and coordinates with the Planology Office to verify, through a spatial analysis, any potential overlap with preexisting mining areas and the specific land uses in the area for which the license is applied.[484]

321. A staff analysis by the Mining and Energy Bureau is prepared if a specific issue requires the Regent's attention.[485] If there is no such issue and the application fulfills all the requirements, the Licensing Subdivision of the

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477 Tr. (Day 4), 154:1-10 (Cross, Ramadani).

478 Tr. (Day 4), 157:10 (Tribunal, Ramadani). Mr Armin specified that if the application was addressed to the Mining and Energy Bureau, it would forward the application to the Regent "for his instruction (*disposisi*)". Armin WS, ¶ 10.

479 Tr. (Day 4), 159:6-13 (Cross, Ramadani); Ramadani WS, ¶ 13.

480 Tr. (Day 4), 156:1-9 (Tribunal, Ramadani).

481 Tr. (Day 4), 157:20-158:5 (Tribunal, Ramadani).

482 Tr. (Day 4), 155:8-25 (Tribunal, Ramadani).

483 Ishak WS1, ¶ 9. Mr. Armin provided the following details: "Upon receipt of the application and the Regent's instruction (*disposisi*), which is usually hand-written on the application itself (it is rarely contained in a separate letter)". Armin WS, ¶¶ 10, 12.

484 Armin WS, ¶¶ 10, 13, 15.

485 Armin WS, ¶ 16.

Mining and Energy Bureau prepares a draft decree,[486] while the Planology Office issues a new map that is initialed by the Head of the Planology Office.[487] The draft decree is then passed on to the Legal Section.

322. Together with the application and related documents, the draft decree is received by the Head of the Legal Section, who passes it on to the Laws and Regulations Subdivision.[488] The latter reviews the legal aspects of the draft decree.[489] If the draft is approved and finalized (dated and numbered), the Head of the Laws and Regulations Subdivision prepares "several originals as required and/or necessary".[490] Mr. Ramadani actually explained that this office prepares three originals. The last page of the decision letter or decree of the first original contains a box for the coordination initials of various departments within the Regency,[491] and is ultimately kept in the archives of the Legal Section.[492] The Secretariat of the Mining and Energy Bureau registers the receipt of the remaining two originals and keeps one of them in the archives of the Mining and Energy Bureau.[493] The third original is delivered to the applicant.[494]

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486 Tr. (Day 5), 2:9-13 (Cross, Ramadani); Ramadani WS, ¶ 15. *See* also: Armin WS, ¶ 16.

487 For instance, Mr. Ordiansyah provided the following explanations with respect to instructions of the Regent to generate a map: "Q. So you said you will develop a new map when the license is granted? A. Yes, if the Regent gave me an order to do that. After our input on the spatial matters, the Regent gives an order whether or not we should follow up on the issuance of the permit. If it is issued, it means that we will develop a new map, where there is a column for the Regent, and I just provide my initials. Q. When you say an order from the Regent, do you mean a disposisi, you will have to receive a disposisi from the Regent to then produce the map? A. Yes. If I'm ordered to do that and have a disposisi to issue the license". Tr. (Day 3), 134:1-15 (Direct, Ordiansyah).

488 Tr. (Day 5), 2:14-20 (Cross, Ramadani).

489 Tr. (Day 4), 161:23-162:4 (Cross, Ramadani). When asked whether the Legal Assistance Subdivision was at all involved, Mr. Ramadani answered that it could be involved, if the draft decree "related to matters that have been handled by legal assistance subdivision as the lawyer of the regional government". Tr. (Day 4), 162:5-14 (Cross, Ramadani). In this context, Mr. Ramadani explained that the Legal Section comprises three subdivisions, the Legal Documentation Subdivision, the Laws and Regulations Subdivision and the Legal Assistance Subdivision (Ramadani WS, ¶ 11; Tr. (Day 4), 159:25-160:8 (Cross, Ramadani)).

490 Tr. (Day 5), 3:24-4:8 (Cross, Ramadani). *See* also: Armin WS, ¶ 17.

491 Ishak WS1, ¶ 10. *See* also: Armin WS, ¶ 17.

492 Tr. (Day 5), 8:18-23 (Cross, Ramadani).

493 Armin WS, ¶ 18.

494 Tr. (Day 5), 9:9-13 (Cross, Ramadani). *See* also: Armin WS, ¶ 18.

323. The Head of the Laws and Regulations Subdivision circulates the first original to various departments in the Regency for approval and keeps the second and third originals in his custody in the meantime.[495] The first original with the coordination box is circulated to the Head of the Mining and Energy Bureau, the Head of the Legal Section, the Assistant I of the Regency, the Regional Secretary of the Regency, and the Deputy Regent. Once the heads of all these departments have approved the decree by affixing their initials in the coordination box, the three originals are presented to the Regent who signs them, starting with the first original which contains the coordination box. Mr. Ramadani provided the following descriptions of this particular process in this respect:

> "After all the coordination initials are complete, then Mr. Aji Rahida, as head of the laws and regulations subdivision, would directly bring the three bundles to the Regent for signing. The coordination initials is on the top. Therefore, if the Regent signs a documents [sic], the first one which is signed by the Regent is the coordination initials, then the second original then the third original. It would be that way".[496]

324. Following signature by the Regent, the three originals are returned to the Legal Section where they are stamped with the official Garuda seal.[497] The decree is then entered in the register book of the Legal Section.[498] Finally, the third original is handed over to the successful applicant by an official of the Regency, but not by way of an official handover ceremony where the Regent is present.[499]

325. Bearing these steps in mind, the Tribunal now turns to the process concerning the disputed Ridlatama licenses, mainly the PT RTM and PT RTP licenses.

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495 Tr. (Day 5), 5:1-6 (Cross, Ramadani).

496 Tr. (Day 5), 9:22-10:6 (Cross, Ramadani).

497 Tr. (Day 5), 9:14-10:10 (Cross, Ramadani). Mr. Ramadani gave evidence that the Legal Section keeps two Garuda seals, one at the Laws and Regulation Subdivision and the other at the Documentation Subdivision. Tr. (Day 4), 147:10-16 (Direct, Ramadani); Tr. (Day 5), 10:19-11:6 (Cross, Ramadani).

498 Tr. (Day 5), 11:7-11 (Cross, Ramadani). Mr. Ramadani stated that the Legal Section Register is kept in the office of the Head of the Documentation Subdivision. Tr. (Day 5), 11:19-12:7 (Cross, Ramadani).

499 Ishak WS1, ¶ 18; Tr. (Day 5), 9:9-13 (Cross, Ramadani). Contrary to Mr. Quinlivan's testimony that Mr. Ishak delivered the Survey and Exploration Licenses to Mr. Kurniawan during official handover ceremonies, Mr. Kurniawan stated that Ridlatama officials collected these licenses from the Mining and Energy Bureau. Tr. (Day 6), 168:22-169:4 (Cross, Kurniawan) and 191:4-9 (Tribunal, Kurniawan). *See* also: Tr. (Day 6), 7:7-11, 10:12-15, 20:22-25, 36:11-25 and 39:10 (Cross, Quinlivan).

(ii) The PT RTM and PT RTP Survey Licenses

326. The Claimants rely on the following elements predating the issuance of the disputed licenses to support their contention that the licenses were validly issued: the application for Survey Licenses by the Ridlatama companies; the staff analysis dated 26 February 2007 prepared by Mr. Putra; the MEMR letter of 23 March 2007; the spatial analyses of 21 May 2007 prepared by Mr. Ordiansyah, the draft decrees dated 24 May 2007; and the formal signing and stamping of the draft decrees.[500] They also note that these two licenses were entered in the register book of the Legal Section, and argue that "this last step is an essential feature of the footprint of a general survey licence".[501] Finally, the Claimants also point to "extensive acknowledgements and recognition from various governmental authorities of the validity of the Ridlatama general survey licenses", including acknowledgements of receipt of various agencies in East Kutai,[502] East Kalimantan,[503] and the MEMR;[504] the payment of dead rent to the MEMR; and the compliance with reporting obligations such as the submission of quarterly reports, final survey reports, and work and budget plans. Churchill and Planet finally invoke a letter sent by the Mining and Energy Bureau to PT RTM and PT RTP "'welcoming' them to East Kutai and inviting them to coordinate with relevant government agencies".[505]

327. According to the Respondent, none of these elements demonstrate that the impugned PT RTM and PT RTP licenses were authorized. In particular, the Respondent relies on evidence given by Messrs. Ordiansyah and Armin that they never processed the general survey applications of PT RTM and PT RTP, since the requested mining areas overlapped with the mining licenses

500 *See*, e.g., Reply, ¶¶ 79-88.

501 Reply, ¶¶ 89-90 and Extracts from the 2007 register book of the Legal Section of the Regency of East Kutai (**Exh. C-456**).

502 Mining and Energy Bureau of East Kutai, Planning and Regional Bureau of East Kutai, Revenue Bureau of East Kutai, Council Secretary of East Kutai, Regional Secretary of the Legal Section of East Kutai, and Regional House of Representatives of East Kutai. Reply, ¶¶ 93, 94(a).

503 Secretary of the Government of East Kalimantan, Mining and Energy Bureau of East Kalimantan, Regional Secretary of East Kalimantan. Reply, ¶ 94(b).

504 Directorate General of Mineral Coal and Geothermal, and Director of Coal Exploitation. Reply, ¶ 94(c).

505 Reply, ¶ 97, referring to: East Kutai Mines Department Order to Commence Work for Ridlatama Mineral and Ridlatama Trade, 25 July 2007 (**Exh. C-52** Resubmitted).

of the companies Nusantara Wahau Coal and Kaltim Nusantara Coal.[506] For Indonesia, the spatial analyses prepared by Mr. Ordiansyah supports this conclusion, considering that the abbreviation "*Eks.*" preceding the names of the Ridlatama companies means *eksplorasi*, or exploration, and does not mean "former" as the Claimants erroneously argue (see also paragraph 335 below).[507]

328. The Tribunal observes that the applications for the Survey Licenses of PT RTM and PT RTP were processed within the Regency and reached the penultimate stage in the process, all the relevant departments having approved the licenses. This being so, for the following main reasons, these facts do not prove that the signatures of Mr. Ishak were affixed on the disputed licenses with his approval.

329. For the Tribunal, the most relevant elements of process in this context are the 26 February 2007 staff analysis, the 21 May 2007 spatial analyses, and the three versions of licenses in the record. The *staff analysis dated 26 February 2007* was prepared by the then-Head of the Mining and Energy Bureau, Mr. Djaja Putra.[508] It analyzes whether the concession areas requested by PT RTM and PT RTP overlap with the mining areas conceded to Nusantara and reaches the following conclusions: (i) the concession areas requested by PT RTM and PT RTP overlap to 100% with "previous" locations of the mining areas of the two Nusantara companies KNC and NWC, respectively;[509] (ii) the KNC and NWC exploration licenses expired on 9 March 2006;[510] (iii) Nusantara sent its first requests for extensions on 20 November 2006 which were received on 29 November 2006;[511] and (iv) the Nusantara extension applications were "eight months and 26 days late from the expiry of the IUP which is 7 March 2006".[512] On that basis, Mr. Putra reached the conclusion that the KNC and NWC licenses had "expired", that

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506 R-PHB1, ¶ 30; Ordiansyah WS, ¶ 26; Armin WS, ¶ 21; Tr. (Day 3), 144:4-14 (Direct, Ordiansyah); Tr. (Day 4), 131:12-132:5 (Tribunal, Armin).

507 R-PHB1, ¶ 30; Tr. (Day 3), 136:8-17 (Direct, Ordiansyah) and 173:1-175:10 (Cross, Ordiansyah).

508 Staff Analysis from the Head of the Mining and Energy Bureau at the Regency of East Kutai, 26 February 2007 (**Exh. C-34**).

509 *Id.*, items A.1 and B.1.

510 *Id.*, items A.2.d and B.2.d.

511 *Id.*, items A.2.e and B.2.e.

512 *Id.*, items A.2.g and B.2.g.

"the concession areas become open to other companies", and that the Regent had "the authority to make any decisions on locations".[513]

330. Assuming the content of the staff analysis to be correct, the latter only shows that the Head of the Mining and Energy Bureau did assess potential overlaps of the requested mining areas with other concessions. His assessment supports the Claimants' contention that the mining areas in question were "open" at the relevant time and that they could apply for a mining license. It does not show that Mr. Ishak's non-handwritten signature on the decrees was authorized. It does so even less if one considers that the staff analysis specified that the ultimate decision to grant a mining license rested with the Regent. Moreover, there is no indication in the analysis that Mr. Putra coordinated his analysis with Mr. Ordiansyah from the Planology Office (at the time called the Geographic Information System), which coordination was necessary to verify the existence of potential overlaps. In fact, Mr. Armin, the staff member in the Licensing Subdivision of the Mining and Energy Bureau who was in charge of processing the Ridlatama applications,[514] gave evidence that he was not involved in the preparation of the staff analysis, and was unable to find the original or a copy of this analysis.[515] In addition, the staff analysis does not contain any instructions (*disposisi*) from the Regent, and Mr. Ishak denied having seen this analysis.[516]

331. In this context, the Tribunal notes that the Respondent questioned the fact that the Claimants were in possession of an internal Regency document. Messrs. Benjamin and Kurniawan testified that Regency officials routinely shared internal documents with applicants in order to keep them informed about the progress of this application. Hence, the Tribunal attaches no particular significance to this point.[517]

332. As a last point in respect of the staff analysis, the Respondent argued that its reference to the MEMR letter of 23 March 2007 casts doubt on the

513 *Id.*, p. 2.

514 Armin WS, ¶¶ 20-21.

515 Armin WS, ¶ 22.

516 Mr. Ishak stated: "I do not recall receiving that Staff Analysis when I was Regent. I also note that the 26 February 2007 Staff Analysis does not have my instruction (*disposisi*) for the relevant bureau to follow up […]". Ishak WS1, ¶ 26. *See* also: Tr. (Day 3), 104:16-21, 107:25-108:2 (Cross, Ishak).

517 Benjamin WS2, ¶¶ 39-40; Kurniawan WS1, ¶ 40.

reliability of the staff analysis which is dated from 26 February 2007. While there may be explanations,[518] it is true that this discrepancy is odd. However, the Tribunal does not see what can be inferred from this oddity for present purposes.

333. The Tribunal now turns to the *spatial analyses of 24 May 2007* prepared by the Head of the Planology Office, Mr. Ordiansyah. These analyses were prepared in respect of the PT RTM and PT RTP applications and are attached to the versions of such licenses contained in the Gunter Documents.[519] Mr. Ordiansyah explained that a spatial analysis is an internal document drawn up for the Regent and the Mining and Energy Bureau, which always consists of a table and a map.[520] The table contains five columns that determine (i) the status of the forest area, (ii) the status of the land, (iii) the forest concessions, (iv) the location of permits for plantation, and (v) the location of mining permits.[521] Mr. Ordiansyah further specified that the map is not the one that is ultimately attached to a mining license, when an application is ultimately approved by the Regent.[522]

334. Mr. Ordiansyah confirmed at the hearing that he had prepared the analyses. In these documents, he concluded that the mining areas for which PT RTM and PT RTP had applied overlapped with the exploration licenses of the two Nusantara companies KNC and NWC.[523] These two spatial analyses are signed by Mr. Ordiansyah, Head of the Planology Office, and Mr. Putra, Head of the Mining and Energy Bureau.[524]

335. Mr. Ordiansyah pointed in particular to the abbreviation "*Eks.*" (with a dot) which precedes the names of the Nusantara companies (see also paragraph 327 above). He explained that "*Eks.*" was the abbreviation used by the Planology Office to signal the existence of an exploration license. He added

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518 For instance, a clerical error in the date of the staff analysis, which could date from 26 March 2007 instead of 26 February 2007.

519 Gunter's General Survey License for RTM (**Exh. R-264**); Gunter's General Survey License for RTP (**Exh. R-265**).

520 Tr. (Day 3), 131:13-17, 131:24-132:1 (Direct, Ordiansyah).

521 Tr. (Day 3), 128:11-129:3 (Direct, Ordiansyah).

522 Tr. (Day 3) 128:18-23 (Direct, Ordiansyah).

523 *See*, with respect to PT RTP: Tr. (Day 3) 135:25-136:7 (Direct, Ordiansyah).

524 **Exh. R-264, R-265**. *See* also: Tr. (Day 3), 128:7-10 (Direct, Ordiansyah).

that an abbreviation was needed because "the column is so small".[525] By contrast, the Claimants understand "*Eks*" as meaning "former" in reliance on a Bahasa Indonesian dictionary definition without corroborating evidence of actual practice. Faced with these two meanings, the Tribunal is inclined to accept Mr. Ordiansyah's explanation that the term "*Eks.*" within the Planology Office was used as an abbreviation for exploration. The spatial analyses therefore confirm Mr. Ordiansyah's evidence that "[d]ue to the overlapping issue, the Planology Office never issued any maps for RTM [and] RTP […] as we understood that general survey licenses would not be approved for those Ridlatama companies".[526]

336. In contrast to the table in the spatial analyses which, in addition to the signature of the Head of the Planology Office, is co-signed by the Head of the Mining and Energy Bureau, Mr. Ordiansyah gave evidence that only the Head of the Planology Office was supposed to sign the map attached to a spatial analysis.[527] He therefore signified his perplexity when seeing that the signatures of both Mr. Putra and Mr. Ishak appeared on the maps of his spatial analyses.[528] It should be mentioned here that the signatures of Mr. Ishak are copy-pasted from another document, i.e. the PT RP General Survey License of 12 February 2007 (see paragraphs 268-270 above).

337. Mr. Ordiansyah further expressed his skepticism about the fact that the spatial analyses had been provided to the Ridlatama companies and the Claimants. Mr. Ordiansyah explained that a new map is generated within the Planology Office if the Regent decides to approve a mining application, which map would then be attached to the original licenses:

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525 Mr. Ordiansyah provided the following explanation: "Q. So is that correct if I say the 'Eks.' stands for 'eksplorasi'; that's what you are saying? A. Yes, it's because the column is so small and we cannot write down the full word, so we tried to abbreviate it, 'exploration', in accordance with the latest status of PT Nusantara Wahau Coal whose license we have in our database. So – it's because the column is too small and won't fit if I wrote down that entire word. So there is a dot there, and that means that it is an abbreviation of the work 'eksplorasi'". Tr. (Day 3), 136:8-17 (Direct, Ordiansyah).

526 Ordiansyah WS, ¶ 26.

527 Tr. (Day 3), 132:6-9 (Direct, Ordiansyah). Mr. Ordiansyah further stated that "this is my analysis and only I can sign it, and there will not be a signature of the head of mining bureau and the Regent's signature. So this is solely my report, the result of our analysis for the Regent; so if it is from me, there shouldn't be a signature from the head of the mining bureau as well as the Regent". Tr. (Day 3), 132:15-22 (Direct, Ordiansyah).

528 Tr. (Day 3), 133:1-11, 137:1-12 (Direct, Ordiansyah).

> "After the analysis has been submitted to the Regent and carbon copied to the head of mining bureau, then there will be an order from the Regent, whether or not it will be followed upon the form of license, then we will make another map for license".[529]

338. The Tribunal notes that Mr. Ordiansyah confirmed that he prepared the maps attached to the two spatial analyses in the Gunter Documents.[530] The Tribunal has no reason to question Mr. Ordiansyah's evidence that only the Head of the Planology Office was meant to sign these maps. Accordingly, the fact that these maps additionally bear the signatures of Messrs. Ishak and Putra and that Mr. Ishak's signatures are copied and pasted tends to show that these maps were doctored.

339. The Tribunal now turns to the *three versions of mining licenses* PT RTM and PT RTP, namely (i) the Survey Licenses which bear identical signatures of the Regent affixed, as was seen earlier, by an autopen or other similarly sophisticated mechanical device (see paragraph 302 above),[531] (ii) the so-called draft decrees provided by Mr. Kurniawan, which bear no signature of the Regent, [532] and (iii) the Gunter Documents, which bear identical signatures of the Regent that were copied and pasted from the PT RP mining license of 12 February 2007.[533]

340. The Tribunal is troubled by the co-existence of these three different versions of the same licenses for which no cogent explanation is offered. It is true that Mr. Gunter stated that he frequently saw different versions of the same licenses. However, his statement did not extend to circumstances like the present, where none of the licenses contain a handwritten signature of the

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529 Tr. (Day 3), 133:20-25 (Direct, Ordiansyah).

