

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Caratube International Oil Company LLP and Devinci Salah Hourani**

**v.**

**Republic of Kazakhstan**

**(ICSID Case No. ARB/13/13)  
Annulment Proceeding**

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**DECISION ON STAY OF ENFORCEMENT OF THE AWARD**

***Members of the Committee***

Prof. Eduardo Zuleta, President of the *ad hoc* Committee  
Prof. Lawrence Boo, Member of the *ad hoc* Committee  
Judge Bernardo Sepúlveda Amor, Member of the *ad hoc* Committee

***Secretary of the ad hoc Committee***

Ms. Milanka Kostadinova

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December 12, 2019

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## I. THE PARTIES

1. Claimants are Caratube International Oil Company LLP and Mr. Devincci Salah Hourani (the “**Claimants**”). In this proceeding Claimants are represented by:

Dr. Hamid Gharavi, Derains & Gharavi  
Ms. Nada Sader, Derains & Gharavi  
Mr. Dmitry Bayandin, Derains & Gharavi

2. Respondent or Applicant is the Republic of Kazakhstan (the “**Respondent**,” the “**Applicant**” or “**Kazakhstan**”). In this proceeding Claimants are represented by:

Mr. Peter Wolrich, Curtis, Mallet-Prevost, Colt & Mosle  
Mr. Geoffroy Lyonnet, Curtis, Mallet-Prevost, Colt & Mosle  
Ms. Gabriela Álvarez Ávila, Curtis, Mallet-Prevost, Colt & Mosle  
Mr. Ricardo Mier y Teran Ruesga, Curtis, Mallet-Prevost, Colt & Mosle

3. Claimants and Respondent are collectively referred as the “**Parties**”.

## II. PROCEDURAL HISTORY

4. On January 25, 2018, the Republic of Kazakhstan presented an Application for Annulment (the “**Application**”) of the Award dated September 27, 2017, issued in ICSID Case No. ARB/13/13 between Caratube International Oil Company LLP and Mr. Devincci Salah Hourani and Kazakhstan (the “**Award**”). Pursuant to Article 52(5) of the ICSID Convention, Respondent requested the ICSID Secretary General to provisionally stay the enforcement of the Award until the *ad hoc* Committee rules on such request, and that the stay be maintained until a decision on the Application is rendered by the Committee.<sup>1</sup>
5. By letter dated February 2, 2018, the ICSID Secretary General provisionally stayed enforcement of the Award, in accordance with ICSID Arbitration Rule 54(2).
6. The proceeding was subsequently suspended by agreement of the Parties. On August 1, 2019, Claimants requested that the proceeding be resumed and submitted a Request to Lift the Stay of Enforcement of the Award (the “**Request to Lift the Stay**”), as per ICSID Arbitration Rule 54(2). Claimants requested that the Committee lift the provisional stay of

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<sup>1</sup> Respondent’s Application for Annulment, January 25, 2018, ¶33.

enforcement of the Award pending its decision on the application of Kazakhstan for the annulment of the Award filed on January 25, 2018, or in the alternative, that the *ad hoc* Committee order Kazakhstan to provide, within 30 days of its decision on this application, financial security by way of an unconditional bank guarantee, as a condition for the continued stay of enforcement of the Award.<sup>2</sup>

7. As per ICSID Arbitration Rules 6 and 53, on September 26, 2019, the *ad hoc* Committee was constituted. Its Members are Professor Eduardo Zuleta (President), Professor Lawrence Boo, and Judge Bernardo Sepúlveda Amor (the “Committee”).
8. By letter dated October 2, 2019, the Committee requested the Parties to seek agreement on a schedule of submissions on the issue of the stay of enforcement and inform the Tribunal accordingly on or before October 11, 2019. The Committee decided to maintain the stay until both Parties have presented their submissions.
9. On separate communications dated October 11, 2019, the Parties informed the Committee that they had not reached an agreement regarding the schedule of submissions on the issue of the stay.
10. By letter dated October 17, 2019, the Committee fixed the schedule of written submissions regarding the issue of the stay. The timetable was set as follows: on November 1, 2019, Kazakhstan would file its Counter-Memorial on Claimants’ Request to Lift the Stay; on November 11, 2019, Claimants would file their Reply on the lifting of the Stay; and on November 21, 2019, Respondent would file its Rejoinder on the lifting of the Stay. The Committee decided that there would be no separate hearing on the issue of the stay.
11. The Parties presented their written submissions in accordance with the timetable set by the Committee.
12. The Committee has considered all the submissions and arguments put forward by the Parties. The fact that certain arguments, documents, or legal authorities are not mentioned in the following sections does not mean that the Committee has not considered them.

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<sup>2</sup> Claimants’ Request to Lift the Stay of Enforcement of the Award, August 1, 2019 (“Claimants’ Request to Lift the Stay”), ¶1.

### III. PARTIES' POSITIONS

#### A. Claimants' Position

13. Claimants request that the Committee lifts the stay of enforcement of the Award or, in the alternative, that it orders Respondent to post a financial security as a condition for the continued stay of enforcement of the Award.
14. Claimants contend that, pursuant to Articles 53(1) and 54(1) of the ICSID Convention, ICSID awards have a final and binding nature and therefore the scope of the remedy of annulment is a narrow one. Claimants allege that, while the stay of enforcement of an award is granted automatically pending the constitution of the committee following an annulment application, once the *ad hoc* committee is constituted, the stay shall only be maintained in exceptional circumstances. This has been recognized by *ad hoc* committees in annulment proceedings such as *Kardassopoulos & Fuchs v. Georgia*, *Vivendi II*, *Wena Hotels v. Egypt*, and *Burlington Resources Inc. v. Ecuador*.<sup>3</sup>
15. Claimants refute Respondent's argument that ICSID *ad hoc* annulment committees' prevailing practice is to stay the enforcement of an award during the pendency of annulment proceedings.<sup>4</sup> While Respondent relies on decisions of *ad hoc* committees in *Occidental v. Ecuador*, *Pey Casado v. Chile*, and *Azurix v. Argentina*, these decisions do not support Respondent's position because all three decisions coincide in that there is no presumption for the continuation of the stay and that the applicant has to discharge its burden of proving the specific circumstances justifying the stay.<sup>5</sup>
16. Claimants allege that the default position under the ICSID Convention is that the stay should not be granted, as explained by the *ad hoc* committee in *SGS v. Paraguay*.<sup>6</sup> According to the 2016 ICSID Updated Background Paper on Annulment, out of the 41 decisions on stay, in only 14 cases the stay was maintained, in 22 cases the stay was

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<sup>3</sup> Claimants' Request to Lift the Stay, ¶¶22-28.

<sup>4</sup> Claimants' Reply on the Stay of Enforcement of the Award, November 11, 2019 ("Claimants' Reply on the Stay"), ¶13.

<sup>5</sup> Claimants' Reply on the Stay, ¶¶13, 15.

