**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

KARKEY KARADENIZ ELEKTRIK URETIM A.S.,

*Plaintiff and Arbitration Award Creditor*,

v.

ISLAMIC REPUBLIC OF PAKISTAN,

*Defendant and Arbitration Award Debtor*.

Civil Action No. 18-01461-RJL

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR STAY THE PROCEEDINGS**

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Plaintiff and Arbitration Award Creditor Karkey Karadeniz Elektrik Uretim A.S. ("Karkey") hereby submits its Opposition to the Motion to Dismiss filed by Defendant and Arbitration Award Debtor the Islamic Republic of Pakistan ("Pakistan") on September 28, 2018.

## INTRODUCTION

On August 22, 2017—after more than four years of exhaustive arbitral proceedings (the "Arbitration") governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270 (the "ICSID Convention")—an international arbitral tribunal unanimously found that Pakistan: (i) had breached its international obligations by, *inter alia*, expropriating Karkey's investment in Pakistan; and (ii) was required to compensate Karkey in the amount of more than US$500 million, plus interest that is accruing daily. *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, August 22, 2017 (hereinafter "Award (Dkt 1., Ex. 1)"), ¶¶ 648, 1081. In violation of its international treaty obligations, Pakistan has yet to pay a single dollar of the Award.

The Award was rendered by an arbitral tribunal composed of three preeminent international law practitioners (the "Arbitral Tribunal") and was issued pursuant to the ICSID Convention, a multilateral treaty designed to promote economic development and foreign direct investment by providing a legal framework to resolve disputes between private investors and governments. *See Teco Guatemala Holdings, LLC v. Republic of Guatemala*, No. CV 17-102 (RDM), 2018 WL 4705794, at *1 (D.D.C. Sept. 30, 2018) (describing the ICSID Convention). The United States is a party to the ICSID Convention, and Congress has enacted implementing legislation, 22 U.S.C. § 1650a (hereinafter "section 1650a" or the "ICSID Implementing Statute"). *Id.*

On June 20, 2018, Karkey filed its Complaint in this action, seeking recognition and enforcement of the pecuniary obligations of the Award. Pursuant to the ICSID Convention and the ICSID Implementing Statute, this proceeding should be summary in nature, as "recognition of ICSID awards is mechanistic and effectively automatic." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 926011, at *1 (S.D.N.Y. Mar. 4, 2015) ["*Mobil Cerro I*"].

After issuance of the summons by the Clerk of the Court, Karkey promptly initiated service of process on Pakistan pursuant to the Foreign Sovereign Immunities Act (the "FSIA"),[1] and specifically pursuant to section 1608(a) thereof (hereinafter, "section 1608(a)"), which governs service of process on foreign sovereigns. In accordance with section 1608(a)(2) of the FSIA, Karkey initiated service under the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention"), a multilateral convention on service of judicial documents to which both the United States and Pakistan are parties. In breach of its obligations under the Hague Convention, Pakistan has failed to take any action on Karkey's service request.

Having improperly frustrated Karkey's initial service attempt, Pakistan now perversely seeks to dismiss the Complaint in this action for lack of service. Since Karkey continues in its diligent efforts to serve Pakistan,[2] and since the FSIA does not impose any time limit for effectuating service, Pakistan's request for dismissal on service grounds is wholly without merit. *See Hardy Expl. & Prod. (India), Inc. v. Gov't of India*, 219 F. Supp. 3d 50, 67 (D.D.C. 2016)

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[1] 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611.

[2] On October 10, 2018, Karkey filed an Update Regarding Service on Pakistan and Motion for Leave to Attempt Service Pursuant to 28 U.S.C. §§ 1608(a)(3) & (4) of the FSIA ("Update and Motion re Service"). Dkt. 14.

("Although the Court must require strict adherence to the terms of 1608(a), a time limit for service is simply not one of those terms" (internal quotation and citation omitted)).

As the second ground for its motion to dismiss, Pakistan posits an entirely unprecedented and unfounded theory that enforcement of the Award "would violate the Due Process Clause of the U.S. Constitution and international norms regarding due process and corruption." Motion to Dismiss ("MTD") (Dkt. 11), ¶ 20. If accepted, this argument would upend the entire foundation of the ICSID Convention and of the ICSID Implementing Statute, which prohibit *any* collateral attack on the Award at the enforcement stage. *See Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 101 (2d Cir. 2017) ["*Mobil Cerro III*"] ("Article 53 of the [ICSID] Convention provides that ***a party dissatisfied with an award may challenge it*** on various grounds, but may do so ***only through proceedings at [ICSID] and not collaterally in the courts of member states***." (emphasis added)).

Even if Pakistan's challenge to the procedure of the Award were not prohibited as a matter of law (which it is), it nevertheless would fail for a variety of reasons. First, Pakistan fails to explain how the Court could adjudicate Pakistan's collateral attack on the Award without first determining that it has personal jurisdiction over Pakistan, which it has not yet done. *See, e.g.*, *Kaplan v. Central Bank of the Islamic Republic of Iran*, 896 F.3d 501, 510 (D.C. Cir. 2018) ("[A] court must first determine that it possesses personal jurisdiction over the defendants before it can address the merits of a claim."). Second, in pursuing its novel dismissal theory, Pakistan seeks to rely on newly-introduced allegations of fact that are inaccurate and disputed.[3] Such allegations are not appropriately made at the motion to dismiss stage, and in any event are irrelevant at every juncture of an ICSID award enforcement proceeding. Finally, the record of the Arbitration

[3] By way of example, Pakistan states that an individual, Mr. Raja Zulqarnain, had testified in the Arbitration, even though, in reality, he did not. *See* Motion to Dismiss (Dkt. 11), ¶ 13.

demonstrates that what Pakistan describes as a "due process violation" amounts to nothing more than a proper exercise by the Arbitral Tribunal of its discretionary authority to deny discovery requests that it found to be unwarranted on the merits, disruptive to the proceedings, and unduly burdensome for Karkey. *See infra* Argument section II.B.2.

As an alternative to its motion to dismiss, Pakistan asks the Court to stay this proceeding pending resolution of Pakistan's request to annul the Award (the "Annulment Proceeding"), which currently is pending before a panel of three new arbitrators (known as an "*ad hoc* committee" or an "annulment committee") empaneled under the ICSID Convention (the "Annulment Committee"). *See* MTD (Dkt. 11), ¶¶ 46–48. Again, Pakistan fails to explain how the Court could grant its requested stay in circumstances where Karkey is still in the process of effectuating service in order to establish the Court's personal jurisdiction.

In addition, the stay request is impermissible because the ICSID Convention grants the Annulment Committee *exclusive* power to stay enforcement of the Award. *See Micula v. Gov't of Romania*, No. 15 Misc. 107 (Part I), 2015 WL 4643180, at *4 (S.D.N.Y. Aug. 5, 2015) (explaining that, once an ICSID annulment committee declines to stay enforcement, "there is little for a court in an ICSID member state to do other than confirm the Award," and noting also that "no stay is warranted during the pendency of the annulment proceeding"), *abrogated on other grounds by Mobil Cerro III*, 863 F.3d 96.

Here, the Annulment Committee expressly declined to order a stay, after receiving full briefing from the parties and conducting a hearing on the matter. *See generally* Decision on the Stay of Enforcement of the Award dated February 22, 2018 ("Stay Decision") (Dkt. 1, Ex. 4).[4]

[4] As explained in the Complaint, the Annulment Committee initially allowed the stay to continue, first for a period of two months, and then for a further one month, in order to provide the parties an opportunity to try to negotiate a voluntary agreement on conditions for continuing

As set forth in the Stay Decision, the Annulment Committee's ruling was based on a determination that Pakistan had failed to meet its burden of proving circumstances warranting a stay. *See* Complaint (Dkt. 1), ¶¶ 26–29 & Exs. 4, 5. Pakistan should not be permitted to undermine this reasoned decision of the Annulment Committee, circumvent the ICSID Convention's stay provisions, and benefit from its noncompliance with its treaty obligations to Karkey's detriment.

In sum, Pakistan's Motion to Dismiss, and its alternative motion to stay this case pending the Annulment Proceedings, should be denied for the foregoing procedural, substantive, and prudential reasons, which are discussed in further detail below.

## RELEVANT FACTUAL BACKGROUND

By the terms of the ICSID Convention, ICSID awards are neither procedurally nor substantively reviewable by any judicial court, anywhere in the world. Under the unique supranational arbitral regime established by the Convention, ICSID awards are not subject to any form of judicial review outside the ICSID system, whether in an enforcement context or otherwise. Accordingly, ICSID awards are different from international commercial arbitration awards, which are subject to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention) and to certain forms of judicial review.

Given the foregoing, Karkey's ICSID Award is not subject to review by any court in the United States. The factual allegations introduced in Pakistan's Motion to Dismiss are therefore irrelevant to the limited scope of the present action, which seeks to enforce the pecuniary obligations of the Award. Indeed, in *any* proceeding before this Court, factual allegations beyond those raised in a complaint are improper on a motion to dismiss and must be excluded.

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the stay. No agreement was reached and the stay, therefore, was lifted on June 15, 2018. Complaint (Dkt. 1), ¶¶ 24–29.

