

PCA CASE N° 2020-07

**IN THE MATTER OF AN ARBITRATION
UNDER THE ENERGY CHARTER TREATY**

- and -

THE UNCITRAL ARBITRATION RULES

-between-

NORD STREAM 2 AG

-and-

THE EUROPEAN UNION

PROCEDURAL ORDER NO. 13

The Arbitral Tribunal

Professor Ricardo Ramírez Hernández (Presiding Arbitrator)
Professor Philippe Sands KC
Justice David Unterhalter SC

9 December 2024

I. PROCEDURAL BACKGROUND

1. Prior to commencing the current arbitration, on 26 July 2019 the Claimant had brought an application (the “**Annulment Application**”)¹ before the Court of Justice of the European Union (“**CJEU**”) for the annulment of Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 (“the **Amending Directive**”)² pursuant to Article 263 of the TFEU (“**Treaty on the Functioning of the European Union**”).³
2. On 20 May 2020, the General Court of the CJEU delivered its order on the Annulment Application, dismissing the action as inadmissible due to the Claimant not being “directly concerned” by the Amending Directive and thus lacking standing to bring the action.⁴
3. The Claimant appealed the above order by the General Court of the CJEU on 28 July 2020.⁵
4. On 12 July 2022, the Grand Chamber of the CJEU delivered its decision declaring:

the action for annulment brought by Nord Stream 2 AG against Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, admissible, to the extent that it is directed against the provisions of Articles 36 and 49a of 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, as amended and inserted, respectively, by Directive 2019/692.
5. The case was accordingly referred back to the General Court of the CJEU for a decision on the merits.⁶
6. On 16 October 2023, the Tribunal issued Procedural Order No. 12 resuming the proceedings at the request of the Claimant, after a year-and-a-half suspension of the arbitration. Procedural Order No. 12 sets out the rules governing the filing of supplementary submissions by the Parties and appends a Procedural Calendar under Annex 1.
7. By e-mail of 2 September 2024, the Claimant informed the Tribunal that it:

respectfully reserve[d] the right to update the Tribunal on the status of the action for annulment at the EU General Court, and on the status of the composition moratorium proceedings at the cantonal court in Zug, in case of relevant developments before the hearing starting on Monday, 10 February 2025.

¹ Ex. CLA-170A/Ex. RLA-2, Nord Stream 2 AG v. European Parliament and Council – Application for Annulment pursuant to Article 263 TFEU brought before the General Court of the European Union (Case T-526/19) (2019/C 305/80).

² Ex. CLA-3/Ex. R-89; Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas.

³ Ex. CLA-42/Ex. RLA-69, the Treaty on the Functioning of the European Union.

⁴ Ex. CLA-67/Ex. RLA-3, Order of the General Court of 20 May 2020 in Case T-526/19, Nord Stream 2 AG v. European Parliament and Council of the European Union, paras. 118, 124.

⁵ Ex. CLA-171A, Nord Stream 2 AG v. European Parliament and Council – Appeal to the Court of Justice of the European Union pursuant to Article 56 of the Statute against the order of the General Court of the European Union of 20 May 2020 in Case T-526/19 (Case C-348/20 P).

⁶ Exhibit CLA-323, Judgment of the European Court of Justice (Case C-348/20 P), 12 July 2022, *dispositif* following para. 168.

8. By further e-mail of 18 September 2024, the Claimant advised that the General Court of the CJEU would “deliver its judgment in the case of Nord Stream 2 AG on 27 November.”
9. On 4 November 2024, the Respondent submitted its Supplementary Reply on Merits, the final substantive written submission foreseen under Procedural Order No. 12.
10. By e-mail of 12 November 2024, the Claimant announced that it “plan[ne]d to update the Tribunal, and comment on [the CJEU] judgment, in December”, adding that it “would like to combine the aforementioned update and comments with written comments on Respondent’s latest submission”. In the Claimant’s view, the Respondent had belatedly shifted its focus in the arbitration to Article 24(3) of the ECT, which resulted in it being “important for Claimant to be given an opportunity to comment on and rebut these arguments as well as to submit appropriate rebuttal documentation.” The Claimant requested that the Tribunal grant it the opportunity to submit such written comments by Friday, 20 December 2024.
11. On the same day, the Respondent submitted an e-mail objecting to the Claimant’s application and requesting that the Tribunal:
 - order the Claimant to abstain from filing any comments on the GC’s Judgement before the hearing;
 - reject the Claimant’s request to be allowed an opportunity to respond to the EU’s Supplementary Reply before the hearing.
12. By letter of 14 November, the Tribunal rejected the Claimant’s request, expressing its preference for the Parties to address the matters raised by the Claimant in oral submission at the upcoming hearing on jurisdiction and merits.
13. By e-mail of 19 November 2024, the Claimant reiterated that it would:

comment on Respondent’s brief, including the exhibits, at the oral hearing and submit rebuttal documents which it considers necessary. In addition, Claimant will submit comments on the expected decision from the General Court.
14. By e-mail of the same day, the Respondent objected to the Claimant’s intention to submit additional written submissions and evidence, and made an application for the Tribunal to confirm its decision of 14 November denying the Claimant’s application.
15. By e-mail of 20 November 2024, the Claimant renewed its request:

to be allowed to submit a brief with rebuttal arguments and documentation. Should the Tribunal be minded to allow such a brief, Claimant could submit it by 16 December. Claimant would combine this with an update and comments on the judgment of the General Court which is expected on 27 November.
16. The Claimant also argued that, “[a]t the very least, Claimant must be given the opportunity to present rebuttal arguments and documents at the hearing.”
17. By e-mail of 21 November 2024, the Respondent requested that the Tribunal:
 - Confirm its previous ruling that the Claimant is not allowed to file an additional written submission before the hearing;

- Reject the Claimant’s subsidiary request to be allowed to submit “rebuttal documents” at the hearing.

18. By e-mail of the same day, the Claimant reiterated that it “must be given an opportunity to provide rebuttal arguments and documentation relating to Respondent’s meandering case” and argued that “[g]enerally accepted rules and principles of international arbitration require that Claimant be given an opportunity to address Respondent’s latest brief.”
19. By e-mail of 27 November 2024, the Claimant advised that the General Court of the CJEU had issued its decision on the Claimant’s action for annulment and reiterated that it would “appreciate to be given the opportunity to comment on this judgment as well as on Respondent’s latest submission.”
20. By letter of 2 December 2024, the Tribunal invited the Respondent to provide any comments it might have on the Claimant’s e-mails of 21 and 27 November 2024, which the Respondent did in its letter of 5 December 2024.

II. PARTIES’ SUBMISSIONS

A. The Claimant’s Position

21. The Claimant complains that the Respondent has changed its line of argumentation in the arbitration in its Supplementary Counter-Memorial on Jurisdiction and Merits and Respondent’s Supplementary Reply on Merits, with a new focus on Article 24(3) of the ECT, and argues that the Claimant must be given an opportunity to address this change in the Respondent’s approach through providing its comments on “these new elements”.⁷
22. In addition, the Claimant argues that it should be given an opportunity to file new rebuttal evidence to the “thousands of pages of new exhibits” supporting this new line of defence submitted by the Respondent.⁸
23. The Claimant requests leave to present these responsive arguments and evidence prior to the hearing, while also averring subsidiarily that “[a]t the very least, Claimant must be given the opportunity to present rebuttal arguments and documents at the hearing.”⁹
24. Furthermore, the Claimant requests the Tribunal’s permission to “combine [the rebuttal arguments and evidence] with an update and comments on the judgment of the General Court [of] 27 November”.¹⁰
25. The Claimant uses para. 6.4 of Procedural Order No. 1 applying *mutatis mutandis* under para. 27 of Procedural Order No. 12 as the basis for its application and argues that the conditions of this provision are met because the Claimant was unable to submit responsive arguments and evidence prior to the Respondent’s change in its line of tactics in the arbitration.¹¹

⁷ Claimant’s E-mail of 20 November 2024; see also Claimant’s E-mails of 12 and 21 November 2024.

⁸ Claimant’s E-mail of 20 November 2024.

⁹ Claimant’s E-mail of 20 November 2024.

¹⁰ Claimant’s E-mail of 20 November 2024; see also Claimant’s E-mail of 12 November 2024.

¹¹ Claimant’s E-mail of 20 November 2024.

