

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Sodexo Pass International SAS**  
Claimant

**v.**

**Hungary**  
Respondent (Applicant on Annulment)

**(ICSID Case No. ARB/14/20)**  
**Annulment Proceeding**

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**DECISION ON THE REQUEST FOR THE CONTINUED STAY OF ENFORCEMENT  
OF THE AWARD**

***Members of the ad hoc Committee***

Mr. Andrés Jana Linetzky, President of the *ad hoc* Committee  
Dr. Ucheora Onwuamaegbu, Member of the *ad hoc* Committee  
Dr. Jacomijn van Haersolte-van Hof, Member of the *ad hoc* Committee

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

Ms. Leah Waithira Njoroge

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February 10, 2020

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**I. PROCEDURAL HISTORY**

1. On May 27, 2019, Hungary (the “**Applicant**” or the “**Respondent**”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) an Application for Annulment (the “**Application for Annulment**”) of the award rendered on January 28, 2019 (the “**Award**”). In its Application for Annulment, Hungary requested a stay of enforcement of the Award pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States dated March 18, 1965 (the “**ICSID Convention**”).
2. On May 31, 2019, the ICSID Secretary-General registered the Application for Annulment and transmitted a Notice of Registration to the Parties on the same date. In that Notice, the Secretary-General noted that the Application for Annulment contained a request for a stay of enforcement of the Award in accordance with Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”). The Secretary-General notified the Parties that, pursuant to Rule 54(2), the enforcement of the Award was provisionally stayed.
3. The *ad hoc* Committee (the “**Committee**”) was constituted on July 30, 2019 in accordance with Article 52(3) of the ICSID Convention. Its members are Mr. Andrés Jana Linetzky (Chilean), serving as President, Dr. Ucheora Onwuamaegbu (British/Nigerian); and Dr. Jacomijn van Haersolte-van Hof (Dutch).
4. Procedural Order No. 1 was issued on September 6, 2019, and provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006.
5. In accordance with the agreed schedule, on September 27, 2019, Hungary filed a Submission in Support of Hungary’s Application for the Continued Stay of Enforcement of the Award, together with Exhibits R-81 through R-84 and Legal Authorities RLA-162 through RLA-178 (the “**Application for Continued Stay**”).

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6. On October 18, 2019, Sodexo Pass International SAS (“**Sodexo**” or the “**Claimant**”) filed its Response to the Applicant’s Request for the Continued Stay, together with Exhibits C-96 through C-103 and Legal Authorities CL-158 through CL-171 (the “**Response**”).
7. On November 8, 2019, Hungary filed a Reply on its Request for the Continued Stay, together with Legal Authorities RLA-179 through RLA-193 (the “**Reply**”).
8. On November 29, 2019, the Claimant filed a Rejoinder on Hungary’s Request for the Continued Stay of Enforcement, together with Exhibits C-104 through C-106 and Legal Authorities CL-172 and CL-173 (the “**Rejoinder**”).

## **II. THE PARTIES’ ARGUMENTS**

### **A. THE APPLICANT’S POSITION**

#### **(1) The Committee has Power to Stay the Enforcement**

9. Hungary submits that the Committee has the power to stay the enforcement of the Award pursuant to Article 52(5) of the ICSID Convention and Arbitration Rule 54(4) pending its decision on Hungary’s Application for Annulment.<sup>1</sup>
10. Hungary states that Arbitration Rule 54(4) requires an applicant to “specify the circumstances that require the stay of enforcement of the award” but neither Article 52(5) of the ICSID Convention nor Arbitration Rule 54(4) provide any guidance as to the type of circumstances that would allow the Committee to grant a stay of enforcement.<sup>2</sup> Relying on the decision in *Kardassopoulos*, Hungary submits that *ad hoc* committees enjoy considerable discretion in determining whether the circumstances are met.<sup>3</sup>

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<sup>1</sup> Application for Continued Stay, paras. 12-13.

<sup>2</sup> Application for Continued Stay, para. 14.

<sup>3</sup> Application for Continued Stay, para.15, citing *Ioannis Kardassopoulos & Ron Fuchs v Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award, November 12, 2010 (“*Kardassopoulos*”) (RLA-162), para. 29.

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11. Hungary submits that the following factors are generally taken into account by *ad hoc* committees in considering whether to grant a stay of enforcement of an award: (i) whether there is a dilatory motive underlying the application for annulment; (ii) the prospect of prompt enforcement of the award if it is upheld; and (iii) hardship to either party in the event that a stay is ordered (or lifted, as the case may be).<sup>4</sup>
  
12. Further, Hungary submits that, based on publicly available information, *ad hoc* committees have overwhelmingly granted applications made pursuant to Article 52(5) of the ICSID Convention, granting stays of enforcement in 40 proceedings, out of a total of 49 decisions.<sup>5</sup>
  
13. Relying on *Elsamex*, *Pey Casado* and *Enron*, Hungary argues that there is a general practice of granting a stay of enforcement, in some instances “quasi-automatically”, and the Committee should not depart from the standard practice unless there are unusual or exceptional circumstances.<sup>6</sup> Hungary argues that there are no circumstances that would justify an immediate enforcement of the Award in the present case; on the contrary, the circumstances “militate for a stay of enforcement.”<sup>7</sup>

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<sup>4</sup> Application for Continued Stay, para. 16, citing Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2013) (RLA-163), p. 1071; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, March 5, 2009 (“*Sempra*”) (RLA-164), para. 24.

<sup>5</sup> Application for Continued Stay, para. 17, citing ICSID’s website and ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, May 5, 2016 (RLA-165), para. 58.

<sup>6</sup> Application for Continued Stay, paras. 18-20 citing *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on the Termination of the Stay of Enforcement of the Award, March 11, 2014 (“*Elsamex*”) (RLA-166), para. 86; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Republic of Chile’s Application for a Stay of Enforcement of the Award, May 5, 2010 (“*Pey Casado*”) (RLA-167), para. 25; *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, November 30, 2004 (“*Patrick Mitchell*”) (RLA-168), para. 25; *Enron Corporation Poderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Stay of Enforcement of the Award, October 7, 2008 (“*Enron*”) (RLA-169), para. 43; *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, December 28, 2007 (“*Azurix*”) (RLA-170), para. 22; See also Reply, paras. 18 and 30.

<sup>7</sup> Application for Continued Stay, para. 21.

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**(2) The Claimant Has No Automatic Right to Enforcement**

14. In its Reply, Hungary argues that contrary to Sodexo’s assertion, Sodexo has no automatic right to enforcement. In its view, in as much as Sodexo has a right to seek enforcement of the Award, Hungary also has a right to seek that any enforcement of the same be stayed.<sup>8</sup>

**(3) Hungary has Satisfied the Burden of Proof**

15. With respect to Sodexo’s contention that Hungary attempted to “shift the burden of proof,” Hungary contends that it has never argued that the stay of enforcement should be granted automatically in each case.<sup>9</sup> Rather, Hungary argues that ICSID practice is that *ad hoc* committees overwhelmingly grant applications for stay of enforcement absent unusual circumstances. Hungary further contends that, while an applicant is required to specify the circumstances justifying the stay of enforcement, at the same time, the other party is required to substantiate the “positive allegations” for rebutting the applicant’s request.<sup>10</sup>

16. Contrary to the Claimant’s argument, Hungary submits that there is no requirement to identify the circumstances requiring the continuation of the stay with the application for annulment; therefore, its request is not belated.<sup>11</sup> Hungary contends that pursuant to the first sentence of Arbitration Rule 54(2), it did not have to specify the circumstances requiring the continuation of the stay, if the request for the stay of enforcement of the Award was filed with its Application for Annulment.<sup>12</sup> Consequently, Hungary dismisses Sodexo’s contention that it failed to discharge its burden of proof with respect the continuation of the stay of enforcement.<sup>13</sup>

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<sup>8</sup> Reply, paras.10-15.

<sup>9</sup> Reply, para.17.

<sup>10</sup> Reply, para. 19, citing *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Applicant’s Request for a Continued Stay on Enforcement of the Award, April 12, 2017 (“*Standard Chartered Bank*”) (CLA-168), paras. 53-54.

<sup>11</sup> Reply, para. 21.

<sup>12</sup> Reply, paras. 22-23.

<sup>13</sup> Reply, para. 25.

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17. Hungary further rejects Sodexo’s allegation that Hungary failed to meet the standard to establish that its request for the stay of enforcement is warranted.<sup>14</sup> Hungary argues that a majority of past decisions have ordered a stay of enforcement pending a decision on annulment and that these decisions do not suggest that there is a particularly high threshold to be satisfied by applicants.<sup>15</sup> Relying on *Occidental*, Hungary states that there is no reason to deviate from the prevailing practice of granting a stay of enforcement in the present case.<sup>16</sup>
18. Hungary further states that *ad hoc* committees “enjoy broad discretion to assess which criteria may [...] justify a stay of enforcement” on a case-by-case basis and “there is no objective ranking of the criteria in order of relevance.”<sup>17</sup>

**(4) The Circumstances of this Case Justify a Stay of Enforcement of the Award**

19. Hungary argues that the Committee should continue the stay of enforcement for three reasons: (a) it applied for annulment in good faith; (b) the stay of enforcement would not cause Sodexo to suffer irreparable harm; and (c) Sodexo’s bad faith attempt to enforce the Award weighs in favour of the stay of enforcement.

*a. Hungary’s Application for Annulment was in Good Faith*

20. Hungary argues that a number of *ad hoc* committees have considered that “absent any evidence that the application for annulment of the Award is purely dilatory or vexatious, the application for a stay must be considered as justified.”<sup>18</sup>

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<sup>14</sup> Reply, para. 26, referring to Response, Section II(B).

<sup>15</sup> Reply, paras. 26-28.

<sup>16</sup> Reply, para. 30, citing *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award, September 30, 2013 (**RLA-182**), footnote 50.

<sup>17</sup> Reply, para. 34.

<sup>18</sup> Application for Continued Stay, para. 23, citing *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Order No. 1 on Guinea’s Application for Stay of Enforcement of the Award, August 12, 1988 (“*MINE*”) (**RLA-171**), para. 17; *Libananco Holdings Co. Limited v. Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award, May 7, 2012 (“*Libananco*”) (**RLA-172**), paras. 48-49; *Pey Casado*, para. 72. See also *Patrick Mitchell*, para. 26.

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21. Hungary relies on *Libananco* and *Enron* to argue that the standard for establishing the existence of a dilatory or vexatious claim is a stringent one, and that to date, no request for stay of enforcement has been rejected on this basis.<sup>19</sup>
22. Hungary states that it has instituted these annulment proceedings in good faith. In particular, Hungary asserts that the basis of its annulment application is the *Achmea* Decision<sup>20</sup>, which “give[s] rise to a key question of jurisdiction.”<sup>21</sup> Hungary states that it is not asking the Committee to conduct an assessment of the strengths of Hungary’s Application for Annulment as this would be inappropriate at this stage of the proceeding.<sup>22</sup> As a result, not staying enforcement is inappropriate since the Award may be annulled in its entirety<sup>23</sup> and this “potential for annulment of the Award in its entirety is in itself a circumstance that justifies a stay.”<sup>24</sup> Further, Hungary states that in the *Dan Cake* revision proceedings, the tribunal granted Hungary’s request for the continued stay of enforcement on the basis of, among others, that the jurisdiction issue raised by Hungary with respect to the *Achmea* Decision was genuine.<sup>25</sup> Hungary submits that in the present case, the same “genuine” issue of jurisdiction with respect to the *Achmea* Decision exists.<sup>26</sup>
23. Hungary dismisses Sodexo’s suggestion that it invokes the “good faith” of its Application for Annulment as an exclusive circumstance, that would be sufficient, in and of itself, to warrant the order of a stay. According to Hungary, its submission is that its request under

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<sup>19</sup> Application for Continued Stay, paras. 24-26, citing *Libananco*, para. 48; *Enron*, para. 47.

<sup>20</sup> Application for Continued Stay, para. 28, citing *Slovak Republic v. Achmea BV*, Case C-284/16, Judgment of the Court (Grand Chamber), March 6, 2018, EU:C:2018:158 (“*Achmea*”) (RLA-174).

<sup>21</sup> Application for Continued Stay, para. 29.

<sup>22</sup> Application for Continued Stay, para. 29; Reply, paras. 42-43.

<sup>23</sup> Application for Continued Stay, para. 29; Reply, para. 5.

<sup>24</sup> Reply, para. 48.

<sup>25</sup> Reply para. 45, citing *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Applicant’s Request for the Continued Stay of Enforcement of the Award, September 30, 2013 (“*Dan Cake*”) (RLA-184), paras. 56-57.

<sup>26</sup> Reply, para. 46.



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Article 52(2) is made in good faith absent any dilatory conduct, and as a justified exercise of its procedural rights of defence.<sup>27</sup>

24. Furthermore, Hungary states that the rapid briefing schedule agreed to by the Parties suggests absence of dilatory conduct on its part.<sup>28</sup>

***b. Stay of Enforcement Would Not Cause Sodexo to Suffer Irreparable Harm***

25. Hungary argues that because Sodexo is “large and financially sound” and “not at risk of imminent insolvency,” a brief delay in enforcement would not cause Sodexo to suffer irreparable harm.<sup>29</sup> Hungary dismisses Sodexo’s assertion that Sodexo’s legal right to enforcement is not contingent upon its financial standing.<sup>30</sup>
26. Hungary further contends that, in any case, the post-Award interest would compensate for the damages caused by the delay in enforcement.<sup>31</sup> To support this assertion, Hungary relies on *Azurix* which found that “[t]he provision for interest compensates for the delay.”<sup>32</sup> Hungary states that, as was the case in *Azurix*, Sodexo would also not be severely prejudiced by the continued stay of enforcement.<sup>33</sup>
27. In reply to Sodexo’s assertion that there is no risk of non-recoupment by Hungary, since Sodexo is financially sound, Hungary argues that Sodexo’s assertion is unpersuasive.<sup>34</sup> In Hungary’s view, recoupment of sums paid in enforcement would result in unnecessary time, cost and resources being expended.<sup>35</sup> Hungary argues that the tribunal in *Dan Cake* emphasized that this circumstance weighs in favour of the continuation of the stay.<sup>36</sup> Thus,

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<sup>27</sup> Reply, para. 39.

<sup>28</sup> Application for Continued Stay, para. 30; Reply, para. 47.

<sup>29</sup> Application for Continued Stay, paras. 31-33, referring to the 2018 Consolidated Financial Statements of Sodexo (**R-81**); Reply, para. 53.

<sup>30</sup> Reply, para. 50.

<sup>31</sup> Application for Continued Stay, paras. 34-36; Reply, paras. 54-58.

<sup>32</sup> Application for Continued Stay, para. 34, citing *Azurix*, para. 40 (emphasis added by the Applicant).

<sup>33</sup> Application for Continued Stay, para. 35.

<sup>34</sup> Reply, para. 59.

<sup>35</sup> Reply, para. 60.

<sup>36</sup> Reply, para. 60 citing *Dan Cake*, para. 62.

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the Committee should weigh the potential consequences and decide in favour of continuing the stay.<sup>37</sup>

*c. Sodexo’s Bad Faith Attempt to Enforce the Award Weighs in Favour of the Stay of Enforcement*

28. Hungary states that Sodexo initiated recognition and enforcement proceedings of the Award before the Budapest Capital Regional Court of Hungary (the “**Court**”) in bad faith.
29. First, Hungary alleges that it is public knowledge that it has filed applications for annulment with respect to each of the ICSID awards that have been rendered against it in intra-EU arbitrations in recent months on the basis of the *Achmea* Decision. Further, Hungary declared on January 16, 2019 that it would seek to set aside inter-EU investment arbitration awards.<sup>38</sup> For that reason, Hungary contends that Sodexo could have foreseen that Hungary would challenge the Award and secure a provisional stay of enforcement.<sup>39</sup>
30. Second, Hungary asserts that Sodexo wrongly listed Hungary’s representative for purposes of the enforcement proceedings and failed to duly notify it of the existence of a dispute.<sup>40</sup> Hungary states that Sodexo was in contact with the correct representative throughout the arbitration proceedings, including the request for voluntary enforcement of the Award, but “inexplicably sought to serve [enforcement] proceedings on a different arm of the State.”<sup>41</sup> Hungary dismisses Sodexo’s assertion that it was not in its interest to name the wrong representative in the enforcement proceedings. In Hungary’s view, Sodexo could have re-filed the application identifying the correct representative. Hungary notes that Sodexo

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<sup>37</sup> Reply, para. 61.

<sup>38</sup> Application for Continued Stay, para. 38, referring to Declaration of the Representative of the Government of Hungary on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, January 16, 2019 (“**Hungary’s Declaration**”) (RLA-176), p. 2, undertaking no. 2.

<sup>39</sup> Application for Continued Stay, para. 39.

<sup>40</sup> Application for Continued Stay, paras. 41-43; Reply, 66.

<sup>41</sup> Application for Continued Stay, paras. 41-43; Reply, paras. 66-67.

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chose not to notify Hungary’s legal counsel in these proceedings, DLA Piper, of the filing.<sup>42</sup>

31. Hungary states that under its domestic law, the Court was bound to rule on Sodexo’s application for enforcement dated May 10, 2019 within 15 days, *i.e.*, on May 27, 2019, a day before the expiration of the time-period for filing an application for annulment under the ICSID Convention.<sup>43</sup> Hungary therefore argues that Sodexo’s attempt to enforce the Award “in anticipation of and in parallel with the annulment proceedings” indicates bad faith on the part of Sodexo, weighing in favour of granting a continued stay of enforcement.<sup>44</sup>
32. Third, Hungary argues that Sodexo’s continued enforcement efforts by filing an appeal against the first instance decision of the Court dated July 11, 2019, which rejected Sodexo’s enforcement application, are a clear breach of the provisional stay.<sup>45</sup> Hungary rejects Sodexo’s contention that it had no other choice than to appeal the Court’s decision to preserve its rights, arguing that the Court’s decision has no *res judicata* effect.<sup>46</sup> Hungary argues that Sodexo should have known that its subsequent attempt to suspend the appeal would be unsuccessful because “there is no possibility, under Hungarian law, for the court competent to decide on ordering enforcement to suspend the proceedings before it.”<sup>47</sup> Hungary also dismisses Sodexo’s assertion that the enforcement proceedings would require that the stay is lifted.

**(5) Provision of Security as a Condition of the Stay is unwarranted**

33. In response to Sodexo’s request for security in the form of a bank guarantee or the posting of an amount due under the Award in an escrow account if the continued stay is granted,

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<sup>42</sup> Reply, para. 68.

<sup>43</sup> Application for Continued Stay, para. 45, referring to Claimant’s letter to the *ad hoc* Committee, August 21, 2019 (R-82), p. 1.

<sup>44</sup> Application for Continued Stay, para. 46; Reply, paras. 62, 65.

<sup>45</sup> Reply, para. 70.

<sup>46</sup> Reply, para. 71.

<sup>47</sup> Reply, paras. 72-73.

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Hungary argues that: (i) the provision of security is not supported by the ICSID Convention; and (ii) there are no compelling reasons to justify the posting of any form of security.

34. First, Hungary states that neither Articles 51(4) nor 52(5) of the ICSID Convention provide for the posting of any form of security or guarantee of payment of an award as a condition for the continued stay of enforcement of an award.<sup>48</sup> Relying on the *Enron* and *Azurix ad hoc* committee decisions, Hungary contends that there is no entitlement to security for a party objecting to a stay of enforcement.<sup>49</sup> Moreover, Hungary observes that *ad hoc* committees refrain from requiring any conditions for continuation of a stay absent any compelling reasons such as, history of non-payment of final ICSID awards by the State or a failure to put in place domestic enforcement mechanisms.<sup>50</sup> Hungary asserts that in order to balance the rights of the investor and the State, the provision of security should not be ordered.<sup>51</sup>
35. Second, Hungary contends that, contrary to Sodexo’s assertions, security is not increasingly granted as a condition of the continued stay.<sup>52</sup> Further, Hungary asserts that Sodexo’s arguments that the granting of a security to compensate for delayed enforcement is unsubstantiated.<sup>53</sup> Hungary rejects Sodexo’s allegation that Hungary “most probably will not comply with the Award nor with its enforcement obligations under the ICSID Convention” as being unsubstantiated.<sup>54</sup> Hungary explains that it did not comply with the Award because it intended to file an application for annulment. Further, Hungary dismisses Sodexo’s characterization of Hungary’s Declaration<sup>55</sup> which stated that Hungary “will

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<sup>48</sup> Reply, para. 82.

<sup>49</sup> Reply, paras. 83-84, citing *Enron*, para. 44 and *Azurix*, para. 35.

<sup>50</sup> Reply, para. 85, citing *Carnegie Minerals (Gambia) Limited v. Republic of The Gambia*, ICSID Case No. ARB/09/19, Decision on the Gambia’s Request for a Continued Stay of Enforcement of the Award, October 18, 2018 (“*Carnegie*”) (RLA-191), para. 51.

<sup>51</sup> Reply, paras. 86-90.

<sup>52</sup> Reply, para. 92.

<sup>53</sup> Reply, para. 93.

<sup>54</sup> Reply, para. 94.

<sup>55</sup> Hungary’s Declaration of January 16, 2019.

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request the courts” to set aside the awards in proceedings relating to intra-EU BITs, but Hungary notes that the Declaration does not “contain a declaration by Hungary that it will not comply with this Award if the Award is upheld.”<sup>56</sup>

36. According to Hungary, the Court rightly rejected Sodexo’s application for the enforcement of the Award because the application was premature in light of the provisional stay of enforcement granted in the annulment proceedings.<sup>57</sup> Therefore, Hungary submits that Sodexo’s conclusion that the Hungarian judicial system was incapable of enforcing ICSID awards is baseless.<sup>58</sup> Hungary contends that Sodexo failed to disprove the existence of an effective domestic enforcement procedure in compliance with Article 54 of the ICSID Convention, specifically that: (i) Hungary failed to enact any specific laws that implement Article 54 of the ICSID Convention; and (ii) Hungary’s internal laws fail to give effect to Article 54 of the ICSID Convention.<sup>59</sup>
37. As to Sodexo’s reliance on the *Sempra* case, Hungary states that the circumstances in the present case are distinct.<sup>60</sup> In *Sempra*, Argentina was ordered to place a portion of the amount granted under the award in escrow because of the State’s history of non-compliance with ICSID awards. Hungary asserts that its attitude towards ICSID awards cannot be compared to the conduct of the State in *Sempra* since Hungary has a track record of paying ICSID awards.<sup>61</sup> In Hungary’s view, Sodexo’s assertion that Hungary “has not and most probably will not comply with its enforcement obligations under the ICSID Convention is unacceptable.”<sup>62</sup>
38. In conclusion, Hungary submits that Sodexo has not met the high threshold under the ICSID Convention for posting of security as a condition for a stay. In particular, Hungary

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<sup>56</sup> Reply, paras. 92-94, 96-100.

<sup>57</sup> Reply, para. 103.

<sup>58</sup> Reply, paras. 103-105.

<sup>59</sup> Reply, para. 106.

<sup>60</sup> Reply, para. 107, referring to Response, paras. 102-105, citing *Sempra*, paras. 102-105.

<sup>61</sup> Reply, para. 108.

<sup>62</sup> Reply, para. 108, referring to Response, para. 88.

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asserts that Sodexo has not demonstrated: (i) a history of non-payment by Hungary of final ICSID Awards, or the absence of a proper mechanism in Hungary to ensure the implementation of ICSID awards; or (ii) any other exceptional circumstance justifying an order of security.<sup>63</sup> In reliance on *Azurix*, Hungary submits that under the circumstances, a request for the posting of security as a condition of the stay should be rejected and the stay of enforcement should be ordered unconditionally.<sup>64</sup>

39. Finally, in its Reply, Hungary reserved its right to seek leave from the Committee to respond to the Rejoinder within the limited subject-matter of the posting of security.<sup>65</sup> Hungary states that it should be afforded the opportunity to have the “last word” on this issue which was first raised in the Response.
40. For the foregoing reasons, Hungary requests the continuation of the stay of enforcement of the Award until a decision on annulment is rendered and for Sodexo to bear all costs borne by Hungary “in relation to the Application for Annulment, including the costs of presenting and defending this application.”<sup>66</sup>

**B. THE CLAIMANT’S POSITION**

41. Sodexo’s arguments in response to Hungary’s application for the continuation of the stay of enforcement are three-fold: (i) Hungary failed to establish the circumstances requiring a stay of enforcement; (ii) the provisional stay should be terminated as there is a high risk of future non-compliance of the Award by Hungary; and (iii) should the Committee grant a continued stay, such stay “should necessarily be conditioned upon the delivery of an international first demand bank guarantee by Hungary or, alternatively, by the placement of the amounts due by Hungary under the Award on escrow.”<sup>67</sup>

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<sup>63</sup> Reply, para. 109.

<sup>64</sup> Reply, paras. 110-111, citing *Azurix*, para. 39.

<sup>65</sup> Reply, para. 112.

<sup>66</sup> Application for Continued Stay, para. 47; Reply, para. 114.

<sup>67</sup> Response, paras. 9-10.

**(1) Hungary Failed to Establish the Circumstances Requiring a Stay of Enforcement**

42. Sodexo argues that: (a) Hungary’s attempts to shift its burden of proof as regards the continued stay to Sodexo fails; (b) Hungary’s attempts to lower the applicable standard of proof also fails; and (c) none of the circumstances put forward by Hungary are relevant with respect to the continuation of the stay.

*a. Hungary’s attempt to shift the burden of proof onto Sodexo is to no avail*

43. At the outset, Sodexo agrees with Hungary’s submission that the Committee has power to order the continuation of the stay of enforcement pursuant to Article 52(5) of the ICSID Convention.<sup>68</sup> Sodexo also does not contest Hungary’s assertion that Rule 54(4) of the Arbitration Rules requires that a party applying for annulment of an award also requests a stay of its enforcement and that such a party “shall specify the circumstances that require the stay.”<sup>69</sup> According to Sodexo, a stay of enforcement will only be granted if an applicant has established that the “circumstances so require” the stay and that absent such circumstances, enforcement of an award should not be stayed.<sup>70</sup>

44. First, Sodexo asserts that granting of a stay of enforcement is in no way automatic. Sodexo dismisses Hungary’s assertion that the granting of the stay of enforcement is “quasi-automatic,” and rejects Hungary’s reliance on *Elsamex*, *Pey Casado* and *Enron*.<sup>71</sup> According to Sodexo, none of these committees stated that the stay of enforcement of an award was automatic.<sup>72</sup> Sodexo submits that the correct approach was stated by the *ad hoc* committee in *Total* which held in relevant part, that “[...]the stay of enforcement in the ICSID system is far from automatic. The fact that statistically *ad hoc* committees may have granted the stay in the vast majority of cases does not mean that the stay is automatic.”<sup>73</sup>

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<sup>68</sup> Response, para. 12.

<sup>69</sup> Response, para. 13.

<sup>70</sup> Response, para. 14.

<sup>71</sup> Response, para. 16, referring to Application for Continued Stay, paras. 18-19.

<sup>72</sup> Response, para. 17.

<sup>73</sup> Response, para. 18, citing *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Stay of Enforcement of the Award, December 4, 2014 (“*Total*”) (CL-159) (emphasis added by the Claimant), para. 76.

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Therefore, Sodexo relies on the finding of the Committee in *Churchill* which found that, “[...]whatever the practice of granting stays might be in the Applicants’ eyes, a stay must remain exceptional.”<sup>74</sup>

45. Although Sodexo does not contest that there was a trend for granting stays in 2016, it argues that this is no longer the case based on the recent decisions that recalled the “exceptional” nature of a stay.<sup>75</sup>
46. Second, Sodexo contends that by attempting to establish that a stay of enforcement is “quasi-automatic,” Hungary shifts the burden of proof to Sodexo. Sodexo contends that it is under no obligation to demonstrate that the continued stay should not be granted by establishing circumstances which would justify the immediate enforcement of the Award.<sup>76</sup> To support that contention, Sodexo argues that numerous *ad hoc* committees (specifically citing *Pezold*, *OI European Group* and *Burlington*) have held that it is for the requesting party to establish that there are circumstances that require continuation of the stay.<sup>77</sup> According to Sodexo, Hungary failed to put forward any of the exceptional circumstances to compel the continuation of the provisional stay of enforcement even though the burden lies clearly with it to establish such exceptional circumstances.<sup>78</sup>

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<sup>74</sup> Response, para. 19, citing *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and 12/40, Decision on the Request for Continued Stay of Enforcement of the Award, June 27, 2017 (“*Churchill*”) (CL-160), para. 34; Rejoinder, para. 21.

<sup>75</sup> Rejoinder, para. 19.

<sup>76</sup> Response, para. 20, referring to Application for Continued Stay, para. 21.

<sup>77</sup> Response, paras. 22-24, citing *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Stay of Enforcement of the Award, April 24, 2017 (“*Pezold*”) (CL-162), para. 80; *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Stay of Enforcement of the Award, April 4, 2016 (“*OI European Group*”) (CL-163), para. 94; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Stay of Enforcement of the Award, August 31, 2017 (“*Burlington*”) (CL-161), para. 85.

<sup>78</sup> Response, paras. 20-24; Rejoinder, paras. 23, 33.



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***b. Hungary’s Attempt to Lower the Applicable Standard of Proof is to No Avail***

47. Sodexo contends that Hungary attempted to lower the applicable standard of proof by arguing merely that the stay is “justified.”<sup>79</sup> According to Sodexo, the wording of Article 52(5) of the ICSID Convention and Rule 54(4) of the Arbitration Rules is clear that the standard to be used in determining whether to continue a stay is: whether the continuation itself is “required.” Sodexo notes that Hungary has not argued in its submissions that the continuation is required.<sup>80</sup> The Claimant further argues that the *ad hoc* committees in *SGS* and *Border* established that the stay shall only be continued if the circumstances so “require” and that less categorical words such as “justified” are not used in the ICSID Convention.<sup>81</sup>

***c. None of the Circumstances Presented by Hungary Justify a Continued Stay of Enforcement***

48. Sodexo contends that none of the three circumstances identified by Hungary in its submissions justify, let alone require, a continued stay of enforcement.<sup>82</sup> In response to Hungary’s arguments, Sodexo submits that: (i) the fact that Hungary’s Application for Annulment is made in good faith does not warrant the granting of a continued stay of enforcement; (ii) the grounds and merits of Hungary’s Application for Annulment are irrelevant with respect to the stay; (iii) Sodexo’s financial standing is irrelevant; (iv) whether or not Sodexo was granted post-Award interest is irrelevant; and (v) Sodexo’s attempt to enforce the Award cannot weigh in favour of the stay of enforcement, but rather necessarily requires that it be lifted.

