

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ENCAVIS AND OTHERS

v.

ITALIAN REPUBLIC

(ICSID Case No. ARB/20/39)

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

Members of the Tribunal

Prof. Juan Fernández-Armesto, President

Ms. Wendy Miles, Arbitrator

Mr. Alexis Mourre, Arbitrator

Secretary of the Tribunal

Ms. Anneliese Fleckenstein

Assistant to the Tribunal

Ms. Sofia de Sampaio Jalles

15 June 2022

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WHEREAS

1. This arbitration arises between Claimants and Respondent, the Italian Republic [collectively, the "**Parties**"].
2. On 11 May 2022 the Arbitral Tribunal received the European Commission's Application for Leave to Intervene as Non-Disputing Party [the "**Commission's Application**"].
3. On 12 May 2022 the Arbitral Tribunal granted the Parties the opportunity to file comments to the Commission's Application.
4. On 26 May 2022 the Arbitral Tribunal received Claimants' Response to the European Commission's Application [**"Claimants' Response"**], and Respondent's Position on the European Commission's Application [**"Respondent's Response"**].
5. After considering the Parties' respective positions, the Tribunal issues the following Decision on the Commission's Application:

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6. The Tribunal will start by summarizing the Commission's Application (1.), followed by Claimants' (2.) and Respondent's (3.) Responses to the Commission's Application. Thereafter, the Tribunal will make its decision (4.).

1. THE COMMISSION'S APPLICATION

7. The European Commission [**"Commission"**] has requested leave to intervene in the present proceeding as a non-disputing party and file a written submission, in accordance with Rule 37(2) of the ICSID Arbitration Rules¹. The Commission explains that it would like to make a written submission on the following point²:

"Article 26 of the Energy Charter Treaty, properly construed, does not apply *intra*-EU in general, and in the relationship between the Italian Republic and the Federal Republic of Germany, in particular, so that the Arbitral Tribunal lacked jurisdiction."

8. Although the Commission is not privy to the Parties' submissions in this arbitration, the Commission assumes that the Italian Republic has objected to the jurisdiction of this Tribunal, pursuant to the declaration "On the Legal Consequences of the Judgment of the Court of Justice in *Achmea* on Investment Protection in the European Union" [the **"Declaration"**] signed by 22 Member States on 15 January 2019, and the most recent judicial developments pertaining to the Tribunal's jurisdiction under the ECT (including the judgments of the Court of Justice of the European Union [**"CJEU"**] in *Slovak Republic v. Achmea GV* [**"Achmea Judgment"**] and *Moldova v. Komstroy* [**"Komstroy Judgment"**])³.
9. The Commission understands that the present dispute may involve two issues of EU law: first, the measures contested by Claimants transpose into Italian law an European Union [**"EU"**] Directive on renewable energy; second, the measures contested by claimants may constitute State aid⁴.

¹ Rule 37(2) of the ICSID Arbitration Rules: "(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal 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 non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission."

² Commission's Application, para. 22.

³ Commission's Application, paras. 18 *et seq.*

⁴ Commission's Application, paras. 26-27.

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10. The Commission considers that the requirements of Rule 37(2) of the ICSID Arbitration Rules are met. First, the Commission avers that it can assist the Arbitral Tribunal in determining the intra-EU legal issue, which is related to these proceedings and within the scope of this dispute⁵, by showing that the *Achmea* and *Komstroy* Judgments preclude the intra-EU application of Art. 26 of the Energy Charter Treaty ["ECT"]⁶.
11. Second, the Commission submits that it will bring a perspective, particular knowledge or insight that is different from that of the Parties⁷, thanks to its threefold position: as the "driving force" behind the negotiations and drafting of the ECT⁸, the "guardian of the Treaties" including the ECT⁹, and the "external representative of the Union" in all CJEU preliminary rulings proceedings¹⁰. The Commission also notes that it is an independent international law subject from Italy¹¹.
12. Finally, the Commission avers that it has a significant interest in this arbitration brought by investors of EU Member States against Italy, another Member State. As the "guardian" and "external representative" of the EU, the Commission must see to the correct interpretation and application of EU law¹². Furthermore, the Commission must prevent conflict between EU Treaties including the ECT and the ICSID Convention¹³.
13. Therefore, the Commission requests that the Arbitral Tribunal¹⁴:
 - (i) Grant the Commission leave to intervene in the present proceedings as a non-disputing party;
 - (ii) Set a deadline for the Commission to file a written submission;
 - (iii) Allow the Commission to access documents filed in the case, to the extent necessary for its intervention in the proceedings; and
 - (iv) Allow the Commission to attend hearings to present oral arguments and reply to the questions of the Tribunal.