B. The Respondent's Position

26. The Respondent avers that “the European Union has not ‘shifted its focus’ to Article 24(3) of the ECT. That provision has been invoked as a subsidiary defence, in the further alternative, with regard to certain claims”¹² and justifies the inclusion of this new, subsidiary defence as a response to the new factual developments, which the Tribunal specifically asked the Parties to update it on.¹³ The Respondent also points out that the Claimant has already had the opportunity to, and in fact has addressed the Respondent’s Article 24(3) defence in the Claimant’s Supplementary Rejoinder on Jurisdiction and Merits.¹⁴
27. In the Respondent’s view, the Claimant’s request to file “any rebuttal documents which it considers necessary” is overly broad.¹⁵ In any event, it should be rejected, alongside the request to provide written comments on the upcoming CJEU decision on the Claimant’s Annulment Application, as going against the Tribunal’s decision of 14 November rejecting the Claimant’s request in this regard.¹⁶ The Respondent avers that there is no need for the Parties to submit comments in writing regarding the CJEU decision on the Claimant’s Annulment Application before the hearing, and opposes the filing of any new evidence beyond the judgment itself.¹⁷
28. In addition, the Respondent argues that the Claimant has failed to meet the conditions required under para. 6.4 of Procedural Order No. 1, namely to prove “exceptional circumstances” or that the Claimant was unable to previously file the exhibits it wishes to submit (because it has not identified what exhibits those would be).¹⁸
29. The Respondent also avers that while para. 6.4 of Procedural Order No. 1 allows a party to submit additional evidence under exceptional circumstances and after a reasoned request, it does not allow a party under any circumstances to submit additional written submissions.¹⁹
30. According to the Respondent, “the Respondent must always be accorded the last word on the Claimant’s substantive case”²⁰ and, in addition, it would be “fundamentally unfair to force the Respondent to suspend its hearing preparations to take account of still further written briefs” on the eve of the “final hearing on the merits”.²¹
31. The Respondent requests that the Tribunal “order costs against the Claimant in relation to the present procedural exchange.”²²

III. THE TRIBUNAL’S DECISION

32. As a preliminary matter, the Tribunal reiterates its decision of 14 November 2024 inviting the Parties to present oral arguments at the upcoming hearing related to both Article 24(3) of the ECT

¹² Respondent’s E-mail of 21 November 2024.

¹³ Respondent’s Letter of 5 December, paras 6, 12; Respondent’s E-mail of 21 November 2024.

¹⁴ Respondent’s Letter of 5 December, para. 6; Respondent’s E-mail of 21 November 2024.

¹⁵ Respondent’s E-mail of 21 November 2024.

¹⁶ Respondent’s E-mail of 21 November 2024; Respondent’s E-mail of 19 November 2024.

¹⁷ Respondent’s Letter of 5 December, para. 16.

¹⁸ Respondent’s Letter of 5 December, paras 11-14; Respondent’s E-mail of 21 November 2024; Respondent’s E-mail of 19 November 2024; Respondent’s E-mail of 12 November 2024.

¹⁹ Respondent’s Letter of 5 December, para. 11; Respondent’s E-mail of 21 November 2024.

²⁰ Respondent’s Letter of 5 December, para. 13.

²¹ Respondent’s Letter of 5 December, para. 13.

²² Respondent’s Letter of 5 December, para. 16 *in fine*.

and the upcoming CJEU decision on the Claimant's Annulment Application (the "**CJEU Decision**").²³

33. The Tribunal also recalls Article 15(1) of the UNCITRAL Rules, which provides:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

34. With these two points in mind, the Tribunal will address the Claimant's three requests for leave:

- a) to submit additional written argument and exhibits responsive to the Respondent's defence based on Article 24(3) of the ECT prior to the hearing;
- b) subsidiarily, to submit additional responsive evidence addressing the exhibits underpinning the Respondent's defence based on Article 24(3) of the ECT at the hearing; and
- c) to submit the upcoming CJEU Decision and comments thereon prior to the hearing.

A. Pre-hearing Submission of Arguments and Evidence on Respondent's ECT Article 24(3) Defence

35. The Claimant requests permission to submit additional written arguments and evidence on the basis of para. 6.4 of Procedural Order No. 1, applying *mutatis mutandis* under para. 27 of Procedural Order No. 12.²⁴ Para. 6.4 of Procedural Order No. 1 reads:

Following the submission of the Reply and Rejoinder, the Tribunal shall not consider any evidence that has not been introduced as part of the written submissions of the Parties, unless the Tribunal grants leave on the basis of a reasoned request justifying why such documents were not submitted earlier together with the respective Party's written submissions or showing other exceptional circumstances. Should such leave be granted to one side, the other side shall have an opportunity to submit counter-evidence.

