

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. 1

The Arbitral Tribunal

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

24 April 2020

1. Continuation in Force of Prior Orders

- 1.1 The provisions of this and future orders shall apply in addition to the Terms of Appointment executed by the Parties and the Tribunal.
- 1.2 Procedural orders made by the Tribunal shall remain in force unless expressly amended or terminated.

2. Place of Arbitration

- 2.1 The legal place (or “seat”) of the arbitration shall be Toronto, Canada.
- 2.2 The Tribunal may hold meetings and hearings with the Parties at any location it considers appropriate, as decided by the Tribunal after consultation with the Parties. Pursuant to paragraph 8.5 of the Terms of Appointment, the PCA shall make its hearing and meeting rooms at the Peace Palace in The Hague available to the Parties and the Tribunal at no charge. The Tribunal may meet at any location it considers appropriate for deliberations.

3. Language

- 3.1 The Parties shall make their written submissions and other communications in English. Accompanying witness statements, expert reports, and exhibits may be submitted in any language, with a translation into English. Translations of exhibits may be limited to relevant excerpts, provided that the full document is submitted in its original language.
- 3.2 Informal translations will be accepted as accurate unless contested by the other Party, in which case, the Parties shall attempt to reach agreement on the translation (including, if needed, through the introduction of certified translations). If no agreement is reached, the Tribunal shall take the appropriate decision, and may for this purpose appoint a certified translator to have the document(s) in question translated.
- 3.3 Documents produced in response to requests or orders for production may be produced in their original language. If a Party submits any such document as an exhibit, the provisions of this section shall apply.
- 3.4 The Tribunal reserves the right to require a Party to translate any document in whole or in part.
- 3.5 Witness or expert testimony in a language other than English shall be interpreted simultaneously to English. The costs of interpreter(s) will be paid from the deposit held by the PCA, without prejudice to the decision of the Tribunal as to which Party shall ultimately bear these costs. Parties shall notify the Tribunal no later than the pre-hearing conference which witnesses and experts will require interpretation.

4. Procedural Calendar

- 4.1 The procedural calendar is enclosed as **Annex 1** to this order.
- 4.2 On or before the date of the deadline for any written submission, the Party in question shall send the submission, together with all accompanying documents, simultaneously to the Tribunal, the PCA, and opposing counsel, by e-mail or secure file-sharing platform, in accordance with the Terms of Appointment.

- 4.3 All written submissions, including witness statements and expert reports, shall be provided as text-searchable PDF files, with a hyper-linked table of contents.
- 4.4 The Parties shall also send hard copies of written submissions, if so requested by any member of the Tribunal or the PCA
- 4.5 For any simultaneous submissions, each side shall submit all documents only to the PCA. The PCA will then distribute copies to the Tribunal and opposing counsel once both submissions have been received.
- 4.6 Unless otherwise provided, all time limits shall refer to midnight on the day of the deadline at the place where counsel for the respective Parties is located.
- 4.7 Extensions may be agreed between the Parties or granted by the Tribunal for justifiable reasons, provided that such extensions do not affect the dates fixed for any hearing or other meeting and that the request for an extension is submitted as soon as practicable after a Party becomes aware of the circumstances which prevent it from complying with the deadline.

5. Document Production

- 5.1 Each Party may request the production of documents from the other Party in accordance with the procedural calendar above. Requests for the production of documents shall be limited to those matters that are reasonably necessary, shall be in writing, and shall precisely identify each document, or category of documents, setting forth reasons for the request in respect of each document or category of documents requested. Unless the requested Party objects to production, it shall produce the requested documents within the applicable time limit.
- 5.2 If the requested Party objects to production, the following procedure shall apply:
 - (a) The requested Party shall submit a response stating which documents or category of documents it objects to producing. The response shall state the reasons for each objection.
 - (b) The requesting Party shall respond to the other Party's objection, indicating, with reasons, whether it disputes the objection.
 - (c) The Parties shall submit all outstanding requests, objections, and responses to objections to the Tribunal for decision in tabular form pursuant to the model appended to this Procedural Order as **Annex 2** (modified Redfern schedule). The Parties shall use the same format throughout their exchange of requests, objections, and responses.
 - (d) The Tribunal shall rule on any outstanding requests, and may for this purpose refer to the *IBA Rules on the Taking of Evidence in International Arbitration 2010*. Documents ordered by the Tribunal to be disclosed shall be produced within the time limit set forth in the procedural calendar.
- 5.3 Pursuant to the UNCITRAL Rules, the Tribunal may also, on its own motion, request the production of documents.
- 5.4 The Parties shall not copy the Tribunal or the PCA on their correspondence or exchanges of documents in the course of the document production phase. Documents produced by the Parties in response to document production requests shall only form part of the evidentiary record if a

Party subsequently submits them as exhibits to its written submissions or upon authorization of the Tribunal after the exchange of submissions.

- 5.5 Should a Party fail to produce documents as ordered by the Tribunal, the Tribunal may draw the inferences it deems appropriate in relation to the documents not produced.

