

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Azienda Elettrica Ticinese

v.

Federal Republic of Germany

(ICSID Case No. ARB/23/47)

PROCEDURAL ORDER No. 8
On the Non-Disputing Party Application of 4 February 2026

Members of the Tribunal

Sir Christopher Greenwood GBE, CMG, KC, President of the Tribunal

Mr. John Beechey CBE, Arbitrator

Prof. Campbell McLachlan KC, Arbitrator

Secretary of the Tribunal

Ms. Anna Holloway

25 February 2026

I. PROCEDURAL BACKGROUND

1. On 25 March 2025, an application (the “**First NDP Application**”) for permission to file a written submission in this proceeding pursuant to ICSID Arbitration Rule 67(1) was filed by the Cornell Law School’s Transnational Disputes Clinic, representing Professor C. Lindsay Anderson; Professor Allison M. Chatrchyan; Professor Robert W. Howarth; Professor Miranda A. Schreurs; Professor Lechi Yona; and the Environmental Law Center at the University of Cologne (“**First NDPs**”). After the parties’ observations were invited and received, the Tribunal, on 17 April 2025, issued Procedural Order No. 4 (“**PO4**”), pursuant to which the First NDP Application was granted in part. On 13 June 2025, the First NDPs filed their submission in accordance with the Tribunal’s directions.
2. On 4 February 2026, an application (the “**Second NDP Application**”) for permission to file a written submission in this proceeding pursuant to ICSID Arbitration Rule 67(1) was filed by Germanwatch, PowerShift, WWF Svezza Italiana and Alliance Sud (the “**Second NDP Applicants**”), all represented by barristers Arman Sarvarian, Harj Narulla and Sean O’Reilly. The Second NDP Application was transmitted to the parties and the Tribunal the same day.
3. Later on 4 February 2026, the Tribunal, in accordance with Rule 67(3) of the 2022 ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”) invited the Parties to provide their observations on the Second NDP Application by 18 February 2026.
4. In accordance with the Tribunal’s directions, on 6 February 2026, the Respondent submitted its observations (“**Respondent’s Observations**”) and on 18 February 2026 the Claimant submitted its observations (“**Claimant’s Observations**”); with its observations, the Claimant submitted Legal Authorities CLA-0207 and CLA-0208.

II. THE APPLICATION

5. The Second NDP Applicants are four NGOs based in Germany and Switzerland. Their focus is on research and public advocacy regarding matters including climate change and sustainable development/ renewable energy/ decarbonisation.¹ They argue that they can assist the Tribunal with

“...two core issues:

(1) the policy context of the Coal Phase-Out Act, including Germany’s climate mitigation measures under the Federal Climate Action Act; and

(2) the policy context of the 2010 Referendum and AET Law in light of Switzerland’s climate mitigation duties.”²

6. The Second NDP Applicants contend that all the requirements of Arbitration Rule 67 are met, meriting the Tribunal exercising its discretion to grant the Second NDP Application. Specifically:
 - i. The matters proposed for submission are matters within the scope of the dispute as contemplated in Arbitration Rule 67(2)(a), and the submission would (i) elaborate upon the role played by Germany’s mitigation duties (e.g. the 2013-2020 second Kyoto Protocol commitment period) for its compensation scheme, and provide insight into the Act, taking account of the interpretation of international climate law by the

¹ Second NDP Application, paras. 1-5.

² Second NDP Application, para. 6.

International Court of Justice in its Advisory Opinion on Obligations of States in Respect of Climate Change of 23 July 2025; and ii) address the 2010 Referendum and later developments in the context of Switzerland's mitigation duties.³

- ii. The Second NDP Applicants maintain that their submission would provide perspectives, knowledge or insights different from, or beyond those, of the Parties, as contemplated in Arbitration Rule 67(2)(b). The Second NDP Applicants have a number of subject-matter experts in economics on staff, and possess specific knowledge from the perspective of civil society of the policy choices for the Coal Phase-Out Act as well as the 2010 Referendum and AET Law, which the Second NDP Applicants say will “provide[] unique insight into the context of the decarbonisation efforts of Germany and Switzerland for the Lünen Plant investment that usefully supplements the Parties’ pleadings.”⁴ The Second NDP Applicants also emphasize that their *pro bono* legal team has relevant experience,⁵ and that the proposed submission differs from the written submissions of the First NDPs, who offer a principally scientific perspective, versus the economic and environmental policy perspective that the Second NDP Applicants would bring.⁶
 - iii. The Second NDP Applicants have a significant interest in the proceeding, as contemplated in Arbitration Rule 67(2)(c), in that they have all been actively involved in policy analysis and engagement, public advocacy and campaigning in the climate change space in Germany and Switzerland. They also have a significant and specific interest with respect to the design of the Coal Phase-Out Act in light of the Federal Climate Action Act alongside the 2010 Referendum and AET Law on the Lünen Plant project in the context of Germany and Switzerland’s climate mitigation duties.⁷
 - iv. The Second NDP Applicants have no direct or indirect affiliation with the Parties (though the German Second NDP Applicants do receive funding from state governments and the federal government of Germany) and are not being provided with financial or other support to file the submission, other than *pro bono* legal representation, as contemplated in Arbitration Rules 67(2)(d) and (e).⁸
7. The Second NDP Applicants request leave to file a 30-page submission addressing the two key issues identified above (para. 5), filed within 40 days to avoid disruption to the timetable. They do not seek permission to make oral arguments at the hearing.⁹

III. THE PARTIES’ OBSERVATIONS

8. The Parties each submitted observations on the Second NDP Application, with the Claimant expressly objecting to the Second NDP Application and the Respondent indicating that it leaves the matter for the Tribunal’s discretion.

³ Second NDP Application, paras. 12-14.

⁴ Second NDP Application, paras. 15 and 16-21.

⁵ Second NDP Application, paras. 22-23.

⁶ Second NDP Application, paras. 24-25.

⁷ Second NDP Application, paras. 27-30.

⁸ Second NDP Application, paras. 31-32.

⁹ Second NDP Application, paras. 33-35.

A. THE CLAIMANT'S OBSERVATIONS

9. The Claimant requests that the Second NDP Application be dismissed.
10. In particular, the Claimant submits that, despite their application being framed as an offer to assist the Tribunal with questions of policy, the Second NDP Applicants in substance seek to advance legal interpretations of international climate law, public international law, investment treaty standards, and the law of State responsibility. The Second NDP Applicants do not offer any expertise beyond that already available to the Tribunal through the Parties' specialist counsel and the Tribunal's own expertise, and the relevant legal competence is that of the Applicants' counsel, not the Applicants themselves. The Second NDP Application therefore falls outside the purpose and scope of ICSID Arbitration Rule 67.¹⁰
11. The Claimant further argues that the Second NDP Applicants' alleged climate and energy policy expertise is overstated, and indistinct from the Respondent's own perspective.¹¹ The German Second NDP Applicants are not the architects of Germany's Coal Ban Law, and they cannot offer a more authoritative perspective than the Respondent itself on the Respondent's policy. Similarly, the first Swiss Second NDP Applicant's reliance on participation in the 2010 Ticino referendum is misplaced, and the second Swiss Second NDP Applicant's claim to Swiss climate policy expertise is not supported by the sources cited.¹² At most, the Second NDP Applicants' collective climate policy competence involves experience in advocacy, lobbying, and domestic political processes, which does not constitute the "perspective, particular knowledge or insight" required under Rule 67(2)(a).¹³
12. The Claimant also raises serious concerns regarding the independence of the German Second NDP Applicants. The Claimant says that they receive substantial public funding from the Federal Republic of Germany and other German public authorities. This funding relationship gives rise to legitimate doubts as to whether they can provide an independent and unbiased perspective, as required by Rule 67(2)(d)–(e).¹⁴
13. Finally, the Claimant submits that admitting a NDP submission at this late stage would disrupt the procedural calendar and unfairly burden the Claimant, contrary to Rule 67(4), even if page limits were imposed. Allowing the Second NDP Application now would either give the Respondent a procedural advantage by being able to amplify the NDP submissions in its Rejoinder or, if it were filed after the Respondent's Rejoinder, disadvantage the Claimant by forcing it to respond to additional submissions while simultaneously preparing for the next phase of the proceedings and the hearing. In the Claimant's view, the Second NDP Application could have been submitted "long ago", and its late timing weighs against allowing it.¹⁵

B. THE RESPONDENT'S OBSERVATIONS

14. Adopting the submissions which it filed with respect to the First NDP Application, the Respondent states that it leaves for the Tribunal's discretion whether to allow a written submission by the Second NDP Applicants, though it does confirm that the issue of the referendum in Ticino on the Claimant's participation in the Lünen Plant mentioned in the

¹⁰ Claimant's Observations, paras. 1-2, 20-55.

¹¹ Claimant's Observations, para. 4.

¹² Claimant's Observations, paras. 8-16.

¹³ Claimant's Observations, paras. 17-19.

¹⁴ Claimant's Observations, paras. 56-60.

¹⁵ Claimant's Observations, paras. 61-65.

Second NDP application is a core issue of the present arbitration. Given the costs that allowing such a submission would impose on the Parties, the Respondent suggests the Tribunal should allow a written submission only if it considered the expected benefit to be “*extraordinarily promising*”.¹⁶

IV. THE TRIBUNAL’S ANALYSIS

15. The question of whether to allow the making of submissions by a non-disputing party in an ICSID Convention arbitration proceeding is governed by Arbitration Rule 67(2), which provides:

(2) *In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:*

(a) *whether the submission would address a matter within the scope of the dispute;*

(b) *how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties;*

(c) *whether the non-disputing party has a significant interest in the proceeding;*

(d) *the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and*

(e) *whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.*

16. The Tribunal notes that this formulation reserves discretion to a tribunal deciding an application, directing the tribunal to consider “*all relevant circumstances*” and setting forth a non-exhaustive list of circumstances to be taken into account.

17. In addition, the Tribunal recalls the terms of Arbitration Rule 67(4), which provides:

The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to the format, length, scope or publication of the written submission and the time limit to file the submission.

18. The Tribunal is also conscious of its general obligation, set out in Arbitration Rule 3(1), to conduct the proceeding in an expeditious and cost-effective manner.

19. Having read the Second NDP Application and the Parties’ observations thereon, the Tribunal has concluded that it should not grant the Application.

20. The Second NDP Applicants suggest that they can provide “*perspectives, knowledge or insights different from, or beyond those, of the Parties*” with regard to the policy of Germany in respect of the Coal Ban Act and the policy and legal obligations of Switzerland in respect of climate change. However, the Tribunal does not accept that the Second NDP Applicants can have, or present, a better understanding of the Respondent’s policy than can the Respondent itself. Nor

¹⁶ Respondent’s Observations, paras. 2-4, and cover email of 6 February 2026.

have the Second NDP Applicants shown that they have the expertise to offer “*perspectives, knowledge or insights*” in relation to Swiss policy which would sufficiently assist the Tribunal. In particular, the fact that one of the Swiss Second NDP Applicants was involved in the referendum in the Canton of Ticino, where it lobbied for an outcome different from that which went on to achieve a majority, does not establish that it has an expertise which would assist the Tribunal.

21. Insofar as the Second NDP Applicants refer to the legal expertise of their counsel, the Tribunal agrees with the observation of the tribunal in *Glencore v. Colombia* that “*the disputing Parties’ legal teams are best suited to address legal issues*”.¹⁷ Here, as in *Glencore*, “*both Parties are represented by highly qualified and experienced domestic and international counsel*” and the Tribunal is confident that it will receive all the assistance it needs from them with regard to all of the legal issues arising in the case.
22. For these reasons, the Tribunal considers that the requirements of Arbitration Rules 67(2) are not met.
23. In addition, the Tribunal has concluded that it should reject the Application on the basis of Arbitration Rule 67(4) and the Tribunal’s general obligation to ensure the effective and efficient conduct of the proceedings. In contrast to the First NDP Application, this Second NDP Application has been made late in the day when the proceedings are already well advanced. The Tribunal agrees with the Claimant’s observation that, if the Second NDP Applicants were allowed to make a submission before the Respondent has filed its Rejoinder, the result would be to put the Claimant at a procedural disadvantage, whereas if they were allowed to make a submission after the filing of the Rejoinder the result would be unduly disruptive of the orderly conduct of the proceedings.
24. In view of the conclusions set out above, the Tribunal does not need to address the other objections raised by the Claimant.

V. ORDER

25. On the basis of the foregoing, the Tribunal DECIDES to reject the Second NDP Application.

On behalf of the Tribunal,

[signed]

Sir Christopher Greenwood
President of the Tribunal
Date: 25 February 2026

¹⁷ *Glencore International AG v. Republic of Colombia* (ICSID Case No. ARB/21/30), Procedural Order No. 3, 10 October 2024 (CLA-0143), para. 61.