

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

Hungary

(Applicant)

and

Dan Cake (Portugal) S.A.

(Respondent)

ICSID Case No. ARB/12/9

Revision Proceedings

**DECISION ON APPLICANT'S REQUEST FOR THE CONTINUED STAY
OF ENFORCEMENT OF THE AWARD**

Members of the Tribunal:

Professor Pierre Mayer, President

Mr. Toby Landau QC, Arbitrator

Professor Dr. Stephan W. Schill, Arbitrator

Secretary of the Tribunal:

Ms. Aïssatou Diop

Assistant to the Tribunal:

Ms. Céline Greenberg

Date of dispatch to the Parties: December 25, 2018

REPRESENTATION OF THE PARTIES

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I. BACKGROUND AND PROCEDURAL HISTORY

1. On 21 November 2017, an Award was rendered in the arbitration proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) between Dan Cake (Portugal) S.A., the Respondent in the present proceedings (“**Dan Cake**” or “**Respondent**”), and Hungary, the Applicant in the present proceedings (“**Hungary**” or “**Applicant**”). In the Award, the Tribunal found that Hungary had breached the Agreement between the Portuguese Republic and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments (“**Portugal-Hungary BIT**”) through conduct of its domestic courts in an insolvency proceeding concerning Dan Cake’s Hungarian subsidiary, and ordered Hungary to pay damages in the amount of EUR 5,233,862.63 plus interest and costs.
2. On 4 June 2018, Hungary filed an Application for Revision with the International Centre for Settlement of Investment Disputes (ICSID), submitting that, because of the discovery of a new fact, the Award should be revised, resulting in the finding that the Tribunal lacks jurisdiction, that Dan Cake is to bear all costs, and that all other requests for relief be dismissed.¹ In Hungary’s own words, the basis for its Application for Revision is:

the discovery, through the judgment of the Court of Justice of the European Union (the “CJEU”) rendered in the *Achmea case* on March 6, 2018 (the “*Achmea Decision*”), of the fact that there had been a conflict between Article 8(2) of the Portugal-Hungary BIT and the Treaty on the Functioning of the European Union (the “TFEU”) since May 1, 2004; and the resultant withdrawal of Hungary’s consent to arbitrate before it was accepted by Dan Cake.²
3. In its Application for Revision, Hungary also requested a stay of enforcement of the Award pending the Tribunal’s decision on its Application for Revision.³ Pursuant to Article 51(4), second sentence of the ICSID Convention, the enforcement of the Award therefore became provisionally stayed pending the Tribunal’s ruling on the Applicant’s request.

¹ See Hungary’s Application for Revision (4 June 2018) para 81.

² *Ibid.*, para 4 (internal citations omitted).

³ *Ibid.*, para 82.

4. On 8 June 2016, the original tribunal that heard the case between Dan Cake and Hungary was reconstituted in accordance with ICSID Arbitration Rule 51(2). Its members were Professor Pierre Mayer as President and Mr. Toby Landau QC and Professor Jan Paulsson as Arbitrators.
5. In accordance with ICSID Arbitration Rules 13(1) and 20(1), the Tribunal held a first session and preliminary procedural consultation with the Parties on 17 July 2018 by teleconference. The following persons were present at the session:

Members of the Tribunal

Prof. Pierre Mayer	President
Toby Landau QC	Arbitrator
Prof. Jan Paulsson	Arbitrator

ICSID Secretariat

Ms. Aïssatou Diop	Secretary of the Tribunal
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Participating on behalf of the Applicant

Mr. Dávid Kőhegyi	DLA Piper
Ms. Zsófia Deli	DLA Piper
Ms. Clémentine Emery	DLA Piper s

Participating on behalf of the Respondent

Mr. António Andrade de Matos	Andrade de Matos & Associados
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6. Following the first session, on 2 August 2018, the Tribunal issued Procedural Order No. 1 recording the agreements of the Parties and the Tribunal’s decisions on procedural matters. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of the proceedings would be Paris, France. Procedural Order No. 1 also set out the schedule of the proceedings and provided for the appointment, with the Parties’ agreement, of Ms. Céline Greenberg as Assistant to the Tribunal. Finally, Procedural Order No. 1 set out a schedule for the Parties’ filing of submissions on the Applicant’s request for the stay of enforcement of the Award.

7. On 8 August 2018, following the resignation of Professor Jan Paulsson as arbitrator, the Acting Secretary-General notified the Parties of the vacancy on the Tribunal. The proceedings were therefore suspended pursuant to ICSID Arbitration Rules 53 and 10(2).
8. On 17 August 2018, Professor Dr. Stephan Schill accepted his appointment as arbitrator appointed by Dan Cake the Respondent in accordance with ICSID Rule 11(1). The Tribunal was therefore reconstituted and the proceedings resumed pursuant to ICSID Arbitration Rules 12.
9. On 26 August 2018, an Application by Hungary for the Continued Stay of Enforcement of the Award (“**Application**”) was filed, requesting the Tribunal to:
 - Order the continuation of the stay of enforcement of the Award until a decision on revision is rendered in these proceedings in accordance with Article 51(4) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules; and
 - Order Claimant to bear all costs borne by Hungary in presenting and defending its application pursuant to Article 51(4) of the ICSID Convention.⁴
10. On 26 September 2018, Dan Cake submitted a Reply to Hungary’s Application for Stay of Enforcement of the Award (“**Reply**”). It opposes Hungary’s Application and requests the Tribunal to:
 - Deny Hungary’s request for the continued stay of enforcement;
 - Subsidiarily, order Hungary to post an adequate guarantee as a condition for granting Hungary’s application for the continued stay of enforcement;
 - Order Hungary to bear all costs borne by Dan Cake in relation to the defence of the application for the continued stay of enforcement of the Award.⁵

⁴ Application by Hungary for the Continued Stay of Enforcement of the Award (“**Application**”) (26 August 2018) para 49.