36. Pursuant to this provision, a party is in general barred from filing additional evidence after the conclusion of the second round of submissions. Under Procedural Order No. 12, this would be after Respondent's Supplementary Reply on Merits for the Respondent.

37. It is uncontested that Claimant made its request to submit additional evidence after it submitted its Supplementary Rejoinder on Jurisdiction and Merits. A party wishing to file further evidence may nevertheless submit a reasoned request in writing to the Tribunal, either:

- proving why such documents were not submitted earlier together with the respective Party's written submissions; or
- showing other exceptional circumstances.

²³ Letter from the Tribunal dated 14 November 2024.

²⁴ "These [the supplementary] submissions may be supported by factual evidence, witness statements and expert reports, if appropriate. Provisions of Procedural Order No. 1 on 'Evidence and Legal Authorities' shall apply *mutatis mutandis*."

38. The Claimant asserts that it was impossible for it to provide documents responsive to the Respondent's Supplementary Reply on Merits—due to the fact that this submission was only filed after the Claimant's last substantive submission—and points out the general shift in the Respondent's defence over the last two of its submissions as the reason for its need to file further responsive evidence. The Claimant also avers that “[g]enerally accepted rules and principles of international arbitration require that Claimant be given an opportunity to address Respondent's latest brief”.²⁵
39. The Tribunal remains, at this stage, unconvinced of the Claimant's application.
40. It is a natural consequence of sequential submissions in arbitration proceedings that one party will inevitably “have the final say” and be the last one to submit evidence. The general rule is, in fact, that it is the Respondent who submits the final (arguments and) evidence, at least on the merits.
41. The Claimant has failed to provide a compelling reason for an exception to this general rule. The Tribunal agrees with the Respondent that the Claimant has had the opportunity to, and has, addressed the Respondent's line of argumentation on Article 24(3) of the ECT in the Claimant's Supplementary Rejoinder on Jurisdiction and Merits, in particular:
- Section IX, under the title “Respondent's assertions in relation to security of supply and competition, including the Brattle Report, are irrelevant, and inaccurate” to addressing the Respondent's argumentation and evidence (by reference to the Brattle Report); and
 - Section XI, under the title “Article 24.3 does not release respondent from liability” to further comments on this line of the Respondent's argumentation.
42. The quantitative argument about the sheer volume of new evidence submitted by the Respondent with its last submission²⁶ is likewise not persuasive, given that the Respondent has argued that the Claimant's latest submission contained a similar volume of new exhibits.²⁷
43. The text of para. 6.4 of Procedural Order No. 1 also disposes of the Claimant's request to provide additional written arguments: the submission of written pleadings is not contemplated by the provision.
44. The Claimant is correct when it states that “[t]here is nothing in Procedural Order No 1 or 12 which prevents the Tribunal from allowing Claimant to proceed as requested” as a matter of the Tribunal's general discretion to conduct the arbitration in such manner as it considers appropriate under Article 15 of the UNCITRAL Rules.²⁸ However, the Tribunal sees no grounds to vary the

²⁵ Claimant's E-mail of 21 November 2024.

²⁶ Claimant's E-mail of 20 November 2024: “As a matter of fact, Respondent has introduced new elements and thousands of pages of new exhibits”; Claimant's e-mail of 19 November 2024: “The Tribunal will have seen that that Respondent has, together with its latest brief, submitted 74 factual exhibits (1.116 pages), 39 legal exhibits (5.836 pages) and 39 exhibits to the second report from Brattle (1.164 pages).”

²⁷ Respondent's E-mail of 21 November 2024: “In support of its Supplementary Rejoinder, the Claimant filed 2 new expert reports and 78 Exhibits, including 9 C Exhibits, 19 CLA Exhibits, and 51 exhibits attached to the expert reports.”