530 Mr. Ordiansyah stated the following: "So this map, if [sic] from our side, from my office, planology office, and together with the table, only I can sign the map. You can see my signature there. And that is the one that I sent to the mining bureau and the Regent's office. Only my signature will be there, because this is an analysis and it is part of my duties – the one that is responsible for the spatial matters to the Regent. And I sent it to the mining bureau and also to the office of the Regent". Tr. (Day 3), 132:1-10 (Direct, Ordiansyah).

531 Documents nos. 1-2 in the Document Table.

532 Draft General Survey Business License for PT RTM, Decree No. 210/02.188.45/HK/V/2007, 24 May 2007 (**Exh. C-383)**; Draft General Survey Business License for PT RTP, Decree No. 211/02.188.45/HK/V/2007, 24 May 2007 **(Exh. C-384**).

533 Documents nos. 33-34 in the Document Table. *See* also: General Survey Business License for Ridlatama Power, Decree No. 53/02.188.45/HK/II/2007, 12 February 2007 (**Exh. C-29**).

Regent. He indeed confirmed that he assumed that his documents contained the handwritten signature of the Regent (something he could not verify since Mr. Mazak from Churchill only provided him photocopies).[534]

341. Further, as was discussed in connection with the approval process, Mr. Ramadani explained that, once the first original license with the coordination box is returned to the Legal Section, the Regent is presented with three originals. He signs all three starting with the first original containing the coordination box. In the draft decrees provided by Mr. Kurniawan, the coordination boxes do appear but they feature no signature of the Regent. Next to the latter's printed name, one only finds the initials of Mr. Putra. If Mr. Ishak had authorized the reproduction of his signature, the process was such that it would first have been applied to the first original.

342. Moreover, Mr. Armin, who had worked on the Ridlatama applications of PT RP and PT Ridlatama Steel ("PT RS"), gave evidence that he did not prepare the draft decrees.[535] Similarly, Mr. Ordiansyah indicated that the maps attached to the draft decrees were not issued or approved by the Planology Office.[536]

343. In addition, the Claimants' explanation that these draft decrees were provided to Ridlatama to verify the coordinates of the mining area is not convincing. The Tribunal does not question the Claimants' statement that internal documents of the Regency were provided to Ridlatama staff. What is questionable, however, is the fact that the draft decrees are dated 24 May 2007, the day when the disputed licenses were supposedly signed by the Regent. It is implausible that the following steps all occurred on the same day: (i) the issuance of draft decrees, (ii) their unofficial transmittal to Ridlatama staff to verify the coordinates of the mining areas, and (iii) the formal signing of the original mining licenses, which would normally occur once the verification was completed. The Tribunal also notes that Mr. Benjamin stated that he had no knowledge of these draft decrees, and had never seen them prior to the hearing.[537]

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534 Tr. (Day 7), 23:1-24:3 (Cross, Gunter). *See* also: Gunter WS, ¶ 65.

535 Tr. (Day 4), 68:11-16, 69:7 (Direct, Armin).

536 Tr. (Day 3), 144:2 (Direct, Armin). *See* also: R-PHB1, ¶ 34.

537 Tr. (Day 7), 106:9-21 (Cross, Benjamin).

344. As a further troubling aspect, the forensic experts confirmed that the signatures of Mr. Ishak in the Gunter Documents were copied and pasted from the PT RP license of 12 February 2007.[538] The Gunter Documents also comprise the spatial analyses of Mr. Ordiansyah mentioned above. These include maps with copied and pasted signatures of Mr. Ishak, as well as the signature of Mr. Putra, when Mr. Ordiansyah explained that none of these signatures should be there in a normal process.

345. Additionally, the originals inspected by the forensic experts of both Parties show additional troubling oddities. In particular, the maps attached to the disputed PT RTM and PT RTP Survey Licenses do not contain Mr. Ordiansyah's initials; they are not registered in the database of the *Sistem Informasi Geografis* (which was the former name of the Planology Office); and they are not in the format of the 2007 official maps of the Regency (Mr. Ordiansyah pointed in particular to the absence of graticules on all four sides of the map).[539]

346. In other words, the existence of three different versions of licenses casts serious doubt on the authenticity of the licenses on which the Claimants now seek to rely. To these considerations one must add the evidence of Messrs. Armin and Ordiansyah, who testified that they never processed the mining license applications of PT RTM and PT RTP, except for Mr. Ordiansyah's spatial analyses concluding that the mining areas overlapped with Nusantara's exploration licenses.

347. To summarize, if the approval process had been completed, there would have been two original decrees within the Regency (the first original in the archives of the Legal Section and the second original in the archives of the Mining and Energy Bureau). The third original would have been provided to the applicant. In the present case, the Respondent stated that it could not find the two originals in its archives, be it in the Legal Section or the Mining and Energy Bureau. More importantly, the Claimants should be in possession of only one original of each license, when they produced three different versions. The first versions (the Gunter Documents) contain copied and pasted signatures of Mr. Ishak, and are therefore clearly doctored; the second versions contain the signature of Mr. Ishak most likely reproduced

538 Tr. (Day 2), 55:13-58:10 (Direct, Epstein); Tr. (Day 2), 180:9-18 (Cross, Strach), 194:12-15 (Tribunal, Strach).

539 Ordiansyah WS, Annex, items 1-2.

with an autopen; and the third versions containing the coordination box show no signature of Mr. Ishak. These elements, together with other oddities identified in the three versions, lead the Tribunal to the conclusion that the PT RTM and PT RTP Survey Licenses are not authentic, and that their issuance was not authorized.

348. In contrast to the elements of process assessed above, the Tribunal does not attach much importance to the PT RTM and PT RTP *mining application letters*, since they merely show that Ridlatama started the application process. That said, the Tribunal notes that the application letters bear the date of 27 February 2007, while the disputed licenses refer to application letters of 20 March 2007.[540] The Tribunal further notes that the coordinates for the applied mining areas do not completely overlap with those set out in the mining licenses.[541] Finally, the Tribunal also notes that the application letters do not bear any instructions (*disposisi*) from the Regent.[542]

349. In this context, the Tribunal does not attribute much relevance to the *MEMR letter of 23 March 2007*. This letter was sent to Ridlatama in response to a request dated 20 March 2007 for a confirmation of the availability of a general survey concession area. In that letter, the MEMR indicated that the status of the mining area contemplated by the two Ridlatama companies would become "open" and could be applied for "if the Concession Area of Exploration held by PT. Nusantara Kaltim Coal of PT. Nusantara Wahau Coal has expired, and no extension [has been] requested by them".[543] It therefore does not support an interpretation that the mining areas in question were open at the relevant time. For present purposes, it merely shows that Ridlatama was interested in obtaining mining rights in the EKCP, but it is otherwise irrelevant to the assessment of whether the disputed licenses were issued with authorization or not.

350. The fact that the PT RTM and PT RTP licenses were registered in the *Register Book of the Legal Section* does not change the Tribunal's assessment. The Tribunal agrees with the Respondent that "[r]egistration of

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540 Compare the PT RTP and PT RTM applications for General Survey Licenses dated 23 February 2007 (**Exh. C-32, C-33**) with the disputed General Survey Licenses dated 24 May 2007, p. 1 (**Exh. C-40, C-41**).

541 *Id*., p. 4 (Indonesian version) (**Exh. C-40, C-41**).

542 The Tribunal draws nothing from this observation, since these may be copies of the applications as they were filed by Ridlatama with the Regency.

543 Letter of 23 March 2007 of the Ministry of Energy and Mineral Resources (**Exh. C-37**).

fictitious or falsified documents does not make them authentic".[544] In any event, the Tribunal cannot follow the Claimants' argument that registration "points very strongly to the affixation of the Bupati signature and the stamp was authorized".[545] In this regard, Mr. Ramadani testified that the registrar told him that Mr. Putra requested the registration, and that he promised that he would thereafter deliver the signed original license with the coordination box. While the Tribunal agrees with the Claimants that this evidence is "aged hearsay", it is a plausible explanation that would rather confirm that the disputed licenses were not signed.

351. Neither does the *subsequent conduct* of Indonesian officials change the Tribunal's assessment of the facts. This is particularly so with respect to the ancillary documents whose authenticity is also disputed by the Respondent and which contain signatures identical to the ones in the disputed licenses, such as the payment letters, for instance. The acknowledgements of receipt by different government agencies at various levels are equally incapable of rendering the mining licenses authentic, since they were issued on the (presumably misguided) assumption that the licenses were authentic.

352. Finally, the Parties extensively argued whether the coordinates of the areas granted in the disputed mining licenses overlapped with the mining areas of two Nusantara companies. The Tribunal does not deem it necessary to delve into this issue in any detail, since it is immaterial to resolve the issue of document authenticity, that is the question whether the signatures in the disputed licenses were affixed with authorization or not. Even assuming, *arguendo*, that the Nusantara licenses had expired at the relevant time and that the mining area called EKCP was "open" and available for other applicants such as Ridlatama, this would still provide no convincing proof that the disputed documents are authentic. At any rate, as will be seen further below, the disputed PT INP and PT IR Survey Licenses created an overlap with two mining areas of another Indonesian company named Bara Energi Makmur ("BEM"), a fact which the Claimants did not address at all in their submissions and therefore further undermines their case.

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544 R-PHB1, ¶ 43.

545 The Claimants stated the following: "I would put most weight on the register, that if there is a document that is recorded in the register on the Regency, even though we can't answer how and who, one can nevertheless conclude that in all the circumstances, the circumstantial evidence points very strongly to the affixation of the Bupati signature and the stamp was authorized". Tr. (Day 7), 175:11-18 (Closing, Sheppard).

353. In conclusion, the Tribunal finds that the disputed Survey Licenses of PT RTM and PT RTP are not authentic, and that Mr. Ishak did not authorize the reproduction of his signature through mechanical means.

(iii) The PT INP and PT IR Survey Licenses

354. In light of the fact that the disputed PT INP and PT IR Survey Licenses (documents nos. 3-4 in the Document Table) contain the same signatures of Mr. Ishak as the ones reproduced in the PT RTM and PT RTP licenses, the analysis conducted and the conclusions reached above apply equally here. To reach this conclusion in the present context, the Tribunal reviewed the following additional elements.

355. First, there is nearly no paper trail regarding the application process of these licenses. The application letter of PT INP is dated 20 November 2007 and that of PT IR 19 November 2007. The Survey Licenses were allegedly issued on 29 November 2007. There is no evidence of any staff analysis or spatial analyses, and Mr. Ramadani stated that he did not locate the originals in the archives of the Legal Section. Messrs. Armin and Ordiansyah indicated that they never processed any aspect of these applications.

356. Second, the maps attached to the PT INP and PT IR Survey Licenses were not generated by the Planology Office, but were copied and pasted from the application letters.[546] In addition, these maps were not signed by hand by Mr. Ishak but contain the same disputed signature of Mr. Ishak that appears on the other challenged licenses.

357. Third, Mr. Ramadani indicated that the decree numbers on the licenses pertain to other decrees issued in June 2007 and confirmed that the maps are not registered in the Planology Office's database and do not comport with the format of the 2007 official maps.[547] In addition, the Respondent pointed to the fact that the licenses were only registered on 28 December 2007 in the Register Book of the Legal Section and with a different decree number.[548] The Respondent further explained that the "improper registration"

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546 R-PHB1, ¶ 37; R-Answers, pp. 32, 34-35.

547 Ramadani WS, Annex, item 4.

548 R-Answers, ¶ 81; R-PHB2, note 56. The decree number of the PT INP license is 247/02.188.45/HK/XI/2007, but it is registered under the number 753/02.188.45/HK/XII/07; and the decree number of the PT IR license is 248/02.188.45/HK/XI/2007 and registered under the number 754/02.188.45/HK/XII/07. *See*: Registration of General Survey Licenses for INP and IR in the 2007 Registration Book of the Legal Section of the Regency of East Kutai, p. 3 (**Exh. C-456**).

of these two licenses "cannot be chalked up to incompetence or mere mistake", since "[t]heir decree numbers did not correspond at all to the registration entries and the date of registration (28 December 2007) was more than a month after their supposed issuance (29 November 2007)".[549]

358. Fourth and importantly, the mining areas allegedly granted to PT INP and PT IR in November 2007 partly overlap with the mining area of the company BEM, which obtained its Exploration License in October 2007.[550] Therefore, the disputed licenses created an overlap with existing licenses that had been issued shortly before. The Claimants focused on the partial overlap of the PT INP and PT IR mining areas with those of the Nusantara companies BNK and NWC, but kept silent on the BEM licenses. The lack of plausible explanation for this overlap is an additional element pointing towards a fraud.

359. On this basis and taking into account the main features of the PT INP and PT IR Survey Licenses described above (see paragraphs 275-279), the Tribunal reaches the conclusion that the licenses under scrutiny are not authentic and that the reproduction of Mr. Ishak's signature was not authorized.

(iv) The Exploration Licenses

360. For essentially the same reasons, the Tribunal also reaches the conclusion that the signatures of Mr. Ishak in the disputed Ridlatama Exploration Licenses of 9 April 2008 (documents nos. 15-18 in the Document Table) were mechanically reproduced without his authorization.[551] Indeed, the four Exploration Licenses bear the same non-handwritten signature of Mr. Ishak.[552] This conclusion is reinforced by the fact that the Exploration Licenses were not registered in the register book of the Legal Section and that there is no paper trail at all regarding the application process.[553]

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549 R-PHB1, ¶ 42.

550 Decree of Regent of East Kutai concerning Mining Undertaking License for Exploration of PT Bara Energi Makmur dated 31 October 2007 (**Exh. R-171**). *See* also: R-Comments 1, ¶ 66.

551 **Exh. C-99 to C-102**.

552 Strach ER1, ¶ 7.

553 Legal Section Register Book 2008 (**Exh. C-479(b)**). *See* further: Reply, ¶¶ 99-101; C-PHB1, ¶ 48; R-Answers, ¶ 156; R-PHB1, ¶¶ 42, 106(2); R-PHB2, ¶ 20(1).

361. In addition, it is noteworthy that the Exploration Licenses contain three different maps generated by GMT (a situation map, a topographic map and an outcrops map), instead of a single map prepared by the Planology Office.[554] In this context, the Tribunal notes that Mr. Gunter stated that the maps attached to the Exploration Licenses were generated by Mr. Harahap, who was the supervisor of GIS systems at GMT. Mr. Gunter further testified that never before had he seen GMT maps being attached to mining licenses:

> "Q. Just to make sure we understand your answer, you have not seen it before that your maps are attached to permits issued by the Regency? Is that what you're saying?
>
> A. Yes, that's correct. Our maps may be used as a support to the application, but should not normally [be] included [in] a kabupaten [i.e. Regency] document".[555]

362. The Respondent called attention to the following other oddities in these maps: they were compiled on 11 June 2007 and are copyrighted; they do not show forestry areas; the legends are in English, instead of Bahasa Indonesian; the Regent's signature is located outside the maps, instead of inside the legend column; the graticules are only on two sides instead of all four; the maps are improperly oriented in portrait format instead of landscape format; there is an inset of East Kalimantan although maps from 2008 did not have insets; the source of the maps is different from the source of official Regency maps produced by the Respondent; and they are in a different scale (1:50000 instead of 1:250000).[556]

363. Finally, the Tribunal notes that the disputed signature of Mr. Ishak that appears on the Exploration Licenses is also reproduced on the mining licenses granted on the same day to two other companies, namely Swasembada Energy and Swasebada Bara.[557] In this connection, the Claimants argue that "[t]he existence of identical signatures on mining licenses granted to unrelated parties on the same day" supports the Claimants' view that "the method of application of the signatures on

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554 R-Answers, p. 45; R-PHB1, ¶ 38.

555 Tr. (Day 7), 52:14-20 (Tribunal, Gunter).

556 R-Answers, pp. 42-48, ¶ 88 and Images 10-11.

557 Mining Undertaking License for General Survey of PT Swasembada Energy, 9 April 2008 (**Exh. C-512**); Mining Undertaking License for General Survey of PT Swasembada Bara, 9 April 2008 (**Exh. C-513**).

Ridlatama's Exploration Licenses was not irregular".[558] The Tribunal cannot accept the Claimants' contention, because the Swasembada companies are related to Ridlatama. Indeed, Mr. Mujiantoro, the Managing Director of the four Ridlatama companies under scrutiny here, is a shareholder and director of the two Swasembada companies.[559]

364. Taking into consideration that no other third party mining licenses in the record contain the same non-handwritten signature of Mr. Ishak, the fact that the two Swasembada companies are related to Ridlatama, that the Swasembada licenses were allegedly issued on the same day as the disputed Exploration Licenses, and that they contain the same identical signatures of Mr. Ishak, the Tribunal finds that these are further significant elements corroborating that the reproduction of Mr. Ishak's signature was not authorized.

365. Having reached the conclusion that the reproduction of identical signatures appearing in the disputed mining licenses was not authorized by Mr. Ishak and that therefore these licenses are not authentic, the Tribunal now turns to the authenticity of the remaining disputed documents, namely the ancillary documents.

2.4. The ancillary documents

366. The ancillary documents contain disputed signatures issued at three levels of the Indonesian Government, the Regency of East Kutai, the Province of East Kalimantan, and the central Government in Jakarta. More specifically, the ancillary documents comprise: (i) the Payment Letters issued at the Regency level (see from paragraph 369 below); (ii) the Cooperation and Legality Letters issued at the Regency level (see from paragraph 369 below); (iii) the Borrow-for-Use Recommendations issued at the provincial level (see from paragraph 383 below); (iv) the Technical Considerations issued by the MEMR at the level of the central government (see from paragraph 409 below); and finally (v) the Re-Enactment Decrees issued at the Regency level (see from paragraph 427 below).

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558 Reply, ¶ 111.

559 The Respondent further pointed out that Mr. Wirmantoro was also a director of PT IR, while at the same time being shareholder and director of the two Swasembada companies. R-Answers, ¶ 94. *See* also: Company Data – PT Swasembada Energy (**Exh. R-215**); Company Data – PT Swasembada Bara (**Exh. R-216**).

367. At the outset, the Tribunal notes that the Claimants did not address these documents during the hearing in the same detail as the others. They observed, however, that if the Tribunal were to find that the mining licenses were validly issued "then the style of signature that one finds in the ancillary documents, was very likely authorized as well".[560] They also confirmed that the reverse would be equally applicable:

> "Q. If we find that those documents here which are called ancillary documents were forged, that we may then also conclude that the survey license and the exploration license are also forged?
>
> […]
>
> A. [I]f you felt that the same style of signature, that however it was affixed, had been affixed by a forger, without authorization on the ancillary documents, that would be a factor that you might give serious consideration to when you came back to look at the licenses. And the reality is that that is an argument that is made against us. They are the same signatures, and you have heard the evidence of Bupati Ishak, something you obviously have to give some weight to […]".[561]

368. The Tribunal will first assess the authenticity of the documents issued at the Regency level (a), followed by those at provincial level (b) and at the level of the central Government (c). Finally, it will turn to the Re-Enactment Decrees (d).

a) Ancillary documents at the Regency level

369. The ancillary documents bearing the signature of Mr. Ishak as Regent comprise the Payment Letters, Cooperation Letters and Legality Letters. After briefly setting out the Parties' positions, the Tribunal sets out the main features of these disputed documents and concludes on their authenticity.

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560 Tr. (Day 1), 154:5-13 (Opening, Sheppard). During Closing Statements, counsel for the Claimants similarly stated the following: "If we then turn to the ancillary documents. These are not relied on as establishing the claimants' rights, but they are relied on by the respondent as evidence of a fraudulent scheme. There are the requests for seriousness bond payments, the certification letters, the certificates of legality. I don't have time to go through those in the same detail, and indeed there is not the same amount of evidence for and against in relation to them. If you find that the general survey licenses and the exploration licenses were validly issued, then it's very likely that these documents were validly authorized as well". Tr. (Day 7), 185:17-186:4 (Closing, Sheppard).

561 Tr. (Day 7), 186:7-187:24 (Tribunal, Sheppard).

(i) Parties' positions

370. The Respondent asserts that the forged documents also include (i) two Payment Letters dated 4 December 2007 for PT INP and PT IR;[562] (ii) four Cooperation Letters dated 8 April 2008 for PT RTM, PT RTP, PT INP and PT IR;[563] and (iii) four Legality Letters dated 8 April 2008 for PT RTM, PT RTP, PT INP and PT IR.[564]

371. The Respondent pointed to the following evidence of forgery. First, Mr. Ishak did not sign the documents "or otherwise authorize them".[565] Second, none of these documents are entered into the Regency Registration Books of Decrees.[566] Third, none contain a unique decree number.[567] Fourth, Mr. Ishak testified that he never issued any Payment or Legality Letters.[568] Fifth, Ridlatama created these ancillary documents "to appease Claimants", in particular because the Legality Letters "were needed because of the co-operation agreements", as the Claimants admitted.[569]

372. The Claimants reply that there is necessarily less evidence of authorization because the ancillary documents are not licenses.[570] With respect to the Payment Letters, the Claimants submit that the "main evidence" that the signatures of Mr. Ishak were authorized is that they also bear the official Garuda seal.[571] Since the Respondent did not provide the original of the register book of the Legal Section, the Claimants further argue that "it is not possible to determine with any certainty whether the payment request letters were recorded or not".[572] With respect to the Legality and Cooperation Letters, the Claimants call attention to the fact that the Respondent failed to produce comparator documents, and thus invite the Tribunal to draw an

562 Letter from the Respondent to the Tribunal dated 11 March 2015, p. 5.

563 Application, ¶ 26(i).

564 Application, ¶ 26(ii).

565 R-PHB1, ¶ 52, item 1.

566 R-PHB1, ¶ 52, item 2.

567 R-PHB1, ¶ 52, item 2.

568 R-PHB1, ¶ 52, item 3; Ishak WS1, ¶ 20; Ishak WS2, ¶ 11; Tr. (Day 3), 23:4-10 (Cross, Ishak).

569 R-PHB1, ¶ 52, item 4, referring to: Tr. (Day 1), 155:10-11 (Opening Statement of Mr. Sheppard).

570 *See*, for instance: C-PHB1, ¶ 51.

571 C-PHB1, ¶ 47.

572 C-PHB1, ¶ 47.

adverse inference from that failure. More specifically, the Claimants stress that these letters bear the official Garuda seal, and that the Legality Letters "were received and acknowledged a total of 38 times by three levels of government".[573]

(ii) Main features of the disputed documents

373. With respect to the Payment Letters (documents nos. 5-6 in the Document Table), the Respondent disputes the authenticity of the letter dated 4 December 2007, with decree number 173/02.188.45/XII/2007, requesting from PT IR the payment of "provisioning of territory", a fixed contribution of general survey and a seriousness security.[574] The Respondent also challenges the authenticity of another letter of 4 December 2007, with decree number 174/02.188.45/XII/2007, requesting the same payments from PT INP.[575] Both these letters are on letterhead with the emblem of the Regency of East Kutai with the date just below that letterhead. They bear the signature of Mr. Ishak, which partly overlaps with the official Garuda seal. The following depicts the signature in the PT IR Payment Letter:[576]

374. And the following shows the signature in the PT INP Payment Letter:[577]

573 C-PHB1, ¶ 51.

574 **Exh. C-92**.

575 **Exh. C-93**.

576 Image taken from: Strach ER4, Annex A, p. 8.

577 Image taken from: Strach ER4, Annex A, p. 9.

375. The Legality Letters (documents nos. 11-14 in the Document Table) addressed to the four Ridlatama companies are dated 8 April 2008. They refer to letters sent by Ridlatama of 12 February 2008 requesting certificates of legality. They are all on letterhead with the emblem of the Regency, bear a decree number, a date below the letterhead, and the signature of Mr. Ishak partly overlapping with the official Garuda seal.

376. Finally, the Cooperation Letters (documents nos. 7-10 in the Document Table) are also dated 8 April 2008 and refer to the Ridlatama application letters of 14 February 2008 regarding the implementation of cooperation between the four Ridlatama companies and PT ICD, the local investment vehicle of the Claimants.[578] It is noteworthy that the letterhead does not show the emblem of the Regency, and that the date is not below the letterhead but above the signature of Mr. Ishak. They contain a decree number. The signature of Mr. Ishak again overlaps with the official Garuda seal.

(iii) Assessment

377. For essentially the same reasons as for the mining licenses, the Tribunal is of the view that the reproduction of Mr. Ishak's signature was not authorized.

378. First, similar to their findings on the disputed mining licenses (see above paragraphs 288-302), both forensic experts agree that the signatures of Mr. Ishak were not handwritten. They further agree that they are high quality reproductions. The experts also agree that the signatures are identical and were reproduced using the master signature for the mining licenses. The

578 **Exh. C-350 to C-353**.

Tribunal has therefore no hesitation to find that these signatures were reproduced with the same device as the signatures on the mining licenses.

379. Second, Mr. Ishak confirmed that he never signed or authorized his signature to be placed on these documents.[579] More specifically, he stressed that he never issued any payment letters or legality letters:[580] "While I was Regent, I never provided instructions to mining companies to pay a seriousness bond or other payment obligation in a mining area. The holder of a mining license is under an obligation to comply with any payment obligations. The Regent does not separately instruct them to comply with these obligations".[581] This was corroborated by the Claimants' witness, Mr. Benjamin, who stated that payment letters were usually sent by the Mining and Energy Bureau, and that he never saw such letters being issued by the Regent.[582]

380. The record indeed contains payment letters signed by Mr. Putra, the Head of the Mining and Energy Bureau,[583] thus confirming the evidence above. There is no explanation why the Regent himself would have sent similar requests to Ridlatama. In addition, the Payment Letters of 4 December 2007 are not registered in the Registration Book of Decrees and the entries for that date show a different sequence of decree numbers.[584]

381. Third, the oddities described above, in particular the fact that the Cooperation and Legality Letters issued on the same date by the same Regent's office use different letterheads, buttress the finding that the

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579 Ishak WS2, ¶ 10.

580 Ishak WS1, ¶ 20; Ishak WS2, ¶ 11; Tr. (Day 3), 23:4-10 (Cross, Ishak). *See* also: R-PHB1, ¶ 52, item 3.

581 Ishak WS2, ¶ 11.

582 Tr. (Day 7), 109:10-24 (Cross, Benjamin).

583 *See*, for instance: Letter dated 3 March 2008 from the Head of the Mining and Energy Bureau of the Regency of East Kutai to PT INP and PT IR regarding Payment of Provisioning of Territory Fixed Contribution and Capability Security, pp. 2-3 (**Exh. C-92**).

584 The decree numbers of the Payment Letters addressed to PT INP and PT IR are 173/02.188.45/XII/2007 and 174/02.188.45/XII/2007, respectively. The Registration Book of Decrees shows for the date of 4 December 2007 a numbering sequence going from 659/02.188.45/HK/XII/07 to 674/02.188.45/HK/XII/07. Furthermore, the Respondent provided a photograph of page containing a "large blank space" around 4 December 2007, confirming that there were no entries other than the numbers 655 to 658, which otherwise do not correspond to the numbers of the impugned payment letters. *See*: R-PHB2, note 56 and Annex B, p. 3; Resubmitted Pages from Regency Registration Book of Decrees – 4 December 2007 (**Exh. C-478**).

signatures of Mr. Ishak were not placed on these documents with his authorization.

382. As a result, the Tribunal reaches the conclusion that the ancillary documents at the Regency level, namely the Payment Letters of 4 December 2007, the Cooperation Letters of 8 April 2008 and the Legality Letters of 8 April 2008, are not authentic. Mr. Ishak did not sign them nor authorize anyone to place his signature on them.

b) Ancillary documents at the level of the Province of East Kalimantan

383. The ancillary documents bearing Mr. Ishak's signature when he was Governor of East Kalimantan are constituted of six Borrow-for-Use Recommendations, two of December 2009[585] and four of March 2010.[586]

(i) Parties' positions

384. According to the Respondent, a borrow-for-use permit must be obtained from the Ministry of Forestry if a mining area falls within a production forest area.[587] The related application for a mining area in East Kutai must include a recommendation letter from the Governor of the Province of East Kalimantan and a technical consideration letter from the Director General of Mineral, Coal and Geothermal of the MEMR.[588]

385. In this context, the Respondent signals that the Ridlatama companies submitted two sets of applications to the Ministry of Forestry. The first was filed on 9 September 2009, and did not contain any recommendation letter from the Governor or a technical consideration from the Director General at the MEMR.[589] The second was filed in March 2010 with copies of the March 2010 Borrow-for-Use Recommendations, but without technical consideration letters.[590]

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585 Documents nos. 19-20 in the Document Table.

586 Documents nos. 21-24 in the Document Table.

587 R-Comments 1, ¶ 12. *See* also: Nurohmah WS1, ¶¶ 9, 21; Ordiansyah WS, ¶ 22; Sianipar WS, ¶ 22.

588 R-Comments 1, ¶ 12. *See* also: Nurohmah WS2, ¶ 8. *See* further: Regulation of the Minister of Forestry No. P.43/Menhut-II/2008, dated 10 July 2008 concerning Guidelines on Borrow-for-Use of Forest Area, Article 9(4)(c), (h) (**Exh. RLA-167**).

589 R-Comments 1, ¶ 20; Nurohmah WS1, ¶ 13; Nurohmah WS2, ¶¶ 10-11, 14.

590 R-Comments 1, ¶ 21; Nurohmah WS2, ¶¶ 11, 14.

386. For the Respondent, the March 2010 Borrow-for-Use Recommendations are forged, since they contain identical signatures of Mr. Ishak. The Respondent also points to two other Borrow-for-Use Recommendations dated 29 December 2009, which are essentially identical to the March 2010 letters, and which, too, contain forged signatures of Mr. Ishak.

387. The Respondent sees the following indications of forgery. First, Mr. Ishak testified that he did not sign or authorize that his signature be affixed on these documents.[591] Second, Mr. Epstein determined that the signatures in these documents are identical, that they were reproduced using the same master signature, different from the one used to reproduce the disputed documents analyzed above and issued at the Regency level, and that they are the product of an autopen.[592] Third, the additional strokes next to the signature are another indication that Mr. Ishak did not sign these documents, since they are "more consistent with the behavior of a person forging a signature than an official properly utilizing 'high quality stamp impressions'".[593] Fourth, the December 2009 and March 2010 Borrow-for-Use Recommendations are "essentially identical",[594] and Ms. Nurohmah stated that there is no copy of the 2009 Recommendations in the archives of the Directorate of Utilization of Forest Area in the Ministry of Forestry.[595]

388. For the Claimants, the recommendation letters are not forged. The Claimants' witness, Mr. Benjamin, stated that Churchill and PT ICD requested that Ridlatama apply for borrow-for-use permits "out of any [sic] abundance of caution".[596] The Claimants note that the Borrow-for-Use Recommendations bear the seal of the Governor of East Kalimantan.[597] In addition, they argue that Mr. Epstein's failure to address additional ink strokes added at the end of the signature lines, and which Dr. Strach addressed in his reports, "casts doubt on the reliability" of Mr. Epstein's

591 R-PHB1, ¶ 54, item 1; Ishak WS1, ¶ 15.

592 Epstein ER2.

593 R-Answers, ¶ 50.

594 R-PHB1, ¶ 54, item 2.

595 Nurohmah WS2, ¶ 7.

596 Benjamin WS1, ¶ 131.

597 C-PHB1, ¶ 53.

methods and his conclusion that the signatures are the product of an autopen.[598]

389. The Claimants believe that there are two possible explanations for the identical signatures on these documents. First, "officials at a number of levels within the Indonesian government used some form of mechanical process to apply signatures to documents", thus supporting the Claimants' good faith authorization theory.[599] Second, these documents are the product of a "scam" orchestrated within the Regency "as a means of making Ridlatama think they were progressing".[600] This would have been possible, so say the Claimants, because Regency officials had access to a master signature of Mr. Ishak, since many documents issued by the Governor's office were copied to the Regency.[601]

(ii) Main features of the disputed documents

390. The December 2009 and March 2010 Borrow-for-Use Recommendations relate to the applications for the Ridlatama companies for borrow-for-use permits. Two recommendation letters dated 29 December 2009 concern PT RTM and PT RTP.[602] Two further letters dated 11 March 2010 were issued in respect of PT INP and PT IR.[603] In addition, two letters concerning PT RTM and PT RTP are dated 22 March 2010.[604]

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598 Reply, ¶ 63.

599 C-PHB1, ¶ 53.

600 C-PHB1, ¶ 53.

601 C-PHB1, ¶ 53, referring to: Tr. (Day 5), 70:13-24 (Cross, Setiawan).

602 Recommendation No. 522.21/5213/Ek from the Governor of East Kalimantan, H. Awang Faroek Ishak, to the Minister of Forestry, dated 29 November 2009, regarding Utilization of Forest Area in the name of PT Ridlatama Tambang Mineral (**Exh. R-144**); Recommendation No. 522.21/5214/Ek from the Governor of East Kalimantan, H. Awang Faroek Ishak, to the Minister of Forestry, dated 29 November 2009, regarding Utilization of Forest Area in the name of PT Ridlatama Tambang Powerindo (**Exh. R-145**).

603 Recommendation No. 522.21/3193/Ek from the Governor of East Kalimantan, H. Awang Faroek Ishak, to the Mininster of Forestry, dated 11 March 2010, regarding Forest Area Lease in the name of PT Investment Nusa Persada (**Exh. C-220**); Recommendation No. 522.21/3192/Ek from the Governor of East Kalimantan, H. Awang Faroek Ishak, to the Mininster of Forestry, dated 11 March 2010, regarding Forest Area Lease in the name of PT Investama Resources (**Exh. C-220**).

604 Recommendation No. 522.21/3219/Ek from the Governor of East Kalimantan, H. Awang Faroek Ishak, to the Mininster of Forestry, dated 22 March 2010, regarding Forest Area Lease in the name of PT Ridlatama Tambang Mineral (**Exh. C-220**); Recommendation No. 522.21/3217/Ek from the Governor of East Kalimantan, H. Awang Faroek Ishak, to the Mininster of Forestry, dated 22 March 2010, regarding Forest Area Lease in the name of PT Ridlatama Trade Powerindo (**Exh. C-220**).

391. The 29 December 2009 recommendation letter in connection to PT RTM contains the letterhead with the emblem of the Governorship on the first page. The decree number and the date are below the letterhead, and are partly inscribed by hand. The signature of Mr. Ishak is found on the last page; it partly overlaps with the official seal of the Governorship. The following image depicts the disputed signature:

392. The same features characterize the 29 December 2009 recommendation letter with respect to PT RTP. The following image depicts the disputed signature in that letter:

393. The 11 March 2010 recommendation letters regarding PT INP and PT IR also show the same main characteristics. The following image depicts the disputed signature in the letter concerning PT INP:

394. And the following image reproduces the disputed signature in the letter concerning PT IR:

395. The 22 March 2010 recommendation letters in respect of PT RTM and PT RTP have the same main characteristics. The following image shows the signature in the letter concerning PT RTM:

396. And the following image depicts the signature in the letter concerning PT RTP:[605]

(iii) Assessment

397. The Tribunal notes that both experts agree that these signatures were not handwritten, and are the product of some mechanical reproduction. They also agree that the signatures are essentially identical to each other, but differ from the signatures of Mr. Ishak in the licenses and ancillary documents dating from the time when Mr. Ishak was Regent of East Kutai.[606] But while Mr. Epstein concluded that the signatures are the product of an autopen, Dr. Strach expressed the view that "a machine driven fluid ink pen would be unlikely to replicate such fine detail", signaling the greater width variation of the main ink lines of the signatures and some edge detail, small spots and smudge marks that are replicated on the signatures of the March recommendation letters.[607]

398. The following image depicts the fine detail identified by Dr. Strach in the March 2010 recommendation letters:[608]

605 Image taken from: Strach ER4, Annex A.

606 Strach ER1, p. 4.

607 Strach ER1, p. 5.

608 Strach ER1, Annex D. Dr. Strach provides the following explanations: "The repeating fine features (except where obscured by text) associated with the signature lines on documents 17 to 20 are marked A, B, C and E. The repeating spot is marked D on each signature image. Smudge marks adjacent to the signature on document 20 (only) are marked F".

399. Dr. Strach further called attention to the presence of several ink lines added to the ends of the "lowest, almost horizontal strokes of the signatures, and which are not identical in form to each other and are in a different ink than the one appearing on the rest of the signature".[609] The following images show the added strokes on the March 2010 recommendation letters compiled by Dr. Strach:[610]

609 Strach ER1, p. 5.

610 Strach ER1, Annex E. Dr. Strach provides the following explanations: "The added ink lines occur at the left and right extremities of the lowest almost horizontal features of the signatures on documents 17, 19 and 20 and the right extremity only of this feature of the signature on document 18". *See* also: Strach ER1, ¶ 15.

400. According to Dr. Strach, the smoothness of the slight curves and tapered ends suggests that these strokes were written with "some fluency" (to the exception of the left side of the signature on document 19 (in the image above) "which appears to have been written more hesitantly (from its non-smooth shape)".[611] For the expert, these additional strokes suggest "a degree of attention to fine detail in the final appearance of the signatures". He was, however, unable to assess whether these strokes support a finding that the signatures are authentic. At any rate, Dr. Strach opines that these strokes put into question Mr. Epstein's view that the signatures were produced using an autopen.[612]

401. The Parties' experts also inspected the two 29 December 2009 recommendation letters. Specifically, they inspected the original of the letter

611 Strach ER1, ¶ 16.

612 Dr. Strach stated that Mr. Epstein's "definitive determination of the use of Autopen technology becomes more questionable particularly in regard to these four signatures which contain small handwritten additional strokes". Strach ER1, ¶ 19.

concerning PT RTP and only a copy of the letter concerning PT RTM.[613] Mr. Epstein here again concluded in favor of an autopen.[614] He also added that these two signatures "are from the same Autopen model that produced the previously identified disputed signatures" in the March 2010 recommendation letters.[615]

402. For his part, Dr. Strach agreed that the signature in the 29 December 2009 PT RTP letter "matches the general form of the signatures" found in the March 2010 recommendation letters, including the fine detail, an extra dot, and the additional strokes in different ink form.[616] This additional ink is "optically indistinguishable" from the ink additions in the 2010 March letters, although this "does not mean that one pen or ink type has been used as many pens would be in existence with such indistinguishable ink".[617] Dr. Strach also pointed to a faint string of ink marks at the upper left of the main signature line, which was not observed in the 2010 March letters. On that basis, Dr. Strach opined that "it is probable that the signature was produced by some form of inked impression (such as a high quality stamp impression or other form of printing)". As to autopen technology, he deemed it unlikely, but did not rule it out.[618]

403. With respect to the PT RTM recommendation letter dated 29 December 2009, Dr. Strach only inspected a .pdf reproduction, but confirmed that the "general form of the signature corresponds to the form of signatures" on the March 2010 recommendation letters. However, Dr. Strach stressed that the ends of the lowest stroke "differ from most of the corresponding ends" on the other five recommendation letters. While he could not identify the same fine detail as in the PT RTP recommendation letter, he found that the small spot in the PT RTM recommendation letter is "in the same position relative to the signature" observed in the other five recommendation letters.[619] Because the document is a reproduction, Dr. Strach stated that he could not determine whether the same technology was used to reproduce the signature in the PT

613 Epstein ER4, p. 2; Strach ER4, p. 1.

614 Epstein ER4, p. 5.

615 Epstein ER4, p. 5.

616 Strach ER4, p. 2.

617 Strach ER4, p. 2.

618 Strach ER4, p. 2.

619 Strach ER4, p. 3.

RTM recommendation letter as in the other disputed recommendation letters. However, he conceded that it seemed "plausible that the actual original ink signature which has been reproduced and observed on the PDF image may have been produced using the same technology as was used to produce" the other signatures in the recommendation letters. The expert again was inclined to find that the signature was produced by "some form of inked impression (such as a high quality stamp impression or other form of printing)" and that autopen was possible "but considered unlikely".[620]

404. For largely the same reasons as for the disputed documents at the Regency level, the Tribunal concludes that the signatures under scrutiny here were not authorized and are the product of a mechanical device. The Tribunal has already weighed the evidence of the Parties' experts in relation to the identical signatures at the Regency level, and prefers the evidence of the Respondent's expert Mr. Epstein. That conclusion seems to apply equally here (see paragraph 302 above).

405. Mr. Ishak also confirmed that he did not sign these letters and did not authorize the reproduction of his signature.[621] It is further striking that there are two versions of recommendation letters for PT RTM and PT RTP, one from December 2009 and the other from March 2010. Mr. Benjamin's explanation that the former concerned land use above the surface and the latter land use above and below the surface[622] was rebutted by Ms. Nurohmah who stated that, for borrow-for-use permits, the Ministry of Forestry does not "differentiate whether it's activity above the surface or activities for below the surface".[623] Neither is there any explanation in the record for the fact that only one series was submitted to the Ministry of Forestry.[624]

406. It is also striking that both the Regency and the Province would have used the same technology, especially when one considers that the witnesses concur that such technology was unknown within these administrations.

