INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TETHYAN COPPER COMPANY PTY LIMITED

Claimant

and

ISLAMIC REPUBLIC OF PAKISTAN

Applicant

(ICSID Case No. ARB/12/1)
Annulment Proceeding

DECISION ON STAY OF ENFORCEMENT OF THE AWARD

Members of the ad hoc Committee
Prof. Joongi Kim, President of the *ad hoc* Committee
Judge Bernardo Sepúlveda-Amor, Member of the *ad hoc* Committee
Ms. Carita Wallgren-Lindholm, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee
Mr. Gonzalo Flores

Date: 17 September 2020

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I. PROCEDURAL BACKGROUND

1. This Decision addresses Tethyan Copper Company Pty Limited's ("**Claimant**" or "**TCCA**") application for the termination of the stay of enforcement of the ICSID award rendered on 12 July 2019 (the "**Award**") by the arbitral tribunal (the "**Tribunal**") in *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1) (the "**Arbitration**").

2. On 8 November 2019, the Islamic Republic of Pakistan ("**Applicant**" or "**Pakistan**") submitted an Application for the Annulment of the Award ("**Annulment Application**"). In its Annulment Application, Pakistan requested, among other things, a provisional stay of enforcement of the Award in accordance with Article 52(5) of the ICSID Convention.

3. On 18 November 2019, in accordance with ICSID Arbitration Rules 50(2)(a)–(c), the Secretary-General registered the Annulment Application and informed the parties of the provisional stay of enforcement of the Award.

4. On 11 February 2020, TCCA filed a request to terminate the stay of enforcement of the Award ("**Cl. Opposition**").

5. On 12 February 2020, Pakistan requested that ICSID only transmit the transmittal cover email of TCCA's filing of 11 February 2020, as opposed to the "actual submission", to the *ad hoc* committee, once constituted.

6. On 14 February 2020, TCCA replied to Pakistan's 12 February 2020 letter, stating that "ICSID has no authority to prevent the Parties from communicating with the *ad hoc* Committee".

7. By email of 18 February 2020, the Centre acknowledged receipt of the parties' communications of 11, 12, and 14 February 2020 and informed the parties that, "[p]ursuant to ICSID Arbitration Rules 30 and 53, as soon as the Committee is constituted, the Secretariat shall transmit to each member a copy of the Annulment Application, of its supporting documentation, of the Notice of Registration and of any communication received from either party in response thereto".

8. On 25 March 2020, in accordance with Article 52(3) of the ICSID Convention, the Secretary-General notified the parties that an *ad hoc* Committee appointed by the Chair of the Administrative Council had been constituted, composed of Prof. Joongi Kim (from the Republic of Korea), as President; Judge Bernardo Sepúlveda-Amor (from the United Mexican States); and Ms. Carita Wallgren-Lindholm (from the Republic of Finland) (the "**Committee**"). Prof. Kim, Judge Sepúlveda-Amor, and Ms. Wallgren-Lindholm are members of the ICSID Panel of Arbitrators, appointed by Korea, Mexico, and Finland, respectively.

9. On 25 March 2020, TCCA wrote to the Committee proposing a pleading schedule with regard to the question of the stay of enforcement of the Award.

10. On 30 March 2020, Pakistan replied to TCCA's letter of 25 March 2020.

11. On 2 April 2020, the Committee fixed a schedule for the parties' further submissions on the stay of enforcement of the Award. The Committee also invited the parties to consider several dates for a First Session as well as the possibility of holding a hearing on the stay of enforcement of the Award.

12. In accordance with the schedule, on 8 April 2020, Pakistan filed additional observations to TCCA's request to terminate the stay of enforcement of the award ("**Applicant's Reply**").

13. On 14 April 2020, TCCA filed a response to Pakistan's observations on the request to terminate the stay of enforcement of the Award ("**Cl. Rejoinder**").

14. On 17 April 2020, Pakistan filed a reply to TCCA's response of 14 April 2020 ("**Applicant's Response"**).

15. On 23 April 2020, the Committee confirmed the schedule for the First Session and Hearing on Stay of Enforcement of the Award ("**Hearing**"), instructed the parties on the manner of proceeding during the First Session and Hearing, and directed the parties as to the procedure for exchanging any demonstratives they would use during the First Session and Hearing.

16. On 27 April 2020, TCCA filed a request to: (i) rely on certain documents from the underlying arbitral record during the Hearing, which had not been cited in the parties' annulment submissions; and (ii) to admit new evidence into the record [i.e. Exhibits CEA-084 and CEA-085].

17. After exchanges from the parties on the matter, the Committee decided on 28 April 2020, to grant TCCA's request, as follows:

    (i) TCCA shall identify the exact paragraphs in CEA-084 and CEA-085 that it wishes to cite;

    (ii) Following the Hearing, Pakistan will be given an opportunity to file responsive evidence, addressing the new evidence and those points on which TCCA relies in each document;

    (iii) Pakistan's responsive evidence should identify the paragraph number(s) of each document relevant to address points raised by TCCA. If Pakistan chooses to file a further witness statement, it can only be from Mr. Kamran Ali Afzal and will be limited to the new issues raised by TCCA through its additional evidence;

    (iv) Should Pakistan decide to use this opportunity, it should do so by close of business Tuesday, 5 May 2020.

18. On 28 April 2020, TCCA provided the specific citations of the portions of Exhibits CEA-084 and CEA-085 on which it would rely during the Hearing. The parties also submitted their respective Power Point Presentations to be used during the Hearing.

19. On 29 April 2020, the Committee held its First Session and Hearing with the parties via Webex videoconference. Participating in the First Session and Hearing were:

The Committee

Prof. Joongi Kim	President
Judge Bernardo Sepúlveda-Amor	Member
Ms. Carita Wallgren-Lindholm	Member

ICSID Secretariat

Mr. Gonzalo Flores	Secretary of the *ad hoc* Committee
Mrs. Marisa Planells-Valero	ICSID Counsel

Tethyan Copper Company Pty Limited

Party Representative

Mr. William Hayes	Tethyan Copper Company Pty Limited
Mr. Ramon Jara	Tethyan Copper Company Pty Limited
Mr. Rich Haddock	Barrick Gold Corporation
Mr Jonathan Drimmer	Barrick Gold Corporation

Counsel

Mr. Donald Francis Donovan	Debevoise & Plimpton LLP
Mr. Mark Friedman	Debevoise & Plimpton LLP
Ms. Natalie Reid	Debevoise & Plimpton LLP
Ms. Berglind Halldorsdottir Birkland	Debevoise & Plimpton LLP
Ms. Elizabeth Nielsen	Debevoise & Plimpton LLP
Mr. Adam Moss	Debevoise & Plimpton LLP
Ms. Moeun Cha	Debevoise & Plimpton LLP
Ms. Lisa Wang Lachowicz	Debevoise & Plimpton LLP
Mr. Feisal Hussain Naqvi	Bhandari Naqvi Riaz (BNR)

Islamic Republic of Pakistan

Party Representative

Mr. Mohammad Farogh Naseem	Minister of Law and Justice
Mr. Khalid Jawed Khan	Attorney General for Pakistan
Mr. Ahmad Irfan Aslam	Head, International Disputes Unit, Office of the Attorney-General for Pakistan
Ms. Maleeka Ali Bukhari	Parliamentary Secretary, Ministry of Law and Justice
Mr. Someir Siraj	Office of the Attorney General for Pakistan
Mr. Raja Naeem	Sr. Consultant, Ministry of Law and Justice
Mr. Sameer Shafiq	Office of the Attorney General for Pakistan
Ms. Ambreen Abbasi	Consultant, Ministry of Law and Justice
Mr. Jam Kamal Khan	Chief Minister, Government of Balochistan
Mr. Fazeel Asghar	Chief Secretary, Government of Balochistan
Mr. Zafar Bokhari	Secretary, Mines and Mineral Development Department, Government of Balochistan

Mr. Ahmed Nadeem	Law Department, Government of Balochistan
Mr. Saif Ali	Law Department, Government of Balochistan
Mr. Atif Rafique	Law Department, Government of Balochistan
Counsel	
Mr. Ignacio Torterola	GST LLP
Mr. Diego Brian Gosis	GST LLP
Mr. Quinn Smith	GST LLP
Ms. Katherine Sanoja	GST LLP
Mr. Gary J. Shaw	GST LLP
Ms. Bethel Kassa	GST LLP
Mr. Sam Wordsworth, QC	Essex Court Chambers
Mr. Lucas Bastin	Essex Court Chambers
Mr. Sean Aughey	11 King's Bench Walk
Mr. Usman Raza Jamil	RJT Litigators
Court Reporter	
Mr. David Kasdan	Worldwide Court Reporting

20. Audio recordings and transcripts of the First Session and Hearing were made and circulated to the parties and the members of the Committee.

21. On 5 May 2020, Pakistan submitted a second witness statement of Mr. Kamran Ali Afzal ("**Mr. Afzal's Second Witness Statement**").

22. On 6 May 2020, counsel for TCCA objected to the scope of Mr. Afzal's Second Witness Statement. On the same date, Pakistan requested permission from the Committee to respond to arguments made by counsel for TCCA during the Hearing.

23. On 8 May 2020, Pakistan replied to TCCA's objections to Mr. Afzal's Second Witness Statement of 6 May 2020.

24. On 9 May 2020, counsel for TCCA opposed Pakistan's request of 6 May 2020. Pakistan replied on the same date.

25. On 11 May 2020, the Committee issued Procedural Order No. 1, establishing, among others, the procedural calendar for the parties' further submissions on Pakistan's Annulment Application. By same communication, the Committee invited each party to submit any

further observations that they may have on their respective applications of 6 and 9 May 2020. Pakistan submitted its observations on 13 May 2020 and counsel for TCCA submitted theirs on 21 May 2020.

26. On 13 May 2020, Pakistan submitted observations on the undertaking proposed by TCCA during the Hearing.

27. On 18 and 19 May 2020, Pakistan and TCCA, respectively, submitted various comments on the transcripts of the First Session and Hearing.

28. By letter dated 21 May 2020, TCCA submitted its observations on Pakistan's undertaking.

29. By email dated 29 May 2020, the Committee informed the parties that, having been at the Hearing and having reviewed the audio recordings, it deemed it would be better served to exercise judicial economy and that it was unnecessary to engage in the time and cost to amend the transcripts, particularly based upon the proposed changes.

30. By email of 31 May 2020, letter of 3 June 2020, and email of 4 June 2020, TCCA, Pakistan, and TCCA, respectively, submitted observations on whether five expert reports that Pakistan filed with its Annulment Application should be admitted into the annulment proceedings and for consideration in the stay decision. In its 31 May 2020 email, TCCA stated that it was prepared to consent to the admission of the reports for purposes of the stay.

31. Following TCCA's 12 June 2020 follow-up email, on 15 June 2020, the Committee made a decision to strike certain portions of Mr. Afzal's Second Witness Statement.

32. The Committee has extensively deliberated, by videoconferencing and other means, on numerous occasions over the period between its constitution and the issuance of this Decision.

II. THE POSITION OF THE PARTIES

33. Applicant requests the Committee to continue the provisional stay of enforcement of the Award until it decides on Applicant's request for annulment.[1] It argues that there is a tendency of *ad hoc* committees to continue the stay of enforcement which, by no means, is an exceptional remedy.[2] In any case, Applicant argues that it has met the burden of proof of demonstrating the existence of circumstances that warrant the continuation of the provisional stay.[3]

34. Claimant requests the Committee to reject Applicant's petition and lift the provisional stay of enforcement of the Award.[4] It argues that Applicant has the burden of demonstrating the existence of specific circumstances that would warrant the continuation of the stay, a burden that has not been met by Applicant.[5] In the alternative, if the Committee considers that such burden was met, Claimant requests the Committee to subject the continuation of the stay to the provision by Applicant of a security.[6]

A. THE STANDARD FOR GRANTING A STAY OF ENFORCEMENT

a. Applicant's Position

35. Applicant argues that the analysis should begin with the key provisions, namely Articles 52(5) and 53(1) of the ICSID Convention and Rules 54(2) and 54(4) of the Arbitration Rules, which shall be interpreted in accordance with Articles 31 through 33 of the Vienna Convention on the Law of Treaties ("**Vienna Convention**" or "**VCLT**").[7] For Applicant, such interpretation demonstrates, contrary to what Claimant affirmed, that granting the continuation of the stay is not the exception.[8]

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[1] Applicant's Annulment Application, ¶ 112. *See also*, Applicant's Annulment Application, ¶ 114(b); Applicant's Response, ¶ 52.

[2] *See, e.g.,* Applicant's Response, ¶ 15.

[3] *See, e.g.,* Applicant's Response, ¶ 20.

[4] Cl. Opposition, ¶ 68; Cl. Rejoinder, ¶ 85.

[5] *See, e.g.,* Cl. Opposition, ¶¶ 3, 7.

[6] *See, e.g.,* Cl. Opposition, ¶ 55.

[7] Applicant's Reply, ¶¶ 10–12. *See also,* Applicant's Annulment Application, ¶ 111; Applicant's Reply, ¶ 8.

[8] Applicant's Response, ¶ 17.

36. Accordingly, Applicant argues that these provisions shall be interpreted in accordance with: ***(1)*** "the ordinary meaning to be given to the terms of the treaty";[9] ***(2)*** "in their context";[10] ***(3)*** "in the light of its object and purpose";[11] and ***(4)*** "tak[ing] into account 'any relevant rules of international law applicable in the relations between the parties'".[12]

37. ***First,*** pursuant to the ordinary meaning of Article 52(5), it is within the "broad discretion" of the Committee to continue the provisional stay. Thus, contrary to Claimant's assertion, there is neither a presumption in favour nor against the stay.[13]

38. Further, these provisions do not qualify the circumstances that may warrant the continuation of the stay and do not establish the weight that the Committee must give to such circumstances.[14] Thus, contrary to Claimant's assertion and as recognized by other *ad hoc* committees, there is no indication in these provisions that the circumstances need to be "exceptional" or "extraordinary".[15]

39. ***Second,*** regarding the context, Applicant first argues that the ICSID Convention confers upon parties the legal right to seek annulment of an award and to have an *ad hoc* committee decide on such request, which is a central feature of the system.[16] Within this framework,

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[9] Applicant's Reply, ¶ 12; *citing*, VCLT, Article 31(1).

[10] Applicant's Reply, ¶ 12; *citing*, VCLT, Article 31(1). *See also,* Applicant's Reply, ¶ 17.

[11] Applicant's Reply, ¶ 12; *citing*, VCLT, Article 31(1). *See also,* Applicant's Reply, ¶ 25.

[12] Applicant's Reply, ¶ 29; *citing* VCLT, Article 31(3)(c).

[13] Applicant's Reply, ¶¶ 13–14; *citing* **RAA-002,** *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB/12/23, Decision on Venezuela's Request for the Continued Stay of Enforcement of the Award, 23 February 2018, ¶ 84 ("***Tenaris v. Venezuela II"***). *See also*, Applicant's Response, ¶¶ 5, 13.

[14] Applicant's Reply, ¶¶ 15–16; *citing* **RAA-005,** *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Paraguay's Request for the Continued Stay of Enforcement of the Award, 22 March 2013, ¶ 87 *("**SGS v Paraguay**")*; **RAA-002,** *Tenaris v. Venezuela II,* ¶104.

[15] Applicant's Reply, ¶ 15; *citing* **RAA-003,** *Antoine Abou Lahoud et Leila Bounafeh-Abou Lahoud v. République démocratique du Congo*, ICSID Case No. ARB/10/04, Décision sur la Suspension de L'Exécution de la Sentence Arbitrale, 30 September 2014, ¶ 47; **RAA-004,** C*aratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Decision on the Stay of Enforcement of the Award, 12 December 2019, ¶ 72–73 ("**Caratube v *Kazakhstan (II)***"*)*. *See also,* Applicant's Response, ¶¶ 15, 20; *citing* **CAA-028,** *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Stay of Enforcement of the Award, 6 April 2020 ("***NextEra v. Spain***"), ¶¶ 78–80, n. 72.

[16] Applicant's Reply, ¶¶ 18–19; *citing* **RAA-006,** *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 28 December 2007, ¶¶ 28, 30 ("***Azurix v. Argentina***"); **RAA-002,** *Tenaris v. Venezuela II* ¶¶ 101, 104; **RAA-007**, *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*,

Article 52(5) confers an auxiliary right to request the stay of enforcement while the request for annulment is decided.[17] In this context, for Applicant, it is "unsurprising" that if and when an annulment is legitimately sought in good faith, the deciding *ad hoc* committee should order the continuation of the stay of enforcement.[18]

40. Applicant further argues that Article 52(5) is part of Section 5 of Chapter IV of the ICSID Convention on "Interpretation, Revision and Annulment of the Award". By contrast, Articles 53–54 of the Convention, which relate to the binding effect of an award and its enforcement, are part of the subsequent section (i.e. Section 6 of Chapter IV).[19] For Applicant, this suggests that when used, "annulment is a process that naturally precedes enforcement", especially given that annulment takes place within the ICSID framework whereas recognition and enforcement takes place outside it.[20]

41. Finally, Applicant rejects the existence of a presumption against the stay of enforcement, as argued by Claimant.[21] For Applicant, the final and binding nature is subject to the exercise of the rights conferred by Article 52 of the Convention, including the right to request the stay of enforcement,[22] something that Claimant has failed to address.[23] Such position, according to Applicant, is supported by the "long-standing practice of committees toward ordering a stay", demonstrated by the fact that out of 59 publicly available stay

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ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008, ¶ 39 ("***Enron v. Argentina***"); **RAA-008,** *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 1 September 2006, ¶ 37 ("***CMS v. Argentina")***.

[17] Applicant's Reply, ¶ 19; *citing* **RAA-002,** *Tenaris v. Venezuela II* ¶ 101; **RAA-009,** *Standard Chartered Bank (Hong Kong) Limited v. TANESCO*, ICSID Case No. ARB/10/20, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 12 April 2017, ¶ 61 ("***Standard Chartered v. Tanzania****").*

[18] Applicant's Reply, ¶ 23; *citing* **RAA-002,** *Tenaris v. Venezuela II*¶ 104; **RAA-006,** *Azurix v. Argentina*, ¶ 44.

[19] Applicant's Reply, ¶ 20.

[20] Applicant's Reply, ¶ 21.

[21] Applicant's Reply, ¶ 24; *referring to* **RAA-013,** *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Chile's Request for a Stay of Enforcement of the Unannulled Portion of the Award, 16 May 2013, ¶ 40 ("***Pey Casado v. Chile***"); **RAA-014,** *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, 21 October 2019, ¶¶ 66–67 ("***Infrastructure v. Spain***"); Cl. Opposition, ¶ 10.

[22] Applicant's Reply, ¶ 24(a); *citing* **RAA-002,** *Tenaris v. Venezuela II* ¶ 101; **RAA-013**, *Pey Casado v. Chile*, ¶ 40.

[23] Applicant's Response, ¶ 17.

applications, 45 were granted and 14 were denied,[24] which is "indicative of a certain line of jurisprudential consistency".[25]

42. ***Third,*** Applicant argues that pursuant to the ICSID Convention's preamble, Article 52(5) has to be interpreted "in light of the 'need for international cooperation for economic development […]'",[26] and taking into account the importance given to the parties' consent.[27] Therefore, an interpretation of the Convention that creates "unnecessary or precipitate impairment of the economic development of ICSID States would be contrary to [said] objective."[28] Accordingly, the Convention's objective and purposes would not be properly served with the immediate enforcement of an award that would have devastating consequences on a developing country.[29]

43. ***Fourth,*** Applicant argues that based upon Article 31(3)(c) of the VCLT, Article 6(1) of the International Covenant for Civil and Political Rights ("**ICCPR**") must also be taken into account. Ratified by almost all ICSID Contracting States, ICCPR enshrines through Article 6(1) the right to life and the prohibition of the arbitrary deprivation of life, which is also a customary international norm.[30] Accordingly, "any circumstance of jeopardy to the right to life of individuals would be one requiring a stay."[31] Similarly, Applicant argues that Article 13(1) of the World Health Organization's ("**WHO**") International Health Regulations 2005 must be taken into account. This Article stipulates that each State must "develop, strengthen and maintain…the capacity to respond promptly and effectively to public health risks and public health emergencies of international concern".[32] As a

[24] Applicant's Reply, ¶ 22 and Table A; *citing* **RAA-010 / CAA-07,** Updated Background Paper on Annulment for the Administrative Council of ICSID of May 2016 ("***ICSID Background Paper***"), ¶ 58. *See also,* Applicant's Response, ¶ 19.

[25] Applicant's Response, ¶ 19(a).

[26] Applicant's Reply, ¶ 26. *See also,* Applicant's Response, ¶ 21.

[27] Applicant's Reply, ¶ 27. *See also,* Applicant's Response, ¶ 22.

[28] Applicant's Reply, ¶ 26.

[29] Applicant's Reply, ¶ 28.

[30] Applicant's Reply, ¶ 29, *citing* **RAA-058,** Article 6(1) International Covenant for Civil and Political Rights; **RAA-015,** Petersen*, Life, Right to, International Protection*, *in* MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (2012). *See also,* Applicant's Response, ¶ 23.

[31] Applicant's Reply, ¶ 65; Applicant's Response, ¶ 29.

[32] Applicant's Reply, ¶ 63; **RAA-**061.

contracting party to the Regulations, immediate enforcement of the Award would hinder Pakistan's performance of this obligation.

44. Based on the aforementioned, Applicant argues that, as correctly accepted by Claimant, the Committee's task "is to consider all the individual circumstances of the particular case before it and decide, in the exercise of its discretion, whether the continuation of the provisional stay is required".[33]

45. Although Applicant rejects that the standard of proof for the continuation of the stay is to demonstrate that the circumstances are "exceptional", it argues that even if that was the standard, as explained *infra*, such standard is met.[34] Applicant further argues that Claimant's argument that something additional to the ordinary consequences of complying with an award is required should be approached with caution.[35] Such consequences are part of the case's individual circumstances, which shall be taken into account by the Committee, and which may warrant the continuation of the stay in the particular case.[36]

b. Claimant's Position

46. Claimant rejects the position adopted by Applicant and argues that a continued stay of enforcement "is the exception and not the rule" whereas lifting the provisional stay of enforcement is the default rule.[37] This position is supported by the following arguments:

47. ***First***, for Claimant, Applicant's reading of the ICSID Convention violates the fundamental tenets of treaty interpretation.[38] Under such an interpretation, any award debtor that seeks

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[33] Applicant's Reply, ¶ 24. *See also,* Applicant's Response, ¶ 20; *citing* **CAA-27,** *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on the Republic of Albania's Request for the Continued Stay of Enforcement of the Award, 13 March 2020 ("**Hydro v. Albania**"), ¶ 101.

[34] Applicant's Reply, ¶¶ 36, 38; *citing* **CAA-10** / **RAA-018,** *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Decision on the Stay of Enforcement of the Award, 22 February 2018 ("***Karkey v Pakistan***"), ¶ 108; **RAA-019,** *CDC Group PLC v. Republic of Seychelles,* ICSID Case No. ARB/02/14, Decision on Whether or Not to Continue Stay and Order, 14 July 2004, ¶ 17. *See also,* Applicant's Response ("***CDC v. Seychelles****")*, ¶¶ 7, 12.

[35] Applicant's Response, ¶ 24(a).

[36] Applicant's Response, ¶ 24(b).

[37] Cl. Opposition, ¶ 8; *citing* **CAA-3**, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Stay of Enforcement of the Award, 31 August 2017, ¶ 70 ("***Burlington v. Ecuador****")*. *See also* Cl. Opposition, ¶ 27; Cl. Rejoinder, ¶ 13; *quoting* **CAA-15**, *SGS v Paraguay* ¶ 93.

[38] Cl. Rejoinder, ¶¶ 11–12.

annulment "would be assured of an extended stay of enforcement for the entire duration of the annulment proceedings", which is contrary to the intent of the provisions.[39] Claimant does not address Applicant's arguments based on ICCPR or the WHO regulations.

48. In this sense, previous *ad hoc* committees have recognized that there is no presumption that an applicant is entitled to or has the right to a continued stay.[40] In fact, because the Committee has to perform an enquiry based on the specific facts of a case, the fact that there may be a trend of *ad hoc* committees towards ordering the stay is irrelevant.[41]

49. ***Second,*** based on the wording of Article 52(5) of the ICSID Convention, a party's wishes are not enough and the circumstances of the case at hand must "require" the continuation of the stay.[42] Thus, filing a request for the annulment of an award, in itself, does not warrant an extended stay of enforcement and such petition does not have a suspensive effect on the enforcement of the award.[43]

50. Similarly, Rule 54(2) states that the provisional stay instituted upon the annulment request "shall automatically be terminated" if it is not affirmatively decided by the *ad hoc* committee that the stay shall continue.[44]

51. ***Third,*** Article 52(5) of the ICSID Convention gives broad discretion to the Committee to adopt its decision, including the power to terminate the stay of enforcement where the

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[39] Cl. Rejoinder, ¶ 12.

[40] Cl. Opposition, ¶ 9; *citing* **CAA-22**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Stay of Enforcement of the Award, 4 December 2014, ¶ 76 ("***Total S.A. v Argentina***"); **CAA-2**, *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Stay of Enforcement of the Award, 24 April 2017, ¶ 80 ("***von Pezold v. Zimbabwe")***; **CAA-3**, *Burlington v. Ecuador*, ¶ 72; **CAA-24**, *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Decision on the Request for Continuation of the Stay of Enforcement of the Award, 6 September 2018, ¶¶ 82–83 (Excerpts - Unofficial English Translation) ("***Valores v. Venezuela***"); **CAA-8**, *Infrastructure v. Spain*, ¶¶ 60, 65; **CAA-15**, *SGS v. Paraguay* ¶¶ 82, 84–85; Cl. Rejoinder, ¶ 16; *citing* **CAA-24**, *Valores v. Venezuela*, ¶ 83.

[41] Cl. Rejoinder, ¶ 15; *citing* **CAA-22**, *Total S.A. v Argentina*, ¶ 76; **CAA-8**, *Infrastructure v. Spain*, ¶ 64; **CAA-27**, *Hydro v. Albania*, ¶ 99; **RAA-004**, Caratube v *Kazakhstan (II)*, ¶¶ 70–71.

[42] Cl. Opposition, ¶ 8; *citing* **CAA-5**, Christoph H. Schreuer, The ICSID Convention: A Commentary (2d ed., 2009) ("**Schreuer**"), ¶¶ 586, 588; Cl. Rejoinder, ¶¶ 10, 13, 17.

[43] Cl. Opposition, ¶ 10; *citing* **CAA-14**, *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, 5 March 2009, ¶ 27 ("***Sempra v. Argentina***"); **CAA-5**, Schreuer, ¶ 581; **CAA-8**, *Infrastructure v. Spain*, ¶ 60.

[44] Cl. Opposition, ¶ 8; *citing* **CAA-5**, Schreuer, ¶¶ 586, 588; Cl. Rejoinder, ¶¶ 10, 13; *citing* ICSID Arbitration Rule 54(2); **RAA-004**, *Caratube v Kazakhstan (II)*, ¶ 71.

annulment application is meritless or is manifestly dilatory.[45] Such discretion, however, does not excuse Applicant from its burden of demonstrating the circumstances that require the stay.[46]

52. ***Fourth,*** based on the object and purpose of the ICSID Convention, awards are final and binding once they are issued and are subject to the very limited avenues for challenge expressly enshrined in the Convention.[47]

53. Based on the aforementioned, Claimant argues that Applicant bears a high burden of proof that requires it to furnish evidence of the specific and exceptional circumstances that would "justify preventing a successful claimant from enforcing a final and binding ICSID award".[48] For Claimant, as explained *infra*, Applicant has failed to meet this burden. [49]

54. Finally, Claimant points out that Applicant relies on several expert reports submitted with its request for annulment. For Claimant, the introduction of such reports was made without leave from the Committee and it is unclear that such reports are admissible. In any case, even if treated as part of the record, Claimant argues that Applicant still fails to meet its burden.[50]

[45] Cl. Rejoinder, ¶ 13; *citing* **RAA-001**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Stay of Enforcement of the Award, 21 February 2020, ¶¶ 43, 66 ("***Perenco v. Ecuador***"); **CAA-15**, *SGS v Paraguay* ¶ 94; **CAA-22**, *Total S.A. v Argentina*, ¶ 84; **CAA-11**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Stay of Enforcement of the Award, 4 April 2016, ¶¶ 115–116; ("***OI European v. Venezuela***"); **CAA-28**, *NextEra v. Spain*, ¶ 82.

[46] Cl. Rejoinder, ¶ 17; *citing* **CAA-3**, *Burlington v. Ecuador*, ¶ 78.

[47] Cl. Rejoinder, ¶ 14; *citing* **CAA-22**, *Total S.A. v Argentina*, ¶ 74; **CAA-21**, *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on the Request to Maintain the Stay of Enforcement of the Award, 24 March 2017, ¶ 74 ("***Tenaris v. Venezuela (I)***").

[48] Cl. Opposition, ¶ 3. *See also*, Cl. Opposition, ¶¶ 7–8, 10–13, 17, 23; *citing* **CAA-3**, *Burlington v. Ecuador*, ¶ 73; **CAA-15**, *SGS v. Paraguay,* ¶¶ 84–86, 92; **CAA-21**, *Tenaris v. Venezuela* (I), ¶¶ 74, 81; **CAA-22**, *Total S.A. v Argentina*, ¶¶ 79–80; **CAA-11**, *OI European v. Venezuela*, ¶¶ 94, 124; **CAA-24**, *Valores v. Venezuela*, ¶ 85; **CAA-10**, *Karkey v. Pakistan*, ¶¶ 102–106; **CAA-2**, *von Pezold v. Zimbabwe*, ¶ 80; **CAA-3**, *Burlington v. Ecuador*, ¶¶ 10, 18; *quoting* **CAA-27**, *Hydro v. Albania*, ¶ 101.

[49] Cl. Rejoinder, ¶¶ 19–20.

[50] Cl. Opposition, ¶ 14.

B. THE CIRCUMSTANCES FOR THE CONTINUANCE OF THE STAY

55. For Applicant, the following circumstances warrant the continuation of the provisional stay of enforcement of the Award:[51] ***(1)*** whether the request for stay was made in good faith; ***(2)*** prejudice to Applicant if the provisional stay is not continued; ***(3)*** prejudice to Claimant if the provisional stay is continued; ***(4)*** the lack of risk of non-compliance with the Award should the Award not be annulled; and ***(5)*** the risk of non-recoupment of the monies paid should the Award be annulled.

56. Claimant argues that Applicant has failed to establish any valid grounds for continuing the stay for the following reasons: ***(1)*** Pakistan has not demonstrated "the kind of acute, particularized harm that satisfies the demanding standard imposed under the ICSID Convention and Rules";[52] ***(2)*** a continuation of the stay would impose greater and unjustified burdens on Claimant; ***(3)*** the risk of non-compliance with the Award; and, ***(4)*** the lack of risk of non-recoupment. Thus, it requests the Committee to terminate the provisional stay of enforcement of the Award.[53]

(1) Whether the Request for Stay was Made in Good Faith

a. Applicant's Position

57. Applicant argues that enforcing an award with potentially devastating consequences on a developing country, when the request for stay is made in good faith, does not serve the object and purposes of the ICSID Convention.[54] Applicant affirms that it has raised serious grounds in its request for stay and, therefore, filing such a request is not a dilatory tactic which, in turn, supports the continuation of the stay of enforcement.[55] In any case, the Committee cannot assume that the Award will not be annulled.[56]

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[51] Applicant's Reply, ¶¶ 5, 31–32.

[52] Cl. Rejoinder, ¶ 2. *See also,* Cl. Rejoinder, ¶ 6.

[53] Cl. Rejoinder, ¶ 8.

[54] Applicant's Reply, ¶ 28.

[55] Applicant's Reply, ¶¶ 4(b), 87–88, 96.

[56] Applicant's Response, ¶ 28.

58. Applicant clarifies that there is no need for the Committee to consider the merits of its annulment request as part of the Committee's analysis of the circumstances requiring the continuation of the stay.[57]

b. Claimant's Position

59. Pakistan's stay request is merely its latest tactic to hinder and obstruct TCCA's efforts to enforce its right to compensation. It is yet another attempt to put off paying the price for its breaches of the Australia-Pakistan bilateral investment treaty. An *ad hoc* committee does have the discretion to reject a stay request made in a manifestly dilatory or abusive annulment application, even if the circumstances would otherwise support it. A claim that an application was submitted in good faith is not a circumstance justifying a stay of enforcement because "a serious good faith application is the least that can be expected from an applicant, and nothing in the ICSID Convention expresses, or allows an understanding, that compliance with or fulfillment of that minimum duty requires the extension of the stay."[58]

60. For Claimant, the supposed merits of the Annulment Application are irrelevant for the decision on the continuation of the stay.[59] If the continuation of the stay was tied to the annulment applicant's merits, *ad hoc* committees would be at risk of prejudging the annulment applications in their decisions on the stay of enforcement.[60] In any case, the grounds cited by Applicant are baseless and the Annulment Application and stay request are nothing more than a tactic to abuse ICSID procedural mechanisms and hinder the efforts of Claimant to obtain effective relief.[61]

[57] Applicant's Response, ¶¶ 27(a)–28; *citing* **CAA-028,** *NextEra v. Spain*, ¶¶ 82–83.
[58] Cl. Rejoinder, ¶ 23.
[59] Cl. Rejoinder, ¶¶ 7, 22–23; *citing* **CAA-15**, *SGS v. Paraguay,* ¶ 94; **CAA-22**, *Total S.A. v Argentina*, ¶¶ 83–84; **CAA-11**, *OI European v. Venezuela*, ¶ 115; **CAA-24**, *Valores v. Venezuela*, ¶ 87; **CAA-28**, *NextEra v. Spain*, ¶ 82; **CAA-10**, *Karkey v. Pakistan,* ¶ 118.
[60] Cl. Rejoinder, ¶ 24.
[61] Cl. Rejoinder, ¶ 21.

(2) Prejudice to Applicant if the Stay is Not Continued

a. Applicant's Position

61. For Applicant, *ad hoc* committees normally consider the economic harm that the parties may suffer from the "immediate" enforcement of an award.[62] Accordingly, it maintains that where *ad hoc* committees have found hardship to exist, they have ordered the continuation of the stay without the need for security from the award debtor.[63] This, however, does not impose the burden on the requesting party to show "that [failing continuation] there will be a financial catastrophe or irreparable prejudice" in the ability of the State to conduct its affairs.[64]

62. Applicant argues that the Award is the second largest ICSID award in existence, representing over 50% of Pakistan's official foreign exchange reserves.[65] As such, its immediate enforcement would have immediate and potentially devastating effects on Pakistan's fragile economy and social and political situation, all of which warrant the provisional stay to be continued.[66] In particular, Applicant highlights the effects described *infra*.[67]

63. ***First,*** immediate enforcement would "'require the abandonment' of Pakistan's ongoing critical economic reforms" that have helped preserve economic stability.[68] Abandoning such reforms would very likely derail the USD 6 billion loan package provided by the IMF to support such economic reforms, since Pakistan would be unable to comply with the

[62] Applicant's Reply, ¶¶ 35, 37(a)–37(b); *citing,* **RAA-004**, *Caratube v Kazakhstan (II)*, ¶ 96.

[63] Applicant's Response, ¶ 36(d).

[64] Applicant's Reply, ¶ 35, *citing,* **RAA-004,** *Caratube v Kazakhstan (II),* ¶ 96.

[65] Applicant's Reply, ¶¶ 3, 36; *citing* Mr. Ramran Afzal's First Witness Statement ("**Mr. Afzal's First Witness Statement**"), ¶ 55.

[66] Applicant's Annulment Application, ¶ 113; *citing* Professor Sachs Report, ¶ 43; Burki Report, ¶ 22; Applicant's Reply, ¶¶ 4(a), 36, 40, 47, 81; *citing* **REA-002,** IMF, Press Release No. 19/264, *IMF Executive Board Approves US$ 6 billion 39-Month EFF Arrangement for* Pakistan, 3 July 2019; **REA-003,** IMF, Press Release No. 19/157, *IMF Reaches Staff-Level Agreement on Economic Policies with Pakistan for a Three-Year Extended Fund Facility*, 12 May 2019; **REA-004,** Pakistan IMF Country Report No. 19/212, ¶ 38 and pp. 5–7, 13; Mr. Afzal's First Witness Statement, ¶¶ 8–35, 62; Applicant's Response, ¶¶ 6(a), 33(a), 36(e).

[67] Applicant's Reply, ¶¶ 4(a), 51 *et seq.*

[68] Applicant's Reply, ¶ 52. *See also,* Applicant's Reply, ¶¶ 38, 41, 62, 69; *citing* Mr. Afzal's First Witness Statement, ¶¶ 8–28; **REA-004,** Pakistan IMF Country Report No. 19/212, Appendix I. Letter of Intent dated 19 June 2019.

conditions set therein. [69] Further, it would likely "lead to withdrawal of the international financing support that has been pledged to Pakistan contingent on the implementation of the IMF package".[70]

64. ***Second,*** immediate enforcement of the Award would be felt across the State's economy and would require the reallocation of the available public funds, including the removal of funding "devoted to health and welfare spending in Pakistan".[71] This, according to Applicant, would have disastrous effects on the State's capacity to meet public needs, including the loss of life and the impact on programs designed to face the crisis of the COVID-19 pandemic, all of which would affect specially the most vulnerable segment of the population.[72]

65. ***Third,*** as required by the IMF, Pakistan has implemented "tough austerity measures" that have led to "large-scale anti-government protests".[73] Because immediate enforcement of the Award would undermine the justification for such austerity measures, enforcement would trigger more strikes and protests and, therefore, would threaten social stability.[74]

[69] Applicant's Reply, ¶¶ 3, 42–45, 53; *citing* Mr. Afzal's First Witness Statement, ¶¶ 10–11, 35, 38–43, 45, 48–55, 70–71; **REA-004,** Pakistan IMF Country Report No. 19/212, Appendix I. Letter of Intent dated 19 June 2019, Attachment I. Memorandum of Economic and Financial Policies and p. 2; **REA-005,** IMF Press Release No. 19/477, IMF Executive Board Completes the First Review of Pakistan's Extended Fund Facility, 19 December 2019; **REA-006,** IMF Country Report No. 19/380; **REA-007,** IMF Press Release No. 20/51, *Statement at the Conclusion of the IMF Mission to Pakistan*, 14 February 2020.

[70] Applicant's Reply, ¶ 54; *citing* Mr. Afzal's First Witness Statement, ¶¶ 29–30, 71; **REA-002,** IMF, Press Release No. 19/264, *IMF Executive Board Approves US$ 6 billion 39-Month EFF Arrangement for Pakistan*, 3 July 2019; **REA-004,** Pakistan IMF Country Report No. 19/212, ¶ 46.

