**PLANET MINING PTY LTD (ABN - 86 108 636 531)**
(A wholly owned subsidiary of Churchill Mining plc)

Suite 1, 346 Barker Rd, Subiaco WA 6008
PO Box 8050, Subiaco East WA 6008
Tel +61 8 63809670 Fax +61 8 63809650
www.churchillmining.com

March 23, 2016

The Committee Secretary
Joint Standing Committee on Treaties
PO 6021
Parliament House
Canberra ACT 2600

Dear Sirs,

**Joint Standing Committee on Treaties Inquiry regarding the Trans-Pacific Partnership**

We write on behalf of the directors of Planet Mining Pty Ltd **(Planet)**, who wish to make a submission to the Joint Standing Committee on Treaties **(JSCOT)** regarding the Trans-Pacific Partnership **(TPP)**. Specifically, the directors of Planet wish to comment on Chapter 9, which concerns investment.

Planet is an Australian mining company headquartered in Perth. Planet and its parent company Churchill Mining Plc **(Churchill)** are currently engaged in Investor-State Dispute Settlement **(ISDS)** proceedings with the Republic of Indonesia under the *Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments 1992* (the **Australia-Indonesia BIT** or the **BIT**). These proceedings are being conducted by way of arbitration at the International Centre for Settlement of Investment Disputes **(ICSID)** in Washington DC (under the docket number ICSID Case No. ARB/12/14 and 12/40). The existence of the Planet/Churchill case is a matter of public record and certain documents from the proceedings are available on the ICSID website.

As an active user of the ISDS system, and an Australian mining business engaged in foreign investments, Planet has been paying close attention to the progress of the negotiation and ratification of the TPP. In this context, the directors of Planet have observed with concern certain aspects of the debate regarding the TPP, particularly suggestions that:

(i) the availability of ISDS is not taken into account by businesses when they invest abroad;

(ii) foreign investors do not need ISDS because they can get justice from the courts of the host State or seek the assistance of their home government; and

(iii) ISDS mechanisms in investment treaties give foreign investors an unfair advantage over their host government.

The purpose of this submission is to address these arguments by reference to Planet's experiences as a foreign investor and active user of the ISDS system provided for under Australia's investment treaty program.

By way of background, Planet invested in a coal exploration project in East Kalimantan in 2006 (the East Kutai Coal Project, **EKCP**). The licenses for the EKCP were held by four Indonesian companies – the Ridlatama Companies – with which Planet and Churchill partnered for the project. Planet's investment, and the corporate structure Planet (and Churchill) used for the EKCP, were approved in writing by the Indonesian Foreign Investment Coordinating Board. In structuring its investment, Planet actively considered the availability of investment treaties and the protection they offered. Churchill did the same. Ultimately, Planet decided that the Australia-Indonesia BIT offered appropriate protection and proceeded to invest directly in Indonesia in reliance upon that treaty (Churchill invested under the United Kingdom-Indonesia BIT).

We pause here to note that, in other foreign mining projects in which we have been involved over the past twenty years (both with Planet and other companies), similar consideration has been given to investment treaties and the way they can be used to manage sovereign risk. So we very much disagree with suggestions that companies like Planet do not evaluate the investment treaty program of a particular country when they make their investment decision. In our experience, they absolutely do. Furthermore, in our experience, where a prospective investment is within a jurisdiction which does not have a reputation for an independent and robust judiciary, the absence of investment treaty coverage could well be fatal to any investment proposal.

Coming back to Planet's case, after several years of intensive exploration activities, in which Planet and Churchill together spent more than USD 70 million, Planet (through Churchill, a company listed on the London Stock Exchange) announced that it had discovered a globally significant coal resource. However, in May 2010, the long-term exploitation mining licences underpinning the EKCP (which were granted for an initial period of twenty years with the company having an option to extend the licence term by a further twenty years) were unilaterally revoked by the head of the local East Kutai sub-regional government.

The purported basis for the license revocation was that the EKCP was located within a forest area, the necessary forestry permits were not in place and the company had operated “illegally” in this forest area. This reasoning was put forward despite the fact that:

(i) on a number of previous occasions, various branches of the Indonesian Government (including the East Kutai Regency government) represented that the EKCP area was not located in a forest area;

(ii) no such permits were required for the exploration activity carried out in the area in question; and

(iii) in any event, applicable Indonesian laws do not mandate revocation of a mining licence for lack of such permits.

We note for completeness that all exploration activities in the area of the EKCP were conducted in full compliance with the terms of the relevant licences and a comprehensive environmental management plan was in place for the EKCP at the time the mining licences were revoked. Planet has reason to believe that the revocation of the EKCP licences was contrived, that the motives for the revocation of the EKCP mining licences were economic and that the Regent of East Kutai unlawfully procured the transfer of the EKCP (which Planet values at over USD 2.5 billion) to Indonesian companies owned and controlled by wealthy and influential Indonesian businessmen and politicians, with minimal or no consideration flowing to the Indonesian State itself.