620 Strach ER4, p. 3.

621 Ishak WS2, ¶¶ 4-7.

622 Benjamin WS2, ¶¶ 12-14.

623 Tr. (Day 5), 111:3-15 (Tribunal, Nurohmah).

624 Respondent's letter of 11 March 2015, p. 2. The PT RTM recommendation letter is listed on the receipt and minutes of the documents taken during the police search. *See*: Minutes of Confiscation (**Exh. C-379**); Police Receipt of Documents Removed from PT ICD's Offices on 29 August 2014 (**Exh. C-380**).

These facts rather point to forgery carried out outside the administrations, hence to unauthorized documents. The Claimants' explanation that the documents were generated within the Regency, since officials at the Regency had access to the master signature of Mr. Ishak in his capacity as Governor, is speculation.

407. Finally, the strokes, which were manually added at the end of the signature lines, show that Mr. Ishak did not produce those signatures. The Tribunal tends to agree with the Respondent that such strokes are rather "consistent with the behavior of a person forging a signature than an official properly utilizing 'high quality stamp impressions' to impart Mr. Ishak's signature to a document in the ordinary course of business".[625]

408. In conclusion, the Borrow-for-Use Recommendations buttress the Tribunal's finding that Mr. Ishak's signatures were reproduced without his authorization. This finding also supports the theory of the existence of a scheme to produce false official documents.

c) Ancillary documents at the level of the central Government

409. The Respondent also disputes the authenticity of four Technical Considerations dated 22 September 2010 bearing the signature of the Director General of Mineral, Geothermal and Coal at the MEMR, Mr. Bambang Setiawan.[626] A technical consideration letter from the MEMR is required in addition to a recommendation letter from the Governor of East Kalimantan, if a mining company wishes to obtain a borrow-for-use permit from the Ministry of Forestry in order to conduct mining activities in a forestry area located, as it were, in East Kutai. After setting out the Parties' positions (i), the Tribunal will assess the features of the disputed documents (ii) and conduct its assessment (iii).

(i) Parties' positions

410. According to the Respondent, the Technical Considerations are not authentic, which confirms that a scheme to defraud the Republic of Indonesia was put in place.[627] The Respondent mainly relies on

625 Respondent's Comments on 3rd and 4th Reports of Dr. Strach, ¶ 30.

626 Documents nos. 29-32 in the Document Table.

627 R-Comments 1, ¶¶ 13, 32-26; R-Comments 2, ¶¶ 15-20; R-PHB1, ¶¶ 53 and 54, items 3-8.

Mr. Epstein's report according to which the signatures of Mr. Setiawan are identical and were produced by an autopen using the same master signature.[628] It also invokes the testimony of Mr. Setiawan that he always signed official documents by hand and "never authorized anyone to sign or place my signature on any such letters".[629] These facts were confirmed by Mr. Djalil, former Head of the General Affairs and Employment Division of the Directorate General of Mineral and Coal, who stated that Mr. Setiawan "always personally signs letters by hand" and that the MEMR does not use autopen devices.[630] Mr. Epstein's review of other signatures of Mr. Setiawan showed "the natural variation of Mr. Setiawan signing his name".[631]

411. The Respondent further stresses the following elements: (i) the letter numbers belong to other authentic letters signed by Mr. Setiawan with a different subject matter and date;[632] (ii) the letters contain an incorrect civil servant identification number (NIP) of Mr. Setiawan;[633] (iii) the Claimants' reference to a letter in English signed by Mr. Setiawan without his NIP is unhelpful since, under the prescribed MEMR format, letters written in English must not include the NIP;[634] (iv) the letters use the wrong font (Times New Roman instead of Arial) and the stamp refers to MEMR as Department (*Departemen*) rather than Ministry (*Kementarian*), the latter being employed after May 2010;[635] (v) the letters contain a signature, stamp and initial, whereas they should only contain a signature and stamp, or a signature and initial;[636] (vi) the summary of the exploitation activities for each

628 Epstein ER3, p. 3; Respondent's Comments on 3rd and 4th Reports of Dr. Strach, ¶ 17.

629 Setiawan WS, ¶ 9; Tr. (Day 5), 65:25-66:4 (Direct, Setiawan); Respondent's Comments on 3rd and 4th Reports of Dr. Strach, ¶ 16; R-PHB1, ¶ 54, item 1.

630 Djalil WS, ¶¶ 14, 16. *See* also: Respondent's Comments on 3rd and 4th Reports of Dr. Strach, ¶ 16; R-PHB1, ¶ 54, item 1.

631 Respondent's Comments on 3rd and 4th Reports of Dr. Strach, ¶ 19; Epstein ER4, p. 4.

632 R-PHB1, ¶ 54, item 3; Djalil WS, ¶ 18.

633 R-PHB1, ¶ 54, item 4; Djalil WS ¶ 17.

634 R-PHB1, ¶ 54, item 4, note 136; Tr. (Day 5), 85:18-87:23 (Direct, Djalil); MEMR Regulation Number 52 Year 2006 concerning Official Correspondence, pp. 15-17, 42 (**Exh. RLA-204**).

635 R-PHB1, ¶ 54, item 5. For the Respondent, the Claimants' reference to two of Nusantara's technical consideration letters dated January and February 2010 containing a stamp with *Departemen* is to no avail, since these documents were issued in the "six-month transitional period from November 2009 to May 2010 during which MEMR moved from using the title *Departemen* to *Kementarian*". *Id.*, note 137; Djalil WS, ¶¶ 7, 20.

636 R-PHB1, ¶ 54, item 6.

Ridlatama company is identical "even though different activities (or no activities) were conducted in the separate blocks",[637] and Ms. Nurohmah indicated that the technical consideration letter was not included in Ridlatama's 9 September 2009 and 13 March 2010 borrow-for-use permit applications.[638]

412. The Respondent also calls attention to the fact that Mr. Setiawan stated that he did not recognize the two initials appearing near Mr. Setiawan's signature.[639] According to his testimony, the initials should be those of the then-Secretary of the Directorate General of Mineral, Coal and Geothermal, Dr. Ir. Soemarno Witoro Soelamo, and the then-Director responsible for MEMR's technical considerations in forestry matters, Ir. Tatang Sabaruddin.[640] This is corroborated, so the Respondent argues, by the fact that Messrs. Witoro and Tatang's initials appear in other letters (for instance, number 2690) from the same day (22 September 2010).[641]

413. Lastly, Indonesia refers to Dr. Strach, who acknowledges that the signatures in these documents have some characteristics of autopen signatures, including the uniform pen pressure, blunt ends and smooth lines. The expert also did not rule out a faulty autopen type process to explain the relatively large deposit of ink with a faint ink trail to the left of the signature in three of the four letters.[642] Indonesia further emphasizes that Dr. Strach failed to identify any stamp or printing method able to generate such high quality reproductions.[643]

414. Similarly to the recommendation letters, the Claimants provide two possible explanations for the identical signatures on the consideration letters. First,

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637 R-PHB1, ¶ 54, item 8.

638 Nurohmah WS2, ¶ 5.

639 R-PHB1, ¶ 54, item 7; Tr. (Day 5), 66:21-69:19 (Direct, Setiawan).

640 Respondent's Comments on 3rd and 4th Reports of Dr. Strach, ¶ 16, note 24. *See* also: Appointment Decree for Dr. Ir. Soemarno Witoro Soelamo dated 16 July 2008, Oath of Dr. Soelamo taken 18 July 2008, and Retirement Decree for Dr. Soelamo dated 1 February 2011 (**Exh. R-238**); Appointment Decree for Ir. Tatang Sabaruddin dated 21 May 2010, Oath of Mr. Sabaruddin taken 26 May 2010, and Extension of Pension Age Limit Decree for Mr. Sabaruddin dated 12 March 2012 (**Exh. R-239**).

641 Compendium of letters from the Director General of Mineral, Coal and Geothermal of the Ministry of Energy and Mineral Resources dated 21 and 22 September (**Exh. R-232**). *See* also: Respondent's Comments on 3rd and 4th Reports of Dr. Strach, ¶ 16, note 24; Tr. (Day 5), 68:18-69:19 (Direct, Setiawan).

642 Respondent's Comments on 3rd and 4th Reports of Dr. Strach, ¶ 17; R-PHB1, ¶ 27.

643 Respondent's Comments on 3rd and 4th Reports of Dr. Strach, ¶ 17.

mechanical devices are used at various governmental levels to reproduce signatures of officials, including the signature of Mr. Setiawan at the MEMR (good faith authorization).[644] Second, having access to Mr. Setiawan's master signature, the Regency orchestrated a "scam" and fabricated the consideration letters "as a means of making Ridlatama think they were progressing" (bad faith authorization).[645]

415. While the Claimants agree that Mr. Setiawan's signatures on the disputed documents "cannot be the product of human handwriting as they are, essentially, identical",[646] they dispute Mr. Epstein's opinion that the signatures are the product of an autopen.[647] They further stress that the Respondent did not dispute the authenticity of the seal partly overlapping with Mr. Setiawan's signature.[648] According to the Claimants, Mr. Epstein's "cursory conclusions" fail to provide the Tribunal "with the means by which to assess objectively his conclusions that the signatures were a result of an Autopen device".[649]

416. In particular, the Claimants argue that Mr. Epstein does not address the discrete features of the signatures, such as the fluidity of the ink, the tip-width of the alleged writing instrument, the pressure and density of the writing and any alterations or artefacts on or around the writing.[650] The Claimants also cite to the "detailed report" of Dr. Strach, which, in addition to such aspects as pen pressure, ink-line width, microscopic appearance, and infrared properties, identified "incidental marks" which are marked as "A", "B", "C", and "D" in the images below:[651]

644 C-PHB1, ¶ 53.

645 C-PHB1, ¶ 53.

646 Reply, ¶ 51.

647 Reply, ¶ 52.

648 C-PHB1, ¶ 41.

649 Reply, ¶¶ 53, 56; C-Answers, ¶ 18.

650 Reply, ¶ 57.

651 Strach ER3, Annex C; C-Answers, ¶ 19.

417. For the Claimants' expert, marks labelled as "D" are of special importance since "they are variable in appearance, comprise large deposits of ink, have

a faint ink 'trail' and share the same ink characteristics as the signature and its surrounding artefacts".[652]

418. The Claimants also point to the Respondent's failure to produce additional consideration letters to test the testimony of Messrs. Setiawan and Djalil.[653] However, for the Claimants, the six Nusantara consideration letters in the record suffice to "raise real questions" about the reliability of the evidence given by Messrs. Setiawan and Djalil, especially because they contain "several of the *same* irregularities" identified with respect to the disputed MEMR letters.[654]

419. First, the letterheads of the Nusantara consideration letters also use the word *Kementarian* (Department), while the stamp uses the word *Departemen*.[655] Second, Mr. Djalil is wrong when he states that from December 2009 Mr. Setiawan affixed the *Kementarian* stamp since the document he relies on, dated 21 December 2009, also uses the *Departemen* stamp.[656] Third, a letter signed by Mr. Setiawan on 21 September 2010 does not contain his NIP at all.[657] Fourth, Mr. Djalil did not dispute the authenticity of the initials next to Mr. Setiawan's signature and the Respondent failed to provide an explanation "for whose initials these are or how these apparently authentic initials were placed on supposedly fabricated documents".[658]

420. Fifth, the copies of the MEMR register produced by the Respondent "appear to be missing key information".[659] Two entries on 21 September 2010 appear to have been covered and five entries on 22 September 2010 are completely blank.[660] Therefore, the Claimants argue that "it may be that the disputed MEMR Letters are recorded elsewhere in the MEMR register".[661] In

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652 C-Answers, ¶ 19.

653 C-Answers, ¶ 25.

654 C-Answers, ¶ 25, referring to (**Exh. C-525 to C-530**).

655 C-Answers, ¶ 27; C-PHB1, ¶ 41.

656 C-Answers, ¶¶ 28-29, referring to Letter of 21 December 2009 from Bambang Setiawan, the Director General of Mineral, Coal and Geothermal of the Ministry of Energy and Mineral Resources to the Regent of East Kutai (**Exh. R-131**).

657 C-Answers, ¶ 30.

658 C-Answers, ¶¶ 31-32.

659 C-Answers, ¶ 36.

660 C-Answers, ¶ 36.

661 C-Answers, ¶ 39.

addition, other notations in the 21-23 September 2010 extract do not include recipient names.[662] Moreover, the Respondent failed to produce documents signed by Mr. Setiawan on 23 September 2010 and "numerous documents in the 21-22 September register extract".[663] Sixth and finally, the Claimants note that the maps attached to the Nusantara technical letters depict the four Ridlatama blocks and do "not show *any* Nusantara companies overlapping with the Ridlatama blocks".[664]

(ii) Main features of the disputed documents

421. The four disputed letters dated 22 September 2010 from Mr. Setiawan, Director General of Mineral, Coal and Geothermal at the MEMR, relate to Technical Considerations for PT RTM, PT RTP, PT INP and PT IR's borrow-for-use forestry permit applications.[665] Each letter comprises a decision letter and a summary of the application for borrow-for-use permits submitted by the respective Ridlatama company. The decision letter refers to an application letter of the respective Ridlatama company and supports the company's application. It is drafted on the letterhead of the Ministry (*Kementarian*) of Energy and Mineral Resources. The decree number and the issuance date are shown below the letterhead. The signature of Mr. Setiawan is at the end of the decision letter and, as seen in the image in paragraph 416 above, partly overlaps with the official seal, which refers to the Department (*Departemen*) of Energy and Mineral Resources. There is also a personal identification number (NIP) below Mr. Setiawan's signature. Finally, two initials are located to the right and left of Mr. Setiawan's signature.

(iii) Assessment

422. The Tribunal starts by noting that the Parties' experts agree that the disputed signatures were not handwritten and that they are identical high quality reproductions.

423. As to the technology employed, the Tribunal favors Mr. Epstein's view of an autopen, also because Dr. Strach was unable to name another method

662 C-Answers, ¶ 37.

663 C-Answers, ¶ 38.

664 C-Answers, ¶ 42.

665 Documents nos. 29-32 in the Document Table.

resulting in high quality reproductions and could not rule out that the ink deposits and faint ink trails were the product of a faulty autopen.[666]

424. The ink marks which Dr. Strach highlighted do not seem to justify a contrary conclusion. Dr. Strach does not draw clear inferences from such marks identified as "A" to "D" in image in paragraph 416 above. In particular with respect to mark "D", Dr. Strach confirmed that the ink properties were "different from those of neighbouring stamp impressions, print and (handwritten) ink initials", and that it was "similar to that of the signature ink line apart from being darker/more intense near the centre of the larger dark mark".[667] In the end, Dr. Strach conceded that he did "not have a full explanation of mark 'D'", but that a "feasible explanation" is that it is "the edge or matrix edge effect of an otherwise high quality stamp impression".[668] By contrast, as was discussed earlier, the Respondent provided evidence that autopens may produce such marks.

425. Furthermore, the Tribunal has no reason to doubt Mr. Setiawan's testimony, which was confirmed by Mr. Djalil, that he always signs official documents by hand. The Tribunal also finds that the anomalies identified on the disputed documents further corroborate the Respondent's case. This is particularly so in respect of (i) the outdated NIP number of Mr. Setiawan,[669] (ii) the incorrect designation of the MEMR as a Department (*Departemen*), whereas the term Ministry (*Kementarian*) was used after May 2010 when the transitory period ended, and (iii) the two initials which Mr. Setiawan did not recognize in combination with the absence of the initials of Messrs. Witoro and Tatang. In contrast to Mr. Setiawan, Mr. Djalil did not mention in his witness statement that he failed to recognize the two initials surrounding Mr. Setiawan's signature, but the Tribunal notes in this respect that the Claimants did not question Mr. Djalil on this issue during cross-examination and provided no further explanations in this regard in their subsequent submissions. Therefore, the Tribunal has no reason to doubt Mr. Setiawan's testimony on these initials. The Tribunal further notes that, in the same way

666 Strach ER3, ¶ 12.

667 Strach ER3, ¶ 9.

668 Strach ER3, ¶ 12.

669 Mr. Setiawan explained that the NIP appearing in the disputed documents was outdated and that a new NIP had been issued since 2008. Tr. (Day 5), 72:23-73:15, 74:15-19 (Tribunal, Setiawan).

as with the recommendation letters addressed further above, the Claimants' explanation that the documents were generated within the Regency as part of a "scam" to mislead the Ridlatama companies is speculative.

426. Finally, the fact that an autopen or similarly sophisticated device was used to reproduce signatures at yet a third level of Government reinforces the probable existence of a scheme to fabricate official documents to provide a mantle of legitimacy to Ridlatama's operations in the EKCP. This assessment is further supported by the review of the last set of disputed documents, namely the Re-Enactment Decrees.

d) The Re-Enactment Decrees

427. The Respondent also claims that the four Re-Enactment Decrees of 14 May 2010 are forged (documents nos. 25-28 in the Document Table). After setting out the Parties' positions (i), the Tribunal will detail the main features of the disputed documents (ii) and proceed to its assessment (iii).

(i) Parties' positions

428. For the Respondent, the Re-Enactment Decrees "never made sense", as they were allegedly issued just 10 days after Mr. Noor revoked the Ridlatama exploitation upgrades. The Respondent also notes that the Claimants have been reluctant to address these Re-Enactment Decrees. When they did, their position changed multiple times "moving from silence to 'bemusement' to 'confusion' to 'no position' and now to 'bad faith authorization'".[670]

429. The Respondent invokes the following elements in support of forgery, irrespective of the fact that Mr. Noor's evidence is disregarded because he did not appear at the hearing.[671] First, the forensic experts agree that Mr. Noor's signatures were not handwritten and that they are identical.[672] Second, Mr. Ramadani testified that he prepared the Revocation Decrees, but that the Legal Section did not prepare Re-Enactment Decrees.[673] Third, Mr. Ramadani also stated that Mr. Noor did not authorize his signature being

670 R-PHB2, ¶ 13. *See* also: R-PHB1, ¶¶ 55, 113.

671 R-PHB2, ¶ 28.

672 R-PHB1, ¶ 57.

673 R-PHB1, ¶ 57; Tr. (Day 4), 150:22-23 (Direct, Ramadani).

placed on the disputed documents,[674] a fact corroborated by a letter from Mr. Noor dated 7 October 2010.[675] Fourth, the Re-Enactment Decrees bear numbers that belong to other documents and are not registered in the 2010 Regency Registration Book for Decrees.[676] Fifth, Mr. Ordiansyah called attention to the fact that the decrees have no maps and that the PLTR Spatial Planning database shows that the mining areas belong to Nusantara.[677] Sixth, as Mr. Ramadani explained, the practice of the Regency was to issue new licenses to reinstate a revoked license, as opposed to issuing re-enactment decrees.[678] Seventh, the Claimants' witness, Mr. Benjamin, testified that he had never heard of or seen the Re-Enactment Decrees.[679] Eighth, the Claimants provided no evidence of protests by Ridlatama or the Claimants, which allegedly caused Mr. Noor to revoke the Revocation Decrees and re-enact the exploitation upgrades.[680] Ninth, the Claimants started proceedings in the Samarinda Administrative Court to seek a revocation of the Revocation Decrees, and provided no cogent reason for doing so when the Re-Enactment Decrees expressly stated that the revocation was no longer valid.[681]

430. The Respondent also submits that the Claimants had a clear motive to forge the Re-Enactment Decrees, since Churchill would have been under an obligation to publicly disclose the revocation under the London Stock Exchange rules, which would have jeopardized Churchill's offering of securities and caused a collapse of the share price.[682]

431. Finally, the Respondent argues that the Claimants' bad faith authorization theory is "rife with speculation" and that they provide "no evidence" to corroborate their position.

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674 R-PHB1, ¶ 57; Tr. (Day 4), 152:14-17 (Direct, Ramadani).

675 Letter of 7 October 2010 from the Regent of East Kutai to the Secretary to Region Province of East Kalimantan (**Exh. R-072**).

