

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. 4
DECISION ON REQUEST FOR PRELIMINARY PHASE ON JURISDICTION**

The Arbitral Tribunal

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

31 December 2020

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I. PROCEDURAL BACKGROUND

1. By Notice of Arbitration dated 26 September 2019 (the “**Notice of Arbitration**”), the Claimant commenced arbitration proceedings against the Respondent pursuant to Article 26(4)(b) of the Energy Charter Treaty (the “**ECT**”).
2. On 24 October 2019, the Respondent submitted its Response to the Notice of Arbitration.
3. By letter dated 5 March 2020, the Tribunal circulated Draft Procedural Order No. 1 and invited the Parties to submit their comments thereon.
4. By letters dated 20 March 2020, the Parties submitted their respective comments on Draft Procedural Order No. 1. In particular, the Claimant proposed a bifurcation of the proceedings consisting of a first phase addressing the merits and the Claimant’s request for injunctive relief, to be followed as necessary by a quantum phase. Meanwhile, the Respondent envisaged a trifurcation of the proceedings with a preliminary phase on jurisdiction and admissibility. The Respondent also proposed that the Claimant’s request for injunctive relief be postponed to a final phase on remedies, including both injunctive relief and damages.
5. By letter dated 27 March 2020, the Tribunal circulated a revised Draft Procedural Order No. 1. The Tribunal noted the proposals for bifurcation and trifurcation, and invited the Parties to revert by 8 April 2020 with their comments on Draft Procedural Order No. 1 as revised.
6. By letters dated 8 April 2020, the Parties submitted their further comments on Draft Procedural Order No. 1. For the Respondent, only after the submission of the Parties’ respective memorials would the Tribunal be able to properly assess whether to bifurcate or trifurcate the proceedings. On the other hand, the Claimant was of the view that the Parties could proceed directly to an exchange of submissions on the question of bifurcation or trifurcation.
7. By letter dated 11 April 2020, the Tribunal decided that it would only rule on the issue of bifurcation or trifurcation after the receipt of the Claimant’s Memorial on the Merits and Final Injunction and the Respondent’s Memorial on Jurisdiction and Admissibility and, potentially, a hearing on the request for a preliminary phase. The Tribunal invited the Parties to revert by 20 April 2020 with their proposals for the timetable to be adopted in this vein.
8. By letters dated 20 April 2020, the Parties made separate proposals regarding the timetable to be adopted.
9. On 24 April 2020, the Tribunal issued Procedural Order No. 1, including a procedural calendar up to the Tribunal’s decision on the bifurcation or trifurcation of the proceedings.
10. On 4 May 2020, the Tribunal issued Procedural Order No. 2 setting out the applicable transparency regime.
11. On 3 July 2020, the Claimant submitted its Memorial (the “**Claimant’s Memorial**”).
12. On 15 September 2020, the Respondent submitted its Memorial on Jurisdiction and Request for Bifurcation (the “**Memorial on Jurisdiction**”).
13. On 16 October 2020, the Claimant submitted the Claimant’s Response to the Respondent’s Request for a Preliminary Phase on Jurisdiction and Admissibility (the “**Response to Preliminary Phase Request**”).

14. By letter dated 4 November 2020, the Tribunal advised the parties that it considered that a videoconference hearing on the Respondent's Request for a Preliminary Phase on Jurisdiction would be useful. The Tribunal invited Parties to revert with their availability for a hearing.
15. By letter dated 11 November 2020, the Tribunal scheduled the hearing for 8 December 2020.
16. The hearing on the Respondent's Request for a Preliminary Phase on Jurisdiction was held by videoconference on 8 December 2020. At the end of the hearing, the Tribunal invited the parties to consult each other regarding possible dates for the next steps in the procedural calendar both in the event that the Respondent's Request were granted and in the event that it were denied.
17. On 16 December 2020, the Parties each informed the Tribunal of their failure to agree and provided their respective proposed timetables for the next phase of the proceedings.

II. RESPONDENT'S JURISDICTIONAL OBJECTIONS

A. THE FORK-IN-THE-ROAD OBJECTION

1. Respondent's Position

18. The Respondent notes that "[t]he Claimant [...] has engaged in a campaign of litigation in respect of the same dispute in multiple jurisdictions."¹ The Respondent recounts that, on 25 July 2019, prior to the Claimant's Notice of Arbitration, the Claimant filed an application for annulment of Directive (EU) 2019/692 (the "**Amending Directive**") before the General Court of the European Union (the "**General Court**").² On 20 May 2020, the General Court issued an order declaring the application inadmissible.³ The Claimant appealed that decision before the Court of Justice of the European Union ("**CJEU**").⁴ Moreover, the Respondent points out that, on 15 June 2020, the Claimant separately filed an appeal against an adverse decision by the German Bundesnetzagentur concerning the Amending Directive.⁵ The Respondent asserts that both appeals are still pending.⁶
19. The Respondent argues that, having elected to pursue the dispute before other fora, the Claimant is precluded from now pursuing the present arbitration.⁷ In the Respondent's view, Article 26(3)(b)(i) of the ECT constitutes a fork-in-the-road clause, as it withholds consent to arbitration "where the Investor has previously submitted the dispute under subparagraph 2(a) [to the courts

¹ Memorial on Jurisdiction ¶ 14.

² Memorial on Jurisdiction ¶ 12, referring to Action brought on 25 July 2019 — *Nord Stream 2 v. Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70, **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), **CLA-170**.

³ Memorial on Jurisdiction ¶ 12; 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*, **RLA-3**.

⁴ Memorial on Jurisdiction ¶ 12; Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*, **RLA-4**; *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)*, **CLA-171**.

⁵ Memorial on Jurisdiction ¶ 13; *Nord Stream 2 AG appeals against decision of German regulator on Nord Stream 2*, Russian News Agency 17 June 2020, <https://tass.com/economy/1168603>, **RLA-5**.

