INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

ESPF BETEILIGUNGS GMBH, ESPF NR. 2 AUSTRIA BETEILIGUNGS GMBH, AND INFRACLASS ENERGIE 5 GMBH & CO. KG

Annulment Respondents

and

ITALIAN REPUBLIC

Applicant on Annulment

ICSID CASE NO. ARB/16/5
Annulment Proceeding

DECISION ON THE EUROPEAN COMMISSION'S APPLICATION FOR LEAVE TO INTERVENE AS NON-DISPUTING PARTY

Members of the ad hoc Committee
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Prof. D. Brian King, Member of the *ad hoc* Committee
Dr. Ucheora Onwuamaegbu, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee
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13 October 2021

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I. PROCEDURAL HISTORY

1. This Decision relates to the Application for Leave to Intervene as a Non-Disputing Party in the present proceeding submitted by the European Commission (the "**EC**").

2. On 1 July 2021, the EC filed before the *ad hoc* Committee an Application for Leave to Intervene as a Non-Disputing Party pursuant to ICSID Arbitration Rule 37(2) (the "**EC's Application**").

3. On 9 July 2021, the *ad hoc* Committee invited the Parties simultaneously to submit their observations on the EC's Application by 30 July 2021.

4. On 30 July 2021, the Parties simultaneously submitted their observations on the EC's Application of 1 July 2021.

II. THE PARTIES' POSITIONS

A. The European Commission's Request

5. According to the EC, its intervention 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. The EC argues that these proceedings "raise important questions concerning the interaction of the EU Treaties, the Energy Charter Treaty ("**ECT**"), and the ICSID Convention."[1]

6. First, referring to Article 17 of the Treaty on European Union ("**TEU**"), the EC submits that pursuant to European Union ("**EU**" or "**Union**") Law, the EC has a "special role" in ensuring that EU Member States comply with EU Law under the control of the Court of Justice of the EU ("**CJEU**").[2] The EC argues that

> If the *ad hoc* Committee finds it has jurisdiction, that would result in an open conflict between Union law and the ICSID Convention. The Commission would have to ensure that EU Member States take the steps prescribed by Article 351(2) of the TFEU [Treaty on the Functioning of the European Union] to remove that conflict.[3]

7. The EC posits that given this special role, it would bring a perspective, particular knowledge or insight that is different from that of the disputing Parties, because it "participates in all preliminary ruling procedures before the CJEU and provides a legal analysis that represents the

[1] Application for Leave to Intervene as Non-Disputing Party lodged by the European Commission ("**EC's Application**"), 1 July 2021, ¶ 5.
[2] EC's Application, ¶ 6.
[3] EC's Application, ¶ 7.

general interest of the Union. In its function as external representative of the Union, the EC also represents the Union before international courts and tribunals, including courts and tribunals of third countries."[4]

8. Second, the EC submits that it "has been the driving force behind the proposition and negotiation of the ECT"[5] and continues to represent the EU in the negotiations on the modernization of the ECT. Additionally, the EC is lead negotiator of many other international agreements, which, it argues, provides it with particular knowledge or insight in the matter.[6] This, too, is said to provide it with a unique perspective.

9. Third, the EC submits that even though Italy is a member of the EU, the EU and its Member States are independent persons in public international law, and the EC would therefore bring independent knowledge or insight different from that of both Parties to the dispute.[7]

10. Furthermore, according to the EC, its intervention would assist the Committee on a matter within the scope of the dispute. The EC states that it has no knowledge of the grounds for annulment invoked by Italy, and therefore introduces its arguments based on the grounds for annulment it perceives given the contents of the Award. Relying on the "declaration of EU Member States of 15 January 2019 on the legal consequences of the judgment of the CJEU in *Achmea,*"[8] the EU assumes that in the original proceeding, Italy objected to the Tribunal's jurisdiction.