⁵ Reply to Hungary’s Application for Stay of Enforcement of the Award (“**Reply**”) (26 September 2018) para 70.

11. Prior to these filings, on 19 March 2018 Hungary had already filed a Request for Annulment of the Award pursuant to Article 52(1)(b) of the ICSID Convention, on the ground “that the Tribunal has manifestly exceeded its powers,” in light of its finding of jurisdiction, which was, Hungary argues, contrary to the law of the European Union (“EU”) as determined by the CJEU in *Achmea*. In its Request for Annulment, Hungary also requested a stay of enforcement of the Award in accordance with Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54. The Parties, however, made arrangements so that the present revision proceedings could be concluded first.
12. With the present decision, the Tribunal decides on Hungary’s Application for the Continued Stay of Enforcement of the Award and Dan Cake’s requests in its Reply to Hungary’s Application.

II. ARGUMENTS OF THE PARTIES

1. APPLICANT

13. In its Application, Hungary relies chiefly on the circumstances of the present revision proceedings to support its application for a continued stay of enforcement.⁶ In support of its Application, it relies on multiple circumstances that all speak, in Hungary’s view, in favor of staying enforcement.
14. First, Hungary points out that the Parties had agreed to an expedited schedule for the revision proceedings, so that the Tribunal would be in a position either to confirm or to revise the Award within a few months from the date of its Application. Against this background, in Hungary’s view, “it would be inappropriate to permit the enforcement of the Award today while, by the very nature of the current procedure, the Award may be revised in the very near future.”⁷ Hungary contends that this is a relevant consideration, as “enforcement of the Award today could lead to difficulties in the event that the Award were

⁶ Application, para 4 (stressing that “[t]he circumstances of the present case justify the continued stay of enforcement of the Award, pending a decision of the Tribunal on Hungary’s Application for Revision”).

⁷ Application, paras 6, 31-34 (relying on *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award (7 May 2012) para 54 (Exhibit AL-43)).

later revised. Notably, the State would not be guaranteed the return of any sums paid under the Award, which may lead to extensive litigation.”⁸

15. Second, Hungary points to the exceptional nature of the question that is at the heart of the revision proceedings. It emphasizes that its request for revision concerns a fact that may influence the assessment of the jurisdiction of the Tribunal, and will have the effect that the Tribunal either confirms the Award in its entirety, or revises it by dismissing Dan Cake’s claim for lack of jurisdiction. This fact, it submits, should be given particular weight in continuing the stay of enforcement of the Award.⁹
16. Third, Hungary points out that its request for revision has been made in good faith and is not dilatory or vexatious.¹⁰ Instead, it “is based on a major and objectively new fact that affects the validity of Hungary’s consent to jurisdiction under the BIT.”¹¹ Given the issue at stake, it arguably concerns “one of the most important and fundamental developments in the history of European investment treaties.”¹²
17. Finally, Hungary points out that for Dan Cake, as “a large and financially sound company, such ... a stay of enforcement of the Award pending the Tribunal’s decision on revision will not cause it to suffer irreparable financial harm.”¹³ Dan Cake would be indemnified appropriately for the delay in securing enforcement through the post-award interest that would accrue pursuant to the Tribunal’s findings in the Award.¹⁴ A stay of enforcement would therefore not cause any prejudice to Dan Cake.
18. Apart from setting out the circumstances that, in Hungary’s view, militate in favour of continuing a stay of enforcement, Hungary also argues that, as a matter of law, there is a

⁸ Application, para 34.

⁹ Application, paras 7, 35-39.

¹⁰ Application, paras 8, 40-44.

¹¹ Application, para 44.

¹² Application, para 8.

¹³ Application, paras 8; see further *ibid.*, paras 45-48.

¹⁴ Application, paras 8, 47 (invoking *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 (28 December 2007) para 40 (Exhibit AL-42)).

presumption favoring the stay of enforcement of an award during revision proceedings. It points out that, while Article 51(4) of the ICSID Convention sets out the power of the Tribunal to order the continuance of a stay of enforcement pending a request for revision, this provision does not specify the circumstances that warrant the grant of a continued stay of enforcement. In Hungary's view, "[d]ecisions of prior ICSID tribunals on Article 51(4) nonetheless indicate that, absent specific reasons opposing a stay, a request for revision of an award should *by its very nature* command a stay of enforcement pending the tribunal's confirmation or revision of its previously issued award."¹⁵ Pointing to the fact that "immediate enforcement could lead to additional, uncalled-for, difficulties should the award be subsequently revised,"¹⁶ and relying on decisions in the revision proceedings in *Victor Pay Casado v. Republic of Chile* and *Venezuela Holdings (formerly Mobil Corporation) v. Venezuela*, Hungary argues that, "by its nature and absent compelling reasons justifying otherwise, the existence of revision proceedings militate strongly in favor of the suspension of enforcement pending the Tribunal's decision on revision."¹⁷

19. In addition, Hungary invokes decisions by ICSID annulment committees on the stay of enforcement of awards pending annulment proceedings pursuant to Article 52(5) of the ICSID Convention as "additional guidance."¹⁸ This is justified, in Hungary's view, because Articles 52(5) and 51(4) of the ICSID Convention are framed "in identical terms."¹⁹ These decisions, Hungary argues, "indicate that a stay of enforcement, pending a decision on a request for annulment of an award, may be denied only under exceptional circumstances."²⁰ Relying on the fact that 36 out of 41 decisions of annulment committees

¹⁵ Application, para 11 (emphasis in the original).

¹⁶ Application, para 20.

