

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Churchill Mining Plc and Planet Mining Pty Ltd

v.

Republic of Indonesia

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

DECISION ON THE REQUEST FOR CONTINUED STAY OF ENFORCEMENT OF AWARD

Members of the ad hoc Committee

Judge Dominique Hascher, President of the *ad hoc* Committee
Professor Dr. Karl-Heinz Böckstiegel, Member of the *ad hoc* Committee
Professor Jean Kalicki, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Laura Bergamini

Date of dispatch to the Parties: June 27, 2017

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I. PROCEDURAL HISTORY

1. On March 31, 2017, Churchill Mining PLC and Planet Mining PTY Limited (“**Churchill**” and “**Planet**,” together, the “**Applicants**”) filed with the International Centre for Settlement of Investment Disputes (“**ICSID**”) an application for annulment (the “**Annulment Application**”) and request for stay of enforcement in respect to the award rendered on December 6, 2016 in *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40) (the “**Award**”). The Annulment Application was filed pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**Convention**”) and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”).
2. On April 11, 2017, the Secretary-General of ICSID registered the Annulment Application and notified to the Applicants and the Republic of Indonesia (the “**Respondent**” or the “**State**”) (together, the “**Parties**”) that the enforcement of the Award was provisionally stayed pursuant to Arbitration Rule 54(2).
3. On May 15, 2017, the *ad hoc* Committee (the “**Committee**”) was constituted in accordance with Article 52(3) of the Convention. Its members are: Judge Dominique Hascher (French), serving as President, Professor Karl-Heinz Böckstiegel (German) and Professor Jean Kalicki (U.S.). All members were appointed by the Chairman of the Administrative Council.
4. On the same date, the Parties were informed that the annulment proceeding was deemed to have begun on that date, and that Ms. Laura Bergamini, Legal Counsel, ICSID, would serve as Secretary of the Committee.
5. On May 21, 2017, the ICSID Secretariat wrote to the Parties regarding arrangements for the first session.
6. On May 23, 2017, the Committee invited the Parties to confer and agree upon a briefing schedule to address the Applicants’ request for stay of enforcement of the Award.
7. By communications of May 24, 26 and 27, 2017, the Parties transmitted to the Committee an agreed briefing schedule, which included one round of written submissions and oral arguments at the first session of the Committee (to be held on June 20, 2017).
8. On May 29, 2017, the Applicants filed their application for continued stay of enforcement of the Award along with exhibit A-47 and legal authorities ALA-23 through ALA-29 (“**Stay Request**”).
9. By letter of May 31, 2017, the Committee took note of the Parties’ agreement on the briefing schedule, and decided to hold the first session on June 20, 2017, by telephone conference. In light of the agreed timetable, the Committee also invited the Parties to confirm that they agreed to extend the provisional stay of enforcement and the 30-day time limit set forth in Arbitration Rule 54(2) until the date of the first session.
10. By emails of June 1 and 5, 2017, the Parties confirmed that they agreed to extend the provisional stay of enforcement and the time limit for the decision on the Stay Request until June 20, 2017.
11. By letter of June 4, 2017, the ICSID Secretariat circulated a draft agenda for the first session and a draft Procedural Order No. 1 providing *inter alia* directions on the conduct of the proceedings.

12. On June 12, 2017, the Respondent submitted its observations on the Stay Request along with exhibits R-269 through R-282, legal authorities RLA-272 through RLA-276, and selected exhibits from the arbitration proceedings (“**Observations**”).
13. On June 13, 2017, the Respondent submitted an amended version of the Observations.
14. On June 14, 2017, upon request from the State, the ICSID Secretariat transmitted one hard copy of the Observations to the Applicants.
15. On June 16, 2017, the Parties filed comments on the draft Procedural Order No. 1.
16. On June 20, 2017, the Committee held the first session. The Parties and the Members of the Committee discussed the draft Procedural Order No. 1. Both Parties presented oral pleadings on the continuation of the stay of enforcement of the Award, which were recorded.
17. On June 20, 2017, having deliberated by telephone call, the Committee ruled that the stay of enforcement was to continue until it issued a final determination on the matter.
18. This decision sets out the Committee’s final determination on the Stay Request.

II. THE POSITIONS OF THE PARTIES

A. Summary of the Applicants’ Position

19. The Applicants request that the enforcement of the Award be stayed without conditions pending a decision on the Annulment Application.¹
20. According to the Applicants, under Article 52(5) of the Convention and Arbitration Rule 54(4), ICSID committees enjoy a “considerable discretion” in deciding whether the enforcement of an award should be stayed.² Relying on *Occidental v. Ecuador*, the Applicants claim that committees have “normally granted” the stay³ and taken into account the following factors: (i) possible irreparable injury to the award debtor in case of immediate enforcement; (ii) hardship to either party in the event that the stay is continued or lifted; (iii) prospect of prompt enforcement of the award if it is upheld; (iv) strength of the case for or against annulment; and (v) whether there is a dilatory motive underlying the application for annulment.⁴ Quoting from *Kassardopoulus v. Georgia*, the Applicants argue that the committees aimed at striking the “proper balance between the interests of the parties in a given case and the legitimate right to enforce the award.”⁵
21. The Applicants put forward three main arguments in favour of the continuation of the stay: (i) the Annulment Application is *prima facie* serious and made in good faith; (ii) the balance of hardship favours the continuation of the stay; and (iii) the Applicants are willing to provide security.

¹ Stay Request, ¶¶ 20 and 3.

² Stay Request, ¶ 6.

³ Stay Request, ¶ 8.

⁴ Stay Request, ¶ 6.

⁵ Stay Request, ¶ 7.

22. First, the Applicants submit that they are seeking to annul the Award in good faith,⁶ relying on arguments *prima facie* serious set out in great detail in their lengthy Annulment Application.⁷ The Applicants deny that their request is dilatory and argue that they have submitted a detailed application for annulment to accelerate the conduct of the proceedings.⁸
23. Second, according to the Applicants, they will suffer “catastrophic” consequences if the stay is lifted.⁹ Specifically, the Applicants submit that, if the Respondent execute the Award, they will need to enter into voluntary administration (with an impact on their ability to exercise their right to apply for annulment)¹⁰ because their current assets include USD346,000, the shareholding in PT ICD, and a corresponding interest in PT ICD’s properties (including a landholding in East Kalimantan Province, the “**Port Land**”).¹¹
24. Relying on *Libananco v. Turkey*, the Applicants further argue that, if the stay is continued, the Respondent will suffer no hardship given that, in light of the Applicants’ dire financial condition, its position as an award creditor will not deteriorate.¹²
25. Finally, the Applicants state that, if the Committee is minded to make the stay of enforcement conditional on some form of security, they are “willing to pledge the Port Land (which has a cost value of USD1.757 million)” but they are not able to “offer security in any other form.”¹³
26. At the first session, the Applicants have further argued that, if they were ordered to post a security for the amount of the Award, the Respondent would be placed in a significantly better position than it would have been if annulment proceedings had not been filed. The Committee would *de facto* be ensuring the enforcement of the Award, a task which is not entrusted with it under the Convention.

B. Summary of the Respondent’s Position

27. The Respondent requests that the continuation of the stay be conditional on the posting of a bank guarantee (or other equivalent security) corresponding to the full amount due under the Award.¹⁴
28. According to the Respondent, the circumstances of the case only warrant a conditional stay of enforcement because: (i) the Annulment Application is dilatory and not *prima facie* serious; and (ii) the Respondent will suffer significant prejudice if no security is posted for the whole amount of the Award (while the Applicants will not suffer undue hardship if security is ordered).¹⁵
29. First, the Respondent submits that the Applicants have initiated this proceeding in order to delay and avoid compliance with the Award.¹⁶ According to the Respondent, the Annulment Application

⁶ Stay Request, ¶ 10.

