

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

PROCEDURAL ORDER NO. 4
Decision on the European Commission's Application to Intervene as a Non-Disputing Party

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 W. Njoroge

January 22, 2021

I. BACKGROUND

1. On December 8, 2020 the European Commission (the “**Commission**”) filed an application pursuant to ICSID Arbitration Rule 37(2) (the “**Application**”), requesting an order from the Committee to:
 - a. *grant the Commission leave to intervene in the present proceedings;*
 - b. *set a deadline for the Commission to file a written amicus curiae submission; and*
 - c. *allow the Commission access to the relevant parts of the contested Award.*¹
2. On December 9, 2020, the Committee invited the Parties to submit their observations on the Application by December 16, 2020.
3. In accordance with the Committee’s directions, on December 16, 2020, the Parties filed their respective observations on the Application (“**Hungary’s Observations**” and “**Claimant’s Observations**” respectively).

II. THE COMMISSION’S APPLICATION

4. The Commission states that it “is the guardian” of the European Union (“**EU**”) treaties, namely, the Treaty on European Union (“**TEU**”), the Treaty on Functioning of European Union (“**TFEU**”), and the Treaty establishing the European Atomic Energy Community.² The Commission notes that under the above-mentioned treaties, it is “in charge of ensuring the uniform interpretation and proper application of the rules relating to investment protection within the [EU].”³ According to the Commission, this legal framework

¹ Application, para. 26.

² Application, para. 2.

³ Application, para. 2.

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establishes the basis for its interest in intervening in this case in order to avoid any conflict between ICSID arbitration awards and EU law.⁴

5. According to the Commission, its intervention is justified under ICSID Arbitration Rule 37(2), applying *mutatis mutandis* in annulment proceedings pursuant to ICSID Arbitration Rule 53, for the following reasons:
 - (a) The Commission’s intervention would “assist the Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.”⁵ The Commission states that it has a role to play in ensuring compliance of EU Member States with EU law, pursuant to Article 17 of the TEU and that it is “the guardian of the Treaties.”⁶ The Commission submits that should the Committee find that the Tribunal had jurisdiction, this would result in a conflict between EU law and the ICSID Convention, and the Commission would have to ensure that the EU Member States take the steps prescribed by Article 351(2) of the TFEU to remove that conflict.⁷ According to the Commission, at this stage, the “ICSID Convention and the EU Treaties are not in conflict with each other, if they are properly interpreted and applied in line with generally and widely recognized principles of public international law.”⁸
 - (b) The Commission’s submission would address a matter within the scope of the dispute. The Commission states that it basing its arguments on possible grounds for annulment, which it has identified based on public sources, i.e., that the Tribunal lacked jurisdiction.⁹ In this context, the Commission wishes to make a written submission on two issues: (i) whether or not a tribunal has to apply, in a concrete

⁴ Application, para. 2.

⁵ Application, header (3).

⁶ Application, para. 10.

⁷ Application, paras. 10-11.

⁸ Application, para. 12.

⁹ Application, para. 16.

intra-EU case, the national law of the host State, which comprises EU law, or EU law as international law applicable between the contracting parties of the intra-EU BIT, is irrelevant for the compatibility of intra-EU investment arbitration with the EU Treaties in the context of the *Achmea* judgment and the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union;¹⁰ and (ii) whether or not investment arbitration takes place on the basis of the ICSID Convention or on the basis of other arbitration rules, is irrelevant for the incompatibility between intra-EU investment arbitration and the EU treaties.¹¹

- (c) In keeping with its role as “guardian of the Treaties,” the Commission “has a significant interest in ensuring that [the] Committee is fully aware of the legal consequences of the judgment of the Court of Justice in *Achmea* and in Opinion 1/17, and considers these in its assessment on the jurisdictional objections.”¹²

III. THE PARTIES’ POSITIONS

A. HUNGARY’S POSITION

- 6. Hungary states that in principle it supports the Commission’s position set forth both in the original arbitration and in the Application, i.e., that the Tribunal did not have jurisdiction, following on from the conflict asserted to exist between the BIT and the EU Treaties.¹³
- 7. Nevertheless, Hungary submits that, since it has already covered in its submissions the Commission’s arguments with respect to the scope of the *Achmea* judgment as well as the “resultant inapplicability of Article 9(2) of the BIT”¹⁴ following the Declarations issued by

¹⁰ Application, para. 21(a).

¹¹ Application, para. 21(b).

¹² Application, paras. 22-23.

¹³ Hungary’s Observations, para. 2.

¹⁴ Hungary’s Observations, para. 3.

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France and Hungary, and considering that these annulment proceedings are at an advanced stage, it “sees no additional benefit in granting the [Application] at this stage.”¹⁵

B. THE CLAIMANT’S POSITION

8. The Claimant submits that the Committee should dismiss the Application as it does not meet the basic requirements of ICSID Arbitration Rule 37(2).¹⁶
9. First, the Claimant contends that the Commission’s intervention at this late stage would disrupt the proceedings.¹⁷ In the Claimant’s submission, these annulment proceedings have been ongoing since May 31, 2019, and the Commission has waited for “more than a year and a half, until the Hearing was weeks behind, to submit its Application.”¹⁸ The Claimant contends that allowing the Commission to file submissions would in turn call for additional submissions from the Parties and delay closure of the proceedings.¹⁹ Further, the Claimant states that neither the two issues raised by the Commission in its Application “are novel, or could not, in any event, have been raised earlier.”²⁰
10. Second, the Claimant submits that in addition to disrupting the schedule, the Commission’s submissions would unduly burden and unfairly prejudice the Claimant, for the following three reasons: (i) the additional submissions from the Parties responsive to the Commission’s submissions would generate additional costs;²¹ (ii) the Commission’s position is the same as Hungary’s and “would force Claimant to defend itself against two associated entities, rather than one;”²² and (iii) the Commission’s submissions would

¹⁵ Hungary’s Observations, para. 4.