¹⁷ Application, para 21. Hungary relies here on *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Demande de suspension de l'exécution de la sentence arbitrale (5 August 2008) pp 1-2 (Exhibit AL-36) for the proposition that "by its very nature" a request for stay of enforcement in revision proceedings should be granted (Application, para 15). *Venezuela Holdings, BV, et al (case formerly known as Mobil Corporation, Venezuela Holdings, BV, et al) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Revision (12 June 2015) para 3.2.2., Sections 2.3 and 2.4 and para 2.4.4(a) (Exhibit AL-17) is invoked for the proposition that "[a]bsent compelling reasons providing otherwise (such as proof of the Respondent's bad faith in filing an application for revision)," the stay should be granted (Application, para 19).

¹⁸ Application, paras 12, 22.

¹⁹ Application, para 23.

²⁰ Application, para 12.

under Article 52(5) of the ICSID Convention had granted a continued stay of enforcement,²¹ Hungary argues that, “absent unusual” or “exceptional circumstances”, continuing to stay enforcement of awards during pending annulment proceedings was a “quasi-automatic practice.”²² One such exceptional circumstance that justified discontinuing a stay, in Hungary’s view, was the “fact that an annulment application is dilatory.”²³

2. RESPONDENT

20. Dan Cake opposes Hungary’s Application on both factual and legal grounds. It argues that “Hungary has not invoked the relevant case law and ... has not even interpreted properly the cases mentioned in its Application.”²⁴ Dan Cake therefore views Hungary’s interpretation of Article 51(4) of the ICSID Convention as incorrect. In addition, Dan Cake is of the view that “Hungary has not alleged or demonstrated that the circumstances of the case require the Tribunal to order a stay of enforcement of the Award.”²⁵
21. At the outset, however, Dan Cake agrees with Hungary that the Tribunal can obtain guidance not only from decisions rendered on the basis of Article 51(4) of the ICSID Convention, but also from those rendered by annulment committees on the basis of Article 52(5) of the ICSID Convention.²⁶ Dan Cake also agrees that “the Tribunal could and should consider the circumstances of this particular case while deciding to grant or to deny

²¹ Application, para 25 (relying on ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID* (5 May 2016) para 58 (Exhibit AL-38)).

²² Application, paras 26-27 (relying on *Elsamex, SA v Republic of Honduras*, ICSID Case No ARB/09/4, Decision on the Termination of the Stay of Enforcement of the Award (11 March 2014) para 86 (Exhibit AL-39); *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 (5 May 2010) para 25 (Exhibit AL-40); *Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Stay of Enforcement of the Award (30 November 2004) para 25 (Exhibit AL-37); *Enron Corporation Poderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Stay of Enforcement of the Award (7 October 2008) para 43 (Exhibit AL-41); *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 (28 December 2007) para 22 (Exhibit AL-42)).

²³ Application, para 28 (quoting *Enron Corporation Poderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on Stay of Enforcement of the Award (7 October 2008) para 47 (Exhibit AL-41)).

²⁴ Reply, para 13.

²⁵ Reply, para 14.

²⁶ Reply, para 8.

Hungary's request for a continued stay of the enforcement of the Award."²⁷ Dan Cake further sees itself in agreement with Hungary in respect of the burden of proof, according to which it sees Hungary as having "to allege and demonstrate that the circumstances of the case required the Tribunal to order the stay of enforcement of the Award."²⁸

22. In Dan Cake's view, the way Article 51(4) of the ICSID Convention is formulated makes it "absolutely clear that, in principle, ICSID Awards should not be stayed while revision proceedings are pending – the enforcement of an award should only be stayed if the circumstances so require."²⁹
23. Dan Cake also counters Hungary's reliance on the decision in *Victor Pey Casado v. Republic of Chile*, pointing out that the tribunal in that case did not lay down a "general principle" that requests for a stay of enforcement should be ordered because of the very nature of revision proceedings. Instead, that tribunal, Dan Cake argues, adopted an approach of weighing the particular circumstances of the dispute to arrive at its conclusion to stay enforcement.³⁰ In respect of the case *Venezuela Holdings (formerly Mobil Corporation) v. Venezuela*, Dan Cake points out that that tribunal, while setting out the parties' arguments on a stay, never decided on the continuation of the stay, but only on the request for revision, which led to an automatic termination of the stay pursuant to ICSID Arbitration Rule 54(3).³¹ Consequently, Dan Cake contends, neither decision could be taken as support for Hungary's legal position that requests for a stay of enforcement should, in principle, be granted.³²
24. Instead, Dan Cake argues, in reliance on several decisions of *ad hoc* committees in ICSID annulment proceedings, that "there is no presumption in favour of a stay of enforcement."³³

²⁷ Reply, para 10.

²⁸ Reply, para 11.

²⁹ Reply, para 16.

³⁰ Reply, paras 20-23.

³¹ Reply, paras 24-29.

³² Reply, para 30.

³³ Reply, para 31 (quoting ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID* (5 May 2016) para 58 (Exhibit AL-38) p 38 (Exhibit-AL-38)).

Instead, the decision on the request for the continued stay of enforcement of the award should be made only in respect of the circumstances of the specific case.³⁴

25. These circumstances should not lead, in Dan Cake’s view, to granting Hungary’s Application. Dan Cake argues that despite the “relatively expedited” schedule for the revision proceedings,³⁵ granting Hungary’s request would lead to keeping the Award, which was rendered in November 2017, unenforceable for almost two years, if the decision on revision was handed down in the spring or summer of 2019.³⁶ Furthermore, the fact that Hungary has initiated annulment proceedings against the Award, would further delay enforcement until the autumn or winter of 2020.³⁷ Since Hungary is offering no security or guarantee for compliance with the Award, Dan Cake argues, it “should not have to wait for three or more years to be able to enforce the Award.”³⁸ This timeline should militate in favor of Dan Cake and of rejecting Hungary’s Application.
26. Dan Cake also considers Hungary’s argument as to the relevance of the special nature of the revision proceedings as flawed.³⁹ Seeking total or partial revision of an award should be irrelevant for deciding on the stay of enforcement.⁴⁰ What is more, considering the nature of the ground for revision, as suggested in effect by Hungary, this would involve the Tribunal making an illicit pre-judgment of the merits of the request for revision.⁴¹
27. Furthermore, Dan Cake does not accept that Hungary’s request for revision is made in good faith.⁴² It points out that Hungary had chosen not to object to the Tribunal’s jurisdiction on the basis that the arbitration provisions in the Portugal-Hungary BIT were invalid or

³⁴ Reply, paras 31-33.

³⁵ Reply, para 38.

³⁶ Reply, para 40.

³⁷ Reply, para 41.

³⁸ Reply, para 42.

³⁹ Reply, paras 44-50.

⁴⁰ Reply, para 46.

⁴¹ Reply, paras 47-50 (relying on *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Demande de suspension de l’exécution de la sentence arbitrale (5 August 2008) p 1 (Exhibit AL-36), where the tribunal pointed to “l’impossibilité en résultant pour le Tribunal de préjuger d’une manière quelconque de sa décision future”).

⁴² Reply, paras 52-56.

inapplicable, even though it had raised this objection in other investment treaty arbitrations based on intra-EU BITs, resulting in “absolutely surprising, contradictory and appalling” conduct of Hungary.⁴³ In addition, Dan Cake contends, the fact that Hungary has initiated parallel revision and annulment proceedings should be weighed against Hungary.⁴⁴ The same is true, in Dan Cake’s view, in respect of the fact that Hungary failed to comply with the Award for more than three months before initiating annulment proceedings, has not provided any security to Dan Cake, and has not otherwise undertaken to comply with the Award should revision and annulment proceedings be decided in favor of Dan Cake.⁴⁵ This shows, in Dan Cake’s view, that Hungary is not “cooperative and is not respecting Dan Cake’s legitimate right to receive immediate payment in case the revision and annulment proceedings are decided in favour of Dan Cake.”⁴⁶

28. In addition, Dan Cake points out that, although it is financially stable, the current amount of compensation of EUR 10 million to which it is entitled under the Award, “represents 20% of its annual turnover.”⁴⁷ Not being able to enforce the Award during a continued stay of enforcement would therefore make it unable to exploit opportunities for expanding its business further, Dan Cake’s claims.⁴⁸ The stay of enforcement would therefore very well cause economic damage to Dan Cake that is not compensable by post-award interest.⁴⁹
29. Apart from refuting the circumstances invoked by Hungary in support of its Application, Dan Cake also points to additional circumstances the Tribunal should consider in order to deny Hungary’s Application. Given that Dan Cake is a financially stable company, and has so far always cooperated in the arbitration proceedings, there is no reason to assume that Hungary would run any risk of recovering sums paid to Dan Cake, should the Award be

⁴³ Reply, para 53 (pointing to Hungary’s objection to jurisdiction in *Electrabel SA v The Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) Part V, pp 1 et seq (Exhibit CL-001-rev)).

⁴⁴ Reply, para 54.

⁴⁵ Reply, para 55.

⁴⁶ Reply, para 56.

⁴⁷ Reply, para 60.

⁴⁸ Reply, paras 61-62.

⁴⁹ Reply, paras 63-64.

enforced now, but be revised or annulled later.⁵⁰ Also, given Hungary's state budget of approximately EUR 61.2 billion in 2018, the payment of the sums due under the Award "would be almost irrelevant for Hungary."⁵¹ On balance, in Dan Cake's view, it would thus be:

unfair that a medium sized company ... that was the victim of a denial of justice and lost its investment in Hungary in 2008 and had to conduct arbitral proceedings from 2012 till 2017 and to bear costs in excess to [sic] 1 million euro [sic] would now have to wait three more years before being able to enforce the Award when Hungary does not even offer a security of a written undertaking.⁵²

30. All of these factors, Dan Cake argues, should lead the Tribunal to deny Hungary's Application.
31. Subsidiarily, Dan Cake requests the Tribunal to make a continued stay of enforcement of the Award dependent on Hungary providing an adequate guarantee as this constitutes a "useful counterbalance to a stay of enforcement."⁵³

III. THE TRIBUNAL'S ANALYSIS

32. The basis for the Tribunal's decision on Hungary's Application for the Continued Stay of Enforcement of the Award pending the present revision proceedings is Article 51(4) of the ICSID Convention, which provides:

The Tribunal 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 Tribunal rules on such request.

33. Revision proceedings under the ICSID Convention are a rare occurrence. To the Tribunal's knowledge, they have been initiated, apart from the present proceedings, in only nine

⁵⁰ Reply, paras 66-67.

⁵¹ Reply, para 67.

⁵² Reply, para 69.

⁵³ Reply, paras 71-72 (quoting in para. 72 'Dispute Settlement, International Centre for Settlement of Investment Disputes, 2.8 Post-Award Remedies and Procedures' p 33 (Exhibit CL-002-rev)).

instances.⁵⁴ While applicants in revision proceedings regularly request the stay of enforcement of the award in their requests for revision, in only one case – *Victor Pey Casado and President Allende Foundation v. Republic of Chile* – has a tribunal actually rendered a decision on the continuation of the provisional stay resulting from such a request pursuant to Article 51(4), second sentence of the ICSID Convention.⁵⁵ The reasoning in that two-page decision, however, is rather terse and provides only minimal guidance as to the interpretation and application of Article 51(4) of the ICSID Convention. The present case therefore comes close to a case of first impression in respect of the decision to continue a stay of enforcement pending revision proceedings.

34. Against this background, and considering the Parties’ controversy about the proper interpretation and application of Article 51(4) of the ICSID Convention as well as the Tribunal’s public function as an adjudicatory body that is part of the administration of international justice, the Tribunal deems it appropriate to first lay out, in the abstract, its approach to interpreting Article 51(4) of the ICSID Convention, before proceeding to apply this abstract framework to the concrete case before it.

1. THE INTERPRETATION OF ARTICLE 51(4) OF THE ICSID CONVENTION

35. In order to lay out the general approach to Article 51(4) of the ICSID Convention, the Tribunal will address the general nature of that provision as involving the exercise of fettered discretion (A), the guidance which the practice of annulment committees under

⁵⁴ These are *American Manufacturing & Trading, Inc v Democratic Republic of the Congo*, ICSID Case No ARB/93/1 (settled and discontinued under Arbitration Rule 44); *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision (18 November 2009); *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8 (settled under Arbitration Rule 43(1)); *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24 (discontinued for lack of payment under Financial Regulation 14(3)(d)); *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18 (settled under Arbitration Rule 43(1)); *Ron Fuchs v Georgia*, ICSID Case No ARB/07/15 (settled under Arbitration Rule 43(1)); *Venezuela Holdings BV and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Revision (12 June 2015); *Bolivarian Republic of Venezuela v Tidewater Investment SRL and Tidewater Caribe, CA*, ICSID Case No ARB/10/5, Decision on Application for Revision (7 July 2015); *Edenred SA v Hungary*, ICSID Case No ARB/13/21 (pending).

⁵⁵ *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Demande de suspension de l’exécution de la sentence arbitrale (5 August 2008). In two further revision proceedings that were not settled or discontinued, requests for the stay of enforcement of the award were not considered separately from the decision on the request for revision and therefore terminated pursuant to Arbitration Rule 54(3), second sentence with the tribunal’s decision on the request for revision. See *Venezuela Holdings BV and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Revision (12 June 2015) paras 3.2.2 and 3.2.3 and *Bolivarian Republic of Venezuela v Tidewater Investment SRL and Tidewater Caribe, CA*, ICSID Case No ARB/10/5, Decision on Application for Revision (7 July 2015) para 64(2).

Article 52(5) of the ICSID Convention can provide (B), the object and purpose of the discretion in Article 51(4) of the ICSID Convention (C), and finally the relevant circumstances for the exercise of discretion (D).

A. *Fettered Discretion Under Article 51(4) ICSID Convention*

36. As the wording of Article 51(4), first sentence of the ICSID Convention makes clear, the power of the Tribunal to stay enforcement of the award during revision proceedings is discretionary. The Tribunal “may”, not “shall”, stay enforcement.
37. Having discretion does not mean that the Tribunal’s power to decide on the stay of enforcement is unlimited or unfettered. Instead, discretion under Article 51(4) of the ICSID Convention is fettered. It has to be guided by the object and purpose for which discretion is given and take into account the different factors that militate in favour of either granting a stay or refusing it, including the respective effects of the decision on the Parties and on the conduct of the revision proceedings themselves. Article 51(4) of the ICSID Convention expresses this general framework by empowering the Tribunal to stay enforcement pending its decision “if it considers that the circumstances so require.” Stays of enforcement must therefore find their basis in particular circumstances that are of such a nature that warrant a stay.
38. So much is clear as concerns the general approach for the application of Article 51(4) of the ICSID Convention, an approach that has also been followed in *Victor Pey Casado and President Allende Foundation v. Republic of Chile*.⁵⁶ The tribunal in that case did not, however, develop a more principled framework for guiding the exercise of discretion under Article 51(4) of the ICSID Convention. It only pointed to the uncertainty in respect of the outcome of the request for revision, to the fact that immediate enforcement of the award could cause difficulties for the parties and the tribunal, and that enforcement did not impose itself.⁵⁷

⁵⁶ See *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Demande de suspension de l’exécution de la sentence arbitrale (5 August 2008).

⁵⁷ *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Demande de suspension de l’exécution de la sentence arbitrale (5 August 2008).

39. What is not clear from either the text or the *travaux* of Article 51(4) of the ICSID Convention is the object and purpose of the power to stay enforcement of the award pending revision proceedings, and the circumstances or factors the Tribunal should take into account as a matter of law in exercising its discretion.

B. Practice of Annulment Committees Under Article 52(5) ICSID Convention

40. There are important differences between annulment proceedings and revision proceedings. In particular, the outcome of revision proceedings may have much more diverse effects on the award than annulment proceedings (where the award may either survive intact, or be annulled in whole or in part). At the same time, in both scenarios, the existence of the proceedings (annulment or revision) creates a doubt as to whether the award debtor will remain bound to perform the award once the outcome of the annulment or revision proceedings is known.

41. In these circumstances, useful guidance for the application of Article 51(4) of the ICSID Convention could in principle come, as suggested by the Parties, from the practice of annulment committees applying Article 52(5) of the ICSID Convention. A number of reasons indeed militate in favour of this analogy: Article 52(5) of the ICSID Convention is worded identically to Article 51(4), has common roots and is treated in parallel in Chapter VII of the ICSID Arbitration Rules. It also covers situations with a comparable distribution of interests of the parties. In both annulment and revision proceedings, one is faced with a situation where a party has already obtained a final and binding and, in principle, enforceable ICSID award, and the other party has interposed a remedy that could, if successful, negate an otherwise enforceable award.

42. Having said this, the guidance that can be derived from the practice of ICSID annulment committees under Article 52(5) of the Convention is limited because that practice itself is all but uniform and in a state of flux.⁵⁸ At present, aside from a number of nuances, annulment committee practice is broadly split between two main approaches. One strand

⁵⁸ See for a recent summary of the practice of annulment committees under Article 52(5) of the ICSID Convention Brian Kotick and Joel Dahlquist Cullborg, 'A (Counter) Balancing Act: The Express Power to Order a Security on a Stay of Enforcement Pending Annulment' (2018) 33 ICSID Review 260, 260-270.

of annulment committees takes a liberal approach in exercising discretion, which results in granting stays of enforcement “under normal circumstances,” and therefore in a “quasi-automatic” manner.⁵⁹ The second strand takes a stricter approach and considers granting a stay of enforcement only “in exceptional circumstances” that have to be shown by the applicant.⁶⁰

43. The diverging approaches of annulment committees notwithstanding, convergence exists on a number of aspects in the application of Article 52(5) of the ICSID Convention. First,

⁵⁹ See, for example, *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, *Ad hoc* Committee’s Decision on the Respondent’s Request for a Continued Stay of Enforcement of the Award (1 June 2005) para 29; *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Decision on the Continued Stay of Enforcement of the Award (28 December 2007) para 22; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on Stay of Enforcement of the Award (5 August 2008) 2; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (7 October 2008) para 43; *Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Stay of Enforcement of the Award (30 November 2004) para 28; *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 (7 May 2010) para 25; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on the Request for a Continued Stay of Enforcement of the Award (30 September 2013) para 50; *Bolivarian Republic of Venezuela v Tenaris SA & Talta – Trading E Marketing Sociedade Unipessoal Lda*, ICSID Case No ARB/12/23, Decision on Venezuela’s Request for the Continued Stay of Enforcement of the Award (23 February 2018) para 90.

⁶⁰ See, for example, *Sempre Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (5 March 2009) para 27; *Ioannis Kardassopoulos and Ron Fuchs v Georgia*, ICSID Case Nos ARB/05/18 and ARB/07/15, Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award (12 November 2010) para 26; *Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award (7 May 2012) para 43; *SGS Société Générale de Surveillance SA v Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Paraguay’s Request for the Continued Stay of Enforcement of the Award (22 March 2013) para 82; *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on the Republic of Chile’s Request for a Stay of Enforcement of the Unannulled Portion of the Award—Supplementary Decision (16 May 2013) para 40; *Elsamex SA v Republic of Honduras*, ICSID Case No ARB/09/4, Decision of the *ad hoc* Committee on the Termination of the Stay of Enforcement of the Award (11 March 2014) para 90; *Flughafen Zürich AG and Gestión Ingeniería IDC SA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/19, Decision on the Stay of Enforcement of the Award (11 March 2016) para 56; *OI European Group BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/25, Decision on Stay of Enforcement of the Award (4 April 2016) para 89; *Bolivarian Republic of Venezuela v Tenaris SA & Talta – Trading E Marketing Sociedade Unipessoal Lda*, ICSID Case No ARB/11/26, Decision on the Request to Maintain the Stay of Enforcement of the Award (24 March 2017) paras 73-74; *Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case Nos ARB/12/14 and ARB/12/40, Decision on the Request for Continued Stay of Enforcement of Award (27 June 2017) para 34; *Valores Mundiales SL and Consorcio Andino SL v Bolivarian Republic of Venezuela*, ICSID Case No ARB/13/11, Decision to List the Temporary Stay of Enforcement (6 September 2018) (reported in Lisa Bohmer and Luke Eric Petersen, ‘Further Developments in Relations to ICSID Stays of Enforcement’ (*IARReporter*, 20 September 2018)). See also *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case No ARB/13/1, Decision on the Stay of Enforcement of the Award (22 February 2018) paras 98 et seq.

annulment committees agree that the prospective success of the applicant's request for annulment does not play a role in the exercise of discretion. The merits of the request, after all, should not be prejudged.⁶¹ Second, annulment committees agree that the economic consequences of a decision to continue or lift a stay of enforcement are relevant factors for the exercise of discretion in light of potential adverse outcomes of the request for annulment. Thus, problems with the recoupment of amounts paid under an award that may be later annulled,⁶² just as the causation of economic hardship for the award debtor by enforcing such an award, have been considered relevant factors for the exercise of discretion under Article 52(5) of the ICSID Convention.⁶³ Similarly, the prospects of compliance with an award by the party applying for annulment have been taken into account in deciding on a stay of enforcement.⁶⁴ Finally, many annulment committees consider the extent to which a request for annulment is driven by dilatory motives or has not been made in good faith as a relevant factor.⁶⁵

44. All in all, the practice of annulment committees in interpreting and applying Article 52(5) of the ICSID Convention therefore casts both shadow and light in terms of consistency. While there is considerable convergence on what circumstances are relevant for the committees' exercise of discretion under Article 52(5) of the ICSID Convention, there is stark divergence on the basic structure and threshold that must be met for a committee to consider that a stay of enforcement is required. All of this points to the lack of an accepted doctrinal structure for the interpretation and application of Article 52(5) of the ICSID Convention.

⁶¹ See, for example, *SGS v Paraguay* (n 60) para 94; *Flughafen Zürich v Venezuela* (n 60) para 60; *OI European Group v Venezuela* (n 60) para 115; *Karkey v Pakistan* (n 60) para 118 (with further references to decisions by annulment committees); *Churchill Mining v Indonesia* (n 60) para 36.

⁶² See, for example, *Flughafen Zürich v Venezuela* (n 60) para 64; *OI European Group v Venezuela* (n 60) paras 109-114 (with further references); *Venezuela v Tenaris*, ICSID Case No ARB/11/26 (n 60) para 87; *Karkey v Pakistan* (n 60) paras 114-117; *Carnegie Minerals (Gambia) Limited v Republic of The Gambia*, ICSID Case No ARB/09/19, Decision on The Gambia's Request for a Continued Stay of Enforcement of the Award (18 October 2018) para 43.

⁶³ See, for example, *OI European Group v Venezuela* (n 60) paras 117-122; *Venezuela v Tenaris*, ICSID Case No ARB/11/26 (n 60) paras 85-86; *Churchill Mining v Indonesia* (n 60) para 35; *Karkey v Pakistan* (n 60) paras 111-113; *Carnegie Minerals v The Gambia* (n 62) para 45.

⁶⁴ See, for example, *OI European Group v Venezuela* (n 60) para 98; *Venezuela v Tenaris*, ICSID Case No ARB/11/26 (n 60) paras 88-90; *Venezuela v Tenaris*, ICSID Case No ARB/12/23 (n 59) paras 112 et seq; *Carnegie Minerals v The Gambia* (n 62) paras 47-49.

⁶⁵ See, for example, *Elsamex v Honduras* (n 60) paras 96-97; *Flughafen Zürich v Venezuela* (n 60) para 68; *OI European Group v Venezuela* (n 60) para 115; *Venezuela v Tenaris*, ICSID Case No ARB/12/23 (n 59) para 104.

45. The practice of annulment committees can thus only provide limited guidance for the present Tribunal in clarifying the interpretive framework of Article 51(4) of the ICSID Convention. This notwithstanding, the Tribunal will, in case it deems it appropriate, make reference to annulment committee practice.

C. Object and Purpose of the Discretion Under Article 51(4) ICSID Convention

46. The object and purpose of the discretion granted under Article 51(4) ICSID Convention is, obviously, to provide a mechanism for the arbitral tribunal, in the concrete circumstances of the case, to balance the interests in favour or against the requested stay. The competing considerations and interests at stake are similar to those at play in applications for a stay pending annulment decisions, that is (i) on the one hand, the prevailing party's right to performance of the losing party's obligations arising under the award, and (ii) on the other hand, the losing party's right to access remedies available to it under the ICSID Convention.

47. Considering these competing rights, the Tribunal is of the view that Article 51(4) of the ICSID Convention cannot be interpreted as including a presumption in favour of staying enforcement, as argued by Hungary, since that provision makes a stay expressly conditional upon the Tribunal's assessment of the circumstances. Similarly, Article 53(1) of the ICSID Convention expressly subjects the enforceability of an award to the possibility of a stay of enforcement and does not contain a preference for enforcement over the right of the award debtor to access remedies under the ICSID Convention against an award.

48. Conversely, the use of the word "require" in Article 51(4) of the ICSID Convention, in the Tribunal's view, does not indicate a presumption against staying enforcement. Rather, it points to the threshold the Tribunal's conviction must reach when ordering a stay of enforcement.

49. What is required by Article 51(4) of the ICSID Convention then is for the Tribunal to undertake a case-specific analysis of the relevant circumstances and to determine how the right of access to justice by the party requesting revision and the opposing party's right to enforcement of the award relate to each other in light of the specific circumstances of the case before it.

D. Relevant Circumstances for the Exercise of Discretion

50. The Tribunal is of the view that the factors that have been considered as relevant by annulment committees in the context of Article 52(5) of the ICSID Convention are equally relevant for the exercise of discretion under Article 51(4) of the ICSID Convention. The Tribunal agrees in particular with the predominant practice by annulment committees that it should not assess the prospective success of the request for revision. Such an analysis would impermissibly prejudge the merits and therefore undercut the Applicant's right to access to justice.
51. There is, however, one exception to this. If it is manifestly obvious that the request for revision has no chances of success, is made in bad faith or for purely dilatory purposes, is vexatious, or is an expression of the Applicant's refusal to abide by its obligations under the ICSID Convention, the right of the Respondent to enforcement of the Award should prevail over the Applicant's right of access to justice and result in a rejection of a request for a (continued) stay of enforcement. In such circumstances, which constitute in effect an abuse of process, there is no reason why the right to enforcement of the award should not take precedence.
52. Absent such circumstances, the Tribunal further agrees with the predominant practice of annulment committees that the economic consequences of its decision on a stay of enforcement play a decisive role. In this context, the Tribunal must conduct a comparative impact assessment, comparing (a) the benefits that would arise for the respondent in revision proceedings, if the stay of enforcement is lifted, but the applicant in the revision proceedings is later successful in its request for revision, with (b) the disadvantages for the respondent in the revision proceedings that would arise if the stay of enforcement is continued, but the applicant's request on the merits is later unsuccessful.
53. Further, the Tribunal considers that, in principle in this context, the chances of enforcement of the award should the request for revision fail is irrelevant for the exercise of discretion. This is so unless the delay caused by a stay of enforcement changes the likelihood of enforcement (for example, because enforceable assets are dissipated, or because the award creditor's rank in relation to different creditors of the award debtor is significantly

worsened and the likelihood of compliance with the award reduced). Simple effects of delay, by contrast, can be compensated by post-award interest.

54. Finally, the Tribunal is of the view that, depending on the circumstances, an order of security for the benefit of the award creditor can be considered as part of the exercise of its discretion under Article 51(4) of the ICSID Convention. Just as annulment committees have considered their authority to enter such orders of security,⁶⁶ tribunals in revision proceedings may utilise such an option in the context of applying Article 51(4) of the ICSID Convention in order to balance the parties' respective rights to access to justice and to the enforcement of the award.

2. EXAMINATION OF THE CIRCUMSTANCES RELEVANT TO THE MERITS OF THE REQUEST IN THE CASE AT HAND

55. The Tribunal deals first with the question of whether the request constitutes an abuse of process (A), before engaging in the comparative impact assessment of its decision on the stay of enforcement (B). It then addresses Dan Cake's request to order Hungary to post security (C).

A. *Non-Abusive Nature of the Request*

56. Hungary submits in the present proceedings that its request for a continued stay of enforcement has been made in good faith as it raises an important and so far unresolved issue, namely the extent to which the CJEU's *Achmea* ruling allows for a revision of the Award. Dan Cake, by contrast, considers that Hungary's request is made in bad faith and purely for the purpose of delaying enforcement of the Award.
57. In the present case, the Tribunal does not consider that Hungary's Application for a stay of enforcement constitutes an abuse of process or was made in bad faith or for purely dilatory purposes. Hungary has raised in its Application for Revision a question that is neither manifestly inadmissible nor manifestly unfounded as a matter of substance. Instead, the issue at stake is a genuine one. Hence Hungary has a right of access to the Tribunal to

⁶⁶ For a review of annulment committee practice on this point, see Kotick and Dahlquist (n 58) 272-276.

entertain its request for revision. Furthermore, Hungary has agreed to an expedited schedule for the revision proceedings.