⁷ Stay Request, ¶¶ 10 and 11.

⁸ Stay Request, ¶ 12.

⁹ Stay Request, ¶ 13.

¹⁰ Stay Request, ¶ 16.

¹¹ Stay Request, ¶¶ 13 and 14.

¹² Stay Request, ¶ 17.

¹³ Stay Request, ¶ 19.

¹⁴ Observations, ¶¶ 3, 12 and 21.

¹⁵ Observations, ¶ 6.

¹⁶ Observations, ¶ 11.

“is, on its face, frivolous” and *prima facie* not serious because the Applicants seek *de facto* to wipe out Tribunal’s factual findings on forgery.¹⁷

30. Second, the Respondent argues that, if no security is posted, “there is an extremely high risk” that the Applicants will not comply with the Award (because they have “no money and no source of business” and it is highly unlikely that their shareholders-investors will pay for the Award).¹⁸ Therefore, if the stay is unconditional, the State will be harmed because the Applicants will pay the costs of the annulment proceedings but will not be able to pay the amounts due under the Award.¹⁹
31. According to Respondent, the offer of the Port Land as a security is inadequate because the land is “worthless”²⁰ and “there is no evidence that the Applicants have any current ownership interest” in it.²¹ In any case, the Respondent submits that the offer would be inadequate even if the Port Land were worth US\$1.757 million because this value is “not even close” to the amount due under the Award.²² Finally, the Respondent argues that, contrary to *Libananco v. Turkey*, the Applicants can post a security for the full amount of the Award without suffering undue hardship because they can be financed by their shareholders (who have been supporting and funding the pursuit of the ICSID claim).²³

III. *AD HOC* COMMITTEE’S ANALYSIS

32. Article 52(5) of the Convention stipulates that: “[t]he Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.”
33. Arbitration Rule 54(4) provides that a request for stay of enforcement “shall specify the circumstances that require the stay ... A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.”
34. The *ad hoc* Committee finds it important to recall that, under the Convention, the award creditor has a right to enforcement. Indeed, Article 53(1) of the Convention makes particularly clear that awards have *res judicata* effect and are immediately enforceable from the date on which the certified copies are dispatched to the parties.²⁴ The award creditor needs to take no further step to secure the award’s enforceability besides what is stated at Article 54(2) of the Convention.²⁵ The award debtor must comply with the award. A stay of enforcement is not automatic and, whatever the practice of granting stays might be in the Applicants’ eyes,²⁶ a stay must remain exceptional.

¹⁷ Observations, ¶¶ 7 and 10.

¹⁸ Observations, ¶ 12.

¹⁹ Observations, ¶ 3.

²⁰ Observations, ¶¶ 4, 13 and 15.

²¹ Observations, ¶¶ 4, 13 to 15.

²² Observations, ¶ 15.

²³ Observations, ¶¶ 17 to 20.

²⁴ Article 53(1) of the Convention provides as follows: “[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

²⁵ Article 54(2) requires the award creditor to prove the authenticity of the award by furnishing the competent court or other authority of a Contracting State with a copy of the award certified by the Secretary-General of ICSID.

²⁶ Stay Request, ¶ 8.

Article 53(1) of the Convention explains that a stay of enforcement is an exception to the obligation of the parties to “abide by and comply with the terms of the award.” The award debtor must apply for a stay and advance the reasons which justify the stay.²⁷ There is no presumption in favor of maintaining the initial provisional stay of enforcement, as noted by the *ad hoc* Committee in *Sempra v. Argentina* referred to by the Respondent.²⁸ If a stay is granted, the award may no more be subject to the enforcement procedure of Article 54 of the Convention until the *ad hoc* committee decides on the application for annulment.

35. The Applicants seek an unconditional stay. The Respondent replies that it does not oppose the continuation of the stay pending the Committee’s decision on the Annulment Application “as long as the Applicants provide proper security for the whole amount of the Award.”²⁹ Although there is no agreement of the Parties about the stay, insofar as the Respondent recognizes that “the circumstances warrant a conditional, not unconditional, stay of enforcement,”³⁰ it is pointless to discuss at length the circumstances which require a stay. Suffice it to note that it is not seriously debated between the Parties that the financial situation of the Applicants is precarious. Churchill declares that it has USD346,000 in its bank accounts in Australia and the United Kingdom. Other assets include 95% shareholding of PT ICD, the Indonesian company through which the Applicants made and operated their investment, as well as a 95 % interest in the Port Land property of PT ICD purchased for USD1.757 million, and the intellectual property worth USD67.95 million which Churchill authored and commissioned for the EKCP coal exploration project.³¹ Planet has no other asset than a 5% shareholding in PT ICD. In light of these elements, the Applicants stress that, if enforcement was sought today, they would have to seek protection by entering into voluntary administration. The Respondent acknowledges that it is unlikely that the Applicants would comply with the Award in light of their situation.³² The financial situation of the award debtor is a circumstance which may justify a stay if enforcement would have manifestly excessive consequences. This is the case here.
36. The Parties have discussed the good faith and/or dilatory nature of the Application for Annulment. The Applicants say that their Annulment Application is *prima facie* serious and not without basis.³³ The Respondent replies that the Annulment Application is frivolous, as shown by the factual determinations made by the Tribunal and inspired by the desire to avoid compliance with the Award.³⁴ This is beyond the point. The *ad hoc* Committee in *Enron v. Argentina* quoted by the Applicants held that “the Committee must assume that any application for annulment is made in good faith, and that the application for a stay is a justified exercise of the applicant’s procedural rights of defence.”³⁵ As remarked by another *ad hoc* Committee referred to by both Parties,³⁶ these arguments would throw the *ad hoc* Committee into an examination of the regularity or the soundness of the reasons of the impugned award, when the Committee’s task in this Decision is

²⁷ Arbitration Rule 54(4).

²⁸ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (March 5, 2009), ¶ 27.

²⁹ Observations, ¶ 3.

³⁰ Observations, ¶ 6.

³¹ Stay Request, ¶ 14.

³² Observations, ¶ 12.

³³ Stay Request, ¶ 11.

³⁴ Observations, ¶¶ 7 to 11.

³⁵ *Enron Corporation Ponderosa Asset, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (October 7, 2008), ¶ 47.

³⁶ *Ioannis Kardassopoulos and Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award (November 12, 2010), ¶ 26.

limited to balancing the consequences of the enforcement of the Award on the Applicants' situation and those of the postponement of the Respondent's right to payment of the Award.