676 R-PHB1, ¶ 57; Tr. (Day 4), 152:7-13 (Direct, Ramadani); Ramadani WS, Annex, items 20-23.

677 Ordiansyah WS, Annex, items 9-12.

678 R-PHB1, ¶ 57; Tr. (Day 4), 150:22-151:9 (Direct, Ramadani).

679 R-PHB1, ¶ 55, n. 143; Tr. (Day 7), 110:9-17 (Cross, Benjamin).

680 R-PHB1, ¶ 56.

681 R-PHB1, ¶ 56.

682 R-PHB1, ¶ 58.

432. For the Claimants, once Mr. Noor's testimony is struck out or disregarded, the only evidence on record to impugn the Re-Enactment Decrees is (i) the undisputed expert evidence that Mr. Noor's signature was not applied by hand, (ii) Mr. Ramadani's evidence that the numbers on the Re-Enactment Decrees are used on other decrees, and (iii) Mr. Noor's letter of 7 October 2010.[683] According to the Claimants, these elements are insufficient for a finding of forgery. The Claimants contend that with respect to (ii), wrong decree numbers "could be attributable to simple clerical error", and with respect to (iii), that the evidentiary value of the 7 October 2010 letter is "severely compromised" by Mr. Noor's refusal to attend the hearing.[684]

433. In the alternative, the Claimants submit that there is a basis for finding that the Re-Enactment Decrees were authorized "but in the bad faith sense".[685] The Re-Enactment Decrees were mainly favorable to Mr. Noor; he could "play both sides" by inducing Ridlatama and the Claimants to believe that their rights were safe, while assuring Nusantara that "for the right price, the re-enactment decrees could be denied and the EKCP could be given to them".[686] The Re-Enactment Decrees provided a means to Mr. Noor to delay passing the mining areas to Nusantara "while he tried to extract improper payments from Ridlatama". Indeed, the 7 October 2010 letter was issued six months later, providing Mr. Noor "more than enough time to hold an 'auction' of rights to the EKCP".[687]

434. The Claimants further argue that, even if the Re-Enactment Decrees were found not to be authorized, this would only affect their claim for restitution of amounts spent between the Claimants' receipt of the Re-Enactment Decrees and the dismissal of their action in the Samarinda Administrative Court.[688]

(ii) Main features of the disputed documents

435. The four disputed decrees of 14 May 2010 from the then-Regent, Mr. Noor, relate to the purported re-enactment of the exploitation upgrades that were

683 C-PHB1, ¶ 38(e).

684 C-PHB1, ¶ 38(e).

685 C-PHB1, ¶ 69.

686 C-PHB1, ¶ 69.

687 C-PHB1, ¶ 69.

688 C-PHB1, ¶ 68.

revoked by Mr. Noor on 4 May 2010.[689] Through these decrees, Mr. Noor purported to (i) re-enact the four Ridlatama exploitation upgrades of 27 March 2009, (ii) declare all other related licenses to be valid again, and (iii) revoke the Revocation Decrees of 4 May 2010. The letters are drafted on letterhead with the emblem of the Regency of East Kutai and a decree number on the first page. The signature block with Mr. Noor's signature and the date are on the last page.

436. Dr. Strach called attention to the variation in width of the signature lines, including a "pronounced taper at the right end of the main component of the signature".[690] He also identified "very small spots" towards the left of each signature and two "closely spaced fine small strokes" to the right and below the tapered end of the main part of each signature.[691] Dr. Strach further mentioned a "repeated sudden narrowing" near the top of the second arch of an "m" like feature, and "repeated smudge like marks above and below the left extremity of the rising lower line associated with each signature".[692]

437. The following image depicts the two disputed signatures and the recurrent features identified by Dr. Strach:[693]

689 Documents nos. 25-28 in the Document Table.

690 Strach ER1, ¶ 21.

691 Strach ER1, ¶ 21.

692 Strach ER1, ¶ 21.

693 Strach ER1, Annex G. Dr. Strach provided the following explanations on the marks he identified: "The repeating fine features (except where obscured by text) associated with the signatures lines [on the four Re-Enactment Decrees] are marked A, C and D (spots) and B (void in the underside of the ink line). Repeating smudge like marks are indicated by letter E".

(iii) Assessment

438. The record shows that the Re-Enactment Decrees are neither authentic nor authorized, which significantly reinforces the Respondent's case that a scheme was put in place to fabricate documents.

439. Several facts are undisputed. The Parties agree that Mr. Noor signed the Revocation Decrees dated 4 May 2010. Their experts agree that Mr. Noor did not sign the Re-Enactment Decrees, that the signatures in all four decrees are identical, and that they are high quality reproductions.[694] The Re-Enactment Decrees were issued just ten days after the Revocation Decrees.

440. Beyond these established facts, the record is less clear cut. As to the technology employed, Dr. Strach is again unable to identify one, other than autopen, that could produce such high quality signatures.

441. Further, the date of the Re-Enactment Decrees raises serious doubts. Why should a government revoke a license one day and reinstate it ten days later? If the Claimants' re-enactment theory were to reflect reality, one would

694 Epstein ER2, p. 8; Strach ER1, ¶ 21.

expect to find cogent evidence for the reasons of such an unusual fact pattern. However, the record reveals none. While the Tribunal has insufficient facts to link the Re-Enactment Decrees to the disclosure obligations for companies quoted on the London Stock Exchange, it is struck by the fact that Mr. Benjamin, a witness presented by the Claimants who at the relevant time was PT ICD's Director/President and was in regular contact with the Claimants' partners from Ridlatama, knew of the revocation but had never heard of the re-enactment.[695] Had it been real, the re-enactment would have been a major development for the Claimants' business, certainly worth reporting to close friends and associates, and in particular to Mr. Benjamin who was managing the Claimants' local investment vehicle.

442. Another aspect weighing against the Claimants' argumentation lies in Mr. Ramadani's assertion, confirmed by Mr. Sianipar, that new licenses, not re-enactment decrees reviving revoked licenses, would have been issued, if at all.[696] This statement seems plausible and there is nothing in the record to contradict it.

443. Finally, the Claimants' bad faith authorization theory, according to which Mr. Noor sought to "play both sides" is speculative and unsupported by facts.[697] The Claimants also argued that Mr. Noor acted "inconsistently at times", notably when sending a letter on 3 September 2009 to the Alternative Investment Market of the London Stock Exchange ("AIM") informing that Ridlatama's licenses had been forged, while sending letters to the Ministry of Forestry on the same day supporting Ridlatama's forestry permits.[698] Due to Mr. Noor's failure to appear at the hearing, the Tribunal has no further information on the circumstances surrounding Mr. Noor's conduct on that occasion. However, the Tribunal simply notes that this allegedly inconsistent conduct, even if assumed to be true for present purposes, is insufficient to prove "erratic decision-making" by Mr. Noor in May 2010.[699] Indeed, the Claimants failed to provide any credible

695 Tr. (Day 7), 110:9-17 (Cross, Benjamin).

696 Tr. (Day 4), 150:22-151:9 (Direct, Ramadani); Tr. (Day 5), 99:8-18 (Tribunal, Sianipar).

697 C-PHB1, ¶ 69.

698 C-PHB1, ¶ 38(f).

699 C-PHB1, ¶ 38(f).

explanation why the Revocation Decrees were signed by hand while the Re-Enactment Decrees were signed with a mechanical device.

444. On that basis, the Tribunal reaches the conclusion that the disputed Re-Enactment Decrees are neither authentic nor authorized. Their existence significantly weakens the Claimants' position on all other documents. Indeed, the Tribunal specifically asked the Parties about the effect on the Claimants' overall case if only the signatures in the Re-Enactment Decrees were unauthentic or unauthorized. In their response, the Claimants accepted that, if the Tribunal were to find that the Re-Enactment Decrees were not authorized, it "could add weight" to the Respondent's case "against the other disputed documents".[700] While a finding that the Re-Enactment Decrees are unauthentic and unauthorized is not necessary to reach the same conclusion for the other impugned documents, the fact that the Re-Enactment Decrees were most likely generated through the same technology shows a recurrent pattern of forgery.

2.5. **Who forged the disputed documents?**

445. The Tribunal now turns to the factual question of the authorship of the disputed documents, starting with the Parties' positions (a) followed by its assessment (b).

a) Parties' positions

446. The Respondent argues that "evidence of 'how' the impugned documents were signed is clear and goes a long way to answering 'who' did so".[701] For the Respondent, Ridlatama signed the documents.[702] Only Ridlatama had, so says the Respondent, the "motive, means or opportunity to fabricate" these documents.[703]

447. Prior to the hearing, the Respondent's primary contention was that Ridlatama was the sole responsible party and that the Claimants were duped. According to the Respondent, Ridlatama fabricated the disputed documents and disseminated them to various government agencies to create a mantle of legitimacy in a larger scheme to defraud the Republic of

700 C-PHB1, ¶ 67.

701 R-PHB1, ¶ 17.

702 R-PHB1, ¶ 59.

703 R-PHB1, ¶ 59.

Indonesia. The Respondent thereafter argued that the hearing revealed that Mr. Mazak, Churchill's Managing Director, was involved in the fraud, which demonstrated the Claimants' complicity.[704] For the Respondent, "the testimony of Claimants' witnesses describing the actions of Mr. Mazak undercut any notion that he was an unwitting dupe of Ridlatama".[705]

448. The Respondent explains that it was Mr. Mazak who built up the relationship with Ridlatama and was responsible for Churchill's day-to-day operations in Indonesia through PT ICD.[706] Following the disappointing results in the Sendawar Coal Project, by 2007 he was under pressure to come up with a viable project in the EKCP.[707]

449. More specifically, Indonesia highlighted the following facts allegedly showing Mr. Mazak's participation in the fraud scheme: (i) he forwarded the "copy and paste" PT RTM and PT RTP Survey Licenses to Mr. Gunter in May 2007;[708] (ii) he handed over Ridlatama's documents to Mr. Benjamin without those "copy and paste" licenses;[709] (iii) he "masterminded" the Re-Enactment Decrees;[710] (iv) he sought to enlist Mr. Kurniawan in April 2015;[711] (v) he told Mr. Quinlivan about "fictitious" handover ceremonies presided by the Regent;[712] (vi) he arranged for STP lawyers to opine on the *bona fides* of the Ridlatama licenses;[713] and (vii) he failed to ensure that the Ridlatama licenses were included as attachments to the Cooperation Agreements concluded between PT ICD and Ridlatama.[714]

450. By contrast, the Claimants dispute that the documents were fabricated by Ridlatama and that they were involved in a fraud. As a primary argument, they rely on their theory of good faith authorization, namely that the disputed documents were generated with authorization within the respective

704 R-PHB1, ¶ 99; R-PHB2, ¶¶ 22(1), 41.

705 R-PHB1, ¶ 65.

706 R-PHB1, ¶ 66.

707 R-PHB1, ¶ 67.

708 R-PHB1, ¶¶ 66, item 1, 87; R-PHB2, ¶¶ 3, 22(1).

709 R-PHB1, ¶¶ 66, item 2, 87.

710 R-PHB1, ¶¶ 58, 66, item 6; R-PHB2, ¶¶ 3, 12 note 19.

711 R-PHB1, ¶ 66, item 7; R-PHB2, ¶ 3.

712 R-PHB1, ¶ 47, 66, item 3.

713 R-PHB1, ¶ 66, item 4.

714 R-PHB1, ¶ 66, item 5.

government agencies. Alternatively, the Claimants put forward their bad faith authorization theory, which implies that someone within the Regency applied Mr. Ishak's signature "as part of a design" to make the licenses "plausibly deniable".[715]

451. In connection with the argument of bad faith authorization, Churchill and Planet allege that Mr. Putra's involvement in processing the disputed licenses was "extensive", as he (i) drafted the 2007 staff analysis; (ii) co-signed the spatial analyses for the PT RTM and PT RTP Survey Licenses; (iii) coordinated and initialed the draft decrees for PT RTM and PT RTP; (iv) drafted the Nusantara staff analysis of 19 May 2008; and (v) liaised with Mr. Noor in processing and issuing the Exploitation Licenses.[716] The Claimants also stress that the authenticity of the official Garuda seal partly overlapping with the disputed signatures is unchallenged, which further corroborates that the contentious documents were produced within the government agencies.

452. According to the Claimants, this bad faith scenario would allow the Regency, if the Claimants and Ridlatama later discovered commercially viable coal reserves (which they did), to "deny it ever granted Ridlatama exploration rights and offer to re-licence the proven ground to Nusantara (or any other party) – for a price".[717]

453. This scam, so the Claimants say, includes the fabrication of the documents from other agencies, such as the Technical Recommendation "as a means of making Ridlatama think they were progressing".[718] The Claimants further argue that the Re-Enactment Decrees made it possible for Mr. Noor to "play both sides" by letting Ridlatama and the Claimants believe that their rights were safe, while at the same time assuring Nusantara that the Re-Enactment Decrees could be denied and the EKCP given to it "for the right price".[719] Finally, even if Ridlatama was involved in a fraudulent scheme, so say the Claimants, Mr. Ishak's testimony implicating "some kind of

715 C-PHB1, ¶ 7.

716 C-PHB1, ¶ 35.

717 C-PHB1, ¶ 7.

718 C-PHB1, ¶ 53.

719 C-PHB1, ¶ 69.

corruption" between Mr. Putra and Ridlatama shows that there is no basis "for a finding that Ridlatama acted alone".[720]

b) Assessment

454. The signatures not being authentic, it mainly remains now for the Tribunal to determine who generated the contentious documents, including whether they were created within or outside the relevant governmental agencies and what role Ridlatama and the Claimants played, if any.

455. On the Respondent's side, three possible explanations are advanced. First, the disputed documents were fabricated by Ridlatama and the Claimants were duped victims, who must bear the risks inherent in the choice of their business partners. Second, the Claimants themselves were involved in the fraud. The third explanation was added by Mr. Ishak at the hearing when envisaging a corrupt official within the Regency of East Kutai.[721] On the basis of facts which emerged at the hearing, Indonesia insisted on the second scenario as being the one which should be accepted by the Tribunal.

456. For their part, the Claimants deny being involved in any fraud and essentially argue that the documents were generated within the Regency either with the authorization of Mr. Ishak or as a result of an official exceeding his powers. According to them, there is no evidence of fraud or corruption by Ridlatama. At any rate, Mr. Ishak's apologies to Churchill during the hearing show that the Claimants are victims and not offenders in the event that there was corruption.[722]

457. For the Claimants, the Respondent's new accusations that Churchill structured its investments to facilitate fraud are "ambush".[723] They explain that they prepared their defense on the basis of the Respondent's allegations prior to the hearing that only Ridlatama was involved in the fraud, not the Claimants or PT ICD.[724] In any event, the Claimants argue that even if Ridlatama were found to have engaged in forgery, this would leave their

720 C-PHB1, ¶ 76.

721 Tr. (Day 3), 104:20-25 (Cross, Ishak).

722 C-PHB1, ¶ 85(c); C-PHB2, ¶ 6.

723 C-PHB2, ¶ 6.

724 C-PHB2, ¶¶ 4, 7-8,

claims unaffected since the evidence suggests an "inside job" within the Regency, the actions of the Regency being attributable to the State.[725]

458. The Tribunal has already determined above that there was insufficient evidence to uphold the Claimants' bad faith authorization theory. Indeed, there is no proof that someone within the Regency issued "plausibly deniable"[726] licenses and fabricated the other disputed documents to satisfy the expectations of Ridlatama and the Claimants that the approval processes were properly advancing. There is no evidence that the Regency or any Regency official was in possession of an autopen or similarly sophisticated technology. It is not established either that Regency officials requested payments from Ridlatama to keep the disputed mining rights or from Nusantara to obtain rights to the EKCP. Moreover, there is no evidence that Nusantara conspired to strip Ridlatama of its mining rights, for instance, by inducing Regency officials to revoke the mining licenses. Nor are there indications that Mr. Noor was seeking to "play both sides" [727] so as to auction off the mining rights to the highest bidder. Therefore, the Tribunal finds that this bad faith scenario does not assist in ascertaining the author of the forgery.

459. Although the record does not support the Claimants' bad faith authorization claim, a number of facts demonstrate that someone within the Regency assisted in the process of introducing the fabricated documents into the Regency's databases and archives, thereby assisting in creating an appearance of legitimacy to the fraudulent scheme. Various elements, such as the staff analysis prepared by Mr. Putra, the spatial analyses prepared by Mr. Ordiansyah and signed by Mr. Putra, and the draft decrees, show that the mining applications of PT RTM and PT RTP were processed within the Regency until the penultimate stage. In particular, the draft decrees were circulated to the five heads of departments who affixed their initials in the coordination box. However, as was seen above, Mr. Ishak never signed these draft decrees, although his signature should have been affixed first on these draft decrees, as Mr. Ramadani convincingly explained.[728]

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725 C-PHB1, ¶ 75.

726 C-PHB1, ¶ 7.

727 C-PHB1, ¶ 69.

728 Tr. (Day 5), 9:22-10:6 (Cross, Ramadani).

460. Even more significant for present purposes is the fact that, in addition to Mr. Putra's initials in the coordination boxes of the two draft decrees, his initials also appear in three other places in each draft decree (i.e., in the decision letter, the attachment setting out the obligations of the license holder, and the attached map) next to the space where Mr. Ishak was supposed to affix his signature.

461. Another element pointing towards Mr. Putra's involvement is the fact that the disputed Survey Licenses for PT RTM and PT RTP were entered in the register book of the Legal Section. A similar indication can be seen in Mr. Ramadani's testimony according to which the registrar told him that it was Mr. Putra who requested the registration and promised to provide the signed decrees at a later time, which he never did.

462. By contrast, the official Garuda seal which partly overlaps with the fabricated signatures does not appear a conclusive element. The Claimants relied on Dr. Strach's expertise to argue that the Garuda seal was applied after the disputed signatures and thus showed that the disputed documents were generated within the Regency. The Respondent replied that anyone could fabricate these seals until 2012, when the Regency introduced heightened security measures following various instances of abuse. In reality, Dr. Strach stated that he was unable to ascertain the exact sequence of the placement of the signatures and the seal without further tests. On that basis and considering Mr. Kurniawan's testimony on the recurrent falsification of the Garuda seal prior to 2012, the Tribunal is unable to draw any useful conclusion from the presence of the Garuda seal in the disputed documents.

463. In this context, the Tribunal must address the possibility of corruption. Corruption only came up at the hearing, when Mr. Ishak was presented with the staff analysis drawn up by Mr. Putra. The Governor reacted by saying that there could have been some form of nepotism or corruption between Mr. Putra and Ridlatama in relation to the EKCP.[729] A little later in this examination, he called the EKCP a "major corruption case in our country".[730] Mr. Ishak even implied that Mr. Noor was involved in the scheme. On a follow up question from the Tribunal, he answered as follows:

729 Tr. (Day 3), 104:16-25 (Cross, Ishak) and 106:1-3 (Tribunal, Ishak).

730 Tr. (Day 3), 108:18-21 (Cross, Ishak).

> "Q. […] You were asked about Mr. Noor and your answer was not entirely clear, that also Mr. Noor would also possibly be involved in corruption here. I would like to be clear whether or not that is the case.
>
> A. I do not know what happened after I left, but what is clear, one difficulty I have, suddenly the Regent has a private jet. It doesn't make sense. An official suddenly has a private jet. How much it [sic] price for a private jet?".[731]

464. Mr. Gunter also mentioned that the payment of facilitation fees was commonplace in Indonesia. He stated, however, that he had no direct knowledge of any such payments by Ridlatama. Specifically, he stated that "there is always a facilitation fee that applies to most things here [i.e., in Indonesia], unfortunately". While he did not know any specifics regarding Ridlatama, he "would consider there would need to be" such payments.[732]

465. In this context, the Tribunal also recalls that the Claimants sought to obtain, and the Tribunal ordered, the production of documents relating to investigations conducted by Indonesia's Corruption Eradication Commission ("KPK") with respect to Messrs. Ishak and Noor. The Respondent refused to produce these documents by invoking privilege, a claim addressed above (see paragraph 250). Finally, with respect to the Re-Enactment Decrees, the Tribunal notes that the Claimants have alleged that Mr. Noor was trying to "play both sides" to auction off the EKCP to the highest bidder.

466. In the Tribunal's view, the evidence on record is insufficient to establish that the issuance of the disputed documents involved corrupt practices. It is true that corruption is inherently difficult to prove. However, even taking such difficulty into consideration, there must be facts on the record, at least in the form of some circumstantial evidence or so-called red flags, that signal the corruption. General statements such as Mr. Gunter's testimony, or suppositions and implications such as Mr. Ishak's assertions are insufficient. On that basis alone, the Tribunal is unable to make a finding of corruption.

467. Having discarded this possibility, the Tribunal goes on reviewing the role of Ridlatama and the Claimants. In the Tribunal's view, a number of facts point to the involvement of an outsider. First, the Respondent's witnesses, Messrs. Ishak, Armin, Ordiansyah, Ramadani, Djalil and Setiawan, all stated that they had never heard of an autopen and that official documents were

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731 Tr. (Day 3), 106:4-13 (Tribunal, Ishak). *See* also: Tr. (Day 3), 105:15-22 (Cross, Ishak).