58. There is also nothing objectionable with Hungary pursuing revision and annulment proceedings in parallel. While the impact of the CJEU's *Achmea* ruling plays a role in both proceedings, the standard of review applied by the present Tribunal in the revision proceedings and the standard of review applied by the annulment committee differ. Furthermore, both annulment proceedings and revision proceedings come with their own deadlines – 120 days after the date on which the award was rendered pursuant to Article 52(2) of the ICSID Convention, 90 days after the new fact was discovered pursuant to Article 51(2) of the ICSID Convention – so that Hungary was required to initiate both proceedings under the ICSID Convention in order to preserve fully its right of access to justice under the ICSID Convention.
59. The fact that Hungary had chosen not to object to the Tribunal's jurisdiction on the basis that the investor-State arbitration provision in the Portugal-Hungary BIT was inapplicable because of a conflict with EU law does also not taint its request for revision or evidence bad faith. There is a legitimate issue, which will be addressed by the Tribunal in due course in these revision proceedings, as to whether Hungary's request for revision is admissible and whether it will have an impact on the Award, despite the fact that Hungary chose not to raise a formal objection to the arbitration based on the alleged incompatibility of the investor-State arbitration provisions in the Portugal-Hungary BIT with EU law. There is, therefore, nothing "absolutely surprising, contradictory and appalling" in Hungary's conduct.
60. Finally, the fact that Hungary failed to comply with the Award between November 2017 and the date when it initiated annulment and later revision proceedings does not change the analysis. Not immediately complying with an ICSID award after it was rendered, not undertaking specifically to comply with it should revision and annulment fail, and failing to offer security with respect to enforcement, are not considerations that indicate that Hungary's request for revision and for the continued stay of enforcement have been made in bad faith or for purely dilatory purposes, therefore constituting an abuse of process.

B. Weighing of Consequences of the Decision for the Parties

61. The core issue in the second step of the Tribunal's analysis is to compare (a) the situation that arises if the stay of enforcement is now lifted, allowing Dan Cake to enforce the Award, and Hungary is ultimately successful with its request for revision, with (b) the situation that arises if the stay of enforcement is continued, thus preventing Dan Cake from enforcing the Award, and Hungary's request for revision is ultimately unsuccessful.
62. In this context, it is a relevant factor that if the request for revision is successful, resulting in a finding that the Tribunal lacked jurisdiction, the rights arising under the Award at present would entirely founder. By contrast, if the request for revision was unsuccessful, the Award would stand in its entirety. In this situation, if enforcement now proceeded, but the Award would later be revised, Hungary would have to face the recoupment of sums paid in enforcement of the Award from Dan Cake. Although the Parties have raised no concern that Dan Cake would be financially incapable of repaying those sums, the need to recoup those sums may nevertheless result in difficulties and require further litigation and enforcement. To protect the Applicant's right of access to justice, these difficulties weigh in favor of continuing a stay of enforcement.
63. On the other hand, the economic consequences for Dan Cake of staying enforcement now, even if the request for revision is ultimately rejected, are limited. Dan Cake would, of course, face a delay in implementing its right to enforcement of the award. This delay, however, would be financially offset, at least in part, by the fact that post-award interest continues to run under the Award. It is to be noted that both parties have agreed to abridge the proceedings, by limiting the written phase to one exchange of memorials and the oral phase to a two-day hearing, which will be held in February 2019. Apart from the fact that this confirms that Hungary is not pursuing dilatory tactics, the brevity of the proceedings entails a correspondingly brief stay, and limits any damage thereby suffered by Dan Cake.
64. The fact that annulment proceedings have been initiated in parallel, and that enforcement may therefore be stayed even beyond the finalization of the present revision proceedings, is a factor that the present Tribunal cannot take into account. It concerns an issue that is germane for the decision the annulment committee may need to take on Hungary's request

for a stay of enforcement before that committee under Article 52(5) of the ICSID Convention. But it is not a consideration that is of relevance for the exercise of discretion by the present Tribunal in the context of the pending revision proceedings.

65. Overall, in weighing the consequences of ordering or lifting a stay of enforcement in the present case, the Tribunal considers that continuing a stay is to be preferred. This avoids the risk that Hungary will need to recoup money paid to Dan Cake under the Award in case its Application for Revision is granted, without causing any disproportionate harm to Dan Cake.

C. Decision on Ordering Hungary to Post Security

66. Finally, in the Tribunal's view, the present situation does not require that Hungary be ordered to post security in return for a continued stay of enforcement. Such security would not merely offset any disadvantage faced by Dan Cake due to a delay in enforcement should the request for revision be unsuccessful. Instead, it would put Dan Cake in a materially better position than if the stay of enforcement was lifted now. To alter the balance between the right of access to justice and the right of enforcement of the award in this manner is uncalled for, in the Tribunal's view. The Tribunal therefore rejects Dan Cake's application that Hungary post security as a counterbalance for the continued stay of enforcement.

3. CONCLUSION

67. In light of the above, the Tribunal comes to the conclusion that continuing the stay of enforcement best reconciles the Parties' competing rights and interest at this stage of the proceedings. The Tribunal also finds that no counterbalance for the continuation of the stay of enforcement, in the form of an order that Hungary post security for the benefit of Dan Cake, is called for.

IV. COSTS

68. All Parties have requested the Tribunal to order costs and fees against the opposing Party. The Tribunal reserves its decision on this question for subsequent determination.

V. DECISION

69. On the basis of the reasoning above, the Tribunal decides that:

- 1) The stay of enforcement of the Award of 21 November 2017 in ICSID Case No. ARB/12/9 will continue pending a decision on the Applicant's Application for Revision.
- 2) All other requests are denied.
- 3) A decision on costs is reserved for subsequent determination.



Mr. Toby Landau QC
Arbitrator



Professor Dr. Stephan W. Schill
Arbitrator



Professor Pierre Mayer
President