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TO THE PRESIDENT AND MEMBERS OF THE
AD HOC COMMITTEE

Prof. Ricardo RAMÍREZ HERNÁNDEZ, President

Judge Dominique HASCHER, Member

Makhdoom Ali KHAN, Member

Secretary of the Committee

Mr. Paul Jean Le Cannu

***Amicus Curiae* submission**

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In ICSID Case No. ARB/13/36 – Annulment Proceeding

EISER

(Respondents on Annulment) (Claimant)

v.

KINGDOM OF SPAIN

(Applicant on Annulment) (Respondent)

1. INTRODUCTION

1. The Commission expresses its gratitude to the *Ad Hoc* Committee for granting it leave to intervene.
2. As decided by the *Ad Hoc* Committee in Procedural Order No. 3, this brief is limited to setting out arguments “*on whether the Tribunal seriously departed from a fundamental rule of procedure by requiring a commitment from the Commission to pay costs and refusing the Commission’s amicus curiae submission*”.¹ The Commission has also taken note that “[*t*]he Committee concedes that the Commission’s view on this ground of annulment could intertwine with the substantive issues on jurisdiction and EU State aid law, which the Commission has indicated it considers were affected as a result of a procedural irregularity. Therefore, the Committee considers such issues could be addressed to the extent that they relate to its view on whether there has been a serious departure from a fundamental rule of procedure”.²
3. The Commission will first set out the relevant facts (2.) and the fundamental rules of procedure from which the Arbitral Tribunal has departed (3.). Against that background, the Commission will show why the requirement “*to pay the additional costs of legal representation reasonably incurred by the parties in responding to that submission*” imposed upon the Commission in Procedural Order No. 7 of the Arbitral Tribunal³ and maintained in Procedural Order No. 8 of the Arbitral Tribunal,⁴ despite a reasoned request by the Commission to alter Procedural Order No. 7,⁵ constitutes a serious departure from those fundamental procedural rules (4.). In a final step, the Commission will demonstrate that, had the Arbitral Tribunal had at its disposal the *amicus curiae* submission of the Commission, it may have reached a different conclusion both on jurisdiction and on merits. This further underlines the seriousness of the Arbitral Tribunal’s departure (5.).

¹ See Procedural Order No. 3, paragraphs 35 and 40(a).

² *Ibid.*, paragraph 35.

³ **Annex EC-2.**

⁴ **Annex EC-3.**

⁵ **Annex EC-4.**

2. DESCRIPTION OF THE RELEVANT FACTS⁶

4. The Commission had sought leave to intervene as a non-disputing party in the proceedings before the Arbitral Tribunal leading to the Award that is contested before the *Ad Hoc* Committee (“contested Award”).⁷
5. By Procedural Order Nr. 7,⁸ the Arbitral Tribunal admitted the Commission as non-disputing party. In that Procedural Order, the Arbitral Tribunal decided that the Commission fulfilled all conditions set out in ICSID Arbitration Rule 37(2). In application of ICSID Arbitration Rule Article 37(2) second sub-paragraph, the Arbitral Tribunal set a short deadline of ten days, ending on 31 December (and thus including the end of year holidays) for filing an *amicus curiae*⁹ brief. Furthermore, it limited the length of the submission to 25 pages. These conditions were deemed necessary in order not to disrupt the proceedings (which were relatively far advanced when the Commission filed its request) and not to unduly burden or unfairly prejudice one party.
6. In addition to those two measures (very short deadline and very limited number of pages), the Arbitral Tribunal requested, still on the same legal basis, “[a]s a condition for filing a non-disputing party submission and prior to any consideration of that submission by the Tribunal [...that] the Commission shall provide a written undertaking, satisfactory to the Tribunal, to pay the additional costs of legal representation reasonably incurred by the parties in responding to that submission”. This requirement will be referred to as “contested undertaking on costs”.
7. In a reasoned request to alter Procedural Order Nr. 7,¹⁰ the Commission set out that the contested undertaking on costs lacked any legal foundation in either the applicable rules (i.e. the Energy Charter Treaty, the ICSID Convention and the ICSID Arbitration Rules) or general principles of international law (as expressed in

⁶ See also paragraphs 59 to 70 of the contested Award.

⁷ The request for leave to intervene is attached as **Annex EC-1**.

⁸ **Annex EC-2**.

⁹ The Commission is aware that the ICSID Arbitration Rules use the term “*non-disputing party*”, rather than *amicus curiae*. However, the historical development leading to ICSID Arbitration Rule 37 shows that that rule is really about *amicus curiae*. Accordingly, in the practice of arbitral tribunals, both terms are used in an interchangeable manner.

¹⁰ **Annex EC-4**.

international or national procedural rules or precedent of international courts and arbitral tribunals or national courts). The Arbitral Tribunal, however, refused to alter Procedural Order Nr. 7 in Procedural Order No. 8.¹¹ It justified the contested undertaking on costs on the basis of the consideration that the Commission's request had been filed only after the parties had completed their exchange of memorials, and relatively shortly before the oral hearing.

8. The Commission was not in a position to accept such a condition, as it would otherwise have violated its obligations under the European Union ("EU" or "Union") rules for executing the Union budget, which would not allow it to incur expenditures that lack a legal basis and hence are without a valid legal foundation.
9. Therefore, it refused to provide the commitment.¹² As a result, the *amicus curiae* brief that had been filed by the Commission was destroyed, without entering the record of the proceedings.

3. FUNDAMENTAL RULES OF PROCEDURE FROM WHICH THE ARBITRAL TRIBUNAL HAS DEPARTED

10. The Arbitral Tribunal, in Procedural Order No. 8, identifies as legal basis for the contested undertaking on costs ICSID Arbitration Rule 37(2), and more precisely the beginning of the second sub-paragraph, which reads: "*The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party [...]*".¹³
11. ICSID Arbitration Rule 28 stipulates:

"Rule 28

Cost of Proceeding

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

¹¹ Annex EC-3.

¹² Annex EC-5.

¹³ Annex EC-4, paragraphs 9 to 14.

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.”

12. While there is significant authority to suggest that arbitral tribunals have discretion in their award for costs under the ICSID Convention, it is clear from the wording of Rule 28 that the provision a costs can only be made between the parties to the proceedings. An *amicus curiae* is not a party to the proceedings. The relevant, non-contested precedent in this regard are the Orders in Response to Transparency and *Amicus Curiae* Petition in *Suez and AWG v Argentina*.¹⁴

“An *amicus curiae* is, as the Latin words indicate, a “friend of the court,” and is not a party to the proceeding. Its role in other forums and systems has traditionally been that of a nonparty, and the Tribunal believes that an *amicus curiae* in an ICSID proceeding would also be that of a nonparty. The traditional role of an *amicus curiae* in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide. In short, a request to act as *amicus curiae* is an offer of assistance – an offer that the decision maker is free to accept or reject. An *amicus curiae* is a volunteer, a friend of the court, not a party.” (emphasis added)

13. Tribunals constituted under the ICSID Convention have long adopted one of two approaches concerning the allocation of costs arising under disputes, namely:¹⁵

“(1) “*Pay your own way*”, whereby the parties share the costs of the proceedings and bear their own legal costs¹⁶; and

(2) the “*costs follow the event*” approach, under which the losing party bears the costs of the proceedings and the legal costs of the winning party¹⁷. Often, this is applied *pro rata* - according to the relative success of the parties. The costs of the

¹⁴ ARB/03/19, Order of 19 May 2005 (**Annex EC-6**), paragraph 13.

¹⁵ See, in detail, *Kateryna Bondar*, “Allocation of costs in investor-State and commercial arbitration: towards a harmonized approach”, in: 32 *Arbitration International* (2016), pp. 45-58 (**Annex EC-7**), on pp. 47-53; *Christoph Schreuer*, *The ICSID Convention. A Commentary*, Commentary on Article 61 ICSID Convention (**Annex EC-8**), paragraphs 15 to 74.

¹⁶ E.g. *Nations Energy v. Panama*, ARB/06/19, Award of 24 November 2010.

¹⁷ E.g. *Spyridon Roussalis v. Romania*, ARB/06/1, Award of 7 December 2011.

winning party are not automatically shifted to the losing party; rather the tribunal will subtract those issues, claims or events on which the winning party is itself the loser.”

14. In both those approaches and in line with ICSID Arbitration Rule 28, the costs are allocated exclusively between the parties to the dispute, rather than burdening any *amicus curiae* with all or part of these expenses. In fact, the Commission was unable to retrieve a single award or decision on costs rendered under the auspices of the ICSID Convention and outside the intra-EU arbitration context, where a non-disputing party was requested to provide the costs that would arise from its limited, single submission intervention.
15. Finally, ICSID Arbitration Rule 47(1)(i) provides that the award shall set out the reasons for the decision of the arbitral tribunal on each decision made in the award. This includes the obligation to provide reasoning for the allocation of costs.¹⁸ A decision on costs can also form the object of annulment proceedings.¹⁹

4. THE CONTESTED UNDERTAKING ON COSTS CONSTITUTES A SERIOUS DEPARTURE FROM THOSE PROCEDURAL RULES, WHICH ARE FUNDAMENTAL

4.1. Introduction

16. In the Commission’s view, the Arbitral Tribunal has seriously departed from a fundamental rule of procedure by requiring the contested undertaking on costs, and, as a result, refusing the Commission’s *amicus curiae* submission.
17. There is, however, no legal basis in ICSID Arbitration Rules, or in the ICSID Convention or in general principles of international law, for requiring such a commitment.
18. The contested undertaking on costs also goes against the rules applicable in national legal systems, in particular the common law jurisdictions where the legal institute of the *amicus curiae* has its source, and for international courts and tribunals. Those converge on the principle that the *amicus curiae* pays its own costs, but not the costs of the parties related to its intervention, because it serves the Tribunal, by bringing a different angle and outside expertise to the proceedings.

¹⁸ *Christoph Schreuer*, *The ICSID Convention. A Commentary*, Commentary on Article 61 ICSID Convention (**Annex EC-8**), paragraphs 41 to 45 and 62 to 74.

¹⁹ *Ibid.*, paragraph 71

19. The Commission will start by providing the necessary background on the role of *amicus curiae*. It is a fundamental principle of investment arbitration that *amicus curiae* interventions are admitted, in particular to enhance transparency and legitimacy of investment arbitration, which involves important matters of public interest (4.2). The Commission will then show that ICSID Arbitration Rule 37(2) is a fundamental rule of procedure, because it governs the *amicus curiae* in ICSID arbitration, and that neither that rule nor any other provision of the ICSID Convention or international law confers power upon an arbitration tribunal to make the acceptance of the *amicus curiae* brief conditional upon an undertaking such as the contested undertaking on costs (4.3). In that context, the rules applicable in national legal systems and for international courts and tribunals are of crucial importance, because the institution of *amicus curiae* has been incorporated into investment arbitration from other international courts and tribunals. Those rules confirm that the *amicus curiae* only bears its own costs. That shows, on the one hand, the fundamental nature of the rule and the seriousness of the departure from it. On the other hand, it also shows that the Arbitral Tribunal could not have found a legal basis in the international practice or a generally recognized principle (4.4). The Commission will conclude by recalling the considerations of judicial policy that militate strongly against the contested undertaking on costs (4.5).

4.2. Background on *amicus curiae* submissions in general and on the Commission’s request before the Arbitral Tribunal in particular

4.2.1. The institute of the amicus curiae: expertise, public interest and transparency

20. Pursuant to ICSID Arbitration Rule 37(2), an arbitral tribunal may allow a third party (or non-disputing party) to file a written submission (or *amicus curiae* brief) regarding a matter within the scope of the dispute.
21. The institution of *amicus curiae* has for a long time played an important role in common law jurisdictions. The role of the *amicus* has evolved over time.²⁰ Initially, the main consideration was the expertise of the *amicus*. In the words of the Arbitral Tribunal in *Suez and AWG v Argentina*, the *amicus* “provid[es] the decision maker

²⁰ See, in detail, *Samuel Krislov*, “The Amicus Curiae Brief: From Friendship to Advocacy”, in: *The Yale Law Journal* 73 (1963), pp. 694-715 (**Annex EC-9**); *David S. Clark*, “Use of the Amicus Curiae Brief in American Judicial Procedure in Comparative Perspective”, in: *RabelsZ* 80 (2016), pp. 327-371 (**Annex EC-10**), the latter also including a description of the use of the institute in other, including civil law, jurisdictions.

with arguments, perspectives, and expertise that the litigating parties may not provide”.²¹ The institution of *amicus curiae* allows third parties to participate in proceedings by way of offering assistance to the court or tribunal. The *amicus curiae* may provide to the judges or arbitrators additional information or its expert scientific or technical knowledge, in particular when the specific issues are outside the judges’ or arbitrators’ areas of expertise.

22. Therefore, the *amicus curiae* can improve the quality of judgments, decisions and awards. The objective of *amicus curiae* briefs is thus that the tribunal and the parties benefit from the special knowledge or expertise of the third party and its perspective on the issues.
23. The second justification for admitting *amicus curiae* interventions has been to ensure that the decision-maker has full knowledge not only of the interests of the disputing parties, but also of the interests of all other entities that are potentially concerned, as well as the general, common or public interest.²²
24. By definition, the *amicus curiae* is a “*friend of the court*”. Its aim is to serve the court or tribunal by bringing a different angle and outside expertise to the proceedings, and to inform the decision maker about matters that may otherwise not come to its attention, or not in the same objective manner.²³
25. The institution of *amicus curiae* is today widely recognized not only in common law jurisdictions, but also in civil law jurisdictions.²⁴ Furthermore, it is a common feature before international courts and tribunals.²⁵ Indeed, it would seem that the institution was first transplanted from common law to international law, and then

²¹ See full quote above at paragraph 12.

²² See, for a comprehensive analysis of the case-law of arbitration tribunals, in particular the seminal decisions in *Methanex*, *UPS* and *Suez*, Alexis Mourre, “Are Amici Curiae the proper response to the public’s concerns on transparency in investment arbitration”, in: *The Law and Practice of International Courts and Tribunals* 5 (2006), pp. 257-271 (**Annex EC-11**).

²³ *Ibid.*, p. 269.

²⁴ Steven Kochevar, “Amici Curiae in Civil Law Jurisdictions”, in: *The Yale Law Journal* 122 (2013), pp. 1653-1669 (**Annex EC-12**); David S. Clark, “Use of the *Amicus Curiae* Brief in American Judicial Procedure in Comparative Perspective”, in: *RabelsZ* 80 (2016), pp. 327-371 (**Annex EC-10**).

²⁵ See for overviews: Lance Bartholomeusz, “The *Amicus Curiae* before International Courts and Tribunals”, in: *Non-State Actors and International Law* 5 (2005), pp. 209-286 (**Annex EC-13**); Luigi Crema, “Testing *Amici Curiae* in International Law: Rules and Practice”, in: *The Italian Yearbook of International Law* XXII (2012), pp. 91-132 (**Annex EC-14**).

diffused back on the national level in civil law jurisdictions.²⁶ In international law, the *amicus curiae* first appeared in WTO and human rights law, before arbitral tribunals, referring explicitly to those precedents, accepted *amicus curiae* briefs in investment arbitration.²⁷

26. Today, *amicus curiae* briefs “constitute an evolving global procedural norm”.²⁸ And, as will be shown in detail in section 4.4, one common feature of that evolving global procedural norm is that the *amicus* is, to use the words of the arbitral tribunal in *Suez and AWG v Argentina*, “a volunteer”,²⁹ that is he pays his own expenditure (different from an expert, which is paid by the court/the parties), but he is not burdened with any other costs. This is intuitive, because, by definition, the *amicus curiae* is a “friend of the court” and cannot be a “friend of the parties” (or one of the parties). Its aim is to serve the court or tribunal, not a party.

4.2.2. *The Commission’s request before the Arbitral Tribunal*

27. The benefits of an *amicus curiae* brief in investment arbitration have been recently summarized as follows:³⁰

“First, [...] *amicus curiae* participation can promote a general interest in procedural openness and ensure that the broader public does not perceive the arbitration process as ‘secretive’ [...] There is a public interest in the enhancement of procedural legitimacy of investment arbitration by means of greater participation. [...]

[Second], there may in fact be instances where third-party involvement actually serves both to improve the legal quality of the award and to assist in the systemic development of international investment law as a whole. As to the first point, in some cases parties to a proceeding may have a specific vested interest in not disclosing all the facts pertinent to the issues in dispute [footnote omitted]. For instance, in AES it is possible that neither Hungary nor the investor would have

²⁶ Steven Kochevar, “Amici Curiae in Civil Law Jurisdictions”, in: The Yale Law Journal 122 (2013), pp. 1653-1669 (**Annex EC-12**); Anna Dolidze, “Bridging Comparative and International Law: *Amicus Curiae* Participation as a Vertical Legal Transplant”, in: The European Journal of International Law 26 (2016), pp. 851-880 (**Annex EC-15**).

²⁷ ARB/03/19, Order of 19 May 2005 (**Annex EC-6**), paragraph 15, at the end.

²⁸ Steven Kochevar, “Amici Curiae in Civil Law Jurisdictions”, in: The Yale Law Journal 122 (2013), pp. 1653-1669 (**Annex EC-12**), p. 1669.

²⁹ See above paragraph 12.

³⁰ Eugenia Levine, “Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation”, in: Berkeley Journal of International Law 29 (2011), pp. 200-224 (**Annex EC-16**).

an interest in emphasizing the fact that the contracts between them may violate the EC's restrictions on State aid [footnote omitted] The claimant would certainly not wish to emphasize that a contract may be based on an illegality, as this may impact their ability to claim damages. As for Hungary, the State may consider it detrimental to emphasize this issue as its primary defence, since its acknowledgement of engaging in State aid may give rise to further actions by the Commission within the EU sphere. In this regard, the Commission's involvement could potentially highlight relevant legal issues that may not otherwise have prominence."

28. The example chosen – EU State aid law – is of particular importance also for the present case. The particular expertise of the Commission in this field – as well as on the interplay between EU law and international law and the question of jurisdiction – has been recognized by an important number of tribunals, including those established under the Energy Charter Treaty, such as the arbitral tribunal in *Electrabel v Hungary*, which noted:³¹

“Albeit with hindsight, it is unfortunate that the European Commission could not play a more active role as a non-disputing party in this arbitration, given that [...] the European Commission has much more than “a significant interest” in these arbitration proceedings”.

29. The Commission stresses that it did not seek to intervene in the Arbitral Tribunal in support of one of the parties or to vindicate rights of its own, but solely to assist the Arbitral Tribunal in deciding a dispute that raises fundamental questions of European Union law. Those questions are novel and pertinent. In this regard, and it is not only in the Commission's interest, but first and foremost in the interest of the disputing parties, the Arbitral Tribunal, the coherence of international law and the sound administration of justice that they are properly considered. A failure to consider the implications of European Union law in a context such as the one of the present dispute which concerns an investor of an EU Member State against another EU Member State, might affect the enforceability of a future award, expose the Respondent and the Claimant to procedures before the Commission and the Court of Justice of the European Union, and ultimately undermine the trust in and the legitimacy of investor-State arbitration.
30. The Arbitral Tribunal has to exercise its discretion in determining whether the *amicus* is trustworthy and whether it is prejudicial to one of the parties in an unfair

³¹ *Electrabel v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, part IV, paragraph 4.92, The Commission assumes that this text is already before the *Ad Hoc* Committee. Should you require a copy, the Commission will provide it immediately.

manner. In the present case, the Arbitral Tribunal had confirmed the trustworthiness and the absence of unfair prejudice.

31. This should come as no surprise, given the very peculiar role of the Commission:
32. The Commission has a central role in the interpretation and application of rules relating to investment protection within the Union. Those rules include in particular the so-called Four Freedoms that characterize the Union's Single Market,³² but also the sector-specific legislation concerning energy, and in particular renewable electricity.
33. That central role derives, first, from its task as "*guardian of the Treaties*". Pursuant to Article 17 of the Treaty on European Union ("TEU"), the Commission is tasked with promoting the general interest of the European Union and taking appropriate initiatives to that end.. In that context, it has in particular the power to initiate infringement procedures pursuant to Articles 108, 258 and 260 of the Treaty on the Functioning of the European Union ("TFEU") against Member States that fail to comply with their obligations. That includes national judges that may have to hear the cases on recognition and enforcement of the contested Award.
34. Moreover, the Commission has a central role in the application of the system of control of State aid established in Articles 107 and 108 TFEU: it is entrusted with the task to keep systems of aid existing in Member States under constant review, and it has the exclusive competence for approving new aid that Member States intend to grant to undertakings. Union law on State aid plays a decisive role in the annulment proceedings and in particular the rules on State aid plays a decisive role in the annulment proceedings, particularly when the dispute concerns an investors of a EU Member State against another EU Member State.
35. The Commission Decision SA.40348 of 10 November 2017³³ contains clear language that arbitration tribunals, such as the *Eiser* Tribunal, lack competence to

³² See in detail Communication "*Protection of Intra-EU Investment*" of 19 July 2018, COM(2018)547 final, p. 3, **Annex EC-17**.

³³ Commission Decision SA.40348 of 10 November 2017, summary published in the *Official Journal of the European Union*, OJ C 442, 22.12.2017, p. 1 (accessible on-line via the EUR-Lex website; see <http://eur-lex.europa.eu/homepage.html?locale=en>), whereas the full text was published at http://ec.europa.eu/competition/state_aid/cases/258770/258770_1945237_333_2.pdf, recitals 159 to 164.

hear cases brought by EU investors, and that in any event, the measures taken by the Kingdom of Spain cannot violate the fair and equitable treatment standard.

36. That decision is part of Union law, and hence also part of the law applicable to the proceedings before this *Ad Hoc* Committee, which concerns an EU investor, and as such binding upon the *Ad Hoc* Committee.³⁴
37. Before the Arbitration Tribunal, and as recognized by the Arbitration Tribunal, the Commission did not intervene in support of one of the parties, but rather solely for the purpose of assisting the Arbitral Tribunal in deciding the novel questions raised by the dispute regarding EU law. More specifically, the Arbitral Tribunal had held that the “*that the circumstances [regarding the application] here are sufficient to satisfy the three numbered factors listed in ICSID Arbitration Rule 37(2)*”.³⁵ To recall, these are the following:

“Rule 37(2)

(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.”

4.3. Article 37(2) does not provide a legal basis for the contested undertaking on costs

38. ICSID Arbitration Rule 37(2) second sub-paragraph states that “*The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party [...]*”
39. The Commission does not contest that the involvement of *amicus curiae* can increase the arbitration costs and can generate delays, and, in general, should not

³⁴ See in detail below

³⁵ Procedural Order No. 7.

overburden the process. The Commission is, in fact, mindful of the often extensive costs incurred in investor-State arbitration cases.

40. An arbitral tribunal may use procedural measures to reduce the costs and delays associated with handling *amicus* briefs. In line with arbitral practice and academic literature, such tools may involve: page limits, subject matter limits, temporal limits, and the tribunal may request potential *amici* to coordinate their efforts and submit a joint *amicus curiae* brief.³⁶
41. In its Procedural Order No. 7, the Arbitral Tribunal set a strict deadline for the submission by the Commission of ten days after the transmission of the order, and a page limit of 25 pages maximum.
42. The temporal limit – the deadline of ten days – already significantly reduces the delay in the arbitration proceedings, limits the time and resources the *amicus* can spend preparing the brief, and thereby also limits the brief and arguments to which the disputing parties have to respond to. More importantly, the strict time limit ensured that the procedural timetable agreed between the Arbitral Tribunal and the parties was not disrupted, and that the date of the hearing did not have to be changed.
43. The single submission direction and page limit imposed – 25 pages – has a similar effect. It reduces the amount of materials that the parties have to respond to and that the tribunal has to assess, which in turn leads to a minimization of the cost incurred by the parties through the non-disputing party, and equally keeps delays for the proceedings to a minimum. In addition, a page limit also has the indirect effect of limiting the subject matter that the *amicus curiae* can reasonably bring forward and in turn causes the *amicus* to narrow its submission to the most essential points it would like to make.
44. The further requirement for the contested undertaking on costs does not add anything of substance in this regard. The question of who pays the costs does not

³⁶ See *Fernando Dias Simoes*, “Friends with Benefits? Amicus Curiae in the TPP Investor-State Dispute Settlement Mechanism” in *J Chaisse et al* (eds), *Paradigm Shift in International Economic Law Rule-Making* (Springer 2017), p. 123 (**Annex EC-18**); *Christina Knahr*, “Transparency, Third Party Participation and Access to Documents in International Investment Arbitration” 23 (2007) *Arbitration International*, p. 327, 351-353 (**Annex EC-19**); *Mariel Dimsey*, ‘Article 4 Submission by a third person’ in *D Euler, M Gehrig and M Scherer* (eds), *Transparency in International Investment Arbitration* (Cambridge University Press), p. 19 (**Annex EC-20**).

have any impact on a possible disruption of the proceedings – that merely is a method to fit the *amicus curiae* brief into the pre-existing schedule and to organise how much potentially new material the parties have to digest.

45. The question of undue prejudice or unfair burden equally is not affected by the contested undertaking on costs. Indeed, which party has to bear the additional costs incurred by the *amicus curiae* submission is purely a question of the method of cost allocation adopted by the Arbitral Tribunal, i.e. “*pay your own way*” or “*costs follow the event*” (see above paragraph 13).
46. This view is also confirmed by the relevant academic writing. For instance, *Thomas Ruthemeyer* concludes in his PhD thesis on the institution of *amicus curiae* in international investment law: “*It already seems questionable whether the arbitration rules provide for a legal basis, on which arbitral tribunals could base a decision requiring an amicus curiae [to pay the costs of the other parties ...]*”. Furthermore, even *de lege ferenda*, he recommends not to introduce such a legal basis into arbitration rules.³⁷
47. In any event, even if in theory the contested undertaking on costs could exceptionally have been based on ICSID Arbitration Rule 37(2) second subparagraph, *quod non*, the Arbitral Tribunal should have reasoned why the temporal and page limit were not sufficient in ensuring that the Commission’s brief would not disrupt the proceedings or unduly burden or unfairly prejudice either party. There is no doubt that a tribunal has a large degree of discretion regarding the submission of amicus brief and setting the procedural limits for doing so. However, setting such a requirement in asking the *amicus curiae*, the Commission, to pay the additional costs incurred by the parties, the Arbitral Tribunal should have at the very least provided a reasoned justification.

4.4. The contested undertaking on costs goes against against the rules applicable in national legal systems and for international courts and tribunals

48. Precedent of Arbitral Tribunals, ordinary courts as well as other international courts and tribunals shows, that whilst the amicus should always cover its own costs, it

³⁷ *Thomas Ruthemeyer*, Der amicus curiae brief im Internationalen Investitionsschutzrecht, (Annex EC-21), pp. 295 and 296

does not bear the financial burden incurred by the parties. The rule that *amici* bear their own costs is key for keeping their independence within the proceedings.

49. In that context, the Commission first recalls that it did not seek to recover any of its own costs. It strongly believes, however, that it is unwarranted to ask that as a precondition for filing a Non-Disputing Party Submission, the Commission shall undertake to pay the additional costs reasonably incurred by the parties.
50. The Commission respectfully submits that it is aware of no precedent for assigning a non-disputing party an obligation to pay or reimburse the parties' costs in the event of an *amicus curiae* brief submission.
51. On the contrary, there appears to be a generally accepted principle that in the light of the function and role of the *amicus curiae* (set out above under 4.2.), it is appropriate that the *amicus curiae* bears its own costs, but not those of the other parties. Any other view may, in fact, have an undue chilling effect on interventions by non-disputing parties and constitute a barrier to entry for non-disputing parties to participate in arbitration proceedings. This is particularly so where a public body and international institution, like the Commission, has been tasked with a specific public mandate (under Article 17(1) TEU), and seeks to defend this interest also before arbitral tribunals. The fact that the Working Paper to the currently-proposed amendments to the ICSID Arbitration Rules specifically expresses the need for a carve out for non-disputing parties with a public mandate only underlines this necessity.³⁸

4.4.1. Precedent from Arbitral Tribunals

52. Arbitral tribunals under ICSID Arbitration Rules, such as the arbitral tribunals in *Electrabel v Hungary*, *AES v Hungary*, and *Micula v Romania*,³⁹ as well as the *Ad Hoc* Committee in the last case,⁴⁰ have not required from the Commission an undertaking on costs, such as the contested undertaking on costs, but applied the

³⁸ See Proposals for Amendment of the ICSID Rules – Working Paper, Volume 3, point 469.

³⁹ See ICSID Case No ARB/05/20, *Micula v Romania*, Award of 11 December 2013, ICSID Case No ARB/07/19 *Electrabel v Hungary*, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, and ICSID Case No ARB/07/22 *AES v Hungary*, Award of 23 September 2010.

⁴⁰ *Ad hoc* Committee's Decision on Annulment dated February 26, 2016.

general principle that the *amicus curiae* only covers its own costs. This position has been most recently confirmed by the arbitral tribunal in *Vattenfall v Germany*.⁴¹

53. ICSID Arbitration Rule 37(2) defines the conditions whereby the arbitral tribunal may allow a person or entity that is not a party to the dispute to file a written submission with the arbitral tribunal. There is no mention whatsoever of such a person bearing part of the costs of the arbitration, and hence there is no legal basis to require them to do so. Rule 28 of the ICSID Arbitration Rules provide that the costs of arbitration are borne by the parties, which the *amicus curiae* admitted on the basis of Rule 37 of the ICSID Arbitration Rules is not.
54. The approach taken by the Arbitral Tribunal (requirement of the contested undertaking on costs) constitutes a clear departure from consistent arbitral practice.
55. The Commission observes, with regard to other procedural rules and practices thereunder relevant for investor-State arbitration, that there are no rules on *amicus curiae* under UNCITRAL 1976 rules, and *a fortiori* no rules on costs. However, the arbitral tribunals in *Methanex* and *United Parcel Services* did not require a commitment on costs from the *amicus curiae* either, nor did the *Suez* arbitral tribunals. The most recent UNCITRAL Arbitration Rules (UNCITRAL Arbitration Rules with new Article 1(4) as adopted in 2013) incorporate the UNCITRAL Transparency Rules, which provide for rules on *amicus curiae* submissions that are very similar to ICSID Rule 37 (see Article 4 of the UNCITRAL Transparency Rules). In this regard, it is significant to note that Article 4(5) of the UNCITRAL Transparency Rules contains a similar provision as the ICSID rules on *amicus* interventions on the condition not to “*disrupt or burden the proceedings*” without however mentioning anything on costs, whereas Article 3(5) of the same Transparency Rules explicitly provides that non-disputing parties may have to bear some costs for accessing particular categories of documents. Based on an *a contrario* reasoning, this shows that *amicus* does have to bear its own costs, but not the costs that the parties have in relation to its intervention.

4.4.2. Precedent from ordinary jurisdictions

56. The Commission would underline that it seems that most (if not all) ordinary jurisdictions do not normally require *amici curiae* to bear the costs of the parties.

⁴¹ ARB/12/12, Decision on the *Achmea* issue, of 31 August 2018, paragraphs 22 and 23.

57. For instance, in preliminary ruling procedures before the Court of Justice of the European Union, the Commission always intervenes as an *amicus curiae*, bearing only its own costs. Similarly, in proceedings before national courts where the Commission intervenes as an *amicus curiae* under Article 15(3) of Regulation No 1/2003 on the implementation of the competition rules laid down in Articles [101 and 102 of the Treaty on the Functioning of the European Union]⁴² or Article 29 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union,⁴³ the practice of these courts and tribunals is not to order the Commission to bear other costs than its own.⁴⁴

58. Furthermore, in England and Wales, the new Supreme Court rules⁴⁵ provide:

“Orders for costs will not normally be made either in favour of or against interveners but such orders may be made if the Court considers it just to do so (in particular if an intervener has in substance acted as the sole or principal appellant or respondent).”

59. Other jurisdictions, such as the Republic of Ireland, New Zealand, and France, do not seem to have laid down explicit statutory rules on the matter, but judges generally order the *amicus curiae* to bear its own costs only.⁴⁶

⁴² OJ L 1, 4.1.2003, p. 1 (**Annex EC-22**).

⁴³ OJ L 248, 24.9.2015, p. 9 (**Annex EC-23**).

⁴⁴ As can be seen on the Commission’s website, see for instance, with respect to *amicus curiae* interventions under Article 15(3) of Regulation No 1/2003 http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html .

⁴⁵ Rule 46(3), Supreme Court Rules 2009 (SI 2009/1603) (**Annex EC-24**). That provision appears to have been inspired by the 2006 decision of the House of Lords in *R (Barker) v London Borough of Bromley* (**Annex EC-25**). Similarly, in the recent *JFS* case (*R (E) v The Governing Body of JFS and others* [2009] EWCA Civ 626.) (**Annex EC-26**), the United Synagogue took on the running of the respondent’s case with the agreement of the parties. In that case, it seems clear that the United Synagogue crossed the line from being an intervener in the public interest (if, indeed, it ever was), into standing in the shoes of the respondent. In such circumstances, assuming that NGO interveners are aware of the costs implications of acting as *de facto* parties, this seems a reasonable exception to the general rule that there should be no orders for costs against interveners.

⁴⁶ See for example for the Republic of Ireland: *hvala v. Minister for Justice, Equality and Law Reform* [2004] 1 ELRM 27 (**Annex EC-27**); for France: Cour d’appel d’Angers chambre sociale, Audience publique du mardi 18 décembre 2001, N° de RG: 2000/01042 (**Annex EC-28**); and for New Zealand: *Levy v Victoria* (1997) 189 CLR 579, per Brennan CJ at 604. 10 (**Annex EC-29**)

60. On the contrary, the more discussed and pertinent question, as highlighted by extensive US case law on the subject, is whether the costs of the *amicus curiae*, given the valuable service they provide, must be covered by the parties or by public funds.⁴⁷
61. Costs are only ever awarded against the *amicus curiae* if it abuses its appearance or unnecessarily protracts the proceedings.⁴⁸
62. The line set out here has also recently been recommended in a PhD dissertation.⁴⁹
63. The relevance of precedent from ordinary courts and tribunals for this *Ad Hoc* Committee is twofold: first, the respondent is a Member State of the European Union, so that general principles of the legal order of the European Union and its Member States are relevant rules of law for deciding the dispute. Second, Article 38 of the Statute of the International Court of Justice recognizes the general principles of law recognized by civilized nations, as well as judicial decisions of the various nations as sources of international law. That same consensus is also expressed in the ALI/UNIDROIT Principles of Transnational Civil Procedure, which also explicitly foresee the participation of *amicus curiae* and an award of costs only against the parties to the procedure, but not against the *amicus curiae*.⁵⁰

4.4.3. Precedent from international courts and tribunals

64. The view taken by the Commission is furthermore supported by the practice of courts and tribunals established under public international law. For instance, in the

⁴⁷ Fifth Circuit: *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 854 (D.C. Cir. 1981) (**Annex EC-30**), *cert. denied*, 455 U.S. 994 (1982); Ninth Circuit: *Miller-Wohl Co. v. Coiran'r of Labor & Indus., State of Mont.*, 694 F.2d 203 (9th Cir. 1982) (**Annex EC-31**); Second Circuit: *Wilder v. Bernstein*, 965 F.2d 1196, 1203 (2d Cir. 1992) (**Annex EC-32**)

⁴⁸ See for an example from Australia: *Breen v Williams* [1994] 35 NSWLR 522, per Kirby P at 533 (**Annex EC-33**).

⁴⁹ See Séverine Menétrey, *L'amicus curiae, vers un principe commun de droit procédural?*, Dalloz, Nouvelle Bibliothèque de thèses, n° 97, 2010. That PhD dissertation tries to develop best practices for *amicus curiae* participation (including in the French legal system), and suggests in its concluding part: « *L'amicus curiae, sauf si le tribunal en décide autrement, supporte les frais de sa participation. L'augmentation du coût de la procédure liée à sa participation est supportée par les parties au titre des frais du procès.* » (**Annex EC-34**).

⁵⁰ See <http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf> , principle 13 (on *amicus curiae* participation) and principle 25 (on costs) (**Annex EC-35**)

World Trade Organization Panels and Appellate Bodies, the *amicus curiae* only bears its own costs.⁵¹

65. Similarly, the rules of procedure of international criminal courts stipulate that the *amicus curiae* only bears its own costs.⁵² Finally, the European Court of Human Rights, where *amicus curiae* interventions are frequent, does not have the power to order the *amicus curiae* to pay the costs that other parties incur as a consequence of the *amicus curiae* brief.⁵³ The Inter-American Court of Human Rights also sees frequent *amicus curiae* interventions and does not order costs against the *amicus curiae*.⁵⁴
66. Precedent from international courts and tribunals is of particular importance for investment arbitration, because the institute of *amicus curiae* in investment arbitration is inspired by precedent from international courts and tribunals.⁵⁵

4.4.4. Conclusion

67. In conclusion, the position taken by the Arbitral Tribunal goes squarely against the practice and written rules that can be found in investment arbitration, national courts, and international economic, criminal, and human rights tribunals.
68. That shows, on the one hand, the fundamental nature of the rule and the seriousness of the departure from it.
69. On the other hand, it also shows that the Arbitration Tribunal could not have found a legal basis in international practice or a generally recognized principle.

⁵¹ The practice at the WTO is that all parties, and all *amicus curiae* bear exclusively their own costs.

⁵² See, for example, Article 7 of the Practice Direction for the Special Court for Sierra Leone (**Annex EC-36**), and Article 9 of the Practice Direction relating to *Amicus Curiae Briefs* presented before the Special Tribunal for Lebanon (**Annex EC-37**), and Article 103 of the Rules of Procedure of the International Criminal Court (**Annex EC-38**).

⁵³ See Rule 44 § 3 of the Rules of Court (which authorize the *amicus curiae* intervention) in conjunction with Practice Directions, Just Satisfaction Claims, III. 4 (which sets out the rules on costs), both available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (**Annex EC-39**).

⁵⁴ See Rule 44 of the Rules of Procedure of the Inter-American Court of Human Rights (**Annex EC-40**).

⁵⁵ ARB/03/19, Order of 19 May 2005 (**Annex EC-6**), paragraph 15, at the end.

70. The Tribunal has never provided a reasoned justification for a divergent view, but has simply ignored the arguments put forward by the Commission, which are grounded in consistent national and international case law and rules of procedure.
71. At the very least, after the Commission's contestation of this requirement, the Arbitral Tribunal should have engaged with this extensive body of precedent and rules. Without such a reasoned justification, the Tribunal has set a dangerous precedent, which could discourage valuable contributions made by *amici curiae* in the future. This therefore entails clear violations under Article 52(1)(d) and (e) of the ICSID Convention.

4.5. Considerations of judicial policy militate strongly against undertakings such as the contested undertaking on costs

72. The view taken by the Tribunal also constitutes a disservice to investor-State arbitration and its perceived lack of openness. Indeed, requiring *amicus curiae* to provide for undertakings such as the contested undertaking on costs will have a chilling effect on the participation of international organisations and non-governmental organisations in investor-State arbitration proceedings.

4.6. Conclusion

73. The fact that the Arbitration Tribunal has requested the commitment to pay costs, disregarded the *amicus curiae* submission of the Commission on that basis, and not provided any reasons for not following the view described by the Commission in its request to alter Procedural Order No. 7 constitutes both a violation of Article 52 (d) ICSID Convention and Article 52 (e) ICSID Convention. This, taken on its own, is sufficient to lead to the annulment of the contested award.

5. IN THE ALTERNATIVE: HAD THE ARBITRAL TRIBUNAL HAD AT ITS DISPOSAL THE AMICUS CURIAE SUBMISSION OF THE COMMISSION, IT MAY HAVE REACHED A DIFFERENT CONCLUSION BOTH ON JURISDICTION AND ON MERITS

74. Should the *Ad Hoc* Committee take the view that in addition to demonstrating a serious deviation from ICSID Arbitration Rules 37(2), 28 and 47(1)(i), it is also necessary to demonstrate that the Arbitral Tribunal may have reached a different conclusion if it had had at its disposal the *amicus curiae* submission at the time of the adoption of the contested award, *quod non*, then the Commission considers that this condition is met as well.

75. The serious departure from a procedural rule set out in section 4 above prevented the Commission from setting out its view on the matter of jurisdiction of the Arbitration Tribunal (5.1) and on the relevance of Union law in general and EU State aid law in particular to the Tribunal (5.2). For the reasons set out above at paragraphs 32 to 35, the Commission was particularly well placed to serve as *amicus curiae* on those points.

5.1. The Arbitral Tribunal has lacked the following elements on jurisdiction, which the Commission could have placed before it and which could have changed the outcome of the case

76. The Commission, first, recalls that there is an obligation for arbitration tribunals to assess their own jurisdiction *ex officio*. This means, in particular, that they are not limited by the arguments the parties put before them. As a consequence, the Arbitration Tribunal would have been obliged to assess any additional argument the Commission would have put before it in its *amicus curiae* brief, irrespective of whether Respondent would have incorporated that argument into its own pleadings.

77. The Commission has carefully read the contested Award. When assessing whether Article 26 Energy Charter Treaty constituted a valid offer for arbitration from Respondent to Applicant, the Arbitral Tribunal has in particular in paragraphs 179 to 207 of the contested Award not at all or wrongly addressed the following arguments, on which the Commission could have brought before it in its *amicus curiae* submission additional relevant information:

5.1.1. *Conflict with Article 19 TEU, Article 267 TFEU, the general principle of mutual trust and the general principle of autonomy of the EU legal order, to be solved on the basis of the general principle of primacy of EU law.*

78. The Arbitral Tribunal fails completely to engage with a possible conflict with those provisions.

79. The Court of Justice of the European Union, in its judgment in *Achmea*, held that “Articles 267 and 344 [... of the Treaty on Functioning of European Union] must be interpreted as precluding a provision in an international agreement concluded between Member States [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal

whose jurisdiction that Member State has undertaken to accept” (emphasis added by the Commission).

80. The Court of Justice of the European Union has hence confirmed the view taken by the Commission before the Court of Justice of the European Union. If it had been admitted as *amicus curiae* before the Arbitral Tribunal, the Commission would have submitted those same considerations to the Arbitral Tribunal. submission before the Tribunal.
81. As the Commission would have detailed in its *amicus curiae* submission before the Arbitral Tribunal, and as has been recognized by a number of Arbitral Tribunals, starting from the Tribunal in *Electrabel v Hungary*, Union law takes precedence over the Energy Charter Treaty in case of conflict, at the very least in intra-EU situations, such as the present case.⁵⁶ Primacy has been long-standing case-law of the Court of Justice since the landmark judgment in *Costa/ENEL*.⁵⁷ It is now, since 2009, also explicitly enshrined in Declaration 17 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.⁵⁸ EU law has primacy over not only domestic law (*stricto sensu*) of each Member State but also international treaties concluded between two Member States. That reasoning is based on the settled case-law of the Court of Justice, whereby “*in matters governed by the EEC Treaty, that Treaty takes precedence over agreements concluded between Member States before its entry into force*”.⁵⁹ The Court of Justice specified that primacy also applies to international treaties that have been concluded between a Member State and another Member State, which acceded to the Union only after the conclusion of that agreement. In such a situation, EU law takes precedence as of

⁵⁶ ICSID Case No. ARB/07/19, *Electrabel v Hungary*, Award of 30 November 2012, paragraphs 4.178 to 4.191. The Commission will refrain in this section from attaching any of the quoted documents as evidence, as the Ad hoc Committee is not in a position to rule in substance, but needs to assess whether, had such arguments and such proof been presented to the Arbitral Tribunal, the outcome of the contested Award could have been different. Should the Ad Hoc Committee wish to receive all those documents, the Commission will immediately send copies of those.

⁵⁷ Case 6/64, ECLI:EU:C:1964:66.

⁵⁸ Against this background, the findings of the Arbitral Tribunal in *Vattenfall v Germany*, Decision on the Achmea issue, paragraphs 224 to 226 that there was a lack of clarity and a substantial need for interpretation to derive the conflict rule of primacy is impossible to understand and accept.

⁵⁹ Judgment in *Commission v Italy*, 10/61, EU:C:1962:2, p. 1. See also judgment in *Commission v Slovakia*, C-264/09, EU:C:2011:580, paragraph 41; judgment in *Commission v Austria*, C-147/03, EU:C:2005:427, paragraph 58; and judgment in *Commission v Luxembourg*, C-473/93, EU:C:1996:263, paragraph 40.

the day of accession.⁶⁰ This view also finds very broad support in the academic literature on international law. *Thomas Eilmansberger* writes: “*the intentions of the parties are expressed in the most authoritative way by conflict rules included in the later treaty, [footnote omitted] and the EC Treaty (being the later Treaty in this case) does indeed contain such a conflict rule, namely the already mentioned Article 307 EC*”.⁶¹ Similarly, *Martti Koskenniemi* writes in his report for the International Law Commission on fragmentation: “*The EC Treaty takes absolute precedence over agreements that Member States have concluded.*”⁶²

5.1.2. *Relationship of the rules of interpretation in Article 31 VCLT – the ordinary meaning of the terms does not enjoy superiority to the other means of interpretation:*

82. In paragraphs 182 and 207 of the contested Award, the Arbitral Tribunal gives decisive importance to the literal interpretation of the Energy Charter Treaty pursuant to Article 31(1) VCLT.
83. However, the *travaux préparatoires* of the VCLT show that there is no such hierarchy. This follows both from the Waldock Report VI, recital 4, and from the Commentary of the International Law Commission, recital 8. It suffices to quote here the latter, which rejects fears of hierarchisation expressed by governments as follows: “*The Commission, by heading the article “General rule of interpretation” in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.*”

⁶⁰ Judgment in *Budějovický Budvar*, C-478/07, paragraphs 97 to 99; see also the earlier judgments in *Conegate*, 121/85, EU:C:1986:114, para. 25; *Matteucci v Communauté française de Belgique*, C-235/87, EU:C:1988:460, para. 22; and *Exportur*, C-3/91, EU:C:1992:420, para. 8.

⁶¹ *Thomas Eilmansberger*, “Bilateral Investment Treaties and EU Law”, in: (2009) 46 *Common Market Law Review*, pp. 383-429, at page 421 and 425.

⁶² “Fragmentation of international law. Report of the Study Group of the International Law Commission.” Finalized by *Martti Koskenniemi*. Available at: <http://legal.un.org/docs/?symbol=A/CN.4/L.682>, paragraph 283.

5.1.3. *Transfer of competence for energy policy to the Union*

84. The Arbitral Tribunal finds that Respondent failed to demonstrate that EU Member States have transferred competence for energy policy to the Union. It observes in addition that EU Member States still enjoy broad margins of discretion when implementing Union law on energy, and that other Contracting Parties had not been aware of that transfer (paragraph 200 of the contested Award).
85. The Energy Charter Treaty was from the outset a European project, rather than an intergovernmental project.⁶³ The origins of the ECT can be traced back to a memorandum which the Dutch prime minister *Ruud Lubbers* presented in June 1990 to the European Council of Dublin.⁶⁴ The President of the Commission, *Jacques Delors*, further developed that idea in a speech on 21 November 1990 at the Conference for Security and Cooperation in Europe's ("CSCE") Summit in Paris. That summit, which closed with the adoption of the "*Charter of Paris for a New Europe*", had the purpose of laying the foundation for "*a new era of democracy, peace and unity*" (and led to the transformation of the CSCE into the Organisation for Security and Cooperation in Europe). The preamble of the ECT therefore refers to the Charter of Paris. Shortly thereafter, the European Council of Rome endorsed in December 1990 the proposals made by *Lubbers* and the Commission.⁶⁵ In February 1991, the Commission presented a draft for that European Energy Charter, which would give life to the commitment of the Charter of Paris.⁶⁶ Then, in 1991, the EU convened an international conference to negotiate and agree on such a charter, funded that conference and provided its secretariat. The final text of the European Energy Charter, which contains the broad political objectives, was adopted in December 1991 in The Hague. The special role of the EU is also

⁶³ *Johann Basedow*, "The European Union's international investment policy Explaining intensifying Member State cooperation in international investment regulation", PhD thesis, The London School of Economics and Political Science (LSE), 2014, page 156.

⁶⁴ At that time, shortly after the fall of the Berlin wall, the centrally-planned economies of the Union of Soviet Socialist Republics (and then Russia and the Commonwealth of Independent States) and the countries of Central and Eastern Europe started to reforms into market economies. They all were short of capital. Therefore, *Lubbers'* memorandum suggested the creation of a European Energy Community to capitalize on the complementary relationship between the EU, the USSR and the countries of Central and Eastern Europe. The idea was to secure investment flows from West to East, so that the energy flows from East to West would be secure.

⁶⁵ See Conclusions of the Presidency on the European Council in Rome.

⁶⁶ See Communication from the Commission on European Energy Charter, COM(91) 36 final of 14 February 1991.

reflected in the recitals of the European Energy Charter itself. Those acknowledge furthermore the obligations of EU Member States under the EU Treaties (and other existing international agreements). The precise wording of those recitals is as follows:

“Assured of support from the European Community, particularly through completion of its internal energy market;

Aware of the obligations under major relevant multilateral agreements, of the wide range of international energy co-operation, and of the extensive activities by existing international organisations in the energy field and willing to take full advantage of the expertise of these organisations in furthering the objectives of the Charter”. (Emphasis added by the Commission.)

86. The reference to the internal energy market makes it clear that all signatory states, also the non-EU Member States, were fully aware that the EU was using its internal shared competence for energy, and had set up an autonomous regime. The reference to the obligations under other multilateral agreements obviously includes the obligations under Union law. Those two recitals, read together, make it hence abundantly clear that the European Energy Charter had no intention whatsoever to be applied within the internal energy market of the Union. The ECT has the objective of implementing the policy objectives set out in the European Energy Charter. Article 2 ECT expresses that as follows:

“This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter.”

87. It follows from that historical process, which ultimately led to the conclusion of the European Energy Charter (a policy document) and the ECT (the translation of that policy document into international law, as witnessed by the reference in the preamble and in Article 2 ECT to the European Energy Charter), that the objective of the ECT is to create an international framework for cooperation in the energy sector between the European Communities, on the one hand, and Russia, the CIS and the countries of Central and Eastern Europe, on the other hand.⁶⁷ The ECT was

⁶⁷ Additionally, on the first conference held in Brussels on July 1991, the European Communities also invited the other members of the Organization for Economic Cooperation and Development (“OECD”) that were not EU Member States to participate in the negotiations on the Energy Charter.

perceived as part of the European Communities' external energy policy.⁶⁸ It was never intended that the ECT should influence their internal energy policy. Johann Basedow, whose excellent historical research on this point has not yet been taken into account by Arbitration Tribunals, explains this at length in this PhD thesis in the chapter on the historical origins of the ECT:

“From the beginning, the Commission underlined that the ECT was conceived as the international relations component of the emerging Single Market for energy. The ECT should extend the Single Market for energy beyond the EU's borders. The underlying reasoning was that the Single Market for energy would only function efficiently and securely, if the supply and transmission countries also embraced a market-based approach to the regulation of their energy sectors. The Commission clearly formulated this view in its communication accompanying the draft text for the European Energy Charter of spring 1992.

[The European Energy Charter...] finds itself fully integrated within the energy policy which the Commission wishes to promote [...] with a view to completing the internal energy market and providing an external relations policy to back it up.”⁶⁹

88. Indeed, the creation of the European Communities' internal energy market was well under way when the ECT was negotiated: Energy has been included into the internal market from its outset. Indeed, one of the first and most prominent cases brought to the ECJ, *Costa v E.N.E.L.*⁷⁰, concerned investments in energy. Special rules applied until 2002 for coal (European Coal and Steel Community, “ECSC”) and still apply for nuclear energy (European Atomic Energy Community, “EURATOM”). In 1985, the European Council in Milan endorsed the Commission's proposal for creating a single market by 1992. In order to implement that commitment, the Council adopted Directives 90/547/EEC on the transit of electricity through transmission grids⁷¹ and 91/296/EEC on the transit of natural gas through grids⁷². In 1991, the Commission proposed more comprehensive rules liberalising the entire electricity and gas

⁶⁸ This point is also underlined in ICSID Case No. ARB/07/19, *Electrabel v Hungary*, Award of 30 November 2012, at paragraph 4.132, quoting *Thomas Wälde*.

⁶⁹ *Johann Basedow*, “The European Union's international investment policy Explaining intensifying Member State cooperation in international investment regulation”, PhD thesis, The London School of Economics and Political Science (LSE), 2014, page 160.

⁷⁰ ECJ, Judgment in *Costa v E.N.E.L.*, 6/64, EU:C:1964:66.

⁷¹ OJ L 313, 13.11.1990, p. 30.

⁷² OJ L147, 12.6.1991, p. 37.

sector.⁷³ Parliament and Council adopted the legislation in 1996 (electricity)⁷⁴ and 1998 (gas)⁷⁵. Those initiatives are explicitly mentioned and recognized in the European Energy Charter and were known to all Contracting Parties of the ECT (see above). Those rules have been overhauled in 2003 and in 2009, when Parliament and Council agreed on the texts as they are on the books today.⁷⁶ The two main liberalisation directives have been complemented over time by an important number of other pieces of Union law, including on renewable energy, so that the Union has today a highly developed set of rules governing the internal market for electricity and gas.

89. As a result of those acts of Union law, the external competence for energy is with the Union. This does not exclude that Member States preserves internally a certain discretion as to how to implement Union acts in detail.

5.1.4. *Lack of relevance of disconnection clause.*

90. A further important point in the reasoning of the Arbitral Tribunal is the absence of a disconnection clause (paragraphs 186, 198 and 199 of the contested Award). That view, which is also widely echoed in academic literature, can be traced back to one single academic article by *Christian Tietje*⁷⁷.
91. However, the view expressed by *Christian Tietje* in his often-referenced (and regrettably never questioned) article is not supported by the academic sources he

⁷³ OJ C 65, 14.3.1992, p.4 (for electricity) and p. 14 (for gas).

⁷⁴ Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.1.1997, p. 20.

⁷⁵ Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, OJ L 204, 21.7.1998, p. 1.

⁷⁶ Third Energy Package, comprising: Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity, OJ L 211, 14.8.2009, p. 55; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 14.8.2009, p. 94; Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211 14.8.2009, p. 1; Regulation (EC) 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, OJ L 211, 14.8.2009, p. 15; and Regulation 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, OJ L 211, 14.8.2009, p. 36.

⁷⁷ *Christian Tietje*, *The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States*. Halle: Institute of Economic Law, 2008, pp. 7-16.

claims to rely on. In order to support the view that *inter se* obligations between Member States are the rule, and that an exception to that rule is only possible where the multilateral agreement contains a disconnection clause, he relies, first, on the article by *Pieter Jan Kuijper*.⁷⁸ By selectively quoting *Kuijper*, *Tietje* distorts the view of *Kuijper*, which is, in fact, the opposite of that of *Tietje*; namely, that such *inter se* obligations are a theoretical possibility, but in practice never created. The paper by *Maja Smrkolj*⁷⁹, quoted as second authority by *Tietje*, also does not provide any support for his view. To the contrary: As *Smrkolj* points out, a disconnection clause is only needed where the application of Union law (and not of the international treaty) between the Member States “*affect[s] the enjoyment by other parties of their rights under the treaty or performance of their obligations*” (emphasis added) or “*relate[s] to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.*” In other words, a disconnection clause is only needed where the application of Union law between the Member States is not in line with Article 41(1)(b) VCLT. Where, on the contrary, as in the present case, the rights and obligations of third countries are not affected, “*the insertion of the EU-specific 'disconnection clause' seems to be entirely superfluous*”.⁸⁰ Also, the last two sources on which *Tietje* relies are misquotes: *Raphael Oen*⁸¹ and *Christoph Herrmann*⁸² take the view that, even in the absence of a disconnection clause, a multilateral agreement may create *inter se* obligations only for those areas where Member States retain their external

⁷⁸ *Pieter Jan Kuijper*, “The Conclusion and Implementation of the Uruguay Round Results by the European Community”, (1995) 6 *European Journal of International Law*, issue 1, pp. 222-244, at p. 228 and 229

⁷⁹ *Maja Smrkolj*, “The Use of the 'Disconnection Clause' in International Treaties: What does it tell us about the EC/EU as an Actor in the Sphere of Public International Law?”, paper presented at the GARNET Conference, “The EU in International Affairs”, Brussels, 24-26 April 2008.

⁸⁰ *Ibidem*, p. 9.

⁸¹ *Raphael Oen*, *Internationale Streitbeilegung im Kontext gemischter Verträge der Europäischen Gemeinschaft und ihrer Mitgliedstaaten*, Berlin: Duncker and Humblot, 2005, S. 73: „Festgehalten wurde bisher nur, dass eine völkerrechtliche Bindung der Mitgliedstaaten zueinander jedenfalls in Bereichen ausschließlicher Gemeinschaftszuständigkeit ausscheide. Die Bindung komme nur für solche Bestimmungen in Betracht, die der (ausschließlichen oder konkurrierenden) mitgliedstaatlichen Zuständigkeit unterfielen“.

⁸² *Christoph Herrmann*, „Rechtsprobleme der parallelen Mitgliedschaft von Völkerrechtssubjekten in Internationalen Organisationen – Eine Untersuchung am Beispiel der Mitgliedschaft der EG und ihrer Mitgliedstaaten in der WTO“, in: *Gabriele Bauschke et al., Pluralität des Rechts – Regulierung im Spannungsfeld der Rechtsebenen*, Boorberg: Stuttgart, 2003, pp. 139 and following, at p. 159: „Soweit die Kompetenzen auf die EG übertragen worden sind, kann ein gemischtes Abkommen zwischen den Mitgliedsstaaten wohl keine Verpflichtungen begründen“.

competence. However, the EU Member States did not retain their external competence for those areas, because the Union had acquired external competence for energy policy and commercial policy.

92. Furthermore, disconnection clauses have traditionally been used in international treaties where the Union could not become a Contracting Party itself due to the rules of the international organisation under whose auspices the international treaty was negotiated, in particular the Council of Europe. In such a setting, disconnection clauses may indeed be useful, as – despite those agreements being mixed agreements insofar as it concerns the question of competence – the Union does not appear in the text of the international treaty, and the disconnection clause serves as a “reminder” of its existence.
93. The situation is completely different in international treaties where the Union is a party, and which explicitly recognize its role as REIO, as is the case for the ECT in Article 1(3) and 1(10) thereof. Here, all Contracting Parties are fully aware of the specificities of the Union's legal order.

5.1.5. *Conflict on substance with EU law*

94. The Arbitral Tribunal, at paragraph 199 of the contested Award, claims that there is no conflict between the support scheme under scrutiny and EU law. That is wrong: Spain had implemented the support scheme in violation of Article 108(3) TFEU, because it had not sought prior State aid approval from the Commission. As a result, the measure on which Claimant relies is contrary to EU law (see in detail section 5.2 below).

5.2. The Tribunal has lacked the following elements on Union law, and on particular on EU law on State aid, which the Commission could have placed before it and which could have changed the outcome of the case

95. The Tribunal finds in paragraphs 322 to 325 of the Award that “*the Tribunal will decide the issues on the basis of the terms of the ECT and the applicable rules and principles of international law*”. According to consistent arbitral precedent, in intra-EU disputes, Union law is part of the applicable law as “*applicable rules and principles of international law*”.⁸³

⁸³ *Ibidem*, paragraphs 4.111 to 4.199. Confirmed many times since in subsequent awards.

96. The Commission, in its *amicus curiae* submission, could have drawn the attention of the Tribunal to the fact that the Spanish support scheme at stake in the arbitration proceedings constitutes State aid pursuant to Article 107(1) TFEU, and that it had not been authorised by the Commission pursuant to Article 108(3) TFEU. As a result, under Union law, any legitimate expectations of the claimants were precluded, in line with long-standing case law of the Court of Justice of the European Union, which has held that, save in exceptional circumstances, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in the Treaties.⁸⁴ Any investor which had carried out a proper legal due diligence would have been told that no one can rely on representations or promises by a EU Member States to receive State aid which has not previously been approved by the Commission.
97. The Tribunal did not discuss those questions at all. Hence, it has manifestly exceeded its powers, by not applying a provision of international law that was part of the law to be applied by it. At the same time, it fails to state reasons.
98. In any event, legitimate expectations must be reasonable in light of the law applicable to the investment. In light of the consistent case law of the Court of Justice of the European Union this means that it would be unreasonable to consider that there is a legitimate expectation that aid be granted. A diligent economic operator must be assumed to be able to determine whether that procedure has been followed.⁸⁵
99. The Tribunal not only failed to discuss those State aid obligations under Union law as a matter of law, but also in the alternative as part of the relevant facts.
100. The fact that the Arbitration Tribunal has failed to address that point in its Award constitutes both a violation of Article 52 (b) ICSID Convention and Article 52 (e) ICSID Convention.

⁸⁴ Case C-5/89 *Commission v Germany* ECLI:EU:C:1990:320, paragraph 14; Judgment of 11 November 2004, *Demesa et Territorio Histórico de Álava v Commission*, C-183/02 P and C-187/02 P, EU:C:2004:701, paragraphs 44 and 45; Judgment of 9 June 2011, *Diputación Foral de Vizcaya and Others v Commission*, C-465/09 P to C-470/09 P, EU:C:2011:372, paragraph 150.

⁸⁵ Case C-5/89 *Commission v Germany* ECLI:EU:C:1990:320, paragraph 14.

101. The Commission remains at the disposal of the Ad Hoc Commission for any question it may have.

A handwritten signature in blue ink, appearing to be 'T. Maxian Rusche', written in a cursive style.

Steven NOË

Petra NEMECKOVA

Tim MAXIAN RUSCHE

Agents of the Commission