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

BETWEEN

Churchill Mining Plc

Planet Mining Pty Ltd

CLAIMANTS/APPLICANTS

AND

The Republic of Indonesia

RESPONDENT

Applicants' Comments on the State's Application to Terminate Stay of Enforcement of the Award and Request for Security for Costs

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23 April 2018

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I. INTRODUCTION

1. In accordance with the *ad hoc* Committee's invitation of 14 April 2018, the Applicants hereby provide their comments on the State's Application to Terminate Stay of Enforcement of the Award and Request for Security for Costs of 13 April 2018 (**State's Application**).

2. The State's Application to Terminate Stay of Enforcement of the Award (**Termination Application**) is a transparent attempt to re-litigate the *ad hoc* Committee's 27 June 2017 Decision on the Applicants' Request for Continued Stay of Enforcement of Award (**Stay Decision**) and its subsequent ruling of 3 August 2017 regarding the Applicants' compliance with the security condition imposed in paragraph 42 of the Stay Decision (**Security Ruling**).

3. Nothing has changed. The Indonesian law issues raised by the State have been raised previously and rejected by the *ad hoc* Committee in the Security Ruling. As explained below, the Applicants have not granted any third-party security in priority of the Deed Poll, which remains enforceable in accordance with its terms. The State's allegations of bad faith are manifestly without merit and raise questions about the State's own *bona fides*. But what is most troubling for the Applicants is that the State's Termination Application has a distinctly predatory quality. As the Applicants explained in their Application for Continuance, "*if the State is free to enforce the Award during these annulment proceedings, the Applicants will have to seek protection by entering into voluntary administration*".[1] Thus, not only would termination of the stay give rise to a serious risk of Applicants' access to justice being stifled but it would almost guarantee that any victory the Applicants may enjoy in these annulment proceedings will be rendered Pyrrhic. Put another way, if the State's Application is granted, there will be no "*Churchill II*". This exposes the irony of the State's argument that orders are needed "*to protect the integrity of these annulment proceedings*".[2]

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[1] Applicants' Request for Continued State of Enforcement of Award, 29 May 2017, para. 16.

[2] State's Application, para. 37.

4. As to the State's Request for Security for Costs, in the history of ICSID, no *ad hoc* Committee has ever made such an order against an investor applicant. The State has not satisfied any of the established (and strict) conditions for an order of security for costs, even less made a case for the exercise of inherent powers (an "*extradordinary control*"[3]). And, on any view, the State's request is embarrassed by the fact that the USD 2 million in security it seeks includes *past costs* the State says it has incurred in challenging the security that the Applicants offered for the stay of enforcement[4] – a flagrant case of a party trying to pull itself up by its own bootstraps.

5. Just as it did in the proceedings before the Tribunal, the State is trying to bully the Applicants and deny them their rights under the ICSID Convention. The late timing of the State's Application suggests it is a stratagem designed to drain the Applicants' financial resources in advance of the critical hearing in July. The Applicants seek the *ad hoc* Committee's protection from these tactics through dismissal of the State's Application in full.

II. COMMENTS ON THE STATE'S TERMINATION APPLICATION

6. The Termination Application is devoid of merit. The reality is that the State is in no worse a position today than it was when it unsuccessfully opposed the Applicants' request for a stay last year. In the face of obstructive behaviour by the State – which included intimidating President Director of PT TCUP (whose signature was needed to put the proposed security in place)[5] – the Applicants did all they could to satisfy the

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3 *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v Republic of El Salvador* (ICSID Case No. ARB/09/17), Decision on El Salvador's Application for Security for Costs, 20 September 2012 (***Commerce Group***), para. 44 (**Exhibit RLA-ANN-352**).

4 State's Application, fn. 93 ("*The cost of these annulment proceedings for Respondent are likely to be higher* [than the average cost of annulment proceedings for respondent States], *given that Claimants' games with respect to the 'Port Land' have forced Respondent to invest a significant amount of resources to apply to terminate the stay*").