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<sup>79</sup> Response, para. 25, referring to Application for Continued Stay, para. 22; Rejoinder, para. 28.

<sup>80</sup> Response, para. 28, referring to Application for Continued Stay, para. 22.

<sup>81</sup> Response, paras. 26-27, citing *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Paraguay’s Request for the Continued Stay of Enforcement of the Award, March 22, 2013 (“*SGS*”) (CL-158), para. 87; *Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Decision on Stay of Enforcement of the Award, April 24, 2017 (“*Border*”) (CL-165), para. 78.

<sup>82</sup> See paragraphs 19-32 above.

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49. First, Sodexo argues that Hungary’s contention that the application was made in good faith does not warrant a grant of stay. Sodexo rejects Hungary’s submission that absent any evidence that the application for annulment of the Award is purely dilatory or vexatious, the application for a stay must be considered as justified. In Sodexo’s view, Hungary’s argument is wrong because it would mean that stays of enforcement would be automatically granted in all annulment proceedings which are not purely dilatory or vexatious, which is not the case. Further, it would require the responding party to establish that the application for annulment was purely dilatory or vexatious for the stay not to be granted, which shifts the burden of proof.<sup>83</sup>
50. Sodexo rejects Hungary’s reliance on *Patrick Mitchell*, *Libananco* and *Enron* and argues that none of these cases support Hungary’s position.<sup>84</sup> According to Sodexo, none of these cases indicate that “the application for a stay of enforcement is justified, whenever the application for annulment was neither dilatory nor vexatious.”<sup>85</sup> Sodexo states that several *ad hoc* committees such as *SGS* have explicitly held the contrary position.<sup>86</sup> Sodexo therefore argues that Hungary cannot benefit from a stay merely because it acted in good faith; this is the expected minimum standard of behaviour.<sup>87</sup> Further, Sodexo underscores that it has a greater interest in an expeditious annulment procedure and states that Hungary waited for 119 days before applying for annulment.<sup>88</sup>
51. Second, Sodexo asserts that the grounds and merits of Hungary’s Application for Annulment are irrelevant with respect to the stay of enforcement. Sodexo contends that the continued stay of enforcement should not be considered as justified merely because the Application for Annulment concerns a “key question of jurisdiction.” Sodexo argues that a question of jurisdiction that allegedly leads to the annulment of the Award “in its entirety”

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<sup>83</sup> Response, para. 33.

<sup>84</sup> Response, para. 34.

<sup>85</sup> Response, para. 34.

<sup>86</sup> Response, para. 35, citing *SGS*, para. 94.

<sup>87</sup> Response, paras. 34-36; Rejoinder, paras. 35, 38.

<sup>88</sup> Response, para. 37.

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- should not be “a relevant circumstance to take into account when deciding on the continued stay.”<sup>89</sup> Sodexo states that the *ad hoc* committees in other cases including *Tenaris* and *Kardassopoulos*, unanimously adopted a position of not looking into the grounds of annulment or the strength of the arguments in support of the applications for annulment.<sup>90</sup>
52. Third, Sodexo states that its financial standing is irrelevant with respect to the stay of enforcement. Sodexo argues that its right to enforcement is guaranteed by the ICSID Convention and is “not contingent upon its financial standing.”<sup>91</sup> Sodexo argues that, as held by the *ad hoc* committee in *Patrick Mitchell*, Sodexo’s financial standing should not influence the Committee’s reasoning as regards the stay of enforcement, as it is a contingent issue which falls “outside the context of the present proceedings.”<sup>92</sup> On the other hand, Sodexo submits that any delay in the enforcement would cause harm to it.<sup>93</sup> In response to Hungary’s argument that Sodexo relied on the minority position adopted by three *ad hoc* committees to argue that post-Award interest should not be deemed to compensate Sodexo for the delay, Sodexo argues that a recent decision in *Infrastructure Services* supports its position. In that case, the Committee stated that “the payment of interest should not be considered a sufficient remedy for any prejudice caused by a delay in the Award’s enforcement.”<sup>94</sup>
53. Sodexo contends that Hungary will not face a risk of non-recoupment if the Award is annulled after enforcement since Sodexo is a “large and financially sound group of companies.” Further, according to Sodexo, time, costs and resources which Hungary would spend for recoupment of the amounts paid to Sodexo should not be taken into account when

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<sup>89</sup> Response, paras. 40-45; Rejoinder, para. 42.

<sup>90</sup> Response, para. 42, citing *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela I*, ICSID Case No. ARB/11/26, Decision on the Request to Maintain the Stay of Enforcement of the Award, March 24, 2017 (“*Tenaris*”) (CL-166), para. 78; *Kardassopoulos*, para. 9.

<sup>91</sup> Response, para. 47.

<sup>92</sup> Response, paras. 48-49, citing *Patrick Mitchell*, para. 25.

<sup>93</sup> Rejoinder, paras. 48-49.

<sup>94</sup> Rejoinder, para. 53, citing *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, October 21, 2019 (“*Infrastructure Services*”) (CL-0172), para. 82 (emphasis added by the Claimant).

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deciding on the continuation of the provisional stay; especially in light of the fact that Sodexo presented alternatives – the delivery of an unconditional and irrevocable first demand bank guarantee by Hungary, or the placement of the sums due to Sodexo on escrow account.<sup>95</sup>

54. Fourth, Sodexo states that the availability of post-Award interest is irrelevant with respect to the stay of enforcement. According to Sodexo, Hungary’s argument ignores the fundamental principle that “despite an application for annulment, awards must be enforced.”<sup>96</sup> Sodexo submits that the post-Award interest will not compensate the harm it has suffered due to the continued stay and the difficulties in enforcement Sodexo will face before the Hungarian courts.<sup>97</sup>
55. Fifth, Sodexo argues that its legitimate exercise of its right to enforcement does not weigh in favour of the stay but rather requires that the stay be lifted. Sodexo argues that its attempt to enforce the Award was not done in bad faith nor in parallel with the annulment proceedings as alleged by Hungary.<sup>98</sup>
56. Sodexo states that it initiated enforcement proceedings due to the lack of response by Hungary to Sodexo’s request to comply with the Award.<sup>99</sup> Sodexo further asserts that Hungary’s allegation that it listed the wrong state representative is baseless and whether or not Sodexo served the wrong representative is still being debated in the Hungarian court.<sup>100</sup> Sodexo argues that listing a wrong representative would lengthen the proceedings or lead to the dismissal of its enforcement application altogether, thus would be of no benefit to it. In addition, Hungary’s assertion that, as a result of listing the wrong representative, Hungary was not put on notice of the enforcement proceedings is irrelevant, since the proceedings are conducted *ex parte*. Sodexo asserts that Hungary was notified of the

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<sup>95</sup> Response, para. 50; Rejoinder, paras. 55-67.

<sup>96</sup> Response, para. 52, citing *SGS*, para. 85.

<sup>97</sup> Response, paras. 51-54; Rejoinder, paras. 49-54.

<sup>98</sup> Response, para. 57.

<sup>99</sup> Response, para. 60; Rejoinder, paras. 69-72.

<sup>100</sup> Response, para. 65.

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decision of the Court and these events do not in any way indicate bad faith on the part of Sodexo.<sup>101</sup>

57. Sodexo also states that the enforcement proceedings began prior to Hungary’s Application for Annulment; thus, the two proceedings did not occur in parallel to each other.<sup>102</sup> Sodexo states that it applied for the suspension of the enforcement proceedings pursuant to the provisional stay of enforcement granted by the Secretary-General. However, Sodexo states that it “had no other choice than to file an appeal” of the Court Decision that dismissed both Sodexo’s requests for enforcement and for suspension of the enforcement proceedings. Sodexo informed the Committee of these proceedings.<sup>103</sup>
58. Based on the above, Sodexo requests the Committee to reject all the arguments asserted by Hungary in support of the continued stay of enforcement and “to declare that Hungary has simply failed to establish that the present circumstances requires a stay of enforcement.”<sup>104</sup>

**(2) The Risk of Future Non-Compliance of the Award Warrants the Termination of the Provisional Stay**

59. Sodexo argues that the provisional stay should be terminated because there is a higher risk of non-compliance by Hungary.<sup>105</sup> Sodexo states that compliance should play a decisive role in the Committee’s conclusion.<sup>106</sup> Hungary publicly declared that it will request the courts “to set awards aside or not to enforce them” following the *Achmea* Decision and this establishes a high-risk of non-compliance with the Award.<sup>107</sup> Sodexo points out that Hungary refused to comply with the Award pursuant to Sodexo’s letter demanding payment after the Award was rendered.<sup>108</sup>

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<sup>101</sup> Response, paras. 64-65; Rejoinder, paras. 73-78.

<sup>102</sup> Response, para. 67; Rejoinder, para. 81.

<sup>103</sup> Response, paras. 66-67.

<sup>104</sup> Response, para. 68.

<sup>105</sup> Response, para. 70; Rejoinder, para. 91.

<sup>106</sup> Response, para. 71.

<sup>107</sup> Response, para. 75; Rejoinder, paras. 95-98.

<sup>108</sup> Response, para. 77; Rejoinder, para. 97.

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60. Sodexo also states that the decision of the Court of September 24, 2019 finding that the Award “impose[d] no obligation” on Hungary,<sup>109</sup> among other findings of the Court, demonstrate that there is a high risk of non-compliance by Hungary. Specifically, Sodexo points out that the order of the Court which drew a distinction between “Hungary” and “Hungarian State”, found that enforcement proceedings can be carried out only against the Hungarian State.<sup>110</sup> According to Sodexo, this interpretation effectively means that “no ICSID Award can ever be enforced against Hungary in its own country.”<sup>111</sup> According to Sodexo, it further proves that there is a high risk of non-compliance by Hungary.<sup>112</sup>

**(3) Continued Stay Should be Conditioned on the Provision of a Bank Guarantee or the Placement of Amounts Due under the Award in an Escrow Account**

61. Sodexo submits that in any event, should the Committee grant the stay – given the Court’s attitude of complicating and delaying enforcement and the high risk of non-compliance on the part of Hungary – the continued stay be conditioned upon the delivery of an international first demand bank guarantee by Hungary.<sup>113</sup> Sodexo argues that *ad hoc* committees consider ordering the provision of a bank guarantee when there are legitimate fears of non-enforcement.<sup>114</sup> Sodexo contends that Hungary has demonstrated that it “will not comply with the Award nor with its enforcement obligations under the ICSID Convention.”<sup>115</sup> Sodexo states that *ad hoc* committees have power to condition continued stays upon the posting of a security and have done so in “12 out of a total of 40 cases”.<sup>116</sup>

62. Sodexo argues that requiring security also balances the Parties’ interests.<sup>117</sup> Sodexo states that ordering a security would “(i) compensate Sodexo for the additional delay of

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<sup>109</sup> Response, para. 80; Rejoinder, para. 101.

<sup>110</sup> Response, para. 80; Rejoinder, para. 104.

<sup>111</sup> Response, para. 80; Rejoinder, para. 108.

<sup>112</sup> Response, paras. 79-81; Rejoinder, paras. 100-108.

<sup>113</sup> Response, para. 88; Rejoinder, paras. 116-119.

<sup>114</sup> Response, para. 87.

<sup>115</sup> Response, para. 88.

<sup>116</sup> Response, paras. 83-88; Rejoinder, paras. 113-115.

<sup>117</sup> Rejoinder, para. 120.

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- enforcement of the Award; (ii) dissipate Hungary’s concerns related to the potential recoupment of sums paid to Sodexo and, therefore, benefit Hungary in the event that the Award were annulled; and (iii) prevent both Parties from incurring unnecessary time, costs and resources in enforcement proceedings during the present annulment phase.”<sup>118</sup>
63. Sodexo also proposes that the continued stay be automatically terminated if the Parties cannot reach an agreement on the particular terms and conditions of the first demand bank guarantee within 30 days.<sup>119</sup>
64. Alternatively, Sodexo submits that in the event that the stay of enforcement is continued without being conditional upon the delivery of a first demand international bank guarantee, for the same reasons, Hungary should be ordered “to place the full amounts due under the Award (including post-Award interest) in an escrow account with a first-tier reputable international bank (acting as escrow agent) with no principal establishment in Hungary.”<sup>120</sup> Again, Sodexo proposes that the continued stay should be automatically terminated if the Parties cannot reach an escrow agreement within 30 days.<sup>121</sup>
65. In summary, Sodexo requests that the Committee reject Hungary’s application for the continued stay of enforcement of the Award; terminate the provisional stay of enforcement of the Award; and order Hungary to reimburse all costs incurred in relation to the stay of enforcement.<sup>122</sup> In the event that the Committee were to grant the continuation of the stay of enforcement of the Award, Sodexo requests the Committee to order Hungary to provide “an unconditional and irrevocable first demand bank guarantee” or to order that “the full amount due under the Award (including post-Award interest) be placed by Hungary in an escrow account with a first-tier reputable international bank” and also to order Hungary to reimburse all costs incurred in relation to the stay of enforcement.<sup>123</sup>

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<sup>118</sup> Rejoinder, para. 130.

<sup>119</sup> Response, para. 91.

<sup>120</sup> Response, para. 92; Rejoinder, paras. 110, 130.

<sup>121</sup> Response, para. 95; Rejoinder, para. 138.

<sup>122</sup> Response, para. 96.

<sup>123</sup> Response, paras. 96-97.

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66. Sodexo opposes Hungary’s request that it should be allowed to file a further response to Sodexo’s rejoinder with regard to the issue of security. Sodexo asserts that this issue was not novel to Hungary and that Hungary had an opportunity to address it in its Reply submission but failed to do so. Sodexo therefore requests that the Committee deny Hungary the possibility of seeking leave to file a reply to the Rejoinder with respect to the issue of the posting of security.<sup>124</sup>

### III. THE COMMITTEE’S ANALYSIS

67. The Committee will first address the legal standard applicable to an application for a continued stay of enforcement; and thereafter consider whether there are circumstances in this particular case that require the continuation of the stay of enforcement.

#### A. THE APPLICABLE LEGAL STANDARD

68. Article 52(5) of the ICSID Convention establishes the power of the Committee to grant or reject Hungary’s request for the continued stay of enforcement of the Award:

*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.*

69. Rule 54 of the Arbitration Rules specifies the procedure as follows:

*(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*

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<sup>124</sup> Rejoinder, paras. 139-143.



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*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.*

*(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).*

*(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) [for a stay or its modification or termination] 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.*

*(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.*

70. It follows from Article 52(5) of the ICSID Convention that the Committee’s decision on the continuation of a stay is discretionary (“the Committee *may* [...]”). In addition, according to the same provision the Committee’s discretionary decision must be based on its appreciation of the specific circumstances of each case (“[...] if it considers that the circumstances so require [...]”). Article 52(5) of the ICSID Convention does not specify the relevant circumstances that the Committee shall consider, a further indication of the Committee’s discretion in this respect.<sup>125</sup>

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<sup>125</sup> See *Burlington*, para. 70; *Kardassopoulos*, para 29.

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71. Hungary concurs that this is the proper legal standard under the Convention<sup>126</sup> – a position that the Claimant does not contest.<sup>127</sup> Also, the Parties are in agreement that Arbitration Rule 54(4) requires that a party requesting a stay of enforcement “shall specify the circumstances that require the stay.”<sup>128</sup>
72. Nonetheless, the Parties disagree with respect to what should be the starting point for the Committee in considering whether or not to grant the continuation of the stay, an issue that is closely linked to the question of burden of proof in satisfying the conditions for the continuation or lifting of the stay. In particular, the Parties have presented opposing positions regarding the right to enforcement of the Award in relation to the procedural rights of the other party to seek annulment of the Award and to request a continuation of the stay of enforcement.<sup>129</sup>
73. Article 53(1) of the ICSID Convention establishes that an award is binding and immediately enforceable, “except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.” Thus, the ICSID Convention appears to attempt to strike a balance between, on the one hand, the binding nature and enforceability of ICSID awards and, on the other hand, the procedural right of the parties to request an annulment in accordance with Article 52 of the ICSID Convention, including the right to request a stay of enforcement of the award. As stated by the committee in *Standard Chartered Bank*, “the obligation that each State assumed on ratification of the Convention, under Article 53, to comply with awards against it is particularly important. This obligation is as important as the right to pursue annulment under Article 52 of the ICSID Convention. These two articles are linked together.”<sup>130</sup>

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<sup>126</sup> Application for Continued Stay, paras. 12-15; Reply, para. 34.

<sup>127</sup> Response, para. 12.

<sup>128</sup> See Application for Continued Stay, para. 14 and Response, para. 14.

<sup>129</sup> See Reply, para 15: “[...]as much Claimant has a right to seek enforcement of the Award, Hungary has a right to seek that any enforcement be stayed [...]”

<sup>130</sup> *Standard Chartered Bank*, para. 84.

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74. In addition, the Parties have argued extensively whether granting a request for the continuation of a stay of enforcement is “automatic” or “quasi-automatic” or if it should be considered rather an exceptional remedy within the ICSID Convention structure.
75. Hungary has used the expression “quasi-automatic” in reference to what in its view is a majority practice by *ad hoc* committees in granting the stay. Hungary clarified in its Reply that the use of that expression was in reference to the practice of *ad hoc* committees in actually granting the stay.<sup>131</sup> Sodexo has contested this position as a past trend, citing decisions that in its opinion support a different current practice.<sup>132</sup> In the Committee’s view, in as much as previous decisions by *ad hoc* committees are useful to illustrate its analysis, this use is limited since, as previously mentioned, granting the continuation of the stay lies within the Committee’s discretion and is circumstance-based.
76. In the Committee’s view, it is now well-accepted that the continuation of a stay is not automatic and that there exists no presumption in favour of a stay of enforcement.<sup>133</sup> Moreover, the Committee agrees with those committees that have confirmed that the continuation of the stay remains the exception to the immediate enforceability of ICSID awards.<sup>134</sup>
77. The Parties have dedicated several paragraphs of their written submissions to the question of who bears the burden of proof with respect to a request for a continuation of the stay of enforcement. In this respect the Committee notes that a number of *ad hoc* committees have interpreted Article 52(5) to mean that the burden of establishing circumstances that require the stay of enforcement lies with the party seeking the continuation of the stay.<sup>135</sup> Some

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<sup>131</sup> Reply, para. 28.

<sup>132</sup> Rejoinder, paras. 29-32.

<sup>133</sup> See *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/11, Decision on the Stay of Enforcement of the Award, February 22, 2018 (“*Karkey*”) (CL-0173) and the *Standard Chartered Bank* decision. See also *Sempra*, para. 27. In paragraph 17 of its Reply, Hungary clarified its position stating that “Claimant’s attempt to distort Hungary’s submission is misplaced. For the sake of clarity, Hungary has never argued that a stay of enforcement should be granted ‘*automatically*’ in each case an applicant requests it.”

<sup>134</sup> *Kardassopoulos*, para. 26; *Burlington*, para. 73; *Churchill*, para. 34.

<sup>135</sup> *Burlington*, para. 75; *OI European Group*, para. 94.

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committees have found that it is part of the committee’s discretion to establish the existence of such circumstances.<sup>136</sup>

78. In this respect, the Committee recalls that Rule 54(4) of the Arbitration Rules instructs the party that makes a request “pursuant to paragraphs [54](1), (2) (second sentence) or (3)” to “specify the circumstances that require the stay[...].” According to the committee in *Carnegie*, “[...] a request to stay enforcement is like any other request before it. A party making the request must bear the burden of establishing the basis for the request.”<sup>137</sup> Consequently, the Committee is of the view that as the moving party, Hungary has the burden of proof, albeit that Sodexo should substantiate the positive allegations it relies on for rebutting Hungary’s position.

**B. ARE THERE CIRCUMSTANCES THAT REQUIRE THE CONTINUATION OF THE STAY OF ENFORCEMENT?**

79. As previously mentioned, Hungary is in agreement that the party seeking the continuation of the stay of enforcement shall specify the circumstances that satisfy such a request, and that the Committee shall use its discretionary power to consider these circumstances in order to determine whether a continuation of the stay of enforcement should be granted.<sup>138</sup> Hungary’s arguments in support of its request for the continuation of the stay of enforcement are three-fold: (i) Hungary applied for annulment in good faith; (ii) the stay of enforcement would not cause Sodexo to suffer irreparable harm; and (iii) Sodexo’s bad faith attempt to enforce the Award weighs in favour of the stay of enforcement.<sup>139</sup>

**(1) The Good Faith and Non-dilatory Nature of the Application**

80. The Committee agrees with Hungary that the basis for a finding of the existence of a dilatory or vexatious request for annulment is a stringent one. For such finding, a high threshold must be met, such as that the application for annulment has a manifestly abusive

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<sup>136</sup> *Standard Chartered Bank*, para. 53.

<sup>137</sup> *Carnegie*, para. 42; See also *Karkey*, para. 103.

<sup>138</sup> See Application for Continued Stay, para. 14; Response, para. 13.

<sup>139</sup> Application for Continued Stay, para. 22.

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character or was brought without any basis under the ICSID Convention. The Committee is not aware of any decision that has rejected a request for a stay based on this circumstance, which reflects its high threshold. The Committee also notes that rather than forming a requirement that must be demonstrated positively, the bad faith or dilatory purpose of an application for annulment may, if demonstrated to a committee's satisfaction, serve to rebut a request for a stay.

81. In this respect, Sodexo has not argued that Hungary's Application for Annulment is either in bad faith or has a dilatory purpose. Further, the Committee sees no indication that Hungary's Application for Annulment does not correspond to the legitimate exercise of its procedural rights under the Convention, which may be presumed to be exercised in good faith.
82. Nevertheless, the Committee is not of the view that, absent any evidence that an application for annulment is purely dilatory or vexatious, the application for a stay of enforcement must be granted. The Committee shares the position of the committee in *OI European Group* which stated that, "the mere fact that the application is not dilatory is not sufficient to grant the extension of the stay."<sup>140</sup> Furthermore, as Sodexo contends, to sustain such a position would mean that the stay of enforcement should be granted in all annulment proceedings that are not purely dilatory or not instituted in bad faith, which as previously explained, would not be consistent with the Convention.<sup>141</sup>
83. Further, the Committee does not agree with Hungary's position that the fact that its Application for Annulment is based on the *Achmea* Decision (thus entailing the potential of annulment of the entire Award), is in itself a circumstance that justifies the continuation of the stay.<sup>142</sup> As Hungary recognizes, it would be inappropriate for the Committee at this stage of the proceeding to consider the merits of the Application for Annulment. As other committees have stated, the merits of the annulment application are not relevant for the

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<sup>140</sup> *OI European Group*, para. 115.

<sup>141</sup> Response, para. 33.

<sup>142</sup> Reply, para. 48.

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purpose of deciding whether or not to grant the continuation of a stay.<sup>143</sup> For that reason, the Committee agrees with Sodexo that the fact that an annulment is based on a “key question of jurisdiction” that could lead to annulment of the Award in its entirety, is not a relevant circumstance for deciding a request for the continuation of a stay of enforcement.<sup>144</sup>

**(2) The Financial Standing of Sodexo**

84. The second circumstance relied on by Hungary as a basis for its request for continuation of the stay of enforcement is the fact that Sodexo is “a large financially sound” entity. Hungary’s position is that the Committee should consider such a factor as weighing in favour of granting the stay because in its view, a brief delay in the enforcement of the Award would not cause Sodexo to suffer irreparable harm.
85. In turn, Sodexo alleges that a delay in enforcing the Award will cause harm to it due to the difficulties in enforcement it will face before the Hungarian courts. Hungary contends that post-Award interest would provide Sodexo with sufficient compensation for any damages it would suffer as a consequence of the delay, in the event that the Committee finds against the Application for Annulment. Sodexo argues that post-Award interest would not be an adequate remedy because the prejudice it would face relates to the difficulties in enforcement before the Hungarian courts.
86. With respect to Hungary’s allegation that the Committee should consider Sodexo’s good financial position as weighing in favour of granting the stay, the Committee disagrees with this assertion. The Committee does not see why the fact that a party opposing the continuation of a stay has good financial standing should be a relevant factor for granting the stay, even more so in this case where Hungary has not alleged that the lifting of the stay would cause it irreparable harm. Indeed, the Committee has not been called upon in this case to address a possible balance of hardship to the Parties if the stay is granted or not.

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<sup>143</sup> *Patrick Mitchell*, para. 60; *OI European Group*, para. 115.

<sup>144</sup> See Response, para. 40.

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87. As for the Parties’ discussion with respect to post-Award interest, it remains unclear to the Committee exactly how a decision to continue the stay would cause specific harm to Sodexo in relation to its enforcement efforts which could not be adequately remedied by interest. Further, the Committee notes that it has not been argued in the present case that any delay caused by the stay would affect the likelihood of enforcement. That notwithstanding, for similar reasons expressed above,<sup>145</sup> the Committee does not consider that the availability of post-Award interest is relevant for the specific circumstances of this case, as a factor that would justify or require the stay of enforcement of the Award.
88. In addition, the Parties presented opposing arguments in relation to the financial position of Sodexo and the possible risk of non-recoupment by Hungary. Hungary argues that such risk exists, notwithstanding Sodexo’s good financial standing, because in any case recoupment of sums paid in enforcement would result in unnecessary time, cost and resources being expended. The Committee considers that, to the contrary, Sodexo’s financially sound position, recognized by Hungary, is a circumstance that militates against such risk.<sup>146</sup> Further, the Committee agrees with Sodexo that the risk of non-recoupment as alleged by Hungary is present in every single annulment proceeding – being a risk inherent in any enforcement of an ICSID award.<sup>147</sup>

**(3) The Claimant’s Attempt to Enforce the Award Before the Hungarian Courts**

89. The third factor invoked by Hungary as a basis for its request for the continuation of the stay is that Sodexo commenced recognition and enforcement proceedings of the Award before the Budapest Capital Regional Court in bad faith and in parallel with the annulment proceedings. According to Hungary, Sodexo improperly “[...] hastily initiated proceedings for the recognition and enforcement of the Award [...]”<sup>148</sup> when it “[...] was undoubtedly

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<sup>145</sup> In addition, considering the Committee’s decision expressed in paragraph 93 *infra*, it is not necessary to analyze the merit of Sodexo’s allegation that the continuation of the stay would cause it to suffer an irreparable prejudice that could not be remedied by the post-Award interest.

<sup>146</sup> *Karkey*, para. 115; *Standard Chartered Bank*, para. 73.

<sup>147</sup> Response, para. 50.

<sup>148</sup> Application for Continued Stay, para. 40.

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foreseeable for [Sodexo] that Hungary would challenge the Award and secure its provisional stay of enforcement [...].”<sup>149</sup> In addition, Hungary alleges that in its application to the Court, Sodexo wrongly listed Hungary’s representative for purposes of the enforcement and failed to duly notify it of the existence of its application for enforcement.

90. The Committee rejects Hungary’s allegation of bad faith by Sodexo. First, when Sodexo filed for the enforcement of the Award with the Court, no application for annulment and request for stay of enforcement had been filed by Hungary, therefore, the Award was enforceable under Articles 53 and 54 of the ICSID Convention, a fact which Hungary does not dispute. In the absence of a pending annulment application and a declaration of provisional stay by the Secretary-General, the Committee sees no reason why Sodexo should have refrained from exercising its rights under the ICSID Convention and, as a consequence, how that could be considered to have been done in bad faith.
91. In addition, the Committee also does not consider that listing the wrong Hungarian representative for enforcement proceedings before its Courts – even if that were the case<sup>150</sup> – could be considered an act of procedural bad faith. From the information available to the Committee, it is difficult to understand how allegedly listing a wrong representative would benefit Sodexo. The likely result would be that this would work against Sodexo’s own interests by delaying the enforcement proceedings. As to the allegation by Hungary that the wrong identification of its representative affected its procedural rights, the Committee is not aware, from the evidence submitted by the Parties, of any such prejudice, more so where the first stage of the enforcement proceedings under Hungarian law is an *ex-parte* proceeding, as acknowledged by Hungary.<sup>151</sup>
92. With respect to Hungary’s allegation that Sodexo pursued enforcement of the Award in parallel with the annulment proceedings, and that its filing of an appeal against the first instance decision of the Court which rejected the Claimant’s enforcement application are

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<sup>149</sup> Application for Continued Stay, para. 39.

<sup>150</sup> The Claimant contests that it wrongly listed the representative under Hungarian law.

<sup>151</sup> See Application for Continued Stay, footnote 24.



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a breach of the provisional stay and a further demonstration of bad faith in the Claimant's behaviour, the Committee finds that as was expressed previously, it is not disputed that Sodexo's application for enforcement to the Hungarian Court occurred before the declaration of the provisional stay. Moreover, as regards the continuation of the enforcement proceedings after the provisional stay came into effect, the Committee is satisfied with the explanation provided by the Claimant that it applied for suspension of the enforcement proceedings before the Court.

93. In light of the foregoing analysis, the Committee finds that Hungary has failed to satisfy the burden of proof to show that there are circumstances in this case that would require the continuation of the stay of enforcement of the Award. In the absence of such justification, the Committee concludes that the provisional stay of enforcement should be lifted.
94. Having reached this conclusion, it is not necessary for the Committee to deal with the Claimant's allegation that in the present case there is a risk of future non-compliance with the Award by Hungary. It is also unnecessary to analyse Sodexo's request to order Hungary to provide "an unconditional and irrevocable first demand bank guarantee" or to order that "the full amount due under the Award (including post-Award interest) be placed by Hungary in an escrow account with a first-tier reputable international bank."<sup>152</sup> Accordingly, Hungary's request for leave to respond to the issue of security as a condition for the stay is also therefore dismissed.

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<sup>152</sup> Response, paras. 83 and 92; Rejoinder, paras. 110 and 133.

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**IV. DECISION**

95. For the above reasons, the Committee:

- (i) decides that the stay of enforcement of the Award should not be continued; and
- (ii) reserves its decision on costs incurred in this Application for Continued Stay until the conclusion of the annulment proceeding.

On behalf of the Committee,

[signed]

Andrés Jana Linetzky  
President of the Committee  
Date: February 10, 2020