<sup>6</sup> Claimants' Reply on the Stay, ¶19.

maintained subject to the granting of a financial security, and in 5 cases the stay was rejected.<sup>7</sup>

17. Considering that the ICSID Convention and the ICSID Arbitration Rules are silent on the criteria that must be analyzed to decide on the termination of the stay, *ad hoc* committees have referred to three circumstances: (i) whether there is a possibility that the applicant will oppose enforcement of the award if the annulment application is rejected;<sup>8</sup> (ii) whether payment of the award would have catastrophic, immediate and irreversible consequences for the party's ability to conduct its affairs;<sup>9</sup> and (iii) whether there is a risk of no recoupment if the annulment application is upheld.<sup>10</sup> Claimants note that ICSID *ad hoc* committees have refused to consider the merits of the application for annulment when deciding the termination of the stay unless there is some indication that the annulment application is dilatory.<sup>11</sup>
18. For Claimants these three circumstances are not sufficient in themselves for a stay of enforcement to be maintained. The applicant must demonstrate that it will comply with the award if the application for annulment is rejected by posting a financial security in a form of an unconditional and irrevocable bank guarantee or similar.<sup>12</sup>
19. Claimants request that the Committee lifts the stay of enforcement requested in the Application because Respondent has not justified the continuation of the stay. Claimants argue that Respondent's Application is dilatory and intends to reopen a debate on the merits of the case that was addressed and resolved in the original arbitration.<sup>13</sup> Moreover, Respondent has failed to demonstrate that the three circumstances referred to by ICSID case law justify the continuation of the stay.
20. As to the first circumstance, Claimants contend that there are more than serious doubts as regards Respondent's intention to voluntarily comply with the Award should the Application be rejected. Respondent is a "serious serial defaulter" and has made false

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<sup>7</sup> Claimants' Reply on the Stay, ¶22.

<sup>8</sup> Claimants' Request to Lift the Stay, ¶¶31-35.

<sup>9</sup> Claimants' Request to Lift the Stay, ¶¶36, 37.

<sup>10</sup> Claimants' Request to Lift the Stay, ¶38.

<sup>11</sup> Claimants' Request to Lift the Stay, ¶30; Claimants' Reply on the Stay, ¶15.

<sup>12</sup> Claimants' Request to Lift the Stay, ¶39.

<sup>13</sup> Claimants' Request to Lift the Stay, ¶43.

promises to secure the continuation of a stay.<sup>14</sup> To support its assertion, Claimants refer to the following annulment proceedings in which Kazakhstan applied for the annulment of an award:

21. *AIG v. Kazakhstan*: AIG secured payment of an ICSID award years after it was rendered by the arbitral tribunal. According to Claimants, this only happened because of the pressure exercised by the US Government on Kazakhstan and the enforcement actions undertaken by AIG before domestic courts.<sup>15</sup>
22. *Rumeli and Telsim v. Kazakhstan*: in order to secure the decision to maintain the stay of enforcement, Kazakhstan issued a letter dated April 28, 2009 signed by its Minister of Justice containing an unconditional promise to pay Claimants the full amount of the award within 30 days of the notification of the decision of the *ad hoc* Committee to dismiss the annulment application. Yet, Kazakhstan started payment of the Award approximately one year (in April 2011) after the *ad hoc* committee rejected its annulment application on March 25, 2010.<sup>16</sup>
23. *Aktau v. Kazakhstan*: on June 13, 2018, the *ad hoc* committee granted Kazakhstan a stay of enforcement subject to the provision of a financial guarantee. Kazakhstan did not provide said guarantee because, allegedly, its legislation did not contain provisions that allowed the granting of a financial security. The committee lifted the stay on August 6, 2018. After Aktau started to enforce the award in Turkey, Kazakhstan requested the *ad hoc* committee to stay the enforcement and offered to post a security; however, on January 22, 2019, the committee refused to grant the stay.<sup>17</sup>
24. *Ascom v. Kazakhstan*: in an award dated 19 December 2013, Kazakhstan was ordered to pay to the investors USD 500 million. Yet, until today, the Republic has not complied with the award, has resisted enforcement actions in domestic courts, and has publicly labelled the award as a fraud.<sup>18</sup>

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<sup>14</sup> Claimants' Request to Lift the Stay, ¶45.

<sup>15</sup> Claimants' Request to Lift the Stay, ¶47; Claimants' Reply on the Stay, ¶¶48, 49.

<sup>16</sup> Claimants' Request to Lift the Stay, ¶48; Claimants' Reply on the Stay, ¶¶50, 51.

<sup>17</sup> Claimants' Request to Lift the Stay, ¶¶49, 50; Claimants' Reply on the Stay, ¶¶53-57.

<sup>18</sup> Claimants' Request to Lift the Stay, ¶51.

25. Claimants further argue that Respondent has not enacted specific laws on enforcement, has not notified ICSID of a competent domestic court or judicial authority for the enforcement of award pursuant to Article 54 of the ICSID Convention and has not adopted legislative measures to promulgate and ratify the ICSID Convention.<sup>19</sup>
26. Furthermore, Claimants refer to the Office of the United States Trade Representative 2004 Report on Foreign Trade Barriers in Kazakhstan, which indicates that “in practice, the government of Kazakhstan has not consistently observed international practices relating to the enforcement and recognition of arbitral awards.”<sup>20</sup>
27. As to the second circumstance, Respondent has failed to demonstrate that it would suffer “catastrophic consequences” and “immediate and irreversible consequences” for its ability to conduct its affairs if the stay is lifted. This standard has been applied in cases such as *MINE v. Guinea* and *Border Timbers et.al. v. Zimbabwe*.<sup>21</sup> The Award orders Respondent to pay USD 55 million inclusive of interest, which represents an insignificant sum in comparison with Respondent’s Gross Domestic Product which amounted to approximately USD 170.54 billion in 2018.<sup>22</sup> In any event, even if the balance of hardship test were to be applied, it would weigh in Claimants’ favor because Claimants have already initiated enforcement actions in multiple jurisdictions against Kazakhstan, and will therefore lose an opportunity to recover the amounts ordered by the Award if the continuation of the stay is granted.<sup>23</sup>
28. As to the third circumstance, Respondent has failed to demonstrate that there is a risk of not recovering the amount paid under the Award if the Application is upheld by the Committee. Claimants state that Mr. Devincci Hourani and Mr. Kassem Omar are wealthy individuals that have means to repay the amounts awarded.<sup>24</sup> In any event, if the Committee considers it necessary, Claimants undertake to place any amount collected under the Award in an escrow account under the control of the Committee pending outcome of the annulment proceedings.<sup>25</sup> In their Reply, Claimants rephrased their proposal in this regard indicating that Claimants would undertake to place any amount voluntarily paid by

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<sup>19</sup> Claimants’ Request to Lift the Stay, ¶62; Claimants’ Reply on the Stay, ¶60.