11. As a preliminary point, the EC reminds the Committee that "an international court or tribunal has an obligation to review arguments challenging its jurisdiction on its own motion."[9] The EC further notes that the CJEU rendered its judgment in the *Achmea* case before the request for arbitration in the present case was filed. The EC submits that its written submission would address the following two points within the scope of the dispute:

    (i) Article 26 of the ECT, properly constructed, does not apply intra-EU; or

    (ii) in the alternative, its intra-EU application is precluded by the EU Treaties due to the primacy of EU law as a conflict rule, so that the Arbitral Tribunal lacked jurisdiction.[10]

[4] EC's Application, ¶ 9.
[5] EC's Application, ¶ 11.
[6] EC's Application, ¶ 11.
[7] EC's Application, ¶ 13.
[8] EC's Application, ¶ 16.
[9] EC's Application, ¶ 17.
[10] EC's Application, ¶ 19.

12. The EC takes issue with the fact that based on "allegedly general considerations of public international law," the Tribunal in this case upheld its jurisdiction despite the *Achmea* judgment.[11] Specifically, the EC disagrees with the following findings of the Tribunal:

> (i) The Original Scope of the ECT should be interpreted as *not* including an express or implied disconnection clause.
>
> (ii) Member States did not agree to subsequent modifications of the ECT as to *inter se* matters when concluding the Lisbon Treaty.
>
> (iii) The intra-EU application of the ECT does not violate Union law and that Article 344 [Treaty on the Functioning of the European Union, or "**TFEU**"] does not exclude the possibility of referring intra-EU investor-state disputes to international arbitration not contemplated in the EU treaties.
>
> (iv) The CJEU's reasoning in the *Achmea* ruling does not apply to arbitrations under the ECT.
>
> (v) The EU Treaties do not prevail over the ECT as Article 16 ECT does not create a hierarchy among international agreements.[12]

13. As to the first finding of the Tribunal listed above, according to the EC, "as a matter of customary treaty law, the use of the REIO [Regional Economic Integration Organization] clause in Art. 1(3) and 1(10) of the ECT renders a disconnection clause superfluous."[13] The EC argues that the EU and the EU Member States act jointly as a single unit when pursuing a common purpose, such that they are not bound by treaty obligations between themselves. This has been accepted by third states and finds its expression in REIO clauses in multilateral treaties like the ECT. Consequently, disconnection clauses are said to be unnecessary since, as a matter of customary international law, the use of REIO clauses "signals to the other contracting parties that the relations *inter se* of the EU and the EU Member States are governed not by the international agreement but on the basis of EU law."[14]

14. Next, the EC submits that the Tribunal's dismissal of the notion that EU Member States intended to modify the ECT when they subsequently signed the Lisbon Treaty is erroneous. According to the EC,

> The relevant conflict rule is primacy of Union law, as the later special conflict rule … and in any event, because of the bilateral nature of the international obligations created by Article 26 ECT, the Treaty of Lisbon constitutes an *inter se* amendment of Article 26 ECT, which is in full

[11] EC's Application, ¶ 20.
[12] EC's Application, ¶ 21 (emphasis in the original).
[13] EC's Application, ¶ 23.
[14] EC's Application, ¶¶ 23-39.

> compliance with Article 41 VCLT [Vienna Convention on the Law of Treaties], as set out by the Arbitral Tribunal in *BayWa v Spain*.[15]

The Tribunal has therefore, in the EC's view, manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention.[16]

15. Third, relying on the *Achmea* judgment and Opinion 1/17,[17] the EC argues that the Tribunal's findings in relation to the intra-EU application of the ECT are incorrect and a manifest excess of powers. Indeed, the EC submits that "the TFEU regulates its relationship with EU Member States' other *inter se* international obligations in favour of the absolute precedence of EU law in case of any conflict, even in the case of multilateral treaties."[18] According to the EC, the *Achmea* judgment confirmed that "any international treaty provision permitting intra-EU investment arbitration is contrary to the TFEU."[19] Article 26 of the ECT can therefore not apply in intra-EU relations, and the Tribunal manifestly exceeded its powers by finding otherwise.

16. Fourth, the EC argues that contrary to the Tribunal's ruling, the CJEU's reasoning in the *Achmea* judgment applies to Article 26 of the ECT and to ICSID arbitrations. The EC states that the

> CJEU held in *Achmea* and in its Opinion 1/17 that an agreement between the Member States giving consent to investor-state arbitration (like Article 26 ECT) is in breach not only of Articles 267 and 344 TFEU, but also of the general principles of autonomy of EU law and mutual trust.[20]

In the EC's view, this holding by the CJEU entails the exclusion of intra-EU application of Article 26 of the ECT.[21]

17. Moreover, the EC argues that the CJEU's interpretation of EU Law is binding on parties to intra-EU disputes.[22] The EC submits that this has been recognized by international tribunals, such as the *BayWa v. Spain* tribunal, and has been confirmed by the CJEU in its Opinion 1/17.[23] The Tribunal therefore manifestly exceeded its powers by upholding jurisdiction and

[15] EC's Application, ¶ 43.
[16] EC's Application, ¶ 44.
[17] **RL-0081**, CJEU, Opinion 1/17, EU:C:2019:341.
[18] EC's Application, ¶ 49.
[19] EC's Application, ¶ 49.
[20] EC's Application, ¶ 52.
[21] EC's Application, ¶ 53.
[22] EC's Application, ¶¶ 55, 66.
[23] EC's Application, ¶¶ 55-57.

concluding "that the intra-EU application of the ECT was compatible with the EU Treaties, and that the findings of the CJEU in *Achmea* did not apply to the ECT."[24]

18. In the alternative, the EC argues that the Tribunal was mistaken in disregarding the primacy of EU Law as a conflict rule. The EC submits that EU Law forms part of the rules and principles of international law applicable to the present dispute by virtue of Article 26(6) of the ECT, as has been expressly stated by international tribunals.[25] According to the EC, it follows that when interpreting Article 26 of the ECT, EU Law must be taken into account, with the result that the offer to arbitrate disputes contained therein applies only to investors of third countries.[26] Furthermore, the EC states that the fact that the present arbitration is under the ICSID Arbitration Rules is irrelevant, because the arbitration agreement is based on Article 26 of the ECT.[27]

19. Regarding the fifth finding referenced in paragraph 12 above, the EC refers to the question of a conflict of law between the ECT and EU Law. Invoking the *Barcelona Traction*[28] case, the EC recalls that public international law distinguishes between bilateral legal relations and multilateral legal relations that stem from multilateral treaty obligations.[29] According to the EC, investment treaties, whether multilateral or bilateral, are a modern form of diplomatic protection. The obligations that would be established between EU Member States on the basis of Article 26 ECT are of a bilateral nature, and no different from the relationship under international law established by a bilateral investment treaty such as the one at stake in *Achmea*.[30] When the parties to the present dispute signed the Treaty of Lisbon, they modified their relations as between them in line with Article 41 VCLT.[31]

20. As a concluding and alternative point, the EC submits that EU Law has primacy over the ECT as a conflict rule. This principle of primacy was codified in Declaration No. 17 of the Treaty of Lisbon and has been recognized by other arbitral tribunals. The EC argues that this principle of primacy extends to the intra-EU application of treaties, as confirmed by the CJEU in various judgments. Consequently, by disregarding the primacy of EU Law, the Tribunal manifestly exceeded its powers.[32]

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[24] EC's Application, ¶ 69.
[25] EC's Application, ¶¶ 71, 74, 76.
[26] EC's Application, ¶ 77.
[27] EC's Application, ¶ 78.
[28] *See* EC's Application, ¶ 82, citing *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ Judgment of 5 February 1970, ¶¶ 33 and 35.
[29] EC's Application, ¶ 82.
[30] EC's Application, ¶ 83.
[31] EC's Application, ¶ 85.
[32] EC's Application, ¶¶ 86-89.

21. The EC therefore requests leave: to intervene in the present proceedings and be allowed access to the documents filed in the case to the extent necessary for the preparation of its *amicus curiae* submission; and to attend any hearings and make oral submissions should the Tribunal deem that useful. The EC adds that it could also be invited to participate as an expert on EU Law, rather than as a non-disputing party.[33]

B. Italy's position

22. Italy argues that the EC's request for leave to intervene should be granted, as it complies with the requirements under ICSID Arbitration Rule 37(2).[34]

23. First, according to Italy, the EC's intervention would assist the Committee by bringing a different perspective from that of the disputing Parties. Indeed, the EC, "as a regional economic integration organization, has the power to exercise directly the competences conferred to it by the Member States and to defend directly its public order system."[35] Further, pursuant to Article 17 of the TEU and Article 335 of the TFEU, the EC must guarantee the application of EU Law, is the EU's representative in international affairs, and is authorized to represent the EU in legal proceedings.[36] Therefore, the EC's views would assist the Committee, in particular given its profound knowledge of EU Law and of the ECT, which was in fact signed by the EC.[37]

24. Italy adds that in discharging its mandate, the EC does so with complete independence from the EU Member States and would therefore provide a distinct position from that of any State.[38] Indeed, "[t]he interests of the Member States and the Commission are inherently distinct, even if they might overlap on occasion. The Commission, serving as a guardian of EU law, can challenge Member States' understanding or application thereof."[39] According to Italy, it would be in the interest of both disputing Parties to have the EC "intervene and address the issue of the Tribunal's jurisdiction (and the Award's validity) in light of the correct interpretation of EU law and the ECT."[40]

25. Second, Italy submits that the EC's intervention would address a matter within the scope of the dispute. Italy argues that the request submitted by the EC points to a lack of jurisdiction

[33] EC's Application, ¶ 96.
[34] Respondent's Position on the EU Commission Application for Leave to Intervene as Non-Disputing Party ("**Italy's Position**"), 30 July 2021, ¶ 11.
[35] Italy's Position, ¶ 13.
[36] Italy's Position, ¶ 14.
[37] Italy's Position, ¶¶ 15, 17.
[38] Italy's Position, ¶ 18.
[39] Italy's Position, ¶ 22.
[40] Italy's Position, ¶ 24.

justifying the annulment of the Award "along lines that have been discussed by the Annulment Applicant in its Application."[41]

26. Moreover, Italy notes that the home States of the Annulment Respondents have signed the interpretive declaration of EU Member States of 15 January 2019 on the legal consequences of the *Achmea* judgment, which "confirms the existence of fundamental issues of compatibility between the arbitration clause under Article 26 ECT and intra-EU investment disputes, as clearly outlined in the Annulment Applicant's Application."[42] It is Italy's position that the EC's intervention goes directly to the essence of the annulment application, being whether the Tribunal "had, or could exercise, jurisdiction" over the Annulment Respondents' claims given the invalidity or inapplicability of Article 26 of the ECT.[43]

27. Third, Italy submits that the EC has a "significant interest in the proceeding concerning the ECT and its coexistence with EU law"[44] and therefore has decided to intervene in all arbitration proceedings brought by EU investors against EU Member States. This Committee's decision, Italy submits,

> might produce consequences for all the ECT Contracting Parties that are EU Member States, and for all investors from EU Member States and operating therein. Therefore, the fact that the Commission has the opportunity to submit its opinion concerning the dispute responds to public interests that are of concern to the entire EU.[45]

Italy stresses, in particular, the EU's interest in the use of investment arbitration by EU companies, and the fact that the interaction of EU Law and investment arbitration has been a topic of debate, with the EC actively participating as the body tasked with the application of EU Law. Hence, the EC has a significant interest in the present proceeding.[46]

28. Finally, Italy submits that the EC's intervention would not disrupt the proceeding as it would address a fundamental issue at a very early stage of the proceeding. Indeed, because the EC filed its application before the submission of any written pleadings, the Parties would be able to address the EC's arguments in their memorials. A further discussion of the issue would also reduce the chance of an infringement procedure, assertedly to the benefit of both Parties.[47]

C. The Annulment Respondents' position

[41] Italy's Position, ¶ 27.
[42] Italy's Position, ¶ 28.
[43] Italy's Position, ¶ 29.
[44] Italy's Position, ¶ 32.
[45] Italy's Position, ¶ 33.
[46] Italy's Position, ¶¶ 34-36.
[47] Italy's Position, ¶¶ 37-39.

29. The Annulment Respondents request that the Committee deny the EC's Application on two grounds: (i) it is inappropriate in the context of ICSID annulment proceedings; and (ii) it does not satisfy the standard for intervention by non-disputing parties under the ICSID Arbitration Rules. The Annulment Respondents add that the substantive arguments put forward by the EC in its Application are meritless in any event.[48]

30. First, the Annulment Respondents argue that the EC is seeking permission to address matters outside of the scope of the Committee's jurisdiction, as it will advocate the reversal of alleged mistakes of law or fact in the Award.[49] Relying on previous annulment decisions,[50] the Annulment Respondents point to the restricted nature of the annulment process, which does not provide scope to analyze whether a decision is correct or incorrect on the law or the facts. The Annulment Respondents submit that the EC's main contention is its disagreement with the Tribunal's decision to uphold jurisdiction and the Tribunal's rejection of an implicit disconnection clause in the ECT, both legal rulings on matters which the Committee cannot reevaluate in this annulment proceeding.[51]

31. In addition, the Annulment Respondents contend that in light of the limited scope of a committee's enquiry, which is restricted to the evidence and arguments before the tribunal, accepting evidence such as the views of the EC on EU Law, which was not submitted before the tribunal, also exceeds the appropriate scope of the Committee's mandate.[52]

32. Second, the Annulment Respondents contend that the EC's Application does not satisfy the standard for non-disputing party interventions under ICSID Arbitration Rule 37(2), because: (i) it does not offer a perspective, particular knowledge, or insight different from that of Italy; and (ii) the EC does not have a valid significant interest in the proceeding.[53] Regarding the first

[48] Annulment Respondents' Response to the European Commission's Application for Leave to Intervene as a Non-Disputing Party ("**Annulment Respondents' Response**"), 30 July 2021.
[49] Annulment Respondents' Response, pp. 2-5.
[50] Referring to **ELA-0035**, *Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Co. Ltd.*, ICSID Case No. ARB/10/20, Decision on Annulment, 22 August 2018, ¶ 61; **ELA-0040**, *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on the Application for Annulment of the Democratic Republic of the Congo, 29 March 2016, ¶ 111; **IL-21**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, ¶¶ 32, 232; **ELA-0039**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award, 8 July 2013, ¶ 233; **ELA-0038**, *Duke Energy Int'l Peru Invs. No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *ad hoc* Committee, 1 March 2011, ¶ 144; **ELA-0036**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009, ¶ 24; **ELA-0037**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, ¶ 136; **IL-11**, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, 5 June 2007, ¶ 20.
[51] Annulment Respondents' Response, pp. 3-4.
[52] Annulment Respondents' Response, p. 4.
[53] Annulment Respondents' Response, p. 5.

requirement, the Annulment Respondents argue that the EC's views are not sufficiently independent from Italy's position; indeed, arguments regarding the relevance of the CJEU decision in *Achmea* to intra-EU disputes under the ECT have already been raised by Italy and were rejected by the Tribunal in the underlying arbitration. Allowing the EC's participation in the annulment proceeding would not assist the Committee, would result in repetitive pleadings, and would disproportionately increase the cost to ESPF, as it would have to respond to both Italy and the EC.[54]

33. Regarding the second requirement, the Annulment Respondents consider that the EC seeks to advance a "self-serving political objective" aimed at reserving the adjudication of intra-EU investment disputes exclusively for EU courts, which is far from a valid significant interest or a broader social concern as required by ICSID Arbitration Rule 37(2).[55] The Annulment Respondents submit that the EC's political agenda has been well-known and well-documented throughout the years, as evidenced by dozens of similar intra-EU ECT proceedings where the EC has sought to intervene. According to the Annulment Respondents, the EC should not be allowed to use this forum to advance its policy objectives or political goals, which have no relevance to the Committee's task.[56]

34. On similar grounds, the Annulment Respondents invite the Committee to reject the EC's alternative request to testify as an expert witness, in particular given what the Annulment Respondents perceive as its clear partisan nature.[57] In support, they rely on the *Cube* decision, where the *ad hoc* committee found that the EC cannot provide an independent and impartial view due to the "critical and extensive role of the Commission in the EU legal architecture."[58]

35. Finally, the Annulment Respondents argue that the substantive arguments advanced by the EC are meritless.[59] They point to the fact that the Tribunal already rejected the arguments: (i) that the intra-EU application of the ECT violates EU Law;[60] (ii) that the ECT is superseded by EU Law;[61] and (iii) that the *Achmea* holding shows that intra-EU arbitration under the ECT is incompatible with EU Law.[62] The Annulment Respondents further point to the long line of cases where tribunals have addressed the same intra-EU objections under the ECT and have

[54] Annulment Respondents' Response, pp. 5-6.
[55] Annulment Respondents' Response, p. 6.
[56] Annulment Respondents' Response, p. 7.
[57] Annulment Respondents' Response, p. 7.
[58] **ELA-0041**, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20 ("***Cube***"), Annulment Proceeding, Decision on the European Commission's Application for Leave to Intervene as a Non-Disputing Party, 2 April 2020, ¶¶ 43, 45.
[59] Annulment Respondents' Response, pp. 8-11.
[60] Annulment Respondents' Response, p. 8.
[61] Annulment Respondents' Response, p. 9.
[62] Annulment Respondents' Response, p. 9.

unanimously rejected the EC's position. In the Annulment Respondents' view, the EC is simply attempting to relitigate issues on which it has never been successful.

36. In light of the above considerations, the Annulment Respondents ask the Committee to deny the EC's request to intervene or to participate as an expert. However, if the Committee decides to grant the Application, the Annulment Respondents submit that the Committee should strictly limit the EC's role in the proceeding to prevent unduly burdening them and delaying the proceeding.[63]

III. THE COMMITTEE'S ANALYSIS

A. The applicable legal standard

37. As stated above, the EC seeks to intervene in this annulment proceeding and bases its Application on Rule 37(2) of the Arbitration Rules.

38. Alternatively, the EC suggests that it can also be invited to participate as an expert on EU Law, rather than as a non-disputing party. Italy has not commented on the alternative request, while the Annulment Respondents oppose it.

39. In their submissions, the Parties agree that Rule 37(2) sets the applicable standard for determining the disposition of the EC's Application.

40. The Committee notes that Rule 37(2) is limited to the possibility of allowing a non-disputing party to file a written submission regarding the matter in dispute. It does not provide an explicit basis for providing access to any non-public documents to such non-disputing party or permitting it to attend a hearing.

41. Furthermore, the Committee is of the view that while pursuant to Rule 53 of the Arbitration Rules, Rule 37(2) applies, *mutatis mutandis*, to the present annulment proceeding, in applying Rule 37(2), it is appropriate to have due regard to the nature of annulment proceedings.

42. The EC's alternative request lacks a specific legal basis and, in any event, exceeds the scope of Rule 37(2) of the Arbitration Rules. The Committee will therefore consider the request within the general procedural framework of these annulment proceedings.

[63] Annulment Respondents' Response, p. 12.

B. The EC's Application to intervene pursuant to Rule 37(2) of the Arbitration Rules or as an expert

43. As the *ad hoc* committee in *Micula v. Romania* considered, the limited scope of annulment proceedings entails that "a request for leave by a non-disputing party must be dealt with in a more restrictive and circumscribed manner."[64] Similarly, the *ad hoc* committee in *Cube v. Spain* considered as follows:

> [I]n deciding whether or not to allow a third party to intervene, the Committee must be mindful of the nature and scope of the present proceeding. Namely, a request for annulment may only be made on the basis of the specific grounds set out in Article 52 of the ICSID Convention, and the Committee may not engage in a broader review of the merits of the award. Nor may it substitute its views for those of the tribunal that rendered the award. Consequently, the Committee should adopt procedures commensurate with the nature and scope of an annulment proceeding. [65]

44. As noted above, the EC's request goes beyond the scope of the express parameters of Rule 37(2) of the Arbitration Rules. The need to assess the request through the prism of the nature and scope of annulment proceedings lends force to the proposition that, even if in some cases a request for third-party intervention that goes beyond the explicit boundaries of Rule 37(2) may be entertained, there is no basis for such an approach in the present annulment proceedings.

45. ICSID Arbitration Rule 37(2) requires the non-disputing party's submission to assist in determining a factual or legal issue, which such party must be in a position to do due to its different perspective, knowledge or insight.

46. While Italy stresses that the timing of the EC's request, namely at the outset of the proceedings, serves to avoid disrupting the proceedings,[66] the corollary of the request having been submitted at this early stage is that the Committee has not yet received any of the Parties' scheduled two rounds of submissions, precluding an informed assessment of which factual or legal issues it will ultimately need to determine in these proceedings. This in turn prevents an informed assessment of whether and, if so, to what extent a written submission from the EC would assist the Committee.

