

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mainstream Renewable Power Ltd and others

v.

Federal Republic of Germany

(ICSID Case No. ARB/21/26)

PROCEDURAL ORDER NO. 5
Decision on the EC's Application to Intervene as a Non-Disputing Party

Members of the Tribunal

Ms. Wendy Miles KC, President of the Tribunal

Mr. Antolín Fernández Antuña, Arbitrator

Dr. Charles Poncet, M.C.L., Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

1 February 2023

TABLE OF CONTENTS

I.	PROCEDURAL BACKGROUND.....	1
II.	THE APPLICATION AND THE PARTIES’ OBSERVATIONS	1
	A. The Application.....	1
	B. The Claimants’ Observations	4
	C. The Respondent’s Observations.....	7
III.	THE TRIBUNAL’S ANALYSIS	10
IV.	ORDER.....	18

I. PROCEDURAL BACKGROUND

1. On 6 October 2022, the European Commission (the “**EC**”) submitted to the ICSID Secretariat an application for leave to intervene as a non-disputing party in this arbitration pursuant to Rule 37(2) of the ICSID Arbitration Rules (the “**Application**”). ICSID transmitted the Application to the Tribunal and the Parties on 6 October 2022.
2. In accordance with ICSID Arbitration Rule 37(2), on 11 October 2022, the Tribunal invited the Parties to submit their observations on the Application. The Claimants and the Respondent submitted their observations on the Application (the “**Claimants’ Observations**” and the “**Respondent’s Observations**”, respectively) on 25 October 2022.
3. This Procedural Order decides on the EC’s Application.

II. THE APPLICATION AND THE PARTIES’ OBSERVATIONS

A. THE APPLICATION

4. The EC seeks leave to intervene as a non-disputing party in these proceedings as the “*guardian of the European Union (‘EU’ or ‘Union’) Treaties, i.e. the Treaty on European Union (‘TEU’), the Treaty on [the] Functioning of European Union (‘TFEU’), and the Treaty establishing the European Atomic Energy Community*”, which the EC states put it “*in charge of ensuring the uniform interpretation and proper application of the rules relating to investment protection within the Union. Hence, it has a particular interest in avoiding any conflict between ICSID arbitration awards and Union law*”.¹
5. The EC confirms that it has “*decided to request leave to intervene as a non-disputing party in any pending or future investment arbitration proceeding concerning disputes between an investor of one Member State and another Member State*”.²

¹ EC Application, para. 2.

² EC Application, para. 3.

6. As to the legal basis for its Application, the EC relies on Rule 37(2) of the ICSID Arbitration Rules. The EC submits that “[t]he proceedings before the Arbitral Tribunal raise important questions concerning the interaction of the EU Treaties, the Energy Charter Treaty, and the ICSID Convention”.³ As to the EC’s intervention on those questions, the EC submits that the requirements of ICSID Arbitration Rule 37(2) would be met because: (i) its intervention 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; (ii) it would address a matter within the scope of the dispute; and (iii) the EC has a significant interest in the proceeding.
7. As to the first of those requirements, the EC submits that these proceedings “raise important questions concerning the interaction of the EU Treaties, the Energy Charter Treaty, and the ICSID Convention”.⁴ In particular:
- a. the EC has a “special role for ensuring compliance of EU Member States, such as the Federal Republic of Germany, with Union law”, which “follows from Article 17 TEU”;⁵
 - b. the EC “was the driving force behind the proposal for and negotiation of the [ECT]” and “has particular knowledge and insight on techniques used, in particular on the use of the Regional Economic Integration Organisation Clause and the necessity (or lack thereof) of so-called disconnection clauses”;⁶ and
 - c. although the Respondent is an EU Member State, “the EU and the EU Member States are independent persons in public international law (even if they often act as a single entity of public international law)”, and therefore the EC “will provide independent knowledge or insight that is different from that of the disputing parties”.⁷

³ EC Application, para. 7.

⁴ EC Application, para. 7.

⁵ EC Application, paras. 8-12.

⁶ EC Application, paras. 13-14.

⁷ EC Application, paras. 15-16.

8. As to the second requirement, the EC acknowledges that it “*has no knowledge of the request for arbitration and the counter-memorial on the merits filed by the Federal Republic of Germany on 26 August 2022*”, but nevertheless assumes that the Respondent had objected to jurisdiction “*based on the declaration of EU Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in Achmea [...] because the dispute is an intra-EU dispute*”, which it and the host State of at least some of the Claimants (*i.e.*, the Republic of Ireland) had signed.⁸
9. The EC therefore seeks to “*make a written submission on one point, which it assumes to be within the scope of the dispute*”. The EC’s “*one point*” is:
- Article 26 of the Energy Charter Treaty, properly construed, does not apply intra-EU in general, and in the relationship between the Federal Republic of Germany and the Republic of Ireland, in particular, so that the Arbitral Tribunal lacks jurisdiction.*⁹
10. As to the third requirement, the EC submits that as “*guardian of the EU treaties and external representative of the Union*”, it has a “*significant interest*” in: (i) the “*proper interpretation of the EU Treaties and the [ECT]*”; and (ii) the “*avoidance of conflict between the EU Treaties and the ICSID Convention*”.¹⁰
11. As to the proposed procedure for its intervention, the EC submits that some tribunals in prior proceedings had “*authorized the Commission not only to file written amicus curiae submissions, but also to attend the relevant part of the oral procedure*”.¹¹ The EC confirms that it is “*willing and prepared to participate in the hearing(s) scheduled to take place in the current proceedings*”, should the Tribunal “*deem it useful*”.¹²
12. On that basis, the EC seeks that the Tribunal:

⁸ EC Application, paras. 18-19.

⁹ EC Application, para. 23.

¹⁰ EC Application, para. 42.

¹¹ EC Application, para. 44.

¹² EC Application, para. 45.

- a. grant the EC leave to intervene in the proceedings;
- b. set a deadline for the EC to file a written *amicus curiae* submission;
- c. allow the EC access to the documents filed in the case, to the extent necessary for the preparation of the *amicus curiae* submission; and
- d. allow the EC “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”, noting that it “could also be invited as an expert on EU law, rather than as a non-disputing party”.¹³

B. THE CLAIMANTS’ OBSERVATIONS

13. The Claimants observe that the Tribunal should reject the Application, which they argue “purports to distort the institution of *amicus curiae*” because ICSID arbitration “is not the place for the Commission to drive its political agenda”.¹⁴
14. In particular, the Claimants observe that: (i) the EC’s “intervention will not assist the Tribunal in a manner that is different from Germany” and the EC “does not have a significant interest in the resolution of the present dispute”, thus failing to meet two of the requirements of ICSID Arbitration Rule 37(2).¹⁵ (ii) the Application should be rejected on the grounds of procedural fairness and efficiency;¹⁶ and, in the alternative, (iii) any submission should be limited to points of law on which the Respondent cannot assist and subject to an undertaking as to costs.¹⁷
15. As to the first requirement of ICSID Arbitration Rule 37(2), the Claimants submit that it is “not sufficient for a third party seeking to intervene in arbitration proceedings to show that it has extensive knowledge in the subject-matter of its application”, but that it “must

¹³ EC Application, para. 46.

¹⁴ Claimants’ Observations, para. 3.

¹⁵ Claimants’ Observations, paras. 5-24.

¹⁶ Claimants’ Observations, paras. 25-41.

¹⁷ Claimants’ Observations, paras. 42-43.

demonstrate that, in addition to its knowledge, it would be able to contribute further information in a way that is different from that of the disputing parties".¹⁸

16. The Claimants further submit that *"the first criteria set out in Rule 37(2)(a) cannot be satisfied in circumstances in which (i) the disputing parties have already exchanged several submissions in relation to the object of the purported non-disputing party's submission and (ii) the purported non-disputing party's submission will not add anything to the sum of already available information"*.¹⁹ According to the Claimants, the EC intervention *"is solely aimed at repeating Germany's EU Objection, which has already been extensively ventilated, and the Commission's submissions would not offer a perspective, particular knowledge or insight that is different from that of Germany"*.²⁰
17. The Claimants also argue that the EC intervention would not offer a different perspective or particular knowledge, because *"there is a perfect overlap in the arguments to be developed in the Commission's purported amicus curiae submission and Germany's submissions to date in relation to the EU Objection"*,²¹ and the EC has failed to demonstrate that it would offer a different insight to that of the Respondent, given Germany's own participation in the ECT negotiation process.²² Moreover, the Claimants submit that the EC's *"general mandate to ensure compliance with EU law"* does not place it in a position to *"offer a 'perspective, particular knowledge or insight' different than that of Germany"*, which is *"equally bound to ensure compliance with EU law"*.²³

¹⁸ Claimants' Observations, para. 7.