37. The conditioning of a stay of enforcement is justified when there are legitimate fears of non-enforcement. The State declares that, given the financial situation of the Applicants, there is a reasonable doubt of compliance with the Award. The State requires that the Applicants post security for the entire amount of the Award.³⁷ The Applicants reply that a security for the full amount of the Award would frustrate their right of access to justice, and put the State in a far better position than without annulment proceedings. They also stress that the State's interests are not jeopardized and that there would not be any significant deterioration, should the stay be continued. They add that the State already has the benefits of the survey work which the Applicants effectuated regarding the EKCP project.³⁸
38. The Committee agrees with the Applicants that their access to justice cannot be frustrated. Access to justice refers here to the right to apply for annulment provided by Article 52 of the Convention. Such right cannot be impaired by the conditions imposed for the continuation of the stay. A balanced approach between the right of access to justice on the one hand and the right to enforcement on the other must be effectuated by *ad hoc* committees. The Applicants contend that the conditions for the stay should not improve the situation of the Respondent which would be the case if the security were to cover the whole amount of the Award. The Committee observes that, on a general plane, the better position which the award creditor obtains by conditioning the stay is made possible by the award debtor having requested a stay of enforcement in the first place. Besides, the pro-enforcement policy of the Convention expressed in Article 54 of the Convention is another advantage given to the award creditor. Additionally, contrary to what the Applicants proclaim, the Committee would not more be involved in the enforcement of the Award by ordering the posting of security than it is already in deciding on the deferring payment of the Award pursuant to the Stay Request.
39. The need for posting security must be ascertained in relation to securing an effective enforcement of the award. The Applicants' financial weakness is not an excuse for non-payment of the Award. However, a guarantee of the entire amount of the Award would be too onerous for the Applicants in light of their financial situation. The Respondent points to the wealthy shareholders of Churchill who, the Respondent says, are able to provide a security for the full amount of the Award.³⁹ There is no reason however to pierce the corporate veil, and there is no contention that the Applicants have voluntarily organized their insolvency to evade their commitment to enforce the Award.
40. The Applicants propose a pledge on the Port Land property located in the Regency of East Kutai, East Kalimantan Province, as security worth USD1.757 million. Port Land designates the land owned by PT TCUP, a subsidiary of PT ICD, for developing an ocean port coal export facility for the EKCP project. The Respondent avers that the Applicants' ownership interests in Port Land is not demonstrated and that the value of the property amounts to only USD2,000 as mentioned in the Interim Report issued by Churchill for the period July 1, 2016 to December 31, 2016 released on March 31, 2017.⁴⁰

³⁷ Observations, ¶ 12.

³⁸ Stay Request, ¶¶ 17 and 18.

³⁹ Observations, ¶¶ 17 to 19.

⁴⁰ Churchill Mining Plc, Interim Report for the Period July 1, 2016 to December 31, 2016, released on March 31, 2017, Respondent Exhibit R-269.

41. The Applicants explain that the Half Year Report for 2016 was prepared in accordance with the International Financial Reporting Standards and International Accounting Standards Board of the EU and that the writing down of the prize of the Port Land property complies with these accounting rules in light of the revocation of the mining licenses in EKCP and the outcome of the Award. The *ad hoc* Committee regards this explanation concerning the evaluation of the Port Land property as valid. For the above referred accounting reasons, the Port Land property cannot be regarded as worthless by others than Churchill, including the State. The Applicants have also clarified that the Port Land property is owned by PT TCUP, a wholly owned subsidiary of PT ICD, in which Churchill has 95% shares and Planet has the remaining 5%. The Respondent contends that the shares in PT TCUP via PT ICD are worth no more than the Port Land itself. The Applicants however also offer to directly pledge the Port Land property.⁴¹
42. The Committee decides that the latter option of a direct pledge of Port Land is a satisfactory condition for the continuation of the stay until the date on which the Committee issues its decision on the pending Annulment Application submitted by the Applicants. Consequently, the Applicants shall use their best efforts to pledge the Port Land and shall provide an update to the ICSID Secretariat within 15 days. Copy of the pledge shall be notified to the Committee and the ICSID Secretariat within 30 days from the date of this Decision. The stay shall be automatically terminated if the direct pledge of Port Land is not provided for.

IV. DECISION

43. In light of the above, the Committee decides that:
- a. The stay on enforcement of the Award of December 6, 2016 in ICSID Case No. ARB/12/14 and ARB/12/40 will continue pending a decision on the Annulment Application, and subject to the condition set out above of the direct pledge by the Applicants of the Port Land property located in the East Kalimantan Province (Indonesia).
 - b. If the condition set out above is not complied with, the stay on enforcement shall be automatically terminated.
 - c. The costs of the Stay Request are reserved until the conclusion of the annulment proceeding.

⁴¹ Stay Request, ¶ 19.

[Signed]

Professor Dr. Karl-Heinz Böckstiegel
Member of the *ad hoc* Committee

[Signed]

Professor Jean Kalicki
Member of the *ad hoc* Committee

[Signed]

Judge Dominique Hascher
President of the *ad hoc* Committee