After all attempts to overturn the Regent of East Kutai's revocation orders in the Indonesian Courts had failed (firstly by application to the Indonesian Administrative Court in Samarinda, secondly by appeal to the Indonesian Administrative High Court in Jakarta and finally by appeal to the Indonesian Supreme Court), on 26 November 2012, Planet requested arbitration against Indonesia under the Australia-Indonesia BIT. In its Request for Arbitration and subsequent written pleadings, Planet alleges (*inter alia*) violation of the Fair and Equitable Treatment (**FET**) standard, illegal expropriation and denial of justice at the hands of the Indonesian courts which have caused Planet (and Churchill) to suffer damages of over USD 2.5 billion. The claims of Planet and Churchill are being dealt with in a consolidated arbitration at ICSID. Since January 2015, Planet and Churchill have been represented in the ICSID arbitration by a team of specialist ISDS lawyers from Clifford Chance, led by Dr Sam Luttrell in Perth and Audley Sheppard QC in London.

Following commencement of the arbitration, Indonesia challenged the jurisdiction of the ICSID Tribunal, arguing that the Australia-Indonesia BIT did not convey its consent to ICSID arbitration. In February 2014, the ICSID tribunal dismissed this objection and held that it has jurisdiction over Planet's claims (this decision is public and is available on the ICSID website). Shortly thereafter, Indonesia brought a motion for dismissal of Planet's claims on the basis that earlier (but now superseded) general survey and exploration licences for the EKCP were forged (**Forgery Dismissal Application**). Planet and Churchill deny all alleged wrongdoing and have opposed Indonesia's Forgery Dismissal Application. Written and oral arguments have been completed and the parties currently await the decision of the ICSID Tribunal on Indonesia's Forgery Dismissal Application. Further detail on the allegations that Indonesia has made in its Forgery Dismissal Application can be found in Procedural Order No. 16, which the ICSID Tribunal made in respect of Planet's requests that Indonesia provide certain documents (this order is also available on the ICSID website).

When the dispute arose with Indonesia, Planet sought the assistance of the Australian Government. Whilst the Australian Government was interested to know of the existence of this dispute and asked to be kept abreast of any new developments, the Government made it very clear that it considered this to be a commercial dispute between the two parties and accordingly would not become directly involved. If ISDS was not available to Planet under the Australia-Indonesia BIT, Planet's recourse against Indonesia for any compensation for its shareholders would have ended with the decision of the Indonesian Supreme Court – in proceedings before which Planet believes (and asserts) it was treated in a manner that fell below the standard prescribed by international law and the BIT. In contrast, the ISDS proceedings before the ICSID Tribunal are being conducted in accordance with the rights granted under the BIT, by three impartial and independent international arbitrators.

At no point in the ICSID proceedings have we or any of our fellow directors perceived that having the protection of the Australia-Indonesia BIT, or the ISDS mechanism in it, has given Planet (or Churchill) any substantive advantage over Indonesia. The BIT has simply given Planet access to a neutral international tribunal and the ability to enforce standards of treatment that are common to Indonesian law and the legal systems of all law abiding nations.

From Planet's perspective, treaties like the TPP are therefore very important tools for the promotion and protection of foreign investment. While the Investment Chapter of the TPP is much more detailed than the Australia-Indonesia BIT, it contains all the basic rules and standards that a company like Planet looks for when it considers making a foreign investment. As an Australian company and taxpayer, Planet has no interest in Australia exposing itself to frivolous claims by foreign investors under the TPP. But, having the experience of the case against Indonesia, and having seen the provisions of the TPP Investment Chapter that concern ISDS, we think this risk is being overstated. Indeed, in our experience, it is very hard to sue a foreign government – even when such recourse

is directly provided for under a treaty – if for no other reason than the disparity of resources that exists between a government and most businesses.

We would also emphasise that the protections offered by treaties like the Australia-Indonesia BIT and the TPP are especially important to participants in the mining exploration industry, like Planet. Exploration in itself is inherently risky: it is risky enough trying to find an economic coal or mineral deposit; if the exploration program proves to be successful, the development of the mine will be subject to ongoing risks including expropriation without just compensation. ISDS helps give smaller exploration companies the confidence they need to commit capital to exploration in a developing country where the rule of law is not as strong as Australia by providing a *bone fide* mechanism for dispute resolution in a recognised international forum.

Further, as the Australian exploration industry is made up of mostly small to medium sized businesses like Planet (rather than majors who may have the leverage to avoid situations like that which developed in Planet's case), if diverse flows of direct foreign investment are to be maintained and promoted it is even more important that the TPP and future Australian trade and investment treaties include clear provisions that:

(i) level the playing field for all parties;

(ii) provide both in-country and external protection for the lawful property rights of foreign investors; and

(iii) allow the foreign investor access to a recognised external forum (such as ICSID) for the resolution of disputes that arise with the host State.

Subject to the above, the directors of Planet express their support for the TPP, and Australia's investment treaty program more generally.

If we can be of any further assistance to JSCOT, please let us know.

Yours faithfully
Planet Mining Pty Ltd

**Nicholas Smith**
Managing Director

**David Quinlivan**
Chairman