¹⁶ Claimant’s Observations, p. 2.

¹⁷ Claimant’s Observations, p. 2.

¹⁸ Claimant’s Observations, p. 2.

¹⁹ Claimant’s Observations, p. 3.

²⁰ Claimant’s Observations, p. 3.

²¹ Claimant’s Observations, p. 3.

²² Claimant’s Observations, p. 3.

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cover issues which have already been raised in the original arbitration, in which the Commission was granted leave to intervene, as well as in these annulment proceedings.²³

11. Third, the Claimant asserts that the Commission should not be allowed to intervene in these annulment proceedings given that it has no valid “significant interest.”²⁴ The Claimant rejects the Commission’s assertion that the Commission has both a significant interest in these proceedings and a “central role” as “guardian of the [EU] Treaties.”²⁵ According to the Claimant, the Commission is pursuing a political agenda “which bears no relevance in the present annulment proceedings and, at the very least, that it cannot amount to a valid or ‘significant interest in the proceedings,’ that would justify the Commission’s intervention therein, as required by Rule 37(2).”²⁶
12. Fourth, the Claimant contends that the Commission’s proposed submissions do not concern matters that are within the scope of the present proceedings.²⁷ With respect to the two issues identified in the Application that the Commission wishes to make submissions on, the Claimant contends that the Commission’s arguments “are irrelevant” and have “no bearing” on these annulment proceedings.²⁸
13. Finally, the Claimant argues that “the Commission’s intervention would in any event be redundant, given that it would not bring any new perspective, nor particular knowledge or insight that is different from that of Hungary.”²⁹ As regards the two issues the Commission wishes to make submissions on, the Claimant submits that these have already been

²³ Claimant’s Observations, p. 4.

²⁴ Claimant’s Observations, p. 4.

²⁵ Claimant’s Observations, p. 4.

²⁶ Claimant’s Observations, p. 4.

²⁷ Claimant’s Observations, p. 4.

²⁸ Claimant’s Observations, pp. 5-6.

²⁹ Claimant’s Observations, p. 6.

addressed by Hungary in its submissions in these annulment proceedings and also in the original arbitration proceedings.³⁰

IV. THE COMMITTEE'S ANALYSIS

14. As stated above, the Commission seeks leave to intervene in the present annulment proceedings pursuant to Rule 37(2) of the ICSID Arbitration Rules.
15. According to Rule 37(2), which applies *mutatis mutandis* to annulment proceedings pursuant to Article 53 of the ICSID Arbitration Rules, an *ad hoc* committee, may, after consulting with the parties, allow a non-disputing party to file a written submission regarding a matter within the scope of the dispute. In using its discretionary power to determine whether to allow such filing, the committee shall consider, among other things, the extent to which:
 - (a) the submission would assist the committee in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
 - (b) the submission would address a matter within the scope of the dispute; and
 - (c) the non-disputing party has a significant interest in the proceeding.
16. In addition, Rule 37(2) establishes that the tribunal (in this case the Committee) must ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party.
17. Having carefully considered the Commission's Application made pursuant to ICSID Arbitration Rule 37(2), the Committee finds that under the circumstances of these annulment proceedings, such requirements are not met.
18. The Committee understands the institutional interest of the Commission in ICSID proceedings, arbitrations or annulments, which are based on intra EU-BITs. The

³⁰ Claimant's Observations, p. 6.

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Committee also acknowledges that for the current policies of the EU regarding investment treaty arbitrations, this interest is significant. The Committee, furthermore, recognises that the two issues in respect of which the Commission is seeking leave to intervene, are, to a great extent, within the scope of the dispute before this Committee according to the Parties' written and oral submissions.

19. Nonetheless, the Committee shares both Parties' positions that, at this stage of the proceedings, the submission by the Commission would not provide relevant assistance to the Committee in the determination of the legal issues on which the Commission seeks leave to intervene, and, in particular, its perspective will not be different from the one already provided by Hungary on those same legal issues. Accordingly, the Committee considers that the Commission's submissions at the current stage of the proceedings would not "bring[] a perspective, particular knowledge or insight that is different from that of the disputing parties."
20. Indeed, as Hungary itself states in its observations to the Commission's Application, "it already covered at length the arguments the Commission seek to advance,"³¹ and, therefore, "Hungary sees no additional benefit in granting the European Commission's application at this stage."³² Similarly, the Claimant concurs with Hungary in that the submission European Commission is seeking leave to file will be no different from the position already presented by Hungary on these annulment proceedings in the same issues, and therefore the requirement of letter (a) of Rule 37(2) is not satisfied.
21. In addition, as the Commission itself states in the Application, it is "conscious of the fact that the proceedings before the *ad hoc* committee are well advanced."³³ In this respect, both Parties concur in the fact that the well-advanced stage of these annulment proceedings is a circumstance that weighs against the request made by the Commission. The Committee agrees. At the time the Committee's Application was submitted, the Hearing had already

³¹ Hungary's Observations, para. 4.

³² Hungary's Observations, para. 4.

³³ Application, para. 24.

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taken place and no additional submissions were expected from the Parties, except for their submissions on costs. In sum, considering together the advanced stage of these annulment proceedings and that the Parties have already covered at length the two issues that the submission by the non-disputing party intends to cover, the Committee decides to deny the Commission’s Application.

V. DECISION

22. Having considered the Commission’s Application and the Parties’ submissions, and for the reasons stated above, the Committee rejects the Commission’s Application.

For and on behalf of the Committee,

[signed]

Mr. Andrés Jana Linetzky
President of the Committee
Date: January 22, 2021