⁶ Memorial on Jurisdiction ¶¶ 12, 14.

⁷ Memorial on Jurisdiction ¶¶ 6, 13, 15.

or administrative tribunals of the disputing Contracting Party] or (b) [any other dispute settlement]”.⁸

20. The Respondent contends that the ordinary meaning of Article 26(3)(b)(i) of the ECT, in its context and in the light of its object and purpose, calls for the application of the so-called “fundamental basis test”.⁹ The Respondent notes that “dispute” is a broad, non-technical term that is neither defined nor qualified in the ECT, and is ordinarily understood as referring to “a disagreement or argument”.¹⁰ The context of Article 26(3)(b) of the ECT also reinforces this broad reading according to the Respondent.¹¹ The Respondent points out that neither the title of Annex I.D, nor Article 26(1) or Part III of the ECT, requires an identity of causes of action, parties, or object in order to determine what constitutes the “same dispute”.¹²
21. As regards the object and purpose of Article 26(3)(b)(i) of the ECT, the Respondent argues that a fork-in-the-road clause is designed to avoid multiple proceedings arising out of the same facts, with the resulting multiplication of cost, risk of contradictory outcomes, and unfairness to the respondent State.¹³ For this reason, the Respondent submits that the interpretation and application of the provision should not be too formalistic, but should focus instead on whether the overlapping disputes “share the fundamental cause of the claim and seek for the same effects”.¹⁴ The Respondent cites various decisions adopting this fundamental basis test,¹⁵ and takes issue with those employing the “triple identity test” to fork-in-the-road clauses.¹⁶ For the Respondent, the triple identity test is more relevant to the *lis pendens* doctrine, and fork-in-the-road clauses requires a more nuanced and distinct approach.¹⁷
22. In this case, the Respondent asserts that the fundamental basis test is met when comparing the present arbitration to the application for annulment before the General Court.¹⁸ According to the Respondent, the Claimant alleges in both proceedings that the Amending Directive discriminates against the Claimant and undermines its investment in the Nord Stream 2 pipeline project.¹⁹ Further, the remedies sought are identical in substance.²⁰ In both cases, the Claimant requests to be placed in the same position as it would have occupied had the Amending Directive never been adopted.²¹ For these reasons, the Respondent surmises that the subject matter of the disputes is fundamentally the same, thereby triggering Article 26(3)(b) of the ECT.²²

⁸ Memorial on Jurisdiction ¶ 17.

⁹ Memorial on Jurisdiction ¶ 19; Hearing Transcript, 8 December 2020, 54:24-56:25.

¹⁰ Memorial on Jurisdiction ¶ 24; Cambridge Dictionary, dispute, noun, **RLA-7**.

¹¹ Memorial on Jurisdiction ¶ 26.

¹² Memorial on Jurisdiction ¶¶ 26-29.

¹³ Memorial on Jurisdiction ¶ 31; Hearing Transcript, 8 December 2020, 14:22-24, 16:18-17:6.

¹⁴ Memorial on Jurisdiction ¶¶ 32-33; Hearing Transcript, 8 December 2020, 14:25-15:17, 16:4-14, 64:25-65:6; *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, ¶ 310, **RLA-11**.

¹⁵ Memorial on Jurisdiction ¶¶ 34-44, citing *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 28 July 2009, ¶¶ 61-62, 64, 67, **RLA-10**; *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, ¶ 367, **RLA-9**; *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, ¶¶ 310, 330, **RLA-11**.

¹⁶ Memorial on Jurisdiction ¶¶ 16, 60-81.

¹⁷ Memorial on Jurisdiction ¶ 16.

¹⁸ Memorial on Jurisdiction ¶ 45; Hearing Transcript, 8 December 2020, 17:7-18, 18:11-22, 19:1-8.

¹⁹ Memorial on Jurisdiction ¶¶ 48-55; Hearing Transcript, 8 December 2020, 17:19-18:2.

²⁰ Memorial on Jurisdiction ¶ 56.

²¹ Memorial on Jurisdiction ¶¶ 57-58.

²² Memorial on Jurisdiction ¶ 59.

23. In the alternative, the Respondent contends that the proceedings before the General Court (appealed before the CJEU) and this arbitration also meet the triple identity test.²³ As to identity of parties, the Claimant commenced both actions against the Respondent and its legislative bodies, namely the European Parliament and the Council of the European Union.²⁴ Further, both actions have the same object, namely the annulment of the Amending Directive such that obligations in Directive 2009/73/EC (the “**Gas Directive**”) are not applicable to the Claimant.²⁵ Finally, the two proceedings share the same cause of action.²⁶ In this regard, the Respondent clarifies that identity of cause of action cannot mean identical pleas or arguments, as that would deprive fork-in-the-road clauses of their *effet utile*.²⁷ The Respondent notes that, in the present arbitration, the Claimant makes five claims of breach of the ECT in respect of the Amending Directive, all of which have corresponding claims before the CJEU.²⁸

2. Claimant’s Position

24. The Claimant contends that the fork-in-the-road clause is triggered only when the dispute submitted under Article 26(2)(a) or (2)(b) is one “which concern[s] an alleged breach of an obligation of [the EU] under Part III”.²⁹ In this regard, the Claimant denies submitting the present dispute to another forum such as to vitiate the Respondent’s consent to international arbitration under Article 26(3) of the ECT.³⁰
25. The Claimant argues that the triple identity test is the correct test to apply.³¹ The Claimant explains that tribunals determining fork-in-the-road objections under the ECT and other treaties have consistently applied the triple identity test, requiring an identity of object, parties, and cause of action.³² In terms of parties, the present arbitration is brought against the Respondent as a Regional Economic Integrated Organization (“**REIO**”), while the action for annulment in the General Court is brought against two specific institutions of the Respondent.³³ The Claimant notes that in the annulment proceeding, the Council and the European Parliament even argued, and the General Court ruled, that the Claimant had no standing and that its claims were inadmissible as a matter of European Union (“**EU**”) law.³⁴ The Claimant adds that the object sought in the two proceedings is completely different.³⁵ While the action for annulment is concerned with the

²³ Memorial on Jurisdiction ¶¶ 82-83.

²⁴ Memorial on Jurisdiction ¶ 85.

²⁵ Memorial on Jurisdiction ¶¶ 86-87.

²⁶ Memorial on Jurisdiction ¶ 88.

²⁷ Memorial on Jurisdiction ¶ 88.

²⁸ Memorial on Jurisdiction ¶¶ 89-121.

²⁹ Response to Preliminary Phase Request ¶ 30; Hearing Transcript, 8 December 2020, 36:14-37:18, 51:17-23, 60:16-62:4; The Energy Charter Treaty, 1994, Articles 26(1) and 26(3)(b)(i), **CLA-1/CL-1**; E. Gaillard & M. McNeill, “Chapter 2 - The Energy Charter Treaty”, in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide To The Key Issues*, 2nd ed. (Oxford: OUP), 2018, p. 52, **CLA-22**.

³⁰ Response to Preliminary Phase Request ¶ 29; Hearing Transcript, 8 December 2020, 36:9-13, 37:20-38:8, 51:24-52:5, 58:6-22, 59:14-60:13.

³¹ Response to Preliminary Phase Request ¶ 35.

³² Response to Preliminary Phase Request ¶ 35; *Yukos Universal Limited (Isle Of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility of 30 November 2009, ¶ 598, **CLA-168**; *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd v. Mongolia*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, ¶ 390, **CLA-169**.

³³ Response to Preliminary Phase Request ¶ 41.

³⁴ Response to Preliminary Phase Request ¶ 38; European Parliamentary Research Service, “Action for Annulment of an EU Act”, Briefing: Court of Justice at work, PE 642.282, November 2019 (last accessed on 14 October 2020 at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642282/EPRS_BRI\(2019\)642282_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642282/EPRS_BRI(2019)642282_EN.pdf)), pp. 1, 8, **C-183**.

³⁵ Response to Preliminary Phase Request ¶ 39.

objective legality of the Amending Directive as a matter of EU law, the present arbitration deals with the Claimant's subjective rights as an investor and how a breach of these might be remedied.³⁶ Finally, the Claimant argues that the remedies sought are different.³⁷ In this arbitration, the Claimant requests an order to prevent the application of certain provisions of the Gas Directive to the Claimant and/or damages, whereas no damages are available in the proceedings before the CJEU.³⁸

26. As regards the judicial proceedings in Germany, the Claimant asserts that the parties are not the same.³⁹ Moreover, according to the Claimant, an international law claim alleging breaches of the ECT cannot share the same object as an appeal of the Bundesnetzagentur's denial of the Claimant's application for a derogation under the domestic legislation implementing the Amending Directive.⁴⁰ The Claimant adds that the remedy sought is different, as the Claimant seeks from the German authorities a derogation from Article 49a of the Gas Directive.⁴¹
27. The Claimant contends that the alternative fundamental basis test is unsupported.⁴² In the Claimant's view, *Pantechniki* and the two subsequent cases in which that test has been applied are outliers in the jurisprudence.⁴³ The Claimant adds that, in any event, *Pantechniki* does not lay down a bright-line test which is satisfied by drawing general comparisons between the two sets of proceedings.⁴⁴
28. However, in the alternative, the Claimant argues that, even if the fundamental basis test is applied, it is not met.⁴⁵ According to the Claimant, the normative sources of the claims are not the same.⁴⁶ The present arbitration is based on the standards of treatment guaranteed to foreign investors by the Contracting Parties to the ECT, whereas the action before the CJEU is governed by EU law.⁴⁷ The Claimant asserts that the relief sought is also different.⁴⁸ In the arbitration, the Claimant seeks, *inter alia*, an order that the Respondent, by means of its own choosing, remove the application of certain articles of the Gas Directive to the Claimant. In addition, the Claimant reserves the right to claim damages.⁴⁹ Meanwhile, the Claimant reiterates, no damages can be granted in an annulment action before the General Court.⁵⁰ While an action for damages in the CJEU is possible, this would require a separate claim made on a separate legal basis.⁵¹ Hence, the outcome of the action for annulment could not be the same as the outcome of the present arbitration.⁵²

³⁶ Response to Preliminary Phase Request ¶ 39.

³⁷ Response to Preliminary Phase Request ¶ 40.

³⁸ Response to Preliminary Phase Request ¶ 40.

³⁹ Response to Preliminary Phase Request ¶ 42.

⁴⁰ Response to Preliminary Phase Request ¶ 34.

⁴¹ Response to Preliminary Phase Request ¶ 34.

⁴² Response to Preliminary Phase Request ¶ 31.

⁴³ Response to Preliminary Phase Request ¶ 31; Hearing Transcript, 8 December 2020, 52:6-11.

⁴⁴ Response to Preliminary Phase Request ¶ 32; *Pantechniki S.A Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 28 July 2009, ¶ 62, **RLA-10**.

⁴⁵ Response to Preliminary Phase Request ¶ 33.

⁴⁶ Response to Preliminary Phase Request ¶ 33(i).

⁴⁷ Response to Preliminary Phase Request ¶ 33(i); Hearing Transcript, 8 December 2020, 52:16-18; TFEU, Article 263, **CLA-42**.

⁴⁸ Response to Preliminary Phase Request ¶ 33(ii).

⁴⁹ Response to Preliminary Phase Request ¶ 33(ii).

⁵⁰ Response to Preliminary Phase Request ¶ 33(ii).

⁵¹ Response to Preliminary Phase Request ¶ 33(ii).

⁵² Response to Preliminary Phase Request ¶ 33(ii).

29. Similarly, the Claimant contends that the proceedings before the German courts do not share the same fundamental basis as the present arbitration, for the same reasons that the two actions do not satisfy the triple identity test.⁵³

B. THE *RATIONE PERSONAE* OBJECTION

1. Respondent's Position

30. In regard to the Tribunal's jurisdiction *ratione personae*, the Respondent submits that it is not the party responsible for the alleged breaches of the ECT.⁵⁴ The Respondent contends that EU directives such as the Amending Directive are addressed to EU Member States only, not individuals, and thus do not impose any legal obligation on the Claimant.⁵⁵ The Respondent points out that directives are binding only "as to the result to be achieved" and leave the choice of form and methods to the national authorities of EU Member States.⁵⁶
31. As a result, the Respondent argues that any alleged breach of the ECT would not be a result of the Amending Directive itself, but of the measures taken by EU Member States implementing the Amending Directive, which are not attributable to the Respondent under international law.⁵⁷ The Respondent notes that even the Claimant acknowledges that the Amending Directive does not discriminate *de iure* against the latter.⁵⁸ Rather, in the Respondent's view, the Claimant anchors its discrimination claims on the alleged practical effects of the Amending Directive and cites various individual decisions of certain EU Member States, such as Germany.⁵⁹ However, the Respondent stresses that those decisions involve the exercise of wide discretion by the competent national authorities of those Member States in their adoption of the Amending Directive.⁶⁰ The Respondent therefore submits that the domestic measures adopted by the legislative or executive organs of EU Member States are solely attributable to those Member States.⁶¹ Hence, even assuming that the Amending Directive, as applied in practice by the Member States, undermined the Claimant's investment, the Respondent maintains that the responsibility for such practical effects would not lie with the Respondent.⁶²
32. Nor can the Respondent be held responsible, in its view, under the Draft Articles on the Responsibility of International Organizations ("**ARIO**").⁶³ The Respondent argues that the adoption of the Amending Directive involves neither "aid or assistance" nor coercion by the Respondent within the meaning of Articles 14 and 16, respectively, of the ARIO.⁶⁴ Likewise,

⁵³ Response to Preliminary Phase Request ¶ 34.

⁵⁴ Memorial on Jurisdiction ¶¶ 123-124; Hearing Transcript, 8 December 2020, 11:3-18, 63:7-11.

⁵⁵ Memorial on Jurisdiction ¶¶ 140, 145, 149-153; Hearing Transcript, 8 December 2020, 20:6-19; ECJ judgment of 26 February 1986, *Marshall*, 152/84, EU:C:1986:84, ¶ 48, **RLA-57**; ECJ order of 7 July 2014, *Group'Hygiène v. Commission*, T-202/13, EU:T:2014:664, ¶ 33, **RLA-58**; ECJ judgment of 14 July 1994, *Faccini Dori*, C-91/92, EU:C:1994:292, ¶¶ 20, 25, **RLA-59**.

⁵⁶ Memorial on Jurisdiction ¶¶ 141, 146.

⁵⁷ Memorial on Jurisdiction ¶¶ 128, 154-210; Hearing Transcript, 8 December 2020, 9:3-10, 45:16-46:2.

⁵⁸ Memorial on Jurisdiction ¶ 186.

⁵⁹ Memorial on Jurisdiction ¶ 186.

⁶⁰ Memorial on Jurisdiction ¶ 187; Hearing Transcript, 8 December 2020, 20:20-21:15.

⁶¹ Memorial on Jurisdiction ¶ 198; Hearing Transcript, 8 December 2020, 11:19-13:14.

⁶² Memorial on Jurisdiction ¶ 189; Hearing Transcript, 8 December 2020, 63:7-15.

⁶³ Memorial on Jurisdiction ¶¶ 199-210; Hearing Transcript, 8 December 2020, 13:15-23; International Law Commission, Draft Articles on Responsibility of International Organizations. Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10), **RLA-61**.

⁶⁴ Memorial on Jurisdiction ¶¶ 200-201.

according to the Respondent, the individual domestic measures do not amount to “direction or control” or circumvention under Articles 15 and 17, respectively, of the ARIIO.⁶⁵

2. Claimant’s Position

33. The Claimant submits that the Respondent’s *ratione personae* argument is fundamentally flawed,⁶⁶ as it is entirely grounded in the Respondent’s own legal order.⁶⁷ The Claimant argues that by the Respondent’s line of reasoning, the latter’s actions in connection with an EU directive, however egregious they might be and even if the directive impairs a protected investment under the ECT, could never give rise to a claim against the Respondent under the same treaty.⁶⁸ The Claimant explains that, as an REIO under the ECT, the Respondent has assumed the same obligations as the State Parties to the ECT as regards matters falling within the scope of the ECT and within the Respondent’s competences.⁶⁹ As such, the Respondent’s actions and omissions must be judged against the standards contained in the ECT as a matter of international law, and not EU law.⁷⁰
34. Contrary to the Respondent’s view, the Claimant maintains that the Respondent’s actions in connection with the Amending Directive, including the proposal for its adoption, the manner in which the Amending Directive was adopted, the results to be achieved, and its ultimate effect, are all attributable to the Respondent.⁷¹ Moreover, the Claimant notes that, while EU Member States enjoy discretion in implementing EU directives, the directives are nonetheless binding as to the result to be achieved.⁷² The European Commission can request the Member State to amend or withdraw a decision granting an exemption if it is in breach of the legal requirements of the Gas Directive and can bring infringement proceedings against the Member States that fail to achieve the result prescribed by an EU directive.⁷³

III. RESPONDENT’S REQUEST FOR PRELIMINARY PHASE

A. RESPONDENT’S POSITION

35. As a preliminary matter, the Respondent submits that, unlike the 2010 UNCITRAL Rules, the 1976 UNCITRAL Rules – which are the version applicable to this dispute – include a presumption in favour of preliminary consideration of jurisdictional issues.⁷⁴ Moreover, in the determination of whether a preliminary phase on jurisdiction is appropriate, the Respondent relies on the *Glamis Gold* test⁷⁵ setting out three criteria for bifurcation, namely that (a) the objection is substantial; (b) the objection to jurisdiction, if granted, would result in a material reduction of the proceedings

⁶⁵ Memorial on Jurisdiction ¶¶ 202-210.

⁶⁶ Response to Preliminary Phase Request ¶¶ 52, 59.

⁶⁷ Response to Preliminary Phase Request ¶¶ 52, 61.

⁶⁸ Response to Preliminary Phase Request ¶ 61; Hearing Transcript, 8 December 2020, 32:8-16.

⁶⁹ Response to Preliminary Phase Request ¶ 53.

⁷⁰ Response to Preliminary Phase Request ¶¶ 52-53.

⁷¹ Response to Preliminary Phase Request ¶ 54; Hearing Transcript, 8 December 2020, 42:19-43:7.

⁷² Response to Preliminary Phase Request ¶ 56; Hearing Transcript, 8 December 2020, 32:3-7.

⁷³ Response to Preliminary Phase Request ¶¶ 56-57; Memorial on Jurisdiction ¶ 175; TFEU, Articles 258, 259, **CLA-42**.

⁷⁴ Memorial on Jurisdiction ¶ 216; *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 2, 18 January 2013, ¶ 16, **RLA-63**; *Michael Anthony Lee-Chin v. Dominican Republic*, ICSID Case No. UNCT/18/3, Procedural Order No. 2 (Decision on Respondent Request for Bifurcation), 6 March 2019, ¶¶ 46-47, **RLA-64**.

⁷⁵ *Glamis v. USA*, UNCITRAL, Procedural Order No. 2, 31 May 2005, ¶ 12(c), **RLA-65**; Hearing Transcript, 8 December 2020, 8:23-24.

at the next phase; and (c) bifurcation is not impractical.⁷⁶ For the Respondent, all three criteria are met in this case.⁷⁷

36. As regards the first criterion, namely that a jurisdictional objection be substantial, the Respondent argues that tribunals do not conduct a comprehensive analysis of the objections, but limit their inquiry to whether the objection is frivolous or clearly unfounded.⁷⁸ The Respondent maintains that, on the basis of a *prima facie* analysis of the extensive arguments set out in its Memorial on Jurisdiction, its objections cannot be dismissed as merely frivolous or vexatious.⁷⁹ With respect to the second criterion, namely that a jurisdictional objection be likely to materially narrow the proceedings, the Respondent points out that granting its fork-in-the-road or *ratione personae* objections would dispose of the case, or at least reduce the scope of the next phase.⁸⁰ Finally, the Respondent contends that its jurisdictional objections are not so intertwined with the merits that it would be impractical for the Tribunal to rule upon them as a preliminary matter.⁸¹ In respect of the fork-in-the-road objection, neither the fundamental basis test nor the triple identity test would, in the Respondent's view, require the Tribunal to enter into an assessment of the merits of the claims, lest the purpose of a fork-in-the-road clause be defeated.⁸² All that would be needed is a comparison of the pleas in law as set out in the application before the CJEU and the description of the claims in the Notice of Arbitration and the Claimant's Memorial.⁸³ Similarly, in deciding on the objection *ratione personae*, the Respondent argues that all that the Tribunal would have to consider is whether the alleged practical effects, and consequently the ensuing violations of the ECT, necessarily result from the Amending Directive as such, or from measures of EU Member States taken within their margin of discretion.⁸⁴ The Respondent further rejects the alleged novelty of this arbitration as a ground to refuse bifurcation.⁸⁵ For the Respondent, the novelty of this case, if at all relevant, weighs in favour of bifurcation, as the Tribunal's jurisdiction *ratione personae* would then be given primary and special attention.⁸⁶
37. Finally, the Respondent refutes the Claimant's mischaracterization of its jurisdictional objections as allegedly being inconsistent.⁸⁷ The Respondent clarifies that its objections have simply been put forward as alternative arguments.⁸⁸
38. Accordingly, the Respondent requests that the Tribunal decide the Respondent's jurisdictional objections as a preliminary matter, before considering the merits of the claims brought by the Claimant, as provided for in Article 21(4) of the 1976 UNCITRAL Rules.⁸⁹

⁷⁶ Memorial on Jurisdiction ¶ 219; Hearing Transcript, 8 December 2020, 9:11-18; *Philip Morris Asia Ltd. (Hong Kong) v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8, 14 April 2014, ¶ 109, **RLA-66**.

⁷⁷ Memorial on Jurisdiction ¶¶ 221-228.

⁷⁸ Memorial on Jurisdiction ¶¶ 221-222; *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Procedural Order No. 4, 18 November 2016, ¶ 4.4, **RLA-67**.

⁷⁹ Memorial on Jurisdiction ¶ 223.

⁸⁰ Memorial on Jurisdiction ¶¶ 224-225; Hearing Transcript, 8 December 2020, 63:16-22, 64:16-24.

⁸¹ Memorial on Jurisdiction ¶ 226.

⁸² Memorial on Jurisdiction ¶ 227; Hearing Transcript, 8 December 2020, 14:22-15:11, 47:2-5, 65:23-66:4, 66:19-25.

⁸³ Memorial on Jurisdiction ¶ 227; Hearing Transcript, 8 December 2020, 16:4-17:18.

⁸⁴ Memorial on Jurisdiction ¶ 228; Hearing Transcript, 8 December 2020, 9:3-10, 21:22-22:21, 49:2-4.

⁸⁵ Hearing Transcript, 8 December 2020, 8:25, 10:2-3.