Fed. R. Civ. P. 12(d). In view of the inaccuracies in Pakistan's account of the events giving rise to the Arbitration, and of the conduct of the Arbitration proceedings themselves, Karkey feels compelled to address these factual allegations simply to set the record straight.[5]

### A. Facts Giving Rise To The Arbitration

Karkey is an energy company organized under the laws of Turkey. Award (Dkt. 1, Ex. 1), ¶ 2. Among other things, Karkey builds and operates "Powerships" (which are ships with power generation equipment mounted on them), which can be sailed around the world and connected relatively swiftly to the electricity grids of countries in need of power. *See id.*, ¶ 77.

Between 2006 and 2007, Pakistan faced one of the worst energy crises in its history, in which blackouts were commonplace. *Id.*, ¶ 75. In 2006, the Government of Pakistan adopted a policy of power generation through Rental Power Projects ("RPPs"), and in 2008, Pakistan accepted bids for such projects. *Id.*, ¶¶ 76, 81. Karkey's bid to supply electricity to Pakistan's electricity grid was accepted (as were the bids of other RPP sponsors), and Karkey entered into a contract with the State-owned power company Lakhra Power Generation Company Ltd. in 2008. That contract was then amended in 2009 (as amended, the "Contract"). *Id.*, ¶¶ 82, 91–95, 101, 110, 593.

In accordance with the Contract, Karkey supplied to Pakistan, *inter alia*, two Powerships (the *Kaya Bey* and the *Alican Bey*) and two support vessels (the *Iraq* and the *Enis Bey*) (all four vessels jointly, the "Vessels"). *Id.*, at vi. Commercial operations of Karkey's Vessels in

[5] Moreover, to the extent that Pakistan is seeking dismissal under Rule 12(b)(6) (*see infra*, Section II), this Court must assume the facts alleged in the Complaint to be true. *Teco Guatemala Holdings*, 2018 WL 4705794, at *5. For the avoidance of doubt, Karkey further notes that: (i) its corrections herein of Pakistan's misstatements of fact should not be construed as an acknowledgement that such allegations are relevant in any way to the Court's adjudication in these enforcement proceedings (because they are not); and (ii) any contention of Pakistan that is not addressed in Karkey's Opposition should not be presumed to be accepted by Karkey.

Pakistan began on April 13, 2011. *Id.*, ¶¶ 119–120. However, Karkey's contractual counter-party, State-owned Lakhra, failed to meet a key requirement under the Contract, which was to establish a fuel payment letter of credit. *Id.*, ¶¶ 121–124. On March 30, 2012, following numerous additional contractual defaults by Lakhra—including non-payment of Karkey's invoices for several months—Karkey served Lakhra a Notice of Termination of the Contract, with immediate effect, and therein requested payment of certain amounts, including termination charges, mobilization and transport charges, and all receivables. *Id.*, ¶ 125.

In the meantime, beginning in July 2009, the so-called "Pakistan chapter" of Transparency International ("TI-Pakistan") started to ask government officials in Pakistan to review the RPP contracts for possible violations of public procurement rules. *Id.*, ¶ 104. Significantly, during the Arbitration, and in response to a formal request from Karkey, Transparency International e.V.—*i.e.*, the globally-respected, Berlin-based non-governmental organization—confirmed in writing, *inter alia*, that "the positions espoused by TI-P [TI-Pakistan] with respect to rental power projects in Pakistan *cannot be attributed to Transparency International*." *See* Declaration of Maria Chedid ("Chedid Decl."), Ex. A, ¶ 23 (emphasis added). In other words, contrary to Pakistan's suggestion in its Motion to Dismiss, TI-Pakistan and Transparency International are *not* the same entity, *see* MTD (Dkt. 11), ¶¶ 5, 45, and the latter entity has disavowed the allegations made by TI-Pakistan. Karkey also established during the Arbitration that TI-Pakistan—contrary to Transparency International—was a disreputable organization, whose unsubstantiated allegations of corruption in the RPP program had been discredited. *See* Chedid Decl., Ex. A, ¶ 23.

In September 2009, at the urging of an individual member of the Pakistani parliament, the Chief Justice of the Supreme Court of Pakistan opened a case (within the original jurisdiction of

the Supreme Court) to examine the parliamentarian's allegations that there had been corruption in the award of the RPPs.[6] Award (Dkt. 1, Ex. 1), ¶¶ 105, 107.

On March 30, 2012 (the same date as Karkey's termination of the Contract)—after more than two years of proceedings—the Supreme Court rendered its judgment in the RPP case (the "RPP Judgment"). *Id.*, ¶ 126. In its ruling, the Supreme Court concluded that *all* of the RPP contracts (including Karkey's) had been procured in breach of public procurement rules. *Id.*, ¶ 126. The Supreme Court therefore declared *all* RPP contracts void *ab initio*.[7] *Id.*, ¶ 126. Importantly, as the Arbitral Tribunal stated in the Award, "***[i]t is undisputed that the Supreme Court made no explicit finding of corruption anywhere in the Judgment, nor any specific finding of corruption against, or involving, Karkey***." *Id.*, ¶ 126 (emphasis added). Instead, the Supreme Court asserted—*without any evidence whatsoever*—that the RPP sponsors and various government functionaries had been "'*prima facie*, involved in corruption and corrupt practices.'" *See id.*, ¶ 207. The Supreme Court did not explain what it means to be "*prima facie* involved in corruption." *See id.*, ¶ 542.

Importantly, in April 2012, the Pakistan Ministry of Water and Power ("MoWP")—*on behalf of Pakistan itself* and others—filed a Civil Review Petition before the Supreme Court seeking to reverse the RPP Judgment, on the basis, *inter alia*, that such ruling was irrational and arbitrary. *Id.*, ¶ 133, 542, 556 (quoting Pakistan's position in the review petition: "[T]he findings of the honorable Court that functionaries are *prima facie* involved in corruption and corrupt practices [*sic*] is not supported by evidence or material submitted either by the petitioner

[6] As discussed below, Karkey was not involved in any corruption. Tellingly, despite years of investigation by various Pakistani authorities—both before and during the Arbitration—Pakistan has never managed to produce a shred of evidence of corruption by Karkey.

[7] In a contradictory statement, the Supreme Court also ordered the same contracts to be rescinded, without explaining why contracts that had been declared void *ab initio* would also need to be rescinded following the judgment. Award (Dkt. 1, Ex. 1), ¶¶ 126, 555.

or by any other person and such observations undermine the fundamental rights of the functionaries . . . .").

The Supreme Court also ordered Pakistan's anti-corruption agency—the National Accountability Bureau ("NAB")—to conduct an investigation into possible corruption by the RPP sponsors and various public officials. *Id.*, ¶ 126. Complying with the Supreme Court's order, NAB launched an investigation of Karkey (and other RPP sponsors) in April 2012. *Id.*, ¶¶ 127–128. At that time, Karkey received notification that a "caution" had been placed on its Vessels, as a result of which the Vessels were not permitted to move from their moored positions until they received clearance from NAB. *Id.*, ¶¶ 130. Ultimately, Karkey's *Kaya Bey* remained detained and forcibly idle *for more than two years*—from April 2012 through May 2014—before finally obtaining release upon order of the Arbitral Tribunal. *Id.*, ¶ 131. However, Pakistan never released Karkey's other vessels—the *Alican Bey*, the *Iraq*, and the *Enis Bey*, as a result of which they remain detained and under Pakistan's control to this day. *Id.*

In September 2012, NAB, Lakhra, and Karkey entered into a "Deed" signed by the Director General of NAB, which provided for payment by Karkey of US$17.2 million to settle accounts and resolve all matters arising from the Contract, the RPP Judgment, and the NAB inquiry. *Id.*, ¶ 136. Importantly for purposes of the Arbitral Tribunal's analysis, the Deed declared (as set out in the Award): "Karkey has no liability, and there remains no basis or evidence for proceeding(s) by NAB or any of the other Parties or GoP [Government of Pakistan] entities against KARKEY and/or its project/investment and that NAB has completed and closed its enquiry in respect of Karkey." *Id.*, ¶ 136. In October 2012, NAB issued a "No Objection Certificate" confirming that it was satisfied that Karkey, *inter alia*, had no liability under

Pakistan's anti-corruption law (the National Accountability Ordinance), and that NAB had "completed and closed [*sic*] inquiry in respect of Karkey." *See id.*, ¶ 138.

In November 2012, at the urging of the same parliamentarian, the Supreme Court unilaterally abrogated the Deed and the No Objection Certificate and directed NAB to recover from Karkey US$120 million (an apparently arbitrary amount) before Karkey's Vessels could be allowed to sail out of Pakistani waters. *Id.*, ¶¶ 140–142, 216. Acting pursuant to the Supreme Court's directions (in direct contradiction to the Deed and the No Objection Certificate), on December 3, 2012, NAB notified Karkey that it was required to make a payment to Pakistan—inexplicably now raised to US$128 million—and that Karkey's Vessels had "been detained as security for payment." *Id.*, ¶ 144. In May 2013, Lakhra—acting on instructions of the Pakistan Government—obtained an arrest order for Karkey's Vessels from a provincial high court with maritime jurisdiction over the Vessels, the Sindh High Court. *Id.*, ¶ 149.

As a result of these actions by the Supreme Court, NAB, Lakhra, and the Sindh High Court, Karkey's Vessels were not permitted to depart Pakistani waters and remained detained by Pakistan, and Karkey was prevented from obtaining any of the payments to which it was entitled upon termination of its Contract with Lakhra.

****

The above facts form the general background to Karkey's dispute with Pakistan and to the Arbitral Tribunal's Award. Among other things, it is important to note that, despite: (i) more than two years of proceedings in the Supreme Court, (ii) an investigation by NAB that at the time of the Award had already been ongoing for four years, and (iii) the even more desperate additional investigations that Pakistan undertook during the course of the Arbitration, Pakistan

managed to produce no evidence whatsoever of corruption by Karkey. As the Arbitral Tribunal stressed in the Award:

> It is important to note that ***the Supreme Court has made no specific finding of corruption in its Judgment regarding Karkey***. Following the Judgment of the Supreme Court, ***the NAB***, which is an Executive agency tasked with the authority to investigate and enforce the NAO [Pakistan's anti-corruption legislation, the National Accountability Ordinance] and ***which has been investigating allegations of corruption related to the Project for the past four years, has not found any evidence of corruption related to Karkey.***
>
> In fact, the NAB itself concluded that there was *no evidence of any wrongdoing by Karkey* under the [National Accountability Ordinance], "after a detailed examination of all accounts and documents".

*Id.*, ¶¶ 538–539 (emphasis added).

### B. The Arbitration And The Award

Karkey filed a Request for Arbitration with ICSID on January 16, 2013 pursuant to the Agreement Between the Islamic Republic of Pakistan and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments, which entered into force on September 3, 1997 (the "Treaty"). Over the course of the ensuing three years and five months of proceedings, the parties exchanged disclosure of relevant documents[8] and each submitted two rounds of voluminous briefing, as well as post-hearing briefs, comprehensively addressing their arguments on the merits and jurisdiction, including with respect to Pakistan's false allegations of corruption by Karkey.[9] *Id.*, ¶¶ 50, 51, 54, 57. A hearing was held in London from February 29 to March 12,

[8] The disclosure process is discussed in more detail in Argument section II.B.2 below, in connection with Pakistan's frivolous contention that it was denied due process in the Arbitration proceedings.

[9] During the proceedings, Karkey filed a request for provisional measures (interim relief) to secure the temporary release of its Vessel, the *Kaya Bey*, for needed drydock repairs. Award (Dkt. 1, Ex. 1), ¶ 5. On October 16, 2013, following briefing and a hearing on this issue, the Arbitral Tribunal ordered Pakistan to "take all steps necessary to allow the [*Kaya Bey*] to depart into international waters and reach, before 1 November 2013, the dry dock in Dubai for inspection and repairs." *See id.*, ¶¶ 26, 150. Pakistan failed to comply with the Arbitral

2016, during which the parties made opening and closing statements, and examined the witnesses and experts at length. *Id.*, ¶ 67.

On August 22, 2017, ICSID dispatched the Award to the parties. In the Award, the Arbitral Tribunal found, *inter alia*, that Karkey's investment had *not* been tainted by corruption, fraud, or misrepresentation, and that the Arbitral Tribunal had jurisdiction over Karkey's claims. *See id.*, ¶¶ 543, 561, 620, 637–640. On the merits, the Arbitral Tribunal determined that the RPP Judgment declaring the Contract void *ab initio*, and Pakistan's subsequent detention of Karkey's Vessels pursuant to that Judgment, were arbitrary and illegitimate and had the effect of depriving Karkey of the use and enjoyment of its rights under the Contract (including its contractual termination rights) and its rights to the Vessels, in violation of the Treaty's prohibition against unlawful expropriation. *See id.*, ¶¶ 647–649. Finally, the Arbitral Tribunal determined that Pakistan had breached its obligation under the Treaty to "permit in good faith all transfers related to an investment to be made freely and without unreasonable delay into and out of its territory" by depriving Karkey of the free disposal of its assets related to its investment, including the Vessels. *See id.*, ¶¶ 651–656 (quoting the Treaty).

As reparation for the injuries that Karkey suffered as a result of Pakistan's breaches of the Treaty, the Arbitral Tribunal awarded Karkey US$500,693,567.17 in damages, plus interest at rates set out in the Award. *See id.*, ¶¶ 1081; *see also* Complaint (Dkt. 1), ¶¶ 19–20. That amount includes an award for reimbursement of a significant portion of Karkey's costs and attorneys' fees incurred in the Arbitration, totaling more than US$10 million. *See* Award (Dkt. 1, Ex. 1), ¶¶ 1081(xv)–(xvi). In reaching its decision to award a portion of Karkey's costs and fees,

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Tribunal's order for more than six months, and the *Kaya Bey* was not released until May 2014. *See id.*, ¶¶ 27, 28, 155–157. Following a subsequent order, the Tribunal lifted the requirement that Karkey return the *Kaya Bey* to Pakistan. *Id.*, ¶ 31.

the Arbitral Tribunal took into account Pakistan's conduct during the proceedings, and found, *inter alia*, that "*Pakistan seemed to be trying to delay and disrupt the[] proceedings*." *Id.*, ¶ 1073 (emphasis added).

### C. Relevant Background On The Pending ICSID Annulment Proceeding

Article 53 of the ICSID Convention states that "*[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention*." *Id.*, Art. 53 (emphasis added); *see also, e.g.*, *Teco Guatemala Holdings*, 2018 WL 4705794, at *1. Since there is no appeal in the ICSID system, if either party to an ICSID dispute wishes to contest a tribunal's award, its ***sole recourse*** is to seek "interpretation," "revision," or "annulment" of the award through the specific procedures established for such purposes in the ICSID Convention. ICSID Convention, Arts. 50–53.[10]

When a party submits to ICSID a request for annulment of an award pursuant to Article 52 of the ICSID Convention, ICSID convenes a new arbitral panel ("*ad hoc* committee") composed of three new panel members (different from the members of the original arbitral tribunal). The *ad hoc* committee is authorized "to annul the award or any part thereof . . . . " ICSID Convention, Art. 52(3), on the basis of certain limited grounds enumerated in Article 52(1). If the party seeking annulment includes in its application for annulment a request for stay of enforcement of the award, "enforcement shall be stayed *provisionally* until the [c]ommittee rules on such request." *Id.*, Art. 52(5) (emphasis added). Once empaneled, the annulment committee has discretion to decide whether enforcement of the award should be stayed pending resolution of the annulment proceeding. *Id.* Article 53 of the ICSID Convention states that "[*e*]*ach party shall abide by and comply with the terms of the award except to the*

[10] ICSID Convention, Regulation and Rules *available at* https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf.

*extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention*." *Id.*, Art. 53(1) (emphasis added). Accordingly, except to the extent that enforcement has been stayed by the annulment committee, the award debtor has an obligation to comply with the award notwithstanding the pendency of an annulment proceeding.

Pakistan filed an application for annulment of the Award on October 27, 2017 (*see* MTD (Dkt. 11), Ex. I), and the Annulment Committee was constituted on December 5, 2017. In its annulment application, Pakistan contended, *inter alia*, that the Arbitral Tribunal departed from a fundamental rule of procedure (*i.e.*, denied due process) by refusing to order Karkey to restore and search certain backup tapes containing electronic files of Karkey's operations, which tapes Pakistan speculated might contain archived emails relevant to Pakistan's allegations of corruption. *See* MTD (Dkt. 11), Ex. I, ¶ 88. Importantly for present purposes, *these are essentially the same allegations on which Pakistan seeks to dismiss Karkey's Complaint before this Court*. MTD (Dkt. 11), ¶¶ 35–37, 45.

### D. The Annulment Committee's Denial Of Pakistan's Request For A Stay Of Enforcement

In its annulment application, Pakistan requested a stay of enforcement of the Award. *See* Complaint (Dkt. 1), ¶ 24. Pursuant to Article 52(5) of the ICSID Convention, ICSID issued an automatic *provisional* stay of enforcement, pending the Annulment Committee's constitution and its decision on Pakistan's stay request. *See* Complaint (Dkt. 1), ¶ 24. After evaluating the Parties' written and oral submissions on Pakistan's request, the Annulment Committee determined that "***Pakistan has not provided sufficient proof that circumstances exist in the present case which require a continuation of the stay [of enforcement of the Award]***." Stay Decision (Dkt. 1, Ex. 4), ¶ 126 (emphasis added). Consequently, Pakistan's request for a stay of enforcement was denied. *Id.* This means that no stay of enforcement is currently in place, and

that Pakistan is therefore under an immediate and ongoing obligation to comply with the terms of the Award. *Id.*; ICSID Convention, Art. 53.

## ARGUMENT

### I. Personal Jurisdiction Over Pakistan Will Be Perfected Once Service On Pakistan Is Completed In Accordance With The FSIA

Pakistan argues that the Complaint should be dismissed for lack of personal jurisdiction because: (i) Karkey purportedly has not alleged facts sufficient to demonstrate the Court's personal jurisdiction over Pakistan; and (ii) Karkey has not filed a proof of service confirming that service has been effected on Pakistan pursuant to the FSIA. MTD (Dkt. 11), ¶¶ 21–28. Both arguments fail.

First, Pakistan is incorrect that Karkey must establish a "factual basis" for personal jurisdiction. Section 1330(b) of the FSIA provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject-matter jurisdiction] where service has been made under section 1608 [of the FSIA]." 28 U.S.C. § 1330(b); *see also* Complaint (Dkt. 1), ¶ 6. As the District Court for the District of Columbia has observed, "[t]his means that if a federal court has subject-matter jurisdiction over a given case, it need only assure itself that the plaintiff has properly served the foreign state in accordance with section 1608(a) [of the FSIA] in order to exercise personal jurisdiction over the foreign state." *Azadeh v. Gov't of Islamic Republic of Iran*, 318 F. Supp. 3d 90, 97 (D.D.C. 2018). There is, therefore, no need for a plaintiff to identify a "factual basis" for personal jurisdiction through "specific facts" (MTD ¶¶ 21–22) beyond those sufficient to establish subject matter jurisdiction and proper service.[11]

[11] Pakistan does not dispute that the Court has subject-matter jurisdiction over Karkey's claim, pursuant to 22 U.S.C. § 1650a(b), 28 U.S.C. § 1330(a), 28 U.S.C. § 1605(a)(1), and 28 U.S.C. § 1605(a)(6)(B). *Compare* Complaint (Dkt. 1), ¶¶ 4–5, *with* MTD (Dkt. 11). Thus, once Karkey

Pakistan cites inapposite cases that do not address personal jurisdiction over a sovereign pursuant to section 1330(b) of the FSIA. For example, in *Allen v. Russian Federation*, the court assessed jurisdiction over individual defendants who had been *joined* in an action against the sovereign. 522 F. Supp. 2d 167, 181 (D.D.C. 2007) (dealing with "personal jurisdiction over each *individual* Defendant," in contrast to the sovereign co-defendant (emphasis added)). In *Wultz v. Islamic Republic of Iran*, the court assessed personal jurisdiction over the Bank of China, a *co-defendant* with Iran in an action brought under the Antiterrorism Act. 755 F. Supp. 2d 1, 31 (D.D.C. 2010). In neither case did the court hold or even suggest that personal jurisdiction over a foreign State required anything more than the dual requirements of subject matter jurisdiction and service in accordance with the FSIA.

With respect to service, Pakistan does not specifically contend that Karkey's attempts to serve it to date have been insufficient under Federal Rule of Civil Procedure 12(b)(5). Rather, it complains that Karkey has not provided *proof* of such service. As explained below, however, the absence of a proof is due to Pakistan's own failure to meet its obligations under the Hague Convention. Moreover, the fact that service has not *yet* been effected is not a valid ground for dismissing the Complaint, especially since (as discussed below) the FSIA does not establish any particular deadline for effecting service, and it cannot be said that Karkey has been negligent in taking steps to serve Pakistan.

Section 1608(a) of the FSIA sets forth the exclusive methods of service on a foreign State, which must be adhered to strictly and in the proper sequence. *Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 27 (D.C. Cir. 2015). Under that provision, there are four available methods for serving a summons and complaint on a foreign State: (i) in accordance with "any

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has effected service on Pakistan in accordance with section 1608(a) of the FSIA, this Court will have personal jurisdiction over Pakistan.

special arrangement for service" between the plaintiff and the State; (ii) if no special arrangement exists, in accordance with an applicable international convention on service of judicial documents; (iii) if service cannot be made under (i) or (ii), by mail to be addressed and dispatched by the Clerk of Court to the head of the ministry of foreign affairs of the State; and (iv) if service cannot be made within 30 days under (iii), via transmission by the U.S. Secretary of State through diplomatic channels. 28 U.S.C. § 1608(a).

Since there is no "special arrangement for service" in place between Karkey and Pakistan, service under section 1608(a)(1) of the FSIA is not an option. *See* Update and Motion re Service (Dkt. 14) at 3. As a result, after Karkey filed the Complaint and the Clerk of Court issued the summons, Karkey promptly initiated service using the next available method under the FSIA, articulated in section 1608(a)(2). *Id.* at 6. Specifically, Karkey attempted service under the Hague Convention, which is a multilateral convention on service of judicial documents to which both the United States and Pakistan are parties. *Id*. Under the Hague Convention, once it received Karkey's service request, summons, and Complaint, Pakistan's designated Central Authority was required promptly to either effectuate service as requested by Karkey or inform Karkey of any defect in its request. *Id*. at 3–4. Pakistan—through its Central Authority—has failed to comply with the foregoing obligation, and Karkey therefore has sought leave from the Court to initiate service pursuant to the third service option under the FSIA, which is that contemplated under section 1608(a)(3), *viz.*, service by mail to the head of the ministry of foreign affairs of Pakistan, or, if that should fail, through diplomatic channels pursuant to section 1608(a)(4). *Id.* at 10.

Pakistan argues that "[c]ourts routinely dismiss lawsuits where the plaintiff has failed to properly effect service pursuant to [section] 1608(a)." MTD (Dkt. 11), ¶ 26. Karkey, however,

has not "failed to properly effect service," nor has it unduly delayed service. Rather, Karkey is still in the active process of effecting service under the FSIA—a process that often takes time, particularly where the sovereign seeks to evade service, as Pakistan clearly is doing here by failing to comply with its Hague Convention obligations. Significantly, the FSIA does not impose any time limit for effecting service. *See Hardy Expl. & Prod. (India), Inc. v. Gov't of India*, 219 F. Supp. 3d 50, 67 (D.D.C. 2016) ( "Although the Court must require strict adherence to the terms of 1608(a), a time limit for service is simply not one of those terms." (internal quotation and citation omitted)).

The cases on which Pakistan seeks to rely for its arguments are inapposite. In each of those cases, the court granted the motion to dismiss only where the plaintiff had failed to attempt service through the applicable method under section 1608(a) of the FSIA; in none of Pakistan's cases did the court grant a motion to dismiss where the plaintiff, like Karkey here, was in the process of attempting to effectuate service through an appropriate method. In *Orange Middle East & Africa v. Republic of Equatorial Guinea*, for example, the plaintiff claimed to have effected service through a special arrangement of service under section 1608(a)(1) of the FSIA, but the court determined that no such special arrangement had been established. No. 15-cv-849 (RMC), 2016 WL 2894857, at *3 (D.D.C. May 18, 2016). In *Doe I v. State of Israel*, for its part, the court found that the plaintiffs had failed even to allege that they had attempted service pursuant to section 1608(a)(2) (*i.e.*, through the Central Authority mechanism prescribed by the Hague Convention). 400 F. Supp. 2d 86, 102 (D.D.C. 2005). And in *Azadeh v. Government of Islamic Republic of Iran*, the court determined that the plaintiff had failed to "first attempt[] service under 1608(a)(3) before proceeding to serve defendants under section 1608(a)(4) . . . ,"

and that this failure to observe the proper sequence of service methods "rendered [plaintiff's] service under section 1608(a)(4) invalid . . . . 318 F. Supp. 3d 90, 99 (D.D.C. 2018).

Importantly, the D.C. Circuit Court of Appeals has found that a District Court's dismissal for failure to properly effectuate service under section 1608(a) can constitute an abuse of discretion. For example, in *Barot v. Embassy of the Republic of Zambia*, the plaintiff had attempted to serve process several times, but the district court determined that each attempt had been flawed. 785 F.3d 26, 28–29 (D.C. Cir. 2015). On that basis, the court granted the Embassy of Zambia's motion to dismiss for failure to serve process. *Id.* at 28. On appeal, the D.C. Circuit held that the district court abused its discretion by dismissing the case, and remanded to the district court to afford the plaintiff another opportunity to effect service. *Id.* at 29–30. The court also restated its guidance that "dismissal 'for failure to prosecute due to a delay in service is appropriate only when there is no reasonable probability that service can be obtained or there is a lengthy period of inactivity.'"[12] *Id.* at 29 (quoting *Angellino v. Royal Family Al–Saud*, 688 F.3d 771, 775 (D.C. Cir. 2012)).

Here, there has been no failure by Karkey to attempt service nor has there been a lengthy period of inactivity. Karkey promptly initiated the applicable process for service under section 1608(a)(2). In addition, having received no response from Pakistan, and once Pakistan's Motion to Dismiss made apparent Pakistan's lack of intention to comply with its Hague Convention obligations,[13] Karkey promptly sought leave of the Court to initiate service under

[12] The court added that "there is no statutory deadline for service under the [FSIA], unlike the presumptive 120-day time limit in Rule 4(m) of the Federal Rules of Civil Procedure." *Barot*, 785 F.3d at 29.

[13] Furthermore, when Pakistan sought an extension to file its response to Karkey's Complaint, Karkey offered to agree to Pakistan's request for an extension "in exchange for Pakistan providing [Karkey] with a completed certificate of service [pursuant to the Hague Convention] and written confirmation that Pakistan fully accepts the adequacy of Karkey's service." Update

section 1608(a)(3). Update and Motion re Service (Dkt. 14) at 10; *see Hardy Expl.*, 219 F. Supp. 3d at 67 ("[B]ecause the FSIA prevents a party from skipping to the next method of service unless the previous method is unavailable or has proven unsuccessful, *see* 28 U.S.C. § 1608(a), [plaintiff's] failure to pursue subsequent methods of service while pursuing the first available method should not be considered evidence of delay.").

For the foregoing reasons, the Court should reject—or, alternatively, decline for now to rule on[14]—Pakistan's motion to dismiss for lack of personal jurisdiction, and allow Karkey adequate time to continue with its efforts to effectuate service through the procedures set forth in the FSIA.[15]

## II. The Court Should Reject Pakistan's Arguments Regarding Alleged Due Process And International Law Violations

Pakistan next argues that the Court should deny recognition and enforcement of the Award based on alleged "due process" violations by the Arbitral Tribunal during the Arbitration. MTD (Dkt. 11), ¶ 39. Given Pakistan's own position that personal jurisdiction has not yet been established, this Court cannot reach the merits of such objection, which in any event is unfounded. Pakistan's novel defense to enforcement is unmoored from any statutory text, and

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and Motion re Service (Dkt. 14), at 7. However, Pakistan not only declined that offer *id.* (thus further signaling that it had no intention of complying with its Hague Convention obligations), but it also incorrectly contended in its motion to dismiss that Karkey would agree to an extension only "under the condition that Pakistan waive any defense regarding service of process." MTD (Dkt. 11), ¶ 18.

[14] *Cf. Phoenix Consulting, Inc. v. Republic of Angola*, 35 F. Supp. 2d 14, 16 (D.D.C. 1999), *rev'd in part on other grounds,* 216 F.3d 36 (D.C. Cir. 2000) (permitting a plaintiff to correct insufficient service of process while a motion to dismiss was pending).

[15] For the same reasons, Pakistan's contention that Karkey should have filed a proof of service together with its Complaint, MTD (Dkt. 11), ¶ 27, is without merit. It would have been procedurally impossible for Karkey to file a proof of service with its Complaint, given that the summons enabling a plaintiff to seek service on the defendant is issued only *after* a complaint is filed; Pakistan's approach would therefore present a "Catch-22" for plaintiffs, and for that reason is untenable.

directly contravenes the ICSID Convention, which precludes domestic courts from second-guessing either (i) the merits of awards that they are asked to enforce, or (ii) the adequacy of the ICSID proceedings pursuant to which such awards were issued. *See infra* section II.A.1.

Moreover, while it is unclear whether Pakistan is advancing its newly-minted theory as an "affirmative defense," as a "failure to state a claim," or both, "[w]hether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the *allegations in the complaint* suffice to establish that ground, not on the nature of the ground in the abstract." *Jones v. Bock*, 549 U.S. 199, 215 (2007) (emphasis added).

For an affirmative defense to bar relief, "the applicability of the defense has to be clearly indicated and must appear on the face of the pleading to be used as the basis for the motion." Wright & Miller, *Federal Practice & Procedure* § 1357 & nn.63–64 (2018). Federal pleading requirements do not require a plaintiff to anticipate and address affirmative defenses in its complaint—much less frivolous defenses like that of Pakistan here. *See* Fed. R. Civ. P. 8. Similarly, it is a basic tenet of federal practice that a motion to dismiss for failure to state a claim can be evaluated only by reference to the contents of the complaint itself. *Stocks v. Cordish Companies, Inc.*, 118 F. Supp. 3d 81, 84 (D.D.C. 2015). Yet Pakistan's motion is laden with unfounded allegations, and includes copious materials from outside the Complaint. Karkey disputes Pakistan's factual allegations, but in any event such allegations are irrelevant (for the reasons already stated) and should not be considered. It is enough that the Complaint "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face"—a standard that is clearly met here. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation mark and citation omitted).

In all events, as discussed below, Pakistan's request that the Court deny recognition of the award fails on the merits—as a matter of both law and fact—and accordingly should be rejected.

### A. As A Matter Of Law, The Court Lacks The Power To Decline To Recognize And Enforce The Award On The Grounds Asserted By Pakistan

Pakistan asks this Court to review and find fault with discretionary procedural decisions made by the Arbitral Tribunal in the course of the Arbitration and, on the basis of such review, to decline to recognize and enforce the Award. This attempt by Pakistan to invent a new, non-statutory "due process" exception to ICSID award recognition and enforcement is *entirely foreclosed* by the ICSID Implementing Statute (22 U.S.C. § 1650a), by the ICSID Convention, and by caselaw establishing that an enforcement court may not conduct any procedural or substantive review of the ICSID award.

#### 1. The ICSID Convention, As Implemented By The ICSID Implementing Statute, Bars This Court From Examining The Conduct Of The Arbitration Or The Substance Of The Award

As implemented through the ICSID Implementing Statute, the ICSID Convention requires this Court to enforce the Award, and forecloses examination of the substance of the Award or of the proceedings in which it was rendered. The ICSID Implementing Statute provides, *inter alia*:

> An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID] [C]onvention shall create a right arising under a treaty of the United States. ***The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.*** The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the convention.

22 U.S.C. § 1650a(a) (emphasis added).

Nothing in the language of section 1650a allows for any collateral attack on an ICSID award in an enforcement proceeding. The absence of such language stands in stark contrast to the Federal Arbitration Act ("FAA"), which sets forth specific bases on which an enforcement court can review and refuse to enforce an arbitration award. *See* 9 U.S.C. § 10 (describing the grounds on which an arbitration award may be vacated). By the express terms of the ICSID Implementing Statute, Congress mandated that none of the provisions of the FAA apply to ICSID awards. 22 U.S.C. § 1650a(a) ("The [FAA] shall not apply to enforcement of awards rendered pursuant to the [ICSID] convention.").

Likewise, the ICSID Implementing Statute precludes application of any of the grounds for review of non-ICSID arbitral awards that are available under the New York Convention. *See Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573, 599 (S.D.N.Y. 2015) ["*Mobil Cerro II*"], *rev'd on other grounds*, 863 F.3d 96 (2d Cir. 2017) ("Chapter 2 of the FAA, as noted, implemented the New York Convention. Section 1650a thereby reflected Congress's intention that the New York Convention, which provided for limited substantive review of—and the right of the award debtor to challenge—arbitral awards would not apply to the enforcement of ICSID awards."). Grounds for substantive review under the New York Convention include, *inter alia*, allegations that the party against whom the award is invoked was "unable to present his case," or that recognition and enforcement of the award "would be contrary to the public policy" of the country where enforcement is sought. New York Convention, Arts. V(1)(b), V(2)(b). The framers of the ICSID Convention precluded ICSID awards from collateral review on such grounds. As the district court in *Mobil Cerro II* explained, the provisions of the ICSID Convention dealing with enforcement of ICSID awards "represented a considered decision [by the negotiators of the ICSID Convention] to depart fundamentally

from the New York Convention, in denying courts any power . . . to refuse to recognize ICSID awards." *Mobil Cerro Negro II*, 87 F. Supp. 3d at 596–97.

As noted above, the ICSID Convention itself establishes procedures—internal to the ICSID system—that constitute the *sole mechanism* by which a party can raise substantive or procedural challenges to an ICSID award. *See* ICSID Convention, Art. 53(1) ("The award . . . *shall not be subject to any appeal or to any other remedy* except those provided for in this Convention." (emphasis added)). As the Second Circuit recently emphasized, "Article 53 of the [ICSID] Convention provides that *a party dissatisfied with an award may challenge it* on various grounds, but may do so *only through proceedings at the Centre [i.e., ICSID] and not collaterally in the courts of member states*." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 101 (2d Cir. 2017) (emphasis added).

Courts in ICSID member States are "not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award;" an enforcing court may ***only*** "examine the judgment's authenticity and enforce the obligations imposed by the award." *Id.* at 102; *accord Teco Guatemala Holdings,* 2018 WL 4705794, at *2; *see also Micula*, 2015 WL 4643180, at *4 ("Recognition [of an ICSID Award] is a matter in which a court has no discretion once it determines that an award is authentic."). ICSID decisions are "final and are subject to review ***only within ICSID itself***." *Micula v. Gov't of Romania*, 104 F. Supp. 3d 42, 45 (D.D.C. 2015) (emphasis added).

The legislative history of the ICSID Implementing Statute confirms that Congress did not contemplate substantive or procedural review of ICSID awards in U.S. courts. Indeed, the Report of the House of Representative on the ICSID Implementing Statute specifically noted this

distinction between the available grounds for review of arbitral awards under the FAA and enforcement of awards under the ICSID Convention. The House Report noted that § 1650a(a)

> provides that ***the Federal Arbitration Act shall not apply to enforcement of arbitral awards made under the convention*. *The Federal Arbitration Act permits courts to vacate an award on grounds of corruption, fraud, partiality, misconduct, or other prejudicial conduct of an arbitrator, or where arbitrators exceed their powers. Under article 52 of the [ICSID] convention, however, such challenges to an award may be made only through the annulment proceedings provided for in the [ICSID] convention.*** Section [1650a(a)], therefore, makes clear that the inconsistent provisions of the Federal Arbitration Act will not apply.

H.R. Rep. No. 89-1741 at 4 (1966) (emphasis added).[16] As the Second Circuit has explained, "[b]y expressly precluding the FAA's application to enforcement of ICSID Convention awards, Congress intended to make these grounds of attack unavailable to ICSID award-debtors in federal court enforcement proceedings." *Mobil Cerro III*, 863 F.3d at 120–21 (citations omitted).

Accordingly, federal law does not permit this Court to consider Pakistan's allegations of procedural deficiency in the Arbitration. The only venue in which such a challenge can be brought is at ICSID, in the context of an annulment proceeding commenced pursuant to Article 52 of the ICSID Convention. ICSID Convention, Art. 52. Pakistan has availed itself of the right to seek annulment of the Award—including on the same basis that it has asked this Court to deny recognition of the Award—and the relevant ICSID Annulment Proceeding is currently pending.