732 Tr. (Day 7), 74:21-24 and 75:22 (Tribunal, Gunter).

always signed by hand. The Tribunal has no reason to doubt these statements, especially since the Claimants' witnesses confirmed the practice of hand signatures.[733]

468. Second, the same technology, most likely an autopen, was used to reproduce the disputed signatures at three different levels of the Indonesian Government, namely the Regency of East Kutai, the province of East Kalimantan, and the central Government in Jakarta, when none of these offices used mechanical devices to reproduce signatures on official documents.

469. Third, the existence of three different versions of PT RTM and PT RTP Survey Licenses, including one version with signatures of Mr. Ishak reproduced with an autopen and another one with his copied and pasted signatures, strongly suggests that these latter two versions were generated outside of the Regency. Indeed, it is undisputable that the Gunter Documents bearing the copied and pasted signatures of Mr. Ishak were doctored. Further, the use of an autopen, when it has been established that government offices did not have such a device available, indicates that the autopen signatures were affixed by an outsider.

470. Fourth, the exact same signatures of Mr. Ishak which appear on the disputed mining licenses and other ancillary documents at the Regency level are also found in two mining licenses granted to Swasembada, a company which happens to be controlled by directors of Ridlatama. This comes in addition to the absence of identical signatures in comparator licenses produced by the Respondent.

471. Fifth, the existence of the Re-Enactment Decrees, bearing unauthentic signatures issued ten days after the Revocation Decrees which the then-Regent Mr. Noor had signed by hand, significantly undermines the Claimants' contention that the disputed documents came from within the Regency. Indeed, the Claimants have provided no credible explanation for the Re-Enactment Decrees.

472. Sixth and last, Ridlatama, not the Regency, circulated the disputed licenses and related documentation to governmental agencies allegedly to ensure that they received all relevant documentation in case the Regency failed to

733 Tr. (Day 7), 35:11 (Cross, Gunter) and 57:20-58:8 (Tribunal, Gunter); Tr. (Day 7), 97:1-19 (Cross, Benjamin).

provide it. Under normal circumstances, this element would appear neutral, but in the present context of fabricated signatures, it would support a finding that Ridlatama was involved in this fraudulent scheme.

473. The last question which the Tribunal must answer here is whether the Claimants participated in or had knowledge of the fraud. As mentioned earlier, until the hearing, the Respondent did not seek to implicate the Claimants in the fraud, but argued that they must suffer the consequences of partnering with fraudsters. The Tribunal also notes that Indonesia's police initiated criminal investigations on forgery in March 2014, including by searching PT ICD's premises, seizing relevant documentation and hard drives, and interrogating Mr. Benjamin. These investigations have not led to evidence used by the Respondent in the present proceedings proving that the Claimants were directly involved in the fraud. With respect to Mr. Mazak's alleged involvement, the Tribunal sees no conclusive proof of his or Churchill's involvement in the fact that he transmitted the "copy and paste" PT RTM and PT RTP Survey Licenses to Mr. Gunter in May 2007, or that he gave Ridlatama's documents to Mr. Benjamin without including the "copy and paste" license. There is also insufficient evidence that he "masterminded" the Re-Enactment Decrees, as the Respondent alleges.[734] Finally, the Tribunal fails to see the relevance of the fact that he contacted Mr. Kurniawan in 2015 in order to obtain the Ridlatama documents in his possession.

474. On the other hand, the record shows that the Claimants and Ridlatama were closely associated and that they liaised regularly during the relevant time. First, PT ICD was initially established by Ridlatama and then acquired by Churchill in 2006.[735] Second, the Claimants chose their partners because of their "good connections" with the Indonesian Government, and in particular with the Regency of East Kutai.[736] Third, PT ICD ensured that Ridlatama circulated the disputed licenses and related documentation to governmental agencies.[737] Finally, the Tribunal cannot lose sight that the Claimants, and in particular Churchill, which is quoted on the Alternative Investment Market of the London Stock Exchange, stood most to gain from the Re-Enactment

734 R-PHB1, ¶¶ 58, 66, item 6; R-PHB2, ¶¶ 3, 12, note 19.

735 Claimants' Memorial on Jurisdiction and the Merits, 13 March 2013, ¶ 62.

736 Kurniawan WS1, ¶ 10.

737 Benjamin WS1, ¶ 15(b).

Decrees, since they obviated the need to publicly disclose the revocation of the mining licenses which had occurred ten days earlier.

475. While these elements suggest that the Claimants may have been involved, they are insufficient to reach a definitive finding that the Claimants were the authors or instigators of the forgeries and the fraud.

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

477. Bearing these facts in mind, the Tribunal now turns to the legal consequences, and in particular, to the Respondent's request that all of the Claimants' claims be dismissed.

C. Legal consequences

1. Parties' positions

478. The Respondent requests that the Tribunal issue an award dismissing all of the claims brought by the Claimants.[738] In short, the Respondent asserts that "Claimants cannot bring claims on the basis of forged documents".[739] In addition, the Respondent argues that a finding of forgery of the mining undertaking licenses has the consequence of "rendering the exploitation upgrades null and void and thereby eliminating any basis" for the claims before this Tribunal.[740] This follows, so the Respondent says, from the fact that all the claims are based on the validity of Ridlatama's mining rights in

738 R-PHB1, ¶ 147; R-PHB2, ¶ 50; R-Comments on Minnotte, ¶ 2; R-Reply on Minnotte, ¶ 2.

739 R-Reply on Minnotte, ¶ 5.

740 R-PHB1, ¶ 68.

the EKCP.[741] In other words, the Respondent argues that there was no EKCP if the licenses were forged.[742]

479. Relying on the maxim *nemo dat quod non habet*, the Respondent argues that the Claimants cannot assert claims "on the basis of rights that are non-existent"[743] and that "the beneficiary of a forgery can be in no better position than the person who committed the forgery".[744] Claims arising from the purported interference with an alleged right obtained by forgery cannot find substantive protection under the BITs "whether asserted by the culpable party or its assignee", even if the Claimants had acted in good faith.[745] To the Claimants' argument that the "vast majority" of their investments would remain legally valid and unaffected by a finding of forgery, the Respondent objects that the Claimants raised no claims arising from investments unrelated to the EKCP.[746]

480. The Respondent further stresses that the forgery of the disputed licenses "informed the decision to revoke the exploitation upgrades".[747] But even if the upgrades were revoked for a reason other than forgery, these forgeries must lead to the dismissal of the claims. Indeed, allowing the claims to continue in these circumstances "would be tantamount to rewarding conduct that is blatantly illegal and to endorsing Ridlatama's strategy of laundering forged documents".[748] According to the Respondent, such a result would be incompatible with "international law, Indonesian law and any system of law", contrary to international public policy, and seriously damaging to the administration of justice.[749]

481. The Respondent also submits that the Claimants were not good faith investors and did not exercise "a reasonable level of due diligence in investigating the forgery of the impugned licenses"; nor did they behave like

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741 R-PHB1, ¶ 68.

742 R-PHB1, ¶ 74.

743 R-Comments on Minnotte, ¶ 27.

744 R-Comments on Minnotte, ¶ 33.

745 R-Comments on Minnotte, ¶ 27.

746 R-PHB1, ¶ 75.

747 R-PHB1, ¶ 76.

748 R-PHB1, ¶ 76.

749 R-PHB1, ¶¶ 76, 79; R-Comments on Minnotte, ¶¶ 30, 44; R-Reply on Minnotte, ¶ 5.

a "reasonably prudent investor in the circumstances".[750] They were aware of the risks involved in investing in the Indonesian mining sector and "forgery was not an implausible risk" in view of the problem of overlapping licenses.[751] Moreover, there is *prima facie* evidence, according to the Respondent, that Mr. Mazak was complicit in the fraudulent scheme.[752] At the very least, "Mr. Mazak was reckless or negligent in his dealings with Ridlatama and shut his eyes to what would have been obvious".[753] For the Respondent, Mr. Mazak's role evinces that the Claimants were either "complicit in the forgeries or deliberately ignored evidence of wrongdoing and resisted further *bona fide* inquiries into it".[754]

482. In addition, so says the Respondent, the Claimants did nothing to independently verify the authenticity of the disputed documents when allegations of forgery were first uttered in 2009 and "deliberately chose not to address this issue".[755] The Claimants deliberately closed their eyes to a number of red flags, which should have alerted them to "the very probable fact of forgery".[756] Therefore, the Claimants should not be entitled to raise any "additional claims" against the Respondent.[757]

483. Finally, the Respondent considers that the alternative legal theories invoked by the Claimants, namely estoppel, acquiescence, legitimate expectations, unjust enrichment, and international wrongful composite act, have no merit.[758] According to the Respondent, the evidence at the hearing "effectively precludes Claimants from meeting the legal criteria applicable" under these theories.[759]

484. By contrast, the Claimants reply that a finding of forgery would not be dismissive of the entire case. The effect of a finding of forgery on the validity

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750 R-PHB1, ¶ 98; R-Comments on Minnotte, ¶ 37; R-Reply on Minnotte, ¶ 7.

751 R-Reply on Minnotte, ¶ 8.

752 R-PHB1, ¶ 99; R-Reply, on Minnotte, ¶ 9.

753 R-PHB1, ¶ 130.

754 R-Reply on Minnotte, ¶ 3.

755 R-Reply on Minnotte, ¶ 13; R-PHB1, ¶ 101.

756 R-Reply on Minnotte, ¶ 14.

757 R-PHB1, ¶ 104.

758 R-PHB1, ¶ 80.

759 R-PHB1, ¶ 80.

of the exploitation licenses would still need to be determined.[760] The Claimants consider these licenses to be "stand-alone administrative acts" that "perfected title" to the EKCP,[761] and are therefore "*prima facie* lawful and efficacious".[762] The Claimants further argue that, even if the Tribunal held that the exploitation upgrades were invalid, it would have to decide which of the claims remain unaffected.

485. For the Claimants, a failure to investigate third-party wrongdoing does not automatically deprive an investor of treaty protection.[763] The Claimants submit that they are good faith investors, that they conducted "extensive" and "exhaustive" due diligence of "*foreseeable* risks".[764] They did not perceive any evidence of forgery when they made their investment and did not deliberately close their eyes to allegations of forgery when they were first put on notice in September 2009. To the contrary, they "responded quickly and effectively to every indication of forgery or fraud that was brought to their attention"; they held meetings with and requested comments from Ridlatama, met with the then-Regent Mr. Noor, and cooperated with the Bawasda investigation, which ultimately concluded that the Ridlatama licenses were "legal and accountable".[765] Because the acts of fraud and forgery are not their own and they are *bona fide* investors, the Claimants assert that they "should be able to have their claims against the State heard".[766]

486. In addition, the Claimants assert that the Tribunal would still need to determine whether, as a matter of law, the Claimants have "surviving, substitute causes of action" on the ground of estoppel, acquiescence, preclusion, legitimate expectations, unjust enrichment, and internationally wrongful composite acts.[767] The Claimants also submit that, if they have

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760 C-Comments on Minnotte, ¶ 6.

761 Tr. (Day 7), 192:23-193:6 (Closing, Sheppard); C-PHB1, ¶ 96(a).

762 C-Comments on Minnotte, ¶ 6.

763 C-Comments on Minnotte, ¶ 2.

764 Emphasis in the original. C-Comments on Minnotte, ¶¶ 7, 12, 15-16, 19; C-Reply on Minnotte, ¶ 7.

765 C-Comments on Minnotte, ¶¶ 18-20.

766 C-Comments on Minnotte, ¶ 8.

767 Letter from the Claimants dated 23 November 2014 ; Letter from the Claimants dated 8 December 2014 ; Reply, ¶¶ 204(b), 206-217, 245-246; C-PHB1, ¶¶ 54, 96(b), 97; C-PHB2, ¶ 27.

unaffected claims and surviving causes of action, the Tribunal would have to establish the underlying facts and the compensation payable to the Claimants.[768] Finally, the Claimants argue that their claims for denial of justice and threats of force would in any event survive a finding of forgery.[769]

2. Assessment

487. The Tribunal will first set out the applicable legal framework (2.1) and then discuss the admissibility of the claims (2.2).

2.1. Applicable legal framework

488. Neither the ICSID Convention nor the BITs contain substantive provisions addressing the consequences of unlawful conduct by a claimant or its business associate during the performance of an investment. The BITs only contain admission requirements applying at the time of establishment of an investment, which are jurisdictional in nature. Therefore, the Tribunal will have recourse to principles of international law to determine the consequences of the forgeries established above.

489. As stated in *Venezuela Holdings v. Venezuela*, all systems of law, including the international legal system, contain concepts designed to avoid misuse of the law.[770] With respect to international investment arbitration and ICSID proceedings more specifically, the tribunal in *Phoenix v. Czech Republic* insisted on the duty of arbitral tribunals not to protect an abuse of the system of international investment protection under the ICSID Convention or bilateral investment treaties.[771]

490. Similarly, the tribunal in *Europe Cement v. Turkey* stated that "conduct that involves fraud and an abuse of process deserves condemnation".[772] Likewise, the tribunal in *Hamester v. Ghana* held that no protection is afforded to investments made in violation of "national or international

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768 *See*, e.g.: Tr. (Day 1), 105:9-106:6 (Opening, Sheppard); C-PHB1, ¶ 96(c).

769 C-PHB1, ¶ 97.

770 *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 167.

771 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 144 (**Exh. RLA-060**; **Exh. CLA-253**).

772 *Europe Cement Investment and Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, ¶ 180 (**Exh. RLA-147**).

principles of good faith", such as corruption, fraud or deceitful conduct, even absent any specific legality requirement in the BIT:

> "An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law".[773]

And the tribunal added:

> "These are general principles that exist independently of specific language to this effect in the Treaty".[774]

491. As the quotation of *Hamester* just illustrated, international tribunals have found fraudulent behavior to breach the principle of good faith, to constitute an abuse of right or, under certain circumstances, an abuse of process.[775] Various tribunals have underlined the fundamental nature and the long-standing recognition of the principle of good faith as a matter of domestic and international law, including investment law.[776]

492. The theory of abuse of process, which is a variation of the prohibition of abuse of rights and, like the latter, an emanation of the principle of good faith also found application in the context of inadmissible corporate restructurings. That theory is another manifestation of the general principle that one does not benefit from treaty protection when underlying conduct is deemed improper. For instance, the tribunal in *Renée Rose Levy v. Peru* held the claimants' attempts to establish jurisdiction on the basis of

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773 *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 123 (**Exh. RLA-058**).

774 *Id*., ¶ 124.

775 *See*, for instance: *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 (**Exh. RLA-056**); *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 139 (**Exh. RLA-059**); *Europe Cement Investment and Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009 (**Exh. RLA-147**); *Alasdair Ross Anderson et al. v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010 (**Exh. RLA-156**); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 127 (**Exh. RLA-155; Exh. CLA-228**).

776 *See*, for instance: *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶ 230 (**Exh. RLA-056**); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 144 (**Exh. RLA-060; Exh. CLA-253**); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 123 (**Exh. RLA-058**); *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶ 116 (**Exh. RLA-269**); *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, ¶ 646.

"untrustworthy, if not utterly misleading" documents amounted to an abuse of process precluding the tribunal's exercise of its jurisdiction over the dispute.[777]

493. Moreover, particularly serious cases of fraudulent conduct, such as corruption, have been held to be contrary to international or transnational public policy.[778] The common law doctrine of unclean hands barring claims based on illegal conduct has also found expression at the international level, although its status and exact contours are subject to debate and have been approached differently by international tribunals.[779]

494. The legal consequences of fraudulent conduct depend to a large extent on the circumstances of each case, which may include the applicable treaty, the seriousness of the fraud, the role of the disputing parties or third parties in relation to the fraud, the nexus between the fraud and the claims, and the time when the fraud was committed. A review of international cases shows that fraudulent conduct can affect the jurisdiction of the tribunal, or the admissibility of (all or some) claims, or the merits of a dispute.[780]

495. In *Phoenix v. Czech Republic*, the tribunal stated that "States cannot be deemed to offer access to ICSID dispute settlement mechanism to investments not made in good faith" and thus held that it lacked jurisdiction under the ICSID Convention and the Israeli-Czech BIT.[781]

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777 *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶¶ 194-195. *See* also, for instance: *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 585.

778 *World Duty Free Company Limited v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, ¶¶ 139, 161, 192(1) (**Exh. RLA-077**); *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 292 (**Exh. RLA-155; Exh. CLA-228**). *See* also: *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶ 246 (**Exh. RLA-056**).

779 *See*, for instance, the view of the majority in *Hesham Talaat M. Al-Warraq v. Indonesia,* UNCITRAL, Final Award, 15 December 2014, ¶¶ 645-646; and compare with ¶ 683, note 217. Compare also with: *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh et al.,* ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18, Decision on Jurisdiction, 19 August 2013, ¶ 477*; Guyana v. Suriname,* PCA, Award, 17 September 2007, ¶ 418.

780 *See*, for instance: *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶¶ 127, 129 (**Exh. RLA-058**); *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶¶ 192, 266, 271 (**Exh. RLA-210**).

781 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 106, 145 (**Exh. RLA-060; Exh. CLA-253**).

496. In *Inceysa v. El Salvador*, the tribunal held that access to international arbitration was barred where investments were secured through fraud.[782] It also affirmed the existence of a "meta-positive provision" prohibiting the attribution of effects to "an act done illegally"[783] and ultimately held that it lacked jurisdiction since the claimant had acted improperly in the bidding process leading to the investment.[784]

497. In *Europe Cement v. Turkey*, the tribunal deemed the copies purportedly supporting the ownership of share certificates to be fraudulent and denied jurisdiction because the claimant failed to provide originals:

> "In the present case, the Tribunal has concluded that the claim to ownership of shares in CEAS and Kepez was based on documents that on examination appear to have been back-dated and thus fraudulent. Since the Claimant either had no original documents to produce or no intention of producing original documents because they would not withstand forensic examination, the continual requests for extensions of time for over a five month period could only be seen as a cynical attempt to postpone the inevitable, further contributing to the abuse of process".[785]

498. Other tribunals dealt with fraudulent conduct as a matter of admissibility. In *Plama Consortium v. Bulgaria*, for instance, the arbitral tribunal was confronted with a "deliberate concealment amounting to fraud" in the making of the investment. It held that the Energy Charter Treaty "should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law" and concluded that the treaty's substantive protections "cannot apply to investments that are made contrary to law".[786] It therefore held the claims inadmissible.[787]

499. Finally, a number of tribunals have treated fraudulent conduct in the course of the assessment of the merits. In *Cementownia v. Turkey*, the tribunal

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782 *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶ 242 (**Exh. RLA-056**).

783 *Id.*, ¶ 248.

784 *Id.*, ¶ 339(2).

785 *Europe Cement Investment and Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, ¶ 180 (**Exh. RLA-147**).

786 *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 135, 139 (**Exh. RLA-059**).

787 *Id.*, ¶ 146.

dismissed all claims as amounting to an abuse of right compounded by an abuse of process through procedural misconduct.[788]

500. In *Malicorp v. Egypt*, the respondent argued that the claimant could not benefit from investment protection since it had entered into a contract based on forgery. The tribunal dismissed the claims on the merits, because the contract had been concluded on the basis of a mistake.[789] It considered that conduct contrary to good faith, such as a "veritable abuse of the law", undermines the substantive rights of the investor as well as his right to arbitrate the dispute.[790]

501. In *Minnotte v. Poland*, the tribunal held that, notwithstanding the absence of an express legality requirement in the BIT, "it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection".[791] In that case, the respondent had failed to provide evidence of "deliberate fraud on the part of the Claimants". Therefore, the tribunal assessed whether its jurisdiction was vitiated "by reason of the alleged negligent failure of the Claimants to investigate the factual circumstances surrounding the making of their investment".[792] The tribunal rejected the proposition that principles of international law, such as *ex turpi causa non oritur actio*, barred jurisdiction in the event of "a negligent failure to make inquiries which might (or might not) have unearthed evidence of fraud".[793]

502. However, on the merits, the *Minnotte* tribunal contemplated the possibility that a claim may be vitiated where the claimant unreasonably failed to perceive evidence of serious misconduct or crime by a third party:

> "There may be circumstances in which the deliberate closing of eyes to evidence of serious misconduct or crime, or an

788 *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, ¶¶ 156-159 (**Exh. RLA-170**).

789 *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, ¶¶ 130,136-137 (**Exh. RLA-269**).

