

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Veolia Propreté SAS

v.

Italian Republic

(ICSID Case No. ARB/18/20)

PROCEDURAL ORDER NO. 2

*Decision on the European Commission's Application
for Leave to Intervene as a non-disputing Party*

Members of the Tribunal

Mr. Eduardo Zuleta, President of the Tribunal
Ms. Judith Gill QC, Arbitrator
Prof. Laurence Boisson de Chazournes, Arbitrator

Secretary of the Tribunal

Ms. Natalí Sequeira

24 March 2021

I. Introduction

1. On 24 February 2021, the European Commission (the “Commission”) submitted an Application for Leave to Intervene as a Non-Disputing Party in the present arbitration (the “Commission’s Application” or the “Application”).
2. On 26 February 2021, the Tribunal requested the Parties to submit their comments regarding the Commission’s Application by 3 March 2021.
3. On 3 March 2021, the Tribunal received the Parties’ communications with their observations to the Commission’s Application.

II. The Commission’s Application

4. The Commission notes that, pursuant to the terms of Rule 37(2) of the ICSID Arbitration Rules, the Tribunal may, after consulting both parties, allow a non-disputing party to file a written submission regarding matters within the scope of the dispute.¹ The non-disputing party should set out the extent to which: first, its 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; second, its submission would address a matter within the scope of the dispute; and third, the non-disputing party has a significant interest in the proceeding.
5. The Commission argues that it complies with those conditions for the reasons summarized in the following paragraphs.
6. In the view of the Commission, the 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.²
7. According to Article 17 of the Treaty on European Union (“TEU”), the Commission has a special role for ensuring compliance of European Union (the “EU” or the “Union”) Member States, such as the Italian Republic, with the law of the European Union (“Union law” or “EU law”).³ Articles 258 and 260 of the Treaty on Functioning of European Union (“TFEU”) provide for the power of the Commission to launch an infringement proceeding before the Court of Justice of the EU (“CJEU”) against EU Member States that violate Union Law.⁴ Additionally, in accordance with Article 351(2) TFEU, if the Tribunal was to find that it has jurisdiction, it would result in an open conflict between Union law and the ICSID Convention⁵ and the Commission would have to

¹ The Commission’s Application, ¶ 5.

² The Commission’s Application, P. 4.

³ The Commission’s Application, ¶ 8.

⁴ The Commission’s Application, ¶ 8.

⁵ The Commission’s Application, ¶ 9.

ensure that EU Member States took the steps prescribed in the referred provision to remove such conflict.⁶

8. The Commission considers, at this stage, that the ICSID Convention and the EU Treaties are not in conflict with each other, if they are properly interpreted and applied in line with generally and widely recognized principles of public international law.⁷ The Commission underlines its participation in all preliminary ruling procedures before the CJEU, providing a legal analysis that represents the general interest of the Union.⁸
9. According to Article 17 TEU, the Commission “shall ensure the Union’s external representation”. For this purpose, the Commission negotiates international agreements on behalf of the Union⁹, *i.e.*, the Energy Charter Treaty (the “ECT”), and also represents the Union before international courts and tribunals, as well as before the courts and tribunals of third countries.
10. The Commission further argues that it played an essential role during the proposition and the negotiation of the ECT on behalf of the Union. Therefore, the Commission has a unique perspective as well as knowledge of the inside drafting history and common understanding of the contracting parties during the negotiations. In addition, the Commission represents the Union in all on-going negotiations regarding the ECT,¹⁰ and, from those negotiations, the Commission has gained particular knowledge and insight on techniques on the application of different clauses.
11. As an EU Member State, the Italian Republic is an independent person from the EU in public international law (even if they often act as a single entity of public international law), therefore the Commission will provide an independent knowledge or insight that is different from that of the disputing Parties.¹¹
12. Regarding the requirement that the submission would address a matter within the scope of the dispute, the Commission contends that it does not have knowledge of the Respondent’s submissions. However, based on the declaration of EU Member States of 15 January 2019 regarding the legal consequences of the CJEU judgment in *Achmea*, it assumes that the Italian Republic had objected to the jurisdiction of the Arbitral Tribunal because the dispute is an intra-EU dispute.¹²
13. The Commission recalls that an international court or tribunal has an obligation to review arguments challenging its jurisdiction on its own motion, irrespective of the stage of the

⁶ The Commission’s Application, ¶ 9.

⁷ The Commission’s Application, ¶ 10.

⁸ The Commission’s Application, ¶ 11.

⁹ The Commission’s Application, ¶ 12.

¹⁰ The Commission’s Application, ¶ 14.

¹¹ The Commission’s Application, ¶ 16.

¹² The Commission’s Application, ¶ 19.

procedure.¹³ In this regard, the Commission presents as the points on which it would like to make a written submission, and which are within the scope of the dispute:

- (a) Article 26 of the ECT, properly constructed, does not apply intra-EU in general, and in the relationship between the Italian Republic and the French Republic in particular, so that the Tribunal lacked jurisdiction;¹⁴
 - (b) In the alternative: Union law precludes intra-EU investment arbitration, including under Article 26 of the ECT; this has been clarified by the judgment in *Achmea* and in the interpretative declaration of Italian Republic and the French Republic, the first of which pre-dates the filing of the request for arbitration. As a result, there is no valid consent to arbitration, and the Tribunal lacks jurisdiction pursuant to Article 25 ICSID Convention, and Article 26 ECT.¹⁵
14. With respect to having a significant interest in the proceedings, the Commission, as a guardian of the EU Treaties, points out its significant interest in (i) the proper interpretation of the EU Treaties and ECT and (ii) the avoidance of conflict between the EU Treaties and the ICSID Convention.¹⁶
15. As procedural considerations, the Commission states that certain tribunals have authorized it to file written *amicus curiae* submission and to attend the relevant part of the oral procedure and that if the Tribunal deem it useful the Commission would be willing and prepared to participate in the hearings.¹⁷
16. The Commission thus concludes that the conditions under Rule 37 of the ICSID Arbitration Rules are met and requests the Tribunal to:

- “a. grant the Commission leave to intervene in the present proceedings;*
- b. set a deadline for the Commission to file a written amicus curiae submission;*
- c. allow the Commission access to the documents filed in the case, to the extent necessary for the preparation of the amicus curiae submission;*
- d. allow the Commission to attend hearings in order to present oral argument and reply to the questions of the Arbitral Tribunal at those hearings, should the Arbitral Tribunal deem that useful. 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.”*¹⁸

¹³ The Commission’s Application, ¶ 19.

¹⁴ The Commission’s Application, ¶¶ 23- 36

¹⁵ The Commission’s Application, ¶¶ 37- 45

¹⁶ The Commission’s Application, ¶ 46.

¹⁷ The Commission’s Application, ¶¶ 48, 49.

¹⁸ The Commission’s Application, ¶ 50.

III. The Disputing Parties' Observations

a) Claimant

17. Claimant objects to the Application and requests the Tribunal to reject the Commission's attempt to intervene in these proceedings as an *amicus curiae*.¹⁹ The Claimant indicates that the correct application of Rule 37(2) of the ICSID Arbitration Rules should lead the Tribunal to reject the Application without any prejudice to the Respondent or the Commission.²⁰
18. In Claimant's view, the Commission's Application is the result of an automatic process by which the Commission has decided, as a matter of policy, to intervene in all international arbitrations based on an investment treaty to which at least two EU Member States are parties.²¹ For Claimant this arbitration proceeding should not be concerned by the policy decisions of a third party.²² Additionally, the Application did not establish any legitimate interest from the Commission to participate in these proceedings.²³
19. According to Claimant, the Commission's purported assistance consists in arguments that have already been specifically made and addressed by Respondent, including the effects of the 2019 Declaration by certain EU Member States and the *Achmea* decision,²⁴ as well as the argument that Union law precludes intra-EU investment arbitration.²⁵ Claimant adds that Respondent may still have an opportunity to further address these points in its Rejoinder.
20. Claimant raises doubts on whether the Commission will bring a new perspective, particular knowledge or insight that is different from that of the disputing Parties. For Claimant, the intervention of the Commission would duplicate the arguments and materials of the record and thus provide no assistance at all to the Tribunal.²⁶ Furthermore, the Commission has failed to establish what "perspective", "particular knowledge" or "insight" it could bring that would differ from that of the Respondent.²⁷
21. Claimant asserts that the allegations made by the Commission on the matters at stake in this arbitration are publicly available, rendering its intervention in these proceeding unnecessary. The

¹⁹ The Claimant's Observations on the Application of the European Commission Requesting Leave to Intervene as a Non-Disputing Party dated 4 March 2021 ("The Claimant's Observations"), ¶ 2.

²⁰ The Claimant's Observations, ¶ 4.

²¹ The Claimant's Observations, P. 2.

²² The Claimant's Observations, ¶ 7.

²³ The Claimant's Observations, ¶ 7.

²⁴ The Claimant's Observations, ¶ 14.

²⁵ The Claimant's Observations, ¶ 17.

²⁶ The Claimant's Observations, ¶ 19.

²⁷ The Claimant's Observations, ¶ 20.

Application would be a repetition of what has already been publicly made, therefore there is no need for the Commission intervention.²⁸

22. Claimant concludes its submission requesting the Tribunal to reject the Application, and in the alternative, to order that the Commission be restricted to filing of a single short submission (15 pages) with no additional exhibits before 15 April 2021. In any case of participation, the Tribunal should order the Commission to provide within 15 days an undertaking to comply with any costs that may be directed against it relating to its intervention (including for the preparation of this letter).²⁹

b) Respondent

23. Respondent submits that the Commission's request to intervene should be accepted since it fulfills the conditions set up under Rule 37(2) of the ICSID Arbitration Rules³⁰:
24. The intervention of the Commission would assist the Tribunal to determine the factual and legal issues by bringing a different perspective from those of the disputing Parties. The Commission, under article 17(1) TEU, is mandated to guarantee the application of Union law and to assume the external representation of the EU.³¹ Article 335 of the TFEU authorizes the Commission to represent the EU in legal proceedings.³² Therefore it should assist the Tribunal in making a decision in light of the Commission's knowledge of Union law and given its acquaintance with the ECT, which was signed by the Commission itself.³³
25. According to Respondent, the Commission, when exercising its competence, is endowed with the most absolute independence, which should contribute to offer to the Tribunal any possible matter of facts or points of law necessary to improve the merits of the decision.³⁴ The objections raised by Claimant regarding the Commission's independence should be rejected.³⁵ International Organizations and EU Member States thereto are two fully autonomous subjects of international law.³⁶ In this regard, Respondent recalls Article 245 of the TFEU.
26. Consequently, for Respondent, the position of the Commission is inherently different from that of either of the Parties and its intervention in addressing the issue of jurisdiction should represent for Claimant and Respondent a common interest, since applicability of the ECT to intra-EU disputes would affect a correct implementation of any award by the Tribunal within the EU.³⁷

²⁸ The Claimant's Observations, ¶ 25.

²⁹ The Claimant's Observations, ¶¶ 31, 32.

³⁰ The Respondent's Observations, ¶ 11.

³¹ The Respondent's Observations, ¶ 14.

³² The Respondent's Observations, ¶ 14.

³³ The Respondent's Observations, ¶ 15.

³⁴ The Respondent's Observations, ¶ 18.

³⁵ The Respondent's Observations, ¶ 19.

³⁶ The Respondent's Observations, ¶ 19.

³⁷ The Respondent's Observations, ¶ 24.

27. Respondent asserts that the only role of the Commission in this proceeding would be that of an *amicus curiae*. Therefore, it would take into consideration the general interest going beyond those of the Parties, while remaining relevant to the dispute, contributing *inter alia* to the “legitimacy of the international rules in question.”³⁸
28. The Commission addresses a matter within the scope of the dispute: a potential lack of jurisdiction of the Tribunal over this intra-EU dispute.³⁹ The points raised by the Commission relate directly to the applicability of the ECT arbitration clause, which indisputably concerns EU Member States. Consequently, it touches upon the very essence of the claims made by Claimant.⁴⁰ Furthermore, the issue of application of Union law in a situation where all Parties are within the Union as well as that of its principles of primacy are undoubtedly within the scope of the dispute.⁴¹ Respondent asserts that to this end, arbitral tribunals operating under ICSID Arbitration Rules have accepted similar requests by the Commission, having been its direct experience in investment cases concerning the ECT.⁴²
29. Respondent contends that the Commission has a significant interest in proceedings concerning the ECT and its coexistence with EU law, i.e., (i) ensuring uniform application of EU law, (ii) as a response to public interest since the Tribunal’s decision might produce consequences for EU Member States and for the investors who are from or are installed in EU Member States.⁴³
30. Respondent further asserts that the Commission’s submission would not disrupt the proceedings, on the contrary, it would address an issue that needs to be undertaken within the proceedings and indeed at an early stage, to avoid any further impact on the application of EU law.⁴⁴
31. Based upon these reasons, Respondent requests the Tribunal to accept the intervention of the Commission as a non-disputing party; to allow it to submit the statements it considers necessary (under the Tribunal’s direction); to have access to all documents needed to comply with its mission; and to intervene at the hearings.⁴⁵

IV. Analysis of the Tribunal

32. Pursuant to ¶ 1.1 of Procedural Order No. 1 the present arbitration proceedings are conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006.

³⁸ The Respondent’s Observations, ¶ 25.

³⁹ The Respondent’s Observations, ¶ 27.

⁴⁰ The Respondent’s Observations, ¶ 29.

⁴¹ The Respondent’s Observations, ¶ 30.

⁴² The Respondent’s Observations, ¶ 31.

⁴³ The Respondent’s Observations, ¶ 34.

⁴⁴ The Respondent’s Observations, ¶¶ 37, 38.

⁴⁵ The Respondent’s Observations, ¶ 41.

33. Both Parties agree that under the term of Rule 37(2) of the ICSID Arbitration Rules, the Tribunal has the power, after consulting both Parties, to allow a non-disputing party to make a submission regarding a matter within the scope of the dispute. In determining whether to allow the filing, the Tribunal shall consider, *inter alia*, 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.⁴⁶”

34. Rule 37(2) contains a non-cumulative, non-exhaustive, list of circumstances that a Tribunal shall consider in determining whether or not to allow a written submission by a non-disputing party and grants the Tribunal broad discretion to decide whether to accept a written submission by a non-disputing party.
35. The Tribunal considers that the Application formally complies with Rule 37(2)(a) of the ICSID Arbitration Rules.
36. The intervention of the Commission could help to illustrate and complement some of the points raised by the Respondent in its objections to the jurisdiction of the Tribunal.
37. There is no reason for the Tribunal to doubt the Commission’s particular experience regarding the negotiations of the ECT and its knowledge and interest in the application of EU law. In addition, the topics addressed by the Commission in its Application pertain specifically to EU law, and by the Commission mandated to assume the external representation of the EU.⁴⁷

⁴⁶ ICSID Arbitration Rules, Rule 37(2)

⁴⁷ Treaty on the European Union, Consolidated Versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union (2012/C326/01) dated 26 October 2012, Article 17 (“*The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.*”).

38. Therefore, the Tribunal accepts the Commission's request to participate in this arbitration as a non-disputing party.
39. However, the requests included in the Application for the Commission to review the file and attend the Hearing, would generate serious and unnecessary additional burdens for the Parties and the Tribunal itself.
40. Taking into consideration that the Commission will only present a written submission limited to the specific points of law described in section 22 of its Application, that it is intended to provide a "perspective, particular knowledge or insight that is different from that of the disputing parties" rather than to comment on the Parties' positions, and that it will not intervene as a party to the proceedings or in support of the position of a given party, the Tribunal does not deem it necessary to provide the Commission with access to the file or copies of the Parties' pleadings.
41. Regarding the Commission's request to attend the hearing, the Tribunal notes that Rule 37(2) deals only with written submissions and does not envisage participation in oral hearings. However Rule 32(2) of the ICSID Arbitration Rules provides:

*"2) 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."*⁴⁸
(emphasis added)

42. Rule 32(2) does not specifically refer to a non-disputing party's opportunity to present oral arguments in a hearing.⁴⁹ However, it covers the possibility that persons other than the parties, their agents, counsel and advocates, witnesses and experts and officers of the Tribunal "attend or observe" all or part of the hearings. Since Claimant objects that the Commission be allowed to attend the hearing, pursuant to Rule 32(2), the Tribunal will not permit the Commission's attendance or participation in the hearing in order to present oral arguments or reply to questions from the Tribunal.
43. Finally, in order to preserve the balance between the interest that the intervention of the Commission may have and the need to preserve the reasonability of the costs for the Parties in the proceedings, the Tribunal will allow the Commission to file a written submission limited in terms of its extent and timing and conditioned on the Commission providing an undertaking to

⁴⁸ ICSID Arbitration Rule, Rule 32(2) [emphasis added].

⁴⁹ *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. (Claimants) v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae dated 17 March 2006, ¶¶ 5-8 (relying on Rule 32 (2) of the 2003 ICSID Arbitration Rules which covers the attendance of persons to the hearings).

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this Tribunal to the effect that it will comply with any decision by the Tribunal on costs that result from the Commission's intervention in these proceedings.

V. Decision

44. Pursuant to Rule 37(2) of the ICSID Arbitration Rules, the Tribunal decides:

- a. To accept the Commission's request to participate in this arbitration as a non-disputing party.
- b. The Commission may file a written submission of no more than 15 pages, with no annexes or additional documents, by 2 April 2021 with the Secretary of the Tribunal at nsequeira@worldbank.org (the "Submission"). The Submission shall be limited in scope to the Commission's "perspective, particular knowledge or insight" regarding solely the interpretation of the ECT and EU law related to the two issues of jurisdiction addressed in section 22 of its Application and set out in paragraph 13 above.
- c. The Submission shall be presented in English.
- d. The Commission shall not have access to the record of this arbitration, nor to the Parties' pleadings.
- e. The Commission shall not attend or observe any hearings.
- f. The Parties may comment on the Submission in their subsequent submissions, as appropriate.
- g. The Commission's participation as a non-disputing party in this arbitration is conditional upon the Commission providing a written undertaking to the Tribunal, on or before 2 April 2021, stating that it will comply with any decision on costs ordered by the Tribunal in connection with the intervention of the Commission in these proceedings as per paragraph (h) hereunder.
- h. The Commission shall bear its costs incurred regarding its participation in the proceeding as a non-disputing party. The Tribunal reserves the right to decide on any further question on costs, including whether the Commission shall reimburse any of the Parties' reasonable and properly documented costs in relation to this Application or the Submission, at the appropriate time.

[Signed]

Mr. Eduardo Zuleta
President of the Tribunal
Date: 24 March 2021