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[16] *See also* S. REP. NO. 89-1374, at 4 (1966) (Statement of Fred B. Smith, General Counsel, Department of the Treasury, Before the Senate Foreign Relations Committee) ("Moreover, the Federal Arbitration Act would permit the courts to vacate an arbitral award on certain grounds, such as the corruption of one of the arbitrators, which under article 52 of the [ICSID] convention may be raised only through the annulment proceedings provided for in the [ICSID] convention.").

### 2. Pakistan's Attempt To Create A Due Process Exception To Recognition And Enforcement Of ICSID Awards Is Contrary To Law

Apparently recognizing that its request lacks any basis in the ICSID Implementing Statute (or any other U.S. statute or case law), Pakistan purports to invoke the U.S. Constitution and international law in support of its argument. It contends, for example, that the Due Process Clause of the Fourteenth Amendment, as well as vague notions of international policy against bribery and corruption, allow this Court to disregard the strict limitations imposed by the ICSID Implementing Statute and the ICSID Convention, and to engage in a review of the adequacy of the process underlying the Arbitration. *See* MTD (Dkt. 11), ¶¶ 29–45. In effect, Pakistan seeks to import into the ICSID Implementing Statute a due process exception that Congress expressly precluded.

Pakistan first argues that the requirement in 22 U.S.C. § 1650a that federal courts give "the same full faith and credit" to arbitral awards as to state court judgments under 28 U.S.C. § 1738 enables federal courts to evaluate the process in an ICSID arbitration through the prism of the standards of the Due Process Clause of the Fourteenth Amendment. MTD (Dkt. 11), ¶ 31. However, neither the Constitution nor section 1650a nor section 1738 confers such authority, and Pakistan fails to cite a single case that suggests otherwise. Instead, Pakistan couches its novel theory as merely "one interpretation"—its own—of the duty to give full faith and credit to judgments of state courts. *Id.*, ¶ 31.

Contrary to Pakistan's position, and as confirmed by the district court in *Mobil Cerro II*, "[t]here are only limited exceptions to the Constitution's requirement of full faith and credit. ***None apply in the context of an ICSID award***." *Mobil Cerro II*, 87 F. Supp. 3d 573 at 598 (emphasis added). The *Mobil Cerro II* court explained that, in the context of enforcement of a U.S. state court judgment, "[u]nder the full faith and credit doctrine, a 'recognizing' court need

not recognize the 'rendering' court's underlying judgment where that judgment is not on the merits, is not yet final, resulted from fraud, or was issued in the absence of personal or subject matter jurisdiction." *Id.* n.32. The court clarified, however, that "***[t]hese exceptions have no bearing in the context of an ICSID award*** because, under the ICSID Convention, an ICSID award necessarily reflects consent by both parties to ICSID's jurisdiction, follows a merits arbitration, represents a final judgment not subject to substantive challenge within the courts of a contracting state, and equates to a judgment entered by a state's highest court." *Id.* (emphasis added).

Furthermore, and in any event, the Due Process Clause of the Fourteenth Amendment is inapplicable to international arbitral proceedings, including ICSID proceedings. The Fourteenth Amendment imposes a requirement on *States* of the United States, to ensure the due process of *persons*. U.S. Const. amend. XIV, sec. 1 ("[N]or shall any *State deprive any person* of life, liberty, or property, without due process of law" (emphasis added)). The Arbitral Tribunal is not a "State," and Pakistan is not a "person" protected by the Due Process Clauses of the Constitution.[17] *See, e.g.*, *Livnat v. Palestinian Auth.*, 851 F.3d 45, 49 (D.C. Cir. 2017) (foreign States not entitled to protections of Due Process Clause of Fifth Amendment); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002) (same).[18] Moreover, there is no basis, either in law or logic, for imposing the Fourteenth Amendment requirements on *private international tribunals* that adjudicate disputes between investors and States—and especially not

[17] The cases cited by Pakistan in paragraph 31 of the motion to dismiss are irrelevant in these circumstances.

[18] In the above-referenced cases, the D.C. Circuit held that foreign States are not entitled to the protections of the Due Process Clause of the Fifth Amendment. It stands to reason that foreign States also cannot be deemed to be entitled to the protections of the Due Process Clause of the Fourteenth Amendment.

where, as here, the relevant investor is not a U.S. national and the Respondent State is not the United States.[19]

Second, Pakistan argues that "[i]nternational law can prohibit the enforcement of ICSID awards," MTD (Dkt. 11), § II.A.2, and that this Court can "review the ICSID Award to determine if it comported with international law (as opposed to the Due Process Clause)." MTD (Dkt. 11), ¶ 38. This argument is even more fanciful than the first, as it rests on the faulty syllogism that "[b]ecause an ICSID award is not made by a 'court' and not rendered by any 'state,' a 'full faith and credit' analysis *could* lead to international law, which is the law under which ICSID awards are rendered." MTD (Dkt. 11), ¶ 33 (emphasis added).

The single case that Pakistan references in urging this Court to review the Award for compliance with "international law," *Osorio v. Dole Food Co.*, is wholly irrelevant. *Osorio* was an action to recognize and enforce a *foreign court judgment* under the Florida Uniform Out-of-country Foreign Money-Judgments Recognition Act, which provided specific grounds for refusal to recognize foreign judgments, including where a "judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." 665 F. Supp. 2d 1307, 1323 (S.D. Fla. 2009); *see also Osorio v. Dow Chem.*

[19] Even if the Due Process clause were relevant in these circumstances (which it is not), any "exception" to the full faith and credit requirement based on the Due Process Clause, *see* MTD (Dkt. 11), ¶ 34, would also have no bearing in the context of an ICSID award. The ICSID system fully satisfies the "minimum procedural requirements" of the Due Process Clause, *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481 (1982), as it provides for, among other things, a merits arbitration, a hearing, and annulment procedures as a failsafe to rectify any failures of due process. As the Supreme Court has explained, "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause" and "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Kremer*, 456 U.S. at 483.

*Co.*, 635 F.3d 1277, 1278 (11th Cir. 2011).[20] The case had nothing to do with ICSID arbitration, and instead related to a foreign *court* judgment, and turned on specific grounds for review enumerated in the applicable foreign judgment enforcement statute. Pakistan has not identified any statutory provision—such as that invoked in *Osorio*—that would permit this Court to evaluate the adequacy of the process in an ICSID arbitration to determine whether such process was compatible with international standards of due process. As explained above, no such statutory provision exists.

**3. International Norms Against Corruption Do Not Assist Pakistan**

Pakistan devotes four pages of its brief to the uncontroversial proposition that there is a strong international public policy against bribery and corruption. MTD (Dkt. 11), ¶¶ 40–45. There is indeed such a policy. However, for at least three reasons, that, too, is entirely irrelevant to this action for enforcement of the Award. First, the existence of a public policy against corruption does not change the limited scope of this Court's mandate in an action to enforce the Award, given that as discussed above such scope is limited to confirming the authenticity of the Award and then enforcing its terms. *See supra*, section II.A.1. Second, Pakistan does not argue that the Award itself was procured by bribery or corruption.[21] Rather, Pakistan is arguing that there was corruption in the bidding process that yielded the contract awarded to Karkey, which is a merits issue relating to the dispute that was the subject of the Arbitration. Third, the Arbitral Tribunal carefully considered and thoroughly rejected Pakistan's allegations of corruption in

[20] The alleged due process violation in *Osorio* was application of a law that imposed an irrefutable presumption that a certain chemical caused an injury (despite medical and scientific facts to the contrary), thereby preventing a party to the litigation from challenging causation. *Osorio*, 665 F. Supp. 2d at 1327. Nothing about the procedure of the Arbitration even remotely resembles the situation in *Osorio*.

[21] As discussed above, any such argument could only be made in the context of an ICSID annulment proceeding. *See supra*, section II.A.1. In any event, Pakistan has not raised such an argument in any forum.

connection with Karkey's investment in Pakistan, *see supra* at 11–12, in a determination that is final and binding. *See, e.g.*, *Micula*, 104 F. Supp. 3d at 45 ("[ICSID decisions] are final and are subject to review only within ICSID itself").[22] Indeed, the gravamen of Pakistan's complaint before this Court is not that there *was* corruption by Karkey—Pakistan has never been able to adduce *any* evidence of such wrongdoing. Rather, Pakistan is claiming that in the Arbitration it was unfairly denied an opportunity for additional discovery that it hoped would have yielded documents supporting its claims of corruption. *See* MTD (Dkt. 11), ¶¶ 37, 45 (complaining about discovery decisions by the Arbitral Tribunal). This challenge to the Arbitral Tribunal's discretionary decisions on evidentiary issues (including matters of document production) is unreviewable by any court and, in any event, is entirely without merit for the reasons discussed below.

**B. In Any Event, Pakistan's Allegations Have No Merit**

Even if it were permissible to entertain Pakistan's allegations of due process violations, the Court should reject them on their merits. Pakistan claims that it was denied minimum procedure under the Due Process Clause "when it came to the presentation of key evidence of corruption," and in particular, in the Arbitral Tribunal's treatment of Pakistan's discovery requests to restore and search certain "Backup Tapes" in Karkey's possession. MTD (Dkt. 11), ¶¶ 35, 39. To the contrary, Pakistan was afforded ample due process throughout the Arbitration. The applicable ICSID procedural rules afford tribunals broad discretion to grant or deny requests for document disclosure. Here, the Arbitral Tribunal appropriately exercised that discretion in denying Pakistan's abusive requests for production of Karkey's electronic archives.

[22] As discussed in the Factual Background section above, Pakistan's invocation of a purported finding to the contrary by "Transparency International" is a sham. *See supra* at 7.

### 1. The Applicable ICSID Procedural Rules Afford Tribunals Considerable Discretion In Deciding Discovery And Evidentiary Matters

Contrary to Pakistan's assertion that "there are no direct 'rules' that one can find in the statutes or civil procedure codes of ICSID," MTD (Dkt. 11), ¶ 32, the ICSID Convention itself establishes principles that govern the procedure in an ICSID arbitration. *See, e.g.*, ICSID Convention, Art. 43 (describing, *inter alia*, a tribunal's discretionary authority to order the production of documents). In addition, pursuant to the ICSID Convention, the ICSID Administrative Council has adopted *rules of procedure*—known as the ICSID Arbitration Rules—which govern the conduct of ICSID arbitrations. *See Id.*, Arts. 6(1)(c), 44; ICSID Arbitration Rules.

Particularly relevant to Pakistan's allegations before this Court, Article 43 of the ICSID Convention provides that "the Tribunal *may, if it deems it necessary* at any stage of the proceedings, (a) call upon the parties to produce documents or evidence." ICSID Convention, Art. 43 (emphasis added). Similarly, Rule 34(2) of the ICSID Arbitration Rules provides that "[t]he Tribunal *may*, *if it deems it necessary* at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts." ICSID Arbitration Rules, Rules 34(2) (emphasis added). As is clear from the use of the term "may, if it deems necessary," the ICSID Convention and the ICSID Arbitration Rules confer upon tribunals broad discretion to decide whether to order production of documents or witness testimony. *See also* Christoph H. Schreuer *et al.*, *The ICSID Convention: A Commentary*, Art. 43, ¶ 19 (2d. ed., 2009); Jean-Christophe Honlet, Barton Legum and Anna Crevon, *Investment Arbitration: Challenges to the System*, *ICSID Annulment*, *in International Investment Law: A Handbook*, ¶ 66 (Marc Bungenberg *et al.* eds., 2015).

**2. The Arbitral Tribunal Fully Heard Pakistan's Claims And Appropriately Exercised Its Discretion On Evidentiary Issues**

Over the course of nearly one year, Pakistan lodged with the Arbitral Tribunal four separate requests for Karkey to restore and search 70 backup tapes containing archived emails. As set forth below, after fully hearing and considering each such request and the views of the parties in relation thereto, the Arbitral Tribunal determined that Pakistan had presented no legitimate basis for demanding the backup tapes, and concluded that it would be unduly burdensome to require Karkey to restore and search them for potentially relevant documents. Accordingly, the Arbitral Tribunal properly exercised its discretion to deny Pakistan's applications.[23]

*Pakistan's First Request for Karkey to Restore and Search the Backup Tapes*. In March 2015, Pakistan propounded a number of requests for documents relating to its allegations of corruption by Karkey. *See* Chedid Decl., Ex. A, ¶ 57. In full compliance with the governing procedures, Karkey agreed to produce certain categories of requested documents, but objected to others. *Id.* In addition, Karkey voluntarily disclosed to Pakistan that some (but not all) of Karkey's electronic files from prior to April 2010 had been archived to 70 back-up tapes that would not be accessible without undue burden and expense—and potentially might not be accessible at all, given the outdated technology of the backup tapes.[24] *Id.*

[23] For the avoidance of doubt, Karkey's recitation of the facts below is intended only to correct the misimpressions created by Pakistan's allegations and should not be construed as a concession by Karkey that such facts are relevant to the issue before the Court, namely, whether the pecuniary obligations of the Award should be enforced. They are not.

[24] Contrary to Pakistan's assertion in this case, the "existence of a number of back-up tapes of emails and other documents" does *not* (and cannot) in and of itself constitute "evidence of corruption." MTD (Dkt. 11), ¶ 11. Nor did Pakistan "discover[]" such back-up tapes, as it claims (*id.*, ¶ 11)—rather, Karkey affirmatively informed Pakistan of their existence.

In response, Pakistan filed an application requesting that the Arbitral Tribunal order Karkey to restore the backup tapes. Pakistan explicitly conceded, however, that "Article 9(2)(c) of the [International Bar Association ("IBA")] Rules [on the Taking of Evidence in International Arbitration] (which were not binding on the Tribunal but are commonly used guidelines in international arbitration proceedings) allows the Tribunal to exclude from production any document which it would be unreasonably burdensome to produce." *See id.*, ¶ 58. Pakistan also admitted "[that] recovering documents from backup tapes is not a straightforward task." *See id.*

In reply, Karkey explained that "[b]ecause of the number of Backup Tapes and their format, restoring the data on them in a manner that would allow Karkey to search for responsive documents would be extremely costly and time-consuming, and might not even be possible." *See* Chedid Decl., Ex. A, ¶ 59. Karkey also explained that at least some pre-April 2010 records were accessible without restoring the backup tapes, and certified that Karkey had already collected, searched, reviewed, and produced such accessible and responsive pre-April 2010 documents. *See id.*, ¶ 60.

On April 24, 2015, the Arbitral Tribunal issued an order declining at that time to grant an order requiring restoration of the backup tapes, but also leaving the door open to further submissions on the issue by Pakistan, as necessary. *See id.*, ¶ 61.

<u>*Pakistan's Second Request for Karkey to Restore and Search the Backup Tapes*</u>. On July 24, 2015, Pakistan renewed its request for the Arbitral Tribunal to order Karkey to restore the backup tapes. *See* Chedid Decl., Ex. A, ¶ 62. Karkey explained the following in response: (i) Karkey's document production already contained most, if not all, of the pre-April 2010 documents that were responsive to Pakistan's requests; (ii) Pakistan had failed to meet the IBA Rules requirement that it "provide 'a description in sufficient detail (including subject matter) of

a narrow and specific requested category of Documents that are reasonably believed to exist' among the Backup Tape files;" and (iii) Pakistan had failed to identify any authority or established rule that would require Karkey to attempt to restore the uncatalogued data on its 70 backup tapes, and had also failed to respond to the authorities cited by Karkey which showed that restoration of data from backup tapes is not required in international arbitration absent proof of deliberate spoliation (which had not occurred and which Pakistan had not alleged). *See id.*

On August 31, 2015, the Arbitral Tribunal denied Pakistan's renewed request for restoration of the backup tapes. In doing so, it ruled that, particularly in light of Karkey's previous production of responsive documents, and the absence of any evidence of spoliation by Karkey, "restoring 70 pre-April 2010 back-up tapes is excessively burdensome." *See id.*, ¶ 63; MTD (Dkt. 11), Ex. H (Procedural Order No. 10, dated August 31, 2015), ¶ 50; Award (Dkt. 1, Ex. 1), ¶ 529.

At the same time, the Arbitral Tribunal required Karkey to produce a declaration that its production of the available pre-April 2010 documents had been exhaustive. Karkey duly complied. *See* Chedid Decl., Ex. A, ¶ 64.

*Pakistan's Third Request for Karkey to Restore and Search the Backup Tapes, and Its Attempt to Introduce So-Called "New Evidence*." On December 11, 2015, nearly two months after Pakistan had submitted its last written submission in the Arbitration, and less than three months before the Hearing (trial-equivalent) (in a proceeding that by then had already been ongoing for three years and two months), Pakistan submitted a *third* request for an order requiring Karkey to restore the backup tapes. *See id.*, ¶ 65. In its application, Pakistan also alleged that it had been approached "by a Lebanese individual" who had allegedly shown (but not given) to Pakistan's counsel a redacted copy of two "Consultancy Agreements" that

allegedly suggested the existence of a purported "scheme" to secure Karkey's rental service contract through illicit payments. *Id.* Pakistan also claimed that the alleged purveyors of the documents had asked Pakistan for millions of pounds sterling if they wished to obtain copies of the alleged documents. *See id.*, ¶ 65; Award (Dkt. 1, Ex. 1), ¶ 528. Pakistan argued that this information concerning a purported bribery "scheme" engaged the Arbitral Tribunal's duty to investigate evidence of corruption—including by reconsidering its previous decisions regarding restoration of the backup tapes. *See* Chedid Decl., Ex. A, ¶ 65.

Karkey categorically denied the existence of the alleged "Scheme" and of the purported documents described in Pakistan's Application. *See id.*, ¶ 66. Karkey also noted that Pakistan's application was "based wholly on hearsay, innuendo, and speculation—certainly not a sufficient basis for re-opening the disclosure process on the eve of the hearing." *Id.* Karkey again confirmed that it had complied with its disclosure obligations, and that it had preserved all relevant evidence. *Id.* Karkey also emphasized again that restoration of the backup tapes would be unduly burdensome and potentially not even possible from a technical standpoint. *See id.*, ¶ 70.

In view of the foregoing, and Karkey's declaration categorically denying Pakistan's allegations (and therefore the existence of any documents evidencing those allegations), the Arbitral Tribunal determined again that no basis for requiring restoration of the backup tapes existed. Award (Dkt. 1, Ex. 1), ¶ 530; *see also* Chedid Decl., Ex. A, ¶ 71.

<u>*Pakistan's Fourth Request for Karkey to Restore and Search the Backup Tapes*</u>. Not content with the outcome of its three earlier failed discovery requests concerning the backup tapes, and also the outcome of its failed allegation of "new evidence," Pakistan made yet another discovery application on the second day of the Hearing (March 1, 2016), at which time it

requested various orders in support of its December 11, 2015 discovery application. Award (Dkt. 1, Ex. 1), ¶ 531; *see also* Chedid Decl., Ex. A, ¶ 72. Remarkably (and abusively), the March 1, 2016 application included a *fourth* request for the restoration of the backup tapes. *See* Award (Dkt. 1, Ex. 1), ¶ 531; *see also* Chedid Decl., Ex. A, ¶ 72. At the eleventh hour of the proceedings, Pakistan argued—for the first time—that it would be willing to bear the costs of restoring the backup tapes, which costs (according to Pakistan's expert) would be manageable. *See* Award (Dkt. 1, Ex. 1), ¶ 531; *see also* Chedid Decl., Ex. A, ¶ 72.

In response, Karkey pointed out, among other things, that Pakistan's own supporting document revealed that it had been attempting to use the alleged meetings with the individuals who had offered the alleged "new evidence" as "the hook on which to hang [Pakistan's] application for disclosure of the Pre-2010 back-up tapes." *See* Chedid Decl., Ex. A, ¶ 73. Karkey noted that this called into question Pakistan's good faith in renewing its discovery application in the middle of the Hearing. *See id.*

The Arbitral Tribunal rejected Pakistan's fourth request to order Karkey to restore the backup tapes, having found no support in the alleged "new evidence" to justify "further investigation" into the issue of corruption—including through restoration of the backup tapes. *See id.*, ¶ 74; *see also* Award (Dkt. 1, Ex. 1), ¶ 328. The Arbitral Tribunal explained that Pakistan's last-minute arguments did not justify any further delay in the proceedings, given that the alleged "new evidence" was "very suspicious" and that "*Pakistan's counsel themselves had serious doubts about the authenticity of the alleged new evidence*." Award (Dkt. 1, Ex. 1), ¶ 536 (emphasis added). The Arbitral Tribunal further found that

> [i]n reality, Pakistan was asking the Tribunal to embark upon an investigation as to the existence of corruption two months before the Hearing and then at the Hearing, after almost three years of arbitral proceedings. ***This request was based on allegations of suspicion of***

> ***corruption and declarations of informants of highly suspect credibility, after the Pakistani authorities, with powers considerably greater than those of the Tribunal, had failed to establish the existence of such corruption after several years of investigation***.

Award (Dkt. 1, Ex. 1), ¶¶ 537 (emphasis added); *see also* Chedid Decl., Ex. A, ¶ 74.

As noted above, even Pakistan's own investigative anti-corruption authority (NAB) had "concluded that there was *no evidence of any wrongdoing by Karkey* under the [National Accountability Ordinance], 'after a detailed examination of all accounts and documents.'" Award (Dkt. 1, Ex. 1), ¶ 539 (emphasis added).

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As the foregoing demonstrates, what Pakistan describes as a "due process violation," MTD (Dkt. 11), ¶ 37, in reality amounts to nothing more than a proper exercise by the Arbitral Tribunal of its discretionary authority to deny duplicative, disruptive, and unsupported requests for Karkey to undertake the burdensome task of restoring and searching 70 backup tapes, based on little more than Pakistan's *hope* that doing so would somehow uncover evidence of corruption. These facts do not establish a due process violation—whether under U.S. constitutional law, under international law, under the ICSID Arbitration Rules, or under the rules of any other legal system. Accordingly, they provide no basis for denying recognition of the Award.

## III. The Court Should Deny Pakistan's Alternative Request To Stay This Case

In the alternative to its motions to dismiss, Pakistan has asked the Court to stay this case pending the outcome of the ongoing Annulment Proceeding at ICSID. MTD (Dkt 11), ¶¶ 46–48. The Court should reject Pakistan's request for a stay, for at least three reasons.

First, as explained above, due to the Pakistan Central Authority's refusal to comply with the Hague Convention, service on Pakistan has not yet been completed. Consideration of the stay request is, therefore, procedurally premature, and would serve no purpose at this time other

than to prevent Karkey from completing the procedures for service of process under the FSIA. *Cf. Kaplan v. Central Bank of the Islamic Republic of Iran*, 896 F.3d 501, 510 (D.C. Cir. 2018) (holding that it would be premature to "address the merits of a claim" before the court "determine[s] that it possesses personal jurisdiction over the defendants").

Second, Pakistan cites no statutory authority permitting a U.S. court to stay an action to enforce an ICSID award. The ICSID Implementing Statute (i) commands that "pecuniary obligations imposed by [an ICSID] award *shall be enforced* and *shall be given* the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States," and (ii) contains no provision for staying an enforcement proceeding. 22 U.S.C. § 1650a (emphasis added). By contrast, where Congress has granted courts authority to stay enforcement proceedings, it has done so expressly. For example, the FAA—which, again, does not apply to ICSID awards, by the express terms of the ICSID Implementing Statute—*does* explicitly authorize courts, in certain limited circumstances, to stay proceedings to recognize and enforce arbitral awards.[25]

Nor does the ICSID Convention provide enforcing courts with any authority or discretion to stay enforcement proceedings. The ICSID Convention vests such authority solely in ICSID annulment committees. Thus, Article 53 of the ICSID Convention provides that "[e]ach 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*." ICSID Convention, Art. 53(1) (emphasis added). Article 52(5) of the ICISD Convention explains that an annulment

[25] 9 U.S.C. § 207 (instructing a district court reviewing a non-ICSID arbitral award to "confirm the award unless it finds one of the grounds for refusal ***or deferral*** of recognition or enforcement . . . specified in the [New York] Convention" (emphasis added)).

committee "may, *if it considers that the circumstances so require*, stay enforcement of the award pending its decision." ICSID Convention, Art. 52(5) (emphasis added).

Accordingly, once an ICSID annulment committee has determined that a stay is not warranted, "there is little for a court in an ICSID member state to do other than confirm the Award." *Micula*, 2015 WL 4643180, at *4; *see also id.* (emphasizing that "no stay is warranted during the pendency of the annulment proceeding"); *cf. Belize Social Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724, 733 (D.C. Cir. 2012) ("The stay order as issued was not in conformity with federal law *and international commitments* . . ." (emphasis added)). As explained above and in Karkey's Complaint, in the present case, following written submissions and a hearing on the issue, the Annulment Committee issued a reasoned decision denying Pakistan's request for a stay of enforcement during the pendency of the Annulment Proceeding, finding that such a stay was not warranted under the circumstances. Complaint (Dkt. 1), ¶¶ 26–29 & Exs. 4–5. Thus, the only body with express authority to stay enforcement of the Award has expressly declined to do so, in a reasoned opinion.

Third, even in cases in which a court does enjoy the authority to stay a case, it should be circumspect in doing so.[26] The U.S. Supreme Court has indicated that a court abuses its discretion if it orders a stay "of indefinite duration in the absence of a pressing need." *Landis v. North American Co.*, 299 U.S. 248, 255 (1936); *see also Belize Social Dev. Ltd.*, 668 F.3d at 731–32. Pakistan has not provided, and cannot provide, any concrete assurances about the

[26] Karkey notes that the district court in *OI European Group B.V. v. Bolivarian Republic of Venezuela*, on which Pakistan relies, granted a stay of enforcement pending the outcome of an ICSID annulment proceeding in the exercise of its inherent authority to control its docket. Case No. 1:16-cv-01533-ABJ, Minute Entry (D.D.C., December 21, 2017). However, as explained above, such a stay would not be appropriate here, given that the Annulment Committee has issued a reasoned decision denying a stay; Pakistan to date has declined to accept service in this case; and efforts by Karkey to effect service are ongoing.

timing of completion of the Annulment Proceeding, and here, as the ICSID Annulment Committee expressly determined, there is no pressing need for a stay. *See* Complaint (Dkt. 1), ¶ 26; Stay Decision (Dkt. 1, Ex. 4), ¶ 126 ("[T]he Committee concludes that Pakistan has not provided sufficient proof that circumstances exist in the present case which require a continuation of the stay.").[27]

The absence of a pressing need for a stay is all the more evident at the present stage of this court action, when service on Pakistan has yet to be fully effectuated. Under the circumstances, a stay would serve only to delay what should be a summary proceeding to recognize the Award, which under the terms of the ICSID Convention is fully binding and enforceable notwithstanding the pendency of the Annulment Proceeding. *See supra*, section II.A.1.

[27] Among other things, the Annulment Committee found that Pakistan had failed to establish (i) that it would be unable to re-coup any amounts collected by Karkey in the event that the Award were annulled, or (ii) that any potential effects on Pakistan's State budget from enforcement actions by Karkey were sufficient justification for a stay. Stay Decision (Dkt. 1, Ex. 4), ¶¶ 112, 117.

## CONCLUSION

For the reasons set forth above, Pakistan's motion to dismiss, or in the alternative to stay this case pending the ICSID Annulment Proceeding, should be denied.

Dated: October 18, 2018

Respectfully submitted,

By: *_/s/ Maria Chedid_*

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