790 *Id.*, ¶ 116.

791 *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014, ¶ 131 (**Exh. CLA-255**).

792 *Id.*, ¶¶ 135, 137.

793 *Id.*, ¶ 139.

> unreasonable failure to perceive such evidence, would indeed vitiate a claim".[794]

503. 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".[795] The Parties further agreed that the standard of willful blindness sheds light on the meaning of "deliberate closing of eyes" or "unreasonable failure to perceive", although the Respondent sees no justification in investor-State arbitration in having resort to American criminal law doctrines of willful blindness.[796]

504. In the Tribunal's view, the passage in *Minnotte* quoted above addresses the so-called "head-in-the-sand problem", also sometimes referred to as "Nelsonian knowledge", where a claimant knew or should have known of third-party wrongdoing in connection with an investment and still chose to do nothing (as opposed to just failing to take due care). 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.

505. Other cases denied protection to investments tainted by the fraud of a third party, be it under the heading of jurisdiction, admissibility or merits. For instance, in *Anderson v. Costa Rica*, the tribunal denied jurisdiction for lack of an investment, since the assets acquired by the claimant had been secured by a third party that had engaged in "aggravated fraud and illegal financial intermediation".[797]

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794 *Id.*, ¶ 163.

795 C-Comments on Minnotte, ¶ 4; R-Reply on Minnotte, ¶ 4.

796 C-Comments on Minnotte, ¶ 17; R-Reply on Minnotte, ¶ 11.

797 *Alasdair Ross Anderson et al. v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, ¶¶ 26, 55, 59 (**Exh. RLA-156**).

506. Investment tribunals also held that investors must exercise a reasonable level of due diligence, especially when investing in risky business environments. In *Anderson v. Costa Rica,* for instance, the tribunal stated that "prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal".[798] The scope of the due diligence depends on the particular circumstances of each case, such as the general business environment,[799] and includes ensuring that a proposed investment complies with local laws,[800] as well as investigating the reliability of a business partner and that partner's representations before deciding to invest.[801]

2.2. **Inadmissibility of claims related to the EKCP**

507. On the basis of the facts discussed above, the Tribunal found that a fraudulent scheme permeated the Claimants' investments in the EKCP. As the Respondent correctly put it, the forgeries of the disputed document were "essential to the making and conduct of the EKCP from which all of the Claimants' claims arise".[802] The question is thus whether, on the ground of the legal principles just set forth, the claims can still deserve protection or whether they must be dismissed. The Tribunal views this question as a matter of admissibility. Indeed, if it dismisses the claims, it will do so on the ground of a threshold bar, without entering into an analysis of the alleged treaty violations.

508. The Tribunal agrees with the Respondent that claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy.[803] For the reasons set out below, the Tribunal disagrees with the Claimants' contention that they conducted "extensive" and "exhaustive" due diligence in verifying the authenticity of the disputed mining licenses, both when the licenses were

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798 *Id*., ¶ 58.

799 *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, ¶ 75 (**Exh. RLA-175**).

800 *Alasdair Ross Anderson et al. v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, ¶ 58 (**Exh. RLA-156**).

801 *MTD Equity Snd. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 178 (**Exh. RLA-173**).

802 R-Reply on Minnotte, ¶ 4.

803 R-Comments on Minnotte, ¶ 41.

purportedly issued and when forgery allegations were first brought to their attention.

509. In reviewing the circumstances of their case in light of the legal standards set out above, the Tribunal is struck by the seriousness of the fraud that taints the entire EKCP (a) and by the Claimants' lack of diligence overseeing the licensing process and investigating allegations of forgery (b).

a) The seriousness of the forgeries and fraud

510. The facts established above reveal the existence of a large scale fraudulent scheme implemented to obtain four coal mining concession areas in the EKCP. The forgeries are directly linked to the claims raised by the Claimants which all relate to the EKCP. The record contains 34 forged documents including ten mining licenses and four decrees purporting to re-enact the revoked Exploitation Licenses. With the exception of four of these forged documents,[804] all of them were filed by the Claimants in support of their case.

511. The Tribunal has no hesitation in finding that the scheme was put in place intentionally. The record shows repeated acts of forgery, starting with the fabrication of the Survey and Exploration Licenses to gain access to the coal reserves. The record also shows that Ridlatama sent copies of these licenses to "affected governmental departments" so as to "ensure that our licenses were officially recognized at all government levels".[805] By doing so, a façade was built that would provide legitimacy to an illegal enterprise.[806]

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804 The PT RTM Recommendation Letter was obtained by the Indonesian police during the raid of PT ICD's office on 29 August 2014 and was filed by the Respondent. Recommendation No. 522.21/5213/Ek from the Governor of East Kalimantan, H. Awang Faroek Ishak, to the Minister of Forestry, dated 29 December 2009, regarding Utilization of Forest Area in the name of PT Ridlatama Tambang Mineral (**Exh. R-144**). *See* further: Letter from the Respondent dated 11 March 2015 I, p. 2; Letter from the Tribunal dated 20 March 2015, p. 2. The PT RTP Recommendation Letter was produced by the Claimants and filed by the Respondent as a result of the document production phase. *See*: Procedural Order No. 16, Annex B, DPR No. 35; Recommendation No. 522.21/5214/Ek from the Governor of East Kalimanatan, H. Awang Faroek Ishak, to the Minister of Forestry, dated 29 December 2009, regarding Utilization of Forest Area in the name of PT Ridlatama Trade Powerindo (**Exh. R-145**). The Gunter Documents (documents nos. 33 and 34 in the Document Table) were produced by the Claimants on 27 July 2015 and filed by the Respondent. *See*: Respondent's email of 30 July 2015 ; Claimants' email of 30 July 2015.

805 Benjamin WS1, ¶ 15(b). *See* also: Quinlivan WS1, ¶ 41; Tr. (Day 6), 12:23-13:6 (Cross, Quinlivan); C-Comments on Minnotte, ¶ 13.

806 In this context, the Claimants' reliance on acknowledgements of receipt and maps generated by the MEMR, obtained on request of Ridlatama, is to no avail. Indeed, the

As a final step in that enterprise, the Re-Enactment Decrees evince an intention to perpetuate the fraud and further mislead affected parties.

512. The facts suggest that the motive driving the fraud was to extend Ridlatama's mining rights in the EKCP beyond the unpromising tenements of PT RP and PT RS, and especially to access the PT RTM block which contains 95% of the coal reserves discovered in the EKCP.[807] To this end, forged licenses and related documents were fabricated to give an impression of lawful entitlement. That false impression was then used to obtain hand-signed Exploitation Licenses issued on the misguided assumption that the entire operation rested on valid mining rights. The fraud was then later perpetuated with the forgery of the Re-Enactment Decrees after the Exploitation Licenses had been revoked.

513. The following facts confirm the motivation behind the forgery. The Sendawar project that preceded the EKCP, in which Churchill and Planet, through PT ICD, first partnered with Ridlatama in 2006, was unsuccessful.[808] The surveys in the concession areas of PT RP and PT RS, the first two tenements of the EKCP for which Ridlatama obtained valid and undisputed licenses, were also disappointing. As a consequence, Ridlatama never applied for exploration licenses for these blocks.[809]

514. The circumstances of the initial field work in the PT RP block are particularly telling. Ridlatama conducted this work in the "nose"[810] or "beak"[811] of what Mr. Quinlivan called the "bird tenement",[812] i.e. the northern part of the PT RP mining area. It concentrated on the southern border of the beak along a

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licensing process for mining in East Kutai was within the competence of the Regency at the relevant time, not the MEMR. In addition, the MEMR did not have the necessary procedures to verify the existence of overlapping concession areas or to validate information received from license holders prior to the institution of the "Clean and Clear" program in 2010. The Tribunal further notes that the MEMR maps on which the Claimants rely reveal various oddities, thereby reinforcing the conclusion that they are unreliable. For instance, the 21 May 2008 map shows the PT RP tenement with an exploration status, although no exploration upgrade had been requested by Ridlatama for that area. Ministry of Energy and Mineral Resources, Map of Kutai Mining Area, 21 May 2008 (**Exh. C-105**). *See* also: R-PHB1, ¶ 48, item 1; R-Reply on Minnotte, ¶ 10, item 6. *See* further: Quinlivan WS1, ¶ 26; Hardwick WS, note 8.

807 Quinlivan WS1, ¶ 27.

808 Quinlivan WS1, ¶ 15; Hardwick WS, ¶ 13.

809 Quinlivan WS1, ¶ 26; Hardwick WS, note 8.

810 Tr. (Day 5), 132, 12-14 (Direct, Quinlivan).

811 Tr. (Day 6), 72:25 (Cross, Quinlivan).

812 Tr. (Day 5), 131:24-132:6 (Direct, Quinlivan).

stream of coal reserves extending southwards into the concession area held by Kaltim Nusantara Coal.[813] That concession later became the block of PT RTM, an area that contains huge coal reserves. Thus, contrary to Mr. Quinlivan's statement, the areas to the south of the beak were not an "empty bank" or a "moose pasture".[814] In other words, the fraud was designed to gain access to the coal reserves located in the areas to the south of the beak of the PT RP mining area.

515. In sum, the Tribunal finds that the acts of forgery brought to light in these proceedings are of a particularly serious nature in light of the number and nature of forged documents and of the aim pursued, namely to orchestrate, legitimize and perpetuate a fraudulent scheme to gain access to valuable mining rights.

b) The Claimants' lack of diligence

516. The seriousness of the fraud just discussed is compounded by the Claimants' lack of diligence, which is evidenced by the following facts.

517. First, the Claimants were aware of the risks involved in investing in the coal mining industry in Indonesia. Indeed, as Mr. Quinlivan confirmed at the hearing, the Claimants knew that investing in the coal mining sector in Indonesia entailed serious risks.[815] According to Mr. Quinlivan, Churchill was aware of the risks resulting from the disorganization in governmental agencies, in particular due to the devolution of power in the context of decentralization since 2001 and to the absence of experienced staff in the Regency administering mining activities.[816] Mr. Quinlivan qualified the situation in the Regencies as resembling the "Wild West".[817] He also confirmed that Churchill was aware of the risk of overlapping mining

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813 *See*, in particular, drill hole BH003 in the map attached to the Confidentiality and Exclusivity Agreement between PT ICD and PT TCUP dated 15 February 2007, p. 31 (**Exh. C-31**). *See* also: Respondent's Slides for Cross-Examination, Slide 9; Respondent's Revised Maps, submitted on 19 August 2015, Maps 3 and 10. *See* further: Tr. (Day 6), 71:17-73:11 (Cross, Quinlivan); Tr. (Day 7), 45:16-24, 46:16-19 (Cross, Gunter).

814 Quinlivan WS3, ¶ 10.

815 Tr. (Day 5), 160:13-15 (Cross, Quinlivan).

816 Tr. (Day 6), 14:7-10, 15:4-7 (Cross, Quinlivan).

817 Tr. (Day 6), 15:8-19 (Cross, Quinlivan).

licenses.[818] Churchill was moreover well aware of the "endemic problem" of corruption in the Indonesian mining sector. Mr. Quinlivan regarded corruption as an "acceptable risk", and insisted that, as a publicly listed company, Churchill was unwilling to engage in such practices.[819]

518. Second, one would expect an investor aware of the risks of investing in a certain environment to be particularly diligent in investigating the circumstances of its investment. Yet, the Claimants did not engage in proper due diligence in their dealings with their partners. In particular, they failed to exert due diligence when choosing Ridlatama. Mr. Quinlivan stated that he relied on Mr. Mazak's judgment and did not investigate the reliability of that company and its directors.[820] Mr. Kurniawan, for his part, testified that in 2007 Ridlatama only had a small shop in Jakarta with no proper infrastructure or staff in East Kutai.[821] It further appears that the Claimants chose their partners essentially because of Ridlatama's alleged "good connections" with government officials, in particular in the Mining and Energy Bureau of the Regency.[822] Mr. Kurniawan indeed stated that he was hired by Ridlatama because he "knew many officials in the local government",[823] having previously been a director of a regional company owned by the Regency of East Kutai.[824] In addition, there is no evidence on record that the Claimants verified the representations made by Ridlatama.[825] While connections with the Government may be a legitimate reason for selecting a business partner, this reason does not dispense with the investor's duty to investigate that partner's reliability, especially in a risky environment.

519. Third, because the environment was risky and because the chosen business partner showed no record of proven reliability, one would expect the investor

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818 Tr. (Day 6), 14:24-15:3 (Cross, Quinlivan). Mr. Gunter mentioned the existence of 5000 overlapping licenses in Indonesia. Tr. (Day 7), 31:9-14 (Cross, Gunter). *See* also: C-Comments on Minnotte, ¶ 12.

819 Tr. (Day 5), 179:10-19, 179:23-180:1 (Cross, Quinlivan); Tr. (Day 6), 69:11-14 (Cross, Quinlivan).

820 Tr. (Day 5), 183:23-184:15 (Cross, Quinlivan).

821 Tr. (Day 6), 158:20-159:13 (Cross, Kurniawan).

822 Tr. (Day 6), 68:23-69:2, 70:2-5 (Cross, Quinlivan).

823 Kurniawan WS1, ¶ 26. *See* also: Tr. (Day 6), 156:18-21 (Cross, Kurniawan).

824 Kurniawan WS1, ¶ 10.

825 *See*, for instance: Tr. (Day 6), 70:21-24, 71:10-12 (Cross, Quinlivan).

to exercise a heightened degree of diligence. This is so in particular in respect of the supervision of the licensing process, since the mining licenses form the indispensable basis of a successful investment. However, the record shows that the Claimants' supervision of the licensing process was deficient in several aspects. For instance, Mr. Benjamin, who became Director of PT ICD in July 2007, stated that he relied upon the information given to him by Ridlatama, believed that what Ridlatama conveyed was true, and never took independent steps to ascertain the veracity of such information.[826] Mr. Quinlivan also stated that he relied on, and did not double check, Ridlatama's representations that the Nusantara licenses had expired or that Ridlatama had confirmed in a meeting with Nusantara that the latter no longer held an interest in the EKCP.[827] He also relied on Mr. Kurniawan's information that the disputed licenses had been hand-delivered by the Regent during official ceremonies.[828]

520. Furthermore, Mr. Benjamin stated that prior to his arrival no one within PT ICD performed any oversight function in relation to licensing or permitting during the application process for the mining rights for PT RTM and PT RTP in 2007:

> "Q. […] Who within PT ICD was responsible for performing the oversight function that you came to assume in relation to licensing or permitting?
>
> A. At that time no one of PT ICD was actually responsible for the obtaining of those licenses mentioned.
>
> Q. Was there anyone within PT ICD who performed the coordination or oversight function that you came to assume?
>
> A. Not that I can think of".[829]

521. Moreover, although Mr. Benjamin was the person at PT ICD responsible for the oversight of the licensing process, he said that he only received copies of the licenses and did not otherwise seek to verify whether the licenses were properly signed or stamped:

> "Q. Did there come a time when you realized that the signatures on the general survey licenses, and on the exploration licenses, purporting to be handwritten signatures of Mr. Ishak, were identical?

826 Tr. (Day 7), 86:24-87:10 (Cross, Benjamin).

827 Tr. (Day 6), 62:12-16, 64:9-11 (Cross, Quinlivan).

828 Tr. (Day 6), 20:22-25, 35:25-36:5, 39:9-10 (Cross, Quinlivan).

829 Tr. (Day 7), 87:16-24 (Cross, Benjamin).

> A. I only received the copies of those documents and I didn't pay attention whether it's stamped or whatever. It was just a document".[830]

And further:

> "Q. Okay. Can you tell me what, if anything, you did while you were employed by ICD to ascertain whether the signatures of Mr. Ishak appearing on those licenses were identical.
>
> A. I never take any effort or time to look at the signatures or compare signatures between documents".[831]

522. Similarly, the Claimants did not seek to ascertain the means of signing mining licenses in Indonesia. Mr. Quinlivan stated that "[w]e didn't know how Bupati [i.e., the Regent] or various people fit their signatures to various documents",[832] although that information would have been readily available. Indeed, Messrs. Benjamin and Gunter testified that they would have been very concerned had they known that the licenses were not hand-signed by Mr. Ishak, which shows that they knew that mining licenses were hand-signed.[833]

523. In the same vein, the Claimants' conduct was not diligent in ensuring that Nusantara was no longer interested in its mining rights. Although the Claimants stated that Mr. Gunter had verified that Nusantara's licenses had expired,[834] he testified that his company GMT "was not involved at all in checking on the Nusantara licenses".[835] Mr. Quinlivan further stated that Ridlatama had sought and obtained assurances from Nusantara in June 2007 that it had no interest in the mining rights anymore. However, seeking such assurances in June when the PT RTM and PT RTP licenses had been issued in May makes no sense, if the disputed licenses had been validly issued.[836] Mr. Quinlivan's explanation that the meeting took place to "make sure that there was no issues with these licenses" "that were granted" is

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830 Tr. (Day 7), 90:22-91:3 (Cross, Benjamin).

831 Tr. (Day 7), 96:7-12 (Cross, Benjamin).

832 Tr. (Day 6), 20:8-10 (Cross, Quinlivan).

833 Tr. (Day 7), 97:1-19 (Cross, Benjamin); Tr. (Day 7), 35:81-12 (Cross, Gunter).

834 *See*, for instance: Hardwick WS, ¶ 17(b).

835 Tr. (Day 7), 41:16-42:9 (Cross, Gunter).

836 Quinlivan WS1, ¶ 29.

hardly convincing.[837] At best, it shows an awareness of possible issues that should have led to increased caution.

524. Fourth, the Claimants failed to exercise due diligence when "indications of forgery" first came to light in the BPK report of 23 February 2009.[838] Mr. Quinlivan gave evidence that he relied on Ridlatama's representations that there was no merit to the "indications of forgery", as well as on the police report dated 6 May 2009, the Bawasda report dated 18 March 2010, the due diligence conducted by the law firm Sondang Tampubolon & Partners ("STP") in 2007, and Mr. Kurniawan's account of the Regent handing over the mining licenses in person.[839] On this basis, he reached the conclusion that the "indications of forgery" were "not an issue".[840] The Claimants also pointed to an evaluation report of 2 October 2009 of the BPK report which first raised the issue of indications of forgery,[841] the assessment conducted by DNC Advocates ("DNC") in 2010 on the instruction of Hari Kiran Vadlamani, a shareholder of Churchill,[842] as well as the due diligence conducted by Mr. Soehandjono in 2011.[843]

525. However, none of these elements warranted Mr. Quinlivan's conclusion that there was no issue with the "indications of forgery". The reliability of Ridlatama's affirmations was not established. The police report only related

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837 Mr. Quinlivan provided the following response:

"Q. Why did that meeting take place after the licenses had been granted?

A. It was, I guess, to make sure that there was no issues with these licenses over this ground, which we understood to have the license over which had expired, so that there would be no complications with the licenses that were granted". Tr. (Day 6), 63:23-64:4 (Cross, Quinlivan).

838 Report No. 20/LHP/XVII/02/2009 dated 23 February 2009 on Result of Audit (Audit with Specific Purpose) Semester II Budget Year 2008 over Management of Coal Mining Budget Year 2006 and 2007 at the Government of the Regency of East Kutai and Holders of Mining Authorization in Sangatta (**Exh. C-145; Exh. R-032**).

839 Tr. (Day 6), 20:18-25 (Cross, Quinlivan). *See* also: C-PHB1, ¶ 50; C-Comments on Minnotte, ¶¶ 19-20.

840 Tr. (Day 6), 21:1-6 (Cross, Quinlivan).

841 Analysis and Evaluation Report of the BPK Report by the Ridlatama Group, 2 October 2009 (**Exh. C-516**).

842 Draft Legal Due Diligence Report for PT RTM prepared by DNC, 25 June 2010 (**Exh. C-474**); Draft Legal Due Diligence Report for PT RTP prepared by DNC, 25 June 2010 (**Exh. C-475**); Draft Legal Due Diligence Report for PT IR prepared by DNC, 25 June 2010 (**Exh. C-476**); Draft Legal Due Diligence Report for PT INP prepared by DNC, 25 June 2010 (**Exh. C-477**). *See* also: C-Comments on Minnotte, ¶ 14; Vadlamani WS, ¶ 8.

843 Mr. Soehandjono's EKCP Development Illustration Map and Legal Conclusions, 2011 (**Exh. C-519**).

to allegations of illegal trespass and did not assess the authenticity of the disputed licenses through forensic analysis.[844] Bawasda's mandate was revoked after Ridlatama had proposed that Bawasda conduct its inspection in Ridlatama's office in Jakarta and offered to pay all travel expenses.[845] In any event, Bawasda was only to assess the overlaps between the licenses of Ridlatama and Nusantara.