[71] Applicant's Reply, ¶ 4(a)(i). *See also*, Applicant's Reply, ¶¶ 38, 56–65; *citing* Witness Statement of Dr. Nishtar, ¶¶ 7–9, 14, 17, 20, 26–27, 31; Mr. Afzal's First Witness Statement, ¶¶ 53, 57, 80–81; Applicant's Response, ¶ 6(b)–(c).

[72] Applicant's Reply, ¶ 4(a)(i) and (ii). *See also*, Applicant's Reply, ¶¶ 38, 56–65; *citing* Witness Statement of Dr. Nishtar, ¶¶ 7–9, 14, 17, 20, 26–27, 31; Mr. Afzal's First Witness Statement, ¶¶ 53, 57, 80–81; Applicant's Response, ¶ 6(b)–(c).

[73] Applicant's Reply, ¶ 66; *citing, inter alia,* **REA-009,** *Pakistani traders strike over IMF austerity measures*, REUTERS, 13 July 2019; Burki Report, ¶ 20; Mr. Afzal's First Witness Statement, ¶ 37.

[74] Applicant's Reply, ¶ 66; *citing* Mr. Afzal's First Witness Statement, ¶ 90.

66. ***Fourth,*** "[l]ifting the stay will likely have particularly serious economic, social and security impacts on the people of Balochistan", the most economically, politically and socially disadvantaged area in Pakistan.[75]

67. ***Fifth,*** immediate payment of the Award would impact Applicant's ability to respond to security threats.[76] These include its efforts to eradicate the presence of terrorists in the Federally Administered Tribal Areas,[77] to ensure control in its Western border with Afghanistan pursuant to its international obligations of suppression of terrorism,[78] and to address particular problems regarding the financing of terrorism and money laundering.[79]

68. ***Sixth,*** all of the aforementioned would take place in the context of the COVID-19 pandemic which has "unknown and uncertain economic, health and welfare impacts", and which has placed Pakistan's economy in a place of special fragility.[80]

69. ***Seventh,*** for Applicant, its position does not change because enforcement proceedings take time. It argues that this has never been a relevant factor considered by *ad hoc* committees, enforcement proceedings are fact-specific, and it is impossible for Claimant to predict how long the enforcement proceedings will take or how Pakistan will act in such proceedings.[81]

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[75] Applicant's Reply, ¶ 67; *citing* Mr. Afzal's First Witness Statement, ¶ 91.

[76] Applicant's Reply, ¶¶ 68, 80; *citing* **RAA-020,** *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 30 November 2004, ¶ 27 ("***Mitchell v. Congo***").

[77] Applicant's Reply, ¶¶ 70–71; *citing* Mr. Afzal's First Witness Statement, ¶¶ 86–87, 89.

[78] Applicant's Reply, ¶¶ 72–74; *citing* Mr. Afzal's First Witness Statement, ¶ 90; **RAA-060,** United Nations Security Council Resolution 1373, UN Doc. S/RES/1373 (28 September 2001), ¶¶ 2(b) and 2(g).

[79] Applicant's Reply, ¶¶ 75–79; *citing* **REA-015,** FATF, *Improving Global AML/CFT Compliance: On-going Process*, 29 June 2018; **RAA-060,** United Nations Security Council Resolution 1373, UN Doc. S/RES/1373 (28 September 2001), ¶ 1; **REA-016,** APG, *Anti-money laundering and counter-terrorist financing measures: Pakistan Mutual Evaluation Report* October 2019, Executive summary, ¶¶ 3, 22; **REA-016,** APG, *Anti-money laundering and counter-terrorist financing measures: Pakistan Mutual Evaluation Report* October 2019, Report, ¶¶ 12, 39; **REA-004,** Pakistan IMF Country Report No. 19/212, Appendix I. Letter of Intent dated 19 June 2019, Attachment I. Memorandum of Economic and Financial Policies, ¶ 17; Mr. Afzal's First Witness Statement, ¶¶ 18, 85.

[80] Applicant's Reply, ¶¶ 4(a)(ii), 55, 62–63; *citing* Mr. Afzal's First Witness Statement, ¶¶ 48–54, 66–68. *See also,* Applicant's Reply, ¶ 46; *citing* Mr. Afzal's First Witness Statement, ¶ 79; Applicant's Response, ¶¶ 10–11, 35(c); *citing* Witness Statement of Mr. Afzal, ¶ 52; **REA-020,** IMF Press Release 20/167*, IMF Executive Board Approves a US$ 1.386 Billion Disbursement to Pakistan to Address the COVID-19 Pandemic*, 16 April 2020; **REA-024**, IMF World Economic Outlook Report, April 2020, Foreword by Gita Gopinath; **REA-025**, Secretary-General's Message on COVID-19, United Nations Secretary-General, 11 March 2020; **REA-026**, World Trade Organization, *COVID-19 and World Trade*; **REA-021**, IMF Country Report No. 20/114, Pakistan: Request for Purchase Under the Rapid Financing Instrument – Press Release; Staff Report; and Statement by the Executive Director for Pakistan, April 2020.

[81] Applicant's Reply, ¶ 84.

Accordingly, it affirms "that the Committee cannot assess how various enforcement jurisdictions will handle the proceedings before it, and cannot speculate thereon when deciding whether circumstances exist requiring a stay".[82]

70. For Applicant, continuing the stay of enforcement would reduce these adverse effects because this would: ***(1)*** give it more time to plan how to minimize the risk posed by the payment of the Award; ***(2)*** allow for a more gradual and careful relocation of funds; and, ***(3)*** allow enforcement to take place when Pakistan is in a better socio-economic position.[83]

71. Applicant denies that, as argued by Claimant, it is ready to monetize the value of Reko Diq and, thus, that the economic hardship would be offset because of the size of the asset.[84] Applicant argues that doing so is a lengthy process for which it is not ready. It affirms that it "still does not have unrestricted access to the project core samples and associated data that were generated by [Claimant] over the course of its several years on the site" and that "the core shed remains in [Claimant's] control", which make any transition from a non-producing to a producing asset much more difficult.[85] Applicant further highlights that it was unreasonable for it to be expected to exploit the asset during the pendency of the case brought by Claimant.[86]

72. Finally, Applicant argues that it is incorrect that the *ad hoc* committee in *Karkey v. Pakistan* rejected similar arguments as those presented in the case at hand. For Applicant, the amount owed under the *Karkey v. Pakistan* award was of a different magnitude and the situation that it is now facing is materially different from the one it was facing after the *Karkey v. Pakistan* award.[87]

[82] Applicant's Response, ¶ 35(a). *See also,* Applicant's Response, ¶¶ 7, 35(b).
[83] Applicant's Reply, ¶¶ 48(a)–(c), 80; *citing* Mr. Afzal's First Witness Statement, ¶¶ 93–94.
[84] Applicant's Reply, ¶ 83; Applicant's Response, ¶¶ 8, 36.
[85] Applicant's Response, ¶ 36(a)(ii).
[86] Applicant's Response, ¶ 36(b).
[87] Applicant's Reply, ¶ 34.

b. Claimant's Position

73. Claimant argues that allowing TCCA to proceed with the enforcement does not create an undue prejudice to Pakistan.[88] This is based on the arguments described *infra.*

74. ***First,*** Claimant argues that Applicant's position is based solely on the size of the Award. On the one hand, as recognized by previous *ad hoc* committees, budgetary consequences arising from the payment of any award cannot serve as a basis to delay its enforcement.[89] Continuing the stay of enforcement based on the budgetary consequences for the State cannot be reconciled with a State's voluntarily assumed obligations to comply with an ICSID award in accordance with Articles 52(5) and 53(1) of the ICSID Convention and Arbitration Rule 54(1).[90]

75. On the other hand, the size of the Award reflects the extraordinary value of the asset that was expropriated by Applicant and the scope of its misconduct. Accordingly, the size of the Award cannot serve as a basis to add barriers to the complex enforcement process that Claimant has to follow. [91]

76. ***Second,*** for Claimant, Applicant failed to demonstrate that: ***(i)*** lifting the provisional stay would have the described consequences, especially when the social and fiscal problems referred to by Applicant are not something new;[92] ***(ii)*** its commitments to the IMF would excuse Applicant from complying with its other international obligations; [93] ***(iii)*** its

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[88] Cl. Opposition, ¶ 27.

[89] Cl. Opposition, ¶¶ 16, 18, 20; *citing* **CAA-11**, *OI European v. Venezuela*, ¶ 122; **CAA-3**, *Burlington v. Ecuador*, ¶¶ 79, 85; **CAA-2**, *von Pezold v. Zimbabwe*, ¶ 84; **CAA-22**, *Total S.A. v Argentina*, ¶ 104; **CAA-10**, *Karkey v. Pakistan*, ¶ 113; Cl. Rejoinder, ¶ 6.

[90] Cl. Opposition, ¶ 19; *citing* **CAA-24**, *Valores v. Venezuela*, ¶ 102; **CAA-11**, *OI European v. Venezuela*, ¶ 120.

[91] Cl. Opposition, ¶¶ 4, 24; *citing* **CEA-3, Ex. CE-108**, Transcript of Interview with Dr. Samar Mubarakmand, Dawn TV, dated 15 December 2010, at 1; **CEA-4, Ex. CE-111,** *Tariq Asad vs. Federal Government and Others*, CMA 220/2011 in C.P. No. 68/2010, Submission of Dr. Samar Mubarakmand in the Supreme Court of Pakistan, dated 19 January 2011, ¶¶ 6, 9–10; **CEA-1, Ex. CE-212**, *Mualana Abdul Haq and others vs. Government of Balochistan and Others*, C.P. No. 892/2006, Submission of the Government of Balochistan and the Balochistan Development Authority in the High Court of Balochistan, dated 2007, at 12; **CAA-18**, Decision on Jurisdiction and Liability, dated 10 November 2017, ¶¶ 1132, 1138, 1264.

[92] Cl. Opposition, ¶ 25; Cl. Rejoinder, ¶¶ 54–56; *citing* **CAA-27**, *Hydro v. Albania*, ¶¶ 119–120.

[93] Cl. Opposition, ¶ 25; *citing* **CEA-52**, Islamic Republic of Pakistan, Domestic Markets & Monetary Management Department, Liquid Foreign Exchange Reserves (last updated 6 February 2020), available at http://www.sbp.org.pk/DFMD/ferm.asp.

argument is different than the one brought before and rejected by the *ad hoc* committee in *Karkey v. Pakistan;*[94] and, more generally, ***(iv)*** its argument is different from the ¨general circumstances¨ that would affect Pakistan at any time when complying with the Award.[95]

77. In particular, Claimant highlights that the *ad hoc* committee in *Karkey v. Pakistan* stated that Pakistan did not "provide specific evidence that gives rise to a particularized fear of harm, since such effects are inherent and 'normal' to the pecuniary obligations imposed by an adverse ICSID award".[96]

78. ***Third,*** Claimant argues that Applicant holds 100% of the Reko Diq project, a project of enormous value as recognized by Applicant itself, and has had complete control over it for more than seven years.[97] Because of this, nothing has prevented it from monetizing the project, which Applicant can do through different mechanisms.[98] Accordingly, it is untrue that the only way for Pakistan to pay the Award is through enacting austerity measures, curtailing socioeconomic programs, or abandoning its IMF package.[99]

79. In any case, even if it were true that Applicant cannot monetize the Reko Diq project, that does not warrant the continuation of the provisional stay. Applicant has been on notice about its obligation to comply with the Award since 12 July 2019. Further, in the course of the annulment proceedings, Applicant has argued that it will be in a position to comply

[94] Cl. Opposition, ¶¶ 21, 25; *citing* **CAA-10**, *Karkey v. Pakistan*, ¶ 112.

[95] Cl. Opposition, ¶ 20; Cl. Rejoinder, ¶¶ 18, 20.

[96] Cl. Opposition, ¶ 21; *citing* **CAA-10**, *Karkey v. Pakistan*, ¶¶ 111–112.

[97] Cl. Rejoinder, ¶ 48–49; *citing* **CEA-69**, Mumtaz Alvi, "Foreign debts to be paid through Reko Diq gold: PM Imran," The International News, dated 13 February 2020, available at https://www.thenews.com.pk/amp/613028-foreign-debts-to-be-paid-through-reko-diq-gold-pm-imran?__twitter_impression=true; **CEA-70**, "Pakistan's Copper Export to China Increase by 400%," The Nation, dated 31 March 2020, available at https://nation.com.pk/31-Mar-2020/pakistan-copper-s-export-to-china-increase-by-400-percent.

[98] Cl. Opposition, ¶ 26; *referring to* **CEA-2**, Andrea Tse, "Sinochem Buys 40% Statoil Brazil Stake," TheStreet, dated 21 May 2010, available at https://www.thestreet.com/investing/stocks/sinochem-buys-40-statoil-brazil-stake-10763460; **CEA-12**, "Spectrum Auction Results (At the end of Final Round)," Pakistan Telecommunication Authority, 23 April 2014, available at https://www.pta.gov.pk/spectrumauction/results/aucres.php; Cl. Rejoinder, ¶¶ 3, 50–51; *citing* **CEA-70**, "Pakistan's Copper Export to China Increase by 400%," The Nation, dated 31 March 2020, available at https://nation.com.pk/31-Mar-2020/pakistan-copper-s-export-to-chinaincrease-by-400-percent; **CEA-77**, Jehangir Nasir, "GIC to Invest More Money Than CPEC in Pakistan: Report," ProPakistani, dated 14 April 2020, available at https://propakistani.pk/2020/04/14/global-investment-consortium-to-invest-more-money-than-cpecin-pakistan-report/?utm_source=rss&utm_medium=rss&utm_campaign=global-investmentconsortium-to-invest-more-money-than-cpec-in-pakistan-report.

[99] Cl. Rejoinder, ¶¶ 4, 52.

with the Award "in, (say), 2–3 years' time."[100] As expressed by the *ad hoc* committee in *von Pezold v. Zimbabwe*, the intention to pay an award if the annulment request is rejected implies that the payment itself would not have "catastrophic immediate and irreversible consequences for the Respondent's ability to conduct its affairs".[101]

80. ***Fourth,*** Claimant sustains that lifting the provisional stay does not entail immediate payment of the Award. Enforcement proceedings, especially against a State like Applicant who has announced that it will oppose all enforcement efforts, "is a lengthy and difficult process",[102] and lifting the stay of enforcement just "removes one [significant] hurdle […] to the lengthy and difficult process of obtaining actual compensation".[103] This has not been altered by the COVID-19 pandemic, especially because Pakistan has not explained how "enforcement actions would compromise its current or near-term efforts to respond to the pandemic" and, if anything, the enforcement efforts may be even slower because of the pandemic.[104]

(3) Prejudice to Claimant if the Stay is Continued

a. Applicant's Position

81. Applicant argues that Claimant will not suffer any prejudice if the stay of enforcement is continued since post-Award interest is accruing at a rate of USD 700,000 per day.[105] Further, Applicant argues that there are no grounds for Claimant's allegation that Pakistan requested the stay to hide or shield assets.[106]

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[100] Cl. Rejoinder, ¶ 53.

[101] Cl. Rejoinder, ¶ 53; *quoting* **CAA-2**, *von Pezold v. Zimbabwe*, ¶ 83

[102] Cl. Rejoinder, ¶ 5. *See also,* Cl. Rejoinder, ¶ 40–43; *citing* **CEA-67**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, C.A. No. 1:19-cv-02424 (TNM), Memorandum of Law in Support of Respondent's Motion to Stay Proceedings, or in the Alternative, to Dismiss the Petition (D.D.C. Jan. 3, 2020), at 21–24; **CEA-68**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, C.A. No. 1:19-cv-02424 (TNM), Respondent's Reply Memorandum of Law in Support of Motion to Stay Proceedings (D.D.C. Feb. 7, 2020), at 2–3.

[103] Cl. Rejoinder, ¶ 44, Annex A. *See also,* Cl. Rejoinder, ¶ 45; citing **CAA-3**, *Burlington v. Ecuador*, ¶ 21; **CEA-62**, Laura Roddy, "Conoco and Ecuador settle ICSID feud," Global Arbitration Review, dated 4 December 2017, available at https://globalarbitrationreview.com/article/1151357/conoco-andecuador-settle-icsid-feud.

[104] Cl. Rejoinder, ¶ 46.

[105] Applicant's Reply, ¶¶ 4(a)(iii), 85, 85(a); *citing* Award, ¶ 1858(III); Applicant's Response, ¶ 47.

[106] Applicant's Reply, ¶ 116(a)(ii).

b. Claimant's Position

82. For Claimant, a continuation of the stay would impose greater and unjustified burdens because it would be forced to chase Applicant's assets around the world after Applicant has had more time to shield those assets.[107] Further, Claimant sustains that the post-Award interest that was ordered is insufficient because it is not tied to Pakistan's actual default risk and, thus, is not even sufficient to maintain the market value of the Award.[108] According to TCCA, while interest may compensate for the time value of money, "[t]he real prejudice of a continued stay is not the passage of time: it is the risk of Pakistan's non-compliance with any part of the Award".[109] TCCA submits that due to the decline in the interest rate under the Award such rate is "not even sufficient to maintain the market value of the Award". TCCA adds that the interest rate is actually lower than Pakistan's borrowing rate and incentivizes it to not pay the award.[110]

(4) Risk of Non-recoupment

a. Applicant's Position

83. According to Applicant, if the stay of enforcement is lifted and the Award is later annulled, it would be exposed to the risk of non-recoupment of any monies paid to Claimant under the Award.[111] This has been widely recognized as a factor that warrants the continuation of a stay.[112]

[107] Cl. Opposition, ¶¶ 4, 62.

[108] Cl. Rejoinder, ¶¶ 77–78; *citing* **CAA-28**, *NextEra v. Spain*, ¶ 93.

[109] Reply, ¶ 61.

[110] Cl. Opposition, ¶ 78.

[111] Applicant's Reply, ¶¶ 4(a)(iii), 98.

[112] Applicant's Reply, ¶¶ 99, 103; *citing* **RAA-031,** *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, 22 December 1989, ¶¶ 14, 28 ("***MINE v. Guinea***"); **RAA-020,** *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 30 November 2004, ¶ 24; **RAA-013**, *Pey Casado v. Chile*, ¶¶ 12, 26; **RAA-008**, *CMS v. Argentina*, ¶ 38; **RAA-033**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution (Rule 54 of the ICSID Arbitration Rules), 1 June 2005, ¶ 29 ("***MTD v. Chile***"); **RAA-032,** *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, ¶ 34.

84. Applicant argues that the risk of non-recoupment is increased where the award creditor is a shell company.[113] In the case at hand, as a shell company, monies received by Claimant could be immediately distributed to its shareholders.[114] Further, the undertaking that Claimant's owners have made does not mitigate such risk since Applicant is unaware of the precise terms of such undertaking and it is unclear whether Pakistan could invoke an undertaking given by third parties for the benefit of Claimant.[115] In any case, Applicant argues that the costs associated with recoupment proceedings could be avoided if the stay is continued.[116]

85. Finally, Applicant considers that Claimant's proposal to place the recovered funds in an escrow while the Committee's decision on annulment is pending does not solve the risk of non-recoupment.[117] This is because placing the funds in escrow does not preserve the *status quo* (e.g. the value of the money) at the time the funds are paid,[118] and there is an inherent risk associated with the logistical difficulties of managing the escrow account and the relationship between the parties and the account/agent.[119]

b. Claimant's Position

86. For Claimant, as recognized by previous *ad hoc* committees, the fact that a State may be required to pay an award to be reimbursed later when the award is annulled is just a natural consequence of the enforcement regime created by the ICSID Convention.[120] As such, there is no risk of non-recoupment that could justify the stay to continue and, in any case, generalized allegations about this cannot justify the continuation of the stay.[121]

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[113] Applicant's Reply, ¶ 99; *citing* **RAA-019,** *CDC v. Seychelles*, ¶ 18; Applicant's Response, ¶ 37.

[114] Applicant's Reply, ¶¶ 100–101; *citing* **REA-019,** 2018 Financial Report, pp. 3–6, 10–11, 19.

[115] Applicant's Response, ¶ 38(c).

[116] Applicant's Reply, ¶ 101; *citing* **RAA-004,** *Caratube v Kazakhstan (II)*, ¶ 93.

[117] Applicant's Reply, ¶ 102

[118] Applicant's Reply, ¶ 102(a).

[119] Applicant's Reply, ¶ 102(b)–(d).

[120] Cl. Opposition, ¶ 27; *citing* **CAA-15**, *SGS v Paraguay*, ¶ 93; **CAA-8**, *Infrastructure v. Spain*, ¶¶ 71–72; Cl. Rejoinder, ¶ 60; *citing* **CAA-15**, *SGS v Paraguay*, ¶ 93; **CAA-8**, *Infrastructure v. Spain*, ¶¶ 71–72; **CAA-27**, *Hydro v. Albania*, ¶¶ 133–135.

[121] Cl. Rejoinder, ¶¶ 7, 57, 60.

87. Claimant argues that this does not change because it is a shell company. Claimant highlights that: ***(i)*** it has always complied with the orders issued during the proceedings and has paid all costs, including those that were Applicant's responsibility;[122] and, ***(ii)*** it is owned in equal shares, through a joint venture, by Antofagasta plc and Barrick Gold Corporation, important mining companies. Both companies have "undertaken to provide sufficient financial assistance to [Claimant] as and when it is needed to enable the Company to continue its operation and fulfil all of its financial obligations", which should provide enough comfort to Applicant.[123]

88. In any case, if the Committee considers it necessary, Claimant offers to place the amounts recovered through the enforcement of the Award in escrow while the annulment proceeding is pending.[124] Such "undertakings to hold assets in escrow are a routine part of modern business and international arbitration practice".[125] This would solve Applicant's concern regarding non-recoupment,[126] and "would mitigate any potential prejudice to Pakistan while avoiding the prejudice to TCCA from a continued stay".[127]

(5) Risk of Non-compliance with the Award

a. Applicant's Position

89. Applicant rejects that continuing with the stay would pose a risk of non-compliance with the Award on its part. Such position presumes that a State will not comply with its international obligations, which is not a valid presumption,[128] and, in Applicant's particular case, it has always met its obligations with the World Bank institutions.[129] In particular, Applicant presents the arguments described *infra.*

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[122] Cl. Rejoinder, ¶ 61.

[123] Cl. Rejoinder, ¶ 62; *quoting* **REA-019**, 2018 Tethyan Copper Company Pty Limited, Copy of financial statements and reports, at 14, Note 1(a)(ii); *citing* **CAA-4**, *CDC v. Seychelles*, ¶ 18; **CAA-18**, Decision on Jurisdiction and Liability, ¶ 224; **CAA-11**, *OI European v. Venezuela*, ¶ 113; **CAA-24**, *Valores v. Venezuela*, ¶ 98.

[124] Cl. Opposition, ¶¶ 5, 27; *citing* **CAA-3**, *Burlington v. Ecuador*, ¶¶ 18–19, 36, 43; **RAA-006**, *Azurix v. Argentina*, ¶ 10.

[125] Cl. Rejoinder, ¶ 59; *citing* **CAA-21**, *Tenaris v. Venezuela (I)*, ¶ 87; **CAA-24**, *Valores v. Venezuela*, ¶ 98; **CAA-27**, *Hydro v. Albania*, ¶¶ 133–135.

[126] Cl. Rejoinder, ¶ 58.

[127] Cl. Opposition, ¶ 5. *See also,* Cl. Rejoinder, ¶ 62.

[128] Applicant's Reply, ¶ 85(b).

[129] Applicant's Reply, ¶ 95; *citing* Mr. Afzal's First Witness Statement, ¶¶ 4, 75(c).

90. ***First,*** where the continuation of the provisional stay was denied because of the risk of non-compliance, such decision was based on "specific public statements or conduct by respondent States suggest[ing] that those States were or would be unwilling to comply with ICSID awards".[130] In the case at hand, however, Applicant "complies, and will continue to comply, with its international obligations, including those arising in respect of Article 53 of the ICSID Convention"[131] and, as such, is in a different situation than other ICSID award debtors whose conduct warranted the lifting of the stay due to the risk of non-compliance.[132]

91. ***Second,*** Applicant argues that Claimant has the burden of demonstrating Applicant's alleged misconduct, a burden that it has failed to meet.[133] In any case, it argues that such allegations of misconduct do not help the Committee in deciding whether Applicant will comply with its international obligation to pay the Award.[134] It also argues that, contrary to what Claimant stated, the Tribunal did not consider that having recourse to the Supreme Court was a means to avoid liability, that there were "abusive extension demands" or that there were attempts to derail the proceedings with baseless corruption claims.[135] The Tribunal just decided that Applicant "had failed to prove any of its factual allegations of corruption".[136]

92. ***Third,*** Applicant argues that, as stated by the *ad hoc* committee in *Hydro v. Albania,* the most relevant metric is the State's "historic compliance with ICSID awards".[137] Before ICSID, there has only been one other award issued against Applicant in *Karkey v. Pakistan*,

[130] Applicant's Reply, ¶ 22.

[131] Applicant's Reply, ¶ 22. *See also* Applicant's Reply, ¶ 4(c).

[132] Applicant's Reply, ¶ 96.

[133] Applicant's Reply, ¶¶ 89(c)–90, 92, 97, 116(a); Applicant's Response, ¶ 26.

[134] Applicant's Reply, ¶ 89(a); *citing* **RAA-023,** *Ron Fuchs v. Republic of Georgia*, ICSID Case No. ARB/07/15 and *Ioannis Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award, 12 November 2010, ¶ 40 ("***Fuchs v. Georgia***"); **RAA-016**, Carnegie Minerals (Gambia) Limited v. Republic of The Gambia, ICSID Case No. ARB/09/19, Decision on the Gambia's Request for a Continued Stay of Enforcement of the Award, 18 October 2018, ¶ 47 ("***Carnegie v. Gambia***").

[135] Applicant's Reply, ¶ 89(b).

[136] Applicant's Reply, ¶ 89(b); *citing* Award, ¶¶ 1839, 1842–1844.

[137] Applicant's Response, ¶ 31.

which was settled in the course of the revision proceedings.[138] This shows Applicant's voluntary compliance with its obligations, something that does not change by the fact that Applicant exercised its rights to seek annulment and revision of the *Karkey v. Pakistan* award.[139]

93. Further, Applicant confirms that the only instance where a non-ICSID award creditor is currently enforcing an award against Pakistan is in a case before the English High Court.[140] In such case, arrangements are in place to pay the creditor in the next couple of weeks. This shows that granting the stay would not force "[Claimant] backwards in a long queue of creditors and thereby reduce its likelihood of being able to enforce the Award if it is not annulled".[141]

94. Notwithstanding the aforementioned, and although it believes that the Award must be annulled, Applicant is willing to give an undertaking whereby it shows its willingness to comply with its international obligations. This has been considered relevant by previous *ad hoc* committees when deciding on the continuation of a stay.[142]

95. Accordingly, Applicant provided an undertaking in its Reply,[143] later modified with its Response to reflect the formality requested by Claimant (i.e. a written assurance from the Attorney General of Pakistan), and included as Annex REA-022.[144] The undertaking was finally modified in Applicant's 13 May 2020 observations to Claimant's new proposed undertaking to result in the following wording:

> (1) it will, in accordance with its obligations under the Convention, recognize the Award rendered by the Tribunal as final and binding and will abide by and comply with the terms of the Award; and (2) it will unconditionally and irrevocably pay the pecuniary obligations imposed by

[138] Applicant's Reply, ¶¶ 32, 93–94; *relying on* **RAA-012,** *OI European v. Venezuela*, ¶ 125; **RAA-029,** *Valores v. Venezuela*, ¶ 93; Applicant's Response, ¶ 32(b)–(c); Applicant's Observations, ¶ 4.

[139] Applicant's Response, ¶ 32(b)–(c); Applicant's Observations, ¶ 4.

[140] Applicant's Response, ¶ 42.

[141] Applicant's Reply, ¶ 85(b).

[142] Applicant's Response, ¶ 29(b)–(d); *citing* **CAA-028,** *NextEra v. Spain*, ¶ 95. *See also*, Pakistan's Observations on the Undertaking Proposed by TCCA, 13 May 2020 ("***Applicant's Observations***"), ¶ 6(c)–(e).

[143] Applicant's Reply, ¶ 4(c). *See also,* Applicant's Reply, ¶ 96; Applicant's Response, ¶¶ 29, 44.

[144] Applicant's Response, ¶ 29(a); *referring to* **REA-022,** Undertaking on behalf of the Islamic Republic of Pakistan, 17 April 2020. *See also* Applicant's Response, ¶ 29(a).

> the Award to TCCA within 180 days following the notification by the ICSID Secretariat of the Committee's decision on annulment such that TCCA would be fully compensated, including interest.[145]

96. According to Applicant, "the Attorney General can readily provide this modified undertaking, which has been approved by the Government of Pakistan".[146]

b. Claimant's Position

97. Claimant argues that, as recognized by Applicant and as considered by previous *ad hoc* committees, a factor that weighs against the continuation of the provisional stay is the risk of non-compliance by the award debtor.[147] In the case at hand, Claimant argues that there is a substantial risk that Applicant will refuse to comply with the Award if the annulment request fails.[148] This is supported by the following arguments:

98. ***First,*** Claimant argues that Applicant's misconduct during the underlying arbitration demonstrates the existence of such risk.[149] Such misconduct includes delaying the proceedings and increasing their costs through different "meritless" requests, defying disclosure orders, refusing to produce original evidence and seeking to introduce new evidence in violation of the Tribunal's orders.[150] In particular, Claimant highlights the following conduct:

[145] Applicant's Observations, ¶ 12.

[146] *Id.*

[147] Cl. Opposition, ¶ 28; *citing* **CAA-15**, *SGS v Paraguay*, ¶ 95; **CAA-11**, *OI European v. Venezuela*, ¶ 98; **CAA-24**, *Valores v. Venezuela*, ¶ 107; Cl. Rejoinder, ¶ 26.

[148] Cl. Opposition, ¶¶ 28, 53.

[149] Cl. Opposition, ¶ 20. *See also* Cl. Opposition, ¶ 30; Cl. Rejoinder, ¶¶ 27, 30 76.

[150] Cl. Opposition, ¶ 2; *citing* Award ¶¶ 1839–1854; **CEA-10**, Letter from Tribunal to the parties, dated 26 June 2013, at 3; **CAA-19**, Decision on Respondent's Application to Dismiss the Claims (With Reasons), dated 10 November 2017, ¶¶ 582, 869, 1045; **CEA-36**, Respondent's Request for Disqualification of Dr. Stanimir Alexandrov, dated 7 July 2017; **CEA-40**, Respondent's Request for Disqualification of the entire Tribunal, dated 25 November 2017. *See also,* Cl. Opposition, ¶¶ 6, 20, 29; Cl. Rejoinder, ¶ 28; *citing* **CEA-10**, Letter from Tribunal to the parties, dated 26 June 2013, at 2–3.

(i) Seeking a declaration from Applicant's Supreme Court, after the arbitration proceedings were initiated, that the CHEJVA was void *ab initio* so it could challenge the jurisdiction of the arbitral tribunals;[151]

(ii) Derailing the arbitration "with ever expanding and patently false corruption claims", filed more than three years after the beginning of the arbitration and even after the parties had filed their post-hearing briefs;[152] Through this, Pakistan effectively delayed the proceedings by almost two years while "fail[ing] to prove any of its factual allegations of corruption";[153]

(iii) "[P]ress[ing] its corruption allegation based on false confessions and fabricated documentary evidence";[154]

(iv) Obstructing the proceedings by refusing to produce the Aziz Diaries, the only documentary evidence on which the corruption allegation was based, for the Tribunal's inspection and/or for their forensic examination;[155] Because of this

[151] Cl. Opposition, ¶ 31; *citing* **CEA-7, Ex. RE-58(VI)(w)**, *Maulana Abdul Haque Baloch and others vs. Government of Balochistan and Others*, C.M.A. No. 631/2012, Parawise Comments on Behalf of Respondent No. 1, filed in the Supreme Court of Pakistan, dated 18 February 2012, at 5 ¶¶ 12–13; **CEA-5, Ex. RE-58(VII)(o),** *Maulana Abdul Haque Baloch and others vs. Government of Balochistan and Others*, C.M.A. No. 399/2012, Application on Behalf of the Petitioners under Order 33, Rule 6 of the Supreme Court of Pakistan, dated 30 January 2012, at 10 ¶ 13; **CEA-6, Ex. RE-58(VII)(q),** *Maulana Abdul Haque Baloch and others vs. Government of Balochistan and Others*, C.M.A, No. 445/2012, Civil Petition under Article 185(3) of the Constitution for Leave to Appeal Judgment, filed in the Supreme Court of Pakistan, dated 6 February 2012, at 9, Point B(1); **CEA-9, Ex. CE-376,** Response of Government of Balochistan to various questions from the Supreme Court of Pakistan, submitted 20 December 2012, ¶ 51.

[152] Cl. Opposition, ¶ 32; *citing* **CEA-15**, Letter from Respondent to the Tribunal, dated 22 June 2015, at 2; **CEA-17**, Letter from Respondent to the Tribunal, dated 21 July 2015, at 3–4, Appendix 1.

[153] Cl. Opposition, ¶¶ 32–33; *citing* **CEA-20**, Letter from Respondent to the Tribunal, dated 5 October 2015, at 2; **CEA-21**, Letter from Tribunal to the parties, dated 12 November 2015, at 2; **CEA-24**, Letter from Respondent to the Tribunal, dated 13 June 2016, at 1–2; Award, ¶ 1842.

[154] Cl. Opposition, ¶¶ 34–36; *citing, inter alia,* Award, ¶ 1821; **CAA-19**, Decision on Respondent's Application ¶¶ 278–279, 909–910, 1148, 1155–1159, 1492–1493.

[155] Cl. Opposition, ¶¶ 37–38; *citing* **CEA-32**, Claimant's Post-Hearing Brief, dated 7 March 2017, Section V.C.; **CEA-27**, Letter from Tribunal to the parties, dated 20 October 2016, at 2; **CEA-28**, Letter from Tribunal to the parties, dated 4 November 2016, at 2; Cl. Rejoinder, ¶ 29; *citing* **CAA-19**, Decision on Respondent's Application to Dismiss the Claims (With Reasons), dated 10 November 2017, ¶¶ 359, 1494; **CEA-58**, Letter from Claimant to the Respondent, dated 28 June 2016; **CEA-59**, Letter from Claimant to the Tribunal, dated 1 July 2016; **CEA-60**, Letter from Tribunal to the parties, dated 4 July 2016.

obstruction, and upon Pakistan's own insistence, an additional hearing was required and scheduled, which produced additional burdens and expenses;[156] and,

(v) Repeatedly and unsuccessfully attempting to disqualify the members of the Tribunal,[157] with the purpose of suspending the proceedings and "improperly leveraging procedural rules to unilaterally extend the timing of the pending submissions";[158] All while Claimant was forced to bear a disproportionate amount of the related costs to ensure that the proceedings could go forward.[159]

99. ***Second,*** for Claimant, the risk of non-compliance is further demonstrated by Applicant's groundless request to continue the stay of enforcement, which is just the latest tactic to obstruct Claimant's efforts to obtain compensation for Pakistan's wrongful acts.[160]

100. ***Third***, according to Claimant, the risk is further demonstrated by Applicant's conduct in *Karkey v. Pakistan,* the only other ICSID case that has resulted in an award against Applicant. After the *Karkey v. Pakistan* award was issued, Pakistan created "repeated and unwarranted delays, culminating in two years of post-award attempts to avoid paying Claimant", using the same arguments that Pakistan is using in this case, including that there was no risk of its non-compliance with the decision of the *ad hoc* committee.[161]

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[156] Cl. Opposition, ¶¶ 37–38; *citing* **CEA-29**, Claimant's Response to the Expert Report of Gerald M. LaPorte, dated 9 February 2017, ¶ 45; **CEA-30**, Letter from Respondent to the Tribunal, dated 13 February 2017, at 1–2; **CEA-31**, Transcript of Hearing held on 21 February 2017, 118:22–120:20 (LaPorte); **CEA-32**, Claimant's Post-Hearing Brief, dated 7 March 2017, Section V.C.; **CAA-19**, Decision on Respondent's Application ¶¶ 1230–1231, 1236–1237, 1263–1264.

[157] Cl. Opposition, ¶¶ 39–41; *citing* **CEA-36**, Respondent's Request for Disqualification of Dr. Stanimir Alexandrov, dated 7 July 2017; **CEA-37**, Letter from the Secretary-General to the parties, dated 8 July 2017, at 2; **CEA-38**, Hugo Hans Siblesz, Secretary-General, Permanent Court of Arbitration, Opinion Pursuant to the Request by ICSID on the Respondent's Proposal for the Disqualification of Dr. Stanimir Alexandrov, dated 31 August 2017, ¶ 157; **CAA-17**, Decision on Respondent's Request for Disqualification of Dr. Stanimir Alexandrov, 5 September 2017, ¶ 79; **CEA-40**, Respondent's Request for Disqualification of the entire Tribunal, dated 25 November 2017; **CEA-42**, Letter from Claimant to the Tribunal, dated 15 December 2017, at 1–2; **CEA-41**, Claimant's Opposition to Respondent's Request for Disqualification of the Entire Tribunal, dated 1 December 2017, ¶¶ 36–43; **CEA-34**, Letter from Respondent to the Tribunal, dated 29 May 2017, at 1–2; **CEA-35**, Letter from Respondent to the Tribunal, dated 30 June 2017, ¶ 3; **CAA-20**, Decision on the Respondent's Proposal to Disqualify All Members of the Tribunal, dated 5 February 2018, ¶¶ 108, 115, 134, 137–138.

[158] Cl. Opposition, ¶ 40. *See also*, Cl. Opposition, ¶¶ 42–43.

[159] Cl. Opposition, ¶ 44; *citing* **CEA-22**, Letter from Tribunal to the parties, dated 9 February 2016, at 1–2.

[160] Cl. Opposition, ¶ 45; Cl. Rejoinder, ¶ 2.