²⁸ Claimant's E-mail of 21 November 2024.

decision already made in this respect on 14 November 2024: “[t]he Tribunal would prefer to have the Parties address these matters in their oral submissions at the hearing”.²⁹

45. As a result, the Claimant’s request to present additional written pleadings addressing the Respondent’s defence based on Article 24(3) of the ECT prior to the hearing is denied. However, the Claimant will have the opportunity to address this subject during the upcoming hearing and, if allowed by the Tribunal at a later stage, also in further written post-hearing pleadings. Nevertheless, in order to facilitate the Tribunal’s and the Parties’ preparation for the hearing, the Tribunal invites the Parties to submit a skeleton outline, limited to a total of five pages, summarizing the essence of their arguments on the Respondent’s ECT Article 24(3) Defence. The Claimant shall submit its outline by **Wednesday, 18 December 2024**. The Respondent shall submit its outline by **Friday, 10 January 2025**.
46. As regards evidence, the Tribunal likewise considers that it would be in accordance with the sound administration of justice for any additional evidence to be produced in advance of the hearing. Whilst the Tribunal has rejected the Claimant’s general and broad application for leave to submit new evidence on Respondent’s defence based on Article 24(3) of the ECT, it does not rule out that there may be some specific additional evidence that may appropriately be admitted into the record, to the extent that compelling reasons are provided in accordance with para. 6.4 of Procedural Order No. 1.
47. Accordingly, the Tribunal invites the Parties to submit requests to produce specific additional exhibits in advance of the hearing, if they wish to do so, for the consideration of the Tribunal and subject to its leave. These requests should be submitted by **Wednesday, 18 December 2024** in a tabular form indicating the proposed exhibit number, together with name, date, author and recipient (if any), as well as an indication of the relevant paragraphs of the latest written submissions to which the new exhibit purports to respond, and a brief comment on its relevance and materiality and why it should be introduced at this stage of the proceedings in accordance with para. 6.4 of Procedural Order No. 1.

B. Submission of Written Arguments and Evidence on Respondent’s ECT Article 24(3) Defence at the Hearing

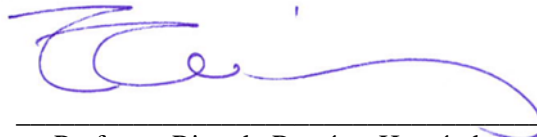
48. The Tribunal now turns to the Claimant’s subsidiary plea that “[a]t the very least, Claimant must be given the opportunity to present rebuttal arguments and documents at the hearing.”
49. The Tribunal agrees with the Claimant that it must, and will, be given the opportunity to present rebuttal arguments at the hearing, although these arguments will be made orally.
50. As regards the Claimant’s application to present new documents responsive to the Respondent’s Article 24(3) of the ECT defence at the hearing, the Tribunal is equally unconvinced, and for the same reasons that it declined to grant leave for such submissions prior to the hearing.
51. The Claimant’s application to present new written arguments and evidence responsive to the Respondent’s ECT Article 24(3) defence at the hearing is therefore denied. The Tribunal reiterates that the Claimant will still have the opportunity to address the Respondent’s Article 24(3) line of argumentation orally at the upcoming hearing and, if allowed by the Tribunal at a later stage, also by submitting further responsive written arguments and evidence in the post-hearing phase of the proceedings.

²⁹ Letter from the Tribunal dated 14 November 2024.

C. The CJEU Decision and Comments

52. The Tribunal considers the CJEU Decision to fall into a different category. Both Parties have devoted considerable attention to the CJEU proceedings and no pleadings could have previously been filed on the upcoming decision, which has just been issued by the CJEU.
53. Having the CJEU Decision submitted in the case record and allowing the Parties to pronounce themselves in writing in advance of the hearing would be efficient and appropriate, allowing the Parties to focus their oral arguments on rebutting the other Party's written pleadings, rather than presenting their views for the first time only at the hearing.
54. The Tribunal thus grants leave to submit the CJEU Decision along with brief written submissions thereon prior to the hearing. At the same time, with the hearing dates approaching, the Tribunal would prefer not to impede the Parties' hearing preparations. Thus, the Tribunal considers that the Parties' written submissions should be limited to 10 pages each and filed by no later than **Wednesday, 18 December 2024**. These submissions may be accompanied with up to 10 factual exhibits and up to 10 legal authorities.
55. The Tribunal shall render its decision on costs related to the points discussed in this Procedural Order at a later stage of the proceedings.

So ordered by the Tribunal.



Professor Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal