

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gabriel Resources Ltd. and Gabriel Resources (Jersey)
Applicants on Annulment

v.

Romania
Respondent on Annulment

(ICSID Case No. ARB/15/31)
Annulment Proceeding

PROCEDURAL ORDER NO. 2

ON THE EUROPEAN COMMISSION’S APPLICATION TO INTERVENE AS NON-DISPUTING PARTY

Members of the ad hoc Committee

Dr. Eduardo Zuleta Jaramillo, President of the *ad hoc* Committee
Prof. Lawrence Boo, Member of the *ad hoc* Committee
Prof. Dr. Maxi Scherer, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Sara Marzal Yetano

Assistant to the Committee

Ms. María Marulanda Mürrle

25 August 2025

I. BACKGROUND¹

1. On 15 July 2025, the European Commission (the “**Commission**”) filed an application pursuant to ICSID Arbitration Rule 37(2)² (the “**Application**”), requesting that the Committee:
 - “a. grant the Commission leave to intervene in the present proceedings;
 - b. set a deadline for the Commission to file a written *amicus curiae* submission;
 - c. allow the Commission access to the documents filed in the case, to the extent necessary for its intervention in the proceedings;
 - d. allow the Commission to attend hearings in order to present oral argument and reply to the questions of the ad hoc Committee at those hearings. In that context, the Commission recalls that it could also be invited as an expert on EU law, rather than as a non-disputing party.”³
2. On 24 July 2025, the Committee invited the Parties to submit their observations on the Application by 31 July 2025.
3. On 31 July 2025, the Parties filed their respective observations on the Application (“**Applicants’ Observations**” and “**Romania’s Observations**,” respectively).

II. THE APPLICATION

4. The Commission states that it has decided to intervene in intra-European Union (“**EU**”) investment arbitration cases, including the case currently pending before the Committee under the Romania–UK BIT, in which “Romania is seeking from the Committee annulment

¹ Capitalized terms not defined herein shall have the meanings ascribed to them in Procedural Order No. 1.

² This proceeding is conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006.

³ Application, para. 37.

of an ICSID award”.⁴ According to the Commission, the award violates EU law because it upheld an arbitration agreement despite EU treaties precluding intra-EU investment arbitration.⁵

5. The Commission maintains that, as “the guardian” of the EU treaties, it is responsible for ensuring the uniform interpretation and proper application of rules relating, *inter alia*, to investment protection within the EU.⁶ It argues that its mandate to ensure Member States’ compliance with EU law and to protect the EU’s general interests justifies its intervention to prevent conflicts between ICSID arbitration awards and EU law.⁷
6. The Commission argues that its intervention is justified under ICSID Arbitration Rule 37(2), applied *mutatis mutandis* in annulment proceedings pursuant to Rule 53, for the following reasons:
7. First, the intervention would assist the Committee by bringing a perspective, particular knowledge, or insight different from that of the disputing parties concerning the EU treaties. Citing Article 17 of the Treaty on European Union (“TEU”), the Commission emphasizes its role in ensuring Member States’ compliance with EU law as “the guardian of the Treaties.” It submits that if the ICSID Convention were interpreted as allowing an arbitral tribunal to confirm its jurisdiction in the present case, this would create a conflict between EU law and the ICSID Convention, requiring Member States to act under Article 351(2) Treaty on the Functioning of the European Union (“TFEU”) to resolve it. The EU, and therefore the Commission, is independent from its Member States, and the Commission’s perspective is unique in that it considers only the interests of the EU as a whole.⁸
8. Second, the intervention would address a matter within the scope of the dispute. While noting that it has “no knowledge of the content of the request for annulment or the memorial for annulment,” the Commission explains that, based on possible grounds for annulment identified in the contested award — specifically that the Tribunal manifestly exceeded its powers as it lacked jurisdiction in the present case— it seeks to make a written submission

⁴ Application, paras. 4-6. The Commission contends that disputes between UK investors and an EU Member State, where the dispute concerns the application of rules dating from before the end of the transition period under the UK–EU Withdrawal Agreement to investments made before that date, should be treated as intra-EU disputes between an investor from a Member State and another Member State. (Application, paras. 8-9).

⁵ Application, paras. 6-7.

⁶ Application, para. 17. *See also*, Application, paras. 2, 33.

⁷ *See generally*, Application, paras. 14-26.

⁸ Application, paras. 14-26.

on two issues:⁹

- (i) “Whether or not an Arbitral Tribunal has to apply, in a concrete intra-EU case, the national law of the host State, which comprises EU law, or EU law as international law applicable between the contracting parties of the intra-EU BIT, is irrelevant for the compatibility of intra-EU investment arbitration with the EU Treaties,”¹⁰ and
 - (ii) “Whether or not investment arbitration takes place according to the ICSID Convention or according to other arbitration rules, is irrelevant for the incompatibility between intra-EU investment arbitration and the EU treaties.”¹¹
9. Third, the Commission has a significant interest in these proceedings. Specifically, the Commission states that “[i]n order to avoid any conflict between arbitration awards and EU law, which would force EU Member States to not comply with those awards and the judiciary of the Member States to refuse recognition and execution of such awards, the Commission has a significant interest in ensuring that your Committee is fully aware of the legal consequences flowing from EU law as interpreted by the CJEU, and considers these in its assessment of the jurisdictional objections.”¹²
10. Finally, regarding procedural considerations, the Commission states that its submission could be brief, as it would be limited to supplementing the *amicus curiae* brief already filed with the Arbitration Tribunal, and the Commission is prepared to submit its *amicus curiae* brief within a deadline that will not disrupt the proceedings.¹³

III. THE PARTIES’ POSITIONS

A. THE APPLICANTS’ POSITION

11. The Applicants submit that the Committee should deny the Application as it does not satisfy any of the factors indicated in ICSID Arbitration Rule 37(2).¹⁴

⁹ Application, paras. 27-32.

¹⁰ Application, para. 32(a).

¹¹ Application, para. 32(b).

¹² Application, para. 34.

¹³ Application, para. 35.

¹⁴ Applicants’ Observations, p. 1.

12. The Applicants assert that

“[t]he application seems to be based on an assumption, stated in paragraph 6 of the application, that ‘Romania is seeking from the Committee annulment of an ICSID award,’ which the application seems further to assume is based on the acceptance of jurisdiction under the UK BIT.

The basis of the Tribunal’s jurisdictional decision is not the subject of this annulment proceeding. The application therefore is entirely irrelevant to the Committee’s mandate.”¹⁵

13. As to the reasons why, according to the Applicants, the Application does not meet the criteria set forth in ICSID Arbitration Rule 37(2), the Applicants state as follows:

- “The application cannot assist the Committee in the determination of a factual or legal issue relating to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties, principally because it can be no assistance to the Committee to receive submissions on legal questions outside the scope of the Committee’s mandate;
- The application would not address a matter within the scope of the dispute before the Committee, including because, as a non-disputing party, the European Commission does not have standing to introduce its own request to annul the Award on grounds not within the scope of the Application for Annulment;
- The European Commission does not have a significant interest in the proceeding, particularly insofar as the scope of this annulment proceeding does not include any consideration of the legal basis for the Tribunal’s decision accepting jurisdiction under the UK BIT; and
- The acceptance of the European Commission’s application would unduly burden the parties, particularly because expanding the procedure to including consideration of the

¹⁵ Applicants’ Observations, p. 1.

application would burden the parties on a matter that is not relevant to the Committee’s mandate.”¹⁶

B. ROMANIA’S POSITION

14. In its Observations, Romania states as follows:

“Romania defers to the Committee whether to admit the EU Commission as a non-disputing party, should it find the points raised in the EU Commission’s application material in light of the specific grounds raised by the Applicant in its annulment application.

We would note, for the sake of completeness, that

1. It is not accurate that “Romania is seeking from the Committee annulment of an ICSID award” (para. 6 of the Application). Romania is defending the award.
2. The “request for annulment [and] the memorial for annulment” of which the EU Commission has no knowledge (para. 27) have been public for some time, via the ICSID website.
3. Matters raised by the Commission were addressed by the arbitral tribunal (see paras. 585-635 of the Award, where the tribunal concluded that its jurisdiction over the dispute submitted to arbitration by Gabriel Jersey was not affected by the European Court of Justice’s judgment in *Achmea* since Gabriel Jersey is a company incorporated in the Bailiwick of Jersey, which has never been an EU Member State).”¹⁷

IV. THE COMMITTEE’S ANALYSIS

15. The Commission requests leave to intervene as non-disputing party in the present annulment proceedings pursuant to Rule 37(2) of the ICSID Arbitration Rules.

¹⁶ Applicants’ Observations, pp. 1-2.

¹⁷ Romania’s Observations.

16. ICSID Arbitration Rule 37(2), which applies *mutatis mutandis* to annulment proceedings pursuant to Article 53 of the ICSID Convention, provides as follows:

“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.”

17. Having carefully reviewed the Application under ICSID Arbitration Rule 37(2), as well as the Parties’ submissions, the Committee finds that, in light of the specific grounds for annulment raised in these proceedings, the requirements for the Commission’s intervention are not satisfied.
18. As noted by the Parties in their respective submissions, (i) the request for annulment was filed by the Claimants in the underlying arbitration, with Romania defending the award, and (ii) the legal basis for the Tribunal’s jurisdictional decision is not the subject of the annulment proceedings. This can be seen from the Application for Annulment and the submissions made to date, including the Applicants’ Memorial on Annulment and

Romania's Counter-Memorial, all of which are publicly accessible on ICSID's website.¹⁸

19. Thus, considering the specific grounds for annulment asserted by the Applicants, and particularly the fact that the legal basis for the Tribunal's jurisdictional decision under the UK-BIT is not the subject of the annulment proceedings, the Committee concludes that the Commission's proposed intervention does not satisfy the criteria established by ICSID Arbitration Rule 37(2).

V. ORDER

20. For the reasons stated above, the Committee denies the Application.

On behalf of the Committee,

[*Signed*]

Dr. Eduardo Zuleta Jaramillo
President of the Committee
Date: 25 August 2025

¹⁸ <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/15/31>