47. The Committee notes that the EC's request is wide-ranging and addresses a large number of substantive legal arguments generally relating to issues that were raised in the underlying

[64] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 63.
[65] **ELA-0041**, *Cube*, ¶¶ 30-31.
[66] Italy's Position, ¶ 37.

arbitration, as is apparent from the Application's many references to the Award.[67] The Annulment Respondents argue just as vigorously that the EC's points are meritless. The Committee cannot and will not express a view on the merits of the position expressed by the EC and, by extension, by the Annulment Respondents at this stage.

48. At the same time, the inability to assess the merits of the arguments presaged by the EC, and indeed the impropriety of doing so, underscores the difficulty of determining at this stage whether the EC's intervention would bring a different perspective that would assist the Committee, and whether its submission would address a matter within the scope of the Parties' dispute. Such a determination at this stage would be premature.

49. Italy has argued that the EC's submission would assist the Committee "[t]hanks to its articulated policy on the matter and its consolidated approach to [intra-EU] investment disputes";[68] and has stressed the EC's interest in proceedings concerning the ECT and its compatibility with EU Law, as well as the institutional role of the EC in relation to these issues.[69] While the Committee is reluctant to opine in general terms on the nature and scope of the mandate of the EC and its policies, the EC refers to itself as "the guardian of the Treaties,"[70] which suggests a policy interest in submitting its Application to intervene, but equally suggests that the EC sees a role for itself in evaluating the questions that comprise the present dispute, which is instead subject to the jurisdiction of this Committee.

50. This already provides a sufficient basis to reject the EC's request to intervene.

51. The EC's perspective and stated interest is also difficult to align with the alternative request to allocate a role to the EC as an independent expert. Furthermore, as confirmed in Procedural Order No. 1, in principle, and given the nature of an annulment proceeding, the Parties are expected to rely on the evidentiary record of the arbitration proceedings, and the Committee does not expect to receive new witness statements or expert reports.[71] Only if, based on a reasoned written request followed by observations from the other Party, exceptional circumstances are found to exist, might the Committee decide to allow such a submission.[72] In the present case, where the EC has not specified in which capacity it would suggest it could or should be involved as an expert, and the Parties have not commented on the procedural

[67] *See* EC's Application, ¶¶ 41, 43, 44, 45, 50, 51 ,69.
[68] Italy's Position, ¶ 17.
[69] Italy's Position, ¶¶ 32 *et seq*.
[70] EC's Application, ¶ 6.
[71] Procedural Order No. 1, ¶ 15.2.
[72] Procedural Order No. 1, ¶ 15.3.

framework for such involvement either, let alone submitted a request as envisaged by Procedural Order No. 1, there is no basis to allow the EC to act in that capacity.

52. Finally, Italy has argued that the EC's submission would not disrupt this proceeding. Given that the Committee has already found sufficient bases to reject the request to intervene, there is no need to address the procedural consequences of any such intervention. Insofar as Italy suggests that the EC's intervention would create a desirable "confrontation" between the EC and a Member State in view of potential future infringement actions by the EC, the Committee underlines that its remit is to assess the Request for Annulment as between Italy and the Annulment Respondents, on the basis of the grounds for annulment submitted in accordance with the applicable provisions of the ICSID Convention and the ICSID Arbitration Rules. The scope of annulment proceedings cannot be expanded beyond these parameters, and does not provide a platform for putative enforcement modalities or constraints, let alone wider policy discussions between EU Member States and third parties.

53. Accordingly, the Committee finds that the request for intervention by the EC must be rejected, as well as the alternative request that the EC be invited to participate as an expert on EU Law.

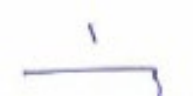
IV. DECISION

54. Having considered the EC's Application and the Parties' submissions, and for the reasons stated above, the Committee at this stage:

(i) rejects the EC's Application;

(ii) rejects the EC's alternative request that it be invited as an expert witness; and

(iii) reserves the issue of costs on this Application to a later order or decision.



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