

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

ELECTRABEL S.A.

(Claimant)

v.

REPUBLIC OF HUNGARY

(Respondent)

(ICSID Case No. ARB/07/19)

Procedural Order No. 4

Dated: 28 April 2009

1. On 3 September 2008, the ICSID Secretariat received from the Legal Service of the European Commission an application by the European Commission dated 13 August 2008, under ICSID Arbitration Rule 37(2), to file a written submission in this case as a non-disputing party in these arbitration proceedings.

2. The European Commission stated (inter alia) that: “... it can assist the Tribunal in the determination of a number of legal issues arising under the Energy Charter Treaty in these proceedings . . . [and] would seek to address the question whether an ICSID Tribunal has or should exercise jurisdiction over disputes between an investor from an EU Member State against an EU Member State under the Energy Charter Treaty, including on matters that substantially fall under Community competence [, and that it would also] address the question of the applicable law in this dispute and how possible conflicts between several bodies of applicable law should be resolved. The European Commission requested, “in order to properly prepare its submission,” that it receive copies of Parties’ written submissions filed to that date.

3. On 9 September 2008, the Tribunal invited the Parties to submit by 30 September 2008 written observations regarding the European Commission’s Application.

4. On 10 September 2008, the Tribunal informed the European Commission that it would respond to the Application having consulted with the Parties.

5. On 30 September 2008, the Parties filed their respective written observations on the Application. On 10 October 2008, the Claimant filed further observations; and on 13 October 2008, the Respondent also filed further observations. On 16 October 2008, the Claimant filed a reply to the Respondent’s observations of 13 October 2008.

6. By letter of 16 October 2008, the Tribunal invited the Parties to submit by 7 November 2008 additional items for the agenda for the procedural meeting to be held by telephone conference-call (as agreed at the First Session of the Tribunal with the Parties), on 17 November 2008.

7. On 30 October 2008, the Respondent filed its Preliminary Objections, as scheduled at the First Session of the Tribunal with the Parties.

8. By letter of 7 November 2008, the Respondent proposed (inter alia) that an item regarding the European Commission's Application and the Parties' comments thereon be added to the agenda for the procedural telephone conference to be held on 17 November 2008.

9. This item was added by the Tribunal to the Provisional Agenda for the procedural conference, circulated to the Parties on 12 November 2008. On 17 November 2008, prior to the start of the procedural conference, the Claimant filed its comments on the agenda items, including the issue of the European Commission's Application.

10. On 17 November 2008, the procedural meeting of the Tribunal with the Parties was held by telephone conference.

11. On 19 November 2008, the Tribunal issued Procedural Order No. 1, by which (inter alia) the Tribunal informed the Parties of its decision: "... in principle to allow the European Commission, as a non-disputing party under Rule 37(2) of the ICSID Arbitration Rules, to file a written submission to the Tribunal regarding a legal matter within the scope of the Parties' dispute . . . subject to the Tribunal hereafter first determining the practicalities and timing of

such a submission in further consultation with the Parties, bearing in mind the factors listed in the last paragraph of Rule 37(2).”

12. Further, the Tribunal determined to: “... notify its decision to the European Commission in due course [and requested the Parties] to agree such practicalities and timing as soon as practicable after the filing of the Claimant's additional claim; and if the same were not agreed, the Parties should submit their procedural differences to the Tribunal in writing not later than 13 February 2009 for the Tribunal's decision.”

13. By their respective letters of 1 December 2008, the Parties informed the Tribunal of their agreement that the European Commission's submission should be filed after the filing of the Respondent's Counter-Memorial, so that it could be addressed in the Claimant's Reply and the Respondent's Rejoinder, respectively. However, the Parties also informed the Tribunal of their inability to agree on the schedule for the filing of their various submissions, including the timing for the filing of the Respondent's Counter-Memorial.

14. On 30 January 2009, the Claimant filed an Amendment to its Memorial, as directed by the Tribunal in Procedural Order No. 1.

15. On 3 February 2009, the Tribunal notified the Parties that it had fixed the hearing dates in this case (namely, 8 to 19 February 2010) at ICSID, Washington, D.C., USA; and that it would revert to the Parties on the remaining procedural issues.

16. In a letter of 12 February 2009, the Claimant referred to a ruling of the Arbitral Tribunal in the case of *AES v. Hungary* (ICSID Case No. ARB/07/22), reportedly granting a similar application of the European Commission for a submission under ICSID Arbitration Rule 37(2). According to the Claimant, it had not seen the Tribunal's ruling in *AES v. Hungary*, granting that application. However, the Claimant proposed that the scope of the European Commission's

submission in this case be the same as in the case of *AES v. Hungary*. In the alternative, the Claimant proposed that the European Commission's submission in this case "be made within 30 days; [a]ddress issues of substantive EC law relating to state aid and stranded costs only (and not issues of international law nor issues relating to the ECT); [n]ot address issues of the Tribunal's jurisdiction; [b]e limited to 20 pages." The Claimant did not agree that the Claimant's Memorial or its Amendment should be provided to the European Commission.

17. By letter of the same date, the Respondent disclosed to the Tribunal and the Claimant a portion of the text from the Tribunal's ruling in *AES v. Hungary* relating to the scope of the submission by the European Commission, authorised by the tribunal in those arbitration proceedings. Further, the Respondent informed this Tribunal that "while it would have no objection to the Tribunal's deciding that the scope should be co-extensive with that in the *AES* case," it was the Respondent's position that, in accordance with ICSID Arbitration Rule 37(2), "the Tribunal (not the parties) should decide in what manner the Commission might best assist it." The Respondent further advised the Tribunal that it did not agree to the Claimant's alternative proposal (summarised above in the preceding paragraph). Finally, the Respondent proposed "that the Commission be permitted to review both Claimant's Memorial (as recently amended) and the Respondent's Counter-Memorial, with appropriate redactions to protect any business confidential information that Claimant may identify."

18. By letter of 13 February 2009, the Claimant reiterated its proposal that the Tribunal "give [...] directions to the EC in similar terms," as the Tribunal in the case of *AES v. Hungary*. By letter of 17 February 2009, the Respondent suggested that the "Tribunal should consider for itself whether . . . it prefers the Commission to be able to express its views on the arguments actually presented by the parties"

19. On 10 March 2009, the Tribunal issued Procedural Order No. 2, by which (inter alia) it requested the Parties "to re-visit their suggested timetable . . . and to advance, if possible, an agreed timetable . . . as soon as practicable – but no later than 31 March 2009." The Tribunal

also advised the Parties that, “[s]ubject to further consultation with the Parties, [it was] minded that the Commission should make its intervention with knowledge of the Parties’ written submissions, namely the Memorial, the Amended Memorial and the Counter-Memorial (subject to any required restrictions or redactions based on confidentiality or commercial or other secrecy, as directed by the Tribunal).”

20. By letter of 20 March 2009, Counsel for the Respondent, on behalf of both Parties, notified the Tribunal that the Parties had reached agreement on a proposal for the procedural timetable for the Tribunal’s consideration.

21. On 27 March 2009, the Tribunal, having considered the Parties’ proposals, issued Procedural Order No. 3, ordering a new procedural timetable in replacement of all previous timetables, according to which the European Commission’s submission may be filed by 12 June 2009, the Claimant’s Reply and the Claimant’s comments on the European Commission’s submission should be filed by 16 September 2009 and the Respondent’s Rejoinder and the Respondent’s comments on the European Commission’s submission should be filed by 17 December 2009.

The Tribunal’s Order on the Application by the European Commission

22. In the exercise of its discretion under ICSID Arbitration Rule 37(2), having considered the Application of the European Commission in these arbitration proceedings, the terms of ICSID Arbitration Rule 37(2), the Parties’ several observations and proposals with regard to the Application, the Tribunal hereby allows the European Commission to file a written submission as a non-disputing party in this case by 12 June 2009.

23. The scope of such submission shall be as requested in the European Commission's Application dated 13 August 2008.

24. More specifically, the Tribunal notes that while the European Commission is an expert commentator on European Community law and could accordingly assist the Tribunal by addressing several legal issues, the scope of its legal opinion should in principle be directed to addressing the following issues: (a) European Community Law and its connection with the Energy Charter Treaty; (b) Community Law and the State Aid investigation concerning the Power Purchase Agreements signed by Hungary; and (c) the Effect of Community Decisions on the European Union's Members States, particularly Hungary.

25. As to purely factual questions, the Tribunal notes that, in principle, the European Commission is unlikely to assist the Tribunal in these arbitration proceedings.

26. The European Commission shall be requested by the Tribunal to limit its written submission to not more than fifty pages, to submit also copies of any legal materials on which it relies and to provide its documentation in both electronic (Word and/or PDF) and hard copy forms.

27. The Parties are requested to assist the European Commission in preparing its written submission, taking into particular account (i) the several factors listed in ICSID Arbitration Rule 37(2) (militating against any disruption to these proceedings, the imposition of any undue burden or the infliction of any unfair prejudice to any Party) and the confidentiality implicit in these ICSID proceedings. As to the latter, the Tribunal notes that Article 48(5) of the ICSID Convention provides that the award cannot be published without the parties' consent; that ICSID Arbitration Rule 48(4) restates this general restriction; that ICSID Arbitration Rule 32(2) provides that hearings must be held *in camera*, unless the parties consent otherwise (Rule 32(2)); and that, if the hearings are open to third parties, the tribunal must make arrangements for the

protection of proprietary and privileged information (*ibid*). In the Tribunal's view, as a general principle, what is true of the award and the hearings under the ICSID Convention and Arbitration Rules must apply equally to the parties' written submissions, document production, exhibits and other evidence submitted during the proceedings by any party to the tribunal and the other party.

28. In this case, a particular difficulty arises on the issue whether the Parties should be ordered to disclose their memorials to the European Commission for the purpose of assisting the Commission to prepare its submission to the Tribunal. The resolution of this difficulty is not made easier given that (as it appears) no tribunal has yet ordered any party to disclose its written submission in like circumstances to an *amicus*, without the parties' consent.

29. Nonetheless, the Tribunal is mindful that the European Commission's "significant" interest as an *amicus* in these proceedings is not limited to pure legal questions but may extend to hybrid issues (*i.e.*, issues of mixed fact and law) and that, in order properly to address the latter, the Commission may need access, in material part, to the substance of the Parties' memorials in this case. The Tribunal is concerned that, without such access, the European Commission would be restricted to what could be regarded as a pure legal moot of academic interest only and thus deprive it of any effective role as an *amicus* in this case under ICSID Arbitration Rule 37(2).

30. Accordingly, bearing all these factors in mind, the Tribunal invites the Parties to consider the most appropriate method of providing such access to the European Commission, namely Method A or Method B as described below. The Parties are requested to indicate their written responses to the Tribunal within five days of this order. Subject to the Parties' responses, the Tribunal considers that if both Parties agree to Method A, Method A will be applied by the Tribunal; and that if one or both Parties do not agree to Method A, Method B will be applied by the Tribunal.

31. *Method A:* The Claimant shall provide the European Commission by 15 May 2009 with electronic and (if requested) hard copies of its Memorial and the Amended Memorial without any exhibits and subject to any redactions based on confidentiality, proprietary or other secrecy as determined by the Claimant.

32. *Method B:* By the same deadline, the Claimant may provide the European Commission with a written summary of its own legal position in these proceedings regarding the specific matters listed in paragraph 24 above, not exceeding 30 pages.

(In neither case shall the Claimant disclose any confidential, proprietary or other secret information obtained from the Respondent during these proceedings.)

33. *Method A:* The Respondent shall likewise provide the European Commission by 15 May 2009 with electronic and (if requested) hard copies of its Counter-Memorial without any exhibits and subject to any redactions as above, as determined by the Respondent.

34. *Method B:* By the same deadline, the Respondent may provide the European Commission with a written summary of its own legal position in these proceedings regarding the specific matters listed in paragraph 24 above, not exceeding 30 pages.

(In neither case shall the Respondent disclose any confidential, proprietary or other secret information obtained from the Claimant during these proceedings.)

35. It is the Tribunal's current intention to provide a copy of this order to the European Commission at a later date, as soon as the choice between the two methods has been decided.

36. As already requested by the Tribunal in Procedural Order No 3, the Claimant may file its written comments on the European Commission's submission together with its Reply by 16 September 2009; and the Respondent may file its written comments on the European Commission's submission together with its Rejoinder by 17 December 2009.

[Signed]

V.V.Veeder
President of the Tribunal