<sup>20</sup> Claimants’ Request to Lift the Stay, ¶46; Claimants’ Reply on the Stay, ¶49.

<sup>21</sup> Claimants’ Request to Lift the Stay, ¶¶36, 37.

<sup>22</sup> Claimants’ Request to Lift the Stay, ¶63.

<sup>23</sup> Claimants’ Reply on the Stay, ¶41.

<sup>24</sup> Claimants’ Request to Lift the Stay, ¶ 64.

<sup>25</sup> Claimants’ Request to Lift the Stay, ¶¶64, 87.

Respondent under the Award in an escrow account under the control of the Committee pending outcome of the annulment proceedings.<sup>26</sup>

29. Based on the foregoing, Claimants request that the Committee order that the stay of enforcement provisionally granted on February 2, 2018, be lifted.
30. Should the Committee decide to continue the stay of enforcement of the Award, Claimants request that Respondent issues an unconditional bank guarantee from a first-tier bank for the amount owed under the Award, including interest, payable to Claimants upon the rejection of the Application.<sup>27</sup>
31. Claimants argue that *ad hoc* committees have the power to request the applicant party to issue financial securities pending annulment proceedings, as confirmed by scholars and by ICSID case law in cases such as *Kardassopoulos v. Georgia*, *Sempra v. Argentina*, *Wena Hotels v. Egypt*, *CDC v. Seychelles*, *Repsol v. Ecuador*, *Amco Asia v. Indonesia*, *MTD v. Chile*, *Lemire v. Ukraine*, *Lahoud v. Congo*, *Kilic v. Turkmenistan*, and *Adem Dogan v. Turkmenistan*.<sup>28</sup> Claimants stress that there is a risk that Respondent will not comply with Award if the Application is rejected, and therefore request that Respondent post a financial guarantee if the Committee decides to extend the stay of enforcement of the Award.<sup>29</sup>

## **B. RESPONDENT’S POSITION**

32. Respondent requests that the Committee orders to stay the enforcement of the Award pending the annulment proceedings. It is prevailing practice for ICSID *ad hoc* annulment committees to stay the enforcement of an award during the pendency of the annulment proceeding unless faced with an obviously frivolous annulment application.<sup>30</sup> Respondent claims that its Application is based on serious grounds that require the annulment of the Award, including a manifest excess of powers and a failure to state reasons, which is an

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<sup>26</sup> Claimants’ Reply on the Stay, ¶¶ 31, 26.

<sup>27</sup> Claimants’ Request to Lift the Stay, ¶68.

<sup>28</sup> Claimants’ Request to Lift the Stay, ¶¶ 69-83.

<sup>29</sup> Claimants’ Request to Lift the Stay, ¶ 85.

<sup>30</sup> Respondent’s Submission in Support of the Continuation of the Provisional Stay of Enforcement of the Award, November 1, 2019 (“Respondent’s Counter-Memorial on the Stay”), ¶ 3.

additional circumstance that should be assessed by the Committee for the continuation of the stay.<sup>31</sup>

33. Respondent relies on annulment proceedings in cases such as *Occidental v. Ecuador*, *Pey Casado v. Chile*, and *MTD v. Chile* to argue that absent unusual circumstances, the granting of stay of enforcement is the prevailing practice. As stated in *MTD v. Chile*, the stay should be granted unless it is obvious that the application is without any basis under the ICSID Convention or that it is dilatory in nature.<sup>32</sup>
34. Respondent notes that in *Caratube I*, Caratube International Oil Company LLP (“**Caratube**”) argued that absent unusual circumstances, the granting of stay of enforcement is the prevailing practice. In that case, Caratube alleged that the stay of enforcement has become standard practice in ICSID annulment proceedings, and referred to the annulment proceedings in *Pey Casado v. Chile*, where the *ad hoc* committee concluded that “absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic.”<sup>33</sup> Caratube also argued in *Caratube I* that the granting of stay without the posting of security is the dominant trend in ICSID annulment proceedings and that the security would place Kazakhstan in a better position than the one it would have for enforcement of the award. Kazakhstan did not object Caratube’s request for the continuation of the stay because it basically agreed with the legal standard proposed by Caratube. The *ad hoc* committee granted the continuation of the stay without requiring Caratube to post a security. Claimants now argue for the application of a different standard in the present case.<sup>34</sup>
35. As indicated by the *Chevron* tribunal, basic principles of good faith prevent Caratube from arguing in favor of a legal standard that is in direct contradiction with the legal standard that Caratube relied on and from which it benefited when it requested the continuation of the stay of enforcement of an ICSID award. In consequence, Claimants are precluded or estopped from arguing that continuation of the stay of enforcement is an exceptional remedy that should only be granted in exceptional circumstances.<sup>35</sup>

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<sup>31</sup> Respondent’s Counter-Memorial on the Stay, ¶18; Respondent’s Rejoinder on the Continuation of the Provisional Stay of Enforcement of the Award, November 21, 2019 (“Respondent’s Rejoinder on the Stay”), ¶30.

<sup>32</sup> Respondent’s Counter-Memorial on the Stay, ¶¶6-9.

<sup>33</sup> Respondent’s Rejoinder on the Stay, ¶6.

<sup>34</sup> Respondent’s Rejoinder on the Stay, ¶¶4-7.

<sup>35</sup> Respondent’s Rejoinder on the Stay, ¶¶10-12.

36. In addition to the above, Respondent alleges that none of the cases cited by Claimants state that “exceptional” circumstances are required in order to grant a stay of enforcement and that neither the ICSID Convention nor the Arbitration rules refer to “exceptional circumstances.” Article 52(5) of the ICSID Convention, Article 54(4) of the Arbitration Rules, and the cases cited by Claimants solely refer to “circumstances,” not to “exceptional circumstances.”<sup>36</sup> For instance, the *ad hoc* committees in *Ioannis Kardassopoulos v. Georgia*, *MTD v. Chile*, and *Vivendi v. Argentina*, referred to “relevant circumstances;” and in *OI European Group v. Venezuela* and in *Wena Hotels v. Egypt*, referred to “circumstances.”<sup>37</sup>
37. According to Respondent, Claimants’ reference to ICSID statistics of ICSID annulment proceedings is unavailing. To date, stays of enforcement have been requested in 77 ICSID annulment cases, 63 of which have led to publicly available decisions; from those 63, the stay of enforcement was granted in 46 cases, which constitutes a 73% success rate. Stays have been denied in only 17 out of 63 cases. Furthermore, Claimants allege that in 22 cases the stay was conditioned upon the provision of an appropriate security by the applicant. Yet, ICSID’s Background Paper on Annulment states that in 9 of these cases the stay was conditioned upon a written undertaking by the award creditor that it would comply with the award if not annulled.<sup>38</sup>
38. As regards the burden of proof, Respondent alleges that it is part of the Committee’s discretionary power to determine the circumstances justifying the continuation of the stay and refers to the decision of the *ad hoc* committee in *Lemire v. Ukraine*, which indicated that “each party has the burden to prove the circumstances requiring the stay.”<sup>39</sup> According to Article 54(4) of ICSID Arbitration Rules, the applicant shall specify the circumstances requiring the stay. Pursuant to this provision, Respondent indicated the circumstances justifying the continuation of the stay. Nonetheless, certain matters are for Claimants to demonstrate, i.e. whether they would suffer any prejudice because of the stay and whether the posting of a security is necessary and warranted under the circumstances of this case.<sup>40</sup>

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<sup>36</sup> Respondent’s Counter-Memorial on the Stay, ¶¶9, 10.

<sup>37</sup> Respondent’s Rejoinder on the Stay, ¶¶12-17.

<sup>38</sup> Respondent’s Rejoinder on the Stay, ¶¶18, 19.

<sup>39</sup> Respondent’s Rejoinder on the Stay, ¶24.

<sup>40</sup> Respondent’s Rejoinder on the Stay, ¶25.

39. When deciding on the continuation of the stay, ICSID *ad hoc* committees have considered four specific circumstances: (i) whether there is at risk of non-recovery by the party applying for annulment; (ii) whether the annulment application was made in good faith; (iii) the balance of hardship between the parties; and (iv) whether there is an objective and substantial risk that the State will not honor its commitments.<sup>41</sup> According to Respondent, the specific circumstances in this case make the continuation of the stay compelling.
40. As to the first circumstance, Respondent argues that there is a serious risk of non-recovery considering Claimants' conduct in *Caratube I*, where the tribunal rejected jurisdiction and granted Kazakhstan USD 3.2 million on costs. Yet, to date, neither Caratube nor Mr. Devincci Hourani have complied with the Award despite Mr. Devincci Hourani allegedly being a "wealthy individual," as stated by Claimants. In fact, Caratube has indicated that "it would not consider complying with the *Caratube I* Award until 'the dispute and the associated multiple claims' [...] were 'ultimately heard of their merits by an international arbitral tribunal' [...] and the Republic was 'ultimately held liable for compensation.'"<sup>42</sup>
41. Claimants' allege that Caratube's assets are in the control of Kazakhstan as a result of the expropriation of the company and therefore Respondent can recover any amount paid under the Award. Respondent refutes this allegation for two reasons: first, because Kazakhstan did not expropriate the company of Claimants but contract rights which do not constitute assets upon which Kazakhstan may obtain payment; and second, because Caratube became a shell company without assets after the termination of the Contract.<sup>43</sup> In consequence, there is a material risk that Kazakhstan will not be able to recover any amounts paid under the Award in the event it is annulled.
42. As to the second circumstance, Respondent states that its Application was made in good faith and is not dilatory. According to Respondent, it has serious grounds to argue that the Tribunal committed an excess of powers by failing to apply the applicable law to the jurisdiction and to the merits of the dispute, and acted manifestly outside the scope of the dispute resolution clause of the Contract, and failed to state the reasons of its decision in the Award.<sup>44</sup>

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<sup>41</sup> Respondent's Rejoinder on the Stay, ¶26.

<sup>42</sup> Respondent's Counter-Memorial on the Stay, ¶16.

<sup>43</sup> Respondent's Rejoinder on the Stay, ¶38.

<sup>44</sup> Respondent's Counter-Memorial on the Stay, ¶¶21, 27.

43. As to the third circumstance, Respondent argues that the stay of enforcement of the award is designed to enable the *ad hoc* committee to balance the rights of the parties pending annulment proceedings.<sup>45</sup> *Ad hoc* committees regularly balance the potential prejudice that each party would face if the stay of enforcement is continued or terminated. Thus, contrary to Claimants’ contention, the award debtor is not required to prove that payment of the award will have “catastrophic consequences in its ability to conduct its affairs.”<sup>46</sup>
44. Claimants have not demonstrated that they would suffer prejudice if the Committee decides to continue the provisional stay of enforcement of the Award. Respondent notes that: (i) Claimants have indicated that Mr. Devincci Hourani, majority shareholder of Caratube, is a “wealthy individual” with the financial capacity to pay an amount at least equal to the amount of the Award; (ii) Claimants argue that they would be prejudiced because they had already initiated enforcement actions in multiple jurisdictions against Kazakhstan; however, to Respondent’s knowledge, Claimants have only commenced two enforcement actions in the Netherlands, which have not been upheld by Dutch courts because the assets sought are protected by immunity from enforcement;<sup>47</sup> (iii) if the Application were to be denied, the delay of the payment of the Award would be compensated by the payment of interests.
45. On the other hand, Respondent argues that it would be severely prejudiced if the stay is lifted because it would be placed in a position in which Caratube fails to comply with the *Caratube I* award and fails to repay the Award if the Application is upheld.<sup>48</sup>
46. As to the fourth circumstance, Respondent claims that there is no objective and substantial risk that Kazakhstan will not pay the Award if the Application is rejected.<sup>49</sup> Respondent has never disregarded its obligations under the ICSID Convention, nor has it taken the position that enforcement proceedings need to be commenced for an award to be paid. To date, Claimants are the only ones that have not complied with an ICSID award. The Republic has been a party to 9 concluded ICSID cases to date. Of these 9 cases, 3 were dismissed either on jurisdiction or on the merits (including *Caratube I*); 2 cases were settled during the pendency of the arbitration; in one case, the tribunal found the Republic liable

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<sup>45</sup> Respondent’s Rejoinder on the Stay, ¶65.

<sup>46</sup> Respondent’s Rejoinder on the Stay, ¶65.

<sup>47</sup> Respondent’s Rejoinder on the Stay, ¶¶67-70.

<sup>48</sup> Respondent’s Rejoinder on the Stay, ¶74.

<sup>49</sup> Respondent’s Counter-Memorial on the Stay, ¶31.

for breach of FET but awarded no damages; and in 3 cases, an award granting damages was rendered. The Republic reached a settlement agreement in all 3 cases.<sup>50</sup>

47. Furthermore, Respondent refutes Claimants' account of facts regarding the *AIG*, *Rumeli*, *Aktau* and *Ascom* cases against Kazakhstan, as follows:
48. *AIG v. Kazakhstan*: Respondent notes that Claimants omit to mention that after the award was rendered on October 7, 2003, the parties entered into settlement negotiations, and on March 16, 2006, a settlement agreement was signed, and that the claimants were paid.<sup>51</sup>
49. *Rumeli v. Kazakhstan*: for Respondent, Claimants' argument that in said case Respondent "refused to pay upon the issuance of the decision rejecting the annulment application" is not true because Kazakhstan never refused to pay. Respondent took the necessary steps to comply within the 30 days as of the issuance of the decision on annulment. In order to comply with its obligations under the ICSID Convention, Respondent directly undertook negotiations with claimants' controlling entity. Finally, the award was paid in accordance with the agreement reached between the parties.<sup>52</sup>
50. *Aktau v. Kazakhstan*: Respondent argues that Claimants omit to mention that, after the *ad hoc* committee rejected the application for annulment on June 21, 2019, Respondent and the claimants reached a settlement agreement for the payment of the award. As regards the financial guarantee, Kazakhstan was not in default of posting said guarantee because it did not commit to it and, in any event, it was not possible for Respondent to post a security bond considering that its financial legislation did not include provisions allowing for it.<sup>53</sup>
51. *Ascom SCC v. Kazakhstan*: Claimants argue that Respondent has not complied with the *Ascom SCC* award and complain that Respondent has labelled the award as a fraud and raised challenges to this effect. Respondent alleges that it considers that the award was obtained by fraud and refers to the decision of Justice Knowles of the High Court of Justice Queen's Bench Division dated June 6, 2017, where he held that "there is a sufficient *prima facie* case that the Award was obtained by fraud."<sup>54</sup>

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<sup>50</sup> Respondent's Counter-Memorial on the Stay, ¶¶35, 36.

<sup>51</sup> Respondent's Counter-Memorial on the Stay, ¶40; Respondent's Rejoinder on the Stay, ¶95.

<sup>52</sup> Respondent's Counter-Memorial on the Stay, ¶41; Respondent's Rejoinder on the Stay, ¶¶92-94.

<sup>53</sup> Respondent's Counter-Memorial on the Stay, ¶¶42, 43; Respondent's Rejoinder on the Stay, ¶¶79-81.

<sup>54</sup> Respondent's Counter-Memorial on the Stay, ¶45.

52. To contest the 2004 Report on Foreign Trade Barriers in Kazakhstan of the Office of the United States Trade Representative presented by Claimants, Respondent relies on *Rumeli v. Kazakhstan*, where the *ad hoc* committee concluded that said document is “of a general nature and contain[s] largely unsubstantiated comments not constituting convincing evidence that [Kazakhstan] has a poor history of compliance with its payment obligations under judgment and awards rendered against it.”<sup>55</sup>
53. Finally, Respondent rebuts Claimants’ argument that Kazakhstan has failed to implement the ICSID Convention because it has not enacted specific laws on enforcement under Article 54(1), has not notified ICSID of an enforcement authority under Article 54(2) and has not adopted legislative measures regarding promulgation and ratification under Article 69. Kazakhstan notes that it not only has signed and ratified the ICSID Convention but also has enacted Law No. 264 regulating the “terms for the membership of the Republic of Kazakhstan” in ICSID, and enacted a specific provision in the Civil Procedural Code pursuant to which arbitral awards shall be recognized and enforced by domestic courts if their recognition and enforcement is provided by the legislation or international treaties ratified by the Republic.<sup>56</sup>
54. Respondent rejects Claimants request that the Committee condition the continuation of the stay of enforcement upon the posting of an unconditional bank guarantee issued by Kazakhstan from a first-tier bank. According to Respondent, such decision would place Claimants in a better position than they would have been in if the annulment proceedings had not been brought. As noted by the *ad hoc* committees in *CMS v. Argentina*, *MTD v. Chile*, *Enron v. Argentina*, *MINE v. Guinea*, *Mr. Patrick Mitchell v. DRC*, and *Azurix v. Argentina*, the provision of a bank guarantee “converts the undertaking of compliance under Article 53 of the Convention into a financial guarantee and avoids any issue of sovereign immunity from execution, which is expressly reserved by Article 55 of the Convention.”<sup>57</sup>
55. Kazakhstan further claims that it is not allowed under Kazakh law to post a guarantee or any other form of security provided by a third party. State organs and entities may only perform those acts that are expressly authorized under Kazakh law and thus may not perform acts that are not expressly regulated and for which they are not expressly

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<sup>55</sup> Respondent’s Counter-Memorial on the Stay, ¶39.

<sup>56</sup> Respondent’s Rejoinder on the Stay, ¶103.

<sup>57</sup> Respondent’s Rejoinder on the Stay, ¶108.

authorized. Consequently, Respondent will not be able to post a financial security as requested by Claimants.

#### IV. TRIBUNAL'S CONSIDERATIONS

56. In order to determine whether to continue the stay of enforcement of the Award, and considering the specific facts of this case, the Committee will address: (i) the applicable legal standard regarding the stay of enforcement of an ICSID Award; and (ii) the application of such standard in the present case.

##### A. Legal Standard on the Stay of Enforcement of an ICSID Award

57. According to Claimants' pleadings before this Committee, ICSID awards have a final and binding nature and therefore the scope of the remedy of annulment is a narrow one. Thus, the stay of enforcement of an ICSID award shall only be maintained in exceptional circumstances. Respondent, on the other hand, argues that the stay should be maintained by the Committee unless faced with a frivolous application for annulment. According to Respondent, granting the continuation of the stay has become almost automatic in ICSID annulment proceedings.

58. As a preliminary matter, the Committee notes that there are two relevant issues in the present case that make it different from other decisions invoked by the Parties and that must be considered in the decision regarding the stay.

59. First, in the *Caratube I* case, Claimants argued in favor of the legal standard now pleaded by Respondent.<sup>58</sup> In said case, Caratube alleged that "the stay of enforcement has become standard practice in ICSID annulment proceedings," and referred to the annulment proceedings in *Pey Casado v. Chile*, where the *ad hoc* committee concluded that "absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic." Caratube also argued that the granting of the stay without the posting of security is the dominant trend in ICSID annulment proceedings and that the security would place Kazakhstan in a better position than enforcement. Kazakhstan notes that it did not object Caratube's request for the

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<sup>58</sup> Caratube's Request for Continuation of the Stay of Enforcement dated December 10, 2012 submitted in the *Caratube I* ICSID Arbitration, p. 1, **Exhibit R-191**.

continuation of the stay because it primarily agreed with the legal standard proposed by Caratube. Consequently, the *ad hoc* committee in *Caratube I* granted the continuation of the stay.<sup>59</sup>

60. Second, it is undisputed that in *Caratube I* there is a final and binding award ordering Claimants to pay Respondent USD 3.2 million<sup>60</sup> and that Claimants have not paid such amount.<sup>61</sup> The Committee finds that no justification has been provided by Claimants for their failure to comply with an ICSID award.
61. The Committee is not convinced that the standard proposed by Respondent in the case at hand and by Caratube in *Caratube I* is the applicable one. The Committee does not agree that the continued stay of enforcement should be granted automatically or that there is a presumption in favor of the stay.
62. For the reasons explained below, the Committee also disagrees with the standard proposed by Claimants. But in addition, the Committee considers that Claimants cannot argue in favor of a legal standard that is in direct contradiction with the legal standard that it itself relied on and from which it benefited when it requested the continuation of the stay of enforcement of an ICSID award. As indicated by the *Chevron* tribunal, “in accordance with the general principle of good faith under international law, no party can have it both ways or blow hot and cold, to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment.”<sup>62</sup> In consequence, Claimants are precluded from arguing that continuation of the stay of enforcement is an exceptional remedy that should only be granted in exceptional circumstances.
63. The applicable legal standard derives from the relevant provisions in the ICSID Convention and in the ICSID Arbitration Rules.
64. Article 53(1) of the ICSID Convention provides that:

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

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<sup>59</sup> Respondent’s Rejoinder on the Stay, ¶5-7.

<sup>60</sup> *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award dated June 5, 2012, **Exhibit CLA-8**.

<sup>61</sup> Respondent’s Counter Memorial on the Stay, ¶4.

<sup>62</sup> *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II dated August 30, 2018, ¶¶7.106-7.107, **Exhibit RL-231**.

have been stayed pursuant to the relevant provisions of this Convention.

65. In connection with the stay of enforcement, Article 52(5) of the ICSID Convention states that:

The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

66. Article 54 of the ICSID Rules provides in its relevant part:

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated. [...]

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

67. In accordance with the General Rule of Interpretation provided for in Article 31 of the Vienna Convention on the Law of Treaties, the Committee must interpret these provisions “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.”

68. It is undisputed that an award issued under the ICSID convention is binding and enforceable except for the remedies provided for under the ICSID Convention (Article 53(1) of the CISID Convention). It is also undisputed that annulment is one of such remedies (Article 52(1) of the ICSID Convention).

69. As regards the stay, it requires a specific request from the Applicant at the time of filing the application for annulment (ICSID Arbitration Rule 54(1)). In the absence of such request, the award would not be stayed and is therefore enforceable. If the party applying for annulment requests a stay of enforcement of the award, the stay is granted automatically

by the ICSID Secretariat pending the constitution of the *ad hoc* committee (Article 52(5) of the ICSID Convention). However, such stay is not indefinite. Once an *ad hoc* committee is constituted, it must rule within 30 days on whether the stay should be continued; the stay shall automatically terminate at the expiration of the 30-day term unless the committee decides otherwise (ICSID Rule 54(2)). Finally, the Committee has a wide discretion to decide whether or not to stay the award considering the circumstances of the case (Article 52(5) of the ICSID Convention).

70. Nothing in the aforementioned articles provides for a presumption in favor or against the continuation of stay of enforcement, and they do not establish or suggest that the continuation of the stay is automatic. Other *ad hoc* committees have mentioned the “automaticity” of the stay, referring to previous decisions of other *ad hoc* committees in which the stay has been maintained but do not refer to a provision in the ICSID Convention or the ICSID Arbitration Rules that provide for or refer to an automatic maintenance of the stay. Moreover, the Committee considers that even though statistics may be useful for other purposes, they do not create a binding precedent for *ad hoc* committees, much less a rule that the stay is automatic in all cases or that there is a presumption in favor of automaticity.
71. The stay is therefore subject to specific requirements. Non-compliance with the requirements or the expiration of the terms result in the lifting of the stay, not in the continuation thereof. In the absence of a request for stay in the application for annulment, the award remains enforceable. If the stay is requested in the application, it is only granted by the ICSID Secretary for a limited period of time – 30-days after the constitution of the *ad hoc* committee – at the expiration of which the stay is lifted, unless the *ad hoc* Committee decides otherwise.
72. The word “may” in Article 52(5), indicates that it is optative for the Committee to maintain the stay “if it considers that the circumstances so require.” Moreover, nothing in the text or context of the aforementioned provisions or the ICSID Convention suggests that the circumstances that the Committee must take into consideration to decide on if the continuation of the stay should require “unusual” or “exceptional circumstances,” they merely refer to “circumstances” that in the view of the committee “require” the continuation of the stay.
73. Thus, to determine whether to maintain the stay of enforcement of the Award, the Committee must analyze the specific circumstances of this case, which need not necessarily be “unusual” or “exceptional.”
74. The Parties seem to agree that to decide on the continuation of the stay, the Committee must analyze the following circumstances: (i) the risk of non-payment of the Award if the

Application is rejected; (ii) the risk of non-recovery if the stay is lifted and the Award is annulled; and (iii) the balance of hardship between the Parties. The Parties differ on whether the Committee should also consider the merits of the Application for Annulment.

75. For the Committee, the merits of the application for annulment should not be addressed at this stage of the proceedings unless faced with a manifestly frivolous application. A review of Respondent's Application leads the Committee to conclude that it is not frivolous and therefore the Committee will analyze only the three circumstances in which both Parties coincide as circumstances that the Committee must consider as regards the stay.
76. In connection with the burden of proof, it is a general rule that a party to an international arbitration has the burden of proving the facts necessary to establish its claim or defense. This widely accepted general principle has been recognized in cases such as *Lemire v. Ukraine*, where the *ad hoc* committee concluded that "each party has the burden to prove the circumstances that rely on to request the granting or termination of the stay."<sup>63</sup>

#### **B. Analysis of the specific circumstances of this case**

##### *i. Risk of non-payment*

77. Claimants allege that there is a risk that Respondent would not pay the Award if the Application is rejected. According to Claimants, Kazakhstan's history of non-payment is evidenced in cases such as *AIG, Rumeli, Aktau*, and *Ascom*, where Respondent's conduct demonstrates that it is a "serious serial defaulter" and that it has made false promises to secure the continuation of a stay. Conversely, Respondent alleges that there is no objective and substantial risk that Kazakhstan will not pay the Award if the Application is rejected. Respondent has never disregarded its obligations under the ICSID Convention, nor has it taken the position that enforcement proceedings need to be commenced for an award to be paid. Respondent rebuts Claimants' account of facts of the *AIG, Rumeli, Aktau*, and *Ascom* cases and notes that it complied with its commitments in said cases.
78. Claimants also argue that Respondent has not enacted specific laws on enforcement and has not adopted legislative measures to promulgate and ratify the ICSID Convention. Respondent contests this allegation by stating that it signed and ratified the ICSID Convention, that it enacted Law No. 264, which regulates the terms of membership of Kazakhstan in ICSID, and enacted the Civil Procedural Code, which incorporates a

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<sup>63</sup> *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (Annulment Proceeding), Decision on Ukraine's Request for a Continued Stay of Enforcement of the Award dated February 14, 2012, ¶ 52, **Exhibit CLA-13**.

provision pursuant to which ICSID arbitral awards shall be recognized and enforced by domestic courts.

79. Finally, Claimants refer to the Office of the United States Trade Representative 2004 Report on Foreign Trade Barriers in Kazakhstan, which indicates that “in practice, the government of Kazakhstan has not consistently observed international practices relating to the enforcement and recognition of arbitral awards.” Respondent argues that said report does not constitute convincing evidence of Kazakhstan’s poor history of compliance with its payment obligations.
80. The Committee notes that the risk of non-payment must be objective and supported with evidence. Considering the allegations and documents presented by the Parties, the Committee does not find that Kazakhstan is a “serious serial defaulter” as claimed by Claimants. The *AIG*, *Rumeli*, and *Aktau* cases do not evidence that Kazakhstan has not complied with its obligation to pay. The said cases evidence that Kazakhstan reached settlement agreements to comply with the obligation to pay.<sup>64</sup> There is no evidence or allegation that Respondent failed to pay the amounts agreed upon in the settlement agreements.
81. Claimants claim that the settlements were the result of the legal actions initiated by Claimants and pressure by other countries and institutions, however, no convincing evidence has been submitted in this regard. Claimants also complain as to the terms and conditions of the settlement, but in the absence of evidence that the settlement was the result of pressure, force, coercion or similar acts by Respondent, it is not for the Committee to question such terms and conditions or to consider that such terms and conditions result in a conduct that may be equivalent to a default in the payment.
82. Claimants allege that in *Lemire v. Ukraine*, the *ad hoc* committee conditioned the continued stay of enforcement of the award on a bank guarantee to be posted by Ukraine on the basis of a mere ten-month delay by the latter in complying with one single award (the *Alpha* award).<sup>65</sup> The Committee does not side with Claimants’ interpretation of this decision. It is true that the *ad hoc* committee found that there was a risk of non-compliance by Ukraine. Yet, the decisive factor for this decision was not the ten-month delay, the key issue was

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<sup>64</sup> Respondent’s Counter-Memorial on the Stay, ¶¶40-43; Respondent’s Rejoinder on the Stay, ¶95; Letter from the Ministry of Justice of Kazakhstan to ICSID, June 8, 2010, **Exhibit CA-14**.

<sup>65</sup> Claimants’ Request to Lift the Stay, ¶67.

that Ukraine had submitted the *Alpha* award to the enforcement proceeding applicable to the recognition and enforcement of foreign court decisions in Ukrainian territory, which incorporated various legal grounds to deny enforcement, including “the existence of a threat to the interests of Ukraine” (Article 396 of Ukraine’s Civil Procedural Code).<sup>66</sup> The *ad hoc* committee concluded (i) that there was no reasonable explanation on why the *Alpha* award was submitted to judicial enforcement proceedings; and (ii) that there was a reasonable doubt that Ukrainian courts could have refused to recognize and enforce the *Alpha* award based on the grounds provided for in Article 396 of the Civil Procedural Code, which “created space for arbitrariness.”<sup>67</sup> The *ad hoc* committee further concluded that the risk of non-compliance in *Lemire* was higher than in *Alpha* because the subject-matter of the former was “far more politicized” than the subject-matter of the latter.<sup>68</sup>

83. The facts in *Lemire v. Ukraine* are different from the facts in the case at hand. The Committee observes that Kazakhstan did not submit the *AIG*, *Rumeli*, or *Aktau* awards for enforcement in its domestic courts. The payment of these awards was accorded in settlement agreements. The Committee further notes that Claimants have not alleged, much less proven, that (i) Kazakhstan intends to submit the Award for enforcement in its domestic courts; and that (ii) the applicable mechanisms for enforcing ICSID awards under Kazakhstan’s domestic law, create “space for arbitrariness.” Thus, the rationale upheld by the *ad hoc* committee in *Lemire* is not applicable in the present case.
84. As to the *Ascom* case, the Committee notes that the *Ascom* award was issued on December 29, 2013, in arbitral proceedings seated in Sweden. The claimants sought to enforce the award in England and in February 2014 permission was initially granted. On April 7, 2015, Kazakhstan applied to set aside the enforcement permission (the “English Application”). After obtaining certain documents in a disclosure proceeding in the U.S., in August 2015, Kazakhstan applied to amend the English Application to add the contention that enforcement of the award would contravene English public policy by reason of claimants’ fraud. This decision is pending before English domestic courts after Mr. Justice Knowles decided to allow the English Application to proceed to trial<sup>69</sup> on the basis that “there is sufficient *prima facie* case that the Award was obtained by fraud.”<sup>70</sup>

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<sup>66</sup> *Joseph C. Lemire v. Ukraine*, ICSID Case ARB/06/18 (Annulment Proceeding), Decision on Ukraine’s Request for a continued Stay of Enforcement dated February 14, 2012, ¶75, **Exhibit CLA-13**.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Anatolie Stati, Gabriel Stati, Ascom Group SA & Terra Raf Trans Trading Ltd v. The Republic of Kazakhstan*, [2017] EWHC 1348 (Comm), Judgment dated June 6, 2017, ¶10, **Exhibit RL-225**.

<sup>70</sup> *Ibid.*, ¶¶ 92-93.

85. The Committee considers that parties to an international arbitration have the legitimate right to pursue the appropriate remedies when they consider that there are grounds to invoke such remedies. For the Committee, there is no sufficient evidence to conclude that Kazakhstan’s position in the *Ascom* case is frivolous or is a dilatory tactic, and therefore it cannot conclude that Respondent does not honor its commitment based on this sole case. It is for the competent courts – not for the Committee – to conclude whether the *Ascom* award was obtained by fraud or not.
86. With respect to the 2004 Report on Foreign Trade Barriers in Kazakhstan of the Office of the United States Trade Representative, the Committee first notes that it is a report issued more than 14 years ago, and second that, as correctly stated by *ad hoc* Committee of *Rumeli v. Kazakhstan*, said document is “of a general nature and contain[s] largely unsubstantiated comments not constituting convincing evidence that [Kazakhstan] has a poor history of compliance with its payment obligations under judgment and awards rendered against it.” In sum, the said report does not constitute sufficient evidence to conclude that Kazakhstan fails to comply with its obligations under the ICSID Convention.<sup>71</sup>
87. In connection with the ratification of the ICSID Convention, the Committee notes that the ICSID Convention has been in force for Kazakhstan since December 6, 2001.<sup>72</sup> As regards its implementation, the mere allegation that Kazakhstan’s legal regime does not provide for the appropriate mechanisms for the recognition and enforcement of an ICSID award is not sufficient. Respondent has submitted an explanation as to the form in which ICSID awards may be enforced in Kazakhstan and the applicable provisions thereto. This explanation has not been convincingly controverted by Claimants.
88. Finally, the Committee considers that Claimants cannot, in good faith, claim that Respondent is a “serious serial defaulter,” that the stay is not automatic, and that the lifting requires the existence of exceptional circumstances, when, on the one hand, Claimants have refused to pay the amount ordered by the Tribunal in *Caratube I* in favor of Kazakhstan, and on the other, Claimants plead in this case against the standard that they alleged in

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<sup>71</sup> Office of the United States Trade Representative 2004 report on Foreign Trade Barriers in Kazakhstan, available at: [https://ustr.gov/sites/default/files/uploads/reports/2007/NTE/asset\\_upload\\_file980\\_10957.pdf](https://ustr.gov/sites/default/files/uploads/reports/2007/NTE/asset_upload_file980_10957.pdf), under the title of “Investment Barriers,” at p. 345, **Exhibit CA-2**.

<sup>72</sup> Law No. 264 of the Republic of Kazakhstan “On Membership of the Republic of Kazakhstan in the International Monetary Fund, International Bank for Reconstruction and Development, International Finance Corporation, International Development Association, Multilateral Investment Guarantee Agency, International Centre for Settlement of Investment Disputes, European Bank for Reconstruction and Development, Asian Development Bank, Islamic Development Bank and Asian Infrastructure Investment Bank” dated December 6, 2001, Article 1, **Exhibit RL-227**; Law No. 589 of the Republic of Kazakhstan “On the Ratification of the Charter Documents of Certain International Organizations” dated July 9, 2004, Articles 1-2, **Exhibit RL-228**.

*Caratube I* and that resulted in the continuation of the stay of said award. This, in the view of the Committee, is one of the “circumstances of the case” that the Committee must consider in its decision regarding the stay.

ii. *Risk of non-recoupment*

89. Respondent contends that there is a serious risk of non-recoupment considering that (i) Caratube is a shell company with no assets, and that (ii) Claimants have not paid USD 3.2 million on costs granted to Kazakhstan in the *Caratube I* award. Claimants allege that Respondent has failed to demonstrate that there is a risk of not recovering the amount paid under the Award if the stay is lifted because Mr. Devincci Hourani and Mr. Kassem Omar are wealthy individuals that have means to repay the amounts awarded. Additionally, Claimants undertake to place any amounts voluntarily paid under the Award in an escrow account under the control of the Committee pending outcome of the annulment proceedings.
90. After analyzing the evidence on the record, the Committee considers that there is a risk of non-recovery if the stay is lifted and the Award is annulled for three reasons:
91. First, because Mr. Kassem Omar is not a party to these proceedings and other than the allegation that Mr. Devincci Hourani is a “wealthy individual,” Claimants did not submit evidence to support such allegation and to allow the Committee to conclude Mr. Devincci Hourani is a “wealthy individual” with the financial capacity to pay an amount at least equal to the amount of the Award.
92. Second, because Caratube and Mr. Devincci Hourani have refused to pay the costs granted to Kazakhstan in the *Caratube I* award,<sup>73</sup> and the Committee has not found a justifiable reason for such refusal. Caratube argues in favor of the application of a strict legal standard against Respondent but does not cope with it.
93. Third, because Caratube is a shell company with no assets upon which Respondent could not obtain payment if the Award is annulled.<sup>74</sup>

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<sup>73</sup> Respondent’s Counter-Memorial on the Stay, ¶16.

<sup>74</sup> Respondent’s Counter-Memorial on the Stay, ¶14.

94. As regards the creation of an escrow account to mitigate the risk of non-recovery, the Committee notes that Claimants amended their initial proposal so that the only amounts to be placed in escrow are those voluntarily paid by Respondent but not the amounts that could be collected through its pending enforcement actions.<sup>75</sup> The Committee considers that this proposal does not mitigate the risk of non-recoupment as it seems that upon lifting of the stay, Claimants could continue with the enforcement actions and the amounts so collected would not be placed into the escrow. This qualification negates the very purpose of creating an escrow to secure the risks of non-recoupment by the Respondent. In sum, this would be simply a security placed by Respondent in favor of Claimants and does not reduce or eliminate the risk of non-recoupment. Thus, the Committee is not persuaded that this scheme reduces or eliminates the risk of non-recoupment.

iii. *Balance of hardship*

95. Claimants allege that Respondent is obliged to prove that payment of the Award would have catastrophic, immediate, and irreversible consequences for its ability to conduct its affairs. Respondent, on the other hand, contends that *ad hoc* committees have regularly balanced the potential prejudice that each party would face if the stay is continued or terminated.

96. The Committee considers that Respondent need not demonstrate that it would suffer catastrophic and irreversible consequences for its ability to conduct its affairs. Nothing in the ICSID Convention or Rules or in the decisions of *ad hoc* committees support such a high standard. The Committee considers that it must balance the potential prejudice that each party would suffer if the stay is maintained or terminated. This same position has been taken by the *ad hoc* committees in *Quiborax v. Bolivia*,<sup>76</sup> *Lemire v. Ukraine*,<sup>77</sup> *Pey Casado v. Chile*,<sup>78</sup> and *Carnegie v. Gambia*.<sup>79</sup>

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<sup>75</sup> Claimants' Reply on the Stay, ¶¶31, 36.

<sup>76</sup> *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on the Application to Terminate the Provisional Stay of Enforcement of the Award dated February 21, 2017, ¶ 62, **Exhibit RL-236**.

<sup>77</sup> *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (Annulment Proceeding), Decision on Ukraine's Request for a Continued Stay of Enforcement of the Award dated February 14, 2012, ¶¶ 84-85, **Exhibit CLA-13**.

<sup>78</sup> *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, ICSID Case No. ARB/98/2 (Second Annulment Proceeding), Decision on the Request for the Stay of the Enforcement of the Award dated March 15, 2018, ¶¶ 73-75, **Exhibit RL-218**.

<sup>79</sup> *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19 (Annulment Proceeding), Decision on The Gambia's Request for a Continued Stay of Enforcement of the Award dated October 18, 2018, ¶¶ 53-55, **Exhibit R-222**.

97. As regards the prejudice that Claimants would suffer if the stay is continued, the Committee concludes that Claimants have not demonstrated that they would suffer any prejudice that could not be compensated by the payment of interests accrued upon the delay of the payment of the Award. On the other hand, the Committee notes that Respondent would be prejudiced if the stay is lifted because in a balance of probabilities and for the reasons mentioned above, including the refusal of Claimants to pay the *Caratube I* award, there is a high risk that, if the award is annulled, Respondent may not recover the amounts paid under the Award.
98. After analyzing the circumstances of the present case, the Committee concludes that the stay of enforcement of the Award should be maintained, without conditions or security, pending the decision on the Application.

## **V. COSTS**

99. The decision on costs for proceedings related to the stay of the award will be made together with the final decision on the application for annulment.

## **VI. DECISION**

The Committee, based on the above considerations:

1. Rejects Claimants' Request to Lift the Stay of Enforcement of the Award.
2. Orders to maintain the stay of enforcement of the Award pending its decision on the Application.
3. The Committee may at any time modify or terminate the stay.

*B. Sepulveda*

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Judge Bernardo Sepulveda-Amor  
Member of the Committee



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Prof. Lawrence Boo  
Member of the Committee



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Prof. Eduardo Zuleta  
President of the Committee