6. Evidence and Legal Authorities

- 6.1 In addition to the relevant articles of the UNCITRAL Rules and the provisions on document production above, the Tribunal may use, as an additional guideline, the *IBA Rules on the Taking of Evidence in International Arbitration 2010*, when considering matters of evidence.
- 6.2 The Parties shall submit with their written submissions all evidence and authorities on which they intend to rely in support of the factual and legal arguments advanced therein, including witness statements, expert reports, exhibits, legal authorities, and all other evidence and authority in whatever form.
- 6.3 In the Reply and Rejoinder, such evidence shall only be submitted in support of the factual or legal arguments advanced in rebuttal to the other side's prior written submission or in relation to new evidence arising from document production or new facts that have arisen.
- 6.4 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.
- 6.5 The Parties shall identify each exhibit submitted to the Tribunal with a distinct number. Each exhibit submitted by the Claimant shall begin with a letter "C" followed by the applicable number (*i.e.*, C-1, C-2, etc.); each exhibit submitted by the Respondent shall begin with a letter "R" followed by the applicable number (*i.e.*, R-1, R-2, etc.). The Parties shall use sequential numbering throughout the proceedings. Any exhibit translations shall be appended to the original exhibit.
- 6.6 The Parties shall identify each legal authority submitted to the Tribunal with a distinct number. Each legal authority submitted by the Claimant shall begin with the letters "CLA" followed by the applicable number (*i.e.*, CLA-1, CLA-2, etc.); each legal authority submitted by the Respondent shall begin with the letters "RLA" followed by the applicable number (*i.e.*, RLA-1, RLA-2, etc.). The Parties shall use sequential numbering throughout the proceedings.
- 6.7 Excel spreadsheets or other calculations performed by experts shall be provided in their native electronic format (*i.e.*, in Excel format rather than PDF).
- 6.8 All evidence submitted to the Tribunal shall be deemed to be authentic and complete, including evidence submitted in the form of copies, unless a Party disputes within a reasonable time its authenticity or completeness, or the Party submitting the relevant evidence indicates the respects in which any document is incomplete.
- 6.9 The use of demonstrative exhibits in aid of argument (such as charts or tabulations), and of skeleton arguments, will be allowed at oral hearings, provided that no new evidence is contained therein, and that such exhibits include citations to the relevant record. An electronic and a hard

copy of any such demonstrative exhibit or skeleton argument shall be simultaneously provided by the Party submitting such exhibit to the other Party, the PCA, and the Tribunal at least 48 hours prior to use.

7. Witnesses

7.1 Any person may present evidence as a witness, including a Party or a Party's officer, employee, or other representative.

7.2 For each witness, a written and signed witness statement shall be submitted to the Tribunal together with the Parties' written Memorials. Where in exceptional circumstances a Party is unable to obtain such a statement from a witness, the oral evidence of that witness shall be admitted only with leave of the Tribunal after consultation with the Parties and, if the Tribunal grants such leave, in accordance with its directions.

7.3 Each witness statement shall contain at least the following:

- (a) the name, date of birth, and present address of the witness;
- (b) a description of the witness's position and qualifications, if relevant to the dispute or to the contents of the statement;
- (c) a description of any past and present relationship between the witness and the Parties, counsel, or members of the Tribunal;
- (d) a description of the facts on which the witness's testimony is offered and, if applicable, the source of the witness's knowledge; and
- (e) the signature of the witness, providing the date and place of signature.

7.4 It shall not be improper for counsel to meet with witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare for examination at a hearing.

7.5 Any issues relating to the testimony of witnesses at an oral hearing shall be addressed by the Tribunal in a subsequent pre-hearing procedural order, after consultation with the Parties.

8. Experts

8.1 Each Party may retain and submit the evidence of one or more experts to the Tribunal.

8.2 For each expert, a written and signed expert report shall be submitted to the Tribunal.

8.3 Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted with the Parties' written submissions, in which case the reference to the number of the exhibit will be enough.

8.4 It shall not be improper for counsel to meet with experts and potential experts to discuss the expert reports and the examinations.

8.5 Any issues relating to the testimony of experts at an oral hearing shall be addressed by the Tribunal in a subsequent pre-hearing procedural order, after consultation with the Parties.

8.6 The Tribunal may, on its own initiative or at the request of a Party (and in both cases after consultation with both Parties), appoint one or more experts. The Tribunal shall consult with the Parties on the selection, terms of reference (including expert fees), and conclusions of any such expert.

9. Hearings

9.1 After consultation with the Parties, the Tribunal shall issue, for each hearing, a procedural order convening the meeting, establishing its place, time, agenda, and all other technical and ancillary aspects.

9.2 The PCA shall arrange for simultaneous interpretation and live transcription of oral argument and testimony where necessary.

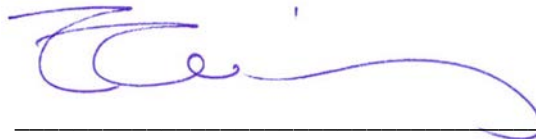
10. Confidentiality/Transparency

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.

So ordered by the Tribunal.



Professor Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Procedural Calendar

<u>Event</u>	<u>Date</u>
Claimant's Memorial	3 July 2020
Respondent's Memorial on Jurisdiction and Admissibility and Request for a Preliminary Phase on Jurisdiction and Admissibility	15 September 2020
Claimant's Response to Request for a Preliminary Phase on Jurisdiction and Admissibility	16 October 2020
Hearing on Request for a Preliminary Phase on Jurisdiction and Admissibility (if needed)	[To be determined]
Tribunal's Decision on Request for a Preliminary Phase on Jurisdiction and Admissibility and Further Procedural Calendar	18 December 2020

Annex 2: Model Redfern Schedule for Document Requests

No.	Documents or category of documents requested (requesting Party)	Relevance and materiality, incl. references to submission (requesting Party)		Reasoned objections to document production request (objecting Party)	Response to objections to document production request (requesting Party)	Decision (Tribunal)
		References to Submissions, Exhibits, Witness Statements or Expert Reports	Comments			