

PCA CASE Nº 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. 17

The Arbitral Tribunal

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

2 April 2025

I. PROCEDURAL BACKGROUND

1. On 22 January 2025, the Tribunal issued Procedural Order No. 14 postponing the Hearing on Jurisdiction and Merits (“**Hearing**”), allowing the Parties to submit an additional round of written submissions (strictly on the Respondent’s ECT Article 24(3) Defence and the 2024 CJEU Decision), and rejecting the Claimant’s request to extend the length of the Hearing. The Tribunal noted that it would engage the Parties separately to discuss a new procedural calendar, including the new hearing dates and the timeline for the submission of additional written submissions by the Parties.
2. On 10 February 2025, having considered the views of the Parties on these matters, the Tribunal issued Procedural Order No. 15 setting new Hearing dates on 8-13 December 2025 and establishing the scope, format, and deadlines for the additional round of written submissions from the Parties.
3. On 24 February 2025, the Tribunal issued Procedural Order No. 16 ruling on three requests for “clarifications and reconsideration” submitted by the Claimant with regard to Procedural Order No. 15. The Tribunal confirmed that the period for the preparation of the Claimant’s additional written submission should begin on the date of issuance of Procedural Order No. 14, extended the time for the filing of the additional written submissions by both Parties to twelve weeks and allowed the submission of new legal authorities supporting the Parties’ additional written submissions with the expectation that the Parties would “limit themselves to those key new authorities that are appropriate in number and proportionate to the limited scope and length of these submissions”. In addition, the Tribunal set the Hearing dates as 10-16 December 2025, excluding the weekend, but with Saturday, 13 December 2025 in reserve.
4. By e-mail of 25 March 2025, the Claimant requested leave to submit two new expert reports to accompany its Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision.
5. By letter of 27 March 2026, the Respondent objected to the Claimant’s request and asked the Tribunal to reject the Claimant’s request with respect to both putative additional expert reports.

II. PARTIES’ SUBMISSIONS

6. The Claimant seeks leave to submit an additional expert report by Mr. Peter Roberts in which Mr. Roberts would comment on the statements of the General Court of the CJEU (“**General Court**”) in the 2024 CJEU Decision according to which the Claimant could have expected the legal change effectuated through the Amending Directive and could have halted its investment and “re-arranged it after the Amending Directive had been proposed in 2017”.¹
7. The Claimant justifies its request on the premise that “it would be beneficial for the Tribunal to obtain first-hand information from Mr Roberts on how he, as an expert, views the respective General Court’s statements about the alleged foreseeability of the Amending Directive for Claimant and about its alleged ability to adapt its project when the Amending Directive was proposed in 2017”.² The Claimant adds that the General Court did not have Mr. Roberts’ first expert report submitted in the current Arbitration and that “[t]he General Court’s suggestions are in direct contradiction to Mr Roberts’ testimony in these arbitral proceedings”.

¹ Claimant’s e-mail of 25 March 2025.

² Claimant’s e-mail of 25 March 2025.

8. In addition to the report by Mr. Roberts, the Claimant also requests permission to file a new expert report by Swiss Economics AG SE (“**Swiss Economics**”) on the security and supply of competition and on the statements on these two subjects in the second Brattle expert report submitted by the Respondent.³
9. According to the Claimant, Swiss Economics did not have the chance to comment on the 2024 CJEU Decision and have not commented on security of supply and competition so far. The additional Swiss Economics report would also, in the Claimant’s view, allow it to respond to the second Brattle report that the Respondent “has chosen to submit [...] without Claimant having initiated the need for that by itself submitting an expert report in response to Brattle’s first Expert Report”.⁴
10. The Respondent argues that the Tribunal should reject the Claimant’s request with respect to both putative new expert reports as the request was submitted on “vague and unsubstantiated grounds”, and because the need to respond to these additional expert reports to be potentially filed at this very late stage would lead to significant additional costs for the Respondent.⁵ In addition, it would be “manifestly unwarranted to show even further indulgence to the Claimant” by the Tribunal after it postponed the hearing and allowed the filing of the additional submissions at the Claimant’s request.⁶
11. With respect to the putative additional expert report by Mr. Roberts, the Respondent avers that the Claimant could have adduced in the CJEU proceedings “the same [...] or equivalent evidence” as in this Arbitration and it was the Claimant’s choice not to do so.⁷ As regards the content of the potential additional report, the Respondent argues that it is “wholly unnecessary for the Claimant to submit a new report by Mr Roberts at this stage” as the issue raised by the Claimant “has been fully argued before this Tribunal”.⁸
12. In respect of the request for leave to submit a further expert report by Swiss Economics, the Respondent claims that the Claimant has had the opportunity to address the Respondent’s first Brattle report and, more broadly, the Respondent’s ECT Article 24(3) defence, and this is a matter already settled by the Tribunal.⁹ The fact that the Claimant did not file a report responsive to the first Brattle report did not preclude the Respondent from submitting a second Brattle report and does not warrant the submission of a rebuttal report by the Claimant.¹⁰ Similarly, the fact that Swiss Economics did not have the chance to comment on the 2024 CJEU Decision does not grant the Claimant the right to use “to use the General Court’s judgement as a pretext for submitting new expert evidence which [...] it could have submitted earlier”.¹¹
13. The Respondent also asks the Tribunal to clarify that, should the Tribunal reject the Claimant’s request, the Claimant “cannot ‘quote’ any ‘statements’ by Swiss Economics AG SE or Mr Peter Roberts, unless those statements have been made in documents admitted by the Tribunal”.¹²

³ Claimant’s e-mail of 25 March 2025.

⁴ Claimant’s e-mail of 25 March 2025.

⁵ Respondent’s letter of 27 March 2025, paras 4-5.

⁶ Respondent’s letter of 27 March 2025, para. 6.

⁷ Respondent’s letter of 27 March 2025, para. 20.

⁸ Respondent’s letter of 27 March 2025, para. 21.

⁹ Respondent’s letter of 27 March 2025, paras 11-12, 14-15.

¹⁰ Respondent’s letter of 27 March 2025, para. 13.

¹¹ Respondent’s letter of 27 March 2025, paras 16-17.

¹² Respondent’s letter of 27 March 2025, para. 22.

III. THE TRIBUNAL'S DECISION

14. The Tribunal must make a decision on the Claimant's request for leave to adduce, with its Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, two expert reports, by Mr. Peter Roberts and Swiss Economics, respectively. The Respondent objects to both putative expert reports.

15. The Tribunal 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.

16. The submission of additional witness and expert testimony at the current stage of the Arbitration is governed by para. 36 of Procedural Order No. 15, which states as follows:

In respect of the submission of further witness and expert testimony, the Tribunal considers that the limited nature of the additional written submissions does not warrant any new witness or expert testimony in writing. Should a Party wish to adduce further testimony, whether factual or expert, arising from the additional written submissions, it must make application to the Tribunal by no later than two weeks before the submission deadline, indicating what testimony it seeks leave to adduce, how it arises from the additional written submissions, and why its admission is sought.

17. As an initial point, the Tribunal observes that the Claimant has made its request for leave to submit the additional expert testimony in compliance with the procedure outlined in this provision.

18. With respect to the substantive aspect of the Claimant's request, the Tribunal tends to agree with the Claimant that "it would be beneficial for the Tribunal to obtain first-hand information"¹³ from Mr. Roberts and Swiss Economics, taking into account how they have not had a chance to comment on the 2024 CJEU Decision, which was delivered on 27 November 2024, predating the last substantive submission in the Arbitration by the Claimant, namely its Supplementary Rejoinder on Jurisdiction and Merits dated 2 September 2024.

19. The Tribunal is also satisfied that the Claimant's request to allow its experts to comment on:

the General Court's repeated statements in its judgment of 27 November 2024, according to which Claimant could have expected the legal change introduced by the Amending Directive, and according to which Claimant could have paused its investment and re-arranged it after the Amending Directive had been proposed in 2017

and

the General Court's findings about security of supply and competition as well as on the statements on these two topics in the second Brattle expert report dated 4 November 2024,

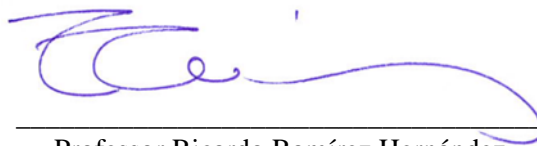
would allow the Claimant's experts to address matters within the limited scope of the additional submissions allowed by the Tribunal under Procedural Order No. 14, namely "strictly on the Respondent's ECT Article 24(3) Defence and the November 2024 CJEU Decision".¹⁴

¹³ Claimant's e-mail of 25 March 2025.

¹⁴ Procedural Order No. 14, para. 62.

20. Notwithstanding the above, the Tribunal also understands the Respondent's concern about the potential additional costs generated by the need to respond to additional expert reports filed by the Claimant. The Tribunal also considers that, at this late stage of the proceedings, any filings should be "proportionate to the limited scope and length of [the additional] submissions".¹⁵
21. For these reasons, the Tribunal grants the Claimant's request to submit an additional expert report by Mr. Peter Roberts and an additional expert report by Swiss Economics together with the Claimant's Supplementary Memorial on ECT Article 24(3) and the 2024 CJEU Decision, with these reports being strictly limited to the subject matter indicated in the Claimant's e-mail of 25 March 2025 and a maximum length of 10 pages each.
22. In addition, the Tribunal instructs the Parties that they may not "quote" from "statements" of their experts which are not reflected in documents admitted in the record of these arbitration proceedings.
23. Finally, the Tribunal takes note of the Respondent's reiterated reservation of its "right to request from the Tribunal, if necessary, an extension of the deadline granted to the European Union for filing its additional submission, in the event that the Tribunal granted leave to the Claimant for submitting further expert testimony in writing pursuant to paragraph 36 of PO No. 15".¹⁶ If the Respondent wishes to make any such application, it is invited to do so well in advance of the 9 July 2025 deadline for its Supplementary Counter-Memorial on ECT Article 24(3) and the 2024 CJEU Decision.

So ordered by the Tribunal.



Professor Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal

¹⁵ Procedural Order No. 16, para. 26.

¹⁶ Respondent's letter of 27 March 2025, para. 23, referencing Respondent's e-mail of 12 February 2025 and Respondent's letter of 17 February 2025.