

THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE No. ARB/20/11 (ANNULMENT PROCEEDINGS)

PETERIS PILDEGOVICS AND SIA NORTH STAR

CLAIMANTS

V.

THE KINGDOM OF NORWAY

RESPONDENT

REQUEST FOR CONTINUATION OF STAY OF ENFORCEMENT

10 APRIL 2024

Savoie Arbitration s.e.l.a.s.u.
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I. INTRODUCTION

1. Pursuant to Rule 54(2) of the 2006 ICSID Arbitration Rules, Mr. Peteris Pildegovics and SIA North Star, the applicants in the present ICSID annulment proceedings (**Applicants**), respectfully submit this Request for Continuation of the Stay of Enforcement of the Award dated 22 December 2023 in ICSID Case No. ARB/20/11.¹
2. In their application for Annulment of 22 February 2024, Applicants asked for the following request for relief:²
 - The provisional stay in the enforcement of all of the Award;
 - That the *ad hoc* Committee confirm the stay of enforcement of all of the Award, without condition;
3. On 27 February 2024, the Secretary-General confirmed the registration of the annulment application as well as the provisional stay of enforcement of the Award.
4. The Applicants have already asked that the *ad hoc* Committee confirm the stay of enforcement. Nonetheless, Applicants note that Rule 54(2) provides:

As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.
5. Out of an abundance of caution and for the sake of ensuring efficient and prompt proceedings, Applicants hereby request the continuation of the stay of enforcement.
6. This Application provides: (II) an overview of the law on stay of enforcement in ICSID annulments; (III) the reasons why the stay must be continued without condition; (IV) Applicants' position on scheduling; and (V) Applicants' request for relief.

¹ Award, 22 December 2023, ICSID Case ARB/20/11, **A-0068**.

² Request for Annulment, 22 February 2024, ICSID Case ARB/20/11, **A-0069**, para. 163.

II. THE LAW ON STAY OF ENFORCEMENT IN ICSID ANNULMENT PROCEEDINGS

7. The framework on stays of enforcement of ICSID awards pending annulment proceedings is set out by Article 52(5)³ and 53(1)⁴ of the ICSID Convention and Rule 54⁵ of the 2006 ICSID Arbitration Rules.
8. In short, an ICSID annulment committee “*may*” stay the enforcement of the award pending the annulment decision “*if it considers that the circumstances so require*”, pursuant to Article 52(5) of the Convention.
9. There is, however, no “*jurisprudence constante*” on the issue of stay of enforcement meaning each case is fact-specific **(A)**. In any event, the *ad hoc* Committee should take special notice of publicly available decisions on the continuation of stays requested by investor-claimants in respect of costs awards **(B)**. More generally, *ad hoc* committees will normally assume annulment applications are made in good faith and are not frivolous **(C)**. Moreover, in their analysis of whether the stay should be continued, *ad hoc* committees will essentially take into consideration: risk of non-payment, risk of non-recoupment, and balance of hardship including an applicant’s right of access to justice **(D)**. Finally, balance of hardship, or proportionality, also applies to whether a stay is continued with or without conditions **(E)**.

³ ICSID Convention, Article 52(5) (“*The 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.*”).

⁴ ICSID Convention, Article 53(1) (“*The 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.*”).

⁵ ICSID Arbitration Rules, Rule 54 (“(1) *The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request. (2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated. (3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3). (4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations. (5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.*”).

A. THERE IS NO “JURISPRUDENCE CONSTANTE” ON CONTINUATION OF A STAY OF ENFORCEMENT OF ICSID AWARDS

10. Whether a stay of enforcement is continued by an ICSID *ad hoc* Committee is a question of fact for each case. This reflects the terms of Article 52(5) of the Convention.⁶
11. As put by the *NextEra ad hoc* Committee,⁷ there is no “*jurisprudence constante*” on the issue amongst ICSID *ad hoc* committees. Indeed, some *ad hoc* Committees have held that continuation of a stay of enforcement is essentially “*automatic*”⁸ while others have held that such continuation should only be “*exceptional*”⁹.
12. ICSID’s most recent report on annulment also shows a lack of trend on this issue. Moreover, many decisions on stay of enforcement are not public.¹⁰

⁶ ICSID Convention, Article 52(5) (“*The 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.*”); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Annulment Proceeding, Decision on Stay of Enforcement of the Award, 6 April 2020, **AL-0001**, para. 76 (“*The Committee’s decision remains one based on the set of particular factual circumstances of the case at hand.*”); *Libananco Holding Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Annulment Proceeding, Decision on Applicant’s Request for Continued Stay of Enforcement of the Award, 7 May 2012, **AL-0002**, para. 43 (“*The Committee is aware that some ad hoc annulment committees have considered that, “absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic.” However this does not follow from the ICSID Convention or the Arbitration Rules, and the Committee considered that its decision should be based on an assessment of all relevant circumstances.*”).

⁷ *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Annulment Proceeding, Decision on Stay of Enforcement of the Award, 6 April 2020, **AL-0001**, para. 76 (“*The Committee finds that no jurisprudence constante can be discerned and prior decisions of other ad hoc committees are non-binding on this Committee.*”).

⁸ *Victor Pey Casado and Fondation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Republic of Chile’s Application for a Stay of Enforcement of the Award, 5 May 2010, **AL-0003**, para. 25, p. 11 (“*a review of the many decisions by ad hoc annulment committees since the MINE decision in 1988 leads the Committee to the conclusion that, absent unusual stances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic*”), citing to: *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Annulment Proceedings, Decision on the Stay of Enforcement of the Award, 30 November 2004, 20 ICSID Rev.—FILJ 587 (2005), **AL-0004**, para. 28; *Enron v. Argentine Republic*, ICSID Case No. ARB/01/3, Annulment Proceedings, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 7 October 2008, **AL-0005**, para. 42.

⁹ *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, 27 June 2018, **AL-0006**, para. 34 (“*a stay must remain exceptional*”).

¹⁰ ICSID, “Updated Background Paper on Annulment”, March 2024, **AL-0007**, pp. 19-28 (including table of all 120 ICSID stay decisions as at December 2023, at pp. 23-28).

B. THE AD HOC COMMITTEE SHOULD TAKE SPECIAL NOTICE OF PUBLIC DECISIONS ON CONTINUATION OF STAYS OF ENFORCEMENT REQUESTED BY INVESTOR-CLAIMANTS REGARDING COSTS AWARDS

13. Despite the absence of “*jurisprudence constante*”, this *ad hoc* Committee should take particular note of publicly available decisions on requests for continuation of a stay of enforcement of ICSID costs awards, by investor-claimants who seek annulment.
14. Requests, by an investor-claimant in an ICSID arbitration, for continuation of a stay of enforcement of an adverse costs award is a small subset of all continuation requests. The vast majority of stay requests are made by States who have lost on the merits and face often large awards.¹¹ While some general principles may apply to all continuation of stay requests, the applicable considerations are often different regarding whether a stay should be granted to an investor or to a state. This justifies paying special attention to the three decisions publicly available which contain full reasoning on whether a stay of enforcement of a costs award against an investor should be continued. Those decisions are:
- *Libananco Holding Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Annulment Proceeding, Decision on Applicant’s Request for Continued Stay of Enforcement of the Award, 7 May 2012, **AL-0002 (Libananco)**
 - *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Second Annulment Proceeding, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, **AL-0008 (Pey Casado)**
 - *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, 27 June 2018, **AL-0006 (Churchill Mining)**
15. Moreover, in one additional case an annulment decision contains extracts of some of the committee’s reasoning from its stay decision even though the full facts underlying the decision are not publicly available:

¹¹ ICSID, “Updated Background Paper on Annulment”, March 2024, **AL-0007**, pp. 19-28.

- *Mr. Raymond Charles Eyre and Montrose Developments (Private) Limited v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Annulment Proceedings, Decision on Stay of Enforcement of Award, 16 July 2020 (cited at para. 14-15 of the Decision on Annulment, 2 December 2020, **AL-0009**) (*Eyre*)

16. The 2024 ICSID Enforcement Report appears to list 21 cases where an investor requested a continuation of a stay of enforcement of an ICSID award, out of 120 cases where *ad hoc* Committees rendered stay decisions.¹² The report indicates that no information is publicly available for nine (9) such cases.¹³ Besides from the four decisions which are publicly available in full or in part (*Libananco*, *Pey Casado*, *Churchill Mining* and *Eyre*), of the eight (8) remaining ones,¹⁴ there is only brief mention of aspects of the continuation decision in the *ad hoc* Committee's decision, without any reference to relevant principles or reasoning.

C. **AD HOC COMMITTEES ASSUME ANNULMENT APPLICATIONS ARE MADE IN GOOD FAITH AND ARE NOT FRIVOLOUS**

17. A number of *ad hoc* Committees have considered that they must assume an annulment application has been made in good faith in the context of a request for continuation of

¹² ICSID, "Updated Background Paper on Annulment", March 2024, **AL-0007**, pp. 23-28 (see the cases listed in the table). These are the applications initiated by investor-claimants *Pey Casado* (case No. 7 in table), *Libananco* (case No. 28 in table), *RSM* (case No. 31 in table), *Caratube* (case No. 34 in table), *Iberdrola* (case No. 36 in table), *Kilic* (case No. 38 in table), *Rizvi* (case No. 44 in table), *Churchill Mining* (case No. 64 in table), *Blue Bank* (case No. 65 in table), *Orascom* (case No. 68 in table), *Caratube* and *Devincci* (case No. 71 in table), *Foud Alghanim* (case No. 76 in table), *Cortec Mining* (case No. 92 in table), *Abed El Jaouni* (case No. 93 in table), *Raymond Charles Eyre and Montrose Developments* (case No. 102 in table), *Attila Dogan* (case No. 106 in table), *Edmond Khudyan and Arin Capital & Investment* (case No. 112 in table), *Almasryia* (case No. 113 in table), *Rizzani de Echer* (case No. 116 in table), *Rasia FZE* (case No. 117 in table), *BRIF TRES* (case No. 118 in table). Note that the *Caratube and Devincci* stay decision of 12 December 2019 listed as No. 71 and initiated by the investor was a case where the investor sought to terminate the provisional stay sought by the respondent state.

¹³ ICSID, "Updated Background Paper on Annulment", March 2024, **AL-0007**, pp. 23-28 (see the cases listed in the table). These are the applications initiated by investor-claimants *Rizvi* (case No. 44 in table), *Foud Alghanim* (case No. 76 in table), *Abed El Jaouni* (case No. 93 in table), *Attila Dogan* (case No. 106 in table), *Edmond Khudyan and Arin Capital & Investment* (case No. 112 in table), *Almasryia* (case No. 113 in table), *Rizzani de Echer* (case No. 116 in table), *Rasia FZE* (case No. 117 in table), *BRIF TRES* (case No. 118 in table).

¹⁴ ICSID, "Updated Background Paper on Annulment", March 2024, **AL-0007**, pp. 23-28 (see the cases listed in the table). These are the applications initiated by investor-claimants *RSM* (case No. 31 in table), *Caratube* (case No. 34 in table), *Iberdrola* (case No. 36 in table), *Kilic* (case No. 38 in table), *Blue Bank* (case No. 65 in table), *Orascom* (case No. 68 in table), *Caratube and Devincci* (case No. 71 in table), *Cortec Mining* (case No. 92 in table). Note that the *Caratube and Devincci* stay decision of 12 December 2019 listed as No. 71 and initiated by the investor was a case where the investor sought to terminate the provisional stay sought by the respondent state.

a stay of enforcement.¹⁵ The *ad hoc* Committee in *Libananco* and *Churchill Mining* gave extensive benefit of the doubt to annulment applicants in this respect.¹⁶ At the same time, the *Pey Casado* second *ad hoc* Committee noted that good faith annulment applicants deserve not only the benefit of the doubt regarding the continuation of the stay, but also to have it without condition.¹⁷

D. IN DECIDING WHETHER TO CONTINUE STAYS OF ENFORCEMENT, AD HOC COMMITTEES CONSIDER: RISK OF NON-PAYMENT, RISK OF NON-RECOUPMENT, AND BALANCE OF HARDSHIP INCLUDING APPLICANTS' RIGHT OF ACCESS TO JUSTICE

18. Many *ad hoc* Committees, such as recently in *Eyre*, addressed whether to continue a stay based on the following three questions: whether there is a risk of non-payment of the award, whether there is a risk of non-recoupment by a party paying an award should it be annulment, and what is the balance of hardship.¹⁸
19. In respect of the risk of non-payment of an award, the *Libananco*, *Pey Casado* and *Churchill Mining* and *Eyre ad hoc* Committees all considered this question. It was held that where the continuation of a stay did not increase the risk of non-payment, or did

¹⁵ *Libananco Holding Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Annulment Proceeding, Decision on Applicant's Request for Continued Stay of Enforcement of the Award, 7 May 2012, **AL-0002**, para. 42, 48-49; *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Second Annulment Proceeding, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, **AL-0008**, para. 72; *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, 27 June 2018, **AL-0006**, para. 36.

¹⁶ *Libananco Holding Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Annulment Proceeding, Decision on Applicant's Request for Continued Stay of Enforcement of the Award, 7 May 2012, **AL-0002**, para. 49 ("The Committee is not in a position at this stage of the proceeding to question the seriousness of the alleged grounds for annulment and there are no circumstances that would justify the assessment as a preliminary matter of whether or not the application is likely to succeed. Consequently, the Committee finds no basis for declaring the Stay Request to be dilatory or vexatious."); *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, 27 June 2018, **AL-0006**, para. 36 (citing to the statement of the *Enron v. Argentina ad hoc* Committee 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").

¹⁷ *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Second Annulment Proceeding, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, **AL-0008**, para. 72 ("The Committee is even more willing to follow this approach because it believes that it would be inappropriate to reject a request for a stay when the applicant pursues its legitimate right to have the award examined for fundamental institutional and procedural propriety in good faith and absent dilatory intentions.").

¹⁸ *Mr. Raymond Charles Eyre and Montrose Developments (Private) Limited v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Annulment Proceedings, Decision on Stay of Enforcement of Award, 16 July 2020, cited in the Decision on Annulment, 2 December 2020, **AL-0009**, paras. 14-15.

not increase it in any significant way, this weighed in favour of maintaining the stay of enforcement.¹⁹

20. The risk of non-recoupment of a paid award should it be annulled after it was paid is a matter that generally arises more where a State raises the possibility that an investor will not repay a large award.
21. In *Libananco*, *Pey Casado*, *Churchill Mining* and *Eyre*, the balance of hardship always weighed in favour of an investor-claimant and its right of access to justice to pursue an annulment. Facing vastly different amounts of costs awards,²⁰ the *ad hoc* Committee considered in all four cases that it would be disproportionate not to continue a stay of enforcement where terminating the stay would hinder the possibility of the investor-claimant to put its annulment case before an *ad hoc* Committee.²¹

¹⁹ *Libananco Holding Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Annulment Proceeding, Decision on Applicant's Request for Continued Stay of Enforcement of the Award, 7 May 2012, **AL-0002**, para. 60 ("the Committee finds no evidence showing that Respondent's chances of obtaining enforcement of the Award would deteriorate as a result of the stay of enforcement, if the Application should eventually be rejected. For this reason, the stay of enforcement cannot be expected to place a heavy burden on Respondent."); *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Second Annulment Proceeding, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, **AL-0008**, para. 75; *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, 27 June 2018, **AL-0006**, paras. 37-38; *Mr. Raymond Charles Eyre and Montrose Developments (Private) Limited v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Annulment Proceedings, Decision on Stay of Enforcement of Award, 16 July 2020, cited in the Decision on Annulment, 2 December 2020, **AL-0009**, para. 14.

²⁰ The adverse costs awards, before interest, were: **USD 15,602,500.00** in *Libananco*; **USD 182,472.19** in *Pey Casado*; **USD 9,446,528.00** in *Churchill Mining*; **GBP 338,162.34** in *Eyre*. See: *Libananco Holding Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, **AL-0010**, para. 570.3; *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Second Annulment Proceeding, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, **AL-0008**, para. 17; *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, **AL-0011**, para. 557; *Mr. Raymond Charles Eyre and Montrose Developments (Private) Limited v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Award, 5 March 2020, **AL-0012**, para. 316.

²¹ *Libananco Holding Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Annulment Proceeding, Decision on Applicant's Request for Continued Stay of Enforcement of the Award, 7 May 2012, **AL-0002**, para. 61; *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Second Annulment Proceeding, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, **AL-0008**, para. 72; *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, 27 June 2018, **AL-0006**, para. 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."); *Mr. Raymond Charles Eyre and Montrose Developments (Private) Limited v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Annulment Proceedings, Decision on Stay of Enforcement of Award, 16 July 2020, cited in the Decision on Annulment, 2 December 2020, **AL-0009**, para. 14.

E. BALANCE OF HARDSHIP AND PROPORTIONALITY APPLY TO WHETHER STAY IS CONTINUED WITH OR WITHOUT CONDITIONS

22. In *Libananco, Pey Casado, Churchill Mining and Eyre*, the balance of hardship, or proportionality analysis was also held to apply to whether the stay of enforcement was continued with or without conditions.²²
23. Moreover, in all reported cases where an investor-claimant sought a continuation of a stay of enforcement of an adverse costs award, the only case in which it was granted under the condition of posting security was in *Churchill Mining* where the investor proposed itself such condition. In that case, the investor proposed a pledge on certain of its assets.²³ It can also be noted that in that case the investor was held by the arbitral tribunal to have committed significant fraud with respect to documents fundamental to the existence of an investment.²⁴ This may have been a factor considered by the investor in proposing a pledge of assets. In other reported cases, *ie Libananco and Pey Casado*, the stay of enforcement was continued without condition.²⁵

III. THE STAY MUST BE CONTINUED WITHOUT CONDITIONS

24. Applicants Mr. Pildegovics and SIA North Star request that the stay be continued without condition.

²² *Ibid.*

²³ *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, 27 June 2018, **AL-0006**, paras. 21, 40.

²⁴ *Churchill Mining Plc and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016, **AL-0011**, para. 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, all of them were filed by the Claimants in support of their case.*”).

²⁵ In *Eyre*, it seems the continuation was granted on the basis of an undertaking by Mr. Eyre as to “*the availability of funds*”: *Mr. Raymond Charles Eyre and Montrose Developments (Private) Limited v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Annulment Proceedings, Decision on Stay of Enforcement of Award, 16 July 2020, cited in the Decision on Annulment, 2 December 2020, **AL-0009**, para. 14. At the same time the sum at issue was relatively small, in the amount of GBP 338,162.34, which is significantly lower than the costs award in the present case. That said, the costs award in the present case remains significantly lower than in *Libananco*, where it was upwards USD 15 million, and the stay was continued without condition.

A. THE ABSENCE OF “JURISPRUDENCE CONSTANTE” ON THE ISSUE OF CONTINUATION OF STAY OF ENFORCEMENT OF ICSID AWARDS DOES NOT PREVENT GRANTING CONTINUATION WITHOUT CONDITIONS

25. Under any view of how relevant caselaw should be applied, Applicants’ request for continuation of the stay should be granted without condition.
26. This would be the case should the Committee apply the caselaw holding that continuation is essentially “*automatic*”.²⁶ Even if the stay is based on the specific circumstances of each case, Applicants’ request must be granted without condition.

B. THE AD HOC COMMITTEE SHOULD TAKE SPECIAL NOTICE OF PUBLIC DECISIONS ON CONTINUATION OF STAYS OF ENFORCEMENT REQUESTED BY INVESTOR-CLAIMANTS REGARDING COSTS AWARDS

27. In this case, like in all reported cases where an investor-claimant requested continuation of the stay of enforcement without condition, the Committee should also grant it without condition. This will uphold Applicants’ right of access to justice while also being in line with the caselaw applying the parties’ balance of hardship.

C. AD HOC COMMITTEES ASSUME ANNULMENT APPLICATIONS ARE MADE IN GOOD FAITH AND ARE NOT FRIVOLOUS

28. While *ad hoc* Committees presume an annulment application was made in good faith, the *Pey Casado* Committee underscored that an additional consideration in favour of continuing a stay is where the annulment is made by a good faith applicant who is not merely trying to delay payment of a costs award.²⁷
29. There are a number of glaring issues with the Award which can be noted on a *prima facie* basis:

²⁶ *Victor Pey Casado and Fondation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Republic of Chile’s Application for a Stay of Enforcement of the Award, 5 May 2010, **AL-0003**, para. 25, p. 11 (“a review of the many decisions by *ad hoc* annulment committees since the MINE decision in 1988 leads the Committee to the conclusion that, absent unusual stances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic”), citing to: *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Annulment Proceedings, Decision on the Stay of Enforcement of the Award, 30 November 2004, 20 ICSID Rev.—FILJ 587 (2005), **AL-0004**, para. 28; *Enron v. Argentine Republic*, ICSID Case No. ARB/01/3, Annulment Proceedings, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 7 October 2008, **AL-0005**, para. 42.

²⁷ *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Second Annulment Proceeding, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, **AL-0008**, para. 72.

- The Tribunal manifestly imposed double compensation in respect of Norway's ICSID arbitration costs, ruling Claimants must pay both the costs advanced by Norway and the costs already paid by Claimants;²⁸
- The Tribunal awarded interest on costs even though Norway did not seek such interest;²⁹
- The Tribunal failed to notify to Claimants a procedural decision key to Claimants' rights a few weeks before the Award was made, preventing Claimants to take steps in relation to such decision, the full contents of which are still not known to Claimants even though such decision is integral to the Award's reasoning and result;³⁰
- The Tribunal refused to decide some of the matters put by Claimants to it, on the basis of the so-called *Monetary Gold* principle, thus creating a denial of justice, as Claimants have no other judicial or arbitral recourse.³¹

30. These four issues, which together taint the Award in its entirety, along with the other grounds for annulment also raised,³² certainly demonstrate the seriousness of Applicants' position, if only on a *prima facie* basis.

D. IN DECIDING WHETHER TO CONTINUE STAYS OF ENFORCEMENT, *AD HOC* COMMITTEES CONSIDER: RISK OF NON-PAYMENT, RISK OF NON-RECOUPMENT, AND BALANCE OF HARDSHIP INCLUDING APPLICANTS' RIGHT OF ACCESS TO JUSTICE

31. On the factors established by other annulment Committees, it is clear that the balance of hardship, as well as the other relevant factors, substantially support the continuation of the stay of enforcement.

32. The first factor considered is whether the continuation of the stay would create for Norway a risk of non-payment of the costs award. The *Libananco*, *Pey Casado* and

²⁸ Request for Annulment, 22 February 2024, ICSID Case ARB/20/11, **A-0069**, paras. 39-42.

²⁹ Request for Annulment, 22 February 2024, ICSID Case ARB/20/11, **A-0069**, paras. 37-38.

³⁰ Request for Annulment, 22 February 2024, ICSID Case ARB/20/11, **A-0069**, paras. 31-35, 91-102.

³¹ Request for Annulment, 22 February 2024, ICSID Case ARB/20/11, **A-0069**, paras. 44-50.

³² See generally Request for Annulment, 22 February 2024, ICSID Case ARB/20/11, **A-0069**.

Eyre committees held that if the continuation does not increase the risk of non-payment then the continuation should be granted.³³

33. In the present case, there is no evidence that granting the continuation of the stay will decrease Norway's chances of obtaining payment on the costs award. North Star still has assets. Moreover, as a physical person, Mr. Pildegovics remains personally liable for the Award.
34. The second factor is not of great relevance in cases where an investor-claimant seeks to continue the stay of enforcement of an adverse ICSID costs award.
35. As to the third factor, the balance of hardship, it greatly weighs in favour of Applicants, who are a physical person and a small enterprise. EU law recognizes access to justice for both physical persons and small and medium enterprises, including in the context of investment treaty arbitration.³⁴
36. Further, Norway has already threatened to enforce the Award against Applicants.³⁵ Having to face Norway's attempts to enforce the Award while the annulment is ongoing will not create the proper atmosphere for productive and serene proceedings. Terminating the stay would also have a direct and real impact on Applicant's right of access to justice.
37. Even if the Award is not annulled in full, it is almost certain that the costs part of the Award will have to be annulled, at least in significant part. For example, paragraph 626(3) of the Award must necessarily be annulled because of the manifestly erroneous

³³ *Libananco Holding Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Annulment Proceeding, Decision on Applicant's Request for Continued Stay of Enforcement of the Award, 7 May 2012, **AL-0002**, para. 60 ("the Committee finds no evidence showing that Respondent's chances of obtaining enforcement of the Award would deteriorate as a result of the stay of enforcement, if the Application should eventually be rejected. For this reason, the stay of enforcement cannot be expected to place a heavy burden on Respondent."); *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Second Annulment Proceeding, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, **AL-0008**, para. 75; *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, 27 June 2018, **AL-0006**, paras. 37-38; *Mr. Raymond Charles Eyre and Montrose Developments (Private) Limited v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Annulment Proceedings, Decision on Stay of Enforcement of Award, 16 July 2020, cited in the Decision on Annulment, 2 December 2020, **AL-0009**, para. 14.

³⁴ *Opinion 1/17*, Court of Justice of the European Union, 30 April 2019, **AL-0013**, para. 58 ("Further, the CETA does not currently offer the possibility of the grant of legal aid, although the right to such aid in so far as necessary to ensure access to justice is expressly laid down in the third paragraph of Article 47 of the Charter, the Court having held, in the judgment of 22 December 2010, DEB (C-279/09, EU:C:2010:811), that that right extends to enterprises.").

³⁵ Letter of Norway to Claimants, 12 January 2024, **A-0119** ("The Claimants are requested to pay the amount [of the costs award] in full no later than 20 February 2024 to avoid enforcement of payment.").

accounting of arbitration costs based on contradictory reasons,³⁶ just like paragraph 626(5) which grants interest that was not sought and which Claimants were unable to argue against.³⁷ This represents over 40% of the costs award of USD 597,307.04 (paragraph 626(3)), EUR 809,724.07 (paragraph 626(4)) and interest (paragraph 626(5)). It would be patently unfair for Applicants to face, while annulment proceedings are pending, a costs award of which almost half is bound to be annulled.

38. Further, the Applicants have been put in a very difficult financial situation by Norway itself. The present case presents the unusual situation where the Applicants' state of nationality, through the European Union (and its fisheries jurisdiction), indirectly supports the claim in various ways.
39. Latvia and the EU have protested Norway and the Russian Federation's measures excluding EU crabbers since 2015. The EU has stated in a regional fisheries organization, NEAFC, that EU vessels who had participated in the Loophole snow crab fisheries, such as North Star, had "*acquired rights*" and needed to be compensated.³⁸ Latvia expressed its surprise to Norway about the measures leading to the closure of the Loophole to EU interests.³⁹ In October 2023, the EU went so far as making a diplomatic protest against Norway regarding a 20 March 2023 Norwegian Supreme Court decision refusing one of the Claimants, SIA North Star, snow crab fishing licenses.⁴⁰
40. It can also be mentioned that the US State Department tried to broker a meeting between Mr. Levanidov, Mr. Pildegovics' cousin and business partner, in early 2022, to resolve a parallel matter.⁴¹ However, the response received by the State Department from Mr. Jervell, Norway's lead counsel, was that Norway's Ministry of Foreign Affairs allegedly was not responsible for the measures leading to the lack of snow crab deliveries to Mr. Levanidov's factory in Baatsfjord, Seagourmet.

³⁶ Application for Annulment, 22 February 2024, ICSID Case ARB/20/11, **A-0069**, paras. 39-42.

³⁷ Application for Annulment, 22 February 2024, ICSID Case ARB/20/11, **A-0069**, paras. 37-38.

³⁸ Report of the 35th NEAFC Meeting, 14-18 November 2016, **C-0214**, p. 18; Claimants' Reply to Respondent Counter-Memorial and Counter-Memorial on Jurisdiction, 28 February 2022, para. 751.

³⁹ Minutes of the meeting between the Norwegian Embassy and the Latvian Foreign Ministry, 4 November 2015, **C-0206**, p. 2 (Norwegian Embassy's minutes of this meeting showing that the change in regulation of snow crab by Norway caused "*genuine surprise and indignation*" on the Latvian side).

⁴⁰ EU Diplomatic Note to Norway, 30 October 2023, **A-0120**.

⁴¹ Email from Nicole G. Johnson to Pierre-Olivier Savoie, 17 March 2022, **A-0121**; Email from Nicole G. Johnson to Pierre-Olivier Savoie, 18 March 2022, **A-0122**; Email from Nicole G. Johnson to Pierre-Olivier Savoie, 30 March 2022, **A-0123**.

41. The Applicants are in a situation where the EU and Latvia believe they should be compensated, and the US is ready to broker a meeting in a related matter, but where Norway continues to refuse to compensate Claimants. At the same time, the first Tribunal entirely refused to decide many of the questions before it, allegedly on the basis of higher politics in the absence of Russia before the ICSID tribunal.⁴² Further, the Claimants have no other international avenue to pursue the claim due the terms of the ICSID Convention.⁴³ This creates very serious access to justice issues.
42. The balance of hardship thus must be in Applicants' favour for the stay to continue.

E. BALANCE OF HARDSHIP AND PROPORTIONALITY APPLY TO WHETHER STAY IS CONTINUED WITH CONDITIONS

43. Ad hoc Committees considering whether a stay should be continued with or without conditions have also considered balance of hardship and proportionality, including in *Libananco*, *Pey Casado*, *Churchill Mining* and *Eyre*.⁴⁴
44. Here, the balance of hardship and proportionality requires continuing the stay without conditions, just like in *Libananco*, *Pey Casado*, and without a guarantee like in *Eyre*. In *Churchill Mining* it was the investor-claimant who proposed conditions and a guarantee.
45. The Applicants believe no conditions are warranted for the continuation of the stay. Again, continuation does not increase the risk of payment or non-payment of the costs award. Moreover, the Applicants have proposed a prompt procedural timetable for the

⁴² Request for Annulment, 22 February 2024, ICSID Case ARB/20/11, **A-0069**, paras. 44-50.

⁴³ ICSID Convention, Article 26 (“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.”).

⁴⁴ *Libananco Holding Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Annulment Proceeding, Decision on Applicant’s Request for Continued Stay of Enforcement of the Award, 7 May 2012, **AL-0002**, para. 61 (“the Committee is of the view that requiring security would affect Applicant’s situation in a disproportionate manner and that the stay of enforcement should not be subject to any such condition”); *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Second Annulment Proceeding, Decision on the Request for the Stay of the Enforcement of the Award, 15 March 2018, **AL-0008**, para. 72; *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, 27 June 2018, **AL-0006**, para. 35 (“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.”); *Mr. Raymond Charles Eyre and Montrose Developments (Private) Limited v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Annulment Proceedings, Decision on Stay of Enforcement of Award, 16 July 2020, para. 95, cited at para. 14 of the Decision on Annulment, 2 December 2020, **AL-0009**.

annulment proceedings, which shows the annulment is not an attempt to gain time, but a good faith proceeding based on the perception that the Award must be annulled.

IV. APPLICANTS' POSITION ON SCHEDULING AND COSTS

46. The Applicants propose the following schedule for the briefing of the Committee on the question of continuation of stay of enforcement of the Award:
- Wednesday 10 April 2024: Applicants' request to continue stay of enforcement;
 - Friday 19 April 2024: Respondents' response;
 - Friday 26 April 2024: Applicants' reply;
 - Thursday 2 May 2024: Respondents' rejoinder;
 - By Wednesday 8 May 2024 [or any further date as the parties may agree]: *Ad Hoc* Committee decision on Applicants' request.
47. The Applicants are open to considering longer deadlines should that be Norway's preference, as long as this does not excessively delay the proceedings.
48. In their annulment application, Mr. Pildegovics and North Star also indicated they would seek Norway's consent on whether it agreed to continue the stay of enforcement, without conditions.⁴⁵ Applicants will continue to seek such an agreement, which would render the proceedings more efficient.
49. Norway's agreement to Applicants' proposal would also render the proceedings less costly to both parties and in particular to Applicants. The Applicants bear in the first instance the full costs of the Committee's time. Such time will naturally be increased if the Committee must render a decision on this issue.
50. Should Norway not agree to continuation of the stay without condition, and should the Committee agree with Applicants' position, this should constitute a significant factor in favour of awarding Applicants their costs at the end of the proceedings.

⁴⁵ Request for Annulment, 22 February 2024, ICSID Case ARB/20/11, **A-0069**, para. 159.

51. The Applicants have provided separately their position on scheduling for the annulment proceedings in general, in a separate letter of this day to the *ad hoc* Committee.

V. CONCLUSION AND PRAYER FOR RELIEF

52. For the reasons set out above the Applicants request:

- That the *ad hoc* Committee confirm the stay of enforcement of all of the Award, without condition;
- That the *ad hoc* Committee reserve the question of costs for its annulment Decision.

10 April 2024

Respectfully submitted

[signed]

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