526. Further, the due diligence of STP was conducted in 2007, two years prior to the "indications of forgeries". That law firm did not assess the authenticity of the disputed signatures,[846] but instead verified if all the steps of the application process had been followed to reach the conclusion that the Ridlatama licenses were "valid, unencumbered, and legally enforceable in Indonesia".[847] In addition, although Mr. Benjamin stated that STP had been recommended by PT ICD, it was hired by Ridlatama to conduct that diligence.[848]

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844 East Kutai Police, Advice of Investigation Process, SP2HP/33/V/2009/Reskrim, 6 May 2009 (**Exh. C-164**).

845 Bawasda Report on Special Audit, 700/29/ITWILKAB/III/2010, 18 March 2010 (**Exh. C-219**). *See* further: Letter from the Respondent dated 1 December 2014 , p. 6; Letter from the Respondent dated 27 March 2015, p. 4; Ordiansyah WS, ¶ 30; Tr. (Day 6), 33:10-23 (Cross, Quinlivan).

846 Tr. (Day 6), 11:12-24 (Cross, Quinlivan). In addition, the Respondent correctly pointed out that it is unclear which version of the PT RTM and PT RTP Survey Licenses, i.e. the version with autopen signatures (documents nos. 1 and 2 in the Document Table) or the version with copy and paste signatures (documents nos. 33 and 34 in the Document Table), was provided to STP. R-Comments on Minnotte, ¶ 16, 2nd item.

847 Mr. Benjamin provided the following testimony:

"Q. Did you talk to the Sondang law firm about the examination they conducted of the signatures?

A. No.

Q. Did you have any basis to think that they had performed a forensic analysis or comparison of the signatures on the licenses?

A. No". Tr. (Day 7), 95:17-23 (Cross, Benjamin). *See* further: Legal Opinions prepared by Sondang Tampubolon & Partners for PT RTP, PT RTM, PT INP and PT IR dated 30 January 2008 (**Exh. C-72 to C-75**).

848 Tr. (Day 7), 93:14-15 (Cross, Benjamin). In this context, the Tribunal notes that the due diligence conducted by Mr. Soehandjono in 2011 is not relevant to assess the Claimants' level of diligence prior to May 2010. Mr. Soehandjono's EKCP Development Illustration Map and Legal Conclusions, 2011 (**Exh. C-519**). The same applies to the due diligence conducted by DNC on behest of Mr. Vadlamani in June 2010. The Tribunal also notes that the DNC draft reports did not consist of any forensic analysis of the disputed signatures. *See*: Draft Legal Due Diligence Report for PT RTM prepared by DNC, 25 June 2010 (**Exh. C-474**); Draft Legal Due Diligence Report for PT RTP prepared by DNC, 25 June 2010 (**Exh. C-475**); Draft Legal Due Diligence Report for PT IR prepared by DNC, 25 June 2010 (**Exh. C-476**); Draft Legal Due Diligence Report for PT INP prepared by DNC, 25 June 2010 (**Exh. C-477**).

527. Finally, the Claimants' absence of diligence became apparent in the present proceedings when they filed or produced 34 forged documents to support their claims. These notably included two different versions of the PT RTM and PT RTP Survey Licenses and the "copy and paste" signatures in the Gunter Documents that were provided to Mr. Gunter by Mr. Mazak[849] and must therefore have been in the archives of PT ICD. In fact, the record reveals that the first time the Claimants engaged in their own forensic assessment of the disputed signatures was through its expert Dr. Strach for the purposes of the present arbitration.[850]

D. Conclusion

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

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

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849 Tr. (Day 7), 23:1-3, 15-17 (Cross, Gunter).

850 The Tribunal notes that the evaluation report of 2 October 2009, which analyzes the BPK report did not involve a forensic assessment of the disputed signatures, although the BPK report specifically raised the issue of identical signatures. Instead, the evaluation focused on translation issues, discrepancies in registration numbers and irregularities in maps. Analysis and Evaluation Report of the BPK Report by the Ridlatama Group, 2 October 2009 (**Exh. C-516**). *See* further: BPK Audit Report on the Management of Coal Mining for the Fiscal Years of 2006 and 2007 at the Regional Government of Kutai Timur and License Area in Sangatta, 23 February 2009, pp. 4-5 (**Exh. C-145**). The Tribunal also notes that the due diligence conducted by Mr. Soehandjono in 2011 consists of an illustration map depicting the licensing process and did not consist of a forensic analysis of the signatures of the disputed documents. Mr. Soehandjono's EKCP Development Illustration Map and Legal Conclusions, 2011 (**Exh. C-519**).

530. The conclusion reached by the Tribunal is within the scope of the present phase of the arbitration as it was circumscribed in Procedural Orders Nos. 13, 15 and 20. In this context, the Tribunal notes in particular that it arrived at this outcome without there being a need to address the validity of the Exploitation Licenses as a matter of Indonesian law (see above paragraphs 232-233). [851] Indeed, whatever their validity under municipal law, the Exploitation Licenses were embedded in a fraudulent scheme, being surrounded by forgeries. Forged documents preceded and followed them in time with the Re-Enactment Decrees, which under a non-authentic signature purported to revoke the revocation of the Exploitation Licenses. The accumulation of forgeries both before and after the Exploitation Licenses show that, irrespective of their lawfulness under local law, the entire EKCP was fraudulent, thereby triggering the inadmissibility of the claims under international law.

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

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

V. COSTS

A. Parties' positions

533. The Respondent's incurred costs in connection with these proceedings amounting to USD 12,328,704.18, comprising legal fees and expenses of USD 11,528,704.18 and advance payments to ICSID of USD 800,000. [852] These costs include (i) costs in relation to the Document Authenticity phase of USD 9,627,863.18, comprising legal fees and expenses of

851 *See* also ¶ 34 of PO15 and ¶ 28 of PO13.

852 Respondent's Costs Submissions of 11 December 2015; Respondent's Reply to the Claimants' Costs Submissions of 23 December 2015; Letter from Tribunal to the Parties dated 1 December 2016; Email from the Respondent to the Tribunal dated 2 December 2016 (see above note 52). *See* also: Respondent's Costs Submissions of 11 June 2013.

USD 9,077,863.18 and advance payments to ICSID of USD 550,000,[853] and (ii) costs incurred during the jurisdictional phase of USD 2,700,841, comprising legal fees and expenses of USD 2,450,841 and advance payments to ICSID of USD 250,000.[854]

534. The Respondent requests that the Tribunal order the Claimants to pay the legal fees, expenses and other costs incurred by the Respondent in connection with this arbitration. According to the Respondent, ICSID tribunals have, in the exercise of their discretion under Article 61(2) of the ICSID Convention, not strictly adhered to the "loser pays" principle, but taken into account a variety of factors, such as the relative success of the Parties' claims, the good faith of a Party in advancing unsuccessful claims and the Parties' conduct during the arbitration.[855]

535. Since the Claimants persisted in asserting claims based on "obviously forged documents", without making a "genuine effort" to discover the truth in addition to mischaracterizing relevant evidence, the Claimants should bear all the costs of these proceedings.[856] In addition to factoring in the "public relations campaign" orchestrated by the Claimants against Indonesia, the Respondent calls attention to the following conduct of the Claimants. First, the Claimants deliberately withheld presenting Mr. Mazak as a witness, whom the Respondent characterizes as the person with "the most direct knowledge of the facts in dispute".[857] Second, they misled the Tribunal and the Respondent in connection with the so-called Kurniawan archive and the non-production of other documents held by Ridlatama.[858] Third, the Respondent submits that the Claimants knew all along that the disputed signatures were identical without ever investigating these signatures. In this context, Indonesia argues that the Claimants "stonewalled" its efforts to

853 Respondent's Costs Submissions of 11 December 2015; Letter from Tribunal to the Parties dated 1 December 2016; Email from the Respondent to the Tribunal dated 2 December 2016 (see above note 52).

854 Respondent's Costs Submissions of 11 June 2013.

855 Respondent's Costs Submissions of 11 December 2015, pp. 1-2.

856 Respondent's Costs Submissions of 11 December 2015, p. 2; Respondent's Reply to the Claimants' Costs Submissions of 23 December 2015, pp. 1-2.

857 Respondent's Costs Submissions of 11 December 2015, pp. 2-3; Respondent's Reply to the Claimants' Costs Submissions of 23 December 2015, p. 3.

858 Respondent's Costs Submissions of 11 December 2015, p. 3-6; Respondent's Reply to the Claimants' Costs Submissions of 23 December 2015, p. 3.

obtain the production of the original versions of the disputed documents.[859] Fourth, the Claimants withheld documents from their own expert, Dr. Strach, and refused to let him confer with Mr. Epstein.[860] This conduct led to the Respondent having to incur "significant additional expenses".[861] Finally, the Respondent calls on the Tribunal to reject the Claimants' complaints about Indonesia's conduct during the proceeding.[862]

536. The Claimants' total costs amount to USD 4,084,021.34, comprising legal fees and expenses of USD 3,284,021.34 and advance payments to ICSID of USD 800,000.[863] These costs are split as follows: (i) costs in relation to the Document Authenticity phase of USD 2,198,795, comprising legal fees and expenses of USD 1,648,795 and advance payments to ICSID of USD 550,000, [864] and (ii) costs during the jurisdictional phase of USD 1,885,226.34, comprising legal fees and expenses of USD 1,635,226.34 and advance payments to ICSID of USD 250,000.[865]

537. For their part, the Claimants ask that the Tribunal order the Respondent to pay the Claimants' legal costs of responding to its Application in full, including costs incurred as a result of the Respondent's late payment of the fifth cost advance.[866] They further argue that the Respondent's claimed costs are "extraordinary".[867]

538. While acknowledging the Tribunal's discretion to make awards of costs, the Claimants argue that the starting point should be that the costs follow the event[868] and that in cases of multiple claims, the Tribunal should weigh the success or failure of each party and allocate costs proportionately to the

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859 Respondent's Costs Submissions of 11 December 2015, pp. 6-7; Respondent's Reply to the Claimants' Costs Submissions of 23 December 2015, p. 4.

860 Respondent's Reply to the Claimants' Costs Submissions of 23 December 2015, p. 4.

861 Respondent's Reply to the Claimants' Costs Submissions of 23 December 2015, p. 4.

862 Respondent's Reply to the Claimants' Costs Submissions of 23 December 2015, pp. 4-5.

863 *See* above note 52.

864 Claimants' Costs Submissions of 11 December 2015; Claimants' Reply to the Respondent's Costs Submissions of 23 December 2015; Claimants' Amended Costs Submissions of 20 April 2016; Claimants' Re-Amended Costs Submissions of 30 May 2016. *See* also above note 52.

865 Claimants' Costs Submissions of 11 June 2013.

866 Claimants' Re-Amended Costs Submissions, 30 May 2016, ¶ 36.

867 Claimants' Reply to the Respondent's Costs Submissions of 23 December 2015, ¶ 10.

868 Claimants' Costs Submissions of 11 December 2015, ¶ 5.

outcome of the case.[869] In applying the principle that costs follow the event, the Claimants further argue that the Tribunal should consider the reasonableness with which the Parties pursued their respective claims and defenses, as well as the Parties' cooperation in achieving cost effective results.[870] On that basis, the Claimants submit that their costs are reasonable "given the intensity with which the State prosecuted its allegations of forgery, fraud and criminal conversion".[871]

539. During the jurisdictional phase, the Claimants requested that the Tribunal order the Respondent "to pay all fees and costs incurred in connection with the respective arbitration proceedings", including arbitration costs and the Claimants' legal and other expenses, "plus interest accrued thereupon at a rate to be determined by the Tribunal from the date on which such costs are incurred to the date of payment".[872]

540. With respect to the Document Authenticity phase, the Claimants argue in the first place that they should be awarded all costs if the Respondent's Application for Dismissal is dismissed.[873] In this context, the Claimants stress that Clifford Chance operated on the basis of a capped fee, although its fees significantly exceeded that cap. Therefore, the Tribunal should not further discount this cost item.

541. In the event that the Respondent's Application for Dismissal is upheld in full or in part, the Claimants submit that the Tribunal should separately consider the Respondent's two limbs of forgery and fraud.[874] As to forgery, the Claimants argue that the Respondent should "pay (at the very least) a portion" of the Claimants' costs if only some of the 34 disputed documents are held to be forged.[875] The Tribunal should also consider whether the forgeries occurred with or without wrongdoing on the part of the

869 Claimants' Costs Submissions of 11 December 2015, ¶ 6.

870 Claimants' Costs Submissions of 11 December 2015, ¶ 7.

871 Claimants' Reply to the Respondent's Costs Submissions of 23 December 2015, ¶ 2.

872 Claimants' Memorial on Jurisdiction and the Merits, 13 March 2013, ¶ 404 C(1); Claimants' Reply to Indonesia's Objections to Jurisdiction, 30 April 2013, ¶ 200 C(1). *See* also: Claimants Reply to the Respondent's Costs Submissions of 23 December 2015, ¶ 12(a).

873 Claimants' Costs Submissions of 11 December 2015, ¶ 9.

874 Claimants' Costs Submissions of 11 December 2015, ¶ 10.

875 Claimants' Costs Submissions of 11 December 2015, ¶ 12.

Claimants.[876] As to fraud, the Claimants argue that the Respondent could only succeed in full if the Tribunal were to find that the Exploitation Licenses were obtained through deceit by "Ridlatama *and the Claimants*".[877] Since they were only victims, so the Claimants argue, the Tribunal should "make no order as to costs against them".[878]

542. While claiming that their conduct has been "reasonable and cooperative",[879] the Claimants assert that the Respondent's conduct was not reasonable. They in particular refer to the document production phase, the refusal of Mr. Noor to attend the hearing, and the variations in the Respondent's case before and after the hearing.[880] In any event, the Claimants are of the view that the Tribunal should verify whether there is no unreasonable duplication in the fees of the two law firms that represented Indonesia and whether these fees have actually been paid.[881]

B. Analysis

543. As a preliminary comment, the Tribunal notes that, whereas the Respondent's submissions on costs of December 2015 include its costs and expenses for the entire arbitration, the Claimants' submissions of December 2015 and April-May 2016 only relate to the Document Authenticity phase. The Tribunal thus also took into consideration cost submissions which the Claimants filed in respect of the jurisdictional stage.

544. Each side requests that its opponent be ordered to bear the entirety of its own costs and expenses, as well as the entirety of the Tribunal's and the Centre's expenses.

545. Article 61(2) of the ICSID Convention provides as follows:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges

876 Claimants' Costs Submissions of 11 December 2015, ¶ 13.

877 Emphasis in the original. Claimants' Costs Submissions of 11 December 2015, ¶ 14.

878 Claimants' Costs Submissions of 11 December 2015, ¶ 15.

879 Claimants' Costs Submissions of 11 December 2015, ¶¶ 16-25.

880 Claimants' Costs Submissions of 11 December 2015, ¶¶ 26-33.

881 Claimants' Reply to the Respondent's Costs Submissions of 23 December 2015, ¶ 12(b).

for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award".

546. ICSID Arbitration Rule 47(1) provides that the Award "shall contain […] (j) any decision of the Tribunal regarding the cost of the proceeding".

547. The Parties agree that Article 61(2) of the Convention grants the Tribunal discretion in allocating the ICSID arbitration costs and the Parties' costs, including legal fees.[882]

548. Two approaches have been adopted by ICSID tribunals in awarding costs. The first consists in apportioning ICSID costs in equal shares and ruling that each party shall bear its own costs.[883] The second applies the principle "costs follow the event", such that the losing party bears the costs of the proceedings, including those of the other party,[884] or that the parties share in the costs proportionately to their success or failure.

549. In the circumstances of this case, the Tribunal considers it appropriate to adopt the second approach of "costs follow the event". Indeed, this is a case where investors started two arbitrations on the basis of a large number of documents that turned out to be forged and revealed a large scale fraudulent scheme. As a result, the Tribunal considers that the costs of these proceedings should fall on the Claimants, subject to the considerations below.

550. First, it is true that the Claimants prevailed on the jurisdictional objections. Accordingly, one might argue that the costs of that phase must be imposed on the Respondent for having raised unsuccessful defenses. The Tribunal does not think so. These proceedings based on forged documents should not have been brought in the first place. Moreover, the objections to jurisdiction raised by Indonesia were far from frivolous. While they were not sustained, they raised legitimate questions about the significance of the BITs, as the Decisions on Jurisdiction show.

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882 Respondent's Costs Submissions, 11 December 2015, p. 1; Respondent's Reply to the Claimants' Costs Submissions of 23 December 2015, p. 1; Claimants' Costs Submissions, 11 December 2015, ¶ 4.

883 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶ 420 (**Exh. RLA-155; Exh. CLA-228**); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 327.

884 *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 321-322 (**Exh. RLA-059**); *ADC Affiliate and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 533.

551. Second, the Tribunal is struck by the disparity in the level of expenses incurred by both sides. The Claimants' expenses amount to USD 4,084,021 (including the advances made to ICSID) and the Respondent's expenses amount to USD 12,328,704, i.e. approximately 3 times more (including advances to ICSID). Differences in fee levels between disputing parties are natural as they are a function of a number of variables, including the complexities of each party's case and a series of choices that a party makes in its best judgment in relation to the conduct of the proceedings. Here, Indonesia had the burden of establishing the forgeries and fraudulent scheme on the basis of a factual matrix that was indeed complex. At the same time, the magnitude of the disparity in fees does not appear entirely justified by these elements. One additional factor may lie in the fact that the Claimants' last counsel worked on the basis of a capped fee. Another factor which may have added to the costs of the Respondent may be the poor state of its own archives,[885] which made the retrieval of relevant documents difficult, a factor for which the Claimants can certainly not be held accountable.

552. Having pondered all of these elements and exercising its discretion in matters of allocation of costs, the Tribunal deems it reasonable that the Claimants pay 75% of the Respondent's expenses incurred in these proceedings. This result may seem harsh to the Claimants considering that they sought to keep their own costs down. Yet, as the foregoing analysis shows, this is a case of forgery and fraud, which in the Tribunal's mind justifies this result.

553. As for the direct costs of the proceedings which were funded with the advances paid to ICSID, there is no reason for an abatement and, thus, the Claimants shall bear 100% of these costs.

554. As indicated above, the direct costs of the proceeding include (i) the fees and expenses of each Member of the Tribunal and the Tribunal's Assistant; (ii) payments made by ICSID for other direct expenses, such as those related to the conduct of document inspections and hearings (e.g., court reporting, audio visual, interpretation, the charges of Maxwell Chambers in connection with hosting the hearings), courier services, as well as estimated

885 As was confirmed by Mr. Ramadani speaking of the archives of the Mining and Energy Bureau. Tr. (Day 4), 145:3-146:3 (Direct, Ramadani).

charges related to the dispatch of this Award; and (iii) ICSID's administrative fees.

555. The direct costs of the proceeding have been paid out of the advances made to ICSID by the Parties. Once the case account balance has been finalized, the ICSID Secretariat will provide the Parties with a detailed financial statement.

556. In sum, the Claimants shall bear the direct costs of these proceedings, i.e. USD 1,600,000 (subject to ICSID's final financial statement) of which it has already paid USD 800,000. It shall therefore pay to the Respondent USD 800,000 or any lower amount that may arise from ICSID's final financial statement. Further, the Claimants shall bear 75% of the Respondent's costs, i.e. USD 8,646,528.

VI. OPERATIVE PART

557. For the reasons set forth above, the Tribunal renders the following decision:

(1) The Decisions on Jurisdiction of 24 February 2014 are incorporated by reference into this Award;

(2) The 34 disputed documents listed in paragraph 108 of this Award are not authentic and unauthorized;

(3) The claims brought in this arbitration are inadmissible;

(4) The Claimants shall bear the fees and expenses of the Arbitral Tribunal as well as ICSID's administrative fees and thus pay to the Respondent USD 800,000 or any lower amount that may arise out of ICSID's final statement of account;

(5) The Claimants shall bear 75% of the expenses incurred by the Respondent in connection with these proceedings and thus pay to the Respondent USD 8,646,528;

(6) All other claims and requests are dismissed.

[Signed]

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Mr. Michael Hwang S.C.

Arbitrator

Date: 25 November 2016

[Signed]

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Prof. Albert Jan van den Berg

Arbitrator

Date: 28 November 2016

[Signed]

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Prof. Gabrielle Kaufmann-Kohler

President

Date: 29 November 2016