[161] Cl. Opposition, ¶ 51. *See also,* Cl. Opposition, ¶¶ 48–49; *citing* **CAA-10**, *Karkey v. Pakistan*, ¶¶ 131, 136; **CEA-45**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, C.A. No. 18-1461-RJL, Plaintiff's

Accordingly, Claimant requests the Committee not to be swayed by the same arguments, especially in light of the "non-monetary" settlement reached by the parties in that case.[162]

101. ***Fourth,*** in *Karkey v. Pakistan*, Applicant avoided payment of the award by settling it for "zero damages" with the direct involvement of the Turkish government.[163] This cannot be considered as compliance under the ICSID Convention, which necessarily entails the prompt and voluntary payment of the obligations under the award.[164] Thus, Applicant has no history of promptly and voluntarily complying with ICSID arbitration awards.[165]

102. ***Fifth***, Claimant argues that the risk of non-compliance is real. According to it, Applicant has "fail[ed] to disclose that non-ICSID creditors are currently pursuing collection efforts against Pakistan in connection with unpaid awards and foreign judgements".[166]

103. Finally, regarding the undertaking given by Applicant, Claimant considers it to be an "empty assurance of compliance with the Award" presented by counsel that just restates Pakistan's current obligations under the ICSID Convention and does not reconcile "Pakistan's claims of inability to pay or its track record of non-compliance".[167]

104. Claimant further highlights that: ***(i)*** previous *ad hoc* committees, including the *ad hoc* committee in *Karkey v. Pakistan*, have declined to treat such assurances as a circumstance that would warrant the continuation of the stay of enforcement, even if they come in the

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Complaint (D.D.C. June 20, 2018), ¶¶ 28–29; **CEA-46**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, C.A. No. 18-1461-RJL, Defendant's Notice (D.D.C. February 11, 2019), at 1–2; **CEA-47**, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, C.A. No. 18-1461-RJL, Plaintiff's Second Notice of Update (D.D.C. March 27, 2019), at 2; **CEA-48***, Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, C.A. No. 18-1461-RJL, Plaintiff's Fourth Notice of Update (D.D.C. June 25, 2019), at 2.

[162] Cl. Opposition, ¶¶ 50–51.

[163] Cl. Rejoinder, ¶ 31; *citing* **CAA-10**, *Karkey v. Pakistan*, ¶ 50; **CEA-50**, Damien Charlotin, "Pakistan's Prime Minister announces settlement of massive Karkey award after talks with Turkey," Investment Arbitration Reporter, 4 November 2019, at 1; **CEA-51**, Tom Jones, "Pakistan settles billion-dollar award without payment," Global Arbitration Review, 5 November 2019, at 3.

[164] Cl. Rejoinder, ¶ 32; *citing* **CAA-3**, *Burlington v. Ecuador*, ¶ 84**; RAA-002**, *Tenaris v. Venezuela (II)* ¶¶ 134–135.

[165] Cl. Opposition, ¶¶ 46–47; Cl. Rejoinder, ¶ 31.

[166] Cl. Rejoinder, ¶ 69; *citing* **CEA-64**, Rajeev Sayal, "Pakistan faces claim over London luxury flats seized from ex-PM," The Guardian, dated 4 November 2019, available at https://www.theguardian.com/world/2019/sep/30/pakistan-faces-claim-over-london-luxury-flatsseized-from-ex-pm.

[167] Cl. Rejoinder, ¶ 7. *See also,* Cl. Rejoinder, ¶¶ 9, 26, 33, 35–36, 39.

form of a separate written undertaking signed by a high-level official;[168] and ***(ii)*** even in cases where *ad hoc* committees have relied on such assurances, like in the *CMS v. Argentina* and *Azurix v. Argentina* cases, such assurances were insufficient and the debtor State still resisted enforcement of the award several years after the annulment was rejected.[169]

C. WHETHER THE STAY SHOULD BE CONDITIONAL

a. Applicant's Position

105. Applicant argues that no security should be required as a condition for the continuance of the stay of enforcement, and that the Committee should address the issue with caution and within the terms of Article 52(5) of the ICSID Convention.[170] This is based on the following arguments:

106. ***First,*** Applicant argues that nothing in Article 52(5) explicitly provides that the Committee can, after deciding to continue the stay, move onto a further enquiry concerning security.[171]

107. ***Second,*** requesting a security can go against the right to immunity that a State has over specific assets since it forces the State to convert an asset that benefits from the rights of Article 55 of the ICSID Convention to one that does not, and intrudes in the enforcement of the award, over which the Convention does not give the *ad hoc* committee any power.[172]

108. ***Third,*** Applicant argues that even if the 25% of the Award is "far less than Pakistan owes" it is inappropriate to ask an *ad hoc* committee to assume that the Award will not be annulled.[173]

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[168] Cl. Rejoinder, ¶¶ 33–35; *citing* **CAA-14**, *Sempra v. Argentina*, ¶ 109; **CAA-21**, *Tenaris v. Venezuela (I)*, ¶ 90; **CAA-24**, *Valores v. Venezuela*, ¶ 95; **CAA-10**, *Karkey v. Pakistan*, ¶¶ 32, 49, 121, 123; **CAA-27**, *Hydro v. Albania*, ¶ 114.

[169] Cl. Rejoinder, ¶¶ 37–38; *citing, inter alia,* **RAA-008**, *CMS v. Argentina*, ¶ 50; **CAA-25**, *Blue Ridge Investments, L.L.C. v. Republic of Argentina*, Case No. 1:10-cv-00153-PGG, Memorandum Opinion & Order (S.D.N.Y. Sept. 30, 2012).

[170] Applicant's Reply, ¶¶ 108, 111(a).

[171] Applicant's Reply, ¶¶ 106, 111(b); Applicant's Response, ¶¶ 40, 51.

[172] Applicant's Reply, ¶¶ 107, 109(b); *citing* **RAA-016,** *Carnegie v. Gambia*, ¶ 51; Applicant's Response, ¶ 41; Applicant's Observations, ¶ 7(a); *citing* **RAA-016,** *Carnegie v. Gambia*, ¶ 51; **RAA-031,** *MINE v. Guinea*, ¶¶ 24–25.

[173] Applicant's Reply, ¶ 110.

109. ***Fourth,*** it is for Claimant to establish that the security should be ordered,[174] which it has failed to do.[175] In any case, the request for a security of 25% is entirely arbitrary,[176] and is unnecessary because Pakistan will comply with the Award and has given such undertaking.[177]

110. ***Fifth,*** ordering security puts Claimant in a better position than it would otherwise be.[178] Applicant quotes the *Mitchell v. DRC* case to argue that a security "is always a burden" and "penalizes" the party seeking annulment.[179] It further imposes additional and unwarranted financial burdens on Applicant, who would be required to provide collateral, pay bank fees and cover costs associated with obtaining and negotiating the security, especially in the context of the COVID-19 pandemic.[180] Mr. Afzal added that if the stay was conditioned on security such as a bank guarantee and collateral "this would severely undermine market confidence in Pakistan's economic stability and credit-worthiness".[181]

111. ***Sixth,*** for Applicant, posting security can be self-defeating since transferring funds to an escrow account, or even a bank guarantee, imposes the risk of third-party attachment, which could frustrate the very purpose of the security.[182]

Seventh, a security is unnecessary because the provision of Applicant's undertaking is sufficient assurance. In terms of providing an undertaking, Pakistan has stated that "it would be content with the language" in the undertakings ordered in *Perenco v. Ecuador*

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[174] Applicant's Response, ¶ 39.

[175] Applicant's Observations, ¶ 3.

[176] Applicant's Reply, ¶ 116(a)(iii).

[177] Applicant's Reply, ¶ 116(a)(i).

[178] Applicant's Reply, ¶ 109, 109(a)–(c); *citing* **RAA-016,** *Carnegie v. Gambia*, ¶ 51; **RAA-034,** *MINE v. Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, 12 August 1988; **RAA-007**, *Enron v. Argentina*, ¶¶ 45, 52; **RAA-033**, *MTD v. Chile*, ¶ 30; **RAA-020,** *Mitchell v. Congo*, ¶¶ 32, 40; Applicant's Response, ¶ 45.

[179] Applicant's Reply, ¶ 109.b; *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 30 November 2004 ("***Mitchell v. DRC***"), ¶¶ 32–33, **RAA-20.**

[180] Applicant's Reply, ¶ 114; *citing* **RAA-034,** *MINE v. Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, 12 August 1988, ¶ 22; Applicant's Response, ¶¶ 37, 38(a)–(b), 48; *citing* Mr. Afzal's First Witness Statement, ¶¶ 54, 67.

[181] Mr. Afzal's First Witness Statement, ¶ 67.

[182] Applicant's Reply, ¶ 115; *citing* **RAA-036,** *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Claimants' Second Request to Lift Provisional Stay of Enforcement of the Award, 20 May 2009, ¶¶ 35–42; Applicant's Response, ¶ 50.

and *NextEra v. Spain*.[183] Accordingly, Pakistan proffered that the Attorney General could "readily provide the new undertaking as described *supra* in Paragraph 95.[184]

b. Claimant's Position

112. Claimant's main contention is that Applicant has failed to meet its burden of demonstrating the specific circumstances that would warrant the continuation of the provisional stay, a burden that cannot be substituted with the provision of a security.[185] However, if the Committee considers that Applicant has discharged its burden, it should require Applicant to post appropriate and effective security in return for the continued stay,[186] which the Committee is well within its powers to order.[187]

113. More specifically, Claimant requests that Applicant be required to either "deposit into escrow an amount equal to at least 25% of the Award, including interest, or to post an unconditional and irrevocable bank guarantee or letter of credit" for the same amount, "provided through a reputable international bank based outside Pakistan […] within 30 days of the Committee's decision on Pakistan's Stay Request […] for the duration of the annulment proceedings, and should be released only on order of the *ad hoc* Committee."[188] In particular, Claimant presents the arguments described *infra:*

114. ***First,*** for Claimant, this "is the minimum condition appropriate to mitigate the considerable prejudice" that it could suffer if the stay is continued.[189] This is because: ***(i)*** it is necessary to mitigate any substantial risk of non-compliance, as explained *supra*, which is not

[183] Applicant's Observations, ¶ 7.b; **RAA-001**, *Perenco v. Ecuador*, ¶ 43**; CAA-28,** *NextEra v. Spain*.

[184] Applicant's Observations, ¶ 12. The Committee notes that Pakistan originally offered a general undertaking that it would "abide by and comply with the Award in conformity with Article 53 of the ICSID Convention". Applicant's Reply, ¶ 4.c.

[185] Cl. Opposition, ¶ 54; *citing* **CAA-3**, *Burlington v. Ecuador*, ¶ 85; Cl. Rejoinder, ¶ 63.

[186] Cl. Opposition, ¶¶ 6, 54–55, 67; Cl. Rejoinder, ¶¶ 9, 64, 72–73.

[187] Cl. Opposition, ¶¶ 56–57; *citing, inter alia,* **CAA-10**, *Karkey v. Pakistan*, ¶ 128; **CAA-13**, *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/01/10, Procedural Order No. 4, 22 February 2006, ¶ 15 ("***Repsol v. Empresa Estatal Petróleos del Ecuador***"); **CAA-14**, *Sempra v. Argentina*, ¶ 101; **CAA-16**, *Standard Chartered v. Tanzania*, ¶ 76; **CAA-1**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986, ¶ 8 ("***Amco v. Indonesia***"); **CAA-14**, *Sempra v. Argentina*, ¶ 101; Cl. Rejoinder, ¶ 65.

[188] Cl. Opposition, ¶ 55. *See also,* Cl. Opposition, ¶ 68(c).

[189] Cl. Opposition, ¶ 58. *See also,* Cl. Rejoinder, ¶ 74; *citing* **RAA-020**, *Mitchell v. Congo*, ¶ 33.

compensated by post-award interest; [190] ***(ii)*** the size of the Award makes the need for security particularly compelling;[191] and, ***(iii)*** overall, requesting such security from the award debtor serves the purpose of deterring abuse of the ICSID annulment mechanism which, in turn, reinforces the effectiveness and efficiency of the ICSID system.[192]

115. ***Second,*** the Committee has the power to order such security. Claimant argues that: ***(i)*** as recognized by previous *ad hoc* committees, such power is inherent to the Committee's discretion under Article 52(5) of the ICSID Convention and the power to conduct the proceedings; [193] and ***(ii)*** sovereign immunity has no bearing on this inherent power. Article 55 of the ICSID Convention, contrary to Applicant's position, has nothing to do with the Committee's powers to condition a stay of enforcement as it seems fit.[194] Further, "'[t]he immunity of a State from execution (Article 55 of the Convention) does not exempt it from enforcing the award' pursuant to the orders of an ICSID tribunal or committee, 'given its formal commitment in this respect following signature of the Convention.'"[195]

116. ***Third,*** as the *ad hoc* committee in *Carnegie v. Gambia* recognized, such a security or guarantee does not provide Claimant with an advantage. On the contrary, it remedies the disadvantage of bearing the risks associated with the delay in enforcing the Award and ensures that Claimant is not in a worse position as compared to other creditors not facing the stay of enforcement.[196]

117. ***Fourth,*** Applicant would not be prejudiced by the Committee's decision to subject the continuation of the stay to the posting of a security.[197] Applicant does not have a right to a

[190] Cl. Opposition, ¶¶ 59–62; *citing* **CAA-4**, *CDC v. Seychelles*, ¶¶ 19–22; **CAA-16**, *Standard Chartered v. Tanzania*, ¶ 86; **CAA-11**, *OI European v. Venezuela*, ¶¶ 124–125; **CAA-21**, *Tenaris v. Venezuela (I)*, ¶ 86; **CAA-8**, *Infrastructure v. Spain*, ¶ 82; Cl. Rejoinder, ¶ 9.

[191] Cl. Opposition, ¶ 63.

[192] Cl. Opposition, ¶¶ 65–66; *citing* **CAA-5**, Schreuer, ¶ 648; **CAA-4**, *CDC v. Seychelles*, ¶ 20; **CAA-12**, *Repsol v. Empresa Estatal Petróleos del Ecuador*, ¶ 9.

[193] Cl. Rejoinder, ¶ 67; *citing* **CAA-10**, K*arkey v. Pakistan*, ¶ 128; **CAA-14**, *Sempra v. Argentina*, ¶ 101; **CAA-16**, *Standard Chartered v. Tanzania*, ¶ 76; **CAA-13**, *Repsol v. Empresa Estatal Petróleos del Ecuador*, ¶ 15; **RAA-001**, *Perenco v. Ecuador*, ¶ 79.

[194] Cl. Rejoinder, ¶ 70.

[195] Cl. Rejoinder, ¶ 71; *citing* **RAA-020**, *Mitchell v. Congo*, ¶ 41; **CAA-4**, *CDC v. Seychelles*, ¶ 19.

[196] Cl. Rejoinder, ¶¶ 68–69, 75; *citing* **RAA-016**, *Carnegie v. Gambia*, ¶¶ 51–52; **CAA-14**, *Sempra v. Argentina*, ¶¶ 95–96; **CAA-4**, *CDC v. Seychelles*, ¶¶ 20–22; **CAA-16**, *Standard Chartered v. Tanzania*, ¶ 86.

[197] Cl. Rejoinder, ¶ 73.

a continued stay in the first place and it would not suffer more harm by posting the security than it would suffer when complying with its obligations under the Award since the guarantee only operates if the annulment is rejected.[198] In any case, Applicant has failed to prove that providing such security would be more burdensome than posting other types of security and that the costs associated with posting such security are prohibitive. By all means, Pakistan has the resources to escrow the funds or pay the costs associated with obtaining a bank guarantee.[199]

118. ***Fifth,*** the risk of attachment by third parties, which previous *ad hoc* committees have considered relevant, is not present in the case at hand and, in any case, can be largely avoided by a careful structuring and design of the escrow agreement.[200]

119. ***Sixth,*** although Applicant argues that the 25% is completely arbitrary, it fails to propose any alternative figure.[201]

III. THE COMMITTEE'S ANALYSIS

120. The Committee provides its analysis in the following manner by: (1) reviewing the applicable legal standards, (2) considering whether a stay should be maintained or discontinued, and (3) determining whether any conditions should be attached if a stay should be maintained or discontinued.

A. APPLICABLE LEGAL STANDARDS

121. The ICSID Convention and the ICSID Arbitration Rules provide the legal standards that apply to an ICSID award, an annulment proceeding, and a stay of enforcement.

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[198] Cl. Opposition, ¶ 64; *citing*, **CAA-14**, *Sempra v. Argentina*, ¶ 96; **CAA-5**, Schreuer, ¶ 647; **CAA-15**, *SGS v Paraguay*, ¶ 93.

[199] Cl. Rejoinder, ¶ 81.

[200] Cl. Rejoinder, ¶ 82; *citing* **RAA-036**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Claimants' Second Request to Lift Provisional Stay of Enforcement of the Award, 20 May 2009, ¶¶ 41–42, 46; **CAA-29**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Sempra Energy International's Request for the Termination of the Stay of Enforcement of the Award, 7 August 2009 ¶ 20; **CAA-22**, *Total S.A. v Argentina*, ¶ 63.

[201] Cl. Rejoinder, ¶ 83.

122. For an arbitral award rendered under the ICSID Convention, Article 53(1) provides as follows regarding its status:

> 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.

123. Despite the binding nature of an ICSID award, either party may seek an annulment pursuant to Article 52(1) of the ICSID Convention, which provides that "[e]ither party may request annulment of the award by an application in writing addressed to the Secretary-General".

124. When a party seeks annulment, it may request a stay of enforcement under Article 52(5) of the ICSID Convention as follows:

> 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.

125. Under the ICSID Arbitration Rules, Rule 54 covers the relevant parts concerning a stay of enforcement and provides as follows:

> (2) If an application for the [ ] 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 [ ] 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 […].
>
> (4) A request…[for a stay]…shall specify the circumstances that require the stay.[…]

126. In terms of determining the applicable standards of whether to continue a stay, Article 52(5) of the ICSID Convention only provides that "[t]he Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision".

127. The Committee observes that the Vienna Convention on the Law of Treaties as such is not applicable to the ICSID Convention, which predates it. Nevertheless, its provisions on treaty interpretation are widely regarded as declaratory of customary international law.

Both Pakistan and Australia are also contracting parties to the Vienna Convention. The Committee considers it appropriate to be guided by the General Rule of Interpretation in Article 31 of the Vienna Convention such that interpretation of relevant provisions of the ICSID Convention will be conducted "in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[202]

128. The parties have referred to prior *ad hoc* committee decisions for the various criteria to be considered when deciding a request for a stay of enforcement. The Committee confirms that prior decisions of other *ad hoc* committees are non-binding, and notes, as prior *ad hoc* committees have, that no *jurisprudence constante* can be discerned in this particular regard. The Committee concludes that, subject to the specific facts of the relevant case, due consideration should be given to earlier cases where they are indicative of a certain line of jurisprudential consistency.[203] The Committee's decision remains one based on the particular circumstances of the case at hand.

129. ***First***, the Committee finds that based on the ordinary meaning of the word "may" in Article 52(5) the ICSID Convention, the Committee has wide discretion to decide whether to continue or terminate a stay of enforcement. *Ad hoc* committees generally agree with this viewpoint.[204] The Committee concludes that it will exercise its wide discretion depending upon the circumstances of the case and its determination will be a case-specific, fact-specific inquiry.

130. ***Second***, the Committee finds that the ICSID Convention and the ICSID Arbitration Rules do not provide substantive guidance on the relevant criteria that an *ad hoc* committee

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[202] Applicant's Reply, ¶ 12.

[203] *NextEra v. Spain,* ¶ 76.

[204] *NextEra v. Spain,* ¶ 77; **RAA-040,** *Occidental v. Ecuador*, ¶ 47; **RAA-038**, *Pey Casado v. Chile*, ¶ 25; **CAA-16 / RAA-009**, *Standard Chartered v. Tanzania*, ¶ 50; **RAA-039**, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 7 May 2012, ¶¶ 41, 43 ("***Libananco v. Turkey***"); **RAA-056,** *Eiser v. Spain*, ¶ 46; , **CAA-5,** the widely-referenced commentary on the ICSID Convention also explains that: "[A] decision by the ad hoc committee on a request is discretionary. The Convention's wording ('the Committee may,…, stay enforcement') is clear in this respect….The *ad hoc* committee's discretion extends to whether it stays enforcement of part or all of the award and to the modification or termination of the stay. Schreuer, ¶ 593.

should consider in determining whether to continue a stay of enforcement.[205] The Convention and Rules stipulate that either party may request the continuation of the stay, then Article 52(5) of the Convention merely provides that if the Committee considers the "circumstances so require" it may stay enforcement, and Rule 54(4) of the Rules simply provides the requesting party must specify the "circumstances that require" such continuation. The texts of Article 52(5) or Rule 54(4) do not specify the "circumstances" to be taken into account in determining whether the circumstances "require" a stay. What qualifies as "require" is also undefined.

131. Based upon the ordinary meaning of the terms "circumstances" and "require", the Committee can find no presumption in favour or against the continuation of a stay of enforcement. In particular, the Committee cannot extrapolate from the current ICSID Convention and Arbitration Rules a presumption of "automatic" continuation of a provisional stay without the need for substantiation.[206] The ordinary meaning of the terms "circumstances" and "require" are neutral and do not provide any "limitation or qualification" or a "default rule".[207] In particular, the term "require" does not warrant being applied in a narrow manner. Similarly, the Committee does not agree that the context provides support for a presumption in favour or against the continuation of a stay of enforcement. Given the context in which Article 52(5) appears, it cannot be said that annulment precedes or postdates enforcement. The finality and binding nature of an award under Articles 53 and 54 also does not militate in favor of a presumption either way.

132. The Committee also does not find that the object and purpose of the ICSID Convention provide support for a presumption in favour or against the continuation of a stay of enforcement in the interpretation of Article 52(5). The text of the article merely provides that a request for a stay is provisional "until the Committee decides". The general purpose

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[205] *NextEra v. Spain,* ¶ 78.

[206] A range of *ad hoc* committees have reached this conclusion. *NextEra v. Spain,* ¶ 79; **RAA-033,** *MTD v. Chile*, ¶ 26,; **RAA-008,** *CMS v. Argentina*, ¶ 35; **CAA-14 / RAA-051**, *Sempra v. Argentina*, ¶ 27; **RAA-052**, *Ioannis Kardassopoulos and Ron 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, 12 November 2010 ("***Fuchs v Georgia***"), ¶ 26; **RAA-039**, *Libananco v. Turkey*, ¶ 43; **CAA-15 / RAA-005**, *SGS v. Paraguay*, ¶ 82; **RAA-030**, *Total S.A. v Argentina*, ¶ 76; **RAA-032**, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 33; **CAA-011 / RAA-012**, *OI European v. Venezuela*, ¶ 89.

[207] Applicant's Reply, ¶ 14; Cl. Opposition, ¶ 8.

as found in the first preambular paragraph to the Convention does not offer any meaningful guidance on how Article 52(5) should be interpreted. It states a general declaratory purpose for the "need for international cooperation for economic development, and the role of private international investment therein".[208] This does not weigh in favor of a presumption either way. It is unclear why enforcement of an award based on international obligations would be contrary to international cooperation for economic development as suggested by Pakistan. Demonstrating Pakistan's commitment to abide by its treaty obligations arguably might provide comfort to foreign investors on how Pakistan adheres to the rule of law and attract more foreign investment that could contribute to the country's economic development.

133. On similar lines, the Committee questions whether in terms of the relevant rules of international law the right to life under Article 6(1) of the ICCPR or "public health rights and public health emergencies of international concern" as provided under Article 13(1) of the WHO's International Health Regulations 2005 should be considered.[209] No evidence exists that such rules ever were considered in the interpretation of Article 52(5). It appears that no previous *ad hoc* committees considered them, or anything comparable. Insufficient basis has been provided to consider such rules in the interpretation of Article 52(5). Even if they could be considered as relevant rules of international law in the interpretation of Article 52(5), whether such concerns are triggered in this case is also unclear. The chain of events that exists between lifting a stay of enforcement and the triggering of the right to life, public health rights, or public health emergencies of international concern appears too long and tenuous, as explained *infra*.

134. In addition to the lack of automaticity, it cannot be said that absent "exceptional" or "extraordinary" circumstances a stay should be continued, nor do exceptional circumstances have to be shown for a stay to be maintained.[210] Not only do such qualifiers not exist in the Convention or Rules, but no basis such as context or object or purpose exists to justify their addition. Both parties acknowledge that the ICSID Convention and

[208] Applicant's Reply, ¶ 26.

[209] Applicant's Reply, ¶ 29.

[210] Cl. Opposition, ¶¶ 11, 13; Cl. Rejoinder, ¶ ¶ 2 and 10 et seq.

the Arbitration Rules do not define the circumstances to be considered.[211] The Committee concludes that, in ruling on whether to maintain a stay, it needs to be satisfied of the existence of circumstances generally that are unqualified and that are based upon the submissions of the parties.

135. The Committee holds that the general principle of *actori incumbit onus probation* shall apply such that the party seeking continuation of the stay must bear the burden to establish that circumstances exist that require such continuation.[212] The parties also appear to agree that the party seeking continuation of the stay bears the burden.[213] As a consequence, the non-moving party does not have to show that circumstances exist that require lifting of the stay.[214]

B. DECISION ON STAY

136. *Ad hoc* committees have taken into account a variety of criteria when deciding whether to grant or deny a stay on enforcement. In reaching its decision on the stay of enforcement, the Committee decides that it will focus on the following issues that the parties have raised:[215]

(1) Good Faith of the Request for Stay

(2) Prejudice to Pakistan

(3) Prejudice to TCCA

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[211] Applicant's Reply, ¶ 14 (quoting *Tenaris v. Venezuela II, which provided that* "[n]either the Convention nor the Arbitration Rules qualify the circumstances or develop the criteria that committees should apply to assess their relevance and relative weight") **RAA-002**, *Tenaris v. Venezuela II* ¶ 84; Cl. Opposition, ¶ 13.

[212] **CAA-10**, *Karkey v. Pakistan*, ¶¶ 102, 105–106; **CAA-3 / RAA-012**, *Burlington v. Ecuador*, ¶¶ 74–75; **CAA-2 /RAA-017**; *von Pezold v. Zimbabwe*, ¶ 80; **RAA-005**, *SGS v. Paraguay*, ¶ 86; **RAA-012**, *OI European v. Venezuela*, ¶ 94; **RAA-023**, *Fuchs v. Georgia*, ¶ 26; **CAA-14/ RAA-051**, *Sempra v. Argentina*, ¶ 27.

[213] Applicant's Response, ¶ 24 (the Committee is to consider "whether a continuation of the provisional stay is required"); Cl. Opposition, ¶ 11.

[214] *Fuchs v. Georgia*, ¶ 46.

[215] Other *ad hoc* committees have taken into account similar factors such as "the risk of non-recovery of sums due under the award if the award is annulled, non-compliance with the award if the award is not annulled, any history of non-compliance with other awards or failure to pay advances to cover the costs of arbitration proceedings, adverse economic consequences on either party and the balance of both parties´ interests". **RAA-010** / **CAA-7,** ICSID Background Paper, ¶ 56.

(4) Risk of Non-recoupment

(5) Risk of Non-compliance

137. The Committee notes that the parties appear to be in agreement that the merits of the annulment proceedings do not need to be considered as part of the analysis of the circumstances requiring the continuation of the stay.[216]

(1) Good Faith of the Request for Stay

138. Applicant claims that it brought its request for a stay in "good faith" and not as a "dilatory tactic".[217] Pakistan argues that TCCA has not proven that Pakistan's request for a stay was not made in good faith or was intended to "hide or shield" its assets from enforcement, or that the request for annulment was "manifestly dilatory or lacking in merit".[218] Pakistan argues that it has a compelling basis to challenge the Award based on, among other things, a "key jurisdictional argument" and the "unprecedented adoption and application" of the methodology applied in the calculation of the damages.[219]

139. Claimant asserts that the stay request is another tactic to hinder and obstruct the proceedings and an attempt to put off payment for the breach of treaty obligations. Claimant asserts that Applicant has a track record of delay and obstruction.[220] As was also raised in its non-compliance argument against Applicant, Claimant cites Applicant's conduct during the Arbitration proceedings and the *Karkey v. Pakistan* proceedings as part of its "record of obstructionist tactics and procedural manipulation" and as previewing its post-Award tactics.[221] Claimant cites how the *Karkey v. Pakistan* tribunal found that Pakistan "did not cooperate in good faith in the arbitral proceedings", "made the Tribunal spend a large part of the Hearing on unfounded…arguments of corruption", and "requested the introduction of additional evidence only at the end of the…proceedings causing

[216] Applicant's Response, ¶¶ 27(a)–28; Cl. Rejoinder, ¶¶ 7, 22–23.
[217] Applicant's Reply, ¶ 87.
[218] Applicant's Reply, ¶ 116.c; Applicant's Response, ¶ 27.b; Cl. Opposition, ¶ 62.
[219] Applicant's Reply, ¶ 88.a.
[220] Cl. Opposition, ¶ 24; Cl. Rejoinder ¶ 25.
[221] Cl. Opposition, ¶ 20.

unnecessary disruption and expenses".[222] TCCA also alleges that a stay would allow Pakistan to "hide or shield" its assets from enforcement.[223]

140. The Committee finds that it has not been demonstrated that Pakistan's request for a stay was not in good faith or brought as a "dilatory tactic". TCCA has not established a pattern of delay and obstruction or potential for assets to be hidden or shielded. The Committee notes that the Tribunal in the underlying case, unlike the *Karkey v. Pakistan* tribunal, did not find that Pakistan "did not cooperate in good faith", or employed "dilatory tactics".[224] Although the Tribunal did find that Pakistan "raised various defenses in the arbitration which were found to be almost entirely meritless but nevertheless caused the proceedings to extend over a significant period of time and the Parties to incur large amounts of costs", it did not find that this amounted to a lack of good faith.[225] While the Committee notes the concerns raised by TCCA, it finds that, even if Pakistan's conduct in the *Karkey v. Pakistan* case is considered together with its conduct during the proceedings in the Arbitration, this would be insufficient to establish a lack of good faith or a pattern to hinder and obstruct.

141. The Committee agrees that unless an application for annulment is manifestly dilatory or frivolous or obviously unmeritorious the Committee should not be concerned with its merits when reviewing a request for a stay of enforcement. Claimant has not argued that the Annulment Application is manifestly dilatory or frivolous or obviously unmeritorious, so the merits of the application need not be considered.

142. The Committee holds that it has not been demonstrated that Applicant's request for a stay of enforcement was not made in good faith.

(2) Prejudice to Pakistan

143. Pakistan submits that immediate enforcement of the Award would lead to dire consequences to the country at a "uniquely bad moment in time".[226] Pakistan emphasizes

[222] **CAA-9,** *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 ("***Karkey v. Pakistan* Award**"), ¶¶ 1063, 1069, 1066**.**

[223] Cl. Opposition, ¶ 62.

[224] *Karkey v. Pakistan* Award, ¶¶ 1063, 1064.

[225] Award, ¶ 1853.

[226] Applicant's Response, ¶ 6.c.

the hardship it would suffer due to the delicate state of the economy that needed a USD 6 billion IMF Extended Fund Facility in July 2019.[227] As Pakistan argues, immediate enforcement would entail immediate payment of the full amount of the USD 5.9 billion Award that would have an "immediate and potentially devastating effect on Pakistan's fragile economy".[228] Immediate payment would lead to removal of funding for health, social, and welfare programs that would have "disastrous impacts for the people of Pakistan...particularly the most disadvantaged and vulnerable".[229] Balochistan, the location of the Reko Diq mine, is particularly vulnerable. Pakistan adds that immediate enforcement would even affect its ability to respond to security threats, including dealing with terrorist threats, terror financing, and money-laundering.

144. Mr. Afzal, the Additional Secretary (External Finance), Finance Division in the Ministry of Finance and Revenue, also stresses that if the stay is lifted "Pakistan's international partners who have pledged a total of around USD 38 billion would also very likely withdraw their support since this has been explained as conditional upon implementation of the IMF program".[230] He suggests that "international development partners like the World Bank and the Asian Development Bank withdraw support when a country in a vulnerable economic situation is not being guided and supported by the IMF".[231]

145. According to Pakistan, its predicament has become more fragile due to the recent COVID-19 crisis that has engulfed the world. Pakistan notes that the pandemic has "unknown and uncertain economic, health and welfare impacts".[232]

146. Pakistan pleads that these factors combine to demonstrate the overwhelming hardship it would face at this juncture due to an immediate enforcement of the Award. A stay of enforcement would grant it "vital time" to plan and make a more "gradual and careful

[227] Applicant's Reply, ¶ 47; **REA-002**, IMF, Press Release No. 19/264, *IMF Executive Board Approves US$ 6 billion 39-Month EFF Arrangement for Pakistan*, 3 July 2019.

[228] Applicant's Reply, ¶ 4.a.

[229] Applicant's Reply, ¶ 4.a.i.

[230] Mr. Afzal's First Witness Statement, ¶ 71.

[231] Mr. Afzal's First Witness Statement, ¶ 71.

[232] Applicant's Response, ¶¶ 4(a)(ii), 10, 55, 62–63.

reallocation of funds". This importance of a reprieve is compounded by the uncertainties arising from the COVID-19 pandemic.

147. While not being unsympathetic to Pakistan's concerns, TCCA challenges its claims. TCCA emphasizes that Pakistan has had plenty of time to prepare for the payment of the Award. Pakistan's situation will not be different in "2–3 years' time" by which time the Committee will have rendered its decision on annulment. TCCA cites that the IMF rescue is not new to Pakistan because it suffers from chronic problems as indicated by it receiving 21 IMF loan agreements and 12 bailouts for over the past three decades.[233]

148. TCCA asserts that even if the stay is terminated in the ICSID proceedings, it will not lead to immediate enforcement because, given Pakistan's challenges and appeals, to collect from the Award it will take on average 18–24 months for actual execution and attachment to occur in local courts around the world.

149. Even if Pakistan's claims of hardship are as serious as it claims, it has control and ownership of the invaluable Reko Diq mines that can be monetized easily. TCCA stresses that Pakistan has had more than eight years to monetize this asset and any delay is its own fault.

150. The Committee decides that it must assess the potential hardship Pakistan may suffer as a result of maintaining the stay with conditions or of terminating it. On one side of the spectrum, the possibility of hardship could be altogether avoided if the stay were maintained. On the other side of the spectrum, the question is what the consequences of lifting the stay would be in terms of the likelihood and severity of hardship.

151. The essence of Pakistan's argument revolves around the likelihood and severity of the hardship it would endure if it immediately had to pay the entire USD 5.9 billion Award as a result of immediate enforcement. USD 5.9 billion is no doubt a significant sum for a developing economy such as Pakistan to bear under its current circumstances. The Committee recognizes that Pakistan could face challenging prospects if it had to pay the entire Award on an immediate basis. Unlike in other cases where the amounts have been

[233] Transcript, 87:9–11.

smaller and the circumstances less specific, the potential severity of hardship to Pakistan in such a situation has been sufficiently particularized.

152. Nevertheless, the Committee does not find that the likelihood of severe hardship is as compelling as Pakistan claims. A lifting of the stay would not lead to an immediate chain of events, starting with immediate enforcement and ending with immediate payment. The Committee finds weight in the evidence that TCCA presented in Annex A of its Rejoinder on the numerous examples of how long actual enforcement can take for an award creditor in an ICSID case.[234] A lifting of the stay does not appear to lead to immediate enforcement in local courts given the defences, challenges, and appeals that can be mounted by an award debtor. This appears to be the situation transpiring in the U.S. and Australian courts where TCCA is seeking enforcement and is being met by Pakistan's defences. Even if defences are overcome, the next hurdle is identifying assets and attaching them. Another hurdle is that national courts might even grant a separate stay of enforcement of an ICSID award irrespective of ongoing ICSID annulment proceedings.[235] The fact that other *ad hoc* committees did not consider the challenges and delays in enforcement is not determinative and appears to be because such arguments were not raised in past cases.

153. Each enforcement example in Annex A of TCCA's Rejoinder may be case specific and the Committee may not be able to determine the situation behind each one, but the end result was that payment did not occur immediately despite the enforcement efforts of the award creditors. On average, considerable time was necessary and elapsed after the lifting of a stay and many cases appear to be ongoing. Out of the 10 cases that were identified, five cases ended in settlement, or partial or full enforcement by payment, attachment, or other means, after an average of 17 months; the other five cases were ongoing and on average 22 months elapsed, and for the *OI European Group v. Venezuela* case 43 months transpired.[236] Claimant's enforcement actions in the U.S. and Australia that were

[234] Cl. Opposition, ¶ 44; Annex A to Rejoinder.

[235] In the case of the U.S., for instance, as argued by Applicant the U.S. "Court has the 'inherent' power to stay this action. *See Landis v. N. Am. Co.,* 299 U.S. 248, 254 (1936) ('[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'). **CEA-67**, p. 12.

[236] Cl. Opposition, ¶ 44; Annex A to Rejoinder.

commenced on 1 August 2019 and 15 October 2019, respectively, appear to continue after more than 13 months and 10.5 months, respectively.[237]

154. At the same time, the Committee does not find Mr. Afzal's dire assessment convincing that "a very high probability" exists that immediate enforcement would lead to the withdrawal of international support and other disastrous consequences.[238] TCCA instituted arbitration against Pakistan at ICSID on 28 November 2011, and the multibillion dollar contingent liability arising from it has been known since that time. Any effect on market confidence, economic stability, and creditworthiness must have been taken into consideration by the IMF and other international development partners since this claim has been hovering over the country. The IMF and others must have been more than aware of the potential liability of a multi-billion award when the IMF announced the EFF package on 3 July 2019, particularly given that the decision on liability was made on 10 November 2017.[239] Notably, the IMF's support or any other "international financial support" that may have been contingent upon the EFF package does not appear to have been altered or affected in any way after the USD 5.9 billion Award was announced nine days later on 12 July 2019.

155. On 16 April 2020, even with potential lifting of the stay of enforcement hanging in the balance, the IMF approved an additional disbursement of USD 1.386 billion "to address the economic impact of the COVID-19 shock".[240] Again, it must be presumed that the IMF was aware that the entire amount of the Award could be subject to enforcement action at a moment's notice with a lifting of the stay. Hence, Mr. Afzal's apprehension that the lifting of the stay would lead to a derailment of the IMF loan package and withdrawal of the international financing support that was contingent on the implementation of the IMF package appears overstated. Pakistan's creditworthiness or its ability to receive IMF support has not been affected by the Award.

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[237] **CEA-67**, p. 1, 6.

[238] Mr. Afzal's First Witness Statement, ¶¶ 69–71.

[239] **REA-002**; **CAA-18**.

[240] Applicant's Response, ¶ 10. IMF Country Report No. 20/114, Pakistan: Request for Purchase Under the Rapid Financing Instrument – Press Release; Staff Report; and Statement by the Executive Director for Pakistan, April 2020, **REA-021**.

156. Taking the COVID-19 pandemic into consideration, the Committee finds that the "capacity to respond promptly and effectively to a pandemic" would also not be affected by the lifting of the stay. This is based on the same lack of immediacy explained above.[241] For similar reasons, Applicant's concerns that its right to life obligations under ICCPR or its obligations under the WHO's International Health Regulations might be affected could hardly be triggered by any lifting of the stay. The same reasoning applies to its national security concerns.