⁸⁶ Hearing Transcript, 8 December 2020, 9:1-2, 10:1-6, 46:15-47:1.

⁸⁷ Hearing Transcript, 8 December 2020, 23:18-25:8, 67:1-9.

⁸⁸ Hearing Transcript, 8 December 2020, 23:15-18.

⁸⁹ Memorial on Jurisdiction ¶ 5, 212-213.

B. CLAIMANT'S POSITION

39. The Claimant disagrees with the proposition that the 1976 UNCITRAL Rules set out a presumption in favour of resolving jurisdictional objections in a preliminary phase.⁹⁰ On the contrary, the Claimant points out that Article 21(4) of the 1976 UNCITRAL Rules as well as arbitral precedents thereunder recognize the very broad discretion of a tribunal to determine whether to hear jurisdictional objections separately from the merits of the dispute.⁹¹ The Claimant likewise asserts that the *Glamis Gold* criteria are non-exhaustive,⁹² and do not constitute a standalone test.⁹³ For the Claimant, the fundamental principle which should guide a tribunal in exercising its discretion is the “need to ensure both ‘procedural justice and efficiency, taking all circumstances into account’”.⁹⁴ In this case, the Claimant is of the view that bifurcation of one or both of the Respondent’s jurisdictional objections from the merits of the dispute would not serve the ends of fairness and procedural efficiency.⁹⁵ Hence, the Claimant submits that the two objections should be considered together and resolved along with the merits.⁹⁶
40. With respect to fairness, the Claimant argues that it would be unfair to allow the Respondent to run two inconsistent jurisdictional arguments concurrently.⁹⁷ In particular, the Claimant notes there is a fundamental inconsistency between arguing on the one hand that the Respondent is not the proper respondent to this arbitration, while on the other hand arguing that the annulment proceedings brought by the Claimant contravene the fork-in-the-road clause.⁹⁸ The Claimant adds that, in its fork-in-the-road argument, the Respondent seeks to draw comparisons between the allegations of breach of the ECT and the allegations in the annulment application concerning the Amending Directive.⁹⁹ However, in support of its objection *ratione personae*, the Respondent characterizes the Claimant’s claim differently, stating that the Claimant’s allegations of treaty breach do not concern the way in which the Amending Directive was passed.¹⁰⁰ For the Claimant, if the two jurisdictional arguments were to be dealt with separately from each other, the Respondent would be at liberty to run inconsistent arguments without proper scrutiny.¹⁰¹

⁹⁰ Response to Preliminary Phase Request ¶ 12; *Cairn Energy Plc and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07, Procedural Order No. 4 (Decision on the Respondent’s Application for Bifurcation), 19 April 2017, ¶¶ 72-75, **CLA-161**.

⁹¹ Response to Preliminary Phase Request ¶ 11; Hearing Transcript, 8 December 2020, 29:16-30:1; “*President Allende*” Foundation, *Victor Pey Casado, Coral Pey Grebe (Spain) v. The Republic of Chile*, PCA Case No. 2017-30, Procedural Order No. 2, 29 November 2017, ¶ 64, **CLA-162**; *Cairn Energy Plc and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07, Procedural Order No. 4 (Decision on the Respondent’s Application for Bifurcation), 19 April 2017, ¶ 75, **CLA-161**.

⁹² Response to Preliminary Phase Request ¶ 14; Hearing Transcript, 8 December 2020, 30:8-16, 31:10-14; *Cairn Energy Plc and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07, Procedural Order No. 4 (Decision on the Respondent’s Application for Bifurcation), 19 April 2017, ¶ 78, **CLA-161**.

⁹³ Response to Preliminary Phase Request ¶ 14; Hearing Transcript, 8 December 2020, 30:13-14; *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, ¶¶ 64-66, **CLA-163**.

⁹⁴ Response to Preliminary Phase Request ¶¶ 7, 10, 13; Hearing Transcript, 8 December 2020, 30:1-7; “*President Allende*” Foundation, *Victor Pey Casado, Coral Pey Grebe (Spain) v. The Republic of Chile*, PCA Case No. 2017-30, Procedural Order No. 2, 29 November 2017, ¶ 64, **CLA-162**.

⁹⁵ Response to Preliminary Phase Request ¶ 16; Hearing Transcript, 8 December 2020, 50: 17-23.

⁹⁶ Response to Preliminary Phase Request ¶ 63.

⁹⁷ Response to Preliminary Phase Request ¶¶ 8(iii), 67.

⁹⁸ Response to Preliminary Phase Request ¶ 65; Hearing Transcript, 8 December 2020, 71:1-10.

⁹⁹ Response to Preliminary Phase Request ¶ 66.

¹⁰⁰ Response to Preliminary Phase Request ¶ 66.

¹⁰¹ Response to Preliminary Phase Request ¶ 66.

41. As regards procedural efficiency, the Claimant contends that dealing with all preliminary objections together with the merits would be more efficient than bifurcating either or both objections.¹⁰² As it is, the Claimant adds, the arbitration is already bifurcated between merits and quantum.¹⁰³
42. Finally, taking into account the totality of the circumstances the Claimant argues that the Respondent's jurisdictional arguments are inextricably linked with the wider merits of the dispute.¹⁰⁴ The Claimant asserts that the determination of the fork-in-the-road objection requires a full consideration of the nature of the ECT claims, including the factual basis of such claims.¹⁰⁵ However, not all potentially relevant information is available at this stage, particularly in the absence of any submission on the merits by the Respondent.¹⁰⁶ Similarly, according to the Claimant, the Tribunal cannot consider the Respondent's objection *ratione personae* at this early stage because it is a matter of the merits to determine whether there is a breach of the ECT and to whom it is attributable.¹⁰⁷ This would require an assessment of the factual background of the dispute, including a full consideration of the legislative history, the legal content, and the practical effects of the Amending Directive, which is relevant to the interpretation, implementation, and application of the Amending Directive by the EU Member States, including Germany.¹⁰⁸ The Claimant likewise notes that this is the first investment arbitration brought against the Respondent under the ECT.¹⁰⁹ Hence, for the Claimant, the potential significance of the Tribunal's decision on its jurisdiction *ratione personae* further justifies refusing bifurcation.¹¹⁰
43. Even assuming that the *Glamis Gold* criteria apply, the Claimant submits that they do not support bifurcation in the circumstances of this case.¹¹¹ First, having refuted the Respondent's jurisdictional arguments, the Claimant maintains that neither of the Respondent's objections is substantial.¹¹² Second, bifurcation is impractical, considering that the jurisdictional objections are intertwined with the merits of the dispute.¹¹³ Third, bifurcation of the Respondent's jurisdictional arguments may not lead to the disposal of the case and may even preclude the Claimant from bringing claims for denial of justice under Article 10(1) of the ECT or breach of Article 10(12) of the ECT in this arbitration.¹¹⁴

¹⁰² Response to Preliminary Phase Request ¶¶ 8(iv), 69; *Glencore Finance (Bermuda) Limited v. The Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation), 31 January 2018, ¶ 56, **CLA-157**.

¹⁰³ Response to Preliminary Phase Request ¶ 69.

¹⁰⁴ Response to Preliminary Phase Request ¶¶ 7-8; Hearing Transcript, 8 December 2020, 26:10-17.

¹⁰⁵ Response to Preliminary Phase Request ¶¶ 8(i)(a), 23-28; Hearing Transcript, 8 December 2020, 33:2-36:5; 70:12-18.

¹⁰⁶ Response to Preliminary Phase Request ¶ 21(i).

¹⁰⁷ Response to Preliminary Phase Request ¶¶ 8(i)(b), 45, 47; Hearing Transcript, 8 December 2020, 39:6-41:1, 52:21-25, 68:14-22.

¹⁰⁸ Response to Preliminary Phase Request ¶ 49; Hearing Transcript, 8 December 2020, 41:2-6, 42:19-43:21, 49:24-50:7.

¹⁰⁹ Response to Preliminary Phase Request ¶ 60; Hearing Transcript, 8 December 2020, 31:19-20, 51:10.

¹¹⁰ Response to Preliminary Phase Request ¶ 62; Hearing Transcript, 8 December 2020, 31:20-33:1, 51:11-16.

¹¹¹ Response to Preliminary Phase Request ¶ 17; Hearing Transcript, 8 December 2020, 30:17-19.

¹¹² Response to Preliminary Phase Request ¶¶ 8(i)(c), 19, 21(ii), 29-43, 45, 52-59; Hearing Transcript, 8 December 2020, 26:18-20, 31:4-9, 69:14-19.

¹¹³ Response to Preliminary Phase Request ¶¶ 7-8, 18, 23-28, 45, 47; Hearing Transcript, 8 December 2020, 26:10-17, 30:20-31:1.

¹¹⁴ Response to Preliminary Phase Request ¶¶ 8(v), 70-72.

44. For these reasons, the Claimant requests that the Respondent's application for a preliminary phase on jurisdiction be dismissed.¹¹⁵

IV. TRIBUNAL'S ANALYSIS

45. At the outset, the Tribunal confirms that, at this stage of the proceedings, its task is to determine whether to bifurcate the proceedings as between jurisdiction and liability, and not to decide on the merits of the Respondent's preliminary objections. Nevertheless, in making this determination, the Tribunal must consider the substance of those objections in order to decide whether their early determination is likely to be fair and efficient. In this vein, the Tribunal notes that, while Article 21(4) of the UNCITRAL Rules sets forth a presumption in favour of the bifurcation of jurisdictional objections, this presumption is seldom decisive. The Tribunal further considers that the *Glamis Gold* criteria constitute relevant criteria for the assessment of whether bifurcation would be fair and efficient, but these criteria do not constitute a rigid test and are not the only criteria that may be considered by the Tribunal.
46. With the foregoing in mind, the Tribunal has carefully considered each of the objections, starting with the Respondent's fork-in-the-road argument on whether the Claimant has already selected a different forum for its dispute.

A. THE FORK-IN-THE-ROAD OBJECTION

47. The Respondent contends that, under Article 26(3)(b)(i) of the ECT, it has reserved its consent "to submit disputes to international arbitration under ECT only to those disputes that have not been submitted to the courts of the European Union",¹¹⁶ and that this case is "before no less than three adjudication bodies."¹¹⁷ In its submissions, the Respondent rejects the "triple identity" test and instead supports a "fundamental basis" test which goes to whether the disputes share a "fundamental cause" and seek the same outcomes.
48. Under the fork-in-the-road clause in Article 26 of the ECT, the Tribunal is required to analyse whether the "dispute" subject to this arbitration has been already submitted to the European courts. The Tribunal is not convinced that the analysis required to rule on the Respondent's fork-in-the-road objection will be as straightforward as the Respondent argues. Irrespective of the proper test to be applied, the Tribunal does not believe that it could decide the issue at hand by merely comparing the pleas in the proceedings before the General Court and the CJEU with the claims made in this arbitration, without further analysis. Absent such analysis, the Tribunal apprehends the danger that it might apply the fork-in-the road clause in a manner too superficial to give proper effect to the clause. The analysis may also – to a certain extent at least – become intertwined with aspects of the merits. Moreover, the Tribunal's ruling may have significant implications as to the jurisdiction of arbitral tribunals in future investor-State disputes involving the EU. Consequently, the Tribunal favours a cautious approach in which it can take account of the complete picture of the claims being advanced in this case alongside the arguments brought and remedies sought before the EU courts. The Tribunal would not otherwise be confident that it could decide the objection and realize any efficiency through bifurcation.

¹¹⁵ Response to Preliminary Phase Request ¶ 73.

¹¹⁶ Memorial on Jurisdiction ¶11.

¹¹⁷ Memorial on Jurisdiction ¶15.

B. THE *RATIONAE PERSONAE* OBJECTION

49. The Respondent argues that the “EU directives challenged by the Claimant impose no legal obligation on the Claimant.”¹¹⁸ According to the Respondent, to rule on this objection, the Tribunal would not have to decide whether the alleged “practical effects” of the Amending Directive have been proven, but only whether those alleged “practical effects”, even if they were substantiated by the Claimant, would result necessarily from the Amending Directive or rather from measures of the Member States within their margin of discretion.¹¹⁹ The Respondent elaborates:

The Claimant’s legal situation has been left unmodified by the Amending Directive, which has no “direct effect” regarding the Claimant. Consequently, the Amending Directive cannot, as such, breach the ECT. Rather, the alleged breaches of the ECT could only result from the measures which the Member States may or may not take in order to transpose and implement the Gas Directive, as modified by the Amending Directive. As explained below, however, the Member States have a broad margin of discretion when transposing and implementing the relevant provisions of the challenged EU directives. This excludes the international responsibility of the European Union for any alleged breaches of the ECT that result from measures of the Member States within that broad margin of discretion.¹²⁰

50. Even if the Tribunal were persuaded to adopt the Respondent’s distinction between deciding on the alleged practical effects of the Amending Directive and the attribution of such practical effects to the enactment by the EU of the Amending Directive itself or to its implementation by EU Member States within their margin of discretion, the Tribunal will, in order to grapple with this objection, need to understand fully the role of the Amending Directive and its relationship with the specific claims brought by the Claimant. While this jurisdictional objection presents a discrete issue different from the issues raised on the merits, the same or similar arguments and facts are likely to be relevant for both the procedural and the substantive determination. Therefore, it is the Tribunal’s view that this objection is closely linked to the merits of the dispute, and not apt for bifurcation.

C. THE SCOPE OF THE NEXT PHASE

51. The Tribunal wishes to make clear that in reaching this view on bifurcation, it has reached no conclusions as to the merits of the preliminary objections, both of which will have to be addressed in the next phase.
52. The Parties diverge in their proposals as to the scope of the next phase of the proceedings. In particular, the Respondent objects to the inclusion of the Claimant’s request for injunctive relief along with the merits within the scope of the next phase. The Claimant, for its part, asserts that this objection is untimely and should have been raised at the time of the submission of the Claimant’s Memorial.
53. The Tribunal notes that the Respondent’s request to bifurcate injunctive relief into a final phase on remedies was made in its letter dated 20 March 2020, and that the Tribunal has not yet ruled on this question in any of its prior orders. Nevertheless, for the same reasons that the Tribunal decides not to bifurcate jurisdiction from merits, the Tribunal considers it appropriate to include the Claimant’s request for injunctive relief along with the merits within the scope of the next

¹¹⁸ Memorial on Jurisdiction heading 2.2.3.

¹¹⁹ Memorial on Jurisdiction ¶ 228; Hearing Transcript, 8 December 2020, 21:22-22:21.

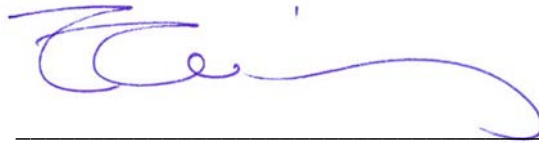
¹²⁰ Memorial on Jurisdiction ¶ 153.

phase of these proceedings. The Tribunal thus orders the bifurcation only of a final phase on damages, if any.

V. DECISION

54. For these reasons, the Tribunal rejects the Respondent's request for bifurcation and establishes the procedural calendar annexed to this order.

So ordered by the Tribunal.



Professor Ricardo Ramírez Hernández
(Presiding Arbitrator)

On behalf of the Tribunal

Annex: 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	8 December 2020
Tribunal's Decision on Request for a Preliminary Phase on Jurisdiction and Admissibility and Further Procedural Calendar	31 December 2020
Respondent's Counter-Memorial on the Merits and Final Injunction, with Witness Statements and Expert Evidence (if any) (together with all essential documentary evidence and legal authorities relied on)	3 May 2021
Exchange of Requests for Documents	17 May 2021
Responses to Requests for Documents	31 May 2021
Reply to Objections to Requests for Documents	14 June 2021
Submission of outstanding requests, objections and responses to objections to the Tribunal for decision	21 June 2021
Tribunal's Order on Disputed Requests for Documents	5 July 2021
Production of Documents both to which no objection is made, and as ordered by the Tribunal	26 July 2021
Claimant's Reply Memorial on the Merits and Final Injunction, Counter-Memorial on Jurisdiction, and Responsive Witness Statements and Responsive Expert Evidence (if any) (together with all essential documentary evidence and legal authorities relied on)	13 September 2021
Respondent's Rejoinder on the Merits and Final Injunction, Reply Memorial on Jurisdiction, Responsive Witness Statements and Responsive Expert Evidence (if any) (together with all essential documentary evidence and legal authorities relied on)	23 November 2021
Claimant's Rejoinder on Jurisdiction, Responsive Witness Statements and Responsive Expert Evidence (if any) (together with all essential documentary evidence and legal authorities relied on)	23 December 2021
Parties to agree format of hearing bundles	14 January 2022

Agreed hearing bundles to be filed	28 January 2022
Parties to inform each other of the names of the witnesses of the other Party not required to be available for cross-examination at the Hearing	4 February 2022
Pre-hearing procedural conference in advance of Hearing on Jurisdiction, Merits	11 February 2022
Hearing on Jurisdiction, the Merits	28 March-8 April 2022 (reserved, with exact length and dates to be determined)