¹⁹ Claimants' Observations, para. 9, citing **CL-0216**, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20 (Annulment Proceeding), Decision on the EC's Application for Leave to Intervene as a Non-Disputing Party, 2 April 2020, para. 36 (*"[T]he Committee should be persuaded that the non-disputing party's submission would assist the Committee and the Committee is of the view that, given all of the submissions on this issue, this threshold has not been met"*.); and **CL-0207**, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, para. 31 (*"The Tribunal was not convinced that a submission by the EC would add to the sum total of available information as to intra-EU jurisdiction under the ECT in the terms of Rule 37(2)(a), while it would most likely cause additional costs to the Parties"*.).

²⁰ Claimants' Observations, paras. 10-12.

²¹ Claimants' Observations, para. 13.

²² Claimants' Observations, paras. 14-18.

²³ Claimants' Observations, para. 20.

18. As to the third requirement of ICSID Arbitration Rule 37(2), a significant interest in the resolution of the dispute, the Claimants submit that the arbitration “*does not revolve around the interpretation of EU treaties, or more generally EU law, which is not the law governing the arbitration*”.²⁴
19. As to procedural fairness and efficiency, the Claimants argue that (i) the EC’s intervention will unduly burden and unfairly prejudice the Claimants; and (ii) the EC’s conduct in bringing the Application “*is inherently contradictory to the detriment of the Claimants who are at significant risk of being deprived of legal remedies to address Germany’s breaches of the ECT*”.²⁵ In particular, the Claimants submit that the EC’s intervention would repeat the Respondent’s “*meritless*” objection to jurisdiction, lead to an increase in cost and time, unduly burden the Claimants, and unduly prejudice the Claimants as a result of the EC’s alleged lack of independence and neutrality towards the Claimants.²⁶
20. As to EC’s allegedly “*contradictory conduct*”, the Claimants argue that the EC should not be permitted to intervene because “[a]fter adopting the ECT on behalf of the EU and abstaining from invoking the existence of a so-called incompatibility of intra-EU investment arbitration under the ECT with EU law for more than two decades, the Commission is now seeking to intervene in each and every intra-EU investment treaty arbitration with a view to opposing investment tribunals’ jurisdiction on that exclusive basis”.²⁷
21. As to the Claimants’ alternative position, they submit that any EC intervention, if permitted, should be limited in scope. In particular, they request that:
- a. the submission be limited to EU law questions relevant to the Tribunal’s jurisdiction;

²⁴ Claimants’ Observations, para. 21.

²⁵ Claimants’ Observations, para. 25.

²⁶ Claimants’ Observations, paras. 26-36.

²⁷ Claimants’ Observations, paras. 37-41.

- b. the EC be denied access to the case file on the grounds that the EC's argument is exclusively based on the EU nationality of the Parties and any materials required by the EC to entertain its EU law arguments are either in the public domain or already in its possession;
- c. the EC be prevented from attending the hearing; and
- d. the EC be ordered to undertake to bear any costs arising from its intervention.²⁸

C. THE RESPONDENT'S OBSERVATIONS

- 22. The Respondent observes that it *“fully supports”* the EC's Application and submits that the requirements of ICSID Arbitration Rule 37(2) are met.²⁹
- 23. As to the first requirement of Rule 37(2), assisting the Tribunal through a different perspective, particular knowledge or insight, the Respondent reiterates the points raised by the EC in its Application, noting its role as the *“guardian of the EU Treaties”*, to *“supervise their correct application”* and its status in representing the EU *“externally in negotiations of the legal instruments at hand”*.³⁰
- 24. The Respondent further asserts that it is *“important to hear one of the original authors' perspectives on this provision and benefit from the [EC]'s particular knowledge and insight”*, and urges that the Tribunal *“not pass up this chance to hear such unique perspective and benefit from the particular knowledge when deciding the matter of jurisdiction”*.³¹
- 25. According to the Respondent, the EC's *“submission on the issue of Art. 26 ECT [...] would assist the Tribunal in the determination of the legal issue of jurisdiction”*, which is *“particularly important as a judicial dialogue with the [Court of Justice of the European*

²⁸ Claimants' Observations, paras. 42-43.

²⁹ Respondent Observations, para. 2.

³⁰ Respondent Observations, para. 7.

³¹ Respondent Observations, para. 7.

- Union] via preliminary proceedings in accordance with Art. 267 TFEU and Art. 19 (3)(b) TEU is not possible within this arbitration”.*³² It further submits that, as “guardian of the EU Treaties”, the EC would offer a “perspective, particular knowledge and insight that is different”, and due to its “unique and special role” the EC “is capable of making a contribution, i.e. providing [its] perspective on the EU Treaties, which would assist the Tribunal in the determination of the legal issue of jurisdiction”.³³
26. In addition to reiterating the EC’s points on the EC’s “specific knowledge of the motivation to initiate the negotiation of the ECT, the content of the respective negotiation and drafting history as well as finally the execution of the ECT”,³⁴ the Respondent further submits that the EC would be able to report on the January 2019 Declaration,³⁵ and “assist the Tribunal in determining the application of Art. 26 ECT”.³⁶
27. As to the second requirement of ICSID Arbitration Rule 37(2), the Respondent submits that the EC’s submission would address “the legal matter of jurisdiction under the ECT in an intra-EU investor-State arbitration”,³⁷ and that “[t]he topic of jurisdiction, i.e. the correct interpretation of Art. 26 (4)(a)(i) ECT is in dispute between the Parties here as well, as Claimants wrongfully maintain that Art. 26 ECT applies in intra-EU investor-State-arbitrations”.³⁸
28. Specifically, according to the Respondent, “the ECT is part of EU law” and “EU law is relevant with regard to ‘the measures contested by the Claimants [that] transpose into German law one of the options offered under the EU Directive on Renewable Energy, i.e. binding EU legislation [...]’”,³⁹ and as described by the EC “the measures contested by

³² Respondent Observations, para. 11.

³³ Respondent Observations, para. 12.

³⁴ Respondent Observations, paras. 13-15.

³⁵ Respondent Observations, para. 16.

³⁶ Respondent Observations, para. 17.

³⁷ Respondent Observations, para. 18.

³⁸ Respondent Observations, para. 19.

³⁹ Respondent Observations, para. 20, quoting EC Application, para. 27.

*the Claimants may constitute State aid in the sense of Article 107(1) TFEU [which] may mean that any legitimate expectations are excluded”.*⁴⁰

29. As to the relationship between Article 26 of the ECT and EU law, the Respondent submits that the EC’s position that “*an investor from one EU Member State investing in another EU Member State as not covered by the ECT’s notion of an ‘investor’ making an investment in the ‘Area’ of ‘another Contracting Party’ as such an investor is investing within the same economic area,*⁴¹ falls within the scope of the dispute in these proceedings. In this regard, the Respondent also refers to the Court of Justice of the European Union’s (“CJEU”) judgments in *Achmea*, *Komstroy* and *European Food*, as well as the SCC arbitral award in *Green Power*.⁴²
30. As to the third requirement of ICSID Arbitration Rule 37(2), the Respondent observes that the EC “*has a significant interest in the proceeding and specifically in the proper interpretation of the EU Treaties and the ECT as well as the avoidance of conflict between the EU Treaties and the ICSID Convention since it is the ‘guardian of the EU Treaties’*”.⁴³
31. According to the Respondent, “*When deciding the issue of jurisdiction, this Tribunal is not operating in a vacuum, and even though there is no stare decisis rule in international investment arbitration law, this Tribunal’s decision on jurisdiction will have an impact on the intra-EU investment community in energy matters*”, a matter that it submits “*is of interest for the entire ECT community*”.⁴⁴ It further observes that the EC “[a]s ‘guardian of the EU Treaties’ and a driving force behind the creation of the ECT, [...] has an interest in ensuring the proper interpretation of both instruments”,⁴⁵ and “*has had to take a lot of*

⁴⁰ Respondent Observations, para. 20, quoting EC Application, para. 28.

⁴¹ Respondent Observations, para. 21.

⁴² Respondent Observations, para. 22, and the cases cited therein.

⁴³ Respondent Observations, paras. 9, 25-30.

⁴⁴ Respondent Observations, para. 27.

⁴⁵ Respondent Observations, para. 28.

initiatives to educate about misunderstandings and avoid conflict between the EU Treaties and the ICSID Convention".⁴⁶

32. In summary, according to the Respondent, the EC "*has a significant interest in helping this Tribunal achieve a harmonious interpretation*".⁴⁷
33. Finally, as to procedural efficiency and fairness, the Respondent submits that the EC's intervention would not "*disrupt or prolong the proceeding, unduly burden or unfairly prejudice either Party*" because the EC "*wishes to assist this Tribunal in a very specific question, with particular knowledge and in an unbiased way*".⁴⁸ The Respondent further submits that there is "*no intention or possibility on the part of the [EC] to hinder or interrupt the arbitral proceedings in any way, so that the integrity of the arbitral proceedings will not be affected*".⁴⁹
34. The Respondent proposes that the procedure for the EC's intervention should involve two stages: that the Tribunal should (i) invite the EC to submit its *amicus curiae* brief before the filing of the Claimants' Reply scheduled for 5 May 2023; and (ii) allow the EC to make another submission at a later stage in the proceeding, after the Respondent has filed its Rejoinder scheduled for 4 August 2023.⁵⁰

III. THE TRIBUNAL'S ANALYSIS

35. The Tribunal has carefully considered the EC Application and the Parties' Observations, including as summarised above.
36. The basis for the EC's Application is Rule 37(2) of the ICSID Arbitration Rules, which provides as follows:

⁴⁶ Respondent Observations, para. 29.

⁴⁷ Respondent Observations, para. 29.

⁴⁸ Respondent Observations, para. 9.

⁴⁹ Respondent Observations, para. 9. *See also* paras. 31-34.

⁵⁰ Respondent Observations, para. 35.

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 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.

37. Pursuant to Rule 37(2), the four primary factors the Tribunal shall consider when deciding whether or not to allow a non-disputing party to file a written submission are:
- a. whether or not 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;
 - b. whether or not the submission would address a matter within the scope of the dispute;
 - c. whether or not the EC has a significant interest in the proceeding; and
 - d. whether or not the EC intervention will disrupt the efficiency of the proceedings, or the equality of the Parties.
38. The first factor in ICSID Arbitration Rule 37(2) requires that the non-disputing party intervention bring a perspective, particular knowledge or insight that is different to that of

the Parties, which would assist the Tribunal in the determination of factual or legal issues. In these proceedings, the relevant issue, according to both the EC and the Respondent, is the legal question as to whether or not the Tribunal has jurisdiction to hear the claim pursuant to Article 26 of the ECT, including in the context of the interaction between the ECT, the EU Treaties and the ICSID Convention.

39. The Respondent clearly has put in issue in these proceedings the effect of the interaction of the ECT, EU Treaties and the ICSID Convention on the Tribunal's jurisdiction. Therefore, this is an issue that the Tribunal must determine. Accordingly, the question for the purposes of this Application is whether or not a separate third-party intervention from the EC would assist the Tribunal to determine that issue because the EC offers a different perspective, particular knowledge or insight, than that of the Parties (and in particular the Respondent).
40. This is a difficult question determinatively to answer in the abstract. On the one hand, as the Claimants have pointed out, the EC's submission may mirror and simply be duplicative of the jurisdictional arguments already put forward by the Respondent. The Claimants' concerns in this regard are not entirely without basis, as is evidenced by the duplicative nature of the Respondent's observations in respect of this Application.
41. Ultimately, the EC's position as to the effect of the interaction of the ECT, EU Treaties and the ICSID Convention on the Tribunal's jurisdiction may do no more than mirror the Respondent's position and add no new substantive analysis or argument. Nevertheless, the EC is a separate administrative entity, which is subject to its own governance and decision-making functions. Whilst its positions on certain matters will align with that of the EU Member States, including the Respondent, its processes are separate and may involve additional aspects that are either not known to the current Respondent representatives, or otherwise not put forward by them.
42. Therefore, the EC's perspective as to the effect of the interaction of the ECT, EU Treaties and the ICSID Convention on the Tribunal's jurisdiction, in addition to that of the

constituent EU Member States, would assist the Tribunal, even if it were to transpire that the EC perspective ultimately mirrors the Respondent's perspective.

43. Accordingly, the Tribunal finds that the EC's knowledge and insight would bring a perspective different from that of the Parties and would assist the Tribunal in its consideration of the Respondent's *ratione voluntatis* jurisdictional objection.
44. The second factor in ICSID Arbitration Rule 37(2) requires that the EC's intervention will address a matter within the scope of the dispute. In this regard, the EC explains that it seeks to make a written submission on one specific issue in dispute, which is that:

*Article 26 of the Energy Charter Treaty, properly construed, does not apply intra-EU in general, and in the relationship between the Federal Republic of Germany and the Republic of Ireland, in particular, so that the Arbitral Tribunal lacks jurisdiction.*⁵¹

45. The EC correctly assumes that the Respondent objects to the Tribunal's jurisdiction on the basis of the application of Article 26 of the ECT, to claims between investors from EU Member States and Respondent EU Member States, including based on the January 2019 Declaration, which the Respondent signed. Therefore, the proper construction of ECT Article 26 in disputes involving an investor from an EU Member State and an EU Member State respondent, is within the scope of the dispute.
46. The EC 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*".⁵² The Tribunal understands, however, that the EC mentions this merely to enumerate the issues of EU law that may have been put to the Tribunal, given that the EC is not privy to the Parties' submissions on this matter. This does not mean that the EC wishes to make a submission on issues of State aid.
47. The third factor in ICSID Arbitration Rule 37(2) is that the EC must have a significant interest in this proceeding. This is an arbitration brought by investors, including nationals

⁵¹ EC Application, para. 23.

⁵² EC Application, para. 28.

of EU Member States, against Germany, another EU Member State. Pursuant to the EC'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]",⁵³ the Tribunal accepts that the EC has an interest in ensuring that when the Tribunal assesses its jurisdiction, it takes into consideration the EC's perspective on the compatibility of EU law and ECT Article 26.

48. Finally, ICSID Arbitration Rule 37(2) further requires that the admission of a non-disputing party's written submission not interfere with efficiency and due process, stating in that regard as follows:

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.

49. In the current proceeding, the Tribunal considers itself capable of making directions to permit the intervention of the EC in a manner that will not disrupt the proceeding and not unduly burden or unfairly prejudice the Parties. In this regard, it considers the following factors to be relevant:
- a. as to timing, the EC Application was submitted on 3 October 2022, 18 months after the Request for Arbitration, six months after the Respondent's Memorial on Jurisdiction and five months after the Claimants' Memorial on Jurisdiction, but prior to both the Claimants' and the Respondent's responsive memorials, providing the Parties with an opportunity to respond without impacting the schedule;
 - b. as to scope, the EC Application has confined its intervention to one written submission on a single issue;

⁵³ EC Application, citing TEU, Art. 17(1) (available at : <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTEXT>).

- c. also as to scope, the single issue in question is an issue that the Respondent has raised that is or should be well-known to the Claimants' representatives; and
 - d. as to convenience, the real possibility that any EC submission addressing the single issue in question will mirror submissions already made by the Respondent, if anything, reduces any additional burden for the Claimants in making any response.
50. The Tribunal accepts that an additional submission nevertheless will require additional effort by the Claimants and the Respondent to review its contents and make any responsive points. That effort will take time and result in additional cost. As the position of the EC appears to align more closely with that of the Respondent, any additional cost is more likely to affect the Claimants.
51. However, ICSID Arbitration Rule 37(2) does not require the Tribunal to ensure no additional burden or prejudice at all to the Parties; it instead requires no *undue* burden and no *unfair* prejudice. In the circumstances, given the limited nature of the EC intervention as directed in this Procedural Order No. 5, the Tribunal does not consider any additional burden, on the Claimants in particular, to be undue or any prejudice to be unfair.
52. This is because the proceeding is still at a stage where both Parties will have an opportunity to address the EC's written submission within the current schedule. The Claimants are yet to submit their Reply on Jurisdiction and the Merits and the Respondent is yet to submit its Rejoinder on Jurisdiction and the Merits in which they will have an opportunity to address the EC's submission. The Parties will have an additional opportunity to address the EC's written submission during the hearing and in any potential post-hearing submissions, if necessary. Therefore, the EC's written submission will not disrupt the proceeding and the existing procedural calendar will be maintained.
53. Moreover, the Respondent has consented to and supports the EC intervention and, accordingly, cannot be said to be unduly burdened or prejudiced as a result. The Claimants have not so consented, but in light of the Tribunal's directions are required to respond to

an additional submission by the EC dealing with a single issue, at the same time that they address the Respondent's arguments on that same issue.

54. Accordingly, as to scope and form, the EC's intervention shall be limited to one written submission, of a maximum length of 30 pages, exclusively to focus on the issue as to whether or not:

Article 26 of the Energy Charter Treaty, properly construed, applies intra-EU in general, and in the relationship between the Federal Republic of Germany and the Republic of Ireland, in particular, so that the Arbitral Tribunal lacks jurisdiction.

55. As to the date of the EC's written submission, the Tribunal determines that the EC shall submit this on or before 30 March 2023. The Claimants will have the opportunity to address this submission in their Reply on Jurisdiction and the Merits on 5 May 2023 and the Respondent in its Rejoinder on Jurisdiction and the Merits on 4 August 2023.
56. This will ensure that both the Claimants and the Respondent will have an adequate opportunity to address the EC's written submission, without any undue disruption of the proceeding. It also maintains the equality between the Parties and ensures that neither the Claimants nor the Respondent is unduly burdened or prejudiced, as both will be able to respond to the EC's submission in writing prior to the hearing.
57. The EC has further requested that the Tribunal allow it to have access to the documents filed in the case, to the extent necessary for the preparation of the *amicus curiae* submission. The 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 EC needs to prepare its submission are in the public domain or already in its possession. The Respondent has no objection to the EC accessing the case file.
58. The Tribunal accepts the Claimants' position; the EC written submission is limited to a single issue within its own existing knowledge and perspective. The EC's own insights and

information uniquely available to it are precisely why it is being granted leave to intervene. The Tribunal sees no need for the EC to access the case file to make this submission. In the event that the EC considers that it is necessary to obtain a specific document, or part of a specific document, in order properly to prepare its written submission, it may submit a narrow and specific request to the Tribunal, which the Tribunal will then consider.

59. Further, the EC has requested that the Tribunal allow it to attend hearings in order to present oral argument and reply to the questions of the Tribunal at those hearings, “*should the Arbitral Tribunal deem that useful*”.

60. In that regard, 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.

61. The Claimants have made it clear that they do not consent to the EC’s attendance. Given the absence of the Claimants’ consent, and the fact that the Tribunal does not at this time deem it useful for the EC separately to present oral argument and reply to Tribunal questions at the hearing, the Tribunal does not consider this direction to be necessary or appropriate.

62. Finally, the Claimants have requested that the Tribunal order the EC bear any costs arising out of its intervention. In this regard, as the EC’s intervention is limited to one 30-page, written submission on a single and narrow issue, the Tribunal does not consider it necessary or appropriate for it to make any order for costs at this time. The Tribunal reserves the right to revisit this decision, after it has reviewed the EC’s submission or if there is a change of circumstances.

IV. ORDER

63. Having considered the EC's Application and the Parties' Observations, and for the reasons stated above, the Tribunal decides and orders as follows:
- a. the EC's request to intervene is granted on the following basis:
 - i. the EC's intervention is limited to one written submission no longer than 30 pages;
 - ii. the written submission shall address the single issue whether or not, from the EC's perspective, Article 26 of the Energy Charter Treaty, properly construed, applies intra-EU in general, and in the relationship between the Federal Republic of Germany and the Republic of Ireland, in particular, so that the Arbitral Tribunal lacks jurisdiction; and
 - iii. the written submission is due on or before 30 March 2023;
 - b. the EC's request to access the case file is denied;
 - c. the EC's request to attend the hearing is denied;
 - d. the Claimants' request that the EC bear the costs arising out of its intervention at the time of this Order is denied; and
 - e. all costs in the arbitration are otherwise reserved.
64. This Order shall be communicated to the Agents designated by the EC who shall not communicate it to third parties or make use of it outside the present proceeding.

On behalf of the Tribunal,

[signed]

Ms. Wendy Miles KC
President of the Tribunal
Date: 1 February 2023