2. CLAIMANTS' POSITION

14. Claimants object to the Commission's Application and ask that the Tribunal deny its request to file a submission as a non-disputing party¹⁵. According to Claimants,

⁵ Commission's Application, para. 23, also referring to Rule 41(2) of the ICSID Convention.

⁶ Commission's Application, paras. 28-37.

⁷ Commission's Application, paras. 7-12.

⁸ Commission's Application, paras. 13-14.

⁹ Commission's Application, paras. 8-9.

¹⁰ Commission's Application, para. 11.

¹¹ Commission's Application, para. 15.

¹² Commission's Application, paras 38-39.

¹³ Commission's Application, para. 10.

¹⁴ Commission's Application, para. 42.

¹⁵ Claimants' Response, p. 1.

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the Commission's Application does not satisfy the requirements articulated in ICSID Arbitration Rule 37(2) (A.), and in any case, the Commission's Application is meritless (B.). If the Commission's Application is granted, Claimants request that the Tribunal limit any submission, deny the request to attend the hearing, and require the Commission to pay the additional costs created by its interference (C.).

A. Commission's Application does not fulfil Rule 37(2) requirements

Commission's submission will not assist the Tribunal

15. Claimants argue that the Commission's intervention would not assist the Tribunal by offering a perspective, particular knowledge or insight that is different from that of Italy¹⁶. Rather, the Commission's arguments would be an "echo" of the arguments that Italy has already advanced in its Memorial¹⁷, namely that Art. 26 of the ECT does not apply to intra-EU disputes¹⁸.
16. Claimants aver that the Commission's views are not independent from Italy's and allowing the Commission's interference would force Claimants to defend their position against two entities, rather than one¹⁹. Claimants submit that this would disproportionately increase their costs²⁰.
17. Further, Claimants note that the Commission refers to issues of potential State aid²¹. Claimants note that such issue is outside the scope of the dispute, and not addressed by Italy²².

No significant interest

18. Claimants aver that the Commission does not have a valid significant interest in this proceeding as required by Rule 37(2) of the ICSID Arbitration Rules. Instead, the Commission has a self-serving political interest to "rewrite" the process of investment treaty arbitration and the ECT itself, to secure the exclusivity of EU courts' jurisdiction over intra-EU investment disputes²³. Claimants submit that this dispute neither affects the EU Treaties, nor EU law, which is not the law governing the dispute²⁴. According to Claimants, the Commission's political agenda does not amount to a significant interest that would merit intervention²⁵.

¹⁶ Claimants' Response, section II, p. 2.

¹⁷ Claimants' Response, section II.A, p. 3.

¹⁸ Claimants' Response, section II.A, p. 3.

¹⁹ Claimants' Response, section II.A, p. 3.

²⁰ Claimants' Response, section II.A, p. 3.

²¹ See Commission's Application, para. 27 and fn. 12.

²² Claimants' Response, section II.B., p. 4.

²³ Claimants' Response, section II.C, pp. 4-5.

²⁴ Claimants' Response, section II.C, p. 5.

²⁵ Claimants' Response, section II.C, pp. 5-6.

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B. Commission's arguments are meritless

19. Claimants state that the arguments which the Commission intends to advance in this case are meritless and have been rejected by numerous tribunals, including after the *Komstroy* Judgment²⁶. In doing so, Claimants raise various arguments, such as the lack of a disconnection clause in the ECT, and the ECT parties' (including the EU's) historical consent to arbitral jurisdiction through Art. 26 of the ECT. Moreover, Claimants call the Commission's reference to State aid matters an unfounded "red herring" which should not persuade the Tribunal²⁷.

C. If granted, Commission's access should be limited

20. In the event that the Tribunal decides to allow the Commission's intervention, Claimants request that the Tribunal strictly limits the Commission's role in the arbitration and direct it to bear the costs of its intervention. Claimants propose this in order to prevent unduly burdening Claimants and delaying the procedural timetable²⁸, as other arbitral tribunals have done in the past²⁹:

- The Commission's intervention should be limited to the EU law issues concerning the tribunal's jurisdiction³⁰;

²⁶ Claimants' Response, section II.C, p. 6, referring to the chart of decisions in Claimants' Reply, pp. 20-22; see also the references cited on pp. 5-6, in footnotes 21 and 22.

²⁷ Claimants' Response, section III, pp. 6-8.

²⁸ Claimants' Response, section IV, p. 9.

²⁹ Claimants' Response, section IV, pp. 9-10, citing to *Methanex v. United States*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae*, Jan. 15, 2001, para. 50, CL-182; *Aguas Argentinas, S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, May 19, 2005, paras. 6, 15, 29 and 33, CL-188; and *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, Sept. 23, 2010, CL-7; *Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission, Feb. 12, 2007, para. 27, CL-189; *Biwater Gauff v. Tanzania*, Procedural Order No. 5, Feb. 2, 2007, para. 71, CL-183; *Watkins* Award, para. 34, CL-17; *Hydro Energy* Decision, para. 47, CL-103; *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Instructions on Quantum, para. 54, CL-104; *RWE Innogy GmbH & RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, para. 29, CL-130; *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum, CL-104; *Stadtwerke München, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, para. 25, CL-86; *Antin Infrastructure Services Luxembourg S.a.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, para. 64, CL-87; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, para. 25, CL-131; and *Eiser Infra. Ltd. & Energia Solar Lux. S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, paras. 65-70, RL-44 (acknowledging that this award has been annulled, on grounds unrelated to the present issue).

³⁰ Claimants' Response, section IV, p. 10.

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- The Commission should be denied access to the case file, as its arguments are based solely on the nationality of the Parties and any materials required by the Commission are either in the public domain or already in its possession³¹;
- The Commission should not be permitted to attend the hearing, as under ICSID Arbitration Rule 32(2) third-party attendance is conditional upon the consent of both parties³², and Claimants do not consent³³;
- The Commission should post security for the added costs that its participation in this arbitration will impose on Claimants or undertake to pay the added costs at the appropriate stage of the proceeding³⁴; Claimants argue that they should not bear the costs of the Commission advancing its political agenda³⁵.

3. RESPONDENT'S POSITION

21. Respondent submits that the Commission's Application should be accepted, as all the conditions of Rule 37(2) of the ICSID Arbitration Rules are met³⁶.

A. Commission's submission will assist the tribunal

22. Respondent avers that the Commission's submission would assist the Tribunal in determining legal and factual issues by bringing a perspective that is different from that of the disputing Parties, by offering particular knowledge and insight into EU law, the ECT, and the specific issue of the applicability of arbitral clauses in intra-EU disputes in light thereof³⁷. This is because the Commission can provide key considerations from its "articulated policy" and "consolidated approach" on EU law³⁸. Further, the Commission is a signatory of the ECT on behalf of the EU³⁹.
23. Respondent states that the Commission's unique expertise on EU law, and specifically the interplay between EU law and international treaties such as the ECT, has been recognized in cases such as *Electrabel v. Republic of Hungary*⁴⁰. Respondent clarifies that the Commission brings an "inherently different" perspective than that of the Parties, considering its authority as keeper of EU law⁴¹.

³¹ Claimants' Response, section IV, p. 10.

³² Claimants' Response, p. 16.

³³ Claimants' Response, section IV, p. 10.

³⁴ Claimants' Response, section IV, pp. 9, 11

³⁵ Claimants' Response, section IV, p. 11.

³⁶ Respondent's Response, paras. 10-11 and 40-41.

³⁷ Respondent's Response, paras. 12 and 24.

³⁸ Respondent's Response, paras. 13-14, referring to Art. 17(1) of the Treaty of the European Union ["TEU"].

³⁹ Respondent's Response, para 15.

⁴⁰ Respondent's Response, para. 15, quoting *Electrabel S.A. v. Republic of Hungary*, Decision on Jurisdiction, Applicable law and liability, 30 November 2012, at 4.92.

⁴¹ Respondent's Response, paras. 17-18.

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24. Respondent notes that the Commission is “endowed with the most absolute independence” from the Member States, as attested by its functioning treaties⁴².

B. Matter within the scope of the dispute

25. Respondent argues that the second criteria in Rule 37(2)(b) is met, as the Commission's Application falls directly within the scope of the dispute because it concerns the question of the Tribunal's jurisdiction⁴³. Moreover, the Republic submits that the Commission's intervention on EU law is “undoubtedly” within the scope of this all-EU parties' dispute⁴⁴.

C. Significant interest

26. Respondent states that the third criteria found in Rule 37(2)(c) is also met as the Commission has a significant interest in the proceedings⁴⁵, particularly, in ensuring a harmonious application of EU law and eliminating any “discrimination and regulatory arbitrage” in intra-EU disputes⁴⁶. The Commission must also intervene in all potential conflicts between EU law and arbitral awards⁴⁷. Furthermore, the Commission represents the public interest in this regard, as this Tribunal's decision will affect all EU States. Given these high stakes it would be “outrageous” for the Tribunal to deny the Commission's intervention⁴⁸.

D. No disruption of the proceedings

27. Lastly, Respondent avers that the Commission's intervention will not disrupt the proceedings as the Application arrived at an early stage, after the first round of submissions⁴⁹. Respondent submits that the Commission's intervention at this stage would permit an early “full debate” of the EU law issues. The Republic claims this debate is necessary to alleviate the risk of infringement procedures faced by EU Member States executing an intra-EU award⁵⁰.

4. THE TRIBUNAL'S DECISION

28. The Tribunal must decide the Commission's request for leave to intervene as a non-disputing party in this arbitration by filing a written submission. The Commission also requests access to the case file and permission to attend hearings⁵¹.

⁴² Respondent's Response, paras. 18 and 21, citing Art. 245 of the Treaty on the Functioning of the European Union [“TFEU”].

⁴³ Respondent's Response, paras. 27-31.

⁴⁴ Respondent's Response, paras. 27-31.

⁴⁵ Respondent's Response, paras. 32-36.

⁴⁶ Respondent's Response, para. 32.

⁴⁷ Respondent's Response, para. 35.

⁴⁸ Respondent's Response, para. 34.

⁴⁹ Respondent's Response, paras. 37-38.

⁵⁰ Respondent's Response, para. 39.

⁵¹ Commission's Application, paras. 40-42.

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29. After carefully considering the Parties' respective positions, the Tribunal decides to grant the Commission leave to participate as a non-disputing party to file a written submission, as the Application meets the requirements of Rule 37(2) of the ICSID Arbitration Rules (**A.**). As to the Commission's other requests, the Tribunal decides not to allow the Commission to access the case file, subject to the possibility of requesting specific documents (**B.**), and to postpone its decision on the Commission's request to attend and present oral arguments at hearings (**C.**). Finally, the Tribunal decides, *pro tem*, not to grant Claimants' request that the Commission be ordered to bear the additional costs caused by its intervention (**D.**).

A. Leave to file a written submission

30. ICSID Arbitration Rule 37(2) provides that:

“(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute.

In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal 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 non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”

31. Pursuant to this provision, the Tribunal considers that the four listed (although not exclusive) factors that the Tribunal shall consider when deciding whether or not to allow a non-disputing party to file a written submission, are present in this case:
- The submission would assist the Tribunal in the determination of factual or legal issues related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing Parties (**a.**);
 - The submission would address a matter within the scope of the dispute (**b.**);
 - The Commission has a significant interest in the proceeding (**c.**); and

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- The Commission's intervention will neither disrupt the efficiency of the proceedings, nor the equality of the Parties (d.).
32. The Tribunal will also address the deadline for the filing of the submission, and the scope of said submission (e.).

a. The Commission's submission will assist the tribunal

33. The Tribunal finds that the Commission's submission would assist the Tribunal in determining factual or legal issues related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing Parties.
34. In this arbitration Respondent objects to the jurisdiction of the Arbitral Tribunal under several grounds, including by presenting a *ratione materiae* objection, which "concerns the arbitrability of intra-EU investment disputes under the ECT"⁵². The Tribunal will thus have to decide on this objection and consider the relationship between EU law and Art. 26 of the ECT. This may involve the consideration of the allegedly conflicting provisions of EU law. As the body responsible to "ensure the application of the Treaties and its measures adopted by the institutions pursuant to them" and to "oversee the application of [EU] law under the control of the [CJEU]",⁵³ the Commission brings a perspective, particular knowledge or insight that is different from that of the disputing parties, that is different from that of Claimants and Italy.
35. Therefore, the Tribunal finds that the Commission's knowledge and insight would bring a perspective different from that of the Parties, and would assist the Tribunal in its consideration of Respondent's *ratione materiae* jurisdictional objection.

b. The submission will address a matter within the scope of the dispute

36. The Commission explains that it wishes to make a written submission on the following specific issue⁵⁴:

"Article 26 of the Energy Charter Treaty, properly construed, does not apply intra-EU in general, and in the relationship between the Italian Republic and the Federal Republic of Germany, in particular, so that the Arbitral Tribunal lacked jurisdiction."

37. This is precisely the scope of Respondent's intra-EU jurisdictional objection in this arbitration⁵⁵. Therefore, the Commission's submission addresses a matter which falls within the scope of the dispute.

⁵² Counter-Memorial, para. 38 *et seq.*

⁵³ TEU, Art. 17(1).

⁵⁴ Commission's Application, para. 22.

⁵⁵ Counter-Memorial, paras. 38 *et seq.*

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38. As pointed out by Claimants, the Commission also refers to an issue of State aid, arguing that “the measures contested by the Claimants may constitute State aid in the sense of Article 107(1) TFEU. That may mean that any legitimate expectations are excluded.”⁵⁶ The Tribunal understands, however, that the Commission mentions this merely to enumerate the issues of EU law that may have been put to the Tribunal, given that the Commission is not privy to the Parties’ submissions on this matter. This does not mean that the Commission wishes to make a submission on issues of State aid – which extrapolate the scope of the present dispute.

c. The Commission has a significant interest in this proceeding

39. This is an arbitration brought by investors, nationals of EU Member States, against Italy. Pursuant to the Commission’s responsibility to “ensure the application of the Treaties and its measures adopted by the institutions pursuant to them” and to “oversee the application of [EU] law under the control of the [CJEU]”⁵⁷, the Commission has a significant interest in ensuring that when the Tribunal assesses its jurisdiction, it takes into consideration the Commission’s position on the compatibility of EU law and Art. 26 of the ECT.

d. The Commission’s intervention will not disrupt the proceedings

40. Rule 37(2) of the ICSID Convention further requires that the admission of a non-disputing party’s written submission does not interfere with efficiency and due process. Specifically, the Rule directs that:

“The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”

41. This requirement is also met.

42. First, the proceedings are still at a stage where both Parties will have ample opportunity to address the Commission’s written submission: Respondent will file a Rejoinder on the Merits and Reply on Jurisdiction, while Claimants will file a Rejoinder on Jurisdiction. Furthermore, the Parties can address the Commission’s submission during the hearing and in their post-hearing submissions. The Commission’s written submission will not disrupt the proceedings, since the procedural calendar will be maintained.

43. Second, the Commission’s submission will not unduly burden or unfairly prejudice either party. Respondent agrees with the Commission’s participation. As for Claimants, they will simply have to answer one submission by the Commission, at the same time that they address Respondent’s arguments on the intra-EU jurisdictional objection.

⁵⁶ Commission’s Application, para. 27.

⁵⁷ TEU, Art. 17(1).

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e. Deadline and scope

44. As to the deadline for the filing, the Tribunal determines that the Commission should file its submission by 1 July 2022. Respondent will have the opportunity to address this submission in its Rejoinder on the Merits and Reply on Jurisdiction, due on 22 July 2022, and Claimants can address it in the Rejoinder on Jurisdiction, scheduled to be filed on 5 August 2022.
45. This ensures that both Parties have an adequate opportunity to address the Commission's submission, without any undue disruption of the proceeding. It also maintains the equality between the Parties and ensures that neither party is unduly burdened or prejudiced, as both will be able to respond to the Commission's submission in writing prior to the Hearing.
46. The Commission is kindly invited to limit its submission to 30 pages and to focus solely on the intra-EU objection.

B. Access to the case file

47. The Commission has requested access to documents filed in this case, to the extent necessary for the preparation of its submission. Claimants object to this request, arguing that such access is unnecessary considering that the EU law issue is based solely on the nationality of the Parties and all materials that the Commission needs to prepare its submission are in the public domain or already in its possession⁵⁸. Respondent has no objection to the Commission accessing the case file.
48. The Tribunal agrees with Claimants. The Commission's submission is limited to narrow issues of law and fact. The insights and information uniquely available to the Commission are precisely why the Commission is being granted leave to intervene. The Tribunal sees no need for the Commission to access the case file in general to make its submission.
49. However, should the Commission feel that it requires access to a specific document or part of a specific document to properly prepare its submission, it may submit a narrow and specific request to the Tribunal, which the Tribunal will then consider.
50. On the basis of its inherent powers and for the sake of transparency, the Tribunal hereby authorizes the Commission to access the jurisdictional sections of the Memorial, Counter-Memorial and Reply filed so far by the Parties (the Parties shall redact their written submissions as appropriate; the submissions' accompanying exhibits are excluded from disclosure). This will ensure that the Commission's submission brings a perspective different from that of the Parties and is limited to addressing the intra-EU objection, as discussed by the Parties. The Commission must refrain from disseminating these documents outside the legal team working on the non-disputing party submission.

⁵⁸ Claimants' Response, section IV, p. 10.

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C. Participation in hearings

51. The Commission has requested permission to attend hearings in order to present oral arguments and reply to the questions of the Tribunal.
52. ICSID Arbitration Rule 32(2) provides that third-party attendance at the hearing is conditional upon the consent of both Parties:

“Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.”

53. Contrary to Respondent, Claimants have made it clear that they do not consent to the Commission's attendance⁵⁹.
54. In view of this, the Tribunal, *pro tem*, rejects the Commission's request to attend hearings. The Tribunal may revisit this decision after reviewing the Commission's submission, should it determine that it needs to hear the Commission's oral arguments or to put questions to the Commission.

D. Costs

55. Claimants have requested that the Tribunal order the Commission to post security for the additional costs imposed upon Claimants as a result of the Commission's intervention, or alternatively to provide an undertaking to pay these added costs at the appropriate stage of the proceeding⁶⁰.
56. Considering that the Commission's non-disputing party submission is on a narrow and specific legal issue, the Tribunal finds that its submission is not likely to significantly increase the costs of the arbitration. The Tribunal therefore does not find it appropriate to order the Commission to provide security for costs or to make an undertaking as to costs, at this moment in time; the Tribunal reserves the right to revisit this decision, after it has reviewed the Commission's submission or if there is a change of circumstances.

* * *

⁵⁹ Claimants' Response, section IV, p. 10.

⁶⁰ Claimants' Response, section IV, p. 11.

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57. In sum, the Tribunal decides:

- To grant the Commission's request for leave to file a written submission as a non-disputing party on the EU law issues concerning the Tribunal's jurisdiction, to focus solely on the Respondent's intra-EU objection;
- To set the date for the Commission's submission to 1 July 2022;
- To reject the Commission's request to access the case file, subject to the possibility of accessing the Parties' main written submissions (as provided in para. 50 *supra*) and requesting specific documents in the future;
- To reject, *pro tem*, the Commission's request to attend and present oral arguments at the hearing;
- To reject, *pro tem*, Claimants' request to order the Commission to bear the costs associated with its participation in this arbitration.

[signed]

Juan Fernández-Armesto
President of the Arbitral Tribunal

Date: 15 June 2022