157. Hence, while the Committee recognizes the potential hardship that Pakistan may suffer due to a lifting of the stay, it is not convinced of the likelihood that Pakistan would suffer the severe hardship on an immediate basis to the degree it claims. Enforcement would be delayed, and payment of the entire Award would not be immediate. Finally, Pakistan's creditworthiness or its ability to maintain and receive IMF support should remain unaffected, particularly since the international community has been well aware of the contingent liability of the Award and the potential lifting of the stay.

(3) Harm to TCCA

158. TCCA emphasizes the damages it has suffered due to Pakistan's breaches of its treaty obligations almost 10 years ago. An unconditional stay would prolong the delay in compensation, particularly given "a systematic campaign to obstruct TCCA's efforts to vindicate its rights" [242] and the difficulties with enforcement as outlined above in Section (2). It would also not "redress the inherent prejudice of being compelled to stay one's hand, while other creditors…proceed unencumbered with their own collection efforts against the debtor". [243] TCCA argues that the post-award interest is inadequate to compensate for its losses.

159. Pakistan stresses that TCCA will suffer no economic hardship if the stay is continued. This is because it is a "shell company" that was "established for the sole purpose of the Reko

[241] Transcript, 25:5–7.

[242] Cl. Opposition, ¶ 1.

[243] Cl. Rejoinder, ¶ 69.

Diq project and pursues no other activities".[244] It is protected by the post-award interest accruing on the Award and through the interest it will be in a better position if the Award is not annulled.[245] Unlike in other cases where there are many creditors, a stay would not "force TCCA backwards in a long queue of creditors and thereby reduce its likelihood of being able to enforce the Award if it is not annulled".[246]

160. The Committee finds that TCCA has demonstrated that it will suffer prejudice if the stay of enforcement is continued until the decision on annulment. First, an unconditional stay would delay TCCA's compensation due under the Award. Second, given that Pakistan could be constrained by its financial ability to meet its obligations, particularly due to the amount, it could reasonably be suggested that TCAA's prospects of being paid in a timely manner could be affected and the risk of further delay and uncertainty exists. This all amounts to prejudice, which would be increased if TCCA was placed behind in the queue of other creditors such as international financial partners.[247]

161. The payment of post-award interest does not sufficiently compensate TCCA if the stay is continued. The Committee agrees with the finding made by various other *ad hoc* committees that interest does not adequately compensate an award creditor.[248] Among other things, interest does not compensate an award creditor for the opportunity to use the benefits of the award. As the *ad hoc* committee in *NextEra v Spain* determined, "[d]epriving the award creditor of their rightful remedy denies them the opportunity to allocate the benefits of such remedy as they see fit" and "while post-award interest may provide some relief, it may not adequately compensate for the uncertainty, delay, and deprivation suffered by the award creditor".[249]

162. Contrary to Pakistan's proposition that cites *NextEra v Spain* as support that post-award interest together with an undertaking would remedy any prejudice from delays, as found

[244] Applicant's Reply, ¶ 85.a.

[245] Applicant's Reply, ¶ 85.a.

[246] Applicant's Reply, ¶ 85.b.

[247] **REA-**004, Table 10, p. 38.

[248] Applicant's Reply, ¶ 61, fn 115; Cl. Opposition, ¶ 77; **CAA-11,** *OI European v. Venezuela*, ¶¶ 124–125; **CAA-21**, *Tenaris v. Venezuela (I)*, ¶ 86; **CAA-8**, *Infrastructure v. Spain*, ¶ 82.

[249] Cl. Opposition, ¶ 77; **CAA-28**, *NextEra v. Spain*, ¶ 93.

infra in Paragraph 202, the Committee finds that the present case differs from *NextEra v Spain* because of the nature of the undertaking that Pakistan proposes. Any delay in compensation just prolongs the violation of the award creditor's rights and the damages it suffered.

163. The Committee recognizes that TCCA will suffer a degree of prejudice as a result of continuing an unconditional stay.

(4) Risk of Non-Recoupment

164. Pakistan claims that a material risk of non-recoupment exists if the Award is annulled given that Claimant is a "shell company (with separate legal personality to its foreign joint venture owners)".[250] Applicant cites that TCCA made a loss of around USD 16 million in 2017 and 14 million in 2018.[251] In the eyes of Applicant, "the risk of a distribution of sums acquired through enforcement to shareholders, and of an inability to recoup from TCCA, is therefore real".[252] Applicant claims that Claimant's offer to place any funds recovered by enforcement in escrow "will not preserve the *status quo*" given the logistical difficulties that could arise and would not be a "viable solution".[253]

165. TCCA in turn submits that no risk of non-recoupment exists given that its two parent companies are large, well-established companies. Furthermore, both parent companies have "undertaken to provide sufficient financial assistance to [TCCA] as and when it is needed to enable the Company to continue its operations and fulfil all of its financial obligations."[254] TCCA itself has also offered to place any funds obtained by enforcement into an escrow account, which is a simple and straightforward task.

166. The Committee finds that Pakistan has not presented persuasive evidence that it may face reasonable risk that it would not be able to recoup any payment made to TCCA if the Committee annuls the Award. The chances that a party may have to seek recoupment of

[250] Applicant's Reply, ¶ 100.
[251] Applicant's Reply, ¶ 100.c.
[252] Applicant's Reply, ¶ 101.
[253] Applicant's Reply, ¶ 102.a, ¶ 103.
[254] Cl. Rejoinder, ¶ 62.

any sums paid for an award that is later annulled are inherent in the system. Pakistan has not demonstrated any "material risk" of non-recoupment that could be deemed credible or substantiated any prospects of TCCA hiding and shielding assets obtained through enforcement.[255].

167. TCCA is a company owned as a joint venture by Antofagasta plc, "a leading copper mining company", and Barrick Gold Corporation, "the world's largest gold mining company".[256] TCCA has invoked a commitment from its Annual Report Fiscal Year 2018 to the effect that the two owners undertook to provide financial assistance to TCCA as a going concern. The Annual Report provides in full as follows:

> The Directors of Antofagasta plc and Barrick Gold Corporation have accepted the responsibility of providing and has undertaken to provide sufficient financial assistance to [TCCA] as and when it is needed to enable the Company to continue its operations and fulfil all of its financial obligations The undertaking is provided for a minimum period of twelve months from the signing date of the annual report. Therefore the Directors are of the opinion the Company is a going concern.[257]

168. The Annual Report was audited by PricewaterhouseCoopers, which is a prominent accounting firm, and it is presumed to have reviewed the relevant board resolutions and other supporting material from Antofagasta and Barrick Gold Corporation as part of its audit. The Committee therefore finds the commitments by the two owners credible. No contradictory evidence has been offered. Notably, the original undertakings were provided for a "minimum period of twelve months from the signing date of the annual report", which was 29 April 2019.

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[255] Applicant's Reply, ¶ 99.

[256] Cl. Rejoinder, ¶ 62.

[257] 2018 Tethyan Copper Company Pty Limited, Copy of financial statements and reports, at 14, Note 1(a)(ii) (quoted in Applicant's Reply ¶ 100(c)), **REA-019**. Cl. Opening Slides, Hearing on Pakistan's Request to Continue the Provisional Stay, 29 April 2020, at 25. Transcript, 99:5–9, TCCA also stated during the First Session that "[i]n TCCA's public annual filings, both of the owners have expressly undertaken to provide sufficient financial assistance to enable the Company to fulfill all of its financial obligations".

169. In addition, even if the "risk is real" regarding the ability to recoup, TCCA has offered to hold in escrow any amount it recovers to address Pakistan's potential concerns.[258] Contrary to Pakistan's assertion, the Committee finds the "solution of an escrow account" to be "a viable one".[259] Pakistan's claims that an escrow would not be appropriate and would be difficult because it would have to be received from "a variety of jurisdictions across a variety of currencies" is not persuasive. Other concerns about "logistical difficulties" associated in the management of an escrow account and management of the relationship of the parties with the account or agent are equally unconvincing given the widespread and common use of escrow accounts. In any event, TCCA can bear any such issues under the Committee's direction. Furthermore, as noted above, both of TCCA's owners, Antofagasta plc and Barrick Gold Corporation, previously provided an undertaking to financially assist TCCA.[260] Under these circumstances, the Committee does not see why an escrow account would "make restitution…impossible" if the Award is annulled.[261]

170. The likelihood of attachment by Pakistan's creditors has not been demonstrated and conflicts with Pakistan's own assertion that other creditors with competing claims do not exist.[262] Pakistan admitted that the case before the English High Court seeking around GBP 17 million is "the only instance of an award creditor currently enforcing an award against it". [263] Pakistan also confirmed that "arrangements are in place for the sum to be paid…which payment is expected to be completed within weeks". [264] Any potential attachment by Pakistan's creditors, hence, appears unlikely under the circumstances. Even if it is considered a possibility, this would not be a risk caused by the escrow but by Pakistan's own pre-existing debt obligations to others. Finally, any potential attachment would negatively affect TCCA as well if the Award were not annulled. If anything, it is a

[258] Applicant's Reply, ¶ 103.

[259] Applicant's Reply, ¶ 101.d.

[260] Rejoinder, ¶ 62.

[261] Applicant's Response, ¶ 39.a.

[262] Applicant's Reply, ¶ 85.b, 93–94.

[263] Applicant's Response, ¶ 42; Applicant's Response, ¶ 32 ("there are no creditors trying to enforce ICSID awards against Pakistan").

[264] Applicant's Response, ¶ 42.

neutral factor that affects both parties in a similar manner. At the same time, the possibility that TCCA's creditors might seek attachment has not been raised.

171. The Committee concludes that Pakistan has not established that it may face a compelling risk of non-recoupment in light of TCCA's offer to place in escrow any monies obtained through enforcement of the Award.

(5) Risk of Non-compliance

172. Pakistan posits that it has never not complied with an ICSID award. To Applicant, the parties' procedural conduct in the Arbitration is irrelevant to the issue of the stay.[265] No risk of non-compliance exists in the present case. All the cases brought against Pakistan to date have been settled or discontinued by the investors or no liability was found.[266]

173. TCCA argues that given the substantial risk of non-compliance by Pakistan of the Award this weighs against continuing the stay. TCCA primarily bases the risk upon Pakistan's conduct during both the proceedings of the Arbitration and the *Karkey v Pakistan* case. According to TCCA, Pakistan disregarded the Tribunal's procedural orders, sought unreasonable extensions, engaged in obstruction and delay tactics, pushed questionable witnesses, fabricated evidence, and made meritless challenges against the Tribunal members. TCCA emphasizes that the *Karkey v Pakistan* case confirms a pattern of misconduct and settlement does not qualify as compliance so Pakistan has never complied with an ICSID award.

174. The Committee finds that an assessment of the potential for non-compliance should be a fact-specific inquiry that should depend upon the circumstances. The Committee notes that while the Tribunal dismissed many aspects of Pakistan's claims and defences, the Tribunal did not explicitly find misconduct and, unlike the *Karkey v. Pakistan* tribunal, did not find it did not cooperate in good faith. The Tribunal did not sanction Pakistan *per se*. It did hold

[265] Applicant's Reply, ¶ 89; Applicant's Response, ¶ 31.

[266] *Karkey v Pakistan* (settled); *Bayindir v. Pakistan* (ICSID Case No. ARB/03/29) (no liability); *Occidental of Pakistan v. Pakistan* (ICSID Case No. ARB/87/4) (settled); *SGS Société Générale de Surveillance S.A. v. Pakistan* (ICSID Case No. ARB/01/13) (settled); *Impregilo S.p.A. v. Pakistan* (ICSID Case No. ARB/03/3) (settled); *Agility for Public Warehousing Company K.S.C. v. Pakistan* (ICSID Case No. ARB/11/8) (discontinued by investor).

Pakistan accountable for costs, but this appears to be primarily based on TCCA prevailing on the merits.

175. The Committee finds that the asserted pattern of conduct is inconclusive and even with the *Karkey v. Pakistan* case is insufficient to be considered evidence of either compliance or a risk of non-compliance. The Committee also finds that one settlement cannot be presumed to be evidence of a risk of non-compliance of a party's obligations.[267]

176. The Committee understands the points raised in *Burlington v. Ecuador* that "post-award negotiations and a settlement, including a cut in the amount awarded by a tribunal . . . is not what compliance means under the ICSID Convention", and stated in *Tenaris v Venezuela* (II) that "[l]eaning back in waiting until the award creditor commences enforcement proceedings because voluntary compliance is not forthcoming" would constitute non-compliance of ICSID Convention obligations.[268] Yet, the Committee notes that *Tenaris v Venezuela* (II) also suggested that "good faith negotiations and arrangements between the parties as to payment modalities if they are conducted diligently and expeditiously" could be considered compliance.[269]

177. The settlement in *Karkey v. Pakistan* was reached after the parties mutually agreed to suspend the annulment and revision proceedings. It would not be unreasonable to presume that they were carrying out "good faith negotiations and arrangements". They apparently achieved a "non-monetary reconciliation".[270] The Committee therefore does not find such settlement to be determinative in showing a risk of non-compliance on Pakistan's part.

178. The Committee holds that TCCA has not demonstrated a risk of non-compliance by Pakistan with the Award if it is not annulled.

[267] **RAA-02,** *Tenaris v Venezuela (II)*, ¶ 135.

[268] **CAA-3**, *Burlington v. Ecuador*, ¶ 84; **RAA-02,** *Tenaris v Venezuela (II)*, ¶¶ 134–135.

[269] **RAA-02**, ***Tenaris v Venezuela II***, ¶ 135.

[270] Cl. Opposition, ¶ 50, citing **CEA-51**.

(6) Sub-conclusion

179. The Committee considers that it should balance the overall interests affected and the circumstances to determine whether the stay on enforcement should be maintained. In this determination the Committee finds the potential prejudice that each party would suffer to be among the most significant factors.

180. As reviewed above, the Committee finds that there is insufficient basis to hold that Pakistan has not acted in good faith or has been dilatory or obstructive in seeking the stay of enforcement. Also as found earlier, Pakistan's difficulties in recoupment if the Award is annulled and TCCA's concerns over Pakistan's non-compliance if the Award is not annulled do not appear justified.

181. The Committee takes note of Pakistan's concern over the impact that enforcement of the Award would have on the country, particularly on its economy and social welfare while the country is facing a widespread crisis and the ramifications of the COVID-19 pandemic. Given the size of the Award, the burden to Pakistan as the award debtor is potentially magnified. The prospect of severe hardship has been particularized. The likelihood of a lifting of the stay leading to immediate enforcement and consequently to immediate and severe hardship, on the other hand, has not been convincingly demonstrated. Immediate and severe hardship does not appear apparent, particularly if the alternative relief requested by TCCA is considered. In any event, it may reasonably be argued that the risk of exposing the country to hardship, although not immediate and severe, exists and could be avoided by maintaining the stay.

182. At the same time, the Committee takes note of the extended delay that TCCA has had to suffer in receiving compensation from a binding ICSID award. The post-award interest in this case does not adequately cover for the damages and costs and the deprivation of the benefits of the Award. Each additional day prolongs TCCA's prejudice as a result of the denial of compensation.

183. Based upon the considerations examined above, the Committee finds that whether a continuation of the stay of enforcement of the Award should be maintained shall be determined after reviewing whether the stay should be maintained on an unconditional or

conditional basis. The Committee next determines below the implications of the alternative relief requested by TCCA and whether the stay in such case should be granted unconditionally or conditionally.

C. WHETHER THE STAY SHOULD BE CONDITIONAL

(1) Security

184. Pakistan argues that any stay should be unconditional, particularly if the stay is based on the hardship that it may suffer from immediate enforcement. Applicant submits that a stay should not be conditioned on a financial security. Applicant adds that the ICSID Convention does not explicitly grant the power to order a security but it does not dispute that the Committee has the discretionary power to condition a stay particularly by such means as a security or undertaking.[271] Pakistan nevertheless argues that "caution is warranted" with regard to the issuance of a security.[272] Applicant believes a security places the "award creditor in a better position than it would otherwise be in".[273] To Applicant, a security "in effect places a respondent State in a position where it would be forced to waive immunity over the secured amount/asset".[274] Mr. Afzal added that a security "would severely undermine market confidence in Pakistan's…economic stability and credit-worthiness".[275]

185. According to Applicant, in cases where detailed evidence of hardship was found such as *MINE v. Guinea*, *Mitchell v. DRC,* or *Carnegie v. Gambia*, *ad hoc* committees have continued stays without conditions.[276] Applicant stresses that TCCA has not been able to point to a single case where an *ad hoc* committee received detailed evidence on hardship, accepted that a stay was required on grounds of hardship, but then went on to order security.

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[271] Applicant's Response, ¶ 40. Applicant initially suggested that Article 55 was "inconsistent with such a power" to grant a security and cited *Carnegie v Gambia* for support that an *ad hoc* committee does not have the power to engage in the enforcement process through the provision of security but appears to have modified its position subsequently. **RAA-016**, *Carnegie v. Gambia,* ¶ 51**;** Applicant's Reply*,* ¶ 107.

[272] Applicant's Response, ¶ P40.

[273] Applicant's Reply, ¶ 109.

[274] Applicant's Reply, ¶ 109.a.

[275] Mr. Afzal's First Witness Statement, ¶ 67.

[276] Applicant's Reply, ¶ 112.a; **RAA-031**, *MINE v. Guinea*, ¶¶ 14, 28.

In addition to the financial burden of providing a security, which would include the need to provide collateral and pay bank fees, a risk exists that a third-party could seek to attach the security.[277] Finally, a security is unnecessary because the provision of Pakistan's undertaking is sufficient assurance.

186. TCCA, as its alternative relief request, proposes that if a stay is ordered then Pakistan should be required to post a deposit or guarantee of at least 25% of the Award and a specific undertaking that, among other things, it will waive its defences and immunity and pay the Award if it is not annulled. Claimant argues that the Committee has the power and authority to order a security and undertaking.

187. TCCA counterargues that several *ad hoc* committees considered claims of hardship and determined either that the hardships were insufficient to warrant continuation of the stay without security, or that the hardships reinforced the risk of non-compliance that warranted the imposition of security.[278] TCCA remains critical of Pakistan's proposed new undertaking and argues that it grants a "grace period" of six months that gives TCCA less protection because it amounts to a six-month delay in enforcement.

188. The Committee observes that the parties agree that the Committee has the discretionary power to condition the stay.[279] The Committee agrees that its broad discretion to grant a continued stay "logically includes medium solutions as a compromise, such as granting a conditional stay."[280] While the practice of *ad hoc* committees has been varied and statistics are not determinative, recent trends also suggest that more stays, if they are not denied, are being granted conditionally. As noted in ICSID's "Updated Background Paper on

[277] Applicant's Reply, ¶ 115.

[278] Cl. Opposition, ¶ 80.

[279] Applicant's Response, ¶ 24; Cl. Rejoinder, ¶ 10.

[280] **CAA-10**, *Karkey v. Pakistan*, ¶ 128. See, e.g., **CAA-13**, *Repsol v. Empresa Estatal Petróleos del Ecuador*, ¶ 15 (["The Committee] added that, as maintained in the consistent jurisprudence of ICSID,…it also had the authority to establish the requirements necessary to allow the stay to continue.")(translation); **CAA-14**, *Sempra v. Argentina*, ¶ 101 ("The Committee has reached the view, fortified by these precedents, that an *ad hoc* committee is empowered by the Convention to require the posting of security or another appropriate assurance of compliance as a condition of granting a stay of enforcement."); **CAA-16**, *Standard Chartered v. Tanzania*, ¶ 76 ("That discretionary power to allow or deny such remedy may implicitly include a power to allow the remedy subject to conditions. This interpretation is consistent with the object and purpose of Article 52(5), which is designed to enable the *ad hoc* committee to balance the rights of the parties pending annulment proceedings.")

Annulment for the Administrative Council of ICSID", the majority of *ad hoc* committees granting stays required the issuance of a security or written undertaking.[281] *Ad hoc* committees have granted stays of enforcement based on a variety of conditions.

189. The Committee notes that maintaining the stay on a conditional basis through a security can serve multiple purposes. As an alternative form of relief, TCCA requested that Pakistan pledge a financial security for at least 25% of the Award, which stands with interest at approximately USD 1.5 billion. The Committee finds that both parties' concerns could be taken into consideration through such a security.

190. For the award creditor, TCCA, as found in *Mitchell v. DRC,* a financial security serves as "the counterbalance to the delay in [the beneficiary's] satisfaction through payment of the amount of the award, which in principle should be immediate."[282] As provided in Schreuer's Commentary, another purpose is that a security "facilitates enforcement".[283] Through a security, "the award creditor's annulment risk may be suitably offset by a reduction of his enforcement risk".[284] Another function is that a "security is necessary to ensure that the award creditor is not in a materially worse position when compared to other creditors".[285]

191. For the award debtor, Pakistan, a security has various advantages, especially given the potential hardship to Pakistan. As a condition for continuing the stay, the Committee finds that a security for such lesser amount could diminish, in multiple ways, the burden that Pakistan may face. First, Pakistan would at an initial stage be responsible for only one-quarter (1/4) of the USD 5.9 billion Award. Second, it would have to offer a guarantee only for USD 1.5 billion, which at fees of 2–3% Pakistan's counsel confirmed would amount to USD 30–45 million with collateral.[286] Third, the financial security would only need to be

[281] ICSID Background Paper, ¶ 58.

[282] **RAA-20**, *Mitchell v. Congo*, ¶¶ 32–33.

[283] **CAA-05**, Schreuer, ¶ 648; Prof. Schreuer also adds security "may also serve as a possible deterrent to requests for annulment that are motivated primarily by a desire to delay and, possibly, to avoid compliance".

[284] **CAA-05**, Schreuer, ¶ 647.

[285] Cl. Opposition, ¶ 75.

[286] Applicant's Response, ¶ 48; Transcript, 180:4–13. The Committee also notes that according to Mr. Afzal provides that the interest payment for a loan of USD 6 billion would be 7–8% per annum. Mr. Afzal's First Witness Statement, ¶ 60.

provided for a limited time period until the decision on annulment, which is not expected to exceed two years.[287] Unlike the prospects of immediately paying USD 5.9 billion, the Committee does not find that payment of a guarantee or letter of credit of USD 30–45 million for a limited period, even if a considerable amount, would lead to the severe hardship claimed. The Committee notes that, as of February 2020, USD 30–45 million would amount to 0.23–0.35% of Pakistan's foreign exchange reserves that stand at USD 12.8 billion.[288]

192. The Committee finds that, among other things, the Reko Diq mine should be able to serve as sufficient collateral and, if it cannot, this responsibility lies with Pakistan. The Chairman of the Board of Governors of the Reko Diq project Dr. Samar Mubarakmand valued the mine at approximately USD 270 billion.[289] Even if it is based on the contingency of its future development and presently is a non-producing asset, given its estimated USD 200 billion plus value, it would appear to be more than sufficient to serve as collateral. The Committee finds that Pakistan has not convincingly explained why, through the mine, "[i]t would also be unrealistic to expect…an up-front licensing fee [that] would be a significant percentage of the Award".[290] In contrast, counsel for Pakistan and Balochistan themselves admitted in 2014 that "there is therefore no impediment to or restriction on the Governments of Pakistan and Balochistan dealing with the deposits as they deem fit. For example, the Government can lease the Reko Diq deposits to other investors."[291]

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[287] Since 2011, "the average time for an annulment proceeding from the registration of the application for annulment until the issuance of the decision was 24 months". **RAA-010 / CAA-07**, ICSID Background Paper, ¶ 61.

[288] Mr. Afzal's First Witness Statement, ¶ 60.e; 'Foreign Exchange Reserves' available at: http://www.sbp.org.pk/ecodata/forex.pdf; 'Summary Balance of Payments BPM6' available at: http://www.sbp.org.pk/ecodata/BOP_arch/index.asp.

[289] **CEA-3**, Ex. **CE-108**, at 1 (Transcript of Interview with Dr. Samar Mubarakmand, Dawn TV, dated 15 December 2010) (assessing that the deposits in Reko Diq are worth US$ 270 billion); **CAA-18**, Ex. **C-111,** Dr. Mubarakmand submitted to the Supreme Court that the GOB's project would yield a net profit of USD 131.824 billion ¶ 1236, pp.6-8; **CEA-4, Ex. CE-111**, Tariq Asad vs. Federal Government and Others, CMA 220/2011 in C.P. No. 68/2010, Submission of Dr. Samar Mubarakmand in the Supreme Court of Pakistan, dated 19 January 2011, estimating that the Reko Diq deposits were worth more than a hundred billion US dollars. ¶¶ 6, 9–10; Dr. Mubarakmand noted that "likely that the real deposits in EL-5 area are much more than the value of $ 104 billion as indicated by TCC's Feasibility Study'. Award, ¶ 178; **CEA-69,** Prime Minister Khan proclaimed that 'foreign debts would be paid through the resources of the Reko Diq gold". Mumtaz Alvi, "Foreign debts to be paid through Reko Diq gold: PM Imran," The International News, dated 13 February 2020.

[290] Applicant's Reply, ¶ 83.a.

[291] The News International interview (December 2014), RE-183, at 2.

193. If, for some reason, Reko Diq cannot qualify as sufficient collateral, the Committee finds that this predicament should be attributed to Pakistan. The Committee notes that as far back as October 2012 Pakistan provided in a submission that at the H4 Tanjeel mine "preparation for the excavation of the ore [was] due to commence in 6 months".[292] Subsequently, at a hearing held in 6 November 2012, Respondent's counsel stated that "[y]es, there will be mining in the H4 deposit within the space of the coming year."[293] Pakistan has had control over Reko Diq since the Tribunal's provisional measures decision on 13 December 2012 and could have commenced efforts to monetise at least the H4 Tanjeel mine since that date.[294] The reasons for the delay in developing Reko Diq and the lack of progress are all the more puzzling in light of Pakistan's proclaimed unfortunate economic challenges, particularly in recent years. Pakistan has not adequately explained why such development has not occurred. Given the extended period that has elapsed since Reko Diq has been under Pakistan's control, any failure or inability to monetize it so that it could at least serve as collateral is not the fault of TCCA and instead must be attributed to Pakistan.

194. Instead of undermining market confidence and leading to a loss of foreign investment and a downgrading of Pakistan's creditworthiness, providing security could instead inspire confidence by demonstrating Pakistan's commitment to abide by its obligations. This could attract more foreign investment and enhance its creditworthiness in the process. The Committee does not see how public knowledge of a security could "severely undermine market confidence in Pakistan's economic stability and credit-worthiness", particularly since the contingent liability of the USD 5.9 billion Award has been known.[295] The prospects of the provisional stay being lifted for the entire Award have been known since the Annulment Application, and a security would be far less burdensome than being

[292] **CAA-30**, ¶ 70 (citing Applicant's Response, ¶ 117).
[293] **CAA-30**, ¶ 139, fn 83 (citing Transcript, p .226).
[294] Cl. Rejoinder, ¶ 50.
[295] Mr. Afzal's First Witness Statement, ¶ 67.

responsible for the entire Award. The Committee also does not find that a security places Claimant in a "better position than it would otherwise be in".[296]

195. Applicant's claim that requiring a security would force it to waive immunity over the secured amount is also not persuasive. How the security is provided is Applicant's choice. It can either provide the security through assets that are unencumbered by any immunity concerns or it can waive the immunity to assets that are subject to immunity. Providing security that is not subject to immunity or waiving immunity is not an undue imposition upon Applicant over its objection and does not "penalize" it. It is merely part of the choice given to Applicant in exchange for the benefit of maintaining the provisional stay of enforcement of the Award.

196. The Committee agrees with *Sempra v. Argentina* that a security should correspond to an "assessment of what is required to constitute an appropriate assurance" that the award debtor will comply with an award.[297] TCCA requested as an alternative remedy a deposit or guarantee or letter of credit of at least 25% of the Award. A request for a security for less than the full quantum of an award, let alone only one-quarter or less of its entire amount, appears to be unprecedented. One would be hard pressed to characterize such a request as "arbitrary" as suggested by Applicant. Instead, the request provides a benchmark for the Committee to exercise its discretion.[298] Most would deem the request generous given that award creditors are practically unknown to request anything less than the full amount of an award. The Committee considers a guarantee or letter of credit for 25% of the Award as reasonable under the circumstances to provide appropriate assurance to TCCA.

197. At the same time, the Committee must consider the possibility that the Award may be annulled. In this case, Pakistan will have unduly incurred the cost of the guarantee or letter of credit for 25% of the Award. Applicant should be able to recoup these costs that it will have to incur and should have assurance that Claimant will meet such financial obligations.

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[296] Applicant's Reply, ¶ 109.

[297] **CAA-14**, *Sempra v. Argentina*, ¶ 11. One of the earlier cases where a security was required and was successfully offered was **CAA-1**, *Amco v. Indonesia*, ¶¶ 8–9. In the case of *SPP v Egypt,* the parties reached an agreement to waive "steps leading to enforcement in exchange for a bank guarantee". **CAA-5**, Schreuer, ¶ 592.

[298] Applicant's Reply, ¶ 116.a.iii.

Therefore, since the possibility that the Award may be annulled remains, the Committee exercises its broad discretion and concludes that, as a condition for granting the alternative relief that Claimant seeks, it would be appropriate to require that Claimant should likewise provide a financial security to cover Applicant's cost of providing a guarantee or letter of credit for 25% of the Award.

(2) Undertaking

198. The Committee next considers whether either of the parties should provide an undertaking as part of the condition of granting the stay.

199. With regard to Pakistan providing an undertaking, the Committee first notes that Pakistan will be providing a guarantee or letter of credit for a partial amount that constitutes only 25% of the Award. Second, the Committee finds that an undertaking could give greater weight to and solidify a party's obligations under Article 53. Third, the Committee cannot disregard that Pakistan did not provide similar security on two occasions in *Karkey v Pakistan* leading to two terminations of the stay of enforcement.[299] These factors offer support for the view that Pakistan's provision of a security should be supplemented by an undertaking to give comfort to TCCA.

200. At the same time, the Committee considers that requiring Pakistan to provide an undertaking with the security as part of the conditions of maintaining the stay also takes into consideration Pakistan's interests, which are comparably outlined *supra* in Paragraph 191.

201. The Committee finds that continuing the stay with an appropriate undertaking balances the interests and concerns of both parties. The Committee thus determines that Pakistan should furnish an undertaking that it will pay the amount owed under the Award if it is not annulled.

202. In terms of the language of the undertaking, the Committee highlights that Pakistan conceded that "it would be content with the language" in the undertakings ordered in

[299] **CEA-45,** *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, C.A. No. 18-1461-RJL, Plaintiff's Complaint (D.D.C. June 20, 2018), ¶¶ 28–29**; CEA-48,** *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, C.A. No. 18-1461-RJL, Plaintiff's Fourth Notice of Update (D.D.C. June 25, 2019), at 2.

Perenco v. Ecuador and *NextEra v. Spain*.[300] The new undertaking that Pakistan offered to provide appears similar to the one required in *NextEra v. Spain*. Yet, the Committee agrees with Claimant and finds the new undertaking wanting. First, it excludes the assurance that Claimant "would not need to engage in any action to recognize, enforce, or execute the Award under Article 54 of the ICSID Convention in any ICSID Contracting State" based on Applicant providing complete compensation as required under the Award.[301] Another primary difference is that the offered new undertaking requires 180 days to be provided as opposed to 90 days in *NextEra v. Spain*.

203. The Committee determines that Pakistan should provide an undertaking to TCCA with the specific assurance of compliance in terms of prompt, unconditional, irrevocable payment of the amount due under the Award if it is not annulled within 120 days. The Committee finds such an undertaking reasonable under the circumstances of granting a stay on enforcement for the entire amount of the Award and ordering a guarantee or letter of credit for only 25% of the Award. The Committee does not consider that ordering such an undertaking to be a waiver of Pakistan's rights or immunity. Instead, it grants Pakistan a choice to make a promise to pay in the future in exchange for enjoying the benefits now of a stay of the entire Award while only providing a partial security. If Pakistan fails to furnish the undertaking within the time so prescribed (or such extended time as the parties so agree or the Committee so permits), the stay of enforcement shall be terminated. Contrary to TCCA's claim, the Committee also finds that requiring payment within 120 days does not constitute a four-month "holiday" but constitutes a binding promise to pay by that deadline.[302]

204. The Committee finds that certain aspects of the conditions that TCCA requested to be included in the undertaking are unwarranted. Requiring a blanket waiver of immunity is a proposition that arguably could encroach upon Pakistan's rights under Article 55 of the ICSID Convention. Similarly, the right to seek revision, for instance, is a separate right

[300] Pakistan's Observations, ¶ 7.b. As Pakistan summarizes, 12 *ad hoc* committees have granted stays on condition of an undertaking. Applicant's Response, ¶ 29.b.i.

[301] *NextEra v. Spain*, ¶ 102.a.

[302] TCCA 20 May 2020 Observation, p. 8.

guaranteed under the Convention and under the jurisdiction of a separate tribunal and it would hence be inappropriate to be the subject of an undertaking. Being separate matters, absent a clear showing otherwise, the Committee finds the connection between whether Pakistan is considering a revision and its application for a stay too tenuous.

205. The Committee is mindful that TCCA did not request its specific undertaking in its request for relief in either its Opposition or Rejoinder but only did so during its oral submission at the Hearing, purportedly in response to Pakistan's proposed undertaking. In this regard, at Pakistan's request, the Committee granted it an opportunity to be heard regarding TCCA's request through a separate submission after the Hearing.[303] The Committee finds that this addresses any fairness issues over TCCA's modified request for relief through its specific undertaking. In any event, the Committee finds that given its broad discretionary power it can condition the stay upon a more meaningful undertaking in addition to the financial security.

206. On the other hand, the Committee considers whether TCCA should provide an undertaking to deal with the contingency of the Award being annulled and in view of the obligations now imposed on Pakistan. The Committee notes that TCCA offered to provide an undertaking that it would pay any amounts that Pakistan could not recover from the escrow account that would be established to hold any assets collected from enforcement.

207. The Committee therefore holds that TCCA shall provide an undertaking that, if the Award is annulled, it will pay Pakistan any amounts that Pakistan cannot recover from the escrow account that will hold any assets collected from enforcement, excluding those amounts due to Pakistan's third-party creditors.

(3) Conclusion

208. In conclusion, the Committee holds that the stay of enforcement shall be conditioned on both parties providing appropriate security and undertakings. The Committee concludes

[303] Pakistan's Observations on the Undertaking Proposed by TCCA ("***Pakistan's Observations***"), 13 May 2020.

that this solution appropriately balances both parties' concerns and interests under the circumstances of the case.

209. The Committee holds that the stay of enforcement shall be conditioned on Pakistan providing (1) a bank guarantee or letter of credit for 25% of the amount of the Award, and (2) an appropriate undertaking that it will pay the Award if it is not annulled.

210. At the same time, the Committee holds that Pakistan's obligations to secure the stay shall be conditioned on TCCA (1) providing a financial security corresponding to the cost that Pakistan incurs for providing the guarantee or letter of credit for 25% of the Award; (2) placing into an escrow account under the sole control of an international escrow agent and under the direction of the Committee any amounts recovered through enforcement; and, (3) submitting an undertaking that, if the Award is annulled, it will pay any amounts that Pakistan cannot recover from the escrow account that will hold assets obtained from enforcement, excluding those amounts due to Pakistan's third-party creditors.

IV. COSTS

211. Article 61(2) and Article 52(4) of the ICSID Convention and Rule 47(1), and Rule 53 of the ICSID Arbitration Rules grant the Committee discretion in the allocation of costs.

212. The Committee does not find it necessary to make a decision on costs at this preliminary stage of the proceedings. The Committee confirms the parties' respective positions on costs and will take them into consideration when rendering its final decision on annulment. The Committee requests that the parties maintain a separate account of their costs incurred during this phase of the proceedings concerning the stay.

V. DECISION AND ORDERS

213. For the foregoing reasons, the Committee hereby:

(a) DECIDES that the stay of enforcement of the Award rendered on 12 July 2019 shall be continued on a conditional basis;

(b) DECIDES that Applicant shall provide an unconditional and irrevocable bank guarantee or letter of credit for 25% of the Award, plus accrued interest as of the date of this Decision, from a reputable international bank based outside of Pakistan, pledged in favour of Claimant and to be released on the order of the Committee;

(c) DECIDES that Applicant shall provide the Committee with a letter signed by Pakistan's Minister of Finance or the official having full authority to bind Pakistan that, to the extent the Award is not annulled, it undertakes as follows:

(i) in compliance with its obligations under the ICSID Convention, Applicant will recognize the Award rendered by the Tribunal as final and binding and will abide by and comply with the terms of the Award;

(ii) in compliance with its obligations under the ICSID Convention, Applicant will unconditionally, irrevocably, and voluntarily pay the pecuniary obligations imposed by the Award within 120 days after the notification by the Secretary-General of ICSID of the Committee's Decision on the Annulment Application such that Claimant will be fully compensated including interest and will not need to engage in any action to recognize, enforce, or execute the Award under Article 54 of the ICSID Convention in any ICSID Contracting State; and

(iii) Applicant will attest that any amount of the Award attached or received by Claimant will not be subject to the intervention of Pakistan's courts initiated by the executive branch of the Pakistani government.

(d) ORDERS that should Applicant not furnish the security and undertaking in the terms as set out in Paragraphs (b) and (c), respectively, to the satisfaction of the Committee, within 30 days after notification of this Decision, the stay of enforcement in the amount of 50% of the Award, plus accrued interest as of the date of this Decision, shall be lifted. The stay will be lifted according to this Paragraph provided that Claimant has submitted the undertaking set out in Paragraph (g) below.

(e) ORDERS Claimant to provide an unconditional and irrevocable bank guarantee or letter of credit in the amount of the costs that Applicant incurs for providing a bank guarantee or letter of credit according to Paragraph (b) above, which shall be confirmed by the Committee, from a reputable international bank based outside of Pakistan, pledged in favour of Applicant and to be released as determined by the Committee if the Award is annulled, within 30 days of Applicant's provision of the bank guarantee or letter of credit under Paragraph (b) above;

(f) ORDERS Claimant to place into an escrow account under the sole control of an international escrow agent and under the direction of the Committee any amounts collected through enforcement if the stay is lifted according to Paragraph (d) above;

(g) ORDERS Claimant to provide an undertaking, to the satisfaction of the Committee, that, if the Award is annulled, it will pay any amounts that Pakistan cannot recover from the escrow account that will hold assets obtained from enforcement, excluding those amounts due to Pakistan's third-party creditors;

(h) DENIES all other relief requested;

(i) RESERVES its right to revisit at any time its decision and order, by its own motion or, in light of the circumstances, at the request of either party based on a significant change in conditions and to the satisfaction of the Committee, to modify or terminate the stay, or vary or amend its decision regarding the undertakings herein; and,

(j) RESERVES its decision on costs for a subsequent stage of the proceedings.

Prof. Joongi Kim
President
On behalf of the Committee