5 See Statement of David Quinlivan, 27 July 2017 (**Exhibit A-49**). To the extent the *ad hoc* Committee considers that the parties procedural conduct in the underlying arbitration is relevant, the Applicants note that, at the hearing on jurisdiction, counsel for Indonesia (Mr Didi Dermawan of the firm DNC Advocates at Work) threatened one of the Claimants' witnesses: "*I got the blessing* [to commence criminal proceedings] *from the Minister already, and also from the Regent, we will commence that – we will use all the legal avenue to pursue this, including, without limitations, the mutual legal assistances in criminal proceedings, so you better tell your clients to prepare for that and it is on the record, we do this in compliance to what you want. And we hope that we get your cooperations because after this then, yes, from our side there will be witness and of course from your side also. So my regards to Mr Paul Benjamin to be prepared because we get on the record now that he is the one who arrange control all of the quote unquote production of that document. We will start*" (Claimants' Reply Post-Hearing Brief, fn. 33, **Exhibit A-38**).

security condition of the Stay Decision on a bilateral basis. The *ad hoc* Committee held that the Applicants had complied. In the Security Ruling, the *ad hoc* Committee ruled that:

> The State raises questions about the nature and validity of the land rights held by PT TCUP under Indonesian law (letter of August 2, 2017, p. 5). The Decision of June 27, 2017 which requested Churchill and Planet "to use their best efforts to pledge the Port Land" is not suspended to the challenge of the ownership rights of PT TCUP before a proper forum. Aside from the possibility of such legal action, the parties may at any time execute the Deed of Granting of Mortgage, the Land Deed Drawing Officer and the Mortgage Certificate which according to the information released by the Respondent in its letter of August 2, 2017 (pp. 3-4) are needed to establish a lawful and perfected encumbrance in Indonesia.
>
> For the purpose of its Decision of June 27, 2017, the Committee holds that the Applicants used their best efforts to pledge Port Land and have complied with the condition set forth in the Decision by making a unilateral pledge in signing a Deed Poll under Australian law.
>
> The stay on enforcement of the Award of December 6, 2016 in ICSID Case No. ARB/12/14 and ARB/12/40 will accordingly continue pending decision on the Annulment Application.[6]

7. In the Termination Application, the State *again* raises questions about the nature and validity of the land rights held by PT TCUP under Indonesian law. With the sole exception of the issue of the security granted to Pala Investments Ltd (**Pala**) (discussed below), the State's Termination Application raises no issue of substance that was not addressed in the written and oral arguments that preceded the Stay Decision and the Security Ruling. The Termination Application is a motion for reconsideration in all but name.

8. The Applicants do not have the resources to engage in costly and unnecessary debate. Accordingly, the Applicants will endeavour to be brief and limit themselves to comments in four areas.

9. First, regarding the issues of Indonesian law raised by the State (and in Professor Nurlinda's report), the Claimants' refer to the Security Ruling, in which the Committee noted that the State's observations of 2 August 2017 "*replicated its explanations contained in its letter of July 27 regarding the requirements of Indonesian law which should be met, and failing which, any interest of PT TCUP over Port Land cannot be*

[6] Security Ruling, pp. 2-3 (**Exhibit R-ANN-330**).

viewed as establishing ownership rights that can be properly secured and transferred to a third party for any appreciable value".[7] The *ad hoc* Committee proceeded to dismiss the State's arguments on the basis that they reflected a "*misunderstanding that has arisen between the parties regarding the conditions to be fulfilled under Indonesian law regarding the pledge*".[8] Given that, nearly nine months ago, the *ad hoc* Committee clearly identified the Indonesian law issues raised (repeatedly) by the State as a "*misunderstanding*" of what was required under the pledge, the State's decision to spend money on a 91-page expert report on those very issues represents a disregard for economy that is inconsistent with the submissions the State makes on security for costs.[9]

10. Second, the State seeks to bolster its Termination Application with a characteristically wild allegation that the Applicants have acted in "*bad faith*"[10] by misrepresenting their interest in the Port Land and proffering as security property that "*has no legal foundation and no economic value*".[11] The Applicants deny these allegations. The Applicants did not misrepresent their interests in the Port Land. In using the term "*own*" in their submissions before the *ad hoc* Committee, the Applicants accurately reflected the wording of the agreements PT TCUP entered into in respect of the property in question, the full set of which was provided to the State and the *ad hoc* Committee[12]. For each parcel of land that comprises the Port Land, the set of documents includes a document titled "*Agreement for the Conduct of Sale and Purchase of Land and Plantations*",[13] in which it clearly states (*inter alia*) that "[t]*he*

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7 Security Ruling, p. 2 (emphasis added) (**Exhibit R-ANN-330**).

8 Security Ruling, p. 2 (emphasis added) (**Exhibit R-ANN-330**).

9 The State even has the audacity to seek higher than average security because of its decision to spend this money, making the utterly baseless suggestion that the "*Claimants' games with respect to the 'Port Land' have forced Respondent to invest a significant amount of resources to apply to terminate the stay*" (State's Application, fn. 93).

10 State's Application, paras. 6-7.

11 State's Application, para. 7.

12 The State acknowledges that it was provided with a full set of documents in its Termination Application (State's Application, para. 15). Having been provided with the transaction documents themselves, the State cannot credibly allege that the Applicants misrepresented their contents.

13 See Hasanudin Sample, p. 4 (**Exhibit R-ANN-338**).

First Party [the seller] *declares it will hand his land ownership to the Second Party, and sell its rights to the land to the Second Party*".[14]

11. Third, as to the State's allegation that Churchill "*grant*[ed] *a charge over all of Churchill's assets to Pala which gave it priority over any rights granted to Respondent under the Deed Pool* [sic] *and the Award*",[15] the State is mistaken. So as to remove any doubt on this issue, the Applicants attach the full suite of documents by which Churchill granted security to its long-term shareholder, Pala.[16] As the *ad hoc* Committee will see, the Pala security was put in place through a bond comprising three documents: a Bond Issue Agreement (**BIA**),[17] a Security Agreement[18] and a Proceeds Interest Deed.[19] The bond documents contain numerous express references to the Deed Poll and the Award, which make it clear that the security offered by the Applicants to the State in the Deed Poll was carved-out of, and senior to, the security given by the Applicants to Pala.

12. In particular, clause 2.4 of the BIA protects the State's interest in the Deed Poll:

> The Bonds constitute senior secured indebtedness of the Issuer [Churchill], ranking equally and rateably with all other senior indebtedness of the Issuer [Churchill], save for the indebtedness referred to in paragraph (e) of the definition of Permitted Indebtedness in clause 1.1 [i.e. the Award] but only to the extent of the value of the secured assets specified in the Port Land Deed Poll, and senior to all subordinated indebtedness of the Issuer [Churchill].[20]

13. Paragraph (e) of the definition of "*Permitted Indebtedness*" in clause 1.1 of the BIA refers to the Award:

> "**Permitted Indebtedness**" means any indebtedness of the Issuer [Churchill]:

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[14] Hasanudin Sample, p. 5 (emphasis added) (**Exhibit R-ANN-338**); See also email from the Applicants' counsel to the State's counsel, 25 July 2017 (**Exhibit R-ANN-331**).

[15] State's Application, para. 30.

[16] Pala has been an investor in Churchill for more than a decade.

[17] Bond Issuance Agreement between Churchill Mining Plc (as Issuer) and Pala Investments Limited (as Bondholders), 22 November 2017 (**Exhibit A-50**).

[18] Security Agreement between Churchill Mining Plc (as the Chargor) and Pala Investments Limited (as the Bondholder), 22 November 2017 (**Exhibit A-51**).

[19] Proceeds Interest Deed between Churchill Mining Plc and Pala Investments Limited, 22 November 2017 (**Exhibit A-52**).

[20] The expression "*Port Land Deed Poll*" is defined in clause 1.1 of the BIA as "*the Deed Poll executed on 27 July 2017 by the Issuer in connection with the security to be granted over the East Kutai Port Land by PT Techno Coal Utama Prima in favour of the Republic of Indonesia*" (**Exhibit A-50**).

[…]

(e) due to the Republic of Indonesia pursuant to and in connection with the award dated 6 December 2017 dismissing inter alia Churchill's claims against the Republic of Indonesia and ordering it to pay the Republic of Indonesia approximately USD9.4 million in costs.

14. The effect of clause 2.4 of the BIA is, therefore, that the Deed Poll is left undisturbed by the Pala security.

15. The Applicants note clause 2.2 of the Deed Poll, which obliged the Applicants (*inter alia*) "*not to do anything that might hinder performance of this Deed Poll*". By ensuring that the bond documents included appropriate carve-outs for the Deed Poll, the Applicants abided by this obligation. There has been no change to the rank or enforceability of the Deed Poll, which was accepted by the *ad hoc* Committee in the Security Ruling almost 9 months ago. As the Pala security is subordinate to the Deed Poll, there is no merit to the State's allegation that Churchill's announcement of 22 November 2017 was "*misleading*".[21] This allegation, too, should be withdrawn.

16. Finally, as to the State's attempt to cast aspersions on the Applicants because "*the Applicants never registered the Deed Poll in the Companies House in England as a charge granted by Churchill to Respondent*",[22] the State is again mistaken. The Deed Poll is not of a form that is registrable at Companies House in London (and the Applicants note that the State has not offered any authority to support its contention that the Deed Poll is registrable). As the *ad hoc* Committee will no doubt recall, the reason for the (unilateral) form of the Deed Poll is that the State would not cooperate in the execution of the bilateral instrument the Applicants offered (i.e. the Power of Attorney).[23] So, to the extent the State is complaining about the form of the instrument, it only has itself to blame. In any event, despite the fact that it is not registrable in England, the Deed Poll is fully enforceable in accordance with its terms.

III. COMMENTS ON THE STATE'S REQUEST FOR SECURITY FOR COSTS

17. In the Applicants' submission, the State's Request for Security for Costs (**Security Request**) is equally lacking in merit and should be dismissed.

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21 State's Application, para. 32.

22 State's Application, para. 5.

23 See Security Ruling, pp. 1-2 (**Exhibit R-ANN-330**).

18. First, the timing of the Security Request – made after the last round of written submissions and at a time when the only real step remaining is a two-day hearing – betrays its strategic rationale. As observed by one commentator: "*Tribunals have taken into account the 'timing' factor in judging a respondent's conduct: generally, an application for security should be made as early as possible, subject to establishing the position on the merits. An application close to the hearing will look more like an attempt to stifle the claim*." [24]

19. Second, the Security Request is framed as a plea for the *ad hoc* Committee to exercise its "*inherent powers to protect the integrity of these annulment proceedings*",[25] relying on the decision of the annulment committee in *Commerce Group v El Salvador*.[26] Even if (*arguendo*) an ICSID annulment committee does have the inherent power to order security for costs, the annulment committee in *Commerce Group* was at pains to point out that such a power was an "*extraordinary control*" [27] and would only be exercised in an "*extreme case*".[28] In particular, the committee in *Commerce Group* indicated that what was required was "*incontrovertible evidence that the Applicants' conduct threatens the integrity of the proceedings, that their conduct amounts to abuse or is pursued in bad faith*". [29] Thus, the substance of the inherent power recognised in *Commerce Group* was the inherent power to prevent *abuse of process*;

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[24] Weixia Gu, "Security for Costs in International Commercial Arbitration", 22(3) Journal of International Arbitration (2005), pdf p. 13 (**Exhibit ALA-32**). See also Chartered Institute of Arbitrators' Practice Guideline on Applications for Security for Costs, Commentary to Article 4, paras. 1(c) and 2(a): "*Applications for security for costs should be made promptly, that is, as soon as the risk of facts giving rise to the application are known or ought to have been known. Arbitrators should consider whether an application has been made at an appropriate time. If the application is made after significant expense has been incurred, they may consider that this unfairly disadvantages the other party and refuse the application unless there is a good reason for the delay. So, for example, if the need for security arose because a party's insolvency has deteriorated during the course of the arbitration, this may be a reasonable explanation for the delay.* […] *Arbitrators should consider whether an application is being used unfairly or oppressively to intimidate a weaker party, to delay the time when the applicant has to address the substance of a dispute or to unjustly prevent a party from pursuing a genuine or legitimate claim. The fact that requiring security will frustrate a party's ability to pursue its claim because of its financial situation may not of itself lead to a refusal to grant security. The arbitrators should consider all of the surrounding circumstances to determine that their decision, whether or not to require security, is in all of the circumstances fair*"(**Exhibit ALA-33**).

[25] State's Application, para. 37.

[26] *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v Republic of El Salvador* (ICSID Case No. ARB/09/17), Decision on El Salvador's Application for Security for Costs, 20 September 2012 (**Exhibit RLA-ANN-352**).

[27] *Commerce Group*, para. 44 (**Exhibit RLA-ANN-352**).

[28] *Commerce Group*, paras. 46-47 (**Exhibit RLA-ANN-352**).

[29] *Commerce Group*, para. 53 (**Exhibit RLA-ANN-352**).

security for costs was simply the form by which that power would have been exercised (if the circumstances warranted it, which they did not). *Commerce Group* therefore does not stand as authority for the proposition that ICSID annulment committees have the inherent power to order security for costs *generally*. Nothing in the Applicants' conduct constitutes an abuse of process nor otherwise threatens the integrity of these proceedings, as required by *Commerce Group*. If there is any threat to the integrity of these proceedings, it is the threat posed by the State's Termination Application which would, if granted, give rise to a serious risk of Applicants' access to justice being stifled.

20. Third, leaving aside the State's other unfounded allegations of bad faith (addressed above), the State's case on bad faith and abuse raises a serious risk of prejudgement of the Applicants' Annulment Application. Relying on paragraph 550 of the Award, the State contends that security is warranted because "*the underlying arbitration giving rise to these annulment proceedings should never have been brought in the first place on the basis of a fraud and forgery*".[30] But if the *ad hoc* Committee were to order security on that basis, it would prejudge the Applicants' case (which is that the Award is a nullity under the ICSID Convention). The need to avoid prejudgement in the determination of a request for security for costs has been recognised by a number of tribunals, including the tribunal in *Maffezini v Spain*.[31]

21. Fourth, in bringing its application based on inherent powers (and the reasoning in *Commerce Group*), the State has accepted a burden of proof and persuasion that is beyond the already heavy burden that applies to security for costs applications in wider arbitral practice. It is well settled that security for costs is an "*extraordinary measure that should only be granted in 'extreme and exceptional circumstances'*".[32] There are no such circumstances here. As explained above, the Applicants have not acted in bad faith. Nor has there been any change in circumstances since these annulment proceedings were commenced: the Deed Poll remains enforceable in accordance with its terms (it has not been subordinated to the Pala bond), and the

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30 State's Application, para. 40.

31 *Emilio Agustin Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 28 October 1999, para. 21 (***Maffezini v Spain***) (**Exhibit ALA-34**).

32 *Sergei Viktorovich Pugachev v Russian Federation*, UNCITRAL, Interim Award, 17 July 2017, para. 377 (**Exhibit ALA-35**).

Applicants have been open about their financial condition from the outset, which has not deteriorated since these annulment proceedings were commenced (needless to say, the Applicants' case is that their financial condition was caused by the State's unlawful measures). These circumstances cannot be classified as "*extreme*" or "*exceptional*". Indeed, if they could, then so could the circumstances of every single-asset company that brings an expropriation claim under the ICSID Convention. As noted by the tribunal in *RSM v Grenada* (cited in *Commerce Group*[33]), "*it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of sufficient financial standing of the investor to meet a possible costs award*".[34]

22. Fifth, even if (*arguendo*) security for costs can be approached as a matter of inherent powers, in the Applicants' submission, due regard should still be had to the test that ICSID tribunals have developed in the context of security for costs as a form of provisional measure. In ICSID jurisprudence, there is a consensus in the authorities that, for security to be granted, the requesting party must demonstrate that security is both necessary and urgent.[35] Clearly, the State's request is not urgent: despite making numerous threats to apply for security for costs over the years,[36] the State has only now done so. Nor is security necessary:[37] the State has demonstrated utter disregard for economy by spending a large amount of money arguing points that the *ad hoc*

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33 *Commerce Group*, fn. 12 (**Exhibit RLA-ANN-352**).

34 *RSM Production Corporation et al v Government of Grenada* (ICSID Case No. ARB/10/6), Tribunal's Decision on Preliminary Issues, 23 June 2008, para. 57 (**Exhibit RLA-ANN-346**).

35 *Sergei Viktorovich Pugachev v Russian Federation*, UNCITRAL, Interim Award, 17 July 2017, para. 378 (**Exhibit ALA-35**) ("*Pursuant to decisions of arbitral tribunals, exceptional circumstances are construed to require that a security for costs request is both (i) necessary and (ii) urgent*").

36 The most recent of these threats was made on Day 1 of the Hearing on Document Authenticity in Singapore in August 2015, in which counsel for the State submitted "[t]*he Republic is faced with a heads I win, tails you lose proposition. For that reason, the Republic wishes to advise the tribunal that it will make an application at the closing of this hearing for an order directing Churchill to post security for costs*" (Mr O'Donoghue, Hearing Transcript – Day 1, 3 August 2013, page 7/20-24, **Exhibit A-28**). No such application was ever made.

37 Alternatively, the requirement of necessity applies as part of the doctrine of inherent powers, under which a power only qualifies as inherent (and may only be exercised) if it is "*necessary to ensure the performance of functions that have been expressly conferred* [upon the relevant international court or tribunal]" (*RSM Production Corporation et al v Grenada* (ICSID Case No. ARB/05/14), Decision on RSM Production Corporation's Application for a Preliminary Ruling, 7 December 2009, para. 20 (**Exhibit RLA-ANN-346**), cited in Chester Brown, "*Commerce Group & San Sebastian Gold Mines, Inc v Republic of El Salvador: Security for Costs in ICSID Proceedings*", 28 ICSID Review 6 (2013), p. 12 (**Exhibit RLA-ANN-353**)).

Committee has already ruled reflect a "*misunderstanding*"[38] of the Stay Decision. On any view, the State cannot seek security for *wasted costs*, which is precisely what it is trying to do. Further, ICSID tribunals have ruled against requests for security for costs on the basis that they do not pertain to rights in existence at the date of the request (or, in the words of the *Maffezini* tribunal, that the rights at issue are "*hypothetical*"[39]). In the Applicants' submission, the rights at issue in the State's Security Request fall into this category. In addition, as noted above, ICSID jurisprudence also requires that, in granting security, the tribunal must not prejudge the case,[40] which is what the State would have the *ad hoc* Committee do by relying on the very Award the Applicants contend should be annulled.

23. Finally, there is a consensus that, in addition to the elements discussed above, tribunals should consider (i) whether "*in light of all of the surrounding circumstances, it would be fair to make an order requiring one party to provide security for the costs of the other party*"[41] and (ii) "*whether awarding security would unjustly stifle a legitimate and material claim*".[42] One of the reasons the committee in *Commerce Group* dismissed the request for security was that "*the Respondent's request, if granted, might seriously affect the Applicants' right to seek annulment of the award*".[43] In the Applicants' submission, that is the case here. The Applicants have raised real issues with the Award – the Applicants' grounds cannot be said to be "*vexatious*" or "*frivolous*" – and they deserve to have their Annulment Application heard and decided, as is their right under Article 52 of the ICSID Convention. Further, the Applicants have sought to control costs and cooperate with the State at all times. Since losing almost USD 70 million expended on their investments in Indonesia,[44] the Applicants have allocated their last remaining funds to these annulment proceedings (including to meet the costs of the *ad hoc* Committee, which the Applicants must pay in full under

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38 Security Ruling, p. 2 (**Exhibit R-ANN-330**).

39 *Maffezini v Spain*, paras. 12-20 (**Exhibit ALA-34**).

40 *Maffezini v Spain*, para. 21 (**Exhibit ALA-34**).

41 Chartered Institute of Arbitrators' Practice Guideline on Applications for Security for Costs, Article 4(1) (**Exhibit ALA-33**).

42 Chartered Institute of Arbitrators' Practice Guideline on Applications for Security for Costs, Article 4(2) (**Exhibit ALA-33**).

43 *Commerce Group*, para. 52 (**Exhibit RLA-ANN-352**).

44 Claimants' letter to the Tribunal dated 10 November 2014, p. 3 (**Exhibit A-10**).

the Institution Rules). They have met all payment deadlines in these proceedings (in contrast to the applicants in *Commerce Group*, against whom security was still not ordered). The Applicants do not have the ability to post security in the sum or form demanded (USD 2 million in escrow) and, as a result, security for costs would, if ordered, unjustly stifle the exercise of the Applicants' rights under the ICSID Convention and bring an end to these proceedings. The *ad hoc* Committee has already ruled against the State in its attempts to pierce the corporate veil[45] and so the State's argument that Churchill's "*wealthy shareholders are effectively behaving like third-party funders*"[46] should be dismissed. In any event, the State's attempt to analogise Pala with a third-party funder is absurd. There is no "*gambler's Nirvana*"[47] here: like all of Churchill's major long-term shareholders, Pala has obviously sustained significant losses, having invested in excess of £20 million to fund Churchill's exploration work in Indonesia prior to 2010. The State's emphasis on the fact that Pala was established by a "*Russian industrialist*"[48] is objectionable and, considering the contribution that Pala made to Indonesia's economy (through Churchill), insulting.

IV. COMMENTS ON THE STATE'S PROPOSED BRIEFING SCHEDULE

24. The Applicants note the State's proposal for two rounds of written submissions and an oral hearing on the State's Application. The Applicants consider that this proposal is excessive and would result in significant unjustified costs and unwarranted distraction from the real issues before the Committee. Indeed, it is remarkable that the State is seeking to make such significant changes to the briefing schedule, long ago fixed by the *ad hoc* Committee, at this late stage. As noted above, the Applicants are reluctant to allocate their already scarce resources to arguments on an Application that is, in the Applicants' submission, manifestly without legal or factual merit (and which, in again raising issues of Indonesian land law, is premised on a "*misunderstanding*"[49]). Accordingly, the Applicants are content for these comments to stand as their final submissions in reply and for the State's Application to be determined on the basis of

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45 Stay Decision, para. 39.

46 State's Application, para. 23.

47 State's Application, para. 42.

48 State's Application, para. 30.

49 Security Ruling, p. 2 (**Exhibit R-ANN-330**).

the papers now submitted. However, the Applicants are guided by the *ad hoc* Committee in this regard.

25. The Applicants reserve their rights to claim the costs of preparing these comments.

Respectfully submitted on behalf of the Applicants on 23 April 2018.

Audley Sheppard QC
Dr Sam Luttrell
Ben Luscombe
Dr Romesh Weeramantry
Clementine Packer

V. INDEX: APPLICANTS' FACTUAL EXHIBITS

Exhibit No.	Description of Document	Date
A-49	Statement of David Quinlivan	27 July 2017
A-50	Bond Issuance Agreement between Churchill Mining Plc (as Issuer) and Pala Investments Limited (as Bondholders)	22 November 2017
A-51	Security Agreement between Churchill Mining Plc (as the Chargor) and Pala Investments Limited (as the Bondholder)	22 November 2017
A-52	Proceeds Interest Deed between Churchill Mining Plc and Pala Investments Limited	22 November 2017

VI. INDEX: APPLICANTS' LEGAL AUTHORITIES

Exhibit No.	Description of Document
ALA-32	Weixia Gu, "Security for Costs in International Commercial Arbitration", 22(3) Journal of International Arbitration (2005) (extract, p. 195)
ALA-33	Chartered Institute of Arbitrators' Practice Guideline on Applications for Security for Costs, Commentary to Article 4
ALA-34	*Emilio Agustin Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 28 October 1999
ALA-35	*Sergei Viktorovich Pugachev v Russian Federation*, UNCITRAL, Interim Award, 17 July 2017