

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Azienda Elettrica Ticinese

v.

Federal Republic of Germany

(ICSID Case No. ARB/23/47)

PROCEDURAL ORDER No. 4
On the Non-Disputing Party Application of 25 March 2025

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

17 April 2025

I. PROCEDURAL BACKGROUND

1. On 25 March 2025, an application (the “**NDP Application**”) for permission to file a written submission (the “**NDP Submission**”) in this proceeding pursuant to ICSID Arbitration Rule 67(1) was filed by the Cornell Law School’s Transnational Disputes Clinic, representing the following individuals or entities: Professor C. Lindsay Anderson; Professor Allison M. Chatrchyan; Professor Robert W. Howarth; Professor Miranda A. Schreurs; Professor Leehi Yona; and the Environmental Law Center at the University of Cologne (the “**NDP Applicants**”). The NDP Application was transmitted to the Parties and the Tribunal the following day.
2. On 27 March 2025, 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 NDP Application by 11 April 2025. The Tribunal noted that such observations should include any comments the Parties might wish to make regarding the manner of participation if the NDP Application were to be granted.
3. In accordance with the Tribunal’s directions, on 11 April 2025 the Parties submitted their observations (the “**Claimant’s Observations**” and the “**Respondent’s Observations**”); with its Observations, the Claimant submitted Legal Authorities CLA-0140 through CLA-0148.
4. On 15 April 2025, powers of attorney supporting the Cornell Law School’s Transnational Disputes Clinic’s authorization to represent the NDP Applicants were received by the ICSID Secretariat and circulated to the Parties and the Tribunal that same day.

II. THE APPLICATION

5. The NDP Applicants are four academics at Cornell University, one academic at the Technical University of Munich, and one academic centre based at the University of Cologne, who are experts on the global effects of fossil fuel emissions on the climate, as well as international and domestic efforts to address these effects in law and policy. They argue that they can provide a perspective grounded in climate science and international environmental norms that can assist the Tribunal in its application of investment law to resolve the current dispute.¹
6. The NDP Application contends that all the requirements of Arbitration Rule 67 are met, meriting the Tribunal exercising its discretion to grant the NDP Application.² Specifically:
 - i. The NDP Applicants would address matters within the scope of the dispute as contemplated in Arbitration Rule 67(2)(a), by providing scientific expertise regarding the impact of coal on global carbon emissions and States’ responses to the need to address the impacts of coal combustion, helping the Tribunal to contextualize Germany’s legislative actions and the Claimant’s consequential claims.³
 - ii. The NDP Submission would provide perspectives, knowledge or insights different from, or beyond those, of the Parties, as contemplated in Arbitration Rule 67(2)(b). As academic experts and an academic centre with expert knowledge regarding the effects of fossil fuel emissions on the climate and the laws and policies enacted to strengthen the global response to climate change, the applicants “*will provide a unique,*

¹ NDP Application, paras. 1, 4-10.

² NDP Application, para. 13.

³ NDP Application, paras. 17-19.

independent academic perspective” of the broad global climate science context and the international community’s consensus on these matters.⁴

- iii. The NDP Applicants have a significant interest in the proceeding, as contemplated in Arbitration Rule 67(2)(c), in that the outcome of the dispute “*could affect the climate sustainability goals*” that they “*aim to further through their research and work*” and they hope the outcome will not undermine efforts to stabilize greenhouse gas concentrations.⁵
 - iv. The NDP Applicants are entirely independent of the Parties and are not being provided with financial or other support to file the submission, as contemplated in Arbitration Rules 67(2)(d) and (e). The NDP Application notes in this regard that the Environmental Law Center of the University of Cologne does not receive German federal funding.⁶
7. More generally, the NDP Application argues that allowing the NDP Submission would advance the public interest. They maintain that the case involves the phasing-out of fossil fuels to comply with national and international legal obligations, with implications for preventing climate change, impacting the global community as a whole. The NDP Applicants claim that they are well-positioned to identify considerations relating to the public interest aspects of this dispute and assist the Tribunal in this respect.⁷
8. In addition to being granted leave to make a submission, the NDP Applicants request access to the documents filed by the Parties in the proceeding, and identify one exhibit (C-0068-EN) in particular. They state that having access to the case documents will enable them to assist the Tribunal with a more specific focus (although they acknowledge that they can make a submission that is helpful even with just publicly available materials). They emphasize that under Arbitration Rule 67(6), the default is that non-disputing parties shall be provided access to the case documents unless either party objects, and indicate an openness to redacting any part of their submission that might discuss confidential case documentation.⁸
9. Finally, the NDP Applicants also seek leave to attend oral hearings and to submit replies to questions, suggesting that this would allow the NDP Applicants to better assist the Tribunal.⁹

III. THE PARTIES’ OBSERVATIONS

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

A. THE CLAIMANT’S OBSERVATIONS

11. The Claimant objects to the request to file an NDP Submission, arguing that the elements in Arbitration Rules 67(2)(b) and (c) have not been made out.
12. In particular, it argues that the NDP Applicants will not present any perspective or insight not already set out by the Respondent, as contemplated in Arbitration Rule 67(2)(b). The Claimant

⁴ NDP Application, paras. 20-23.

⁵ NDP Application, paras. 24-26.

⁶ NDP Application, para. 27, fn. 15.

⁷ NDP Application, paras. 28-29.

⁸ NDP Application, paras. 30-32.

⁹ NDP Application, paras. 33-34.

contends that all the topics that the NDP Applicants propose addressing have already been addressed by the Respondent in its Counter-Memorial (and the Respondent has filed an expert report on some of these topics). To the extent that the NDP Applicants seek to assist the Tribunal on legal matters, precedent has established that submissions on legal matters cannot establish a different perspective (citing to *Glencore v. Colombia*).¹⁰

13. In addition, the Claimant denies that the NDP Applicants have a significant interest in the proceeding as contemplated in Arbitration Rule 67(2)(c). The interests postulated by the NDP Applicants (relating to the international community's collective efforts to respond to climate change and the scientific research which they seek to advance) are insufficient to constitute a *significant* interest under Rule 67(2)(c). The interest(s) invoked must go beyond the general common interest of the wider public or general professional interest (citing to *Odyssey v. Mexico* and *Glencore v. Colombia*).¹¹
14. In the event that the NDP Applicants are allowed to make the NDP Submission, the Claimant states that it objects to the request for the NDP Applicants to attend hearings, submit responses to questions, and be granted access to arbitration documents. The Claimant maintains that, under Arbitration Rules 67(6) and 65(1), these possibilities are subject to the unilateral veto of either Party.¹²

B. THE RESPONDENT'S OBSERVATIONS

15. The Respondent states that it leaves for the Tribunal's discretion whether to allow a written submission by the NDP Applicants. Given the costs that allowing such a submission will impose on the Parties, the Respondent suggest the Tribunal allow a written submission only if it considers the expected benefit to be "*extraordinarily promising*".¹³
16. In the event that such a submission is allowed, the Respondent objects to participation by the NDP Applicants at the hearing, bearing in mind the costs of in-person participation and the fact that the hearing will, in any event, be streamed to the public. Similarly, the Respondent does not see a basis to grant the NDP Applicants access to case materials beyond those that are already publicly available.¹⁴

IV. THE TRIBUNAL'S ANALYSIS

17. 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;*

¹⁰ Claimant's Observations, paras. 6-14; **CLA-0143**, *Glencore International A.G. v. Republic of Colombia*, ICSID Case No. ARB/21/30, Procedural Order No. 3, 10 October 2024 ("*Glencore v. Colombia*"), para. 61.

¹¹ Claimant's Observations, paras. 15-25; **CLA-0144**, *Odyssey Marine Exploration, Inc. v. United Mexican States*, ICSID Case No. UNCT/20/1, Procedural Order No. 6, 20 December 2021, para. 19; **CLA-0143**, *Glencore v. Colombia*, para. 68.

¹² Claimant's Observations, paras. 26-30.

¹³ Respondent's Observations, paras. 2-4.

¹⁴ Respondent's Observations, paras. 5-6.

- (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.*

18. 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.
19. Having considered the submissions in the NDP Application, and the Parties’ observations in this regard, the Tribunal is satisfied that the proposed NDP Submission would address a matter within the scope of the dispute. Both Parties accept in their observations that climate change and its effect on coal-fired energy production is within the subject matter of the proceeding.¹⁵ The Tribunal therefore accepts that the requirements of Arbitration Rule 67(2)(a) are met.
20. The Tribunal also has been given no reason to doubt that the requirements of Arbitration Rules 67(2)(d) and (e) are met.
21. The Claimant has, however, contended that the requirements of Arbitration Rules 67(2)(b) and (c) are not met and it is on those that the Tribunal will concentrate.
22. The Tribunal accepts that some interest more specific than the general public interest is required by Arbitration Rule 67(2)(c). It also accepts that the issues raised by this case are likely to be of interest to all environmental bodies. Nevertheless, it considers that the NDP Applicants have a particular interest and expertise in the issue of coal-fired plants and it therefore accepts that they have a sufficient interest to satisfy the requirements of Arbitration Rule 67(2)(c).
23. As regards the requirements of Arbitration Rule 67(2)(b) that a submission from the NDP Applicants would aid the Tribunal by bringing a different perspective, knowledge or insight, the Tribunal considers that having a submission specifically tailored to the question of scientific knowledge and legal developments at the date on which the decision to invest was made could provide a helpful perspective that might not be squarely addressed by either Party. Moreover, the NDP Applicants appear well-placed to address these matters.
24. The list in Arbitration Rule 67(2) is not exhaustive and the Tribunal has considered whether there are other “*relevant circumstances*” which need to be taken into account.
25. The Tribunal is conscious of its general obligation, set out in Arbitration Rule 3(1), to conduct the proceeding in an expeditious and cost-effective manner, and its more specific obligation, under Arbitration Rule 67(4), to ensure that non-disputing party participation does not disrupt the proceeding, or unduly burden or prejudice a party. The Tribunal considers, however, that a short, focused NDP Submission would not unduly increase costs or delay the proceedings given the existing procedural timetable.

¹⁵ Claimant’s Observations, para. 10; Respondent’s Observations, para. 2.

26. With these obligations in mind, the Tribunal directs that the Non-Disputing Parties provide a submission that is more limited in scope than they have proposed, is subject to page limits, and filed within a timetable that allows the Parties ample time to respond in their scheduled second round of submissions. Accordingly, the Tribunal permits the applicants to submit a document (i) limited in scope to addressing only “*the climate science ... and the international environmental laws and standards that were in place in the time leading up to AET’s investment*” as referenced in paragraph 22 of the Application;¹⁶ and (ii) limited in length to 30 pages (letter sized, double-spaced, Times New Roman font, pt 12).
27. As regards the NDP Applicants’ request to have access to non-public documents filed in the proceedings, Arbitration Rule 67(6) provides that an NDP shall be provided with relevant documents “*unless either party objects*”. Both Parties have expressly objected to this request, which the Tribunal accordingly refuses.
28. With regard to the NDP Applicants’ request to be permitted to attend the hearing and to answer questions, Arbitration Rule 65(1) permits the attendance of persons not connected with a party only if neither party objects. Both Parties have expressly objected to this request, which the Tribunal accordingly refuses.

V. ORDER

29. On the basis of the foregoing, the Tribunal makes the following decisions:
- i. The NDP Applicants’ request to submit the NDP Submission is granted, as limited in subparagraph (ii) below;
 - ii. The NDP Submission shall be (a) limited in scope to addressing only “*the climate science ... and the international environmental laws and standards that were in place in the time leading up to AET’s investment*” as referenced in paragraph 22 of the Application; and (b) limited in length to 30 pages (letter sized, double-spaced, Times New Roman font, pt 12);
 - iii. The NDP Submission shall be filed by Monday 16 June 2025; and
 - iv. The NDP Applicants’ other requests are dismissed.

On behalf of the Tribunal,

[signed]

Sir Christopher Greenwood
President of the Tribunal
Date: 17 April 2025

¹⁶ The NDP Application refers to the “*climate science consensus*” but it would obviously be inappropriate for the Tribunal in a preliminary role of this kind to take a position as to whether or not there is a consensus.