

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. 2

The Arbitral Tribunal

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

4 May 2020

1. Introduction

- 1.1 On 24 April 2020, the Tribunal issued Procedural Order No. 1, setting forth basic provisions on the transparency and confidentiality of the proceedings as follows:
- 10.1 Pursuant to Article 25(4) of the UNCITRAL Rules, hearings shall be held in camera unless the Parties agree otherwise.
 - 10.2 The PCA shall make awards in the arbitration available to the public, having first given each Party an opportunity to redact any information that each Party, in its sole discretion, considers sensitive.
 - 10.3 The arbitration shall otherwise be conducted in accordance with the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (the “Transparency Rules”), with the PCA assuming the role of the “repository” foreseen under the Transparency Rules with respect to this arbitration.
- 1.2 Having considered the views of the Parties, the Tribunal issues the following order setting forth the transparency regime to be applied in these proceedings in accordance with section 10 of Procedural Order No. 1 and the UNCITRAL Arbitration Rules.

2. Publication of Information and Documents

- 2.1 The PCA shall publish the existence of the arbitration and the names of the Parties, counsel representing the Parties, and the members of the Tribunal on its website. The PCA shall provide a draft of the contents of any webpage relating to the arbitration to the Tribunal and the Parties for their comments prior to publication on its website.
- 2.2 Subject to section 5 below and paragraph 10.2 of Procedural Order No. 1, the PCA shall make available to the public the following information and documents regarding the arbitration, except as otherwise decided by the Tribunal:
- (a) the notice of intent;
 - (b) the notice of arbitration;
 - (c) the Parties’ written submissions, excluding their accompanying documents;
 - (d) any written submissions by a non-disputing Party to the Energy Charter Treaty and by third persons;
 - (e) orders, decisions, and awards of the Tribunal; and
 - (f) decisions of the appointing authority.
- 2.3 Subject to section 5 below, the Tribunal may decide, on its own initiative or upon request from any person, and after consultation with the Parties, whether and how to make available any other documents or information relating to the arbitration.

3. Amicus Curiae Submissions

- 3.1 After consultation with the Parties, the Tribunal may accept and consider written *amicus curiae* submissions from third persons regarding a matter within the scope of the dispute.

- 3.2 A petition to make an *amicus curiae* submission shall be submitted in electronic format to the PCA, and distributed by the PCA to the Tribunal and the Parties.
- 3.3 The petition shall meet the following requirements:
- (a) be made in English;
 - (b) be no more than 5 pages in length;
 - (c) describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);
 - (d) disclose any connection, direct or indirect, which the third person has with any of the Parties;
 - (e) provide information on any government, person, or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the petition;
 - (f) describe the nature of the interest that the third person has in the arbitration; and
 - (g) identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission; and
 - (h) attach the proposed written submission.
- 3.4 After providing the Parties an opportunity to comment on any petition to make an *amicus curiae* submission, the Tribunal shall rule on its admissibility. In determining whether to admit an *amicus curiae* submission, the Tribunal shall take into consideration, among other factors it determines to be relevant: (a) whether the third person has a significant interest in the arbitral proceedings; and (b) the extent to which the submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge, or insight that is different from that of the Parties.
- 3.5 The written submission shall meet the following requirements:
- (a) be made in English;
 - (b) be no more than 30 pages in length (including any accompanying exhibits);
 - (c) be dated and signed by the person filing the submission on behalf of the third person;
 - (d) set out a precise statement of the third person's position on issues relevant to the dispute; and
 - (e) address only matters within the scope of the dispute.
- 3.6 The Tribunal shall ensure that any submission by a third person does not disrupt or unduly burden the proceedings, or unfairly prejudice any of the Parties.

3.7 The Parties may comment on any *amicus curiae* submissions in subsequent pleadings. The Tribunal may consider such *amicus curiae* submissions, but is not required to do so.

4. Submission by a Non-Disputing Party to the Energy Charter Treaty

4.1 After consultation with the Parties and subject to paragraph 3.6, the Tribunal may invite or allow submissions on issues of treaty interpretation or further matters within the scope of the dispute from a non-disputing Party to the Energy Charter Treaty.

4.2 The Tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraph 4.1.

4.3 The provisions of section 3 above will apply *mutatis mutandis* to any petition and submission by a non-disputing Party to the Energy Charter Treaty.

5. Exceptions to Transparency

5.1 Pursuant to Article 25(4) of the UNCITRAL Rules, hearings shall be held in camera unless the Parties agree otherwise.

Confidential or Protected Information

5.2 Confidential or protected information, as defined in paragraph 5.3 and as identified pursuant to the arrangements referred to in paragraphs 5.4 and 5.5, shall not be made available to the public.

5.3 Confidential or protected information consists of:

- (a) confidential business information;
- (b) information that is protected against being made available to the public under the Energy Charter Treaty;
- (c) information that is protected against being made available to the public, in the case of the information of the Respondent, under the law of the Respondent, and in the case of other information, under any law or rules determined by the Tribunal to be applicable to the disclosure of such information; or
- (d) information the disclosure of which would impede law enforcement.

5.4 Any Party may request to designate information contained in any document as confidential or protected information by submitting a redacted version of the document excluding the confidential or protected information by no later than 15 days from the date of submission of the document in question.

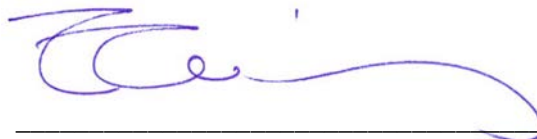
5.5 Any Party may designate information contained in the Tribunal's awards, decisions, and procedural orders as confidential or protected information by submitting a redacted version of the award, decision, or procedural order excluding the confidential or protected information within 15 days of the issuance of the award, decision, or procedural order. If more than one Party submits a redacted version of the award, decision, or procedural order, the Parties shall attempt to agree and submit a joint redacted version within 21 days of the issuance of the award, decision, or procedural order.

- 5.6 The Tribunal shall decide on any objection regarding the designation of information as confidential or protected information.
- 5.7 Where the Tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, the Party, non-disputing Party to the Energy Charter Treaty, or *amicus curiae* that voluntarily introduced the document into the record will be permitted to withdraw all or part of the document from the record of the proceedings.
- 5.8 Confidential or protected information shall be kept confidential from all persons other than the Parties, their representatives, witnesses, experts, the Tribunal, the PCA, and the Assistant to the Tribunal, except as otherwise decided by the Tribunal.

Integrity of the Arbitral Process

- 5.9 Information shall not be made available to the public pursuant to sections 2 to 4 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 5.10.
- 5.10 The Tribunal may, on its own initiative or upon the application of either of the Parties, after consultation with the Parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for the Parties or members of the Tribunal, or in comparably exceptional circumstances.

So ordered by the Tribunal.



Professor Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal