

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**United Utilities (Tallinn) B.V.
and
AS Tallinna Vesi**

Claimants

v.

Republic of Estonia

Respondent

(ICSID Case No. ARB/14/24)

DECISION

**on the Application for Leave to Intervene as a Non-Disputing Party
Submitted by the European Commission**

The Tribunal

Professor Brigitte Stern, *Arbitrator*
Mr. David A.R. Williams, Q.C., *Arbitrator*
Mr. Stephen L. Drymer, *President of the Tribunal*

Secretary of the Tribunal

Mr. Paul-Jean Le Cannu

Assistant to the Tribunal

Ms. Laurence Ste-Marie

Date: 2 October 2018

DECISION

I. BACKGROUND

1. On 22 August 2018, the European Commission (“**Commission**” or “**EC**”) submitted an Application for Leave to Intervene as a Non-Disputing Party in the present arbitration (“**Application**”) pursuant to Rule 37(2) of the ICSID Arbitration Rules (“**Rules**”).
2. The basis of the Application is what the Commission terms a “*new significant jurisdictional event, namely the judgment in Achmea*” that was rendered by the Court of Justice of the European Union on 6 March 2018 (Application, para. 11).
3. According to the Commission, its request for leave to intervene and make submissions in the arbitration is limited to the jurisdictional question of “*the legal consequences of the judgment of the Court of Justice in Achmea for the case before your Arbitral Tribunal*” (Application, para. 12).
4. Briefly, the Commission submits that, given its role as a “*guardian of the Treaties*” under Article 17 of the Treaty on European Union, it can bring a perspective, particular knowledge and insight concerning that question, which concerns the Tribunal’s jurisdiction and is clearly within the scope of the parties’ dispute, as required by Rule 37(2). On the same basis, it submits that it has a significant interest in the proceedings within the meaning of Rule 37(2)).
5. The Commission seeks an order in the following form:
 - i. grant the Commission leave to participate in the present proceedings;
 - ii. set a deadline for the Commission to file a written *amicus curiae* submission;
 - iii. allow the Commission access to the documents filed in the case, to the extent necessary for its participation in the proceedings;
 - iv. allow the Commission to attend hearings in order to present oral argument and reply to the questions of this Tribunal at those hearings, should this Tribunal and the parties deem that useful.
6. In their comments in response to the Application (“**Claimants’ Comments**”), Claimants ask the Tribunal to reject the Commission’s Application. They submit that, in the circumstances of this case, allowing the Commission to participate is uncalled for. They argue that any submissions from the Commission regarding the impact of *Achmea* on the Tribunal’s jurisdiction will not offer a perspective that is in any way different from that already offered by the parties, as provided in Rule 37(2). They note that the Tribunal has been extensively briefed on the question, and they reject the notion that the Commission’s views on the matter are any more persuasive or determinative than those of the parties themselves.
7. Claimants also maintain that the Commission’s conduct shows that it does not in fact have a significant interest in the proceedings within the meaning of Rule 37(2), as demonstrated by its decision not to approach the Tribunal until long after it presumably became aware of the arbitration and many months after the *Achmea* judgement was issued.

8. Lastly, Claimants argue that granting the Application would unfairly prejudice Claimants and disrupt the proceedings by causing further contention and delay.
9. For its part, Respondent supports the Commission's Application, reiterating many of the same arguments made by the Commission itself. In its comments on the Application ("**Respondent's Comments**"), Respondent contends that submissions from the Commission regarding the consequences of *Achmea* for the Tribunal's jurisdiction would complement the parties' submissions on the same question. It further contends that any potential disruption of the proceedings could easily be minimized by means of an order setting reasonable deadlines and page limits for both the Commission's submissions and the Parties' observations thereon.

II. DISCUSSION

10. It is not disputed that an ICSID tribunal's authority to allow a non-disputing party to participate in an arbitration, and the form of any such participation, is largely discretionary in nature. After consulting the parties and after considering various factors (certain of which are specified in Rule 37(2), while others are left to be determined by the tribunal), a tribunal may decide to allow a non-disputing party to participate in the proceedings on terms that it considers appropriate to protect the integrity of the proceedings and maintain fairness for the parties.
11. In the circumstances here, notwithstanding the Commission's failure to manifest itself sooner, the Tribunal considers that, on balance, the Application satisfies the criteria of ICSID Arbitration Rule 37(2)(a), (b), and (c). Moreover, the Tribunal is convinced that the Commission's request can be accommodated without unduly or unfairly disrupting the proceedings or burdening or prejudicing any party.
12. The Tribunal considers that submissions from the Commission on the legal question specified in the Application – that is, "*the legal consequences of the judgment of the Court of Justice in Achmea for the case before your Arbitral Tribunal*" (Application, para. 12) – could potentially assist the Tribunal in the determination of a jurisdictional issue that is squarely before it (as per Rule 37(2)(b)), by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties (Rule 37(2)(a)). The Tribunal is also satisfied that the Commission has a significant interest in the jurisdictional aspect of the proceedings (Rule 37(2)(c)), as outlined both by the Commission and by Respondent.
13. Whether the Commission's perspective on this legal question is or is not "more persuasive" than others' views or "determinative of the issue" (Claimant's Comments, para. 24) is not the point. The fact is that the question is of fundamental importance to the matter of the Tribunal's jurisdiction, and the Tribunal does not agree with Claimants that the Commission necessarily has nothing to offer to an analysis of the question.
14. It remains only to determine the nature and form of the Commission's participation so as to ensure that it does not disrupt the proceedings or unduly burden or unfairly prejudice any party.
15. Claimants have proposed that, should the Tribunal grant the Commission's Application, the following conditions should apply (Claimants' Comments, paras. 40-42):

- i. The Commission's participation in the proceedings should be limited to a single written *amicus curiae* submission of no more than 10 pages, to be filed within one week of the Tribunal's decision;
 - ii. The parties should be permitted to submit comments on the Commission's submission within 14 days, to be filed simultaneously;
 - iii. The Commission should not be afforded access to the documents filed in the case;
 - iv. The Commission should not be permitted to attend any further hearings in these proceedings
16. The Tribunal considers that, subject to a slight increase in the proposed time- and page-limit for the Commission's submission and the addition of a similar page-limit for the parties' comments, these proposals are entirely appropriate and reasonable case management measures to protect the interests specified in Rule 37(2). As for the last of the proposed conditions, the issue is moot: as noted by Estonia (Respondent's Comments, para. 43), no further hearing is scheduled in this arbitration, and indeed the Tribunal does not consider that any further hearing will be required.

III. DECISION

17. For all of these reasons, the Tribunal decides and orders as follows:
- (1) The Commission's Application is granted in part;
 - (2) The Commission is granted leave to participate in the present arbitration as a non-disputing party to the extent and in the manner set out below;
 - (3) The Commission is invited to submit a single, written *amicus curiae* submission of not more than 15 pages on the legal question specified at para. 12 of its Application, by no later than 10 days from the date of dispatch of the present Decision to the Commission;
 - (4) The parties (Claimants on the one hand, Respondent on the other) may each file comments of not more than 15 pages to the Commission's submission, should they wish to do so, within 14 days of the date of transmission to them of the Commission's submission;
 - (5) The Commission's request for access to the documents filed in the case is rejected;
 - (6) The Commission's request for attend any further hearing in the case is rejected, as no such hearing is either scheduled or foreseen.

For and on behalf of the Tribunal:

[signed]

Stephen L. Drymer
President of the Tribunal