

**AD HOC ARBITRATION UNDER THE RULES OF ARBITRATION OF THE UNITED
NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**

AND

PURSUANT TO THE ENERGY CHARTER TREATY

NORD STREAM 2 AG

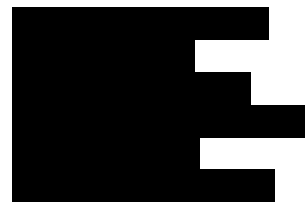
(Claimant)

VS

EUROPEAN UNION

(Respondent)

**EUROPEAN UNION
COUNTER-MEMORIAL ON THE MERITS**



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Exhibit R-40	Argus Media, 22 March 2021, “Nord Stream 2 pipelaying could end by October”, available at https://www.argusmedia.com/en/news/2198327-nord-stream-2-pipelaying-could-end-by-october
Exhibit R-41	Oil price, 26 March 2021, “Gazprom Nord Stream Construction to be completed in 2021”, available at: https://oilprice.com/Latest-Energy-News/World-News/Gazprom-Nord-Stream-2-Construction-To-Be-Completed-In-2021.html
Exhibit R-42	Countering America’s Adversaries Through Sanctions Act (CAATSA), H.R. 3364, Pub. L. 115-44, available at https://www.govinfo.gov/content/pkg/PLAW-115publ44/pdf/PLAW-115publ44.pdf .
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Exhibit R-44	Protecting Europe’s Energy Security Clarification Act (PEESCA), Section 1242, National Defense Authorisation Act for Fiscal Year 2021, available at https://www.congress.gov/116/bills/hr6395/BILLS-116hr6395enr.pdf (Exhibit R-44)
Exhibit R-45	Statement posted by ██████████ in its website, dated 19 December 2020, available at: ██████████

Exhibit number	Title
Exhibit R-46	S & P, 11 December 2020, "Nord Stream resumes gas link pipe laying work in German waters, available at: https://www.spglobal.com/platts/en/market-insights/latest-news/shipping/121120-nord-stream-2-resumes-gas-link-pipelaying-work-in-german-waters-operator
Exhibit R-47	Reuters, 6 February 2021, "Pipe laying for Nord Stream 2 restarts in Danish waters", available at https://www.reuters.com/article/us-russia-nordstream2-gas-pipes-idUSKBN2A600T
Exhibit R-48	Reuters, 26 February 2021, "[REDACTED], 16 others quit Nord Stream 2 pipeline", available at https://www.reuters.com/article/us-usa-nord-stream-2-companies-exclusive-idUSKBN2AO285
Exhibit R-49	Reuters, 19 January 2021, "Gazprom bond prospectus carries risk warning over Nord Stream 2", available at https://www.reuters.com/article/nordstream-gazprom-idUSL1N2JU0BX (Exhibit R-49)
Exhibit R-50	NSP2AG's "Company Response to the European Commission Initiative for Negotiations Between the EU and Russia on an Intergovernmental Agreement", available at https://www.nord-stream2.com/ru/dlia-pressy/novosti-i-meropriiatiia/company-response-to-the-european-commission-initiative-for-negotiations-between-the-eu-and-russia-on-an-intergovernmental-agreement-55/
Exhibit R-51	RWE's website: https://www.group.rwe/en/investor-relations/news-and-ad-hoc-announcements/news/archive-ir-announcements/2010/RWE-sells-Thyssengas-to-Macquarie
Exhibit R-52	European Commission Opinion on the certification of Thyssengas, C(2013)570, https://ec.europa.eu/energy/sites/ener/files/documents/2012_048_de_en.pdf
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Exhibit R-54	Statoil Annual Report 2016, p. 33, available at: https://www.equinor.com/content/dam/statoil/documents/annual-reports/2016/statoil-2016-annualreport-20-F.pdf.pdf
Exhibit R-55	CNBC, 19 August 2020, "Why Warren Buffet is betting on pipelines even as climate fears rise", available at: https://www.cnbc.com/2020/08/19/why-warren-buffett-is-betting-on-pipelines-even-as-climate-fears-rise.html
Exhibit R-56	S&P Global, 4 January 2021, "Norway's based DNV GL halts Nord Stream 2 certification work on US sanctions", available at: https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/010421-norway-based-dnv-gl-halts-nord-stream-2-certification-work-on-us-sanctions
Exhibit R-57	Press release of the Polish Competition Authority (UOKiK) of 10 July 2020, available at: https://www.uokik.gov.pl/news.php?news_id=16818
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Exhibit number	Title
Exhibit R-61	Reuters, "Putin says will fight for Nord Stream 2 pipeline project", 18 May 2018, available at: https://uk.reuters.com/article/us-russia-germany-putin-merkel-nordstrea/putin-says-will-fight-for-nord-stream-2-pipeline-project-idUSKCN1IJ1SW
Exhibit R-62	Reuters, "Lavrov: Nord Stream 2 will be completed despite difficulties", 19 May 2020, available at: https://www.reuters.com/article/us-russia-gas-nord-stream-2-idUSKBN22V240
Exhibit R-63	The World Bank Group, "Financial Sector Assessment Programme, Russian Federation, Role of State in Financial Services, Technical Note, July 2016, p. 7, available at: http://documents1.worldbank.org/curated/en/753211472557282940/pdf/108089-FSA-P157494-PUBLIC-Russia-FSAP-Update-II-TN-on-Role-of-State-in-FS.pdf
Exhibit R-64	Commission Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 8.11.2017, SWD(2017) 368 final, COM(2017) 660 final, pp. 5 and 6.
Exhibit R-65	Commission Staff Working Document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity (Explanatory Note)
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Exhibit R-67	Decision of the Bundesnetzagentur of 25 February 2009 with respect to OPAL, pp. 63-64.
Exhibit R-68	Commission Decision of 28 October 2016 on review of the exemption of the Ostseepipeline-Anbindungsleitung from the requirements on third party access and tariff regulation granted under Directive 2003/55/EC, para. 20
Exhibit R-69	ENTSOG, the European Natural Gas Network, Map, 29 October 2019,
Exhibit R-70	Part Two, Title VIII of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN
Exhibit R-71	Commission Opinion of 11.3.2013 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – the Netherlands and the United Kingdom – Certification of BBL Company VOF, C(2013)1526

Exhibit number	Title
Exhibit R-72	OFGEM Decision to derogate Interconnector (UK) from certain articles of Commission Regulation (EU) 2017/460: https://www.ofgem.gov.uk/system/files/docs/2018/07/17072018_iuk_a37_ofgem_derogation_letter_1.pdf .
Exhibit R-73	Steps of legislative procedure 2017/0294/COD
Exhibit R-74	https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1237-Commission-proposal-for-a-Directive-amending-Directive-2009-73-EC .
Exhibit R-75	Opinion of the European Economic and Social Committee on the proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (COM(2017) 660 final – 2017/0294 (COD)), 18 April 2018.
Exhibit R-76	Opinion of the European Committee of the Regions – Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 2018/C 361/09, 16 May 2018.
Exhibit R-77	Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, (COM(2017)0660 – C8-0394/2017 – 2017/0294(COD)), 11 April 2018.
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Exhibit R-79	Comments to the Proposal from national parliaments
Exhibit R-80	Presidency’s First Revision of the Proposal, from the General Secretariat of the Council to delegations, 27 March 2018
Exhibit R-81	Guidance for further technical work, from the Presidency to the Permanent Representatives Committee, 18 June 2018
Exhibit R-82	Further revised text of the draft directive from the General Secretariat of the Council to Delegations, 21 November 2018
Exhibit R-83	Information from the Presidency from the General Secretariat of the Council to the Council, 14 December 2018
Exhibit R-84	Third revised text of the draft directive from the General Secretariat of the Council to the Delegations, 9 January 2019;
Exhibit R-85	Mandate for negotiations with the European Parliament, from the General Secretariat of the Council to Permanent Representatives Committee, 4 February 2019
Exhibit R-86	Mandate for negotiations with the European Parliament, from the General Secretariat of the Council to Delegations, 11 February 2019
Exhibit R-87	Analysis of the final compromise text with a view to agreement, from the General Secretariat of the Council to Permanent Representatives Committee, 14 February 2019
Exhibit R-88	Analysis of the final compromise text with a view to agreement, from the General Secretariat of the Council to Permanent Representatives Committee, 19 February 2019
Exhibit R-89	Directive amending Directive 2009/73/EC, 5 April 2019

Exhibit number	Title
Exhibit R-90	Information Note, Outcome of the European Parliament's first reading, from the General Secretariat of the Council to Permanent Representatives Committee/Council, 7 April 2019
Exhibit R-91	Adoption of the legislative act, from the General Secretariat of the Council to Permanent Representatives Committee/Council, 9 April 2019.
Exhibit R-92	Voting result, DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (first reading) Adoption of the legislative act 3686th meeting of the COUNCIL OF THE EUROPEAN UNION (Agriculture and Fisheries) 15 April 2019, Luxembourg, ST 8610 2019 INIT.
Exhibit R-93	Legislative train schedule Resilient Energy Union with a climate change policy, Common rules for gas pipelines entering the EU internal market, https://www.europarl.europa.eu/legislative-train/theme-resilient-energy-union-with-a-climate-change-policy/file-common-rules-for-gas-pipelines-entering-the-eu-internal-market
Exhibit R-94	Activity Report, Developments and Trends of the Ordinary Legislative Procedure (8th parliamentary term)
Exhibit R-95	Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79 of 21.3.2019, p.1).
Exhibit R-96	EU Monitor, Interinstitutional Agreements
Exhibit R-97	Better Regulation Toolbox, available at: https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox_2.pdf , p. 48.
Exhibit R-98	COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE COMMITTEE OF THE REGIONS AND THE EUROPEAN INVESTMENT BANK, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy COM(2015) 80 final.
Exhibit R-99	Adoption procedures
Exhibit R-100	Commission Staff Working Document, Better Regulation Guidelines, SWD (2017) 350
Exhibit R-101	Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012

Exhibit number	Title
Exhibit R-102	Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9 (the 2017 IGA Decision).
Exhibit R-103	Have your say https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1237-Commission-proposal-for-a-Directive-amending-Directive-2009-73-EC .
Exhibit R-104	Public consultations
Exhibit R-105	Orsat Miljenić, "Energy Charter Treaty – Standards of Investment Protection", <i>Croatian International Relations Review</i> , XXIV (83) 2018, 52-83, at p. 65
Exhibit R-106	C.H. Schreuer, "Selected standards of treatment available under the Energy Charter Treaty", in <i>Investment Protection and the Energy Charter Treaty</i> (2008), pp. 63-115, p. 74.
Exhibit R-107	Decision of the Energy Charter Conference of 6 October 2019, Policy Options for Modernisation of the ECT, https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf
Exhibit R-108	Cross-border points between EU and non-EU countries

GLOSSARY

2012 IGA Decision	Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy
2015 Energy Strategy	Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee, The Committee Of The Regions And The European Investment Bank, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy
2017 IGA Decision	Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU
Amending Directive	Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending the Gas Directive
Annulment Application	NSP2AG's application to the General Court under Article 263 TFEU for annulment of the Amending Directive
Better Regulation Guidelines	Commission Staff Working Document CSW (2017) 350 of 7 July 2017, adopted following the Interinstitutional Agreement
Better Regulation Toolbox	Additional guidance and advice complementing the Better Regulation Guidelines
CAATSA	Countering America's Adversaries Through Sanctions Act
CETA	Comprehensive Economic and Trade Agreement
Claimant	NSP2AG
CPS	Constant Protection and Security
DG	Directorate General of the European Commission
DG Energy	Directorate-General for Energy of the European Commission
DNV GL	Det Norske Veritas GL
ECAs	Export Credit Agencies
ECJ	Court of Justice of the European Union
ECT	Energy Charter Treaty

EPP	European People's Party
EU	European Union
FET	Fair and Equitable Treatment
Financial Investors	Five multinational energy companies (Engie, OMV, Shell, Uniper and Wintershall) that agreed to provide part of the financing needed for the NS2 pipeline
Gas Directive	Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC
Gas Regulation	Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on Conditions for Access to the Natural Gas Transmission Networks and Repealing Regulation (EC) No 1775/2005
German FNA	German Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur)
GTA	Gazprom Export
ICJ	International Court of Justice
IGA Decisions	2012 IGA Decision and 2012 IGA Decision
IGAs	Intergovernmental agreements in the field of energy
ILC	International Law Commission
Interinstitutional Agreement	Interinstitutional Agreement on Better Law-Making of 13 April 2016 between the European Commission, the European Parliament, and the Council
ISO	Independent system operator
ITO	Independent transmission system operator
ITRE	European Parliament Committee on Industry, Research and Energy
LNG	Liquefied natural gas
MEP	Member of the European Parliament
MFN	Most Favoured Nation
NDAA	National Defense Authorization Act
NEL	Northern European natural gas pipeline (Nordeuropäischen Erdgasleitung)
NRA	National Regulatory Authority

NS2 pipeline	Nord Stream 2 pipeline
NSP2AG	Claimant
OU	Ownership unbundling
PAS	Pipeline Application System
PEESA	Protecting Europe's Energy Security Act
PEESCA	Protecting European Energy Security Clarification Act
PPI	Producer Price Index
PSS	Pressure Safety System
REIO	Regional Economic Integration Organisation
TEU	Treaty Establishing the European Union
TFEU	Treaty on the Functioning of the European Union
TGS	Transportadora de Gas del Sur
TPA	Third Party Access
TSO	Transmission system operator
VCLT	Vienna Convention on the Law of Treaties

1. INTRODUCTION AND SUMMARY

1. This Counter-Memorial provides the response of the European Union (EU) to the Memorial of Nord Stream 2 AG (the Claimant or NSP2AG) dated 3 July 2020. Section 1 provides a summary of the Counter-Memorial¹. Section 2 sets out the rebuttal to the Claimant's factual allegations. Section 3 contains the rebuttal to the Claimant's legal claims under the Energy Charter Treaty (ECT) based on those factual allegations. Finally, Section 4 sets out the EU's objections to the remedy sought by the Claimant.
2. This Counter-Memorial is without prejudice to the EU's position that the present dispute falls outside the Tribunal's jurisdiction for the reasons set out in its Memorial on Jurisdiction of 15 September 2020. Nothing in this Counter-Memorial should be construed as an admission that this dispute is properly before this Tribunal, or that the European Union may legitimately be held responsible for the breaches of the ECT alleged by the Claimant.
3. The present dispute is unprecedented in a number of fundamental respects, which set it apart from previous disputes under the ECT.
4. First, the Claimant is a Swiss based company (NSP2AG), fully owned by Gazprom, a Russian company, which is in turn owned and controlled by the Russian State. In practice, Gazprom is but a trade and political instrument of the Russian Government. The Claimant accuses the European Union of failure to respect certain standards relating to the treatment of foreign investments in the energy sector, as set out in the ECT. Ironically, Russia, which owns and controls Gazprom, has refused to become bound by the same standards vis-à-vis the European Union and its investors, despite being among the original signatories of the ECT. It would be difficult to conceive of a more egregious instance of double standards and free riding.
5. Second, by bringing this dispute, the Claimant's primary goal is not to obtain compensation for any damage allegedly caused by any EU measure. Rather, the Claimant's stated goal is to secure, with regard to the Nord Stream 2 pipeline (the NS2 pipeline), immunity from the generally applicable regulatory regime for gas applied by the European Union within its own territory.

¹ Section 1 summarises the subsequent sections. All relevant references and citations will be provided in sections 2 to 4.

6. The EU regulatory regime for gas pursues legitimate public policy objectives prescribed by the EU Treaties, including ensuring the functioning of a competitive and efficient market for gas and ensuring the security of gas supply. It is applicable to all transmission operators, regardless of their origin, and without any discrimination.
7. The EU's regulatory regime for gas is among the most advanced, fair and efficient regulatory regimes in the world, and it has provided a model for other countries, including many other Parties to the ECT.
8. The core component of the EU's regulatory regime for gas is Directive 2009/73/EC (the Gas Directive), which provides *inter alia* for the separation (unbundling) between production and transmission activities, third-party access (TPA), and tariff regulation.
9. Unbundling is a common regulatory approach to address the anti-competitive practices to which all network-bound industries are prone. Like the European Union, many other countries around the world, apply unbundling measures in the energy sector. In turn, TPA constitutes the cornerstone of network industry regulation. Tariff regulation is one of the most usual tools for regulating any industry supplying essential goods or services. Together, these three measures promote effective competition, fair access and rate setting and avoid abuse of dominant position.
10. The specific measure at issue in this dispute, the Amending Directive, clarifies that the Gas Directive applies to interconnectors between the European Union and third countries, such as the NS2 pipeline. By doing so, the Amending Directive makes a material contribution to the legitimate public policy objectives pursued by the Gas Directive, by ensuring that all market participants in the EU Single Market for gas – including those with a point of origin outside of EU territory – take part in that market on a level playing field and are equally bound by EU public policy on security of supply. The Amending Directive was adopted in accordance with the usual and proper legislative process. It did not involve “a dramatic and radical” regulatory change, but rather confirmed longstanding EU policy to apply the referenced disciplines on all market actors. The Amending Directive applies to the NS2 pipeline in the same way as to any other pipeline in like circumstances and, therefore, does not discriminate against the Claimant.
11. It is obvious, however, that the regulatory disciplines the EU imposes on participants in the Single Market for gas fail to accord with Gazprom's preferred business model. Gazprom currently enjoys an exclusive legal right over exports

of pipeline gas from Russia. Gazprom and its owner (Russia) are used to extract monopoly rents from that situation. Understandably, Gazprom and Russia would like to prevent the application of the Gas Directive to the NS2 pipeline and import into the EU the preferential status it enjoys in Russia. But the EU's confirmation that its generally applicable regulatory regime applies equally to all interconnectors, including the NS2 pipeline, cannot possibly constitute a breach of any of the EU's obligations under the ECT. If Gazprom wishes to sell its gas within the European Union, it is for Gazprom to adapt its business model to the EU's generally applicable regulatory regime, rather than the other way around.

12. Third, the Claimant's allegations that the Amending Directive will have a [REDACTED] [REDACTED] on its investment are manifestly speculative and premature.
13. As of the time of filing, it remains uncertain whether and when the NS2 pipeline ever will be operational for reasons that have nothing to do with the European Union. Even if the NS2 pipeline were eventually to become operational, any potential implications the Amending Directive might have on the operation or profitability of NSP2AG's investment will depend on the specific measures which the German authorities may or may not adopt with regard to the NS2 pipeline within the wide margin of discretion the Amending Directive accords to them, as well as on choices to be made by NSP2AG itself within the framework of any such measures.
14. The Claimant is well aware that its claims are speculative and premature. For that reason, the Claimant insists that the Tribunal should bifurcate its determinations on merits and damages and that the Tribunal should rule on the unprecedented injunctive relief it seeks as a first option, before establishing damages.
15. For the same reason, the Claimant has asserted the right to complete its case at a later stage, by introducing new evidence as the situation evolves. The European Union reserves the right to object to the production of such new evidence, as well as the right to produce new evidence in response. The European Union further reserves the right to request modifications to the timetable of the proceedings, should the Claimant produce new evidence, so as to ensure the equality of arms between the parties and safeguard the EU's defence rights.

1.1. The Claimant has failed to prove its factual allegations

1.1.1. The Amending Directive pursues legitimate and achievable public policy objectives

16. The Gas Directive is the centrepiece of the EU's generally applicable regulatory regime for gas. That regime pursues legitimate policy objectives in the field of energy, as prescribed by Article 194 of the Treaty on the Functioning of the European Union (TFEU). Those objectives include, in particular, ensuring the functioning of a competitive internal market and ensuring security of energy supply.
17. The Amending Directive makes a material contribution to those legitimate public policy objectives. While the Claimant may disagree with such objectives, it certainly cannot legitimately claim the Amending Directive's stated objectives are "specious" and "unachievable".
18. The Amending Directive clarifies that the EU internal market rules for gas established by the Gas Directive are applicable to all interconnectors, including interconnectors between the European Union and third countries, so as to ensure the full benefits of a competitive and well-functioning internal gas market, as well as to enhance security of supply.
19. By clarifying the applicability of the Gas Directive to the numerous onshore and offshore connections between the European Union and third countries, the Amending Directive enhances consistency in the application of the regulatory regime for gas and contributes to the proper functioning of the EU's internal market in natural gas. In this way, the Amending Directive also facilitates the operation of pipelines with non-EU countries and, consequently, trade with those countries.
20. By ensuring that TPA, tariff regulation and unbundling apply to all pipelines, the Amending Directive avoids distortions of competition and ensures a level playing field for all suppliers within the European Union, regardless of their origin. It notably avoids possible foreclosure risks that would otherwise result from control over an unregulated pipeline monopoly, thereby enhancing security of gas supply.
21. The Amending Directive also enhances transparency and provides legal certainty to market participants. This, in turn, improves security of supply by reducing the risk of disputes over the applicable rules for the operation of interconnectors.

1.1.2. The Amending Directive did not involve a “dramatic and radical regulatory change”

22. The Amending Directive did not involve a “dramatic and radical regulatory change”. As explained previously, the Amending Directive clarified that the Gas Directive applied to interconnectors between the European Union and third countries, such as the NS2 pipeline.
23. The Claimant is therefore wrong in asserting that, when NSP2AG adopted its Final Investment Decision regarding the NS2 pipeline in September 2015, the requirements of unbundling, tariff regulation and TPA did not apply to offshore import pipelines.
24. First, there were multiple indications prior to 2015 that the requirements of unbundling, tariff regulation and TPA laid down in the Gas Directive would apply to offshore import pipelines before the Amending Directive was enacted. Clear signals included the aims expressed in the recitals of the Gas Directive as well as its scope, which drew no distinction with regard to the origin or nature of pipelines to which it applied. Similarly, EU decisional practice attested to the applicability of the Gas Directive to gas pipelines linked to third countries. The applicability of the Gas Directive to offshore import pipelines was consistent also with EU Member States’ territorial jurisdiction under international law, not least because 140 kilometres of the NS2 pipeline were to run through German internal waters.
25. Second, independent from the Gas Directive and its later amendments, dominant undertakings operating offshore import pipelines, such as the proposed NS2 pipeline, were aware all along that they could be subject to requirements comparable to those applied through the Amending Directive by virtue of EU competition law. Completion of the NS2 pipeline was likely to bestow upon its operator a dominant position within the meaning of Article 102 of the TFEU, potentially rendering applicable EC Regulation 1/2003. Under the latter Regulation, the European Commission is empowered to adopt structural and behavioural remedies in order to intervene against breaches of EU competition law. Such remedies may include tariff regulation and the need to grant third-party access comparable to what is required under the Gas Directive.
26. Accordingly, in the eyes of a duly diligent investor, the Amending Directive did not result in a significant regulatory change, and even less so in a dramatic or radical one.

**1.1.3. The Amending Directive will not have the alleged [REDACTED]
[REDACTED] on NSP2AG's investment**

27. The Claimant's allegations that the Amending Directive will have a [REDACTED] [REDACTED] on its investment are premature, conjectural and without merit.
28. The construction of the NS2 pipeline is considerably behind schedule for reasons that are entirely non-attributable to the European Union, including in particular due to sanctions imposed or threatened by the United States against persons and entities involved in its construction or operation. Given these circumstances, it is uncertain when, if ever, the NS2 pipeline will become operational.
29. Even if the NS2 pipeline were eventually to become operational, any potential implication the Amending Directive might have on the operation or profitability of NSP2AG's investment will depend on the specific measures which the German authorities may or may not adopt with regard to the NS2 pipeline within the wide margin of discretion the Amending Directive accords to them, as well as on choices to be made by NSP2AG itself within the framework of any such measures.
30. The Claimant bases its premature, speculative and factually unsupported allegations of [REDACTED] on the premise that NSP2AG necessarily will have to comply in full with the requirements provided for in the Gas Directive with regard to unbundling, TPA and tariff regulation. Yet the Gas Directive allows EU Member States to grant derogations or exemptions from such requirements, on a case-by-case basis and subject to certain conditions. Moreover, ownership unbundling (OU) requirements may be deemed satisfied in the case of pipelines owned by public bodies, including foreign Governments, where the conditions of Article 9(6) of the Gas Directive are met. Even where unbundling requirements apply in full, Germany's *Energiewirtschaftsgesetz* (Energy Industry Act) allows operators, in certain situations, to choose among various unbundling models. In addition, in the case of import pipelines such as the NS2 pipeline, the specific conditions of operation are often determined through the conclusion of intergovernmental agreements (IGAs) between the European Union and/or EU Member States, on the one hand, and the country of export, on the other.
31. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
32. While compliance with the applicable requirements of the Amending Directive, as transposed and implemented by Germany, might well prevent NSP2AG from operating the NS2 pipeline “as originally intended” by NSP2AG, the Claimant has not shown that the operation of the pipeline in compliance with those requirements will have *per se* the alleged [REDACTED] on NSP2AG which it alleges.
33. In any event, NSP2AG could have avoided the alleged [REDACTED] by exercising due diligence when negotiating the GTA and the finance agreements.

1.1.4. The NS2 pipeline project was not “deliberately excluded” from the Derogation Regime

34. The Claimant’s allegations that there was a “deliberate exclusion” of the NS2 pipeline project from the derogation provided for in Article 49a of the Amending Directive, and a “specific targeting” of NSP2AG, are equally baseless. The Article 49a derogation regime is neutral and fits seamlessly with the other existing exemptions and flexibilities under the Gas Directive that together form a coherent system, covering all possible pipelines that that enter and distribute gas in the EU, including pipelines originating from a third country.
35. Under the Gas Directive, the principles of unbundling, TPA access and tariff regulation apply to all gas interconnectors between EU Member States, as well as to interconnectors between EU Member States and third countries. These principles apply to onshore interconnectors and offshore interconnectors alike. Exceptions to this rule exist in the form of Article 36 exemptions and Article 49a derogations. These exceptions are available, subject to the objective conditions set, to all gas interconnectors, between EU Member States, or between EU Member States and third countries, onshore or offshore. There is no “gap” between the possible flexibilities. As is natural for such regimes, specific procedures need to be followed and conditions must be met in order to obtain either an exception or a derogation.
36. Given the coherent framework established by the Gas Directive, with its rules and flexibilities, the Claimant is wrong to suggest that Gas Directive disciplines on unbundling, TPA and tariff regulation will necessarily apply fully to the NS2 pipeline project, without any potential flexibilities. Within this coherent legal

framework, the NS2 pipeline is not “singled out” or a “specific target” in one way or another. In fact, the Claimant itself argues that the German national regulatory authority (NRA) should grant it a derogation under Article 49a, having appealed the decision of the German NRA, i.e., the German Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (*Bundesnetzagentur*) (German FNA) and claiming that the requirement of being “completed” before 23 May 2019 is met. As long as this appeal is not decided, it remains possible that NSP2AG may obtain an Article 49a derogation.

37. Furthermore, even if NSP2AG were barred from obtaining an Article 49a derogation, it could still apply for an Article 36 exemption. The provisions of an Article 36 exemption can be as favourable to the transmission system operator (TSO) as those of an Article 49a derogation. Nothing in the text of Article 36 prevents NSP2AG from making such an application (which, to date, it has failed to do).
38. Finally, as for the decision to grant (or not) either an exemption or a derogation, the decision ultimately rests with the national regulatory agency, in application of conditions applied to all proposed projects. Any decision that Nord Stream 2 fails to comply with substantive conditions either for a derogation or an exemption (e.g. that its construction might have a negative impact on security of supply) is not inherently “discriminatory”, but rather depends on the rational application of objective criteria to the particular circumstances of this project, in the legitimate exercise of State regulatory powers.

1.1.5. The Claimant has failed to prove that the Amending Directive underwent an improper legislative process

39. The Claimant’s further allegations that the Amending Directive was adopted further to an improper legislative process² are equally baseless. The aim of the Amending Directive was to confirm the application of the EU regulatory regime to interconnectors between the European Union and third countries. Despite this limited scope, the Proposal for the Amending Directive was subject to intense scrutiny by all relevant actors. Its adoption followed all of the procedural steps required for a legislative act of its type. Negotiations between the European Parliament and the Council of the EU leading to its adoption were not “rushed”, but rather took place over 18 months: this corresponds to the average length of negotiations for legislative acts adopted in first reading. Where, as here a

² Claimant’s Memorial, paras. 249-260.

proposal merely confirms an existing interpretation and practice, it is unusual and redundant to require either an impact assessment of the future legislative act or an ex-post evaluation of the legislation in force. The Explanatory Memorandum accompanying the proposed amendment explained this clearly. In the legislative process, EU institutions thoroughly followed the Better Regulation Guidelines which were adopted on the basis of the Interinstitutional Agreement on Better Law-Making of 13 April 2016 between the European Commission, the European Parliament, and the Council of EU (the Interinstitutional Agreement). Overall, the legislative process that was followed for the adoption of the Amending Directive respected and exceeded the highest standards for democratic law-making.

1.1.6. The European Commission acted transparently

40. Finally, the Claimant's allegations that the European Commission failed to act transparently in its exchanges of information with NSP2AG between April and August 2019³ are wholly without merit. On 12 April 2019, NSP2AG contacted the European Commission as a representative of the EU, asking the European Commission to confirm that the NS2 pipeline would be treated as "completed" for the purposes of Article 49a of the Amending Directive. The European Commission promptly replied to NSP2AG's message and actively engaged in a dialogue, inviting NSP2AG to a meeting which took place on 25 June 2019 at the European Commission's premises. During the meeting of 25 June 2019 and in subsequent written communications, the European Commission explained that EU Member States enjoy discretion in achieving the objectives set by the Amending Directive. As such, in the case of the NS2 pipeline, the decision regarding whether the NS2 pipeline qualified as "completed" within the meaning of Article 49a of the Amending Directive was a matter to be decided by the German NRA, which would act in accordance with the German legislation that implemented the Amending Directive. The European Commission's responses therefore correctly informed the Claimant of the allocation of competences between the European Union and its Member States, as provided in EU law: in no way does this amount to a "lack of transparency".

1.2. NSP2AG's claims that the European Union has breached the ECT are baseless

³ Claimant's Memorial, para. 381(v).

**1.2.1. There is no breach of the Fair and Equitable Treatment (FET) Standard
in Article 10(1) of the ECT**

1.2.1.1. The European Union ensured due process and justice

41. Contrary to the Claimant's allegations, the European Union ensured due process and did not deny NSP2AG justice through the Order issued by the EU General Court in case T-526/19.⁴ In that matter, the Claimant had a fair hearing. The EU General Court found that NSP2AG lacked standing to pursue its claim as it failed to satisfy the requirements of Article 263(4) of the TFEU. An appeal against the EU General Court Order is currently pending before the Court of Justice of the European Union (ECJ) as case C-348/20 P. NSP2AG's failure to meet the requirements set by Article 263(4) of the TFEU does not amount to a denial of justice by the European Union, but rather amounts to the kind of legitimate jurisdictional decision that is taken daily by courts around the world. Disappointment over the outcome of a court decision does not amount to denial of justice, on any measure. Moreover, access to justice as regards questions of interpretation or validity of the Amending Directive can also be ensured in national proceedings through the use of the preliminary ruling procedure laid down in Article 267 TFEU. This procedure gives the national courts or tribunals of EU Member States the possibility to refer those questions to the ECJ for a preliminary ruling. When those courts or tribunals adjudicate in last resort under national law, they have to obligation to refer to the ECJ any questions of interpretation or validity of EU law raised before them.⁵

1.2.1.2. The European Union did not breach legitimate expectations

42. The ECT makes no reference to the protection of investors' legitimate expectations. Rather, it includes a commitment on the part of its Contracting Parties to accord fair and equitable treatment (FET) to the investments concerned. Contrary to the Claimant's submission, there is thus no general legal obligation for a host state to protect an investor's legitimate expectations. Nor would a breach of such expectations in itself suffice to demonstrate that the FET standard has not been complied with.

⁴ Order of the EU General Court of 20 May 2020, Case T-526/19, Nord Stream 2 AG v Parliament and Council (Exhibit RLA – 3).

⁵ In accordance with the third subparagraph of Article 267 TFEU, the court or tribunal of an EU Member State "against whose decisions there is no judicial remedy under national law", are obliged to refer questions of interpretation or validity of EU law to the ECJ.

43. Even if legitimate expectations were protected as such under the ECT (*quod non*), the Claimant's submission as to the conditions for such expectations to be invoked would need to be rectified as follows.
44. First, legitimate expectations may only be based upon a specific regulatory context aimed at inducing investments, which the Claimant has failed to identify.
45. Second, expectations may in any event only be invoked if they are reasonable, legitimate as well as justifiable, and if they have actually been relied upon by the investor when making the investment. However, in the present case there were clear indications before the Claimant adopted its financial investment decision on 4 September 2015 that the requirements of unbundling, tariff regulation and TPA would apply to pipelines such as the NS2 pipeline by virtue of the Gas Directive, and that the direction of travel of EU regulation was to confirm this position. Moreover, any duly diligent investor knew that similar requirements followed from EU competition law. Given this, the Claimant cannot claim that it exercised due diligence or that it familiarised itself at the relevant time with the applicable regulatory context and its likely future application. Indeed, several public statements by the European Commission and exchanges with the Russian Government between 2008 and 2015 were clear indications that the requirements of the Gas Directive and the Gas Regulation would apply to offshore import pipelines such as the NS 2 pipeline. Finally, the Claimant has not adduced any evidence that it actually relied on its alleged expectations when making the investment.
46. Third, legitimate expectations do not guarantee a stable legal or business environment in the sense of a regulatory regime that is fixed in time and cannot evolve or be clarified. As consistently held by arbitral tribunals, the State has a right to regulate and fairness does not mean immutability of the legal framework. Even if the Claimant could invoke legitimate expectations (*quod non*), the overriding public interest pursued by the Amending Directive would have justified the frustration of such expectation of regulatory stability.

1.2.1.3. The European Union acted proportionately

47. The allegation that the European Union acted disproportionately is premised on a series of interrelated factual allegations, all of which the Claimant has failed to prove. First, the Claimant has failed to prove that the Amending Directive will have the practical effects alleged by NSP2AG. Second, the stated objectives of the Amending Directive are neither "specious" nor "unachievable". To the contrary, its objectives are reasonable and reflect legitimate public policy goals,

rendering any impact on the Claimant's investment (which has not been proved) a legitimate exercise of EU police powers.

1.2.1.4. The European Union did not impair the investment by arbitrary or discriminatory measures

48. The Amending Directive is not arbitrary. The policy objective that the Amending Directive pursues, confirming that the aforementioned obligations of the Gas Directive are applicable to interconnectors with third countries, is the contribution to the creation of an internal market in natural gas, so as to achieve efficiency gains, competitive prices, and higher service standards, and to contribute to security of supply and sustainability. Clarifying that the obligations of the Gas Directive apply also to interconnectors with third countries serves to achieve this rational policy.
49. Moreover, the Amending Directive is not discriminatory. As a rule, the NS2 pipeline is subject, like other offshore and onshore third country import pipelines, to the obligations laid down in the Gas Directive, in particular the obligations of unbundling, TPA and tariff regulation. And just like investors in other offshore and onshore third country import pipelines, NSP2AG can apply to obtain flexibility under the Gas Directive. Decisions in respect of applications for an Article 36 exemption or an Article 49a derogation depend on a case-by-case analysis of the factual aspects of each project at issue in light of the applicable objective conditions.
50. Finally, even if the NS2 pipeline project would not obtain a flexibility under Article 49a or Article 36 – a point that the Claimant has not demonstrated – or would not rely on other OU models, Article 9(6) or an IGA, the full application of the Gas Directive to the NS2 pipeline serves a legitimate objective, namely addressing the foreclosure risks and risks for other anti-competitive practices that arise when production and transmission activities are combined in one company.
51. For the same reasons, the Claimant's claim that the Amending Directive would violate the national treatment and Most-Favoured-Nation obligations in Article 10(7) of the ECT must be rejected.

1.2.1.5. The European Union acted transparently

52. For the reasons explained above, the European Union did not fail to act transparently in its exchanges with NSP2AG between April and August 2019, as

the European Union shared with NSP2AG all the information that was in its power to share.

1.2.1.6. The European Union acted in good faith

53. The European Union acted in good faith by describing the genuine objectives of the Amending Directive, by pursuing those objectives throughout the legislative process that led to the adoption of the Amending Directive and during its exchanges with NSP2AG between April and August 2019.

1.2.2. The European Union has not breached its obligations under the Constant Protection and Security (CPS) standard in Article 10(1) of the ECT.

54. The European Union rejects the Claimant's allegation that it breached the CPS standard. First, the CPS standard does not provide for an obligation to provide legal security. Instead, it concerns the State obligation of due diligence with regard to physical integrity of the investor. Clearly, the Claimant does not allege a violation of such an obligation here. In any event, even if the Tribunal were to find that the CPS standard extended to so-called "legal security", it would find that nothing in the European Union's conduct amounts to a violation of even that misstatement of the CPS standard. The objectives of the Amending Directive were clearly stated and rationally linked to a legitimate public policy objective. The legislation was adopted following the usual principles and rules governing the EU's law-making procedures. The European Union responded to NSP2AG's queries regarding the legislation in a coherent and accurate fashion. The Amending Directive confirmed a longstanding EU interpretation of its existing legislation. As the European Union demonstrates in this Counter-Memorial, none of the arguments brought forward by the Claimant to assert the contrary are well-founded.

1.2.3. The European Union has not breached its obligations under Article 13 of the ECT.

55. The Amending Directive is a regulatory measure aimed at achieving a public welfare objective. It was enacted in accordance with due process and is applied in a non-discriminatory and proportional manner. As such, it is a legitimate exercise of the EU's police powers which cannot, therefore, be regarded as expropriatory. In any event, the Claimant has failed to demonstrate that the Amending Directive is tantamount to an expropriation, in that the Claimant has failed to demonstrate that it has suffered a substantial taking of its investment as a result of the adoption of the Amending Directive.

1.3. The relief sought by NSP2AG is inappropriate

56. The Claimant requests as its “primary relief” that the Tribunal order the European Union, “by means of its own choosing”, to “remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive (i.e., those provisions which became applicable to Nord Stream 2 as a result of the Amending Directive to NSP2AG and Nord Stream 2)”, thus “restoring the position that would have existed but for the EU’s breaches of the ECT”.
57. This is nothing more than a request for an interim and permanent injunction preventing the European Union from applying general rules of EU law.
58. Granting the Claimant’s request would amount to an extraordinary and unprecedented incursion into the EU’s sovereign right to regulate within the scope of their powers to promote public welfare objectives. Were it to grant the requested relief, the Tribunal would exceed its remedial jurisdiction in an unprecedented manner.
59. The Claimant’s requested relief lacks any secure foundation in general public international law. The power to grant such relief is not otherwise provided for under the ECT. Even if the power to grant an interim or final injunction of the kind as the one that is requested did exist (*quod non*), the Claimant manifestly fails to meet the conditions that would need to be met for it to be granted.
60. First, neither general remedial principles nor the specific rules developed for State-to-State disputes establish a right to enjoin the legitimate exercise of State regulatory power, in the specific context of an investor-State dispute.
61. Second, contrary to the Claimant’s assertion, the ECT does not give the Tribunal power to grant the relief requested by NSP2AG. The Claimant misreads the ECT, and the decisions on which it relies fail to support such a conclusion.
62. While the ordinary meaning of the ECT confirms that a tribunal may grant remedies beyond monetary compensation, such other potential remedies remain unspecified. Nor does the ECT set out the circumstances in which the grant of any such other remedies may be appropriate. Certainly, nowhere does the ECT expressly grant *ad hoc* tribunals the power to grant final injunctive relief, either as an alternative to monetary compensation or on its own.
63. The ECT should be interpreted in the general context of public international law, including the customary international rule that the exercise of State sovereignty may be limited only on the basis of an express rule. A presumption in favour of

- the free exercise of State sovereignty is among the most fundamental rules of public international law.
64. Tellingly, the Claimant has failed to provide any clear precedent for its remedial request in investor-State jurisprudence.
65. Third, apart from the issue of whether the Tribunal has the power to grant such a final injunction (*quod non*), the Claimant must first demonstrate that the conditions for an injunctive relief of any kind have been met in the present case. It has failed to do so.
66. Investor-State tribunals have consistently found that the grant of even an interim injunction is an exceptional remedy, and subject to stringent conditions. Notably, tribunals have considered that the following conditions, *inter alia*, must be met:
- a) urgency and necessity (the latter being interpreted as, the harm caused by failure to grant the injunction is not of the kind that could be compensated in damages);
 - b) that urgent and irreparable harm to the claimants exists, and “greatly” outweighs the harm that would be caused to a respondent State (that is, that the balance of convenience favours the grant of injunctive relief); and
 - c) that the loss must not be compensable in damages
- National courts apply similarly high standards.
67. Such stringent conditions, developed for interim injunctions, must also apply to the consideration of any final injunctive relief in light of public international law’s caution when restricting the exercise of State sovereignty.
68. In its arguments in favour of granting the injunctive relief it seeks, the Claimant puts forward only brief, self-serving allegations that entirely fail to fulfil any of the applicable criteria.

2. THE CLAIMANT HAS FAILED TO PROVE ITS FACTUAL ALLEGATIONS

2.1. The Amending Directive pursues legitimate and achievable policy objectives

2.1.1. Introduction

69. NSP2AG asserts that the reasons expressed by the EU institutions for enacting the Amending Directive are “specious”, as the Amending Directive is incapable of achieving its own stated objectives.⁶

70. The Gas Directive is the cornerstone of the EU’s generally applicable regime for gas. That regime pursues legitimate policy objectives of fundamental importance for the European Union, as required by Article 194(1) of the TFEU, which provides that:

In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:

- a) ensure the functioning of the energy market;
- b) ensure security of energy supply in the Union;
- c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
- d) promote the interconnection of energy networks⁷

71. The Amending Directive clarifies that the EU internal market rules enacted by the Gas Directive are applicable to all interconnectors, including interconnectors between the European Union and third countries. By doing so, the Amending Directive makes a material contribution to the legitimate public policy objectives pursued by the Gas Directive and, more generally, to the EU’s energy policy. The Claimant is therefore wrong in asserting that the stated objectives of the Amending Directive are “specious” and “unachievable”.

2.1.1.1. The objectives of the Gas Directive

72. The Gas Directive pursues the legitimate public welfare objectives prescribed by Article 194 TFEU, including, in particular, ensuring the functioning of a competitive internal market for natural gas in the European Union, as well as ensuring security of supply of natural gas.

a) Ensuring competition

73. Ensuring competition in the EU’s internal market is one of the main objectives of the European Union. This is reflected in Article 3(3) of the Treaty on the European Union (TEU), which states in relevant part that:

⁶ Claimant’s Memorial, paras. 270-303.

⁷ Article 194 of the TFEU (Exhibit RLA-69).

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.⁸ (Emphasis added.)

74. This objective is further elaborated in the rules on competition contained in Chapter 1 of Title VII of the TFEU. Those rules include rules against cartels (Article 101)⁹ and abuse of a dominant position by one or more undertakings (Article 102)¹⁰. Examples of the latter include directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions on suppliers or consumers;¹¹ or applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.¹²
75. Within the framework of the above treaty provisions the European Commission¹³ and the ECJ¹⁴ have frequently addressed the competition concerns raised by the

⁸ Article 3(3), first subparagraph of the Treaty on European Union, Exhibit RLA-70. See also Protocol No 27 to the TEU, (Exhibit RLA-71), which states the following:

"THE HIGH CONTRACTING PARTIES,
CONSIDERING that the internal market as set out in Article 3 of the Treaty on European Union includes a system ensuring that competition is not distorted,
HAVE AGREED that:

To this end, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union.

This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union".

⁹ (Exhibit RLA-69).

¹⁰ (Exhibit RLA-71).

¹¹ Article 102(a) of the TFEU (Exhibit RLA-1).

¹² Article 102(c) of the TFEU (Exhibit RLA-1).

¹³ See, e.g., Commission Decision of 26 November 2008 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Cases COMP/39.388 – German Electricity Wholesale Market and COMP/39.389 – German Electricity Balancing Market), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39388/39388_2796_3.pdf (Exhibit R-1); Commission Decision of 18 March 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.402 – RWE Gas Foreclosure), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf (Exhibit R-2); Commission Decision of 3 December 2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.316 – Gaz de France), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39316/39316_2298_3.pdf (Exhibit R-3); Commission Decision of 4 May 2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.317 – E.ON Gas), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39317/39317_1942_3.pdf (Exhibit R-4); Commission Decision of 29 September 2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.315–ENI), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39315/39315_3019_9.pdf (Exhibit R-5); Commission Decision of 17 December 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39849 – BEH Gas), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39849/39849_2692_4.pdf (Exhibit R-6); and Commission Decision of 24.5.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf (Exhibit R-7).

¹⁴ See, e.g., Court of Justice of the European Union, Case C-418/01 *IMS Health*, ECLI:EU:C:2004:257 (Exhibit RLA-72); Court of Justice of the European Union, Case C-7/97 *Oscar Bronner GmbH & Co. KG*

control over essential facilities, such as the interconnectors at issue in this dispute. The same type of competition concerns have led to the adoption of sectoral legislation regulating network industries, such as the Gas Directive at issue in this dispute.

b) Ensuring security of supply

76. Energy is one of the most basic necessities of modern societies and ensuring its supply is regarded as a fundamental policy objective in all countries. Indeed, the secure supply of energy is of vital importance not only for a country's economy, but also for the operation of its institutions and essential public services and even for the survival of its inhabitants.¹⁵
77. Natural gas plays an essential and ever-growing role in the energy balance of many countries, including the European Union, making gas security a key element in energy security.¹⁶
78. The importance accorded in the European Union to the security of supply of energy, including gas, is expressly reflected in Article 194 of the TFEU.
79. Security of energy supply has both a short term and a long-term dimension. In the short term, security of supply focuses on the ability to respond promptly to sudden changes within the supply-demand balance. In the long term, security of energy supply requires adequate investments in the production and distribution of energy and competitive energy markets.
80. As required by Article 194 of the TFEU, the objective of ensuring security of energy supply in the European Union informs all the legislation enacted by the European Union in the energy sector, including the Gas Directive and the Amending Directive. The contribution of the Amending Directive to this objective has been demonstrated in the Expert Report of Prof. Maduro¹⁷.

v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, ECLI:EU:C:1998:569 (Exhibit RLA-73); Court of Justice of the European Union, *Joined Cases C-241/91 P and C-242/91 P RTE and ITP v Commission (Magill)*, ECLI:EU:C:1995:98, paras. 48-57 (Exhibit RLA-74); Court of Justice of the European Union, *Joined cases 6/73 and 7-73 Commercial solvents v. Commission*, ECLI:EU:C:1974:18, para 25 (Exhibit RLA-75).

¹⁵ The WTO Panel report in the case DS 476, *European Union – Energy Sector*, found that security of gas supply was a matter of public order for the European Union, which could justify derogating from other provisions of the WTO GATS, pursuant to Article XIV(a) of the GATS. See WTO Panel Report, *EU-Energy Sector*, para. 7.1156, (Exhibit RLA-76).

¹⁶ See Communication from the Commission to the European Parliament and the Council on the short term resilience of the European gas system, Preparedness for a possible disruption of supplies from the East during the fall and winter of 2014/2015, 16.10.2014, COM(2014) 654 final (Exhibit R-8), which concluded that many EU Member States were still highly vulnerable because of their dependence of one single supplier, available at: https://ec.europa.eu/energy/sites/ener/files/documents/2014_stresstests_com_en.pdf

¹⁷ Expert Report by Prof. Maduro, paras. 237-245.

2.1.1.2. Key provisions of the Gas Directive

81. In order to achieve its objectives the Gas Directive provides *inter alia* for the separation (unbundling) between production and transmission activities, third-party access (TPA), and tariff regulation.

a) Unbundling

82. The unbundling rules aim at ensuring an effective separation of networks from activities of production and supply. As stated in Recital (6) of the Gas Directive, “without [such a separation] [...] there is a risk of discrimination not only in the operation of the network but also in the incentives for vertically integrated undertakings to invest adequately in their networks”.

83. In principle, the Gas Directive requires the EU Member States to ensure so-called “full ownership unbundling” (OU)¹⁸. The OU model implies the appointment of the owner of the gas transmission line as transmission system operator and its full independence from any production or supply interests¹⁹.

84. Nevertheless, with respect to transmission systems that belonged to vertically integrated systems on 3 September 2009, the Gas Directive allows Member States, at their discretion, to make available in their national legislation, in addition to the OU model, one or two alternative unbundling models²⁰, namely:

- 1) the independent system operator (ISO) model, pursuant to which an undertaking with production or supply interests may continue to own the gas transmission line, but must appoint an independent entity to carry out all the operator functions listed in the Gas Directive;²¹
- 2) the independent transmission system operator (ITO) model, pursuant to which an undertaking with production or supply interests may continue to own and operate the gas transmission line, subject to certain organizational and governance provisions aimed at safeguarding the independence of the ITO vis-à-vis the undertaking to which it belongs.²²

b) Tariff regulation

85. In order to prevent pipeline owners from abusing their transport monopoly position, the Gas Directive has conferred the power to set or approve tariffs or tariff methodologies to independent National Regulatory Authorities (NRAs).

¹⁸ Article 9(1) and 9(2) of the Gas Directive.

¹⁹ Article 9(1) and 9(2) of the Gas Directive.

²⁰ Article 9(8) of the Gas Directive.

²¹ Article 14 of the Gas Directive.

²² The requirements for the ISO and ITO models are set out in Articles 14-15 and Articles 17-23 of the Gas Directive, respectively. Additional competences of the NRA under the ISO and ITO models are set out in Article 41(3) and 41(5) of the Gas Directive, respectively.

While they must respect certain requirements set out in the Gas Directive (the methodologies must be non-discriminatory, transparent, reflect the actual costs incurred by an efficient economic operator and provide TSOs with appropriate incentives), NRAs enjoy wide discretion in developing or approving tariff-setting methodologies that are best suited to the network topology.²³

86. NRAs have an essential role in the application of the Gas Directive. They are responsible for taking decisions in relation to all regulatory issues of relevance to the proper functioning of the EU gas market.²⁴ Amongst other things, they approve tariffs and adopt decisions on certification,²⁵ exemptions²⁶ and derogations.²⁷ They are fully independent of any political or economic interest. To guarantee their independence and ensure that their powers are exercised in an impartial and transparent way, the NRAs are distinct and functionally independent from any other public or private entity and receive a separate budget allocation and autonomy with regard to its implementation.²⁸

c) Third party access

87. The Gas Directive also requires a system of TPA to the transmission and distribution system based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users.²⁹ Access to storage facilities and upstream pipeline networks shall also be ensured.³⁰

2.1.1.3. The objectives of the Amending Directive

88. The Amending Directive provides expressly that gas transmission pipelines to and from a third country shall be subject to the same rules as those set out in the Gas Directive which have been applicable to all gas transmission lines between EU Member States since 3 March 2011.

²³ See Article 41(1)(a) and recitals (31) and (32) of the Gas Directive.

²⁴ See Articles 40, 41 and 42 of the Gas Directive.

²⁵ The certification is the authorisation to operate transmission activities in the European Union under the Gas Directive, see article 10 of Directive 2009/73, whereby "*Before an undertaking is approved and designated as transmission system operator, it shall be certified according to the procedures laid down in paragraphs 4, 5 and 6 of this Article and in Article 3 of Regulation (EC) No 715/2009*". (Exhibit RLA-77).

²⁶ See Article 36 of Directive 2009/73, whereby major new gas infrastructures may, upon request, be exempted, for a defined period of time, from the main provisions of the Directive, under certain conditions (Exhibit RLA-77).

²⁷ See Article 49 of Gas Directive whereby gas transmission lines between a Member State and a third country completed before 23 May 2019, may get a derogation from the main provisions of the Directive, for a defined period of time and under certain conditions.

²⁸ See Article 39 and recital (30) of the Gas Directive;

²⁹ See Article 32 of the Gas Directive.

³⁰ See Article 33 and 34 of the Gas Directive.

89. As expressed in the Explanatory Memorandum attached to the Proposal for the Amending Directive, as well as in Recital (3) of the Amending Directive, the Amending Directive aims at clarifying the legal framework applicable to interconnectors with third countries. It addresses the legal uncertainty that existed previously in this regard and ascertains that the rules of the Gas Directive apply equally to onshore and offshore connections with third countries.
90. The Explanatory Memorandum also underlines that it is best, for a well-functioning gas market which is a prerequisite for enhancing security of gas supply, to ensure that transparency and competitiveness are also applied to pipelines from third countries.³¹
91. Recital (3) of the Amending Directive further explains the objectives of the Amending Directive. It reads as follows: *"[t]his Directive seeks to address the remaining obstacles to the completion of the internal market in natural gas resulting from the non-application of Union market rules to gas pipelines to and from third countries. The amendments introduced by this Directive will ensure that the rules applicable to gas transmission pipelines connecting two or more Member States, are also applicable to pipelines to and from third countries within the Union. This will establish consistency of the legal framework within the Union while avoiding distortion of competition in the internal energy market in the Union. It will also enhance transparency and provide legal certainty as regards the applicable legal regime to market participants, in particular investors in gas infrastructure and network users"*.

2.1.2. General benefits of the Amending Directive

92. As a form of "network regulation", the EU gas market regulation serves the main purpose of organising fair competition in a system in which gas pipelines constitute a natural monopoly. Clear rules on transmission grids notably aim at preventing dominant suppliers from distorting competition in the EU natural gas market by using their pipeline monopoly to unduly support supply interests. In contrast to Mr Cameron's thesis and as demonstrated by the expert report of

³¹ See Explanatory Memorandum: "[t]he internal gas market is considered to function well when gas can flow freely between Member States to where it is needed most and at a fair price. A functioning gas market is a prerequisite for enhancing security of gas supply in the Union. Since gas is transported mainly through pipelines, the interconnection of gas networks between Member States and non-discriminatory access to these networks are the basis for the market to function efficiently. It is also a prerequisite for gas deliveries during emergencies, both between Member States and with neighbouring third countries. The EU is to large extent dependent on gas imports from third countries and it is in the best interest of the EU and gas customers to have as much transparency and competitiveness also on pipelines from those countries".

- Prof. Maduro, these rules do have a manifest and tangible positive effect on competition.³²
93. The amendments to the Gas Directive introduced by the Amending Directive therefore clarify that the rules for transmission grids set out in the Gas Directive apply equally to gas interconnectors between EU Member States and third countries. Through this, such undertakings are prevented from abusing their monopoly position in gas sales to the EU.
94. The main benefit of the Amending Directive is thus that it establishes a clear legal basis for the application of the Gas Directive to the numerous onshore and offshore connections between the European Union and third countries, thereby ensuring a level playing field for all market operators in the EU territory regardless of their point of origin.
95. For most onshore gas interconnectors with third countries, these rules were already being applied in practice on the EU side of the respective interconnection points: this was the case, for example, for the Trans Adriatic Pipeline between Italy and Albania, pipelines connecting Germany and Italy with Switzerland or pipelines between Turkey and EU Member States. The Amending Directive has incorporated this practice into a legal framework. This ensures a consistent application of the necessary regulations and eliminates the risk of legal challenges regarding the application of the Gas Directive to such interconnectors in the future. It therefore ensures transparency and legal certainty, as demonstrated by the Expert Report of Prof. Maduro³³.
96. This regulatory clarification is particularly relevant for interconnections between Member States and the Contracting Parties of the Energy Community Treaty such as Ukraine and Serbia.³⁴ These countries have a legal obligation to transpose and implement the Gas Directive. However, the transposition was made effective in their case by replacing the term "Member States" by the term "Contracting Parties". This in effect meant that interconnectors between Member States of the EU, as well as interconnectors between Contracting Parties of the European Energy Community, were subject to the Gas Directive, while

³² Expert Report by Prof. Maduro, paras. 213-236.

³³ Expert Report by Prof. Maduro, paras. 246-251.

³⁴ The Energy Community is an international organisation which brings together the European Union and its neighbours to create an integrated pan-European energy market. It was founded by the Treaty establishing the Energy Community signed in October 2005 and is in force since July 2006. The objective of the Energy Community is to extend the EU internal energy market rules and principles to countries in South East Europe, the Black Sea region and beyond on the basis of a legally binding framework. Presently the Energy Community has nine Contracting Parties - Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Georgia, Moldova, Montenegro, Serbia and Ukraine, and three countries, Armenia, Norway and Turkey take part as Observers.

interconnectors between EU Member States and European Energy Community Contracting Parties were not clearly covered by the Gas Directive. In order to advance the aims of the Energy Community Treaty, the Energy Community Ministerial Council³⁵ and the European Commission³⁶ issued interpretations of the legal situation confirming that in the Commission's view interconnectors integrating the Parties to the EU internal energy market should be subject to the same rules as interconnectors between the Contracting Parties. The fact that such interpretative acts were required reflected the need to clarify the applicability of the Gas Directive. With the Amending Directive, the application of the Gas Directive to interconnectors between EU Member States and Energy Community Contracting Parties, on both sides of the respective interconnection points, ensures the establishment of a coherent framework for the transmission of gas between EU Member States and Energy Community Contracting Parties.

97. The amendments introduced by the Amending Directive confirm that the same set of requirements (including unbundling, TPA and tariff regulation) enshrined in the Gas Directive is applicable to interconnectors between EU Member States and interconnectors with third countries. For any given national gas market in an EU Member State, this creates a level playing field by putting suppliers using pipelines from other EU Member States and those using pipelines from third countries on equal footing. Therefore, it ensures that EU gas market rules respect the principle of equal treatment which requires that comparable situations must not be treated differently.³⁷ The European Union has a duty to ensure the respect of the general EU law principle of equal treatment, which entailed clarifying that the rules of the Gas Directive apply consistently to all pipelines running in its territory.³⁸
98. By explicitly bringing interconnectors with third countries within the scope of the Gas Directive, the Amending Directive clarifies that the full range of enforcement powers of NRAs is applicable to such interconnectors and their operators. This includes the powers: to carry out inspections at the premises of TSOs and ISOs (Article 41(3)(e)); to require any information from natural gas undertakings relevant for the fulfilment of its tasks (Article 41(4)(c)); to issue binding

³⁵ See Interpretation on integration of the energy markets of Contracting Parties and Member States at <https://www.energy-community.org/legal/other.html>. (Exhibit R-9).

³⁶ 2014/761/EU: Commission Recommendation of 29 October 2014 on the application of internal energy market rules between the EU Member States and the Energy Community Contracting Parties (Exhibit R-10).

³⁷ See, e.g., Judgment of the ECJ, in P and S, C-579/13, EU:C:2015:369, para. 41. (Exhibit RLA-78)

³⁸ See, e.g., Judgment of the ECJ of 30 January 2019, *Planta Tabak*, C-220/17, EU:C:2019:76, paras. 36-7 (Exhibit RLA-79) or Judgment of the ECJ of 4 May 2016, *Pillbox*, C-477/14, EU:C:2016:324, para. 35 (Exhibit RLA-80).

decisions on natural gas undertakings (Article 41(4)(a)); and to impose effective, proportionate and dissuasive penalties on natural gas undertakings not complying with their obligations under the Gas Directive (Article 41(4)(d)).

2.1.3. Specific benefits of the Amending Directive

2.1.3.1. Third-Party Access (TPA)

99. TPA comprises two elements: (i) the physical connection to the gas grid; and (ii) the right to use the grid by getting access to the necessary transmission capacities under fair and non-discriminatory terms. A wide range of TPA rules have been introduced in the European Union over the last two decades, following the experience that pipelines monopolies are regularly used to foreclose competitors from the market³⁹. These access rights have proven critical in avoiding distortions of the level playing field in the internal energy market, notably by dominant supply companies (tariff regulation, transparency, contractual arrangements, capacity allocation and congestion management rules, including “anti-hoarding” rules). In contrast to Mr Cameron’s thesis and as demonstrated by the expert report of Prof. Maduro, these rules do have a manifest and tangible positive effect on competition, not only on EU internal gas transmission networks, but also on interconnectors with third countries, including the NS2 pipeline.

2.1.3.2. Rights related to the connection to the pipeline

100. EU gas network rules are designed to prevent dominant suppliers from favouring their own supply business with regard to grid access, to the detriment of competitors. The most straightforward method for suppliers to avoid competition from third parties is to refuse access by not connecting them to their grids. NRAs are therefore obliged to ensure that TPA is not hampered by unfair connection tariffs or conditions.⁴⁰

³⁹ See, e.g., Report on the Energy Sector Inquiry from 2007, p. 47-66; https://ec.europa.eu/competition/sectors/energy/2005_inquiry/full_report_part1.pdf. (Exhibit R-11)

⁴⁰ See, e.g., the approval of grid connection tariffs by NRAs under Article 41 (6) of the Gas Directive; the obligation for NRAs to facilitate access to the network for new production capacity under Article 40(5) of the Gas Directive; Article 8 of the Gas Directive for fair/non-discriminatory technical connection rules; Article 8(6)(b) of Regulation (EC) No 715/2009; on the right to adopt EU Network Codes on Grid Connection (Exhibit RLA-81); and Article 23 of the Gas Directive on connecting certain groups of network users.

101. The EU gas grid is not conceived as a system of independent transit pipelines, but as an interconnected network. If EU law applies, TSOs may, under certain circumstances, be obliged to allow grid connection.⁴¹
102. This right to connect may well become relevant for NSP2AG in the future. As there are many suppliers in the North of the European Union, and many customers in the South of the European Union, some of those suppliers might request to be connected to the NS2 pipeline. The connection may also be requested with the aim of using the pipeline in reverse flow from the German market to the markets in the North, which would contribute to price convergence across EU markets. The Gas Directive ensures that NSP2AG cannot dismiss such requests to protect affiliated gas supply activities. Even if there may not be any actual connection requests today, this may change in the future, e.g., with the onset of hydrogen transports from third countries. From a legal assessment perspective, it is irrelevant if a right granted by EU law has already been used or is going to be used in the short term. What matters is that the beneficiaries (e.g., potential competitors of Gazprom) can use the rights granted by the Gas Directive if and when they need it during the lifetime of the pipeline. Further to the possibility of other networks connecting to offshore pipelines in a Member State's territorial sea, the application of core TPA requirements under the Directive (Article 32 of the Gas Directive) also implies the application of a wide range of rules detailing various aspects of fair contractual network access. This includes rules on TSOs and transparency in the Gas Directive, rules on congestion management procedures and capacity allocation methods in Gas Regulation (EC) No 715/2009⁴² (the Gas Regulation) and the Network Codes/Guidelines on Capacity Allocation Mechanisms and Congestion Management procedures adopted under the Gas Regulation.
103. The Claimant argues that the EU Network codes would not apply to the NS2 pipeline. This is not accurate: according to Article 2(2) of the Gas Regulation, the scope of application of the Gas Directive also entails the application of the Gas Regulation. It follows that the Gas Regulation includes the application of all Network Codes adopted on its basis.

⁴¹ See Article 23(2) of the Gas Directive for an explicit example of such connection rights in the Third Energy Package.

⁴² Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on Conditions for Access to the Natural Gas Transmission Networks and Repealing Regulation (EC) No 1775/2005 (Exhibit RLA-81).

104. It is true that several Network Codes (including the Network Code on capacity allocation mechanisms (NC CAM)⁴³ and the Network Code on harmonised transmission tariff structures (NC TAR)⁴⁴ provide that their application to interconnection points with third countries is, partly or entirely, subject to a decision by the respective Member State's NRA. In the absence of such decisions, these Network Codes (or the relevant parts thereof) would not be applicable to connection points with third countries. However, as far as Germany is concerned, the German FNA ((i.e., the German NRA) has adopted a decision to apply the NC CAM to connection points with third countries.⁴⁵ NC CAM thus applies to the NS2 pipeline.

2.1.3.3. Obligations for NSP2AG as a TSO – Article 13 of the Gas Directive

105. Article 13 of the Gas Directive sets out obligations to "*operate, maintain and develop under economic conditions secure, reliable and efficient transmission [...] facilities to secure an open market, with due regard to the environment, ensure adequate means to meet service obligations*". This means, *inter alia*, that TSOs are under an obligation to adequately maintain the gas transmission system and to reduce methane leakage.

106. Furthermore, Article 13 sets out a general non-discrimination obligation; thus, the TSO may not favour a vertically integrated undertaking over its competitors.

107. Article 13 (1)(c) and (d) furthermore set out information obligations. This obliges the TSO to make available all required information to other system operators (13(1)(c)) and to those requesting access to the system (13(1)(d)). In case of non-compliance, NRAs have a legal basis to take actions for enforcement.

2.1.3.4. Transparency rules – Article 16 of the Gas Directive

108. In addition to confirming applicability of the basic rules on unbundling, TPA and tariff regulation, the Amending Directive also ensures that Gas Directive rules on transparency apply to pipelines entering the EU from third countries.

109. Article 16(3) of the Gas Directive provides that "*information necessary for effective competition and the efficient functioning of the market shall be*

⁴³ Cf. Article 2 paragraph 1 of Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (Exhibit RLA-82).

⁴⁴ Cf. Article 2 paragraph 1 of Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas (Exhibit RLA-83).

⁴⁵ Cf. Determination BK7-15-001 of 14 August 2015, point 5: https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK7-GZ/2015/BK7-15-0001/BK7-15-001_Beschluss_englisch_download.pdf?blob=publicationFile&v=3; (Exhibit R-12)

made public". This is an expression of the TPA rule and can include, e.g., informing the market sufficiently in advance and in a transparent manner on planned maintenance periods, available capacity, and planned flows. Market participants can thus plan for possible flow interruptions on a given pipeline and hedge against their market impact. These transparency rights can be highly relevant for competing suppliers, as maintenance works influence market prices.

110. Article 16(1) of the Gas Directive sets out that the TSO "*shall prevent information about its own activities which may be commercially advantageous from being disclosed in a discriminatory manner*". This means that when such information is made available to the vertically integrated undertaking, it must also be made available on a non-discriminatory basis to other market participants. If only the vertically integrated undertaking is aware of planned maintenance on major import pipelines, this would give the vertically integrated undertaking a major advantage in gas trading on the internal market, as it can predict the effect (e.g., increased price in certain areas due to lower imports) of the maintenance. Maintenance periods could even be scheduled precisely to achieve such an effect (e.g., putting pressure in gas delivery contract negotiations).

2.1.3.5. Rules in the Gas Regulation on transparency, congestion management and capacity allocation procedures

111. The amendments introduced by the Amending Directive clarify that the Gas Regulation also applies to gas interconnectors with third countries located on EU territory.
112. The transparency requirements contained in Chapter 3 of Annex 1 of the Gas Regulation, the capacity allocation rules in Art 14 of the Gas Regulation and the CAM Network Code,⁴⁶ as well as congestion management rules in Chapter 2 of Annex 1 of the Gas Regulation are now applicable at the exit point from the interconnector.⁴⁷ The application of these rules leads to increased transparency on the interconnector as information is provided on the relevant point (e.g., for how long and in what amount capacity is booked on the interconnector, information about maintenance works). The application of congestion

⁴⁶ See Commission Regulation (EU) 2017/459 of 16 March 2017 establishing a network code on capacity allocation mechanisms in gas transmission systems and repealing Regulation (EU) No 984/2013 (Exhibit RLA-82).

⁴⁷ The exit point of the regulated section of the NS2 pipeline is now part of the German transmission system. Application of Network Codes (including NC CAM) is mandatory and not at the discretion of the NRA (as for connection points with third countries).

management rules provides network users the possibility to effectively gain access to the exit capacity from the interconnector,⁴⁸ even if the interconnector is contractually already fully booked.

113. These rules will become particularly important for enabling fair competition in the event that, at the request of other TSOs, the NS2 pipeline would be connected to another part of the EU pipeline network by way of a new connection.

2.1.3.6. Tariff regulation

114. Likewise, the application of tariff regulation (e.g., Article 41(6) of the Gas Directive and Article 13 of the Gas Regulation) to the NS2 pipeline underpins the TPA rules and is important to ensure a level playing field.
115. On the one hand, regulated tariffs (i.e., tariffs or the methodology used to calculate the tariffs for the use of a pipeline being set by the NRA) aim at preventing foreclosure of competitors by way of artificially high transmission tariffs. This could become relevant in case other users wish to use the NS2 pipeline, e.g., in the event that the current Russian export monopoly were to be lifted or a new pipeline were to connect to the NS2 pipeline.
116. On the other hand, regulated tariffs are also meant to prevent that suppliers holding a network monopoly exploit their monopoly power by charging artificially high transmission charges to their customers – to the detriment of consumers. In particular, if the transport customers themselves hold a dominant position in supplied countries (such as Gazprom in several EU markets), they may be able to pass on the artificially high prices to their customers, ultimately harming consumers.⁴⁹

2.1.3.7. Unbundling rules

117. In the regulatory framework governing the EU internal energy market, unbundling (i.e., the separation of energy transmission activities from activities of energy production and supply through regulatory means) is vital to prevent suppliers that own transmission pipelines from using their monopoly position to

⁴⁸ In the case of the NS2 pipeline, the exit capacity refers to the capacity at the “NS2 side” of the interconnection point Greifswald. So far, only the German side of the Greifswald interconnection point was regulated. With the Amending Directive, it is now clear that all the sides of the Greifswald interconnection point are subject to the rules of the Gas Directive.

⁴⁹ See in this context for example European Commission Decision of 18 March 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.402 – RWE Gas Foreclosure) (Exhibit R-2) which concerned the problem of a so-called “margin squeeze”, whereby a dominant supplier charges too high network tariffs to foreclose competitors.

- the detriment of consumers. Indeed, Article 9 of the Gas Directive requires that gas producers and suppliers not control a gas grid at the same time.
118. These unbundling rules are meant to provide for a more structural solution to the problem of network foreclosure than TPA rules which aim at instigating behavioural changes.⁵⁰
119. Especially in the event of a new connection to the NS2 pipeline, unbundling rules will play a crucial role to prevent abuses arising out of pipeline ownership.
120. In the absence of unbundling rules, there would be a risk that the pipeline owner (Gazprom) would use the NS2 pipeline to favour its own supply interests, e.g., by not granting fair TPA (even should the NS2 pipeline not be used at full capacity). The application of unbundling rules (Article 9 of the Gas Directive) is therefore highly relevant in the present case.
121. Depending on the unbundling model applied to a given offshore pipeline within EU territory, additional provisions can apply. For example, where the ITO model is applied, investment planning is required.⁵¹ That means the relevant TSO has to submit annual network expansion plans to the NRA which can require amendments to the plan. NRAs monitor the execution of the planned investments. If the TSO fails to realise a given project, the NRA can either force the TSO to execute it or bring in third-party investors of the EU Member State's choosing.
122. Moreover, Article 23 of the Gas Directive sets out specific obligations on ITOs to accept connections to the transmission system. Notably, the TSO is not entitled to refuse the connection of a new storage facility, a liquefied natural gas (LNG) regasification facility or an industrial customer on the grounds of possible future limitations to available network capacities or additional costs linked with necessary capacity increase.
123. These requirements prevent TSOs from foreclosing gas markets via a strategic underinvestment into network development.
124. NSP2AG claims that the limited coverage of the Amending Directive is such that it could not, in any event, contribute to its purported aims.⁵² It claims that the Directive would cover only approximately 16% (the NS2 pipeline capacity only), of third country import pipeline capacity.

⁵⁰ See, e.g., Impact Assessment for 3rd Energy Package, p. 33-37: https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2007/sec_2007_1179_en.pdf (Exhibit R-13).

⁵¹ See Article 22 of the Gas Directive.

⁵² Claimant's Memorial, paras. 302-303.

125. This is a misleading presentation of the facts. First, all import transmission lines are covered by the Gas Directive, both onshore and offshore. Some interconnectors are (or will be subject) to a derogation under Article 49a of the Amending Directive, based on the decision of the NRA, which in turn acts on the basis of the national transposing legislation. However, such derogations are temporary and may be subject to conditions. Moreover, some pipelines completed before the entry into force of the Amending Directive might not be covered by a derogation.
126. Second, EU rules apply to many interconnectors with third countries without any derogation. For example, EU rules apply to the interconnectors between EU Member States and Contracting Parties of the Energy Community, notably regarding the import pipelines from Ukraine towards Poland, Slovakia and Hungary. It is also the case in respect of the interconnectors between Hungary and Serbia and between Serbia and Bulgaria. EU rules also apply to the Yamal pipeline between Belarus and Poland and the three interconnectors between Ukraine and Romania. Interconnectors between Russia and EU Member States (Finland, Estonia, Latvia), Turkey and EU Member States (Bulgaria, Greece), the Trans Adriatic Pipeline connection between Italy and Albania, as well as the pipelines between Germany and Italy on one side and Switzerland on the other, are also subject to the Gas Directive. It is also relevant to point out that the offshore interconnectors between the United Kingdom and Belgium, Ireland and the Netherlands have become interconnectors with third countries after the withdrawal of the United Kingdom from the European Union. The Amending Directive ensures that the same legal framework applies to those pipelines.
127. Other future projects may also be covered by the Gas Directive. This could be the case, for example, for the planned EastMed project which may include an interconnector between Israel and Cyprus.
128. Therefore, NSP2AG's assertion that only 16% of the import capacity in the European Union would be subject to EU rules is misleading and factually wrong. Indeed, the pipelines currently benefitting from Article 49 a derogations account for only 27 % of the EU's import capacity. Those pipelines include the Nord Stream 1 pipeline (controlled, like the NS 2 pipeline, by Gazprom and the Russian Government), which accounts for 11 % of the EU's import capacity⁵³.

⁵³ This percentage has been derived from import capacity data reported by ENTSO-G and summarised in Exhibit R-108. ENTSO-G's data are publicly available at <https://transparency.entsog.eu/>

2.2. The Claimant has failed to prove that the Amending Directive involves a “dramatic and radical regulatory change”

2.2.1. Introduction

129. NSP2AG asserts that the European Union has amended the relevant legal framework in such a way as to create a dramatic change in its regulatory reach that undermines the basis of NSP2AG’s investment. NSP2AG’s claim is premised on the hypothesis that when NSP2AG’s adopted its financial investment decision regarding the NS2 pipeline on 4 September 2015, the requirements of unbundling, tariff regulation and TPA did not apply to offshore import pipelines and were only rendered applicable later on to pipelines such as the NS2 pipeline through the introduction of the Amending Directive.⁵⁴
130. The Respondent submits that this assertion as to a “dramatic and radical regulatory change” is baseless. First, there were clear indications that the requirements of unbundling, tariff regulation and TPA laid down in the Gas Directive would apply to offshore import pipelines before the Amending Directive was enacted and before the NSP2AG’s decision to invest was made. Second, notwithstanding the Gas Directive and subsequent amendments thereto, dominant undertakings operating offshore import pipelines such as the NS2 pipeline were aware that they could be subjected to comparable requirements by virtue of EU competition law. Accordingly, the Amending Directive did not result in a significant regulatory change, and even less so a dramatic or radical one.

2.2.2. The Claimant could have understood that the Gas Directive applied to gas pipelines importing gas into the European Union from third countries

131. The Claimant suggests it was caught off guard when the EU through the Amending Directive allegedly extended Gas Directive disciplines to pipelines entering the EU from third parties. In fact, far from being surprising, this move was consistent with longstanding trends in EU gas and related competition policy and practice, apparent to any sophisticated participant in the Single Market. In particular, the Gas Directive, as it applied before the Amending Directive was enacted, could reasonably have been interpreted so as to apply to offshore import gas pipelines such as the NS2 pipeline.
132. First, the outcome of such reasonable interpretation would have been apparent from the aims that the co-legislators (the Council of EU and European

⁵⁴ Claimant’s Memorial, para. 381(i).

- Parliament) pursued and that were clearly articulated in the recitals of the Gas Directive.
133. Recital (37) in particular noted that "natural gas is mainly, and increasingly, imported into the [EU] from third countries". Recital (22) stated that "security of supply of energy to the [EU] requires, in particular, an assessment of [...] the level of the [EU's] and individual Member States' dependence on energy supply from third countries, and the treatment of both domestic and foreign trade and investment in energy in a particular third country". The EU co-legislators were thus signalling the need for gas import pipelines from third countries into the European Union to be covered by the Gas Directive as part of achieving a comprehensive and effective legal framework for gas transmission activities in the European Union.
134. In view of the economic and political significance of energy imports into the European Union via pipelines from third countries, it was foreseeable that the EU co-legislators would seek to ensure that EU market disciplines governed the operation of such pipelines. The Gas Directive notably aimed at ensuring that gas supply within the European Union was undertaken in a manner that contributes to the European Union's objectives set out in that Directive, including by ensuring competitive gas prices resulting from competition between suppliers, and energy security, through multiplicity of suppliers and effective competition between them.
135. This conclusion was further corroborated by the statement in recital (35), which referred to the possibility of applying temporary derogations to pipelines "transporting gas from third countries" into the European Union. The possibility to grant derogations for pipelines transporting gas from third countries into the European Union implied that these pipelines were covered by the Directive in the first place.
136. Second, the likely applicability of the Gas Directive to offshore pipelines such as the NS2 pipeline was also apparent its provisions concerning its scope and reach. These provisions covered pipelines regardless of their origin and nature. As is evident from Article 1 (subject-matter and scope), the Gas Directive generally applied to natural gas transmission activities and laid down the criteria and procedure applicable to the operation of systems. The scope of the Gas Directive, as can be gleaned from its definitions of the terms "transmission", "system", as well as its rules, were neither explicitly nor implicitly confined to the onshore territory of EU Member States. Whilst the definition of "interconnector" mentioned transmission lines "between Member States", the

- European Commission considered that the applicability of the Gas Directive for pipelines such as the NS2 pipeline, in the context of the Gas Directive as a whole, was not to be excluded.⁵⁵
137. Rather, the aim of ensuring the comprehensive application of its rules to all facilities used to carry out gas transmission was confirmed by Article 13(1)(a) of the Gas Directive regarding tasks of TSOs. The requirement for TSOs to “operate, maintain and develop [...] transmission, storage and/or LNG facilities” applied to all such facilities. The application of the Gas Directive to import infrastructure could be further inferred from the choice of the co-legislators to provide full TPA to LNG terminals which had been, and have been since their construction, used almost exclusively for the import of LNG from third countries. Similarly, Article 34 of the Gas Directive applies to upstream pipelines, notably from Norway. Once again, this provision illustrates the co-legislators’ intention of not confining the scope of the Gas Directive to “domestic pipelines”.
138. Overall, the rules of the Gas Directive could reasonably have been interpreted as applying equally to offshore gas pipelines that carry out transmission activities, to the extent that such pipelines were located within the confines of EU Member States’ territorial jurisdiction. Moreover, investors that adopted such an interpretation would have seen their views confirmed by EU decisional practice regarding a number of gas pipelines linked to third countries. Such examples would include the Trans Adriatic Pipeline which passes through Albania, crosses Greece and reaches Italy but is subject to exemption decisions from the European Commission taken in 2013 and 2015. Another example would be the earlier Nabucco pipeline project which planned to link the Caspian region and Central Asia to the European Union via Turkey, Romania, Bulgaria and Hungary to Austria and which was subject to a number of exemption decisions. Furthermore, EU law was applied to a number of connections to third countries, e.g., between Germany and Italy at one end and Switzerland at the other end.⁵⁶
139. Third, the applicability of the Gas Directive to offshore import pipelines would have accorded with EU Member States’ territorial jurisdiction under international

⁵⁵ See, for example, (Exhibit R-14), proposal of the Commission for a mandate to negotiate an IGA https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1571 and (for electricity) (Exhibit R-15), Commission Statement on the interconnector definition annexed to the legislative resolution on Directive 2019/944, [https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2019/03-26/0226/P8_TA\(2019\)0226_EN.pdf](https://www.europarl.europa.eu/RegData/seance_pleniere/textes_adoptes/definitif/2019/03-26/0226/P8_TA(2019)0226_EN.pdf) (page 4) (Exhibit R-15).

⁵⁶ As regards the Interconnection point Germany-Switzerland “Wallbach” see the information at: <https://platform.prisma-capacity.eu/#/network-point/details/33107> (Exhibit R-16). As regards the virtual interconnection point DE-CH see the information at: <https://platform.prisma-capacity.eu/#/network-point/details/8650754>. (Exhibit R-17) As regards the Interconnection point Italy-Switzerland “Passo Gries” see the information at <https://platform.prisma-capacity.eu/#/network-point/details/1277956> (Exhibit R-18).

law. The territorial sea is an integral part of the territory of a State to which a State's jurisdiction is fully applicable. This must be taken into account where EU law refers to Member States or their territory. EU jurisdiction is undisputed over at least 140 kilometres of the NS2 pipeline that passes through German territory as well as German and Danish territorial waters. There is no reason why EU law would not apply within EU territory.⁵⁷ Indeed, the view was even taken in academic literature that pipelines such as the NS2 pipeline were subject to the Gas Directive in their entirety.⁵⁸

2.2.3. There were indications that the Gas Directive would apply to the NS2 pipeline

140. In light of the above, the Gas Directive could reasonably have been interpreted so as to apply to offshore import pipelines such as NS 2 before the Amending Directive was enacted. This interpretation would have been corroborated by a substantial number of public statements making clear that the requirements of unbundling, tariff regulation and TPA would apply to offshore import pipelines. These statements have been issued by the Commission before 4 September 2015, when NSP2AG alleges it took its so-called financial investment decision.
141. As early as 29 June 2010, the European Commission had informed the Russian Government of the correct interpretation of the Gas Directive. In a reply rendered public on 14 August 2012, the European Commission clarified that the Gas Directive applied to gas pipelines originating from a third country and entering the territory of a Member State.⁵⁹ Since NSP2AG is 100% owned by Gazprom, and Gazprom is effectively the petroleum arm of the Russian Government, NSP2AG must be assumed to have been informed of the EU's position on the applicability of the Gas Directive and the Gas Regulation (including its rules on unbundling, TPA and tariff regulation) from the date of its incorporation. This alone is determinative of the issue of NSP2AG's so-called "expectations".

⁵⁷ Rather, the European Commission issued, on 29 October 2014, Recommendation 2014/761/EU on the application of internal energy market rules between the EU Member States and the Energy Community Contracting Parties (OJ L 311/82) (Exhibit R-10), which stated in recital 6 that: "[t]he geographical application of the EU internal market legislation for gas and electricity comprises the entire territory of the EU".

⁵⁸ See *ex multis*, Szymon Zaręba, in Bulletin No. 104 (1044) of the Polish Institute of International Affairs (PISM), 3 November 2017 (Exhibit R-19).

⁵⁹ See <https://www.asktheeu.org/fr/request/168/response/558/attach/html/3/Annex%20reply%20GHP%20Shmatko%203rd%20package%202.pdf.html> (Exhibit R-20) question 3, page 2: "Gas pipelines originating from a Third country and entering the territory of a Member State are subject to the rules of the Gas Directive on the territory of this Member State, unless the legal framework is amended by a valid public law agreement (see below)".

142. Beyond this, in December 2013, the European Commission Director for energy markets delivered a speech in the European Parliament explaining that in the EU's view the Gas Directive and its requirements of unbundling, tariff regulation and TPA applied to trans-boundary projects such as those originating in Russia and entering EU territory. The speech was widely publicised via the media.⁶⁰
143. On 31 March 2014, an MEP submitted a question to the European Commission enquiring *inter alia* about the applicability of EU law to the NS2 pipeline project.⁶¹ The European Commission responded as follows: "[n]o exemption has been granted or requested for the [NS2] pipeline project. Should South Stream promoters decide to apply for exemption under the 3rd Energy Package, the Commission stands ready to review the national regulators decision on such requests".⁶² It followed from this reply that in the view of the European Commission the Gas Directive did apply to pipelines transporting gas from third States and therefore engaged the European Commission's power to give an opinion on the potential eligibility of such pipelines for exemptions through decisions taken at the EU Member State level within their margin of discretion. This reply was published in the EU Official Journal on 5 September 2014.⁶³
144. On 4 May 2014, Commissioner Oettinger issued a statement recalling that the South Stream pipeline had to meet the EU energy law requirements flowing *inter alia* from the Gas Directive, including access requirements to third parties and the obligation to split gas production from operating the infrastructure.⁶⁴ The similarities between the South Stream and NS2 pipelines would have led a duly diligent investor to understand that the Gas Directive would apply to pipelines such as the NS2 pipeline. South Stream was planned as an import pipeline from Russia to Bulgaria via the Black Sea. As such, it would have been similar in purpose, structure and length to the NS2 pipeline.
145. Finally, the following European Commission opinions, adopted and published before the financial investment decision regarding the NS2 pipeline was adopted on 4 September 2015, pointed to the applicability of the Gas Directive to pipelines importing gas from third countries to the European Union (and, in this respect, comparable to the NS2 pipeline):

⁶⁰ See, for instance, [South Stream bilateral deals breach EU law, Commission says](https://www.euractiv.com/section/competition/news/south-stream-bilateral-deals-breach-eu-law-commission-says/) <https://www.euractiv.com/section/competition/news/south-stream-bilateral-deals-breach-eu-law-commission-says/> (Exhibit R-21).

⁶¹ Parliamentary Question, E-001009/2014, 31st January 2014. (Exhibit R-22)

⁶² See response to Parliamentary Question E-001009/2014, 31st March 2014. (Exhibit R-23)

⁶³ OJ C 300, 05/09/2014 p.290 (Exhibit R-23).

⁶⁴ See <https://www.reuters.com/article/ukraine-crisis-pipeline-eu-idUSL6N0NU60U20140508> (Exhibit R-24).

(i) European Commission decision of 8 February 2008 on the exemption decision on the Austrian section of the Nabucco pipeline⁶⁵; and European Commission decision of 16 May 2013 on a prolongation of the effects of the exemption decision of Nabucco pipeline from TPA and tariff regulation.⁶⁶ The Nabucco pipeline entered the European Union from Turkey to Bulgaria and was crossing several EU Member States (Bulgaria, Rumania, Hungary and Austria). It was considered an interconnector between EU Member States and was exempted on the EU territory as such, i.e., from the border between Bulgaria and Turkey.

(ii) European Commission decision of 16 May 2013 on the exemption of the Trans Adriatic Pipeline from the requirements on TPA, tariff regulation and OU.⁶⁷ The Trans Adriatic Pipeline enters the European Union from Turkey to Greece, exiting the EU to Albania and re-entering the European Union through the sea from Albania to Italy. It was considered as an interconnector between Italy and Greece and also treated as an interconnector in Albania based on the fact that it links with EU Member States.

(iii) European Commission opinion of 15 March 2015 on the Certification of Gaz-System as the operator of the Polish section of Yamal-Europe Pipeline.⁶⁸ The Yamal pipeline is a pipeline entering Polish territory from Belorussia. EU legislation applies as of Polish territory. This opinion illustrates that also for the import of Russian gas via Belarus, the YAMAL pipeline is operated on EU territory in accordance with the EU legal framework.

146. The Claimant does not refer to any statement made by any EU institution that would have led to a different assessment of the applicability of the Gas Directive to the NS2 pipeline. Rather, the Claimant's Memorial refers solely to – mostly internal – communications that were drawn up as of 2017, long after the financial decision regarding NSP2AG had been taken.⁶⁹
147. In the light of the above, any reasonably informed financial investor familiarising itself with the Gas Directive and EU competition law⁷⁰ would have understood that its investment into an offshore pipeline exporting gas into an EU Member

⁶⁵ https://ec.europa.eu/energy/sites/ener/files/documents/2008_nabucco_decision_austria_en.pdf (Exhibit R-25).

⁶⁶ https://ec.europa.eu/energy/sites/ener/files/documents/2013_nabucco_decision_austria_en.pdf (Exhibit R-26).

⁶⁷ https://ec.europa.eu/energy/sites/ener/files/documents/2013_tap_decision_en.pdf (Exhibit R-27).

⁶⁸ https://ec.europa.eu/energy/sites/ener/files/documents/2015_108_pl_en.pdf (Exhibit R-28).

⁶⁹ See, in particular, Claimant's Memorial, paras. 206-216.

⁷⁰ Indeed, applying proper diligence would also have yielded the conclusion that EU competition rules would apply to undertakings with a dominant position and this irrespective of the place of establishment of the undertaking as long as there is a qualified effect on the EU internal market. See below section 2.2.4.

State was highly likely to be subject to EU rules on unbundling, TPA and tariff regulation.

148. NSP2AG points to the derogation that the Amending Directive included in Article 49a of the Gas Directive and to recital 4 of the Amending Directive which explains such derogation, *inter alia*, on the basis of a lack of specific EU rules regarding gas transmission lines to and from third countries. The Claimant interprets these provisions of the Amending Directive as an acknowledgment, on the part of the European Union, of an “instability in the conditions in which investments are made in the EU”.⁷¹
149. It is worth recalling that the Amending Directive was adopted on 17 April 2019, i.e., nearly four years after the financial investment decision regarding the NS2 pipeline had been made. The Amending Directive is irrelevant to the interpretation of the Gas Directive as it applied prior to the adoption of the Amending Directive. For the sake of completeness, the Respondent wishes to point out that the Amending Directive was adopted, *inter alia*, to bring about a greater degree of legal certainty regarding rules applicable to gas transmission lines to and from third countries.⁷² However, the legal situation that prevailed prior to the adoption of amendments cannot be inferred from such amendments aimed at ensuring greater clarity.

2.2.4. EU competition law prohibits abuses of a dominant position with the result that remedies such as unbundling, tariff regulation and TPA could be imposed prior to the adoption of the Amending Directive

150. The Respondent wishes to recall that when the financing decision regarding the NS2 pipeline was taken on 4 September 2015, and irrespective of the Gas Directive, requirements comparable to unbundling, TPA and tariff regulation could have applied to offshore pipelines operated by dominant undertakings as remedies, had such pipelines engaged in conduct qualifying as an abuse of a dominant position contrary to Article 102 of the TFEU. This follows from the EU competition law framework, and more particularly from Article 102 of the TFEU, the European Commission enforcement practice and the corresponding case law.
151. It follows from long-standing EU case law dating back to 1971 that the fact that an undertaking operating a pipeline is situated in a third country does not

⁷¹ Claimant’s Memorial, para. 381(ii).

⁷² The European Commission Proposal for the Amending Directive (COM/2017/0660 final - 2017/0294 (COD)) stated as follows under point 3: “[t]he content of the current proposal is limited to providing clarification in an area where applicable EU law (or the lack thereof) and applied practice diverge”. (Exhibit R-29).

prevent the application of Article 102 of the TFEU to its practices.⁷³ The ECJ has ever since emphasised that if the applicability of prohibitions laid down under competition law were dependent on the place where such practices had occurred, undertakings could easily evade such prohibitions.⁷⁴ Therefore, EU competition law applies to conduct which, while not adopted within the EU, may have anticompetitive effects liable to have an impact on the EU market.⁷⁵ This includes the operation of offshore pipelines importing gas into the EU internal market.

152. The NS2 pipeline is a gas pipeline establishing a direct link between Russia and the European consumers that is intended to ensure a reliable supply of Russian gas to the European Union at a time when there is a decline in EU domestic gas production and an increasing EU demand for imported gas.⁷⁶ It is likely to bestow upon its operator a dominant position, i.e., a position of economic strength that would enable its operator to prevent effective competition from being maintained on the relevant market by giving its operator the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.⁷⁷

153. Article 102 of the TFEU imposes on dominant undertakings a special responsibility not to allow their behaviour to impair genuine, undistorted competition on the internal market.⁷⁸ The European Commission and EU Member States' national competition authorities may intervene where undertakings abuse their dominant market position, including where prices charged by the dominant undertaking are excessive, i.e., where they have "no reasonable relation to the economic value of the product supplied".⁷⁹ Under EC Regulation 1/2003, the European Commission is empowered to adopt structural or behavioural remedies in order to bring an infringement of the rules of competition to an end. These could include tariff regulation comparable to what is required under the Gas Directive.

⁷³ See Judgment of 25 November 1971, *Béguelin Import*, 22/71, EU:C:1971:113, para. 11 (Exhibit RLA-84).

⁷⁴ See Case C-413/14 P, *Intel Corporation v Commission*, EU:C:2017:632 para 44 (Exhibit RLA-85); referring to Judgment of 27 September 1988, *Ahlström Osakeyhtiö and Others v Commission*, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, para. 16 (Exhibit RLA-86).

⁷⁵ See Case C-413/14 P, *Intel Corporation v Commission*, EU:C:2017:632 para. 45 (Exhibit RLA-19). See also Case T-102/96 *Gencor ECLI:EU:T:1999:65*, paras. 90-108 (Exhibit RLA-87).

⁷⁶ This is how Gazprom describes the the NS2 pipeline, see <https://www.gazprom.com/projects/nord-stream2/> (Exhibit R- 30).

⁷⁷ Case 27/76, *United Brands*, EU:C:1978:22, para. 65 (Exhibit RLA-88).

⁷⁸ See, most recently, Cases C-413/14 P, *Intel*, para. 135 (Exhibit RLA-85); Case C-23/14, *Post Danmark II*, para 71 (Exhibit RLA- 89); Case C-209/10, *Post Danmark I*, para. 23 (Exhibit RLA-90).

⁷⁹ Case 27/76, *United Brands*, para. 250 (emphasis added) (Exhibit RLA-88). See also Case 226/84, *British Leyland*, EU:C:1986:421, para. 27 (Exhibit RLA-91) and Case 26/75, *General Motors*, EU:C:1975:150, paras 12, 16 (Exhibit RLA-92).

154. Gas to be provided through the NS2 pipeline would appear to be an essential input for other undertakings to compete in downstream and/or complementary markets. Therefore, NSP2AG could be required under Article 102 of the TFEU to grant TPA if its product is indispensable to the exercise of a particular activity on a neighbouring market and if the refusal would be liable or likely to exclude any effective competition on that neighbouring market.⁸⁰
155. Gazprom, as the parent company of NSP2AG, could furthermore be required under Article 102 of the TFEU to ensure some form of structural separation between itself and NSP2AG akin to the unbundling models set out in the Gas Directive. Examples for the application of Article 102 of the TFEU to potentially anti-competitive behaviour of vertically integrated energy companies include the cases against RWE AG⁸¹ and ENI,⁸² both of which predate the creation of the Claimant and its alleged date of "Final Investment Decision" by over five years. In both cases, the European Commission identified evidence of a possible abuse of a dominant market position, notably by refusing access to their network, setting artificially high transmission tariffs and strategically limiting investment in their transmission system. The cases were closed on the basis of legally binding commitments which obliged RWE and ENI to divest their networks. Whilst it is true that such structural remedies, in the European Commission's decisional practice, have thus far been implemented through commitments offered by the undertakings concerned and made binding upon them by a European Commission decision pursuant to Article 9 of EC Regulation 1/2003, Article 7(1) of EC Regulation 1/2003 explicitly provides for the possibility to impose structural remedies by way of a decision ordering the undertaking to bring the infringement to an end.⁸³
156. Gazprom, the main developer and beneficiary of the NS2 pipeline, was no doubt fully acquainted with EU competition rules applicable to dominant undertakings

⁸⁰ See Case T-201/04, *Microsoft*, paras 332-334 (Exhibit RLA-93); Case C-7/97, *Bronner*, para 40 (Exhibit RLA-6); Joined Cases C-241/91 P and C-242/91 P Magill, EU:C:1995:98 para. 56 (Exhibit RLA-7).

⁸¹ European Commission Decision of 18 March 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.402 – RWE Gas Foreclosure), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf (Exhibit R-2).

⁸² European Commission Decision of 29 September 2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.315-ENI) https://ec.europa.eu/competition/antitrust/cases/dec_docs/39315/39315_3019_9.pdf (Exhibit R-5).

⁸³ "Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy." (Exhibit RLA-94).

and well aware of the risks of regulatory interventions regarding its activities. The behaviour of Gazprom was already in conflict with EU law many times before its investment decision. Gazprom has been subject to a series of EU antitrust cases concerning its anti-competitive supply practices and abuses of its dominant position in the last 15 years.⁸⁴ These cases prompted Gazprom to modify numerous supply contracts to end anti-competitive practices such as so-called “territorial restrictions” (i.e., prohibitions to export gas to destinations other than the destination country), excessive prices and other practices through which Gazprom obtained anti-competitive advantages and leveraged its dominant position to customers.⁸⁵ It is difficult to follow the Claimant’s allegation that the applicability of EU rules to its pipelines was a “surprise” given that the cases against Gazprom were the most prominent energy regulation cases at that time.⁸⁶ Gazprom held a dominant position in the gas supply markets in at least 8 EU Member States in 2015, with a supply share that exceeded 50% and in some cases reached 100% in Central and Eastern European countries.⁸⁷ Any company holding as important a supply position as that of Gazprom could have expected that it would need to take necessary precautions in order to ensure full regulatory alignment. It certainly would not, acting as a rational and informed market actor, deliberately structure its transaction regarding activity in the EU on the assumption that EU regulatory frameworks would never apply to it. Such a position would be fundamentally unreasonable, and can in no way give rise to a valid claim of disappointed “expectations”, under the ECT or otherwise at law.

2.3. The Claimant has failed to prove that the Amending Directive will have the alleged [REDACTED] on NSP2AG’s investment

2.3.1. Introduction

157. In this section, the European Union will rebut the Claimant’s factual allegation that the Amending Directive will have a [REDACTED] on NSP2AG’s

⁸⁴ See case AT.37811 - Territorial Restrictions 1) Algerian gas export contracts 2) Expansion of TAG pipeline summarised in press release IP/03/1345, https://ec.europa.eu/commission/presscorner/detail/en/IP_03_1345 (Exhibit R-31); case AT.38085 Territorial restrictions - PO/Territorial restrictions - Austria summarised in press release (IP/05/195), https://ec.europa.eu/commission/presscorner/detail/en/IP_05_195 (Exhibit R-32); see also *Nyssens/Cultrera/Schnichels*, The territorial restrictions case in the gas sector: a state of play, Competition Policy Newsletter 2003, https://ec.europa.eu/competition/publications/cpn/2004_1_48.pdf (Exhibit R-33).

⁸⁵ Case AT.39816 Upstream gas supplies in Central and Eastern Europe, summarised in press release IP/18/3821 - https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3921 (Exhibit R-34).

⁸⁶ See for instance, from articles in the press: <https://www.ceps.eu/ceps-publications/commission-v-gazprom-antitrust-clash-decade/> (Exhibit R-35).

⁸⁷ See European Commission Press Release of 22 April 2015, IP/15/4828 (Exhibit R-35).

investment in the NS2 pipeline⁸⁸. The European Union will address NSP2AG's legal claims based on that factual allegation in sections 3.1.4. and 3.4.

158. The Claimant speculates that NSP2AG will have to implement in full the requirements stipulated in the Amending Directive with regard to unbundling, TPA and tariff regulation in respect of the NS2 pipeline. The Claimant alleges that compliance with those requirements is incompatible with the GTA⁸⁹ [REDACTED]

[REDACTED]

159. As the European Union will show below, the "impact" of the Amending Directive on NSP2AG's investment remains highly uncertain. The Claimant's allegations of [REDACTED] are conjectural and without merit.

160. First, the construction of the NS2 pipeline is already considerably behind schedule for reasons that are not attributable to the European Union, including in particular the sanctions imposed or threatened by the United States against persons and entities involved in its construction. As a result, it is uncertain when, if ever, the NS2 pipeline will be operational.

161. Second, even if the pipeline were to become operational, the "impact" of the Amending Directive on NSP2AG's investment will flow only from measures that the German authorities may or may not adopt within the wide margin of discretion accorded to them by the Amending Directive, as well as from choices to be made by NSP2AG itself within the framework of those measures.

162. Even assuming that NSP2AG had to comply in full with the requirements of the Amending Directive, as transposed and implemented by Germany, in relation to unbundling, TPA and tariff regulation, the Claimant has failed to prove that NSP2AG cannot comply with those requirements while operating the NS2 pipeline.

⁸⁸ Claimant's Memorial, Section VII.

⁸⁹ Claimant's Memorial, Section VII.2.

[REDACTED]

163. While compliance with the applicable requirements of the Amending Directive, as transposed and implemented by Germany, may well prevent NSP2AG from operating the NS2 pipeline “as originally intended” by NSP2AG,⁹⁴ the Claimant has not shown that the operation of the pipeline in compliance with those requirements will have *per se* the alleged [REDACTED] on NSP2AG.
164. In any event, NSP2AG could have avoided any alleged [REDACTED] by exercising due diligence when negotiating the GTA and the finance agreements.

2.3.2. Preliminary considerations: identification of the relevant alleged “impacts” for the purposes of this dispute

165. Before addressing the Claimant’s allegation that the Amending Directive will have a [REDACTED] on NSP2AG’s investment in the NS2 pipeline, it is appropriate to set out a number of preliminary considerations in order to circumscribe the alleged effects of the EU measures at issue on the Claimant’s investment. As explained below, those effects, which are the only relevant ones for the purposes of this arbitration, must be carefully distinguished from the effects of those measures on other persons or entities, as well as from the effects on the Claimant’s investment of facts not attributable to the European Union or its Member States.

2.3.2.1. The effects of the Amending Directive on Gazprom’s or on the Financial Investors’ investments in NSP2AG are outside the scope of this arbitration

166. The present arbitration concerns exclusively the claims brought by NSP2AG (a Swiss investor) in respect of the NS2 pipeline, an investment partly made within the territory of the European Union. Only the alleged effects of the Amending Directive on that investment can possibly fall within the scope of the Tribunal’s jurisdiction.
167. By contrast, any investments made by either Gazprom (a Russian entity) or the Financial Investors (EU entities) in NSP2AG (a Swiss investor) are beyond the scope of this arbitration. Any alleged impact of the Amending Directive on those investments is, therefore, irrelevant for the purposes of ruling on NSP2AG’s claims in this arbitration.
168. In particular, any alleged losses or other prejudice that Gazprom might suffer as shareholder, [REDACTED] to NSP2AG cannot be invoked in support of the Claimant’s allegation that the Amending Directive has a [REDACTED] on NSP2AG’s investment. Thus, for example, the risk

⁹⁴ Claimant’s Memorial, Section VII.2.

alleged by the Claimant that the [REDACTED]
[REDACTED]⁹⁵ cannot be regarded as evidence of the alleged
[REDACTED] of the Amending Directive on NSP2AG's investment.

2.3.2.2. The Claimant seeks to rely on the effects of extraneous factors that are not attributable to the European Union

169. In support of its allegation that the Amending Directive will have a [REDACTED] [REDACTED] on its investment, the Claimant seeks to rely on the consequences of certain events or circumstances which are not attributable to the European Union but rather to the Claimant itself and/or to third parties.
170. Notably, the Claimant repeatedly invokes the sanctions imposed or threatened by the United States⁹⁶ against entities involved in the construction or operation of the NS2 pipeline as a contributing factor to the alleged [REDACTED] of the Amending Directive on NSP2AG. For example, the Claimant alludes to those sanctions in order to prove the [REDACTED]
[REDACTED]
[REDACTED] It is plain, however, that the European Union cannot be held responsible for the "impact" of those U.S. sanctions. Insofar as the [REDACTED] alleged by the Claimant depends on the effects of those or any subsequent U.S. sanctions, the requisite causal link between the alleged impact and the Amending Directive is missing.
171. Similarly, the Claimant repeatedly invokes the fact that Gazprom has been granted a monopoly under Russian law on exports of pipeline gas from Russia as a constraint that prevents NSP2AG from complying with the Amending Directive.⁹⁹ It is Russia's prerogative to grant such export monopoly within the limits of its jurisdiction. However, the European Union cannot be held responsible for any impact on NSP2AG that may result from NSP2AG's inability to comply with EU law as a result of that export monopoly. If Russia, which controls both NSP2AG and Gazprom, wishes to sell gas in the European Union, it is for Russia to adapt itself to EU laws, not the other way around.¹⁰⁰

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[REDACTED]
Described in [REDACTED]

See, e.g., Claimant's Memorial, paras. 331 and 338.

The European Union notes that Russia has already lifted similar export monopolies previously granted to state owned enterprises with regard to LNG and oil. See, e.g., website of PAO Novatek, available at: <https://www.novatek.ru/en/business/marketing/gasmarketing/> (Exhibit R-37).

2.3.2.3. The delays in the construction of the NS2 pipeline, and the ensuing additional costs for NSP2AG, cannot be attributed to the Amending Directive

172. The construction of the NS2 pipeline is considerably behind schedule. According to [REDACTED], [REDACTED] As of June 2020, NSP2AG's expectation was that construction would not be finished until the end of 2020 or the beginning of 2021.¹⁰² As of the time of filing this submission, there are indications that the pipe-laying work may not be finished until the autumn of 2021.¹⁰³ According to [REDACTED], the lost revenue to NSP2AG is in the amount of approximately [REDACTED] per month.¹⁰⁴
173. The recurring delays in the construction of the pipeline, and the ensuing costs, are not attributable to the Amending Directive. Rather, they have arisen due to other factors for which the European Union bears no responsibility.
174. Those factors include, in particular, the sanctions imposed or threatened by the United States pursuant to: the *Countering America's Adversaries Through Sanctions Act* (CAATSA) of 2017;¹⁰⁵ the *Protecting Europe's Energy Security Act* (PEESA), adopted as part of the *National Defense Authorization Act* (NDAA) for fiscal year 2020 (NDAA 2020);¹⁰⁶ and the *Protecting European Energy Security Clarification Act* (PEESCA), adopted as part of the *National Defense Authorization Act* for fiscal year 2021 (NDAA 2021).¹⁰⁷
175. PEESA targeted pipe-laying vessels engaged in the construction of the NS2 pipeline, as well as foreign persons or entities making those vessels available.
[REDACTED]

¹⁰² Statement by Gazprom's head of investor relations, Mr Anton Demchenko, in June 2020, quoted by S&P Global, 22 June 2020, available at <https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/062220-gazprom-still-eyeing-nord-stream-2-completion-by-end-2020start-2021-report> (Exhibit R-38).

¹⁰³ Argus Media, 8 March 2021, "Nord Stream 2 work continues", 8 March 2021 <https://www.argusmedia.com/en/news/2193735-nord-stream-2-work-continues> (Exhibit R-39); Argus Media, 22 March 2021, "Nord Stream 2 pipelaying could end by October", available at <https://www.argusmedia.com/en/news/2198327-nord-stream-2-pipelaying-could-end-by-october> (Exhibit R-40); Oil price, 26 March 2021, "Gazprom Nord Stream Construction to be completed in 2021", available at: <https://oilprice.com/Latest-Energy-News/World-News/Gazprom-Nord-Stream-2-Construction-To-Be-Completed-In-2021.html> (Exhibit R-41).

¹⁰⁴ [REDACTED]

¹⁰⁵ *Countering America's Adversaries Through Sanctions Act* (CAATSA), H.R. 3364, Pub. L. 115-44, available at <https://www.govinfo.gov/content/pkg/PLAW-115publ44/pdf/PLAW-115publ44.pdf> (Exhibit R-42).

¹⁰⁶ *Protecting Europe's Energy Security Act* (PEESA), Title LXXV, *National Defense Authorization Act for Fiscal Year 2020*, Pub. L. No. 116-92, available at: <https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf> (Exhibit R-43).

¹⁰⁷ *Protecting Europe's Energy Security Clarification Act* (PEESCA), Section 1242, *National Defense Authorisation Act for Fiscal Year 2021*, available at <https://www.congress.gov/116/bills/hr6395/BILLS-116hr6395enr.pdf> (Exhibit R-44).

██████████ ██████████ In anticipation of the enactment of these sanctions, ██████████ suspended its NS2 pipe-laying activities in December 2019.¹⁰⁹ Pipe-laying was not resumed before December 2020, at that time only for a very short section in German waters,¹¹⁰ and then in February 2021 in Danish waters.¹¹¹

176. PEESCA further extended the scope of application of the U.S. sanctions. Activities targeted by PEESCA include vessel-related transactions for the construction of the NS2 pipeline and the provision of insurance to such vessels. As a result, 18 European companies, including those providing certification, insurance and engineering services (e.g., ██████████ ██████████ ██████████) have withdrawn from the project¹¹². This means that, even if the construction of the NS2 pipeline is finished (which remains uncertain), the pipeline faces challenging prospects of ever being either certified or insured, in effect leaving it unusable.
177. In view of the obstacles resulting from U.S. sanctions, it remains highly uncertain whether and when the NS2 pipeline will become operational. Indeed, Gazprom has been forced to disclose publicly the risk that the NS2 pipeline project may be suspended or scrapped as a result of the U.S. sanctions.¹¹³

2.3.3. The practical “impact” of the Amending Directive, as transposed and implemented by Germany, on NSP2AG’s investment remains highly uncertain at this stage

178. The practical “impact” of the Amending Directive, as transposed and implemented by Germany, on NSP2AG’s investment in the NS2 pipeline remains highly uncertain at this stage. The Claimant’s allegation of ██████████ is, therefore, premature and speculative.

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110 S & P, 11 December 2020, “Nord Stream resumes gas link pipe laying work in German waters, available at: <https://www.spglobal.com/platts/en/market-insights/latest-news/shipping/121120-nord-stream-2-resumes-gas-link-pipelaying-work-in-german-waters-operator> (Exhibit R-46).

111 Reuters, 6 February 2021, “Pipe laying for Nord Stream 2 restarts in Danish waters”, available at <https://www.reuters.com/article/us-russia-nordstream2-gas-pipes-idUSKBN2A600T> (Exhibit R-47).

112 Reuters, 26 February 2021, “██████████, 16 others quit Nord Stream 2 pipeline”, available at <https://www.reuters.com/article/us-usa-nord-stream-2-companies-exclusive-idUSKBN2AO285> (Exhibit R-48).

113 Reuters, 19 January 2021, “Gazprom bond prospectus carries risk warning over Nord Stream 2”, available at <https://www.reuters.com/article/nordstream-gazprom-idUSL1N2JU0BX> (Exhibit R-49).

179. In the first place, as previously explained, the construction of the NS2 pipeline is considerably behind schedule for reasons that are not attributable to the European Union, including in particular the sanctions imposed or threatened by the United States. As a result, it is very uncertain when, if ever, the NS2 pipeline will become operational.
180. In any event, the Amending Directive imposes no obligation on the Claimant.¹¹⁴ Therefore, the Amending Directive cannot have as such any “impact” on the Claimant, let alone the [REDACTED] alleged by the Claimant. Only the measures taken by Germany when transposing and implementing the Amending Directive can have an “impact” on NSP2AG’s investments.
181. EU Member States have a broad margin of discretion when transposing and implementing the relevant provisions of the Gas Directive, as modified by the Amending Directive.¹¹⁵ The “impact” of the Amending Directive on NSP2AG’s investment will depend, to a very large extent, on measures which the German authorities may or may not take with regard to the NS2 pipeline within the scope of that margin of discretion.
182. Moreover, the “impact” on NSP2AG’s investment will also depend on the choices to be made by NSP2AG itself within the framework of the measures taken by Germany for transposing and implementing the Directive.¹¹⁶
183. The Claimant bases its allegations of [REDACTED] on the premise that NSP2AG will necessarily have to comply in full with the requirements provided for in the Gas Directive with regard to unbundling, TPA and tariff regulation.
184. Yet, as explained in greater detail below, the Gas Directive allows the EU Member States to grant derogations or exemptions from those requirements, on a case-by-case basis and subject to certain conditions. Moreover, even where the unbundling requirements apply in full, Germany’s Energy Industry Act allows each operator, in certain situations, to choose among various unbundling models, each of which would have distinct implications for the operation of a pipeline.¹¹⁷
185. In addition, in the case of import pipelines, such as the NS2 pipeline, the actual conditions of operation of an import pipeline can be and frequently are also

¹¹⁴ EU Memorial on Jurisdiction, Section 2.2.3.

¹¹⁵ EU Memorial on Jurisdiction, Section 2.2.4.

¹¹⁶ The uncertainties have been openly acknowledged by [REDACTED], one of the Claimant’s witnesses:

¹¹⁷ Energy Industry Act § 9 (ISO); Energy Industry Act § 10 (ITO) (Exhibit RLA – 68).

determined through the conclusion of intergovernmental agreements (IGAs) between the European Union and/or the EU Member States, of one part, and the country of export, of the other.

2.3.3.1. Article 49a derogations

186. Under Article 49a of the Gas Directive, an EU Member State may derogate from certain obligations imposed by the Gas Directive, including the requirements on unbundling, TPA and tariff regulation, in respect of gas transmission lines between that Member State and a third country "completed before 23 May 2019".¹¹⁸
187. The derogations under Article 49a are not automatic. They must be based on "objective reasons"¹¹⁹ and the Member State concerned must ascertain that the derogation "would not be detrimental to competition or the effective functioning of the internal market in natural gas, or to security of supply in the Union".¹²⁰
188. The derogation must be "limited in time up to 20 years based on objective justification, renewable if justified and may be subject to conditions which contribute to the achievement of the abovementioned criteria".¹²¹
189. On 9 January 2020, the Claimant filed an application for an Article 49a derogation with Germany's NRA (the German FNA). On 15 May 2020, the German FNA rejected the Claimant's application on the basis that the NS2 pipeline had not been "completed before 23 May 2019".¹²²
190. On 15 June 2020, the Claimant appealed the German FNA's decision before the German courts.¹²³ That appeal is still pending. Therefore, it remains uncertain whether the NS2 pipeline will benefit from an Article 49a derogation granted by the German authorities.
191. In its application before the German FNA, the Claimant argued that the NS2 pipeline was "completed" on the relevant date,¹²⁴ thereby conceding that the term "completed" admits of different interpretations and in effect leaves EU Member States a further margin of discretion. Before this Tribunal, however, the Claimant has maintained that NSP2AG cannot qualify for an Article 49a

¹¹⁸ Article 49(1), first subparagraph, of the Gas Directive.

¹¹⁹ Article 49(1), first subparagraph, of the Gas Directive.

¹²⁰ Article 49(1), first subparagraph, of the Gas Directive.

¹²¹ Article 49(1), second subparagraph, of the Gas Directive.

¹²² Bundesnetzagentur decision on NSP2AG's Derogation Application, 15 May 2020, section 2.2.3 (Exhibit CLA-17).

¹²³ Claimant's Memorial of 3 July 2020, para. 412.

¹²⁴ Claimant's Application for an Article 49a derogation filed with the *Bundesnetzagentur* on 9 January 2020, as summarised in Bundesnetzagentur decision on NSP2AG's Derogation Application, 15 May 2020 (Exhibit CLA-17).

derogation because it was not “completed” by the relevant date. The Claimant has openly acknowledged this blatant inconsistency¹²⁵ which calls into question its good faith in bringing these proceedings.

192. As confirmed by the EU General Court,¹²⁶ EU Member States have a wide margin of discretion when assessing whether an infrastructure has been “completed” by the relevant date within the meaning of Article 49a of the Gas Directive. For that reason, and in order to respect the constitutional allocation of competences between the European Union and its Member States under the EU treaties, the EU authorities have refrained from taking position on the issue of whether the NS2 pipeline may qualify for an Article 49a derogation. The European Commission has maintained this position, consistent with EU law, despite the Claimant’s unjustified requests that the European Commission interfere with the EU Member States’ discretion.¹²⁷
193. If the Claimant is granted the Article 49a derogation which it has requested from the German authorities, it will not be required to comply with the requirements on unbundling, TPA and tariff regulation in respect of the NS2 pipeline. While the German authorities could subject the granting of that derogation to certain conditions, the ensuing “impact” on NSP2AG could hardly be regarded as [REDACTED] even by the Claimant’s unreasonably demanding standards.

2.3.3.2. Article 36 exemptions

194. Under Article 36 of the Gas Directive, the NRAs of EU Member States may, upon request, exempt major new gas infrastructures from the unbundling, TPA and tariff regulation obligations. Qualifying infrastructures include gas transmission lines between an EU Member State and a third country, such as the NS2 pipeline.
195. Exemption decisions are taken by the NRA of the EU Member State where the infrastructure in question is connected to the EU network.¹²⁸ Decisions are taken on a case-by-case basis, after consultation of the NRA of the EU Member State

¹²⁵ Claimant’s Memorial of 3 July 2020, para. 420.

¹²⁶ Order of the EU General Court of 20 May 2020, Case T-526/19, Nord Stream 2 AG v Parliament and Council, para. 122 (Exhibit RLA – 3). (“It is for the Member States to adopt national measures enabling the operators concerned to ask to benefit from those derogations, determining precisely the conditions for obtaining those derogations in the light of the general criteria laid down by Article 49a of Directive 2009/73, as amended, and regulating the procedure enabling their national regulatory authorities to decide on such requests within the periods laid down by the contested directive. In addition, for the purpose of implementing those conditions, the national regulatory authorities have a wide discretion as regards the grant of such derogations and any specific conditions to which those derogations may be subject”.)

¹²⁷ See below section 2.6.

¹²⁸ Article 36.3 of the Gas Directive.

- whose market is likely to be affected by the new infrastructure and of the relevant authorities of third countries.¹²⁹
196. Exemptions are not automatic. The infrastructure at issue must meet certain qualifying conditions.¹³⁰ The relevant NRA is required to assess the impact of the requested exemptions in the light of criteria relating to the objectives pursued by the Gas Directive. In particular, the NRA is required to ascertain that the exemption is not “detrimental to competition in the relevant markets which are likely to be affected by the investment, to the effective functioning of the internal market in natural gas, the efficient functioning of the regulated systems concerned and the security of supply of natural gas in the Union”.¹³¹ Nonetheless, NRAs have a wide degree of discretion in assessing those conditions and criteria.
197. Exemptions must be granted for a defined period of time¹³² and may be subject to conditions regarding the non-discriminatory access to the infrastructure.¹³³ Once again, however, NRAs have wide discretion to determine both the duration of the exemption and those conditions.
198. Both the qualifying conditions for requesting an Article 36 exemption and the applicable decision-making procedures are different from those that apply in respect of an Article 49a derogation. But the content of an Article 36 exemption can be as favourable to the TSO as that of an Article 49a derogation. Indeed, as discussed below in section 2.4.4, the objectives of both provisions overlap. Moreover, their application may be subject to specific conditions imposed by the Member State’s NRA. These conditions could result in very similar outcomes.
199. If the Claimant requests from the German authorities an Article 36 exemption from the requirements on unbundling, TPA and tariff regulation in respect of the NS2 pipeline and the German authorities grant it, NSP2AG will not be required to comply with these requirements. Again, while the German authorities could subject the granting of that exemption to certain conditions, the ensuing “impact” on NSP2AG would be far from [REDACTED]
200. So far, however, the Claimant has refrained from requesting an Article 36 exemption. Instead, as recalled above, the Claimant has requested an Article

¹²⁹ Article 36.4 of the Gas Directive.

¹³⁰ Article 36.1 of the Gas Directive.

¹³¹ Article 36.1 (e) of the Gas Directive.

¹³² Article 36.1 of the Gas Directive.

¹³³ Article 36.6 of the Gas Directive.

49a derogation, even though it has made clear before this Tribunal that it considers that the NS2 pipeline cannot possibly qualify for such derogation.

201. The Claimant cannot legitimately complain about the alleged [REDACTED] [REDACTED] of the Amending Directive on NSP2AG's investment, while at the same time refraining from availing itself of the possibility to request an Article 36 exemption, which, if granted, could exempt the NS2 pipeline from the same requirements that, according to the Claimant, cause such [REDACTED]. If the Claimant chooses not to avail itself of that possibility, the alleged [REDACTED] on NSP2AG, even if it could be proven, would be self-inflicted and not attributable to the European Union.

2.3.3.3. Unbundling options

202. As explained in section 2.1.1, in principle, the Gas Directive requires that EU Member States ensure full OU¹³⁴. Nevertheless, with respect to transmission systems that belonged to vertically integrated systems on 3 September 2009, the Gas Directive allows EU Member States, at their discretion, to make available in their national legislation, in addition to the OU model, one or two alternative unbundling models,¹³⁵ namely the ISO model¹³⁶ and the ITO model.¹³⁷
203. Likewise, the Amending Directive requires EU Member States to ensure OU with regard to gas transmission lines between an EU Member State and a third country. However, it allows EU Member States, at their entire discretion, to make available the alternative ISO and ITO models for gas transmission lines that belonged to a vertically integrated system on 23 May 2019.¹³⁸
204. The German legislator has made the choice, in its Energy Industry Act, to transpose the OU, ISO and ITO unbundling models and to allow each operator to choose one of those three models.¹³⁹ It is for the German NRA to ascertain, in each case, whether the transmission system qualifies for the model selected by each operator.
205. Each of the three unbundling models available under Germany's Energy Industry Act could have a very different impact on NSP2AG's investment in the NS2 pipeline. Yet the Claimant's Memorial has not disclosed the unbundling option

¹³⁴ Article 9(1) and 9(2) of the Gas Directive.

¹³⁵ Article 9(8) of the Gas Directive.

¹³⁶ Article 14 of the Gas Directive.

¹³⁷ The requirements for the ISO and ITO models are set out in Articles 14-15 and Articles 17-23 of the Gas Directive, respectively. Additional competences of the NRA under the ISO and ITO models are set out in Article 41(3) and 41(5) of the Gas Directive, respectively.

¹³⁸ Article 9(8) and Article 9(9) of the Gas Directive.

¹³⁹ §§ 8-10 Energy Industry Act (Exhibit RLA – 68).

which NSP2AG intends to select, if necessary. Furthermore, the European Union is not aware that NSP2AG has given any indication so far to the German authorities regarding that choice.

2.3.3.4. Article 9(6) of the Gas Directive

206. In accordance with Article 9(6) of the Gas Directive, the requirement to ensure OU is deemed to be satisfied where an EU Member State, or another public body (including a third country), chooses to confer to two separate public bodies the exercise of control over a transmission system or a TSO, on the one hand, and over an undertaking performing any of the functions of production or supply, on the other hand.¹⁴⁰
207. In practice, Article 9(6) of the Gas Directive implies that if an EU Member State or a third country controls both a gas producer and a TSO, it is not required to ensure complete separation between them in order to comply with the OU model. Rather, the EU Member State or third country concerned may choose to confer control over the gas producer and the TSO to two separate public entities, such as, for example, two different ministries.¹⁴¹
208. Both the Claimant and Gazprom are controlled by the Russian Government, which is a “public body” within the meaning of Article 9(6) of the Gas Directive. Yet the Claimant does not address this provision in its Memorial.

2.3.3.5. IGA between the European Union and Russia

209. As discussed above, the Claimant repeatedly invokes that Gazprom has been granted, under Russian law, a monopoly on pipeline gas exports from Russia as a constraint that would prevent NSP2AG from complying with the requirements of the Amending Directive on unbundling, TPA and tariff regulation. While it is Russia’s prerogative to grant an export monopoly within the limits of its own territorial jurisdiction, it is obvious that such export monopoly cannot provide a valid justification for not complying with the Amending Directive within EU territory.

¹⁴⁰ Article 9.6 of the Gas Directive.

¹⁴¹ Article 9(6) of the Gas Directive must be read together with recital 20 which states that: “The implementation of effective unbundling should respect the principle of non-discrimination between the public and private sectors. To that end, the same person should not be able to exercise control or any right, in violation of the rules of ownership unbundling or the independent system operator option, solely or jointly, over the composition, voting or decision of the bodies of both the transmission system operators or the transmission systems and the production or supply undertakings. With regard to ownership unbundling and the independent system operator solution, provided that the Member State in question is able to demonstrate that the requirement is complied with, two separate public bodies should be able to control production and supply activities on the one hand and transmission activities on the other”.

210. Usually, this type of jurisdictional overlap between the country of export and the country of import is resolved through an IGA on the operation of the pipeline between the countries concerned. For example, on 2 January 2020 Greece, Cyprus, Italy and Israel signed an IGA setting out the legal framework for the EastMed project, relating to the construction of a 1,900-km pipeline carrying 10bn cu metres/year of gas from Israeli and Cypriot fields via Crete to mainland Greece and Italy.¹⁴²
211. In line with that practice, the European Commission has adopted a recommendation pursuant to Article 218(3) of the TFEU¹⁴³ for a Council of the EU decision authorising the negotiation of an IGA with Russia on the operation of the NS2 pipeline.¹⁴⁴
212. The envisaged IGA would provide for a single regulatory regime for the entire pipeline agreed between the European Union and Russia. Such a regime would not seek to replicate all the requirements of the Gas Directive. Rather, in order to accommodate Russia's interests, it would "establish an appropriate regulatory regime for the operation of the pipeline, which introduces the key principles of EU energy law and moderates the expected negative market impacts".¹⁴⁵
213. NSP2AG reacted immediately to the European Commission's initiative by making clear its opposition to the negotiation of any kind of IGA between the European Union and Russia.¹⁴⁶ It can be safely assumed that NSP2AG's opposition reflects faithfully the views of both Gazprom (NSP2AG's parent company) and the Russian Government, which ultimately controls both Gazprom and NSP2AG. The

¹⁴² Intergovernmental Agreement between the Republic of Cyprus, and the State of Israel, and the Hellenic Republic, and the Italian Republic concerning a pipeline system to transport Eastern Mediterranean Natural Gas to the European Markets (Exhibit RLA-95).

¹⁴³ The text of Article 218(3) of the TFEU is provided as (Exhibit RLA-96).

¹⁴⁴ Exhibit C- 88. The Claimant speculates that the Council of the EU has not adopted the decision authorising the opening of negotiations by the European Commission because of the legal objections raised in an internal note of the legal service of the Council of the EU (Claimant's memorial, para. 216). This is incorrect. That note expressed the view that the European Union lacks exclusive external competence over all matters covered by the envisaged agreement. In addition, it cautioned that "it could not be excluded" that certain matters fell outside the EU's shared competence and within the scope of the Member States' exclusive competence. Even if correct, the view of the Council of the EU's legal service would not imply that the European Union cannot conclude the envisaged agreement. Rather, its sole implication is that the European Union could not conclude it alone, but only together with the Member States as a "mixed" agreement, in accordance with well-established practice. In any event, the note in question only expresses the views of the legal service of the Council of the EU and has no legal status or effects whatsoever under EU law. The European Commission does not share those views. The EU institutions and the Member States, and their respective legal services, disagree with relative frequency about the allocation of external competences between the European Union and the Member States and those disagreements have to be resolved from time to time by the ECJ.

¹⁴⁵ Exhibit C-88, Explanatory memorandum p. 4.

¹⁴⁶ See NSP2AG's "Company Response to the European Commission Initiative for Negotiations Between the EU and Russia on an Intergovernmental Agreement", available at <https://www.nord-stream2.com/ru/dlia-pressy/novosti-i-meropriiatiia/company-response-to-the-european-commission-initiative-for-negotiations-between-the-eu-and-russia-on-an-intergovernmental-agreement-55/> (Exhibit R-50).

Claimant's (and, by implication, Gazprom's and Russia's) persistent hostility to an IGA is reflected in the Claimant's Memorial.¹⁴⁷

214. The alleged ██████████ of the Amending Directive on NSP2AG could be addressed through the conclusion of an IGA between the European Union and Russia on the operation of the NS2 pipeline, as recommended by the European Commission. Yet, as explained, NSP2AG, which is controlled by Russia, has systematically objected to the negotiation of such an IGA.

2.3.4. The Claimant has failed to prove that the Amending Directive, as transposed and implemented by Germany, will prevent the operation of the NS2 pipeline

215. For the reasons set out below, the Claimant also has failed to prove that NSP2AG cannot comply with the applicable requirements of the Amending Directive, as transposed and implemented by Germany, and, therefore, that the NS2 pipeline cannot be operated in accordance with those requirements.

2.3.4.1. The Claimant has failed to prove that it cannot comply with the unbundling requirements, as transposed and implemented by Germany

216. The Claimant alleges that it cannot comply with the unbundling requirements because "the sale of the entire pipeline is not a viable option"¹⁴⁸ and other solutions "are outside NSP2AG's control, requiring the agreement of a number of third parties, with uncertain outcome".¹⁴⁹

217. However, as explained below, the Claimant has not shown that the Amending Directive, as transposed and implemented by Germany, will oblige NSP2AG to sell the NS2 pipeline. In any event, the Claimant has failed to prove that it could not sell that pipeline. Moreover, the Claimant has failed to properly consider and assess other options.

2.3.4.1.1. The Claimant has failed to prove that the Amending Directive, as transposed and implemented by Germany, will require NSP2AG to sell the pipeline

218. Even if the German authorities did not grant an Article 49a derogation or an Article 36 exemption in respect of the NS2 pipeline, the Claimant has not proven that the Gas Directive requires NSP2AG to sell either the entire NS 2 pipeline, or any part thereof, in order to comply with the unbundling requirements.

¹⁴⁷ Claimant's Memorial, section VII.7.

¹⁴⁸ Claimant's Memorial, Section VII.6.

¹⁴⁹ Claimant's Memorial, section VII.7.

219. As explained above, Germany’s Energy Industry Act has transposed the OU, ISO and ITO unbundling models and allows each operator, in certain situations, to choose one of those three models.¹⁵⁰ The Claimant has not proven that NSP2AG could not, in accordance with German law, choose to unbundle according to the ISO or ITO models, rather than the OU model. Both the ISO and the ITO models would allow NSP2AG to continue to own the entire NS2 pipeline. In addition, the ITO model would also allow NSP2AG to continue to operate the NS2 pipeline by itself, subject to certain conditions.
220. The Claimant has neither alleged nor proved that NSP2AG cannot comply with the ISO or the ITO unbundling models. Indeed, Section VII of the Claimant’s Memorial does not even address those two unbundling models.
221. The Claimant’s Memorial also fails to address Article 9(6) of the Gas Directive. NSP2AG is fully owned and controlled by Gazprom which, in turn, is controlled by the Russian Government. Yet, the Claimant’s Memorial contains no analysis of whether Russia’s control over both Gazprom and the NS2 pipeline could be (re)-organised so as to comply with the requirements of that provision.

2.3.4.1.2. In any event, the Claimant has failed to prove that it cannot sell the NS2 pipeline

222. In any event, the Claimant has failed to prove that selling the entire NS2 pipeline is not a “viable option”.¹⁵¹ The Claimant provides no evidence that it has made any attempt to sell the NS2 pipeline, or even that it has sought an independent expert opinion on the possibility of selling the NS2 pipeline.
223. The Claimant’s allegations rely exclusively on the personal views of [REDACTED].¹⁵² In turn, [REDACTED] views are but speculation largely based on extraneous factors not attributable to the European Union.¹⁵³

224. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁵⁰ §§ 8-10 Energy Industry Act (Exhibit RLA – 68).
¹⁵¹ Claimant’s Memorial of 3 July 2020, Section VII.6.
¹⁵² Claimant’s Memorial, paras. 329-333.
¹⁵³ [REDACTED]
¹⁵⁴ [REDACTED]
¹⁵⁵ [REDACTED]

225. [REDACTED]
[REDACTED] Yet, that [REDACTED] applies, at least to some degree, to most existing pipelines in the European Union, including offshore interconnectors which are profitably and successfully operated.

226. In practice, many “vertically integrated undertakings” within the meaning of Article 2(20) of the Gas Directive have chosen voluntarily to spin off their transmission networks, or parts thereof, with a view to focusing on their core production activities.¹⁵⁷ They have been able to do so successfully, despite the transmission systems being subject to unbundling, TPA and tariff regulation requirements under the Gas Directive. Indeed, regulated assets such as gas pipelines or electricity grids are considered a very attractive investment category, precisely because regulation (including tariff regulation) provides for stable and foreseeable cash-flows and excludes the commercial risks of non-regulated assets.¹⁵⁸

227. [REDACTED]
[REDACTED] This [REDACTED] however, is not attributable to the European Union, but only and exclusively to Russia. It is within the discretion of Russia, which controls both Gazprom and NSP2AG, to address that [REDACTED] as necessary, in order to allow the sale of the NS2 pipeline.

¹⁵⁶ [REDACTED]

¹⁵⁷ Prominent examples of the voluntary sale of transmission systems located in Germany by vertically integrated undertakings subject to unbundling, TPA and tariff regulation requirements include:

- 1) the sale by RWE AG of its German supra-regional gas transmission network – which is comprised in Thyssengas GmbH – to infrastructure funds managed by Macquarie Infrastructure and Real Assets (Europe) Ltd. See announcement in RWE’s website: <https://www.group.rwe/en/investor-relations/news-and-ad-hoc-announcements/news/archive-ir-announcements/2010/RWE-sells-Thyssengas-to-Macquarie> (Exhibit R - 51) and European Commission Opinion on the certification of [REDACTED] Thyssengas, [REDACTED] C(2013)570, https://ec.europa.eu/energy/sites/ener/files/documents/2012_048_de_en.pdf (Exhibit R - 52)
- 2) the sale by E.ON AG of Open Grid Europe (which operates an 11.400 km long gas transmission network covering large parts of Germany) in September 2012 to a consortium under the name of “Vier Gas Holding S.à.r.l.” led by the Australian investor Macquarie Group Limited and MEAG Munich ERGO Investments (together holding 42.9% of the shares), Infinity Investments from Abu Dhabi (24.9%) and finally, the British Columbian Investment Management Corporation (32.2%). See European Commission’s Opinion on BNetzA’s draft certification decision for Open Grid Europe C(2013) [REDACTED] 6444, [REDACTED] p.2: https://ec.europa.eu/energy/sites/ener/files/documents/2013_080_de_en.pdf (Exhibit R - 53)
- 3) the takeover of jordgas GmbH, a TSO participated by Statoil ASA (now Equinor, i.e., the main Norwegian gas producer) by two other German TSOs (Open Grid Europe and Gasunie Deutschland). See Statoil Annual Report 2016, p. 33, available at: <https://www.equinor.com/content/dam/statoil/documents/annual-reports/2016/statoil-2016-annualreport-20-F.pdf.pdf> (Exhibit R - 54).

¹⁵⁸ CNBC, 19 August 2020, “Why Warren Buffet is betting on pipelines even as climate fears rise”, available at: <https://www.cnbc.com/2020/08/19/why-warren-buffett-is-betting-on-pipelines-evern-as-climate-fears-rise.html> (Exhibit R - 55)

¹⁵⁹ [REDACTED]

228. [REDACTED]
[REDACTED]
Yet, again, this [REDACTED] is not attributable to the European Union but to a third country. The European Union cannot be held responsible for any detrimental effects of such [REDACTED]. Moreover, in principle, this [REDACTED] would affect the operation of the NS2 pipeline, regardless of whether the NS2 pipeline is operated by NSP2AG or sold to a third party.

2.3.4.1.3. The Claimant has failed to properly consider and assess other options

229. According to [REDACTED] statement, [REDACTED]
[REDACTED]. But both [REDACTED] and NSP2AG fail to identify and explain in any meaningful detail any other such "options",¹⁶¹ including the options available under the various options and flexibilities described in section 2.3.3.

230. The only other purported "option" discussed in the Claimant's Memorial would be "separating the operation of the German Section from the remainder of the pipeline".¹⁶² The Claimant contends, on the basis of [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

231. [REDACTED]
[REDACTED] announces that [REDACTED]
[REDACTED]

232. Nothing in the procedural rules established and applied to the present arbitration allows a Claimant to hold arguments "in reserve", to be revealed only at a later date, in a self-declared right to further rounds of pleading. To allow this would be contrary to fundamental principles of procedural fairness, including the Tribunal's obligation to ensure efficient resolution of the present dispute.

233. In any event, in view of the Claimant's deliberate failure to develop this "option" in its Memorial, the European Union is unable to take position at this stage. In particular, the European Union cannot take position on whether this "option"

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161 Claimant's Memorial of 3 July 2020, para. 336. [REDACTED]

162 Claimant's Memorial of 3 July 2020, para. 336.

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upon completion of the NS2 pipeline.¹⁷¹ As a result of DNV GL's withdrawal, NSP2AG will, in any event, need to reapply for certification from another qualified certification entity meeting all the requirements of the responsible authorities of the EU Member States concerned, assuming any such entity can be found and remains available in view of the U.S. sanctions.

2.3.4.2. The Claimant has failed to prove that it cannot comply with the TPA and tariff regulation requirements, as transposed and implemented by Germany

239. The Claimant emphasises that, even if an "unbundling solution was found",¹⁷² the NS2 pipeline would still be subject to TPA and tariff regulation requirements. The Claimant suggests that NSP2AG cannot comply with the TPA requirements because they would conflict with Gazprom's export monopoly under Russian law,¹⁷³ and that both the TPA and tariff regulation requirements would be incompatible with the GTA.¹⁷⁴

240. As regards Gazprom's export monopoly, the European Union recalls, again, that it is within the discretion of Russia, which controls Gazprom, Gazprom Export and NSP2AG, to address that constraint, as necessary.

241. As regards the incompatibility with the GTA of the TPA and tariff regulation requirements, the European Union will show below that the Claimant has failed to prove that the [REDACTED]

2.3.4.3. The Claimant has failed to prove that the [REDACTED]

242. The Claimant alleges that the unbundling, TPA and tariff regulation requirements are incompatible with the GTA and the [REDACTED]¹⁷⁵ In order to comply with those requirements, it would be necessary to amend the GTA and

¹⁷¹ S&P Global, 4 January 2021, "Norway's based DNV GL halts Nord Stream 2 certification work on US sanctions", (Exhibit R - 56) available at: <https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/010421-norway-based-dnv-gl-halts-nord-stream-2-certification-work-on-us-sanctions>

¹⁷² Claimant's Memorial of 3 July 2020, para. 338.

¹⁷³ Claimant's Memorial of 3 July 2020, para. 338.

¹⁷⁴ Claimant's Memorial of 3 July 2020, para. 318.

¹⁷⁵ Claimant's Memorial of 3 July 2020, paras. 316-318.

[Redacted]

243. [Redacted]

244. [Redacted]

245. [Redacted]

246. [Redacted]

176 [Redacted]
177 [Redacted]
178 [Redacted]
179 [Redacted]
180 [Redacted]
181 [Redacted]
182 [Redacted]
183 [Redacted]

[Redacted text block]

247. [Redacted text block]

248. [Redacted text block]

249. [Redacted text block]

184 [Redacted footnote text]

[REDACTED]

250. [REDACTED]

[REDACTED]

251. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

252. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

185 [REDACTED]

186 [REDACTED]

187 [REDACTED]

188 [REDACTED]

[REDACTED]

189 [REDACTED]

190 [REDACTED]

[REDACTED]

191 [REDACTED]

[REDACTED]

[REDACTED]

192 [REDACTED]

2.3.5. The Claimant has not shown that the operation of the pipeline in compliance with the Amending Directive, as transposed and implemented by Germany, will have a [REDACTED], let alone the alleged [REDACTED]

253. The Claimant has argued that compliance with the applicable requirements of the Amending Directive would prevent NSP2AG from operating the NS2 pipeline “as originally intended by NSP2AG”.¹⁹³ This might be true, depending on the measures which the German authorities may or may not take within the margin of discretion accorded to them by the Amending Directive.¹⁹⁴ However, even if the NS2 pipeline could not, eventually, be operated “as originally intended” by NSP2AG, this would not entail *per se* the [REDACTED] on NSP2AG’s investments alleged by the Claimant.
254. The Claimant asserts at several points that the implementation of any “other solutions” allowing NSP2AG to operate the NS2 pipeline in compliance with the Amending Directive, as transposed and implemented by Germany, [REDACTED] [REDACTED]⁵ to NSP2AG. Those assertions, however, are not supported by any argument or evidence. Indeed, the Claimant has not properly identified those “other solutions” nor has it attempted to describe and evaluate in any detail their impact on NSP2AG’s investment.
255. The only analysis of the effects of compliance with the Amending Directive, as transposed and implemented by Germany, that the Claimant attempted to undertake was based on the mistaken premise that NSP2AG cannot possibly comply with the Amending Directive [REDACTED] [REDACTED] and, therefore, cannot operate the NS2 pipeline. As previously shown,¹⁹⁶ however, that premise is incorrect.
256. In any event, as recalled above, the Gas Directive and the Amending Directive provide, where necessary and subject to appropriate conditions, for adequate flexibilities, in the form of derogations or exemptions from the generally applicable requirements on unbundling, TPA and tariff regulation. The Claimant has not shown that those flexibilities, which are within each EU Member State’s discretion, are unavailable to NSP2AG with regard to the NS2 pipeline.

193 [REDACTED]
Claimant’s Memorial of 3 July 2020, Section VII.2.

194 See above section 2.3.3.

195 [REDACTED]

196 [REDACTED]

2.3.6. NSP2AG could have avoided the alleged [REDACTED] by exercising due diligence when negotiating the GTA and the finance agreements

257. [REDACTED]
[REDACTED] As explained in detail in section 2.2, by then NSP2AG could not have reasonably ignored that there was a significant possibility that the operation of the NS2 pipeline could become subject to the requirements of the Gas Directive on unbundling, TPA and tariff regulation, as transposed and implemented by Germany.

258. The [REDACTED] alleged by NSP2AG therefore could have been averted if NSP2AG had duly taken the EU regulatory context into account when negotiating and concluding the GTA and the finance agreements.

259. Instead, as already explained in detail in section 2.2, NSP2AG knowingly disregarded the regulatory context in its negotiations with third parties.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

260. According to [REDACTED] the adoption of the Amending Directive [REDACTED] [REDACTED] Such a lack of foresight is hardly credible on the part of an operator like the Gazprom group, which has vast financial and human resources at its disposal and which can count on the assistance of highly qualified counsel. [REDACTED] attempts to justify NSP2AG's alleged [REDACTED]

[REDACTED] But compromises among the members of a legislative body such as the Council of the EU are neither unprecedented nor illegitimate. They are a regular feature of the EU legislative process, and indeed of any representative legislative process, which a diligent operator would ignore at its own peril.

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202

[REDACTED]
[REDACTED]

261. As shown in detail by the European Union in section 2.2, far from being a “surprise”, there were clear and unmistakable signals that the NS2 pipeline either was or would become subject to EU regulation long before NSP2AG signed the GTA and the various finance agreements. NSP2AG instead chose to deliberately disregard those signals in the expectation that, by creating facts on the ground, NSP2AG could deter the European Union and its Member States from acting. This was a very risky gamble that failed.

262. For these reasons, the alleged [REDACTED] on NSP2AG’s investment, even if proven, would be the result of NSP2AG’s own gross negligence.

2.4. There was no “deliberate exclusion” of the NS2 pipeline project from the derogation regime nor any “specific targeting”

2.4.1. Introduction

263. The Claimant alleges that the NS2 pipeline project was the victim of a “deliberate exclusion” by the European Union from the Article 49a derogation,²⁰³ and that the practical effect of the Amending Directive is that NS2 “is the only pipeline impacted”.²⁰⁴ In presenting its case before this Tribunal, the Claimant misrepresents the facts and fails to recognize that the derogation regime introduced by Article 49a of the Amending Directive is part of a coherent system of rules and exceptions for interconnectors and transmission pipelines in the EU. In the following sections, the European Union will set out the full legal framework that applies in the present case and will show that there was no “deliberate exclusion” of the NS2 pipeline project from the Article 49a derogation. Rather, the design of the Gas Directive, as modified by the Amending Directive, is neutral. The possibility for an Article 49a derogation fits seamlessly with the other existing exemptions and flexibilities.

2.4.2. The Amending Directive is of a general and abstract nature

264. The Amending Directive is not NS2-specific. Like any Directive in EU law, it is of general application and effectively seeks to promote a level playing field across the EU concerning the conditions for competition in the oil and gas industry, which in turn seek to promote public goods including fair pricing and security of supply. The regulatory framework under the Gas Directive is applicable to any transmission line to be completed after its entry into force, including any transmission line with a third State.²⁰⁵ Even if the triggering event for the

²⁰³ Claimant’s Memorial, para. 248 and see Section VI.9.

²⁰⁴ Claimant’s Memorial, para. 262 and see Section VI.11.

²⁰⁵ Expert Report by Prof. Maduro, paras. 252-282.

adoption of the Amending Directive would have been the NS2 pipeline project to the extent that the project flagged an issue to address in the legislative scheme, this would not affect the general and abstract nature of the Proposal and of the Amending Directive.²⁰⁶ The Amending Directive is neither a discriminatory nor a targeted piece of legislation given that current and future offshore import pipelines between EU Member States and third-countries similar to the NS2 pipeline project, also will fall within its ambit. The Claimant's assertion that the Amending Directive "targeted" its operation reflects its unjustified discomfort at being subject to basic EU law when seeking to do business in Europe. But this does not take away from the general and abstract nature of the Amending Directive.²⁰⁷

2.4.3. The eligibility criterion for Article 49a derogations is objective and appropriate

265. As previously explained in Section 2.3.3.1, under Article 49a of the Gas Directive, an EU Member State may derogate from certain obligations imposed by the Gas Directive, including the requirements on unbundling, TPA and tariff regulation, in respect of gas transmission lines between that Member State and a third country "completed before 23 May 2019".²⁰⁸

266. The fourth recital of the Amending Directive indicates that:

To take account of the lack of specific Union rules applicable to gas transmission lines to and from third countries before the date of entry into force of this Directive, Member States should be able to grant derogations from certain provisions of Directive 2009/73/EC to such gas transmission lines which are completed before the date of entry into force of this Directive. The relevant date for the application of unbundling models other than ownership unbundling should be adapted for gas transmission lines to and from third countries

267. The derogation thus also aims at addressing any uncertainty that may have existed with regard to the specific EU rules applicable to gas transmission lines to and from third countries before the entry into force of the Amending Directive. Therefore, Member States are permitted to grant derogations to pipelines that are completed before the date of entry into force of the Amending Directive, i.e., 23 May 2019. The time limitation for access to a derogation reflects the intention of the European Parliament and Council of the EU to ensure that the

²⁰⁶ Expert Report by Prof. Maduro, para. 273.

²⁰⁷ Expert Report by Prof. Maduro, para. 278.

²⁰⁸ Article 49(1), first subparagraph of the Gas Directive.

- clarification of the rules through the Amending Directive applies effectively to all pipelines at a given point in time. At the same time, the European Union felt it proportionate to allow a certain transition.
268. In doing so, the European Union also wished to duly take into account of the need to ensure that the rules were expressly aligned with its longstanding policy position, namely, that the Gas Directive applies to all pipelines functioning in the EU territory, regardless of their origin. By providing for time-limited derogations which may be made subject to conditions, Member States are enabled to progressively adapt the regulatory framework on these pipelines, moving it closer to full application of the principles where appropriate.²⁰⁹
269. The Claimant argues that “[b]y using the eligibility criterion of ‘completed before’ the date of entry into force of the Amending Directive, the proposed derogation regime had the intention of excluding only Nord Stream 2”.²¹⁰ This is incorrect.
270. To the contrary, the Amending Directive had to set a time limit for undertakings to request a derogation precisely to reconcile the need for enabling transition for completed pipelines with the overall need to clarify that the Gas Directive applies to all pipelines functioning in the EU territory, regardless of their origin. The “completed” criterion is objective and appropriate since it enables an accurately assessment whether it is met. Completed pipelines and non-completed pipelines are in an objectively different situation.²¹¹ The “completed” criterion is no less objective and precise than the criterion proposed by the Claimant. The legislator must be accorded a margin of discretion in choosing a cut off criterion and as long as the choice is not unreasonable, it cannot be considered as discriminatory.²¹²
271. Moreover, the term “completed” is not alien to the Gas Directive. Indeed, under Article 36 of the Gas Directive, “major new gas infrastructure” may, upon request, be exempted, for a defined period of time, from certain provisions under the Gas Directive, including unbundling and TPA. Article 2(33) of the Gas Directive defines “new infrastructure” as “an infrastructure not completed by 4 August 2003”. (Emphasis added.) It is thus wrong for the Claimant to suggest

²⁰⁹ See, Commission Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 8.11.2017, SWD(2017) 368 final, COM(2017) 660 final, pp. 5 and 6. (Exhibit R – 29)

²¹⁰ Claimant’s Memorial, para. 239.

²¹¹ Expert Report by Prof. Maduro, paras. 184-185.

²¹² See also Expert Report by Prof. Maduro, para. 186.

- that a “completion” criterion was introduced in Article 49a specifically to target the NS2 pipeline project. This is instead a criterion that had been used before to establish an objective threshold for applicability of a particular regime. The criterion made particular sense here, given that the Amending Directive sought essentially to clarify the regime and the derogation provided better ability to ensure pipelines would have some means of access to regulatory flexibility, if warranted.
272. In fact, as explained further in the next sub-section, reading the cut-off criteria in Article 49a of the Amending Directive and Article 36 of the Gas Directive together shows that the EU legislator has set up a coherent system. Transmission pipelines that are completed by the date of entry into force of the Amending Directive are eligible for an Article 49a derogation, while transmission pipelines that are not yet completed can apply for an Article 36 exemption. Therefore, a fully coherent system exists under the Gas Directive that provides flexibility through possible exemptions and derogations.
273. Furthermore, the examples cited by the Claimant where the European Union allegedly took a different approach than for the Amending Directive can clearly be distinguished.
274. First, the Claimant alleges that, in the context of determining whether a transmission system “belonged to a vertically integrated undertaking” on 3 September 2009 (i.e., the date of entry into force of the Gas Directive) and consequently whether the two alternative unbundling regimes are available, the European Commission applied the criterion of whether the *final investment decision had been taken*.²¹³ The Claimant thereby refers to the Certification of the Operators of the Northern European natural gas pipeline (*Nordeuropäischen Erdgasleitung* (NEL)).²¹⁴ However, the Claimant refers to this certification out of context and reads more into this decision than there was to it. The NEL certification states that “the NEL pipeline, did not exist yet and no final investment decision had been taken”.²¹⁵ This Opinion thus merely mentions that no final investment decision had been taken but does not consider it as the criterion for the cut-off date for the availability of the alternative unbundling models. The cut-off moment is set out in Article 2(33) of the Gas Directive only.

²¹³ Memorial, para. 247(i).

²¹⁴ **Exhibit C-34**, European Commission Opinion, “Certification of the Operators of the Nordeuropäischen Erdgasleitung (NEL)”, C(2013) 7019 final (German original and English translation), 18 October 2013, pp 4-5.

²¹⁵ **Exhibit C-34**, European Commission Opinion, “Certification of the Operators of the Nordeuropäischen Erdgasleitung (NEL)”, C(2013) 7019 final (German original and English translation), 18 October 2013, pp 4-5.

275. Nor do EU rules on energy capacity mechanisms in the Electricity Regulation offer any further support to the Claimant's argument.²¹⁶ These rules limit the making of public payments to electricity generators willing to invest in electricity generation infrastructure that will only function at times of peak demand to high carbon emitting generation capacity. However, there is an exception for capacity contracts concluded before the entry into force of the Electricity Regulation. It is irrelevant that this criterion does not rely on the question of "whether or not the relevant infrastructure has been completed". To the contrary, this example shows that the relevant cut-off moments are fit for purpose: if a power plant is already built, but no capacity contracts completed, it will not be able to obtain energy capacity mechanism payments after 2025. The capacity mechanism payments are indeed linked to the public contracts concluded before 31 December 2019. Hence, there is no guarantee that all electricity generators will obtain these payments. This is an objective approach, just like in the present case.
276. The third example that the Claimant refers to, i.e., the fact that, according to the Commission State aid Guidelines for environmental protection and energy,²¹⁷ the application of certain conditions on the grant of State aid depends on the start of the works for renewable energy installations after 1 January 2017,²¹⁸ also fails to provide an apt comparison. Relying on the start of works for determining the application of the Amending Directive would have had the disadvantage of uncertainty regarding the completion date. In case of long or interrupted construction processes for a given pipeline, such pipelines could qualify for derogation far in the future and thus weaken the purpose of the transitional derogation mechanism.
277. In sum, the different cut-off criteria in other contexts that the Claimant refers to do not detract from the appropriateness of the cut-off criterion used in the Amending Directive. Every criterion is adapted to the circumstances of its own measure and must be considered in its own context.

²¹⁶ Claimant's Memorial, para. 247(ii).

²¹⁷ **Exhibit C-123**, European Commission Communication, "Guidelines on State aid for environmental protection and energy 2014-2020", OJ C200/1, 28 June 2014, section 3.3.2.1 and in particular, footnote 66.

²¹⁸ Claimant's Memorial, para. 247(iii). See **Exhibit CLA-156**, Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast), OJ L 158/54, 14 June 2019, Article 22(5).

2.4.4. There is no “gap” between Articles 36 and 49a of the Gas Directive: these provisions form part of a coherent system of rules and flexibilities

278. The Claimant also appears to suggest that the Amending Directive specifically targeted it, in that it allegedly sits in a “gap” between different potential avenues to regulatory flexibility. This is untrue. To the contrary, Articles 36 and 49a of the Gas Directive provide a coherent regime for accessing possible flexibilities with respect to the obligations (in particular unbundling, TPA and tariff regulation) that would otherwise apply to interconnectors and pipelines under the Gas Directive.
279. Under the Gas Directive, the rule is thus that the principles of unbundling, TPA and tariff regulation apply to all gas interconnectors between EU Member States, as well as between EU Member States and third countries. These principles apply to onshore interconnectors and offshore interconnectors alike. As previously discussed in section 2.3.3.3, the Amending Directive also provides that three unbundling models are available to pipelines to and from third countries, thereby ensuring that the latter are not treated less favourably than domestic infrastructure. Indeed, the Amending Directive sets a new reference date for the application of Articles 9(8) and 9(9) of the Gas Directive. It allows the use of alternative unbundling models in cases where pipelines to and from third countries belonged to vertically integrated undertakings at the date of adoption of the Amending Directive (i.e., 17 April 2019).
280. Article 36 exemptions and Article 49a derogations provide a coherent regime for relaxing Gas Directive disciplines, where conditions warrant. These exceptions are available, subject to the objective conditions, to all gas interconnectors, both between EU Member States and between EU Member States and third countries, onshore or offshore. There is no “gap” between those two possible flexibilities. Precise procedures need to be followed and conditions must be met for obtaining either an exception or a derogation, but that is in the nature of such regimes.
281. As discussed in section 2.3.3.2 above, Article 36 of the Gas Directive provides that “major new gas infrastructure, i.e., interconnectors, LNG and storage facilities” may, upon request, be exempted, for a defined period of time, from certain provisions under the Gas Directive, including unbundling and TPA. “New infrastructure” is defined as “an infrastructure not completed by 4 August 2003”.²¹⁹ The definition of Article 2(17) of “interconnector” reads as follows: “a transmission line which crosses or spans a border between Member States for

²¹⁹ Article 2(33) of the Gas Directive.

the purpose of connecting the national transmission system of those Member States or a transmission line between a Member State and a third country up to the territory of the Member States or the territorial sea of that Member State”.

282. The possibility provided for temporarily exempting major new infrastructure projects from the generally applicable unbundling, TPA and tariff regulation requirements seeks to incentivise investment in major new infrastructure. Recital (35) of the Gas Directive underlines that the proper functioning of the EU internal market in natural gas must nonetheless be ensured:

Investments in major new infrastructure should be strongly promoted while ensuring the proper functioning of the internal market in natural gas. In order to enhance the positive effect of exempted infrastructure projects on competition and security of supply, market interest during the project planning phase should be tested and congestion management rules should be implemented. Where an infrastructure is located in the territory of more than one Member State, the Agency for the Cooperation of Energy Regulators established by Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (‘Agency’) should handle as a last resort the exemption request in order to take better account of its cross-border implications and to facilitate its administrative handling. Moreover, **given the exceptional risk profile of constructing those exempt major infrastructure projects, it should be possible temporarily to grant partial derogations to undertakings with supply and production interests in respect of the unbundling rules for the projects concerned. The possibility of temporary derogations should apply, for security of supply reasons, in particular, to new pipelines within the Community transporting gas from third countries into the Community.** Exemptions granted under Directive 2003/55/EC continue to apply until the scheduled expiry date as decided in the granted exemption decision. (Emphasis added; footnote omitted.)

283. The European Commission has emphasised that the national authorities of EU Member States, when assessing exemption requests, have to strike a balance between the objectives of, on the one hand, promoting infrastructure investment; and, on the other hand, ensuring competition through fair, non-discriminatory access to infrastructure which is one of the key principles of energy market liberalisation.²²⁰

²²⁰ Commission Staff Working Document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity (Explanatory Note), para. (11) (Exhibit R – 65).

284. In the same interpretive document, the European Commission recalled that exemption requests for major new infrastructure have to be assessed by national authorities on a case-by-case basis. And they add:

It is the particular characteristics of the investment project and of the markets concerned that determine the need and the scope of a possible exemption. When assessing an exemption request, the national authority needs to investigate in detail the impact of the specific exemption on competition, security of supply and the functioning of the internal market. Moreover, the national authority should take into account the risk of creating a competitive distortion between regulated and exempted infrastructure. To ensure a consistent application of the exemption practice and to safeguard the wider European interest, the Commission reviews the national exemption decisions.²²¹

285. Exemptions are an exception to the generally applicable regulatory framework and, more specifically, to the rules of unbundling, TPA and regulated tariffs. They must therefore be limited to what is strictly necessary to realise the investment. This implies that each exemption has to be proportionate and may take the form of a partial exemption or may be granted subject to conditions. Exemptions may apply only in respect of certain types of obligations imposed by EU legislation (unbundling, TPA or regulated tariffs). They may also apply only to a part of the overall capacity of the new infrastructure.²²²

286. Article 36 of the Gas Directive sets the following cumulative conditions for exemptions:

- a) the investment must improve security of supply and boost competition in the gas market;
- b) the investment could not go ahead without the exemption due to the level of risk;
- c) the infrastructure must be owned by a legally separate firm from the TSO in whose system it will operate;
- d) users of the infrastructure must pay for access;
- e) the exemption does not harm the functioning of the EU's internal gas market or the transmission system to which the infrastructure is linked.

287. As pointed out, a derogation under Article 49a is available to "gas transmission lines between a Member State and a third country completed before 23 May

²²¹ Explanatory Note, para. (12).

²²² Explanatory Note, paras. (16) and (17).

- 2019”, subject to a decision by the “Member State where the first connection point of such a transmission line with a Member State’s network is located”.
288. A derogation may be granted for objective reasons such as to enable the recovery of the investment made or for reasons of security of supply, provided that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas, or to security of supply in the European Union.
289. Within these parameters, EU Member States enjoy wide discretion. The “recovery of investment made” is just one of the reasons why an EU Member State may grant a derogation. “Security of supply” is another reason. The list of objective reasons for granting a derogation is not exhaustive. Derogations may be granted for other objective reasons. The derogation may be subject to conditions and is in any event time-limited.
290. As previously indicated (at sections 2.3.3.1 and 2.3.3.2), transmission pipelines that are completed by the date of entry into force of the Amending Directive are eligible for an Article 49a derogation and transmission pipelines that are not yet completed can apply for an Article 36 exemption. Therefore, a fully coherent system exists under the Gas Directive that provides flexibility either through possible derogations or through exemptions. The following table provides a summary of the cut-off criteria, objectives and conditions:

Article 36	Article 49a
<p>“major new gas infrastructure”, i.e., interconnectors, LNG and storage facilities not completed by 4 August 2003</p> <p>(Article 36 and Article 2(33))</p>	<p>gas transmission lines between a Member State and a third country completed before 23 May 2019</p> <p>(Article 49a(1) first subparagraph)</p>
<p>a) the investment must improve <u>security of supply</u> and boost competition in the gas market;</p> <p>b) the <u>investment could not go ahead without the exemption due to the level of risk</u>;</p> <p>c) the infrastructure must be owned by a legally separate firm from the TSO in whose system it will operate;</p> <p>d) users of the infrastructure must pay for access;</p> <p>e) the exemption does <u>not harm the functioning of the EU's internal</u></p>	<p>Member State where the first connection point of such a transmission line with a Member State's network is located may decide to derogate from Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) for the sections of such gas transmission line located in its territory and territorial sea, for objective reasons such as:</p> <p>a) to <u>enable the recovery of the investment made</u> or</p> <p>b) for reasons of <u>security of supply</u>,</p>

gas market or the transmission system to which the infrastructure is linked.	provided that the derogation would not be detrimental to <u>competition on or the effective functioning of the internal market</u> in natural gas, or to security of supply in the Union.
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291. The European Union disagrees with the Claimant's suggestion that the exceptions under Article 36 would be more "exceptional" than an Article 49a derogation in the sense that they are reserved for "infrastructure projects that, if the investment takes place, are expected to have a particularly positive impact on competition and security of supply".²²³ In fact, these same objectives are also set forward with respect to an Article 49a derogation. Indeed, as previously discussed in section 2.3.3.2, even if the qualifying conditions for requesting an Article 36 exemption and the applicable decision-making procedures are different from those that apply in respect of an Article 49a derogation, an Article 36 exemption can be as favourable to the TSO as an Article 49a derogation. Their objectives overlap. Moreover, their application may be subject to specific conditions imposed by an EU Member State's NRAs. These conditions can result in very similar outcomes.

292. In addition, the European Commission Staff Working Document accompanying the proposal for an Amending Directive²²⁴ explains that:

New pipelines to and from third countries could request exemptions from unbundling, third party access and/or tariff regulation pursuant to Article 36 of the Gas Directive. As existing infrastructure cannot meet the "risk" criterion of Article 36, existing infrastructure could not request an exemption (**but could be subject to derogation, see below**)

293. This last sentence demonstrates that the Gas Directive, as amended, provides a complete and coherent system: flexibilities are available for infrastructure either through Article 36 or through Article 49a of the Gas Directive. Indeed, the Staff Working Document specifies that:

²²³ Claimant's Memorial, para. 305.

²²⁴ Commission Staff Working Document of 8 November 2017, Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas {COM(2017) 660 final}, p. 6. (Emphasis added.)(Exhibit R-64)

The application of the aforementioned rules to existing pipelines to and from third countries may in some cases be considered unsuitable or difficult to implement in practice, including in cases where the operation of such infrastructure is governed by existing international agreements with third countries. Therefore, the proposal envisages the **possibility for Member States to grant derogations** from the application of Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) of the Gas Directive **for existing gas pipelines to and from third countries**. Such derogations shall - as is existing practice for exemption decisions - be limited in time and may be subject to conditions. In order to ensure a coherent legal framework for pipelines passing through more than one Member State, the decision to grant a derogation shall be taken by the Member State in the jurisdiction of which the first interconnection point is located.

294. Nothing in Article 36 of the Gas Directive prevents NSP2AG from applying for an exemption under that article. Indeed, Article 36 of the Gas Directive does not require that a final investment decision must not have been taken. Nor does it require that construction of the infrastructure must not have been started. Article 36 of the Gas Directive does not exclude an application for an exemption in either of these cases. A prominent example in this respect is the exemption decision by the European Commission with respect to the "OPAL" pipeline in 2009, a case well-known to the Claimant. The European Commission agreed to an exemption²²⁵ in this case at a moment when all tubes for the pipeline had already been bought and where the construction had already started,²²⁶ similar to the situation of the NS2 pipeline.
295. Moreover, Article 36 of the Gas Directive makes clear that it is possible for exemption decisions to be reviewed and for conditions to be modified or added, even when the investment decision has already been taken.²²⁷

²²⁵ See (Exhibit R – 66): Commission Decision of 12 June 2009 on the exemption of the Gernam Beundesnetzagentur for the OPAL pipeline, available at: https://ec.europa.eu/energy/sites/ener/files/documents/2009_opal_decision_de.pdf.

²²⁶ See (Exhibit R – 67): Decision of the Bundesnetzagentur of 25 February 2009 with respect to OPAL, pp. 63-64.

²²⁷ See (Exhibit R – 68): Commission Decision of 28 October 2016 on review of the exemption of the Ostseepipeline-Anbindungsleitung from the requirements on third party access and tariff regulation granted under Directive 2003/55/EC, para. 20 ("In view of the principle of congruent forms and in order to ensure legal certainty, it is appropriate, in case of modifications to national exemption decisions such as the Notified Decision, to review it under the procedure described in Article 36 of Directive 2009/73/EC. In the absence of specific review clauses, changes to the scope of an exemption or the conditions attached to an exemption decision must be justified. New factual developments which have occurred following the initial exemption decision can be a valid reason for a review. A review process may be triggered where, for example, an exemption holder submits to the relevant NRA a request to amend certain conditions imposed by the existing exemption decision, to amend the scope of the exemption or requests a prolongation of the exemption or of the validity of the exemption decision.[footnote omitted] It can also concern cases, where due to changes in the project and/or external circumstances, certain parameters of the project change and as a result questions arise whether the existing exemption still can be applicable to the modified project" [Footnote omitted]).

296. The Claimant further argues that the application of the Gas Directive would have a negative impact on its investment.²²⁸ In fact, this indicates precisely that the rationale for an Article 36 exemption could in principle also apply in this case, subject to a detailed factual assessment: would the investment go ahead without the exemption due to the level of risk involved for the NS2 pipeline project?
297. Given the coherent framework established by the Gas Directive, the Claimant is wrong to suggest that Gas Directive disciplines will necessarily apply in full to the NS2 pipeline project without any possibility for flexibilities. In this coherent legal framework, the NS2 pipeline is not “singled out” or a “specific target”²²⁹ in one way or another. In fact, as previously discussed in Section 2.3.3.1, the Claimant itself argues that the German NRA should grant it a derogation under Article 49a of the Gas Directive, having appealed the German FNA’s decision and claiming that the requirement of being “completed” before 23 May 2019 is met.²³⁰ As long as this appeal is not decided, it cannot be excluded that NSP2AG may obtain an Article 49a derogation. Furthermore, even if NSP2AG did not obtain an Article 49a derogation, it could still apply for an Article 36 exemption. There is nothing in the text of Article 36 of the Gas Directive that would prevent NSP2AG from making such application.

2.4.5. The Amending Directive does not have as “practical effect” that only the NS2 pipeline will be affected

298. The Claimant wrongly argues that the Amending Directive has a “practice effect” on its undertaking only. This is untrue. The amendments to the Gas Directive introduced by the Amending Directive clarify the applicability of the rules for transmission grids as set out in the Gas Directive to all gas interconnectors between EU Member States and third countries regardless of location. The Amending Directive thus addressed the legal uncertainty that existed previously in this respect.
299. The rules in question apply equally to onshore and offshore connections with third countries.²³¹ The Directive itself makes no distinction in this regard.
300. To the extent that the rules were already being applied to certain onshore gas interconnectors with third countries (e.g., interconnectors between Ukraine and Slovakia), the Amending Directive establishes a clear legal basis in EU law for

²²⁸ See Section VII of the Claimant’s Memorial.

²²⁹ Claimant’s Memorial, para. 410.

²³⁰ See Claimant’s Memorial, para. 412.

²³¹ See Expert Report by Prof. Maduro, paras. 252-282.

- this practice and eliminates the risk of future legal challenges as to the application of the Gas Directive to such interconnectors.
301. The amendments introduced by the Amending Directive clarify that the same set of requirements (including unbundling, TPA and tariff regulation) enshrined in the Gas Directive is applicable to interconnectors between EU Member States and interconnectors with third countries. For any given national gas market in an EU Member State, this creates a level playing field by putting suppliers using pipelines from other EU Member States and those using pipelines from third countries on equal footing.
302. The Gas Directive, as amended, establishes a coherent legal framework, with rules and flexibilities, and does not “single out” the NS2 pipeline. The Claimant has not demonstrated that there is no possibility for the NS2 pipeline to benefit from flexibilities under the Gas Directive.
303. In any event, an overview of the pipeline landscape shows that there is no “targeting” of NSP2AG.²³² All gas interconnectors, both between EU Member States and between Member States and third countries, onshore or offshore, are, as a rule, subject to the Gas Directive. Flexibilities are available and are granted, or denied, by the competent EU Member State authority based on the specific conditions and facts of each situation. It is incorrect to claim that the NS2 pipeline project would be the only interconnector with third countries that is subject to the obligations of the Gas Directive.
304. There are indeed several onshore and offshore interconnectors with third countries that are subject to the Gas Directive and that do not benefit from an Article 49a derogation.
305. A first group of such interconnectors are those between EU Member States and Contracting Parties of the Energy Community, notably the import pipelines from Ukraine towards Poland, Slovakia and Hungary, as well as the interconnectors between Hungary and Serbia and Serbia and Bulgaria. In practice, the Gas Directive and the Gas Regulation have been applied on the EU side of these interconnectors. Contracting Parties to the Energy Community Treaty were indeed already subject to an obligation to transpose and apply the Gas Directive and the Gas Regulation. However, given that it was uncertain whether the Gas Directive expressly extended to third country interconnectors, the Amending

²³² See (Exhibit R-69): ENTSOG, the European Natural Gas Network, Map, 29 October 2019, [ENTSOG CAP 2019 A0 1189x841 FULL 401](#).

- Directive clarified the legal basis for existing EU policy in favour of its applicability in such circumstances.
306. A second group of interconnectors includes the Yamal pipeline between Belarus and Poland and the three interconnectors between Ukraine and Romania. There have been obstacles to the intended application of the Gas Directive and the Gas Regulation to these interconnectors. The Amending Directive is also relevant for this group as a means of creating a solid legal basis for future application and enforcement of the Gas Directive.
307. A third group of interconnectors includes those between Russia and EU Member States (Finland, Estonia, Latvia) and between Turkey and EU Member States (Bulgaria, Greece).
308. A fourth group includes the interconnectors between Germany and Italy on one side and Switzerland on the other. These have always been operated on the basis of EU law principles. This practice received a stable legal basis following the amendment of the Gas Directive.
309. A fifth group of interconnectors includes those with the United Kingdom which relate to offshore pipelines. With the withdrawal of the United Kingdom from the European Union, those would no longer have been subject to the Directive without the Amending Directive. It is true that the agreement with the United Kingdom provides for some specific provisions in this regard.²³³ However, the conclusion of such an agreement was not certain at the time when the Gas Directive was amended. In any event, the Gas Directive provides for a more detailed framework than the agreement.
310. The Gas Directive applies to all interconnectors with third countries mentioned above and no Article 49a derogation has been granted in any of the cited cases.
311. Some of these third-country pipelines obtained an Article 36 exemption. For instance, the BBL interconnector between the United Kingdom and the Netherlands has been partially exempted until 2 December 2022.²³⁴ It qualifies as an interconnector with a third country following the United Kingdom's withdrawal from the European Union. Further, the IUK interconnector between the United Kingdom and Belgium was exempted from tariff regulation under

²³³ See (Exhibit R-70): Part Two, Title VIII of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A1231(01)&from=EN).

²³⁴ Commission Opinion of 11.3.2013 pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) of Directive 2009/73/EC – the Netherlands and the United Kingdom – Certification of BBL Company VOF, C(2013)1526 (Exhibit R-71)

Article 37 TAR NC (COM Reg. 460/2017).²³⁵ The IUK interconnector also qualifies as an interconnector with a third country following the United Kingdom's withdrawal from the European Union.

2.5. The Amending Directive underwent a proper legislative process

2.5.1. The Amending Directive was not tabled with haste

312. The Claimant asserts that the Amending Directive was tabled and adopted with haste.²³⁶ To the contrary, the adoption of the Amending Directive followed all of the procedural steps required for an act of its type and was thoroughly considered and attentively discussed by all the relevant actors. The scope of the act, as assessed by the number and simplicity of legal provisions covered, is limited. Nonetheless, given the importance of the EU legislation governing the internal market for energy and security of supply, the proposal was subject to intense scrutiny by a wide range of actors during the legislative process which culminated in the adoption of the Amending Directive.

2.5.2. The Amending Directive underwent an 18-month negotiation process

313. The process of adopting the Amending Directive in accordance with the ordinary legislative procedure took about 18 months from the transmission of the European Commission Proposal to the European Parliament and the Council of EU on 8 November 2017²³⁷ to the adoption of the text endorsed by the European Parliament and the Council of the EU on 17 April 2019.²³⁸

314. The legislative process involved the following actors and stages:

- a) the European Commission transmitted its Proposal to the European Parliament and the Council of the EU on 8 November 2017, accompanied by an Explanatory Memorandum and the European Commission Staff Working Document Assessing the amendments to the Gas Directive setting out rules for gas pipelines connecting the European Union with third countries;²³⁹

²³⁵ (Exhibit R-72): OFGEM Decision to derogate Interconnector (UK) from certain articles of Commission Regulation (EU) 2017/460: https://www.ofgem.gov.uk/system/files/docs/2018/07/17072018_iuk_a37_ofgem_derogation_letter_1.pdf.

²³⁶ Claimant's Memorial, para. 249.

²³⁷ (Exhibit R-73).

²³⁸ Exhibit CL-3, Amending Directive.

²³⁹ (Exhibit R-64): Commission Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, which accompanied the Proposal for a Directive of the European Parliament and of the Council

- b) stakeholders provided their feedback on the Proposal between 6 December 2017 and 31 January 2018;²⁴⁰
- c) the European Economic and Social Committee issued its Opinion on 18 April 2018;²⁴¹
- d) the Committee of the Regions published its Opinion on 16 May 2018;²⁴²
- e) the European Parliament endorsed the report prepared by the rapporteur Member of the European Parliament (MEP) on 11 April 2018,²⁴³ and adopted its position at first reading on 4 April 2019;²⁴⁴ and
- f) the Council of the EU issued 17 discussion documents dated from 13 November 2017 to 9 April 2019,²⁴⁵ and approved the position of the European Parliament on its final voting on 15 April 2019.²⁴⁶

amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 8.11.2017, SWD(2017) 368 final, COM(2017) 660 final.

²⁴⁰ Available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1237-Commission-proposal-for-a-Directive-amending-Directive-2009-73-EC>. (Exhibit R-74).

²⁴¹ (Exhibit R-75): Opinion of the European Economic and Social Committee on the proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (COM(2017) 660 final – 2017/0294 (COD)), 18 April 2018.

²⁴² (Exhibit R-76): Opinion of the European Committee of the Regions – Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, 2018/C 361/09, 16 May 2018.

²⁴³ (Exhibit R-77): Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, (COM(2017)0660 – C8-0394/2017 – 2017/0294(COD)), 11 April 2018.

²⁴⁴ (Exhibit R-78): European Parliament legislative resolution of 4 April 2019 on the proposal for a directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (COM(2017)0660 – C8-0394/2017 – 2017/0294(COD)),

²⁴⁵ Exhibit (Exhibit R-79)., Comments from the French Senate to the Council, 12 January 2018; Comments to the Spanish Parliament to the Council, 19 December 2017; Comments From the French Senate to the President of the European council, 12 January 2018; Comments From the Spanish Senate to the President of the European Council, 12 January 2018; Comments From the Portuguese Parliament to the President of the European Council, 22 January 2018; Comments From the Romanian Senate to the President of the European Council, 23 February 2018; Exhibit (Exhibit R-80), Presidency's First Revision of the Proposal, from the General Secretariat of the Council to delegations, 27 March 2018; Exhibit (Exhibit R-81), Guidance for further technical work, from the Presidency to the Permanent Representatives Committee, 18 June 2018; Exhibit (Exhibit R-82), Further revised text of the draft directive from the General Secretariat of the Council to Delegations, 21 November 2018; (Exhibit R-83), Information from the Presidency from the General Secretariat of the Council to the Council, 14 December 2018; Exhibit (Exhibit R-84), Third revised text of the draft directive from the General Secretariat of the Council to the Delegations, 9 January 2019; (Exhibit R-85), Mandate for negotiations with the European Parliament, from the General Secretariat of the Council to Permanent Representatives Committee, 4 February 2019; (Exhibit R-86), Mandate for negotiations with the European Parliament, from the General Secretariat of the Council to Delegations, 11 February 2019; (Exhibit R-87), Analysis of the final compromise text with a view to agreement, from the General Secretariat of the Council to Permanent Representatives Committee, 14 February 2019; Exhibit (Exhibit R-88), Analysis of the final compromise text with a view to agreement, from the General Secretariat of the Council to Permanent Representatives Committee, 19 February 2019; (Exhibit R-89), Directive amending Directive 2009/73/EC, 5 April 2019; (Exhibit R-90), Information Note, Outcome of the European Parliament's first reading, from the General Secretariat of the Council to Permanent Representatives Committee/Council, 7 April 2019; (Exhibit R-91), Adoption of the legislative act, from the General Secretariat of the Council to Permanent Representatives Committee/Council, 9 April 2019.

²⁴⁶ Exhibit (Exhibit R-92), Voting result, DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (first reading) Adoption of the legislative act 3686th meeting of the COUNCIL OF THE EUROPEAN UNION (Agriculture and Fisheries) 15 April 2019, Luxembourg, ST 8610 2019 INIT.

315. The Proposal was examined in detail by a dedicated Committee in the European Parliament and a dedicated Working Group in the Council of the EU.
316. In the European Parliament, the file was allocated to the Committee on Industry, Research and Energy (ITRE), which appointed its chairman, MEP Jerzy Buzek (European People's Party (EPP), Poland), as rapporteur. The final report by MEP Jerzy Buzek included 22 amendments and was adopted by the ITRE Committee on 21 March 2018 and endorsed during the April 2018 plenary session, together with a mandate for the ITRE Committee to enter into inter-institutional negotiations.²⁴⁷
317. The Proposal was discussed in the Council of the EU Working Group on Energy, as well as at COREPER²⁴⁸ level. Following the publication of 17 discussion documents, the Council of the EU eventually reached a common position on 8 February 2019.
318. The Claimant relies exclusively on the Written Comments by Germany in the Council of the EU Working Paper to argue that Germany saw "no need for haste for implementing the proposal".²⁴⁹ It is useful to recall that Germany is only one of the then 28 EU Member States. Other EU Member States had very different views on the matter, notably on the need to clarify that pipelines originating in third-countries were subject to the rules applying to the internal market for energy.
319. One of the reasons why Germany favoured a slower and more cautious approach stemmed from Germany's doubts and concerns relating to EU competence "in the field of energy policy and external energy policy": "[the proposal] involves an extension of the Union's competence into areas which to a large degree lie outside the sovereign territory of the Member States".²⁵⁰ However, all of Germany's doubts on EU competence and the economic implications of the Proposal were overcome by the time it voted in favour of the Amending Directive on 15 April 2019.²⁵¹

²⁴⁷ Legislative train schedule Resilient Energy Union with a climate change policy, Common rules for gas pipelines entering the EU internal market, <https://www.europarl.europa.eu/legislative-train/theme-resilient-energy-union-with-a-climate-change-policy/file-common-rules-for-gas-pipelines-entering-the-eu-internal-market> (Exhibit R-93)

²⁴⁸ COREPER stands for Committee of the Permanent Representatives of the Governments of the Member States to the European Union.

²⁴⁹ C-114.

²⁵⁰ C-114, p. 2.

²⁵¹ (Exhibit R-92), Voting result, DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (first reading) Adoption of the legislative act 3686th meeting of the COUNCIL OF THE EUROPEAN UNION (Agriculture and Fisheries) 15 April 2019, Luxembourg, ST 8610 2019 INIT.

320. Tripartite negotiations ('trilogues') took place on 12 February 2019 and were concluded with a provisional agreement. The agreed text was endorsed by the European Parliament on 4 April 2019 and by the Council of the EU on 15 April 2019. The Amending Directive was published in the EU Official Journal on 3 May 2019 and entered into force on 23 May 2019. The scope of the Amending Directive was rather limited; the Proposal was not complex.
321. Eighteen months elapsed from 8 November 2017, date of the transmission of the European Commission Proposal to the European Parliament, and the date of adoption of the Amending Directive during a meeting of the Council of the EU that took place on 15 April 2019. The duration of the negotiations leading to the adoption of the Amending Directive corresponds to the average duration of negotiations for the adoption of other legislative acts at first reading.²⁵² To provide a comparative example, the European Commission Proposal for a regulation establishing a framework for the screening of foreign direct investment into the European Union was also adopted within eighteen months.²⁵³
322. The adoption of the Amending Directive by the European Parliament and the Council of the EU therefore followed all of the steps prescribed in the ordinary legislative procedure. The Amending Directive was treated no differently from other legislative proposals submitted by the European Commission of a similar scope and complexity.

2.5.3. The Explanatory Memorandum illustrates the rationale of the Amending Directive

323. The Claimant alleges that European Union provided "false justifications" for the procedure followed for the adoption of the Amending Directive.²⁵⁴
324. The Proposal for the Amending Directive, which was published on 8 November 2017, was accompanied by an Explanatory Memorandum which was the result of a study carried out by the European Commission. The Explanatory Memorandum provides comprehensive background on the purpose, context, and legal elements of the Amending Directive. It confirms that the Proposal for the Amending Directive is in compliance with the principles of subsidiarity and

²⁵² (Exhibit R-94), p. 4: "[t]he average length of procedure for acts adopted at first reading is just below 18 months for the 8th term (from adoption by the Commission to signature by the colegislators); the figure rises to approximately 20 months for those that were negotiated".

²⁵³ (Exhibit R-95), Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (OJ L 79 of 21.3.2019, p.1).

²⁵⁴ Claimant's Memorial, para. 252.

- proportionality, and explains its relation with other EU policies, as well as the reasons justifying its legal basis.
325. In the paragraph “[r]easons for and objectives of the proposal”, the Explanatory Memorandum describes the context of the proposal. The Explanatory Memorandum indicates that, in order to create an Energy Union, it is essential to establish an integrated gas market as a precondition for ensuring security of gas supply in the EU.²⁵⁵
326. The paragraph on “[c]onsistency with existing policy provisions in the policy area” emphasises the need to clarify certain rules, specifically “to take account of the specific requirements in relation to third countries”.²⁵⁶
327. The Explanatory Memorandum adds that the legal basis for the Amending Directive is Article 194 of the TFEU, and that it aims at building upon a comprehensive set of legislative acts that have been adopted and updated during the past two decades with the objective of creating an Energy Single Market.²⁵⁷
328. The Explanatory Memorandum then addresses the principles of subsidiarity and proportionality.²⁵⁸ It explains that the proposed changes to the Gas Directive are necessary to achieve the purpose of an integrated EU gas market, which cannot be accomplished at a national level, and that the amendment is strictly oriented towards what is indispensable to achieve the necessary progress for the integration of the internal gas market.
329. As detailed in paragraphs 103, 106, and 108 of this Counter-Memorial, the Proposal for the Amending Directive aims to ensure a level playing field by putting suppliers using pipelines from other EU Member States and those using pipelines from third countries on equal footing. It prevents owners of pipelines, who often coincide with dominant suppliers, from favouring their own supply business to the detriment of competitors by, for example, refusing access, setting unfair connection tariffs or imposing unfair conditions.
330. Whereas the objectives of creating an Energy Union and ensuring security of energy supply were established in the Treaties and in EU legislation, and whereas its principles were applied in practice when the European Commission reviewed IGAs concluded with third countries, the Explanatory Memorandum explains that a further step was needed to complete the regulatory framework.

²⁵⁵ Explanatory Memorandum to the Amending Directive, p. 2.

²⁵⁶ Explanatory Memorandum to the Amending Directive, p. 3.

²⁵⁷ Explanatory Memorandum to the Amending Directive, p. 3.

²⁵⁸ Explanatory Memorandum to the Amending Directive, pp. 3-4.

- The Explanatory Memorandum asserts that the Proposal for the Amending Directive aims at clarifying “existing situations created as a result of lack of explicit rules under the current framework”.²⁵⁹
331. The Explanatory Memorandum provides the reasons why no public consultation or impact assessment was necessary. The sections on “[i]mpact assessment”²⁶⁰ and “[e]x-post evaluations/fitness checks of existing legislation”²⁶¹ of the Explanatory Memorandum are of core importance for a complete understanding of the context that led to the issuance of the Proposal for the Amending Directive.
332. These two sections explain that the Proposal for the Amending Directive emerged from the need to clarify a point that had remained ambiguous in EU law. The Explanatory Memorandum adds that, since the European Union is to a large extent dependent on gas imports from third countries, it is in the best interest of the European Union and gas customers to apply the regulatory framework also in respect of pipelines to and from third countries. Ensuring that all pipelines provide non-discriminatory access to third-parties is one of the core principles for the EU internal energy market to function efficiently. It is also a prerequisite for gas deliveries during emergencies, both between EU Member States and with neighbouring third countries.²⁶²
333. The sections on “[i]mpact assessment” and “[e]x-post evaluations/fitness checks of existing legislation” of the Explanatory Memorandum are addressed in greater detail in Sections 2.5.4 and 2.5.5 of this Counter-Memorial.

2.5.4. An impact assessment was not required

334. The Claimant maintains that the Proposal for the Amending Directive needed a self-standing impact assessment based on the Interinstitutional Agreement²⁶³. However, this section demonstrates that the Proposal for the Amending Directive, which aimed at clarifying an existing legal act, did not require the carrying out of an impact assessment, and that the Explanatory Memorandum explained the reasons why this was not necessary.
335. It is now useful to provide some background on the nature of interinstitutional agreements and their legal effects.

²⁵⁹ Explanatory Memorandum to the Amending Directive, p. 4.

²⁶⁰ Explanatory Memorandum to the Amending Directive, p. 4.

²⁶¹ Explanatory Memorandum to the Amending Directive, p. 4.

²⁶² (Exhibit R-64), Context of the Proposal, Explanatory Memorandum to the Amending Directive.,

²⁶³ Claimant’s Memorial, para. 250(ii).

336. Article 295 of the TFEU governs interinstitutional agreements: “[t]he European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation”.²⁶⁴ Interinstitutional agreements are non-legislative acts that focus on self-organisation²⁶⁵ and regulate certain aspects of consultation and cooperation between EU institutions. They aim at increasing efficiency and at clarifying procedures in order to prevent or limit conflicts amongst EU institutions.²⁶⁶
337. Contrary to other legal acts, whose effects influence those who are in a relation of subordination, interinstitutional agreements have a horizontal direction: the institutions that establish the rules and the institutions that are affected by those rules are identical.²⁶⁷ Their contractual nature distinguishes interinstitutional agreements from acts of secondary law.²⁶⁸
338. Article 295 of the TFEU specifies that interinstitutional agreements may also “[...] be of a binding nature”.²⁶⁹ However, based on the contractual mode of effect, interinstitutional agreements have binding effects only upon the institutions that conclude them.²⁷⁰
339. Under the Interinstitutional Agreement, the European Commission, the Council of the EU, and the European Parliament agreed to regulate certain aspects of consultation and cooperation between each other. The aim of the Interinstitutional Agreement is to achieve high-quality EU legislation by means of a number of objectives and tools.²⁷¹
340. Article 11 of the Interinstitutional Agreement defines the purpose of an impact assessment and clarifies that it does not replace the democratic decision-making process: “[i]mpact assessments are a tool to help the three Institutions reach

²⁶⁴ Article 295 of the TFEU. (Exhibit RLA-69)

²⁶⁵ Florian von Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung / Interinstitutional Agreements: a Legal Instruments of EU Constitutional Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 182, 2006, 459-470, Springer. (Exhibit RLA-97)

²⁶⁶ (Exhibit R-96), EU Monitor, *Interinstitutional Agreements*.

²⁶⁷ Florian von Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung / Interinstitutional Agreements: a Legal Instruments of EU Constitutional Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 182, 2006, 459-470, Springer. (Exhibit RLA-97)

²⁶⁸ Florian von Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung / Interinstitutional Agreements: a Legal Instruments of EU Constitutional Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 182, 2006, 459-470, Springer. (Exhibit RLA-97)

²⁶⁹ Article 295 of the TFEU. (Exhibit RLA-69)

²⁷⁰ Florian von Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung / Interinstitutional Agreements: a Legal Instruments of EU Constitutional Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 182, 2006, 459-470, Springer. (Exhibit RLA-97)

²⁷¹ CLA-49, *Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making* of 13 April 2016, OJ L 123/1, 12 May 2016, Article 1.

- well-informed decisions and not a substitute for political decisions within the democratic decision-making process".²⁷²
341. Article 13 of the Interinstitutional Agreement establishes that: "[t]he Commission will carry out impact assessments of its legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environmental or social impacts".²⁷³ The Better Regulation Toolbox clarifies this point: "[c]learly, the appreciation of what is considered "significant" will depend on expert judgment and should take into account the results of associated evaluations".²⁷⁴
342. The Interinstitutional Agreement continues: "[i]mpact assessments must not lead to undue delays in the law-making process or prejudice the co-legislators' capacity to propose amendments".²⁷⁵ This is confirmed in the Better Regulation Toolbox: "[a]n IA [impact assessment] should be carried out only when it is useful. An assessment of whether an IA is needed should therefore be done on a case-by-case basis and reported on in the roadmap when an IA is deemed not to be necessary".²⁷⁶
343. The Better Regulation Toolbox lists the initiatives for which the need for an impact assessment *should be assessed*, and a "[r]evision of existing legal acts", such as an amending directive or an amending regulation, is included in this list.²⁷⁷ The Better Regulation Toolbox also provides that the evaluation of whether an impact assessment is needed *"is likely to conclude that no IA is needed when there is little or no choice available for the Commission"*.²⁷⁸
344. In the case at hand, the Amending Directive amounts to a limited revision of an existing legal act. It aimed at clarifying a legal issue left ambiguous by the Gas Directive. Moreover, the Amending Directive enshrined principles that were already established in Article 194 of the TFEU and recalled in the European Commission's Energy Union Strategy of 2015.²⁷⁹

²⁷² CLA-49, Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123/1, 12 May 2016, Article 11.

²⁷³ CLA-49, Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123/1, 12 May 2016, Article 13.

²⁷⁴ Better Regulation Toolbox, available at: https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox_2.pdf, p. 48. (Exhibit R-74)

²⁷⁵ CLA-49, Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123/1, 12 May 2016, Article 13.

²⁷⁶ Better Regulation Toolbox, pp. 48-51. (Exhibit R-74)

²⁷⁷ Better Regulation Toolbox, p. 49. (Exhibit R-74)

²⁷⁸ Better Regulation Toolbox, p. 48. (Exhibit R-74)

²⁷⁹ COM(2015) 80 final. (Exhibit R-98)

345. The redundancy of an impact assessment in this case is further corroborated by the absence of an impact assessment in 86% of Amending Directives or Amending Regulations adopted from 1 January 2019 to 17 February 2021.²⁸⁰ In fact, out of 65 amending legislative acts adopted during this period, an impact assessment was performed in only nine of them, amounting to only 13,8% of the total. In other words, the process followed in respect of this Amending Directive was the norm rather than any exception.
346. Based on the Interinstitutional Agreement, in 2017 the European Commission issued the Better Regulation Guidelines, which provide a definition of impact assessment: “[i]mpact assessments collect evidence (including results from evaluations) to assess if future legislative or non-legislative EU action is justified and how such action can best be designed to achieve desired policy objectives. An impact assessment must identify and describe the problem to be tackled, establish objectives, formulate policy options, assess the impacts of these options and describe how the expected results will be monitored. The [European] Commission’s impact assessment system follows an integrated approach that assesses the environmental, social and economic impacts of a range of policy options thereby mainstreaming sustainability into Union policymaking”.²⁸¹
347. In those cases where the performance of an impact assessment is suggested, the Better Regulation Guidelines recommend collecting evidence aimed at assessing whether the proposed legislative action is justified and how it can be best designed to achieve the desired policy objectives. As explained in paragraphs 98-100 of this Counter-Memorial, the Proposal for an Amending Directive had the following objectives:
- a) to clarify the legal framework is applicable to interconnectors with third countries;
 - b) to seek to address the remaining obstacles to the completion of the EU internal market in natural gas;²⁸²
 - c) to address the legal uncertainty that existed previously and enhance transparency as regards the applicable legal regime;²⁸³
 - d) to enhance security of gas supply,²⁸⁴ and

²⁸⁰ (Exhibit R-99)

²⁸¹ Commission Staff Working Document, Better Regulation Guidelines, SWD (2017) 350. (Exhibit R-100)

²⁸² Recital No. 3, Amending Directive.

²⁸³ Recital No. 3, Amending Directive.

²⁸⁴ Recital No. 1 and No. 3, Amending Directive.

- e) to establish consistency of the legal framework within the European Union²⁸⁵ while avoiding distortion of competition in the internal energy market in the European Union.
348. The Proposal for an Amending Directive was aimed at clarifying a point left ambiguous by the Gas Directive. The Proposal was reiterating the same principles already established in the 2012 IGA Decision²⁸⁶ and the 2017 IGA Decision²⁸⁷ (the IGA Decisions). It follows that an impact assessment would have been redundant. The Explanatory Memorandum explained that there was no need for an impact assessment because there would be no unforeseen impact, based on the EU approach on the applicability of EU law to pipelines to and from third countries as reflected in several IGAs. Therefore, the impact of the Amending Directive was already known. A detailed description of the role of the IGA Decisions can be found in paragraphs 380-391 below.
349. The Better Regulation Toolbox further provides that: “[t]he reasons why an impact assessment will not be prepared should be presented”.²⁸⁸ The evaluation on whether an impact assessment was necessary was indeed carried out by the European Commission in the Explanatory Memorandum to its Proposal for the Amending Directive.²⁸⁹ The European Commission concluded that no impact assessment was needed, based on the fact that the proposed changes to the Gas Directive were already applied in practice: “[t]he present initiative does not require a detailed impact assessment as the changes proposed reflect the practice of applying core principles of the regulatory framework set out in the Gas Directive in relation to third countries”.²⁹⁰

2.5.5.A separate ex-post evaluation was not needed

350. The Claimant asserts that the European Commission “normally” undertakes an ex-post evaluation or fitness check of the existing legal framework with prior consultation of the interested parties.²⁹¹ However, given the purpose of an ex-

²⁸⁵ Recitals No. 3 and 15, Amending Directive.

²⁸⁶ (Exhibit R-101), Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13–17 (the 2012 IGA Decision). The 2012 IGA Decision was repealed by the 2017 IGA Decision.

²⁸⁷ (Exhibit R-102), Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9 (the 2017 IGA Decision). The 2017 IGA Decision repealed the 2012 IGA Decision.

²⁸⁸ Better Regulation Toolbox, p. 39. (Exhibit R-97),

²⁸⁹ Explanatory Memorandum to the Amending Directive, p. 4.

²⁹⁰ Explanatory Memorandum to the Amending Directive, p. 4.

²⁹¹ Claimant’s Memorial, para. 250(i).

- post evaluation or fitness check, this step is only required in certain cases. Such cases did not include the Amending Directive.
351. The Better Regulation Toolbox defines the aim of an ex-post evaluation: “to assess [EU interventions’] (...) actual performance compared to initial expectations. By evaluating, the Commission takes a critical look at whether EU activities are fit for purpose and deliver their intended objectives at minimum cost”.²⁹²
352. In particular, the ex-post evaluation assesses whether an existing EU intervention is:
- a) effective;
 - b) efficient;
 - c) relevant given the current needs;
 - d) coherent both internally and with other EU interventions; and
 - e) has achieved EU added value.²⁹³
353. It follows that an ex-post evaluation would only be necessary when the fitness of the existing piece of legislation is assessed. In the present case, since the purpose of the Amending Directive was not to assess the fitness of the Gas Directive, but rather to elucidate and provide clarity to its provisions, an ex-post evaluation of the Gas Directive was not necessary.
354. Despite the fact that an ex-post evaluation was unnecessary, the Proposal for an Amending Directive welcomed comments from all stakeholders: public feedback could be provided from 6 December 2017 until 31 January 2018. Thirty-seven responses from NGOs, companies, trade associations, public entities, chambers of commerce, and anonymous contributors were received during that period.²⁹⁴ The reactions were published on the “[h]ave your say” webpage of the European Commission, a platform that gathers the feedback of citizens and businesses on new EU policies and existing laws.
355. Collecting feedback does not amount to a formal public consultation: “[t]he collection of feedback offers an opportunity for stakeholders to express general views on a specific document (roadmap, inception impact assessment, draft secondary legislation, legislative proposals and accompanying impact assessments, established legislation), not based on specific questions or

²⁹² Better Regulation Toolbox, p. 52. (Exhibit R-97),

²⁹³ Better Regulation Toolbox, p. 52. (Exhibit R-97),

²⁹⁴ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1237-Commission-proposal-for-a-Directive-amending-Directive-2009-73-EC>. (Exhibit R-103),

- consultation background documents. Consultation is a formal process of collecting input and views from stakeholders on new initiatives or evaluations/fitness checks, based on specific questions and/or consultation background documents or Commission Documents launching a consultation process or Green Papers. When consulting, the Commission proactively seeks evidence (facts, views, opinions) on a specific issue”.²⁹⁵ A proposal for an amending legal act is not included in the list of acts for which a formal consultation is required.
356. The Claimant argues that, since the Proposal for the Amending Directive was opened for feedback after its issuance, such feedback could have no impact in shaping the Proposal itself.²⁹⁶ This inherently contradictory argument misses the purpose of the feedback process, which is to allow “stakeholders to provide comments on a particular document which will be considered in the further elaboration of the document or initiative”.²⁹⁷ The Better Regulation Guidelines specify that: “[s]takeholder engagement can in principle take place throughout the whole policy cycle”.²⁹⁸
357. The Explanatory Memorandum specifically addresses the need for ex-post evaluations/fitness checks of existing legislation and concludes that in this particular case, no such evaluation was needed, for the following reasons: “[t]he content of the current proposal is limited to providing clarification in an area where applicable EU law (or the lack thereof) and applied practice diverge. The proposal builds on established practice. To take account of nevertheless existing situations created as a result of lack of explicit rules under the current framework, Member States are enabled to provide for derogations for existing operating infrastructure. In view of the above, it is considered that the amendment of the Gas Directive can be carried out without a separate evaluation process”.²⁹⁹ In other words, the Amending Directive was introduced to ensure that the relevant EU legal instrument aligned clearly with an EU practice whose impact was already well understood.
358. The involvement of stakeholders in the legislative process that led to the adoption of the Amending Directive was ensured through the collection of feedback.

²⁹⁵ Better Regulation Toolbox, p. 437. (Exhibit R-97)

²⁹⁶ Claimant’s Memorial, fn 276.

²⁹⁷ Better Regulation Guidelines, p. 71. (Exhibit R-100)

²⁹⁸ Better Regulation Guidelines, p. 71. (Exhibit R-100)

²⁹⁹ Explanatory Memorandum to the Amending Directive, p. 4.

359. The collection of feedback after the Proposal for the Amending Directive was published by the European Commission, instead of a public consultation before the Proposal was published, reflects EU law-making practice which simplifies the legislative process when the content of the acts has a limited scope, while ensuring that all stakeholders can express their views. Since 2019, out of the 124 legislative proposals adopted by the European Commission, only 14, amounting to 11,3% of the total, were subject to a formal public consultation.³⁰⁰

2.5.6. The Amending Directive provided legal certainty

360. The internal market in natural gas has been progressively implemented throughout the European Union since 1999.³⁰¹ The Gas Directive had the objective of creating a fully operational internal market in natural gas,³⁰² and has made a significant contribution towards this end.

361. The European Commission's position from the start was that the Gas Directive would apply regardless of the point of origin of a pipeline, so long as the pipeline entered EU territory and sold gas on the EU market. Although the Gas Directive includes provisions on unbundling, TPA, tariff regulation, and transparency for transmission lines crossing a border between EU Member States, it did not explicitly mention that its provisions also applied to gas transmission lines to and from third countries.

362. The lack of explicit applicability of the Gas Directive to gas transmission lines to and from third countries gave rise to differences of views as to the scope of the existing rules. These differences of views compelled the European Union to issue its Proposal for the Amending Directive.

363. At the same time, the Gas Directive contained several references suggesting that its application extended to pipelines entering the EU territory from third parties. As detailed in Section 2.2 of this Counter-Memorial, clear signals included the aims expressed in the recitals of the Gas Directive as well as its scope, which drew no distinction with regard to the origin or nature of pipelines to which it applied. Similarly, there were indications that the Gas Directive would apply to third country pipelines based on the public statements of the European Commission in 2008-2015³⁰³ (see paras. 140-144 of this Counter-Memorial) as well as Decisions issued by the European Commission on the applicability of the

³⁰⁰ (Exhibit R-104)

³⁰¹ Recital No. 1, Amending Directive.

³⁰² Recital No. 60, Gas Directive.

³⁰³ See (Exhibits RLA-87, RLA-88, RLA-89, RLA-90, and RLA-91)

- Gas Directive to pipelines importing gas from third countries³⁰⁴ (see para. 145 of this Counter-Memorial).
364. It emerges that there were multiple indications that the Third Gas Directive would apply to third country pipelines such as NS2 pipeline.
365. The applicability of the Gas Directive to offshore import pipelines also was consistent with EU Member States' territorial jurisdiction under international law, not least because 140 kilometres of the NS2 pipeline were to run through German internal waters.
366. The European Union recognized the need to ensure that all pipelines selling gas into the EU regardless of origin were operating on a level playing field and subject to the same disciplines. The European Union therefore began exploring all policy instruments at its disposal to achieve this goal. This included consistent EU initiatives to negotiate IGAs with third countries. It also included taking the position that the Gas Directive would apply to third country pipelines. This was illustrated in particular in the European Commission's statements concerning the applicability of the Gas Directive to South Stream, as detailed in paras. 143-144 of this Counter-Memorial. It was therefore evident to any market participant that the EU would not permit pipelines to function in the EU space in a manner inconsistent with the disciplines of the Gas Directive.
367. Moreover, by providing legal certainty, the Amending Directive reflected the EU approach supporting the applicability of EU law to pipelines to and from third countries. This approach had already developed long before the European Commission issued its Proposal for the Amending Directive on 8 November 2017.
368. Several EU legal acts require compliance with EU law of IGAs concluded between an EU Member State and a third country, in so far as they relate to the construction and operation of gas pipelines to and from third countries and the supply of gas, including: (i) the 2012 IGA Decision;³⁰⁵ (ii) the 2015 Energy Union Strategy;³⁰⁶ and (iii) the 2017 IGA Decision.³⁰⁷

³⁰⁴ See (Exhibit RLA-92, RLA-93 and RLA-94)

³⁰⁵ (Exhibit R-101), Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13-17 (the '2012 IGA Decision'). The 2012 IGA Decision was repealed by the 2017 IGA Decision.

³⁰⁶ (Exhibit R-98), COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE COMMITTEE OF THE REGIONS AND THE EUROPEAN INVESTMENT BANK, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final, 25 February 2015 (the 2015 Energy Union Strategy).

³⁰⁷ (Exhibit R-102), Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and

369. Relevant IGAs are defined as “legally binding agreements between one or more [EU Member States]³⁰⁸ and one or more third countries having an impact on the operation or the functioning of the internal energy market or on the security of supply in the Union”.³⁰⁹ IGAs are often the basis for commercial contracts between third country energy suppliers and EU Member States for the provision of oil, gas, or electricity.
370. Whereas the Gas Directive established an internal market in natural gas and it was clear that its provisions applied to gas pipelines *between Member States*, it was not sufficiently clear whether Gas Directive provisions would apply to all pipelines to and from third countries.
371. The Amending Directive intervened to clarify that point and provide legal certainty by reiterating an approach that was already enshrined in the 2012 IGA Decision,³¹⁰ the 2015 Energy Union Strategy³¹¹ and the 2017 IGA Decision.³¹²
372. Pursuant to the consistent approach developed by the European Commission, IGAs must comply with EU law. This is stated in Recital (3) of the 2012 IGA Decision:
- “[t]he proper functioning of the internal energy market requires that **the energy imported into the Union be fully governed by the rules establishing the internal energy market.** [...] A high degree of transparency with regard to agreements between Member States and third countries in the field of energy would allow the Union to take coordinated action, in the spirit of solidarity, in order to ensure that **such agreements comply with Union law**”.³¹³ (emphasis added)

non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9 (the ‘2017 IGA Decision’). The 2017 IGA Decision repealed the 2012 IGA Decision.

³⁰⁸ Member States.

³⁰⁹ Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012. (Exhibit R-101)

³¹⁰ (Exhibit R-101), Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13–17.

³¹¹ (Exhibit R-98), COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE COMMITTEE OF THE REGIONS AND THE EUROPEAN INVESTMENT BANK, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final, 25 February 2015.

³¹² (Exhibit R-102), Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9.

³¹³ (Exhibit R-101), Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13–17.

373. Recital (9) of the 2012 IGA Decision stresses that:

“[m]ore transparency with regard to future intergovernmental agreements that will be negotiated or that are being negotiated between Member States and third countries in the field of energy could contribute to consistency in Member States’ approaches to such agreements, to **compliance with Union law**, and to the security of energy supply in the Union”.³¹⁴ (emphasis added)

374. Recital (20) of the 2012 IGA Decision establishes that:

“[t]he Commission should assess whether this Decision is sufficient and effective in **ensuring compliance of intergovernmental agreements with Union law**”.³¹⁵ (emphasis added)

375. Article 7 of the 2012 IGA Decision encourages the drafting of model clauses to be integrated in IGAs that would “significantly improve compliance of future intergovernmental agreements with Union law”.³¹⁶

376. The 2015 Energy Union Strategy sets as one of its fifteen actions points the need for IGAs to fully comply with EU law:

“[i]ntergovernmental agreements should **comply fully with EU legislation** and be more transparent”.³¹⁷ (emphasis added)

377. Recital (1) of the 2017 IGA Decision provides that:

“[t]he proper functioning of the internal energy market requires that **the energy imported into the Union be fully governed by the rules establishing the internal energy market**. Transparency and **compliance with Union law** represents an important element in ensuring the energy stability of the Union”.³¹⁸ (emphasis added)

³¹⁴ (Exhibit R-101), Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13–17.

³¹⁵ (Exhibit R-101), Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13–17.

³¹⁶ (Exhibit R-101), Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13–17.

³¹⁷ (Exhibit R-98), COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE COMMITTEE OF THE REGIONS AND THE EUROPEAN INVESTMENT BANK, A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final, 25 February 2015, The Energy Union in fifteen action points, page 19.

³¹⁸ (Exhibit R-102), Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9.

378. Recital (2) of the 2017 IGA Decision recalls the importance of full compliance with EU law of agreements related to the buying of energy from third countries:

“the Energy Union Strategy emphasises that **full compliance** of agreements related to the buying of energy from third countries **with Union law** is an important element in ensuring energy security [...] The European Council in its conclusions of 19 March 2015 called for **full compliance with Union law** of all agreements related to the buying of gas from external suppliers”.³¹⁹ (emphasis added)

379. Recital (8) of the 2017 IGA Decision provides that:

“**[i]n order to avoid any non-compliance with Union law** and to enhance transparency, Member States should inform the Commission of their intention to enter into negotiations with regard to new intergovernmental agreements or amendments to intergovernmental agreements as soon as possible”.³²⁰ (emphasis added)

380. Recital (10) of the 2017 IGA Decision provides that Member States should send to the European Commission, on an *ex-ante* basis, the draft IGAs related to gas or oil. The European Commission will then identify issues on compliance with EU law and accordingly suggest amendments:

“**[i]n order to ensure compliance with Union law**, and with due regard to the fact that intergovernmental agreements and amendments in the area of gas or oil currently have the largest relative repercussions on the proper functioning of the internal energy market and on the security of energy supply of the Union, Member States should, on an *ex-ante* basis, notify draft intergovernmental agreements relating to gas or oil to the Commission before they become legally binding on the parties. In a spirit of cooperation, **the Commission** should support the Member State in **identifying compliance issues** of the draft intergovernmental agreement or amendment. **The Member State concerned would then be better prepared to conclude an agreement that complies with Union law**”.³²¹ (emphasis added)

³¹⁹ (Exhibit R-102), Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9.

³²⁰ (Exhibit R-102), Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9.

³²¹ (Exhibit R-102), Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9.

381. Article 9(2) of the 2017 IGA Decision establishes that the European Commission shall develop model clauses and provide guidance to help Member States conclude or renegotiate IGAs that fully comply with EU law:

“Article 9 Coordination among Member States

2. By 3 May 2018, the Commission shall, on the basis of best practices and in consultation with Member States, develop optional model clauses and guidance, including a list of examples of clauses that do not respect Union law and should therefore not be used. Such optional model clauses and guidance would, if applied correctly, **significantly improve compliance of future intergovernmental agreements with Union law**”.³²² (emphasis added)

382. To sum up, the 2012 IGA Decision³²³ and the 2017 IGA Decision³²⁴ are binding on EU Member States. These two instruments require that the energy imported into the European Union be fully governed by EU law. The 2015 Energy Union Strategy similarly stresses that IGAs must comply with EU law.

383. The fact that the European Union regularly reviewed IGAs governing projects for the construction and operation of pipelines linking the EU internal gas market to third countries, that in this context the European Union insisted upon the application of EU internal market rules to the functioning of such pipelines, clearly signalled to market participants that pipelines to and from a third country could not function in the EU market in the absence of the application of the Gas Directive rules to these pipelines. A lack of an agreement to that effect led to the discontinuation of some proposed projects, such as, for instance, the South Stream pipeline.

384. In its Memorial,³²⁵ the Claimant argues that, as detailed in the Report on the application of the 2012 IGA Decision³²⁶ as well as in the Staff Working Document accompanying the Proposal for the 2017 IGA Decision,³²⁷ the European

³²² (Exhibit R-102), Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9.

³²³ (Exhibit R-101), Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13–17 (the ‘2012 IGA Decision’). The 2012 IGA Decision was repealed by the 2017 IGA Decision.

³²⁴ (Exhibit R-102), Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9 (the 2017 IGA Decision). The 2017 IGA Decision repealed the 2012 IGA Decision.

³²⁵ Claimant’s Memorial, para. 253.

³²⁶ Exhibit C-127 – EC Report, Information exchange on intergovernmental agreements

³²⁷ Exhibit C-128 – Commission Staff Working Document, Impact Assessment Accompanying the document Proposal for a Decision of the European Parliament and of the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding

- Commission assessed the compatibility of 50 IGAs related to energy supplies or energy infrastructure with EU law, and expressed doubts on 17 of them. Seventeen out of 50 amounts to only one third.
385. The incompatibility of such a minority of the IGAs assessed was raised with regard to the provisions of the Gas Directive and the Gas Regulation (e.g., unbundling, TPA and tariff regulation, including the independence of NRAs) and EU competition law (prohibition of market segmentation by means of destination clauses). The European Commission thereby invited EU Member States to terminate such agreements: “[t]herefore, around one third of the notified IGAs related to energy supplies or energy infrastructure has been judged of concern. Letters were sent in 2013 to the 9 Member States concerned by their IGAs, inviting them to amend or terminate the IGAs in question in order to resolve the identified incompatibilities”.³²⁸ However, IGAs often contain no appropriate termination or adaptation clauses which would allow EU Member States to eliminate any non-compliance within a reasonable period of time.³²⁹
386. The fact that the European Union requested EU Member States to terminate the IGAs where they failed to comply with EU rules was as clear a signal of the EU approach on the applicability of EU law, including the Gas Directive rules, to gas pipelines to and from third countries. These developments took place several years before the Claimant took its so-called “final investment decision” to build the NS2 pipeline and structured its investment transaction in the way that it did.
387. Once again, when the Claimant argues that “many of these agreements do not reflect the requirements of the Gas Directive”,³³⁰ the Claimant is cherry-picking the information that supports its position and providing a misleading and fragmented picture to the Tribunal.
388. It follows that the EU approach toward ensuring that EU law applies to pipelines to and from third countries had already developed long before the European Commission issued its Proposal for the Amending Directive on 8 November 2017.
389. The Claimant cites a statement by Commissioner for Energy Arias Cañete, who welcomed a provisional political Agreement that the Council of the EU reached

instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU, SWD(2016) 27 final.

³²⁸ C-127, page 3.

³²⁹ (Exhibit R-101), IGA Decision 2017, Recital No. 6.

³³⁰ Claimant’s Memorial, para. 253.

- in February 2019 on the Amending Directive,³³¹ in an attempt to argue that the Amending Directive was a fundamental change in EU policy.³³² This is untrue. In fact, the statement in question was welcoming the political agreement on the Amending Directive as the confirmation of a longstanding EU policy, pursued over the previous decade.
390. Rather than noting any major policy change on the part of the European Commission, Commissioner Cañete in fact was welcoming the clarification provided by the agreement, precisely since it confirmed and provided a secure legal basis for what had already been the European Commission's policy for years. As set out above, the clarification provided by the Amending Directive grew out of principles established by the TFEU³³³ and reiterated in the European Energy Security Strategy of May 2014,³³⁴ the Energy Union Strategy of February 2015,³³⁵ the 2012 IGA Decision³³⁶ and the 2017 IGA Decision.³³⁷ Any well informed investor would have understood this at the time, with the exception of a wilfully blind market operator such as the Claimant.
391. The creation of an internal gas market would not be complete, and fair competition would not be ensured, if the core provisions of the Gas Directive only applied to interconnectors between EU Member States, and not to import pipelines from third countries. Indeed, in that case the effectiveness of the rules in the Gas Directive would be compromised. The Amending Directive addressed this issue and cleared out any ambiguities left by the Gas Directive.
392. The Proposal for an Amending Directive had a very limited scope and was aimed at clarifying a point of law relating to the scope of application of the Gas Directive. Its adoption did not require an impact assessment or a separate *ex-post* evaluation of the Gas Directive. The reasons why an impact assessment

³³¹ Exhibit C-129 -EC press release, Political agreement on import pipelines, 12 Feb 2019: "This is a major step forward in the creation of a truly integrated internal gas market which is based on solidarity and trust with full involvement of the European Commission".

³³² Claimant's Memorial, para. 256. See also Exhibit C-129 -EC press release, Political agreement on import pipelines, 12 Feb 2019.

³³³ Articles 194, 101, and 102 of the TFEU. (Exhibit RLA-69),

³³⁴ COM(2014) 330 final. (Exhibit R-108),

³³⁵ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE COMMITTEE OF THE REGIONS AND THE EUROPEAN INVESTMENT BANK A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final. (Exhibit R-98),

³³⁶ (Exhibit R-101), Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13-17 (the '2012 IGA Decision'). The 2012 IGA Decision was repealed by the 2017 IGA Decision.

³³⁷ (Exhibit R-102), Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1-9 (the 2017 IGA Decision). The 2017 IGA Decision repealed the 2012 IGA Decision.

and a separate *ex-post* evaluation of the Gas Directive were not needed are detailed in the Explanatory Memorandum,³³⁸ as well as in the Staff Working Document accompanying the Proposal for the Amending Directive.³³⁹

393. To conclude, the ordinary legislative procedure that led to the adoption of the Amending Directive followed all of the necessary steps provided for in the TFEU. The process respected the commitments taken by the European Commission, the European Parliament and the Council of the EU towards each other, as set out in the Interinstitutional Agreement and detailed in the Better Regulation Guidelines and the Better Regulation Toolbox. The negotiation process of the Amending Directive ensured the active participation of all of the relevant actors concerned. With its adoption, the Amending Directive provided legal certainty in a manner consistent with the multiple indications that EU law, including the Gas Directive norms, applied to gas pipelines to and from third countries, thereby contributing to the completion and proper functioning of the EU internal market in natural gas.

2.6. The European Union informed NSP2AG about the division of competences between the European Union and its Member States

394. The Claimant complains of a lack of transparency and alleges that the European Union withheld “information about the interpretation of the Amending Directive”.³⁴⁰ The Claimant’s allegation is without merit and amounts to criticising the European Union for declining to overstep the division of competencies within the EU legal order. The European Union was entirely transparent in communicating its position in this regard to the Claimant. The fact that the Claimant disliked the answer does not suddenly make the EU “non-transparent”, by any rational standard.
395. In the exchange between NSP2AG and the European Commission giving rise to its allegation, NSP2AG demanded that the European Commission confirm that the NS2 pipeline would be considered as “completed” by the competent NRA in deciding whether to grant an Article 49a derogation. The European Commission in response confirmed that it was not within its competence to determine how the relevant EU Member State would transpose the Amending Directive, nor how the competent NRA might decide to apply the derogation regime as transposed by the relevant EU Member State.

³³⁸ Exhibit (Exhibit R-29), Proposal for the Amending Directive, page 4.

³³⁹ Exhibit C-4, Commission Staff Working Document assessing Directive 2009-73, page 5.

³⁴⁰ Claimant’s Memorial, para. 381(v).

396. The Claimant confuses “transparency” with “improperly stepping into the interpretive role of a Member State”. The Claimant was in effect asking the European Commission to illegitimately prejudge the exercise of an EU Member State’s margin of discretion under the Amending Directive by providing “advance views” on how that discretion should be exercised.
397. It is not for the European Union to take on the role of EU Member States in transposing the Amending Directive, or that of the competent NRA in applying it. The Claimant once again attempts to distort the facts as opposed to how they actually occurred.
398. Whereas the Claimant complains of a lack of transparency on the part of the European Union, its repeated requests “for clarification” show that the Claimant was actually pressuring the European Commission to make a statement that the Commission was not competent to make.
399. On 12 April 2019, the Claimant sent a letter to Mr. Jean-Claude Juncker, then President of the European Commission.³⁴¹ In that letter, the Claimant asked the European Commission, as representative of the European Union, to confirm, *inter alia*, that the NS2 pipeline would be treated as “completed” for the purposes of Article 49a of the Amending Directive.
400. The Claimant wrote in its letter of 12 April 2019 that: “[t]he Derogation would allow Germany to derogate from these rules but this depends on the interpretation of the concept of a ‘completed’ transmission line. The relevant section of [the NS2 pipeline] will be ‘substantially’ completed if the amendment enters into force by summer 2019, but it will not be operational”.³⁴²
401. In the same letter, the Claimant asked the European Commission to confirm that the NS2 pipeline would be treated “as completed”: “NSP2AG requests that the [European Union] confirms that [the NS2 pipeline] will be treated as ‘completed’ and falling within the Derogation regime”.³⁴³
402. The Claimant alleges that “no substantive response was received to that letter”.³⁴⁴ In truth, the European Commission replied on 13 May 2019 and invited the Claimant to contact one of the European Commission’s officials to arrange a meeting. That meeting took place on 25 June 2019.³⁴⁵

³⁴¹ C-5.

³⁴² C-5, para. 16.

³⁴³ C-5, para. 25.

³⁴⁴ Claimant’s Memorial, para. 381(v).

³⁴⁵ C-11.

403. In a note dated 14 June 2019, the Claimant expressed its views on how Article 49a of the Amending Directive should be interpreted: "the [European Union] should interpret the criterion of "completed before 23 May 2019" as encompassing pipelines in which actual investment has been made. This would include [the NS2 pipeline]".³⁴⁶ The Claimant's clear objective was to lead the European Commission to agree with its interpretation of the notion of "completed" under Article 23 of the Amending Directive. According to the Claimant, that term should encompass any pipeline in which investment had been made, regardless of the status of the works.
404. During a meeting held on 25 June 2019, the European Commission responded to the Claimant's queries. The European Commission recalled that, pursuant to Article 49a(1) of the Amending Directive, the power to decide whether to grant a derogation lied with the EU Member State where the first connection point of a gas transmission line between an EU Member State and a third country line is located. In the case of the NS2 pipeline, the European Commission clarified that the competence to grant a derogation pursuant to Article 49(a) lied with Germany.³⁴⁷
405. In its responding letter of 8 July 2019, the Claimant complained that, during the Parties' meeting of 25 June 2019, the European Commission did not "confirm or deny whether [the NS2 pipeline] could be considered as "completed before 23 May 2019" and, therefore, whether NSP2AG is eligible for a derogation pursuant to Article 49a".³⁴⁸ Indeed, it is not for the European Commission to determine how the competent NRA will apply the derogation regime laid down in the Amending Directive and transposed by national measures.
406. In a further letter dated 26 July 2019, the European Commission replied to the Claimant and reiterated the position that it had stated at the Parties' meeting on 25 June 2019: "[i]n accordance with Article 49a of Directive 692/2019 the decision on whether to grant a derogation to the [NS2] pipeline will be up to the competent Member State authority based on the national legislation implementing Directive 692/2019. The competent Member State authority – which in the case of [the NS2] pipeline would be the German

³⁴⁶ C-6, para. 6.2.

³⁴⁷ Claimant's Memorial, para. 381(v)(b).

³⁴⁸ C-8, page 1.

regulatory authority – will need to take a decision in response to an application by NSP2AG”.³⁴⁹

407. In the same letter, the European Commission elaborated on the role granted to German authorities with reference to Article 49a: “[t]he Commission has not been attributed the role of deciding on derogations in relation to transmission lines to and from third countries. It is thus not for the Commission to anticipate how the German authorities will decide in the event that NSP2AG applies for a derogation, nor it is for the Commission to decide for NSP2AG whether it should apply or not for a derogation”.³⁵⁰
408. Ignoring the European Commission’s clear response, on 6 August 2019, the Claimant wrote once again to the European Commission. While it acknowledged that the European Commission had reiterated its position that it is not within the EU’s competence to explain the intended scope of the phrase “completed before 23 May 2019”, it asked the European Commission for the third time to commit to a statement as to how the concept of “completed before 23 May 2019” would apply with regard to the NS2 pipeline.³⁵¹
409. Whereas the Claimant complains about a lack of transparency,³⁵² its repeated requests for what it called “clarification”³⁵³ show that in fact, the Claimant was trying to pressure the European Commission to issue an interpretation that the Commission was not competent to provide. First, as clarified by the European Commission, it was Germany’s competence to assess the applicability of the Article 49a derogation to the NS2 pipeline. Second, only the ECJ is competent to authoritatively interpret EU law.³⁵⁴
410. The European Union’s referral to the Member States on the question of interpretation of the notion of “completion” reflects a broader deference to Member States under EU law in the context of instruments such as the Amending Directive. Under the principle of conferral set out in Article 5.2 of the Treaty Establishing the European Union (TEU), “the Union shall act only within the limits of the competences conferred upon it by the Member States”.³⁵⁵ Both the Gas Directive and the Amending Directive fall within one

³⁴⁹ C-9, page 1.

³⁵⁰ C-9, pages 1-2.

³⁵¹ C-10, page 1.

³⁵² Claimant’s Memorial, para. 381(v).

³⁵³ Letters from the Claimant to the European Commission on 12 April 2019, 8 July 2019, and 6 August 2019, the meeting between the Claimant and the European Commission held on 25 June 2019, and a note from the Claimant’s counsel to the European Commission on 14 June 2019.

³⁵⁴ (Exhibit RLA-69), Article 267 of the TFEU.

³⁵⁵ Article 5.2 of the TEU, (Exhibit RLA-70).

of the areas where competence is shared between the EU Member States and the EU, namely energy.³⁵⁶ Where the EU Treaties confer on the European Union a competence shared with the EU Member States in a given area, both the European Union and the EU Member States may legislate and adopt legally binding acts in that area.³⁵⁷ Where the European Union has already exercised its shared competence in an area, the EU Member States remain entitled to exercise their competence to the extent that the European Union has not exercised its competence.³⁵⁸

411. Pursuant to Article 288 of the TFEU, EU Member States enjoy wide discretion in the choice of measures for transposing directives:³⁵⁹ “[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the *national* authorities the choice of form and methods”.³⁶⁰ As any other EU directive, the Amending Directive leaves wide discretion to EU Member States in the choice of form and methods for transposing it into national legislation.
412. Therefore, only EU Member States (and not the European Commission) can assess, under the control of the ECJ, whether a pipeline qualifies for an Article 49a derogation. The granting of an Article 49a derogation is not automatic: it must be based on objective reasons and the EU Member State concerned must ascertain that the derogation will not be detrimental to competition, to the effective functioning of the internal market in natural gas or to security of supply in the European Union.³⁶¹
413. It was in keeping with this legal background that the European Commission replied to the Claimant’s questions in two letters, on 13 May 2019 and on 26 July 2019, and held a dedicated meeting with the Claimant on 25 June 2019. Throughout these multiple communications, the European Commission clearly identified the authority that had the competence to assess the eligibility of the NS2 pipeline for a derogation under Article 49a of the Amending Directive: the German NRA.

³⁵⁶ The Gas Directive is based on Articles 47(2), 55 and 95 of the ECT, all relating to the establishment of the EU internal market. The Amending Directive is based on Article 194(2) of the TFEU, which belongs to Title XXI of Part III (entitled “Energy”). Both the “internal market” and “energy” are areas of “shared” competence between the European Union and the Member States. See Article 4.2(a) of the TFEU and Article 4.2(i) of the TFEU, respectively (EXHIBIT RLA-44).

³⁵⁷ Article 2.2 of the TFEU, Exhibit RLA-43.

³⁵⁸ On the allocation of competences between the EU and Member States, see paras. 129-136 of the EU Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020.

³⁵⁹ On the nature and legal effects of EU directives, see paras. 145-151 of the EU Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020.

³⁶⁰ Article 288 of the TFEU, Exhibit RLA-53.

³⁶¹ On the discretion to grant an Article 49a derogation, see paras. 170-172 of the EU Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020.

414. In sum, the correspondence between the Claimant and the European Commission confirms that the Claimant's accusations that the European Union "lacked transparency" are specious and unsubstantiated. The European Union's refusal to prejudge decisions rightly to be taken at the EU Member State level amounts to the European Union acting lawfully, and not to it "lacking transparency".

2.7. The Claimant's legal actions before the EU Courts

415. The Claimant further criticizes the EU General Court decision finding its application for the annulment of the Amending Directive inadmissible.³⁶² In truth, the Claimant does not accept that the EU General Court did not rule in the Claimant's favour.

416. On 26 July 2019, the Claimant brought an application before the EU General Court against the European Parliament and the Council of the EU seeking annulment of the Amending Directive pursuant to Article 263 of the TFEU (the Annulment Application).³⁶³ On 20 May 2020, the EU General Court found the Annulment Application to be inadmissible, as the Claimant was not directly concerned by the Amending Directive.

417. The EU General Court recalled that Article 263(4) of the TFEU grants any natural or legal person the right to act against a regulatory act under two conditions: (i) the regulatory act must directly affect the legal situation of the applicant; and (ii) the regulatory act must leave no discretion to its addressees who are entrusted with implementing it.³⁶⁴

418. Under point (i), the EU General Court established that a directive cannot, in and of itself, impose obligations on an individual. The Amending Directive is addressed to EU Member States, who must transpose it into national legislation. Only national legislation would make operators such as NSP2AG

³⁶² Claimant's Memorial, para. 393.

³⁶³ (Exhibit RLA-69). Article 263 of the TFEU provides that:

"1. The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

2. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

[...]

4. Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

³⁶⁴ Exhibit CLA-67, General Court's Decision on Admissibility of NS2AG's Annulment Application, 20 May 2020, para. 102.

subject to the obligations of the Gas Directive as amended.³⁶⁵ The EU General Court concluded that the Amending Directive did not in and of itself directly affect the legal situation of NSP2AG.³⁶⁶

419. Under point (ii), the EU General Court specified that: “[I]t is for the Member States to adopt national measures enabling the operators concerned to ask to benefit from those derogations, determining precisely the conditions for obtaining those derogations in the light of the general criteria laid down by Article 49a of Directive 2009/73, as amended”.³⁶⁷
420. The EU General Court recalled that EU Member States enjoy a margin of discretion in implementing the provisions of the Amending Directive,³⁶⁸ and that NRAs in turn have broad discretion with regard to the grant of potential derogations under any specific conditions set by the Member States.³⁶⁹
421. The EU General Court concluded that NSP2AG lacked standing as it did not satisfy the conditions of Article 263(4) of the TFEU,³⁷⁰ and rejected the Annulment Application as inadmissible.³⁷¹
422. On 4 September 2020, NSP2AG appealed the Order of the EU General Court: the appeal is now pending before the ECJ as Case C-348/20 P.
423. The Claimant therefore had a fair hearing before the EU General Court; the EU General Court decided the matter in accordance with the TFEU; the Claimant appealed that decision; and the appeal is now pending. There is no basis in fact for the allegation that the Claimant was subjected to any unfair proceedings in this regard. The fact that the Claimant was disappointed in the outcome of the proceedings does not in itself give rise to any valid claim.

³⁶⁵ Exhibit CLA-67, General Court’s Decision on Admissibility of NS2AG’s Annulment Application, 20 May 2020, para. 110.

³⁶⁶ Exhibit CLA-67, General Court’s Decision on Admissibility of NS2AG’s Annulment Application, 20 May 2020, para. 129.

³⁶⁷ Exhibit CLA-67, General Court’s Decision on Admissibility of NS2AG’s Annulment Application, 20 May 2020, para. 115.

³⁶⁸ Exhibit CLA-67, General Court’s Decision on Admissibility of NS2AG’s Annulment Application, 20 May 2020, para. 111.

³⁶⁹ Exhibit CLA-67, General Court’s Decision on Admissibility of NS2AG’s Annulment Application, 20 May 2020, para. 115.

³⁷⁰ Exhibit CLA-67, General Court’s Decision on Admissibility of NS2AG’s Annulment Application, 20 May 2020, para. 124.

³⁷¹ Exhibit CLA-67, General Court’s Decision on Admissibility of NS2AG’s Annulment Application, 20 May 2020, Ruling.

3. NSP2AG'S CLAIMS ARE BASELESS

3.1. There is no breach of the FET standard under Article 10(1) ETC

424. The European Union did not breach the FET standard under Article 10(1) of the ECT. It ensured due process and justice and did not breach legitimate expectations. It acted proportionately, transparently, and in good faith. There was no impairment by unreasonable or discriminatory measures. The following paragraphs will address each of these issues.

3.1.1. The European Union ensured due process and did not deny justice

3.1.1.1. Legal Standard

425. The Claimant alleges that the European Union failed to afford the Claimant due process and denied it justice, in violation of the FET standard in Article 10(1) of the ECT.³⁷² Both claims are untrue. The European Union's compliance with these two standards will be addressed separately in the following paragraphs.

Legal standard of due process

426. The European Union afforded due process to NSP2AG during the adoption of the Amending Directive, throughout the European Commission's exchanges with NSP2AG, and in Case T-526/19 on NSP2AG's Application for Annulment of the Amending Directive before EU courts.

427. Under international law, due process of law is regarded as the embodiment of "minimum standards in the administration of justice".³⁷³ It guarantees aliens the right to a fair trial and prohibits arbitrary and discriminatory conduct before judicial and other governmental agencies.³⁷⁴

428. In international investment law, due process of law is often associated with notions of denial of fairness in the administration of justice. Investment treaty tribunals have held that not all alleged breaches of due process rise to the level of a breach of the standard under international law: the breach must be so serious as to lead "to an outcome which offends judicial propriety".³⁷⁵

³⁷² Claimant's Memorial, paras. 388-393.

³⁷³ *Loewen v. USA*, ICSID, Award, 26 June 2003, para.129: "[C]ustomary international law imposes on States an obligation "to maintain and make available to aliens, a fair and effective system of justice" (Second Opinion, para. 79). (Exhibit RLA-98)

³⁷⁴ *Elettronica Sicula S.p.A.*, ICJ, Judgment, 20 July 1989, para.124: "Yet it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law". (Exhibit RLA-99)

³⁷⁵ *Waste Management v. Mexico (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98. (Exhibit RLA-100)

429. The concept of fairness in the administration of justice is linked to some basic legal mechanisms such as reasonable notice, fair hearing, and an unbiased and impartial adjudicator.³⁷⁶ No denial of fairness in the administration of justice occurred in the present case.
430. Due process of law is also associated with procedural fairness in the application of administrative procedures by the host State. Investment treaty tribunals have held that due process is infringed when the acts of the State: “cannot be regarded as anything other than conscious attempts to deliberately prevent [the Claimant] from asserting and enforcing its legitimate rights”.³⁷⁷ By way of exemplification, in *Metalclad v Mexico*, the tribunal noted, as one factor in finding a violation of FET, that the construction permit was denied to the claimant “at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation and at which it was given no opportunity to appear”.³⁷⁸
431. In *Genin v. Estonia*, the tribunal found certain procedural violations on the part of the Central Bank of Estonia that had revoked the licence from the claimant’s local bank. These procedural violations included: the lack of formal notice of revocation or grace period to comply with the Central Bank of Estonia’s requirements; the lack of invitation to the session during which the decision to revoke the licence had been taken; and the immediate effect of the decision to revoke. However, given that the revocation was found to be a reasonable regulatory decision, the tribunal did not find a breach of the FET standard.³⁷⁹
432. The threshold necessary to find a violation of the obligation to provide due process in an investor-State dispute is therefore very high. Not every breach of domestic procedure amounts to a breach of the right to due process under international law. Typically, the breach needs to be egregious and fundamental, such as to manifestly and materially impact the right of a party to a fair hearing in a case concerning it. Moreover, the standard for due process in judicial decision-making is higher than that in administrative decision-making.³⁸⁰

³⁷⁶ (Exhibit RLA-101), *ADC Affiliate Limited and ADC & ADMC Management Limited Claimants v. The Republic of Hungary*, Award, 2 October 2006, para. 435.

³⁷⁷ (Exhibit RLA-102) *Petrobart v. Kyrgyz Republic (II)*, SCC, Award, 29 March 2005, para. 133.

³⁷⁸ Exhibit CLA-126, *Metalclad v. Mexico* (ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, paras. 91 and 97.

³⁷⁹ (Exhibit RLA-103), *Genin v. Estonia*, Award, 25 June 2001, paras. 363–365.

³⁸⁰ (Exhibit RLA-104), *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 200.

433. In this case, there was no administrative procedure between NSP2AG and the European Union. Therefore, no allegation of infringement of due process associated with procedural fairness in the application of administrative procedures can be raised by the Claimant.

Legal standard of denial of justice

434. Denial of justice is traditionally defined as “any gross misadministration of justice by domestic courts resulting from the ill-functioning of the State’s judicial system”.³⁸¹ An UNCTAD study on the FET standard classified the following conduct of States as likely to be considered a denial of justice:³⁸²
- a. denial of access to justice and the refusal of courts to decide;³⁸³
 - b. unreasonable delay in proceedings;³⁸⁴
 - c. lack of a court’s independence from the legislative and the executive branches of the State;³⁸⁵
 - d. failure to execute final judgments or arbitral awards;
 - e. corruption of a judge;
 - f. discrimination against a foreign litigant;³⁸⁶
 - g. breach of fundamental due process guarantees, such as a failure to give notice of the proceedings and failure to provide an opportunity to be heard.³⁸⁷

³⁸¹ (Exhibit RLA-105), Focarelli Carlo, Denial of justice, In: *The Max Planck Encyclopedia of Public International Law*. Oxford University Press, 2013.

³⁸² (Exhibit RLA-106), UNCTAD, *Fair and Equal Treatment* in UNCTAD Series on Issues in International Investment Agreements II. New York and Geneva: United Nations. Available at: http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.

³⁸³ On the miscarriage of justice by domestic courts, see (Exhibit RLA-98), *Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003; (Exhibit RLA-107), *Azinian v. Mexico*, ICSID Case No. ARB(AF)/97/2.

³⁸⁴ On the delay in judicial proceedings and other violations of due process, see (Exhibit RLA-108), *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13; (Exhibit RLA-109), *Amto v. Ukraine*, SCC Case No. 080/2005; (Exhibit RLA-110), *Petrobart v. Kyrgyz Republic*, UNCITRAL Rules.

³⁸⁵ For instance, in (Exhibit RLA-110), *Petrobart v. Kyrgyz Republic*, the tribunal held that the collusion between the executive and the court constituted “a clear breach of the prohibition of denial of justice under international law” (Award, 13 February 2003, p. 28).

³⁸⁶ (Exhibit RLA-98), *Loewen v. United States*, ICSID Case No. ARB(AF)98/3, Award, 26 June 2003, para. 135.

³⁸⁷ (Exhibit RLA-111), *Krederi v. Ukraine*, ICSID, Award, 2 July 2018, para.449; (Exhibit RLA-107), *Azinian v. Mexico*, ICSID, Award, 1 November 1999, para.102, para.103; (Exhibit RLA-112), *Ambatielos Claim* (Greece, United Kingdom of Great Britain and Northern Ireland), Ad hoc Arbitration, Award, 6 March 1956, page.111; (Exhibit RLA-113), *ECE v. Czech Republic*, PCA, Final Award, 19 September 2013, para.4.742; (Exhibit RLA-103), *Genin v. Estonia*, ICSID, Award, 25 June 2001, paras. 357-364; (Exhibit RLA-114), *Amco v. Indonesia*, ICSID, Award in Resubmitted Proceeding, 5 June 1990, para.137.

435. By contrast, errors, misinterpretations and misapplication of domestic law do not rise to the level of a denial of justice, unless they result from "the clear and malicious misapplication of the law".³⁸⁸
436. The threshold for denial of justice is certainly very high and higher than that for breach of due process, "due to the gravity of a charge which condemns the State's judicial system as such".³⁸⁹ For a denial of justice to exist under international law, there must be "clear evidence of [...] an outrageous failure of the judicial system" or a demonstration of "systemic injustice" or that "the impugned decision was clearly improper and discreditable".³⁹⁰ As Sornarajah wrote, denial of justice occurs if the conduct of a State organ amounts to an act which shows such prejudice that "would shock the conscience of the outside world".³⁹¹
437. Procedural deficiencies are insufficient to establish a breach of the denial of justice standard if they do not reach this high threshold, and if the contested measure itself is legitimate.³⁹²
438. Finally, the misapplication of procedural law is not enough to constitute a breach of the FET standard:³⁹³ there must be fundamental flaws in the administrative and judicial proceedings.
439. It follows that a breach of the obligation not to deny justice as part of Article 10(1) of the ECT would entail finding *at least* one of the State conducts previously listed in paragraph 443 of this Counter-Memorial and applying a high threshold.
440. Denial of justice may slightly overlap with due process when the fundamental due process guarantees are breached in the course of judicial or administrative proceedings. Unlike denial of justice, which would normally require exhaustion of local remedies, a breach of due process can occur at any stage of the judicial or administrative proceedings. In any event, none of these standards were breached in this case.
441. The Claimant conflates due process and denial of justice into one single standard. In identifying the legal standard for due process and denial of

³⁸⁸ (Exhibit RLA-115), Solange Baruffi, The EFT clause in the EU-Singapore Free Trade Agreement. A first Analysis, *Papers di diritto europeo* 2015/n.1, pages 10-11, quoting (Exhibit RLA-107), Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award of 1 November 1999, para. 103.

³⁸⁹ (Exhibit RLA-117), *Philip Morris v. Uruguay*, ICSID, Award, 8 July 2016, paras. 499-500.

³⁹⁰ (Exhibit RLA-117), *Philip Morris v. Uruguay*, ICSID, Award, 8 July 2016, para 500.

³⁹¹ (Exhibit RLA-118), Sornarajah, M. 2010. *The International Law on Foreign Investment*. Cambridge: Cambridge University Press, page 357.

³⁹² (Exhibit RLA-106), page 81.

³⁹³ (Exhibit RLA-119), *Liman v. Kazakhstan*, Award, 22 June 2010, para. 285.

justice, the Claimant relies on *Tecmed v Mexico*³⁹⁴ and argues that the arbitral tribunal held that “there may be a lack of due process when a decision-maker bases a decision on inappropriate or irrelevant considerations”.³⁹⁵

442. However, the tribunal in *Tecmed v Mexico* did not mention due process or denial of justice, nor did it set out a test that a tribunal should apply in determining whether there was a breach of due process or denial of justice.³⁹⁶ In any event, the legal standard that the Claimant proposes is misleading and incorrect.

443. Tribunals generally have not relied upon *Tecmed v Mexico* as an expression of the legal standard for either lack of due process or denial of justice, given that the *Tecmed v Mexico* tribunal considered this issue only incidentally, and in any event ostensibly misstated the standard, wrongly suggesting that an international tribunal should sit in review of the substantive basis of domestic decision-making.

3.1.1.2. Due process was ensured and justice was not denied

444. The Claimant argues that NSP2AG was denied justice and due process based on five sets of misrepresented facts:

- a. the objectives of the Amending Directive allegedly failed to correspond to the legal basis upon which it was approved;³⁹⁷
- b. the European Union allegedly employed an “improper legislative process” to adopt the Amending Directive;³⁹⁸
- c. the Amending Directive allegedly caused a “dramatic and radical regulatory change”;³⁹⁹
- d. the European Commission allegedly failed to ensure transparency by refusing to interpret the scope of application of the Article 49a Derogation of the Amending Directive;⁴⁰⁰ and

³⁹⁴ Exhibit CLA-66, *Técnicas Medioambientales Tecmed S.A. v. Mexico* (ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003), para 154.

³⁹⁵ Claimant’s Memorial, para. 388.

³⁹⁶ Exhibit CLA-66, *Técnicas Medioambientales Tecmed S.A. v. Mexico* (ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003), para 154.

³⁹⁷ Claimant’s Memorial, paras. 389-390.

³⁹⁸ Claimant’s Memorial, para. 391.

³⁹⁹ Claimant’s Memorial, para. 391.

⁴⁰⁰ Claimant’s Memorial, para. 392.

- e. the Order of the EU General Court dated 20 May 2020 declared inadmissible NSP2AG's application for annulment of the Amending Directive.⁴⁰¹
445. The following paragraphs address in detail why the Claimant misrepresents the relevant facts and fails to provide a credible application of the legal standards of due process and denial of justice even to its own version of the facts.
- a. The objectives of the Amending Directive allegedly failed to correspond to the legal basis upon which it was approved
446. Concerning the objectives of the Amending Directive (point a.), the Amending Directive had the objective of clarifying the legal framework applicable to interconnectors with third countries, as described in paragraphs 98-100 above. The Amending Directive seeks to address the remaining obstacles in the completion of the EU internal market in natural gas. It aims at avoiding distortion of competition in the energy sector. It aims at enhancing transparency and at providing legal certainty to all market participants, in addition to improving security of supply.
447. As stated in its Preamble, the Amending Directive aims at further achieving the objectives set out in Article 194 of the TFEU, according to which the EU policy on energy shall ensure the functioning of the energy market and ensure security of energy supply in the EU. The Amending Directive aims at attaining these objectives by applying a set of rules put in place by the Gas Directive to interconnectors to and from third countries: rules on unbundling, TPA, transparency, and tariff regulation. The Amending Directive clarifies the application of these rules to pipelines selling gas into the EU from third countries and ensures that the EU's policy objectives of fair competition and security of supply are pursued.
448. The legal basis of the Amending Directive and its intended objectives are therefore entirely aligned. Certainly, nothing in the Amending Directive amounts to the kind of conduct sanctioned under denial of justice as outlined above. The objectives of the Gas Directive are achieved by the Amending Directive through the application of a set of rules to interconnectors to and from third countries.

⁴⁰¹ Claimant's Memorial, para. 393.

449. Professor Cameron, the Claimant's Expert, maintains that the Amending Directive was not necessary to complete the EU internal market in natural gas.⁴⁰² In taking this position, he apparently forgets that the creation of an EU internal market in natural gas would be incomplete, and there would be significant distortions of competition, if the rules of unbundling, tariff regulation, transparency and TPA applied only to interconnectors between EU Member States, and not to interconnectors to and from third countries. To the contrary, pursuant to the Amending Directive all oil and gas pipelines supplying and selling into the EU, regardless of their point of origin, are subject to the same rules. This ensures a level playing field and avoids distortions that otherwise would arise through partial application of such rules, which would undermine the entire market.

b. The European Union allegedly employed an "improper legislative process" to adopt the Amending Directive

450. With regard to legislative process (point b. above), the Amending Directive was adopted through an entirely proper and standard legislative procedure.⁴⁰³ All necessary steps were taken in this regard, and all requisite actors were involved, as explained in detail in Section 2.5.

451. The Claimant, among other things, complains that the process was allegedly rushed.⁴⁰⁴ To the contrary, the duration of the legislative process aligned with the average duration for the adoption of legislative acts at first reading: eighteen months passed from 8 November 2017, date of the transmission of the European Commission Proposal to the European Parliament and the Council of the EU up to 15 April 2019, date on which the Amending Directive was adopted.⁴⁰⁵

452. Pursuant to Article 294 of the TFEU, at first reading, the European Parliament and the Council of the EU examine in parallel the European Commission's proposal. The European Parliament votes first. After the European Parliament has adopted its position, the Council of the EU may decide to approve the European Parliament's position, in which case the legislative act is adopted, or it may adopt a different position at first reading and communicate it to the

⁴⁰² Claimant's First Expert Report, paragraph. 1.11.

⁴⁰³ On the legislative process followed in the adoption of the Amending Directive, see Section 2.5 of this Counter-Memorial.

⁴⁰⁴ Claimant's Memorial, para. 249.

⁴⁰⁵ (Exhibit R-96),, page 4: "[t]he average length of procedure for acts adopted at first reading is just below 18 months for the 8th term (from adoption by the Commission to signature by the co-legislators); the figure rises to approximately 20 months for those that were negotiated".

European Parliament for a second reading.⁴⁰⁶ In the 2014-2019 legislative term, 89% of legislative acts following the ordinary legislative procedure were adopted in first reading.⁴⁰⁷

453. The Claimant also complains that the legislation lacked an impact assessment.⁴⁰⁸ In fact, the Explanatory Memorandum accompanying the legislation clarified that an impact assessment was not needed in the circumstances, given that the Amending Directive brought the Gas Directive more clearly in line with the EU's interpretation of its scope. This result was in line with the practice followed by the vast majority of amending legislative acts: 86% of proposals for EU acts are not preceded by an impact assessment on the grounds that such an assessment is not warranted in the circumstances.⁴⁰⁹

454. The Claimant further complains of a lack of public consultation before the publication of the Proposal for the Amending Directive.⁴¹⁰ However, although a public consultation was not required, the involvement of stakeholders was assured, given that the Proposal for the Amending Directive was open for public feedback during a period of eight weeks. The EU approach in this case aligned with the majority of legislative proposals issued by the European Commission: since 2019, out of the 124 legislative proposals adopted by the European Commission, only 14, amounting to 11,3%, were subject to a public consultation before the publication of the respective proposals, on the grounds that such a prior public consultation is not warranted in the circumstances.⁴¹¹

455. It follows that a proper legislative process was followed in relation to the adoption of the Amending Directive. Accordingly, this process cannot have denied justice or have failed to ensure due process.

c. the Amending Directive allegedly caused a "dramatic and radical regulatory change"

456. With regard to point c., the Claimant asserts that the adoption of the Amending Directive "introduced a dramatic and radical regulatory change".⁴¹² However, the issue related to the allegedly "dramatic and radical regulatory

⁴⁰⁶ Exhibit (Exhibit RLA-69), Article 294 of the TFEU.

⁴⁰⁷ Exhibit (Exhibit R-96), European Parliament Activity Report. Developments and Trends of the Ordinary Legislative Procedure, 1 July 2014-1 July 2019 (8th parliamentary term), page 3.

⁴⁰⁸ Claimant's Memorial, para. 250.

⁴⁰⁹ (Exhibit RLA-99),.

⁴¹⁰ Claimant's Memorial, para. 250.

⁴¹¹ (Exhibit R-104)

⁴¹² Claimant's Memorial, para. 391.

change” is not relevant to the standards of due process or denial of justice: it pertains instead to the different legitimate expectations claim advanced by the Claimant. As detailed in Section 2.2 of this Counter-Memorial, any diligent investor would have been aware of the applicable normative framework and its reasonable interpretations.

d. the European Commission allegedly failed to ensure transparency by refusing to interpret the scope of application of the Article 49a Derogation of the Amending Directive

457. The Claimant also complains that the European Union allegedly failed to grant it due process by declining to prejudge the interpretation and application of the Amending Directive at the EU Member State level (point d.). Specifically, the Claimant argues that the European Commission’s confirmation that it was not in a position to provide an authoritative interpretation of the notion of “completed” for the purposes of an Article 49a derogation amounts to a violation of due process. As explained in Section 2.3.3.1 and Section 2.6 of this Counter-Memorial, the jurisdiction to interpret such language rests with EU Member States, as they are required to transpose the Amending Directive into national measures and define the conditions for granting Article 49a derogations. The competent NRA has the power to apply national provisions and grant an Article 49a derogation in accordance with those provisions. Thus, in response to the Claimant’s question, the European Commission correctly confirmed that decisions on interpretation and application could only be taken at the level of EU Member States.

458. Despite this, the European Commission actively engaged in exchanges with NSP2AG. It invited NSP2AG to the European Commission’s premises for a meeting, which took place on 25 June 2019, and provided NSP2AG with all information that was in its power to share.

459. In any event, the decision by a State authority threatened with litigation by a private party does not amount to a violation of the standard of due process under international law nor does it amount to a denial of justice. This was not an instance of administrative decision-making or judicial decision-making. Rather, the European Commission was simply confirming the allocation of competences between the European Union and its Member States. Thus, no violation of due process could have taken place: the European Commission promptly engaged in a dialogue with NSP2AG and indicated that the German NRA would be able to answer NSP2AG’s query.

- e. the Order of the EU General Court dated 20 May 2020 declared inadmissible NSP2AG's application for annulment of the Amending Directive
460. Regarding point e., the Claimant mentions the possibility of alleging, at a later stage, denial of justice under the FET standard set out in Article 10(1) of the ECT, as well as a breach of Article 10(12) of the ECT,⁴¹³ in connection with the Claimant's Annulment Application and the subsequent Order of the EU General Court dated 20 May 2020 in Case T-526/19.⁴¹⁴
461. The European Union reserves its right to further elaborate its response if the Claimant were indeed to raise a claim under Article 10(12) of the ECT. As a preliminary observation, investment treaty tribunals considering the standard of Article 10(12) of the EC have held that it "requires States to provide a legal framework that guarantees effective remedies to investors for realization and protection of their investments".⁴¹⁵ They add that "[t]he standard [...] does not impose any obligation on States regarding the way in which [they organise their] judicial system. It is sufficient that an adequate system of laws and institutions is established and that it functions effectively".⁴¹⁶
462. The Annulment Application was discussed in detail in Section 2.7 of this Counter-Memorial and is summarized in the paragraphs below.
463. On 26 July 2019, the Claimant brought an action before the EU General Court against the European Parliament and the Council of the EU seeking annulment of the Amending Directive pursuant to Article 263 of the TFEU.⁴¹⁷

⁴¹³ Article 10(12) of the ECT provides that: "[e]ach Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorisations".

⁴¹⁴ Claimant's Memorial, para. 393.

⁴¹⁵ (Exhibit RLA-120), *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, para. 470, referring to *White Industries Australia Limited v. Republic of India* (UNCITRAL), Final Award, 30 November 2011, para. 11.3.2.

⁴¹⁶ (Exhibit RLA-120), *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012, Award, para. 470, referring to *White Industries Australia Limited v. Republic of India* (UNCITRAL), Final Award, 30 November 2011, para. 11.3.2.

⁴¹⁷ (Exhibit RLA-69),. Article 263 of the TFEU provides that:

"1. The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

2. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

[...]

4. Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

[...]"

464. On 20 May 2020, the EU General Court found the Annulment Application inadmissible,⁴¹⁸ ruling that the Claimant lacked standing as it did not satisfy the conditions of Article 263(4) of the TFEU.⁴¹⁹
465. On 4 September 2020, NSP2AG appealed the Order of the EU General Court: the appeal is now pending before the ECJ as Case C-348/20 P.
466. Denial of justice does not occur simply when a court, upon hearing a claim, deems a dispute to be inadmissible or beyond its jurisdiction in accordance with applicable law. Otherwise, every time a domestic court were to decline jurisdiction or declare a claim to be inadmissible, this would allegedly amount to a denial of justice, which is a nonsense. Determining whether or not a claim is within a court's jurisdiction and/or whether it is admissible is intrinsic to the administration of justice, not to its denial.
467. Deciding on a denial of justice claim does not authorise investment treaty tribunals to act as appellate courts in respect of a legitimate exercise of judicial decision-making power by domestic courts, either on jurisdictional or on substantive issues.⁴²⁰ Moreover, it is incoherent to allege a denial of justice at the national level before an international arbitral tribunal, while an appeal on that same issue is pending at the national level in connection with the same matter. Even if a party were to take the position that it had effectively been denied justice through flawed proceedings at the first stage (*quod non*), a State's compliance with its international law obligations must be ascertained as a whole, including by considering the availability, exercise and outcome of any rights of appeal in relation to an allegedly improper first-stage decision.
468. The Claimant's denial of justice claim under Article 10(1) of the ECT, as well as its threat of a claim of breach of the obligation to provide effective remedies under Article 10(12) of the ECT with regard to the Annulment Application, are entirely without substance or merit.
469. NSP2AG's failure to meet the criteria set out in Article 263(4) of the TFEU cannot be considered as a denial of justice or a breach of Article 10(12) of the ECT.

⁴¹⁸ Exhibit CLA-67, General Court's Decision on Admissibility of NS2AG's Annulment Application, 20 May 2020, Ruling.

⁴¹⁹ Exhibit CLA-67, General Court's Decision on Admissibility of NS2AG's Annulment Application, 20 May 2020, para. 124.

⁴²⁰ (Exhibit RLA-119), *Limán v. Kazakhstan*, Award, 22 June 2010, para. 274.

470. Moreover, access to justice as regards the interpretation or validity of the Amending Directive can also be ensured in national proceedings through the preliminary ruling procedure laid down in Article 267 TFEU. Pursuant to Article 267 TFEU, national courts or tribunals have the possibility⁴²¹ and in certain cases the obligation,⁴²² to refer questions pertaining to the interpretation or validity of EU law to the ECJ, which has sole jurisdiction to give binding preliminary rulings on those questions.⁴²³

3.1.1.3. Conclusions

471. The claims of denial of justice and breach of the obligation to afford due process under Article 10(1) of the ECT, and the invocation of the possibility to rely on Article 10(12) of the ECT by the Claimant are unsubstantiated and should be entirely rejected.

3.1.2. There is no impairment by arbitrary or discriminatory measures

472. The Claimant alleges that it has suffered from arbitrary or discriminatory treatment in violation of the FET standard under Article 10(1) of the ECT.⁴²⁴ The Claimant also argues that the Amending Directive allegedly breaches the EU's express obligation under Article 10(1) of the ECT not to impair NSP2AG's investment by discriminatory measures, and that the Amending Directive also constitutes a "clear breach of the EU's guarantee to provide FET".⁴²⁵ In reviewing its claim of FET breach based upon alleged arbitrary measures, the Claimant also refers to the discussion of related investment treaty decisions in the sections of its Memorial on the supposedly self-standing obligation "not to adopt unreasonable measures" under Article 10(1) of the ECT.⁴²⁶ With respect to its allegations of discriminatory treatment, the section of the Claimant's Memorial on the supposedly self-standing obligation cross-refers to the discussion regarding the FET standard.⁴²⁷ The Claimant conflates legal standards and relevant facts for its "arbitrariness" and "discrimination" claims under the FET standard, on the one hand, and under the supposedly self-standing "reasonableness" and "non-discrimination" obligations in Article 10(1) of the ECT, on the other hand.

⁴²¹ (Exhibit RLA-69), Article 267, second subparagraph, of the TFEU.

⁴²² (Exhibit RLA-69), Article 267, third subparagraph, of the TFEU.

⁴²³ (Exhibit RLA-69), Article 267 of the TFEU.

⁴²⁴ Claimant's Memorial, paras. 394-415.

⁴²⁵ Claimant's Memorial, para. 396.

⁴²⁶ Claimant's Memorial, para. 397.

⁴²⁷ Claimant's Memorial, paras. 443-444.

473. The legal standard for arbitrary or discriminatory treatment under FET is the same as that for impairment by alleged unreasonable or discriminatory measures. The Claimant does not argue otherwise, as it cross-refers case law and reiterates substantive arguments in the sections of its Memorial that address these supposedly distinct allegations. Arbitral tribunals for their part have recognized that the ECT has two overlapping standards relating to alleged discriminatory treatment: one under FET and another under the explicit provision against impairment through discriminatory measures. To date, no arbitral tribunal has articulated any difference between these two analogous standards. At best, the tribunal in *Stati v. Kazakhstan* recognized that there are two separate standards with protections that overlap, “*though it may be arguable to which extent*”.⁴²⁸ In *AES v. Hungary*, the Tribunal recognized the existence in principle of two standards, but decided to deal only with discrimination as a separate standard of protection.⁴²⁹
474. The apparent distinction between the two standards is therefore theoretical at best.⁴³⁰ Certain authors have considered how a tribunal would be able to establish a distinction in a specific case, with one author concluding that this is “hard to imagine”.⁴³¹ The lack of clarity surrounding the content of the FET standard in Article 10(1) of the ECT has been identified by the overwhelming majority of the Members of the ECT Modernisation Group as an area of desirable reform in the context of the ECT Modernisation process.⁴³²
475. In any event, even if the Tribunal were to consider that there could be, in theory, conceptual differences between the arbitrariness and discrimination standard under FET and the explicit unreasonableness and discrimination standard in Article 10(1) of the ECT, the Claimant in effect collapses the two by relying on the same alleged facts in relation to either alleged breach.

⁴²⁸ (Exhibit RLA-121): *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Kazakhstan*, (SCC Case No. V 116/201, Award of 19 December 2013), para. 1282.

⁴²⁹ (Exhibit RLA-122): *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, (ICSID Case No. ARB/07/22, Award of 23 September 2010), para. 10.3.53.

⁴³⁰ (Exhibit R-105): Orsat Miljenić, “Energy Charter Treaty – Standards of Investment Protection”, *Croatian International Relations Review*, XXIV (83) 2018, 52-83, at p. 65.

⁴³¹ (Exhibit R-105): Orsat Miljenić, “Energy Charter Treaty – Standards of Investment Protection”, *Croatian International Relations Review*, XXIV (83) 2018, 52-83, at p. 65. Schreuer considers that FET and the prohibition of arbitrary or discriminatory measures are “*conceptually different*”. He notes nevertheless that “*this does not deny that there may be considerable overlap and that one particular set of facts may violate both the fair and equitable treatment standard and the rule against arbitrary or discriminatory treatment*”. See (Exhibit R-106): C.H. Schreuer, “Selected standards of treatment available under the Energy Charter Treaty”, in *Investment Protection and the Energy Charter Treaty* (2008), pp. 63-115, p. 74.

⁴³² See (Exhibit R-107): Decision of the Energy Charter Conference of 6 October 2019, Policy Options for Modernisation of the ECT, <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf>.

476. Given the Claimant's own failure to distinguish between the two standards, and its explicit factual cross-references between the two, the European Union will set out the legal standard for arbitrariness and unreasonableness as well as for discrimination in Section 3.1.7, below. It will then also respond to the Claimant's substantial arguments under these standards jointly. To the extent the Tribunal were to consider that separate standards exist, or that the Claimant would be able to specify distinct factual arguments that apply under one standard but not the other, the European Union will respond to this in its rejoinder. For now, the European Union combines its rebuttal to both sections in the Claimant's Memorial in Section 3.1.7, below.

3.1.3. The European Union has acted in good faith

3.1.3.1. Legal Standard

477. The Claimant in its Memorial argues that the European Union failed to act in good faith in the adoption of the Amending Directive, and that this constituted a separate heading of violation of Article 10(1) of the ECT. This is incorrect both as a matter of fact and of law.
478. On the legal standard, Article 10(1) ECT does not impose a separate obligation to act in good faith. Rather, good faith is a fundamental principle of international law that informs the interpretation and application of the various requirements imposed by the FET obligation.⁴³³
479. In this regard, the Vienna Convention on the Law of Treaties (VCLT) provides that a treaty must be interpreted⁴³⁴ and performed⁴³⁵ in good faith.
480. Whereas, in accordance with the principle of international law codified in the VCLT, the obligations imposed by the FET standard in Article 10(1) of the ECT must, of course, be interpreted and performed in good faith by the responding State, a "failure to act in good faith" does not constitute, in and of itself, a breach of Article 10(1) of the ECT.⁴³⁶

⁴³³ SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic, SCC Case No. V2016/32, Final Award, 25 March 2020, para. 737 ("[t]he Tribunal does not consider the requirement of good faith or bona fide conduct to constitute a separate obligation under Article 10(1) ECT. Instead, the Tribunal is persuaded by Respondent's view that good faith is a fundamental concept that permeates across the FET obligation in general, and all independent facets thereof")(Exhibit RLA-123):

⁴³⁴ Article 31.1 VCLT.

⁴³⁵ Article 26 VCLT.

⁴³⁶ WTO Panel report, EC – Bed Linen, Article 21.5, para. 6.91 ("More fundamentally, we reject the assertion that a WTO dispute settlement panel should find a violation of a provision of a covered agreement, not on the basis of inconsistency of a Member's measure with a provision of a covered

481. In any event, the parties to an international agreement enjoy a presumption that they will perform it in good faith.⁴³⁷ While that presumption may be rebutted, this requires a high standard of proof.⁴³⁸
482. Even if the Tribunal were to consider that Article 10(1) of the ECT imposes a separate legal obligation to act in good faith, the Claimant has failed to meet its burden of proving that the European Union has acted in bad faith.
483. Indeed, as explained below, in support of this allegation the Claimant limits itself to repeating, without further elaboration, a series of factual allegations, which it had already invoked in support of other alleged breaches of Article 10(1) of the ECT. The Claimant has failed to prove those factual allegations, let alone show that they would constitute bad faith on the part of the European Union.

3.1.3.2. The European Union has acted in good faith

484. The Claimant relies on the following sets of factual allegations in its claim of lack of good faith: (i) the objectives of the Amending Directive; (ii) the legislative process that was followed; and (iii) the exchanges between NSP2AG and the European Commission in 2019.⁴³⁹
485. With respect to (i) the objectives of the Amending Directive, as detailed in paragraphs 98-100 of this Counter-Memorial, the Amending Directive aimed at clarifying the legal framework applicable to interconnectors with third countries. It addresses the legal uncertainty that existed previously in this regard and clarifies that the rules of the Gas Directive apply equally to onshore and offshore connections with third countries. It seeks to address the remaining obstacles to the completion of the EU internal market in natural gas resulting from the non-application of EU rules to gas pipelines to and from third countries. The amendments aim to establish consistency in the legal framework within the EU while avoiding distortion of competition.
486. It is precisely good faith that has moved the European Union to adopt the Amending Directive. The Amending Directive clarified the scope of application of rules set out in the Gas Directive and was consistent with the EU approach requiring IGAs to comply with EU law. There is no "bad faith" in the European

agreement, but rather on the basis that a provision of a covered agreement is 'being applied in bad faith'...") (Exhibit RLA-124):

⁴³⁷ WTO Appellate Body Report, EC – Sardines, para. 278 (Exhibit RLA-125).

⁴³⁸ SunReserve Luxco Holdings S.À.R.L., SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic, SCC Case No. V2016/32, Final Award, 25 March 2020, para. 740 ("In any event, the Tribunal considers it important to emphasise that in order for bad faith or mala fide conduct to be established, the burden on the investor is high") (Exhibit RLA-123):

⁴³⁹ Claimant's Memorial, para. 418.

- Union clarifying and confirming the legal regime applicable on a non-discriminatory basis to all market players seeking to do business in the EU internal market for natural gas.
487. Concerning point (ii) on the legislative process followed, the Respondent refers to Section 2.5 of this Counter-Memorial. The legislative timetable followed by the Amending Directive was not accelerated: on the contrary, eighteen months of negotiations elapsed since the date of transmission of the Proposal for the Amending Directive to the European Parliament and the Council of the EU on 8 November 2017 until its approval by the co-legislators on 15 April 2019, with the subsequent publication of the agreed text in the Official Journal on 3 May 2019. Eighteen months correspond to the average duration of negotiations of legislative acts adopted in first reading.⁴⁴⁰
488. Coming to point (iii) on the exchange between NSP2AG and the European Commission in 2019, as highlighted in Section 2.6 of this Counter-Memorial, the European Union has actively engaged in good faith exchanges with NSP2AG. The European Commission replied to the Claimant's questions in two letters, on 13 May 2019⁴⁴¹ and on 26 July 2019,⁴⁴² and held a dedicated meeting with NSP2AG on 25 June 2019.
489. It is baseless to allege that the European Union acted in bad faith by refusing to provide an interpretation of the concept of "completed" under Article 49a of the Amending Directive. In fact, no interpretation could have been provided by the European Commission: the NRAs of EU Member States are the entities empowered to grant an Article 49a derogation, subject to the conditions laid down through national measures that transpose the Amending Directive at the EU Member State level within the scope of their margin of discretion. The decisions of the NRAs may in turn be challenged before the competent national courts and are ultimately under the control of the ECJ, if questions of interpretation or validity of the Amending Directive are raised.
490. In its exchanges with NSP2AG, the European Commission clearly identified the authority that had the competence to assess the eligibility of the NS2 pipeline to obtain a derogation under Article 49a of the Amending Directive: the German NRA. There is no "bad faith" involved in explaining to a private party, as the European Commission did, why a question put to it should instead (as here) be

⁴⁴⁰ (Exhibit R-94): p. 4: "[t]he average length of procedure for acts adopted at first reading is just below 18 months for the 8th term (from adoption by the Commission to signature by the co-legislators".

⁴⁴¹ Exhibit C-11.

⁴⁴² Exhibit C-9.

addressed to the competent NRA of a Member State in accordance with the relevant procedures. By refusing to yield to NSP2AG's attempts to short-circuit those procedures the European Union has not acted in bad faith.

3.1.3.3. Conclusions

491. The burden of proof regarding an alleged lack of good faith lies with the Claimant. It has entirely failed to demonstrate its false allegations. By contrast, the European Union has confirmed the good faith of its actions at three different instances: (i) *before* the Proposal for the Amending Directive was transmitted to the co-legislators, when its drafting was aimed at clarifying the applicability of the Gas Directive to gas transmission pipelines to and from third countries; (ii) *during* the negotiating process for the adoption of the Amending Directive which lasted eighteen months, in line with the average duration for that type of legislative act, and (iii) *after* the Amending Directive was approved, when the European Commission engaged in a dialogue with NSP2AG concerning the Amending Directive and provided all the information it was in its power to provide.
492. The Claimant's allegations regarding an alleged EU lack of good faith are therefore groundless.

3.1.4. The European Union has acted proportionately

493. The Claimant alleges that the European Union has breached the FET standard in Article 10(1) of the ECT because it has failed to act proportionately.
494. More particularly, the Claimant alleges that "the [European Union] has acted in a wholly disproportionate way with regard to the burden placed upon NSP2AG by the Amending Directive, when assessed against the EU's stated objectives of the Amending Directives"⁴⁴³.
495. As will be shown below, this claim is without merit because it is entirely premised on unproven and indeed incorrect factual allegations regarding the objectives of the Amending Directive and its impact on NSP2AG.

3.1.4.1. Legal Standard

496. The Claimant does not articulate any legal standard in relation to its claim that the Amending Directive is disproportionate.

⁴⁴³ Claimant's Memorial, para. 419.

497. Article 10(1) itself, upon which the Claimant relies, makes no express reference to an obligation of “proportionality”. Investment treaty tribunals have recognized that proportionality is not a separate element of FET, but rather an “inherent element when balancing regulatory state interests and investor interests” in assessing compliance with other elements of the FET standard.⁴⁴⁴

498. Regardless of the legal characterization of proportionality in relation to the FET standard, it is generally recognized that States enjoy a wide margin of appreciation when balancing regulatory interests and investors’ interests. For example, in a recent award concerning a claim under Article 10(1) of the ECT, the tribunal noted that:

[i]t is also recognized that States, as the entities tasked with balancing the often competing interests involved, enjoy a margin of appreciation in the field of economic regulation. This means that an arbitral tribunal asked to review general economic regulation will normally not second-guess the State’s choices; it will not review *de novo* whether they are well-founded, nor assess whether alternative solutions would have been more suitable. Governments often have to make controversial choices, which especially those directly affected may view as mistaken, based on misguided economic theory, placing too much emphasis on certain social values over others. It is not the task of an investment treaty tribunal to evaluate the policy choices that often underpin economic decisions.⁴⁴⁵

499. Having regard to that margin of appreciation, regulatory measures have been found “proportionate”, provided that they do not “[impose] burdens on foreign investment that went far beyond what was reasonably necessary to achieve good faith public interest goals”.⁴⁴⁶

⁴⁴⁴ *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, para. 555 (Exhibit RLA-126); See also *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, where the proportionality of the measure is examined as part of the assessment of claims of arbitrariness and unreasonableness, para. 179 (Exhibit RLA-127)

⁴⁴⁵ *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, para. 583, footnotes omitted (Exhibit RLA-128). See also *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para 468 (“[t]he Tribunal is of the opinion that the Respondent enjoys a margin of appreciation in conducting its economic policy; therefore, it will not substitute its own views either on the appropriateness of the measures at stake or on the characterization of the situation which prompted them; in particular, the Tribunal will abstain to take any position on the issue of the existence of other or more appropriate possible measures to face this situation”) (Exhibit RLA-129):

⁴⁴⁶ *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, para. 410 (Exhibit RLA-130)

500. Furthermore, the proportionality of a regulatory measure of general applicability “must be evaluated in light of its overall features and impacts, and not through the narrow lens of its impact on a particular investor”⁴⁴⁷.

3.1.4.2. The allegation that the European Union has acted disproportionately is premised on unproven factual allegations with regard to both the effects and the objectives of the Amending Directive

501. NSP2AG alleges that the Amending Directive is disproportionate because “the Practical Effects of the Amending Directive and the burden imposed on NSP2AG clearly outweigh any arguable policy benefit of the Amending Directive”.⁴⁴⁸

502. This allegation is entirely premised on a series of interrelated factual allegations, all of which the Claimant has failed to prove.

503. First, as shown by the European Union in section 2.3 of its Counter-Memorial, the Claimant has failed to prove that the Amending Directive, as transposed and implemented by Germany, will have the “Practical Effects” summarised by the Claimant at paragraph 420 of its Memorial⁴⁴⁹.

504. Second, as shown by the European Union in section 2.2, the stated objectives of the Amending Directive are neither “specious”⁴⁵⁰ nor “unachievable”.⁴⁵¹ The Amending Directive does pursue legitimate objectives and is capable of making an effective and significant contribution to the achievement of those objectives.

505. Last, as shown by the European Union in section 2.4, the Amending Directive is not “set to apply in fact only to [the NS2 pipeline]”.⁴⁵²

3.1.4.3. Conclusion

506. For the above reasons, the European Union submits that the Claimant has failed to show that the Amending Directive, as transposed and implemented by Germany, is disproportionate and in breach of Article 10(1) of the ECT.

⁴⁴⁷ *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, para. 413 (Exhibit RLA-130)

⁴⁴⁸ Claimant’s Memorial, para. 421.

⁴⁴⁹ Paragraph 420 of the Claimant’s Memorial purports to summarise the “practical effects” alleged in Section VII of the Claimant’s Memorial of Merits under the heading “The Amending Directive will be [redacted] for Nord Stream2 AG’s Investment”.

⁴⁵⁰ Claimant’s Memorial, para. 421.

⁴⁵¹ Claimant’s Memorial, para. 421.

⁴⁵² Claimant’s Memorial, para. 421.

3.1.5. The European Union did not breach legitimate expectations

507. The Claimant alleges that the European Union breached its legitimate expectations through the alleged “dramatic and radical regulatory change” resulting from the adoption of the Amending Directive.⁴⁵³
508. The Energy Charter Treaty does not contain any reference to the protection of investors’ legitimate expectations. Rather, it includes a commitment on the part of the Contracting Parties of the Energy Charter Treaty to accord to investments of Investors of other Contracting Parties FET. The Claimant infers from this FET standard a far-reaching right of investors to the protection of legitimate expectations and a right to regulatory stability.
509. The Respondent would first point out that the FET standard, rather than the protection of investors’ legitimate expectations, is the relevant legal standard. A breach of legitimate expectations would not in and of itself suffice to demonstrate that a host State fell short of the FET standard. Rather, investment tribunals have held that legitimate expectations are but one relevant factor to the application of the FET standard and are not, as such, a source of legal obligations.⁴⁵⁴ Accordingly, the Respondent submits that legitimate expectations may only be treated as a relevant consideration by a tribunal when assessing an allegation of breach of another element of the FET standard, and not as a standalone element.
510. Furthermore, the Claimant’s submissions as to the protection of legitimate expectations are flawed because (i) they are not based on any specific commitments intended to induce investments; (ii) they ignore that expectations are in any event worthy of protection only if they have been reasonable,

⁴⁵³ See Claimant’s Memorial, paras. 423-428.

⁴⁵⁴ See, e.g., *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007, (Exhibit RLA-131) para. 89 (“[a]lthough legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause contained in the BIT”); *MTD Equity Sdn Bhd & MTD Chile S.A. v. Chile*, ICSID No. ARB/01/7, Decision on Annulment, 16 February 2007, (Exhibit RLA-132) paras. 67-69 (“[...] the TECMED Tribunal’s apparent reliance on the foreign investor’s expectations as the source of the host State’s obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly”. But the tribunal added that “legitimate expectations generated as a result of the investor’s dealings with the competent authorities of the host State may be relevant to the application of the guarantees contained in an investment treaty”); *AWG Group v. Argentina*, UNCITRAL Decision on Liability, 30 July 2010, Judge Nikken’s Separate Opinion, (Exhibit RLA-133) para. 3 (“The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms ‘fair and equitable.’ Therefore, prima facie, such a conception of fair and equitable treatment is at odds with the rule of interpretation of international customary law expressed in Art. 31(1) VCLT”).

legitimate and justifiable as well as actually relied upon by the investor when making the investment; and (iii) they are premised on a right to regulatory stability, a notion rightly rejected by investment tribunals and which in any event must take into account the Respondent's legitimate regulatory interests.

3.1.5.1. Legitimate expectations require specific commitments inducing investments

511. First, arbitral tribunals have recognized that to the extent they may exist at all, legitimate expectations may only be based on State commitments *specifically inducing investments*.⁴⁵⁵ As summarised by one such tribunal: “[a]rbitral decisions suggest in this regard that an investor may derive legitimate expectations either from (a) specific commitments addressed to it personally, for example, in the form of a stabilisation clause, or (b) rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment”.⁴⁵⁶
512. NSP2AG cannot invoke any specific commitments addressed to it. It otherwise would need to identify rules devised with the specific aim of inducing foreign investments that existed at the time when the financial investment decision regarding the NS2 pipeline was taken on 4 September 2015. The Claimant, which bears the burden of proving its case under the ECT's FET standard,⁴⁵⁷ has failed to identify any such specific rules through which the European Union allegedly created “objective expectations *in order to induce investment*”.⁴⁵⁸
513. The only specific reference to the investment's regulatory context in the Claimant's Memorial is the assertion that Article 49a of the Amending Directive “protects legitimate expectations”.⁴⁵⁹ Even if this were the case (*quod non*),

⁴⁵⁵ This is highlighted in all recent investment agreements concluded by the European Union, its Member States and, e.g., Canada, Singapore, Mexico etc. See, for instance, Article 8.10(4) of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States of the other (Exhibit RLA-134): “When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated”. (Emphasis added.)

⁴⁵⁶ See *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, Award 16 May 2018, ICSID Case No. ARB/14/1, (Exhibit RLA-135) para. 493 quoting UNCTAD, *Fair and Equitable Treatment* (2012), (Exhibit R-106) p. 69; similarly, *9REN Holding S.a.r.l. v. Kingdom of Spain*, Award 31 May 2019, ICSID Case No. ARB/15/15, (Exhibit RLA-136) para. 294, quoting also *El Paso Energy International Company v. The Argentine Republic*, Award 31 October 2011, ICSID Case No. ARB/03/15, para. 375. (Exhibit RLA-137)

⁴⁵⁷ *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*, Award 21 January 2020, ICSID Case No. ARB/15/44, (Exhibit RLA-138) para. 516; *Electrabel S.A. v Republic of Hungary*, Award 25 November 2015, ICSID Case No. ARB/07/19, para. 154. (Exhibit RLA-127)

⁴⁵⁸ *Glamis Gold, Ltd. v. The United States of America*, Award 8 June 2009, UNCITRAL, para. 627. (Emphasis in original.) (Exhibit RLA-139)

⁴⁵⁹ See Claimant's Memorial, paras. 427, 245-246.

Article 49a would still be irrelevant *ratione temporis*. It is common ground in the case law of investment treaty tribunals that the relevant point in time for the assessment of legitimate and reasonable expectations is when the investment is made,⁴⁶⁰ i.e., the moment when the investor decides to invest.⁴⁶¹ The same necessarily follows from the requirement that the conditions allegedly creating such expectations were relied upon by the investor when deciding to invest.⁴⁶² Accordingly, Article 49a of the Amending Directive, a piece of legislation that did not exist when NSP2AG's financial investment decision regarding the NS2 pipeline was taken on 4 September 2015, is inconsequential. At best, the provision was meant to further clarify and confirm EU rules applicable to gas transmission lines to and from third countries before the entry into force of the Amending Directive, in a manner consistent with regular signalling from the European Union regarding the applicability of the Energy Directive regime to such undertakings. Therefore, EU Member States are permitted to grant derogations to pipelines that were completed before the date of entry into force of the directive, i.e., 23 May 2019. In doing so, due account is also taken of the possible need for greater clarity regarding the applicability of such rules since the adoption of the Gas Directive in 2009. By providing for time-limited derogations available subject to conditions, EU Member States may progressively adapt the regulatory framework on such pipelines, aligning these undertakings with full application of the principles where appropriate.

514. Overall, the Claimant has failed to point to any specific commitment which allegedly induced its investment and on which it supposedly relied when deciding to invest.

3.1.5.2. Expectations need to be reasonable, legitimate and justifiable as well as actually been relied upon

515. Even if an investor could claim legitimate expectations in the absence of rules whose specific aim is to induce foreign investments (*quod non*), such expectations would be relevant only if the following two conditions were met cumulatively:

⁴⁶⁰ See, e.g., *Electrabel S.A. v. Republic of Hungary*, Award 25 November 2015, ICSID Case No. ARB/07/19, para. 7.76. (Exhibit RLA-127)

⁴⁶¹ *BG Group Plc. v. The Republic of Argentina*, Award 24 December 2007, UNCITRAL, para. 298. (Exhibit RLA-140)

⁴⁶² See, e.g., *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award 22 May 2007, ICSID Case No. ARB/01/3, para. 262; (Exhibit RLA-141) *International Thunderbird Gaming Corporation v. The United Mexican States*, Award 26 January 2006, UNCITRAL, para. 147; (Exhibit RLA-104) *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award 29 May 2003, ICSID Case No. ARB (AF)/00/2, para 154 (Exhibit RLA-142); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, Decision on Liability 3 October 2006, ICSID Case No. ARB/02/1, para. 127. (Exhibit RLA-143)

- a) the expectations were reasonable, legitimate and justifiable;⁴⁶³
- b) the expectations were actually relied upon by the investor when making the investment.⁴⁶⁴
516. For an expectation to be reasonable, legitimate and justifiable, the investor needs to demonstrate that it has exercised rigorous due diligence and that it has familiarised itself with existing laws.⁴⁶⁵ The investor's expectations need to be assessed in the light of the information that the investor knew or should reasonably have known at the time of making its investment.⁴⁶⁶
517. As explained above, when the financial investment decision regarding the NS2 pipeline was taken on 4 September 2015, there were strong indications that the requirements of unbundling, tariff regulation and TPA, now allegedly frustrating the Claimant's investment, would apply to offshore import pipelines such as the NS2 pipeline, both due to the applicability of the Gas Directive and by virtue of EU competition law.⁴⁶⁷ The applicability of such rules to pipelines entering the European Union from third-party States was not adopted as the expression of an "initial tactic" of "actors opposed to [the NS2 pipeline]" by representatives of the European Commission.⁴⁶⁸ Rather, it expressed the prevailing direction and interpretation of EU law at the time the financial investment decision regarding the NS2 pipeline was taken on 4 September 2015. The fact that NSP2AG chose to ignore this does not make its expectations "legitimate"; to the contrary, it demonstrates that they were not.
518. It was also pointed out that by 4 September 2015, when NSP2AG alleges it took its so-called financial investment decision, the European Commission had issued a substantial number of public statements making clear that the requirements

⁴⁶³ See, for instance *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, Award of 2 December 2019, ICSID Case No. ARB/15/1, para. 264; (Exhibit RLA-144) *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, Award 16 May 2018, ICSID Case No. ARB/14/1, para. 498; (Exhibit RLA-135) *Plama Consortium Limited v. Republic of Bulgaria*, Award 27 August 2008, ICSID Case No. ARB/03/24 paras. 176 and 219 (Exhibit RLA-145); *Parkerings-Compagniet AS v. Republic of Lithuania*, Award 11 September 2007, ICSID Case No. ARB/05/8, para. 333 (Exhibit RLA-146); *International Thunderbird Gaming Corporation v. The United Mexican States*, Award 26 January 2006, UNCITRAL, para. 147. (Exhibit RLA-104)

⁴⁶⁴ See, ex multis, *Plama Consortium Limited v. Bulgaria*, Award of 27 August 2008, ICSID Case No. ARB/03/24 para. 176 (Exhibit RLA-145); see also *Novenergia II - Energy & Environment (SCA) v. Spain*, SCC Arbitration (2015/063), para. 654 (Exhibit RLA-147): "investments already made **on the basis of such legislation**". (Emphasis added.)

⁴⁶⁵ See *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, Award 16 May 2018, ICSID Case No. ARB/14/1, (Exhibit RLA-135) para. 494; *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, Award of 2 December 2019, ICSID Case No. ARB/15/1, para. 264. (Exhibit RLA-144)

⁴⁶⁶ See *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, Award 16 May 2018, ICSID Case No. ARB/14/1, (Exhibit RLA-135) para. 495 referring to *Electrabel S.A. v. Republic of Hungary*, Award 25 November 2015, ICSID Case No. ARB/07/19, para. 7.78. (Exhibit RLA-127)

⁴⁶⁷ See above, sections 2.2.2 – 2.2.4.

⁴⁶⁸ See Claimant's Memorial, para. 203.

- of unbundling, tariff regulation and TPA would apply to offshore import pipelines.⁴⁶⁹
519. Accordingly, any reasonably informed financial investor familiarising itself with the Gas Directive and EU competition law⁴⁷⁰ would have understood that its investment into an offshore pipeline exporting gas into an EU Member State was highly likely to be subject to EU rules on unbundling, TPA and tariff regulation.
520. Hence, even if one accorded credibility to the self-serving witness statement of [REDACTED] according to which NSP2AG believed that the Gas Directive would not apply to the NS2 pipeline⁴⁷¹ (*quod non*), NSP2AG would still fail the test for establishing legitimate expectations. An investor's expectations are only relevant if they are based on the exercise of appropriate due diligence and are objectively reasonable in light all of circumstances. In other words: it does not matter what [REDACTED] might have believed. What matters is what [REDACTED] could and should have known. The Claimant is hardly a small, unsophisticated investor: it is the wholly-owned subsidiary of one of the world's largest State oil monopolies, with enormous resources at its disposal and a high degree of sophistication with regard to the functioning of oil and gas markets. Any suggestion that NSP2AG was ignorant of the regulatory environment apparently applicable to its investment is not only unreasonable; it is confirmation of deliberate and wilful blindness on the part of NSP2AG. Such behaviour fails to give rise to any entitlement on its part under the rules of the ECT or otherwise under international law.
521. Indeed, even based on the Claimant's own account, the NS2 pipeline project had knowingly "progressed against a complex political dynamic"⁴⁷² and in light of a perceived disagreement regarding the scope of application of the Gas Directive.⁴⁷³ Accordingly, what the Claimant describes is in fact the undertaking of a business risk (resulting from hopes that a regulatory framework that would appear to apply to its investment might eventually not be applied), rather than a legitimate expectation to the effect that its project would be exempted from the application of EU law.⁴⁷⁴ NSP2AG's decision to proceed with the investment

⁴⁶⁹ See above, section 2.2.3.

⁴⁷⁰ Indeed, applying proper diligence would also have yielded the conclusion that EU competition rules would apply to undertakings with a dominant position and this irrespective of the place of establishment of the undertaking as long as there is a qualified effect on the EU internal market. See above, 2.2.4.

⁴⁷¹ See [REDACTED]

⁴⁷² See Claimant's Memorial, para. 428.

⁴⁷³ See Claimant's Memorial, paras. 203-216.

⁴⁷⁴ See, e.g., *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, Award 18 August 2008, ICSID Case No. ARB/04/19, (Exhibit RLA-148) para. 351: "Duke Energy was thus aware of the risk that Electroquil could be fined [...] and it assumed the related business risk. It appears, however,

in this regulatory environment and to downgrade the regulatory risk in its decision-making process amounts to the wilful and knowing acceptance that EU regulatory rules would apply to its project.⁴⁷⁵

522. It has rightly been held that the obligation of the State to provide FET “does not dispense the obligation of the investor to evaluate the circumstances. Reliance has at its prerequisite diligent inquiry and information. The investor has to understand the content and the context of the law and the administrative practice. Put differently, the standard is addressed to both the State and the investor. Fairness and equitableness cannot be established adequately without an adequate and balanced appraisal of both parties’ conduct”.⁴⁷⁶ As any duly diligent investor would have refrained from harbouring the expectation that the Claimant’s Memorial attempts to depict as “legitimate” under the given circumstances, the Claimant’s claim pertaining to legitimate expectations should be dismissed.
523. Finally, and for the sake of completeness, it is submitted that the Claimant does not adduce evidence that it actually relied on its alleged expectations when making the investment. Failure to provide such evidence is another reason why any arbitral tribunal would reject the Claimant’s reliance on its alleged legitimate expectations given that the Claimant bears the burden of proving its case.⁴⁷⁷

3.1.5.3. Legitimate expectations do not guarantee a stable legal or business environment

524. The Claimant’s assertion that the FET standard justifies an investor’s “expectation that the host state will maintain a stable legal and business environment”⁴⁷⁸ misstates the legal standard. As investment tribunals have recognized, there is no general obligation under the ECT or otherwise under

to have expected that no fines were yet to be imposed [...] The Tribunal does not believe that this expectation can be viewed as reasonable when one bears in mind the [...] opacity that prevailed in the administration of the contract prior to Duke Energy’s investment. In view of the contract history, the expectation could only have been deemed reasonable if it had been based on clear assurances from the Government”. Similarly, *Parkerings-Compagniet AS v. Republic of Lithuania*, Award 11 September 2007, ICSID Case No. ARB/05/8, (Exhibit RLA-146) para. 335-336: “The circumstances surrounding the decision to invest in Lithuania were certainly not an indication of stability of the legal environment”.

⁴⁷⁵ See, e.g., *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, Award 18 August 2008, ICSID Case No. ARB/04/19, (Exhibit RLA-148) para. 340: “The assessment of the reasonableness or legitimacy [of the investor’s expectations] must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State”.

⁴⁷⁶ *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, Award 30 March 2015, ICSID Case No. ARB/11/24, para. 634. (Exhibit RLA-149)

⁴⁷⁷ *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*, Award 21 January 2020, ICSID Case No. ARB/15/44, para. 516 (Exhibit RLA-138); *Electrabel S.A. v Republic of Hungary*, Award 25 November 2015, ICSID Case No. ARB/07/19, para. 154. (Exhibit RLA-127)

⁴⁷⁸ See Claimant’s Memorial, para. 425.

- international law for a legal and regulatory environment to remain frozen in time.⁴⁷⁹
525. In support of investors' alleged legitimate expectations of a stable investment environment, the Claimant invokes the first sentence of Article 10(1) of the ECT⁴⁸⁰ which directs the Contracting States to "encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area".
526. First, the first sentence of Article 10(1) of the ECT provides no specific directions on the particular obligation it entails. Instead, more specific content is provided only in the next clause: "[s]uch conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment".
527. It is well understood that an obligation of according FET does not entail a right to regulatory stability on the part of investors.⁴⁸¹ As consistently held by arbitral tribunals addressing both ECT and non-ECT related cases, including regarding those on which the Claimant itself relies,⁴⁸² in the absence of a specific commitment contractually assumed by a State to freeze its legislation, investors may not reasonably expect that "a regulatory framework ... is not to be modified at any time to adapt to the needs of the market and to the public interest".⁴⁸³ Rather, "the state has a right to regulate" and investors "must expect that

⁴⁷⁹ Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, para 510 (unofficial English translation available at <https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf>) (Exhibit RLA-120). See also, Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, Award 16 May 2018, ICSID Case No. ARB/14/1, para. 510 (Exhibit RLA-135); Saluka Investments B.V. v. The Czech Republic, Partial Award 17 March 2006, UNCITRAL, para. 305 (Exhibit RLA-150) and similarly, Stadtwerke München v Spain, Award of 2 December 2019, ICSID Case No. ARB/15/1 para. 264 (Exhibit RLA-144); El Paso Energy International Company v. The Argentine Republic, Award 31 October 2011, ICSID Case No. ARB/03/15, para. 372. (Exhibit RLA-137)

⁴⁸⁰ See Claimant's Memorial, paras. 371, 426.

⁴⁸¹ Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, Award 11 December 2013, ICSID Case No. ARB/05/20, para. 666. (Exhibit RLA-151)

⁴⁸² See Claimant's Memorial, paras. 423-425.

⁴⁸³ Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, para 510 (unofficial English translation available at <https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf>) (Exhibit RLA-120). See also, Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, Award 16 May 2018, ICSID Case No. ARB/14/1, para. 510 (Exhibit RLA-135); Saluka Investments B.V. v. The Czech Republic, Partial Award 17 March 2006, UNCITRAL, para. 305 (Exhibit RLA-141) and similarly, Stadtwerke München v Spain, Award of 2 December 2019, ICSID Case No. ARB/15/1 para. 264 (Exhibit RLA-144); El Paso Energy International Company v. The Argentine Republic, Award 31 October 2011, ICSID Case No. ARB/03/15, para. 372. (Exhibit RLA-137)

legislation may and will be changed".⁴⁸⁴ The requirement of fairness does not entail the immutability of the legal framework.⁴⁸⁵

528. In the light of the above, it is submitted that the Claimant's attempt to impose a "regulatory freeze" on the European Union is neither supported by the ECT text, nor reflected in interpretations of analogous language by investment treaty tribunals.

529. In this context, it is also worth highlighting that arbitral tribunals recognize a legitimate regulatory interest against which investors' expectations need to be weighed even if deemed legitimate.⁴⁸⁶ In other words: even if the Claimant could demonstrate that its expectations were legitimate in that they were based upon specific representations by the State, were objectively reasonable, and the Claimant in fact relied upon them to invest (*quod non*), an overriding public interest would have justified the frustration of any such expectations. This is because an overriding public interest was pursued by the Amending Directive, as is set out in detail above in section 2.1.

3.1.6. The European Union has acted transparently

3.1.6.1. Legal Standard

530. Article 10(1) of the ECT provides that:

"[e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area".

⁴⁸⁴ Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, Award 15 February 2018, SCC Case No. 2015/063, para. 654 (Exhibit RLA-147) by reference to Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, Award 11 December 2013, ICSID Case No. ARB/05/20, para. 666 (Exhibit RLA-151), as quoted in Memorial para. 425vii. For recent clarifications, see Article 8.9.2 CETA (Exhibit RLA-134), Article 2.2.2 of the EU-Singapore Investment Protection Agreement (Exhibit RLA-116), Article 2.2.2 of the EU-Vietnam Investment Protection Agreement (Exhibit RLA-152), Article 14.1 of the of the Investment Chapter of the EU-Mexico Agreement. (Exhibit RLA-162),

⁴⁸⁵ Electrabel S.A. v. Republic of Hungary, Award 25 November 2015, ICSID Case No. ARB/07/19, para 7.77. (Exhibit RLA-127). The same is set out in recent EU investment agreements on a "for greater certainty" (i.e., declaratory) basis, for instance in Article 8.9.2 of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States of the other (Exhibit RLA-134): "For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section".

⁴⁸⁶ See Saluka Investments BV v The Czech Republic, UNCITRAL, Partial Award, 17 March 2006; paras 305-306 (Exhibit RLA-150); Total SA v The Argentine Republic, ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010, para. 123 (Exhibit RLA-153),. See *also* Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award on Merits, 16 December 2002, para. 112. (Exhibit RLA-154),

531. Whereas the Claimant argues that the obligation to create transparent conditions for investors under Article 10(1) of the ECT is related to the FET standard,⁴⁸⁷ in fact transparency is not an element of the FET standard under the ECT. An UNCTAD study on the FET standard reports that: "A number of possible elements, such as transparency or consistency, have generated concern and criticism. So far, they may not be said to have materialized into the content of fair and equitable treatment with a sufficient degree of support".⁴⁸⁸
532. A recent award established that Article 10(1) of the ECT does not compel the State parties to act in a "completely transparent" manner in its relations with the foreign investor:⁴⁸⁹ "[t]here is nothing in Article 10(1) or elsewhere in the ECT to suggest that the Contracting States were willing to accept such an exacting obligation".⁴⁹⁰
533. In any event, investment treaty tribunals have noted that the threshold for a breach of the transparency requirement as part Article 10(1) of the ECT is very high. In *RWE Innogy v. Spain*, the decision on jurisdiction noted to this effect as follows:
- "[t]he Tribunal sees no reason why, and no basis in the ECT to suggest that, a lower threshold would apply in the particular context of transparency. It also notes that various awards have suggested that there is a need to establish a *complete* lack of transparency, or some equivalent phraseology, in order to serve as a foundation for a breach of the FET standard"⁴⁹¹. (emphasis added)
534. If the Tribunal were to find that transparency forms part of the FET standard under the ECT (*quod non*), it would still need to define the scope of the obligation. Investment law scholars have found that if the investor has been informed "openly, promptly and clearly" that "the law has [...] changed [...] [s]uch a situation could not be said to lack transparency".⁴⁹²
535. In the present context, transparency relates to candour in sharing the interpretation an authority gives to its laws and regulations, and the manner in which it goes on to implement future changes or refinements to that law. Here, the European Union has respected its obligations on both fronts. As stated above

⁴⁸⁷ Claimant's Memorial, para. 429.

⁴⁸⁸ (Exhibit RLA-106), page 66.

⁴⁸⁹ (Exhibit RLA-155), *RWE Innogy v. Spain*, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, para. 660.

⁴⁹⁰ (Exhibit RLA-155), *RWE Innogy v. Spain*, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, para. 660.

⁴⁹¹ (Exhibit RLA-155), *RWE Innogy v. Spain*, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, para. 660.

⁴⁹² (Exhibit RLA-156), Jonathan Bonnitcha, *Fair and Equitable Treatment, in Substantive Protection under Investment Treaties A Legal and Economic Analysis*, Cambridge University Press, 2014, p. 204.

in paragraphs 140-144 of this Counter-Memorial, EU officials candidly and repeatedly affirmed from at least 2010 onward their understanding that the Gas Directive and the Gas Regulation applied to pipelines selling into the EU territory from third-party States. The European Union also transparently announced its intention to clarify and enhance alignment between the statement of the law and its policy through the Amending Directive. The obligation of transparency does not result in State liability each time there may be competing interpretations of a legal or regulatory provision. To reach that conclusion would entail an impossibly high threshold for avoiding State liability.

536. The following paragraphs demonstrate that the European Union has acted transparently, in full compliance of its obligations under the ECT.

3.1.6.2. The European Union acted transparently

537. The Claimant argues that: (i) the legislative process followed and (ii) the “withholding” of information about the interpretation of the Amending Directive⁴⁹³ amount to a breach of the obligation to act transparently as part of the FET under Article 10(1) of the ECT.⁴⁹⁴ Neither assertion accords with the relevant facts.

538. First, the legislative process leading to the introduction of the Amending Directive included the publication of the Proposal by the European Commission on 8 November 2017.⁴⁹⁵ The Proposal was also open for feedback for a period of eight weeks, from 6 December 2017 to 31 January 2018.⁴⁹⁶

539. The publication of the Proposal for the Amending Directive, and the related opportunity granted to stakeholders to provide feedback; the clear presentation of all the steps of the legislative process on a dedicated webpage;⁴⁹⁷ and the immediate availability to any reader of the final agreed text of the Amending Directive, all enabled the Claimant to follow the legislative process and provided a meaningful opportunity to engage. There is nothing here that comes close to an alleged breach of “transparency” either under the ECT or otherwise at international law.

⁴⁹³ Claimant’s Memorial, para. 433.

⁴⁹⁴ Claimant’s Memorial, paras. 432-434.

⁴⁹⁵ Exhibit C-46, Proposal for a Directive Of The European Parliament And Of The Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, Brussels, 8.11.2017, COM(2017) 660 final.

⁴⁹⁶ On the feedback process, see paras. 353-358 of this Counter-Memorial.

⁴⁹⁷ Exhibit (Exhibit R-73), Procedure 2017/0294/COD, also available at: <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:32019L0692>

540. As detailed in Section 2.5.1, Section 2.5.2, and Section 2.5.4 of this Counter-Memorial, an impact assessment was not needed and would have been redundant, as justified in the Explanatory Memorandum, and the duration of the negotiations of the Amending Directive corresponded to the average duration of legislative acts adopted in first reading.⁴⁹⁸ Indeed, the EU's intentions in introducing the Amending Directive were prompted by a desire to clarify (and therefore render more transparent) the applicable legal regime. By expressly affirming in the Amending Directive its longstanding and well-known interpretation of the Gas Directive and the Gas Regulation, the European Union enhanced the consistency, coherence, and certainty of the legal framework.⁴⁹⁹ To characterise this as a lack of "transparency" is nonsensical.
541. Second, as detailed in Section 2.6 of this Counter-Memorial, the European Commission never concealed any information from the Claimant regarding the application of the Amending Directive or otherwise. The Claimant's main complaint in that regard is that the European Commission declined to confirm to it whether or not it would be eligible for a derogation under Article 49 of the Amending Directive. This confuses transparency with respect for the allocation of competences between the EU and its Member States. As noted above, it is nonsensical to allege that by refusing to overstep its authority and interpret the Amending Directive in the place of a Member State, the European Union allegedly lacked transparency. To the contrary, the European Commission was clear and candid to the Claimant in its responses – the Claimant simply did not like what it heard. The European Commission engaged with NSP2AG by twice responding to its questions in writing⁵⁰⁰ and by organising and hosting a meeting at the European Commission's premises on 25 June 2019.
542. NSP2AG asked the European Commission to confirm that the NS2 pipeline was completed before the relevant date.⁵⁰¹ This would have required the European Commission to prejudge the interpretation and application of the law in a specific case. EU Member States are responsible for transposing the Amending Directive into national measures and applying them.
543. The European Commission's letter to NSP2AG confirms that:

⁴⁹⁸ (Exhibit R-94), page 4: "The average length of procedure for acts adopted at first reading is just below 18 months for the 8th term (from adoption by the Commission to signature by the co-legislators); the figure rises to approximately 20 months for those that were negotiated".

⁴⁹⁹ Exhibit CLA-84, *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability para. 7.77. Case law clarified that: "The requirement that the host states respect FET standard must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably".

⁵⁰⁰ Exhibit C-9 and Exhibit C-11.

⁵⁰¹ Exhibit C-7, p. 14, and Exhibit C-8, p. 1.

“the decision on whether to grant a derogation to the [NS2] pipeline will be up to the competent Member State authority based on the national legislation implementing Directive 692/2019. The competent Member State authority – which in the case of [NS2] pipeline would be the German regulatory authority – will need to take a decision in response to an application by [NSP2AG]”.⁵⁰²

544. In other words, the European Commission directed the Claimant towards the regulatory authority who had the competence to answer the Claimant’s questions about the meaning of “completed” as per Article 49a of the Amending Directive. The Claimant made use of the information provided by the European Commission, and applied for a derogation under Article 49a to the German NRA.

3.1.6.3. Conclusions

545. (i) The European Union ensured full publicity of the legislative process and guaranteed an active participation of the stakeholders; an impact assessment was not needed and would have been redundant, as justified in the Explanatory Memorandum and detailed in Section 2.5 of this Counter-Memorial; and the duration of the negotiations leading to the adoption of the Amending Directive corresponded to the average duration of the legislative process for acts adopted in first reading.⁵⁰³

546. (ii) The European Union ensured full transparency in its exchanges with NSP2AG. NSP2AG sought to obtain a confirmation from the European Commission that the NS2 pipeline was considered as “completed”. The European Commission directed NSP2AG to the German NRA, which had the authority to decide on the interpretation of the notion of “completed”, in accordance with the criteria and procedures set out in the provisions transposing the Amending Directive into German law.

547. It follows that the allegations made by the Claimant concerning the failure to act transparently lack any legal or factual ground.

3.1.7. There is no impairment by unreasonable or discriminatory measures

548. As pointed out in section 3.2.2 above, the European Union addresses the Claimant’s claims with regard to arbitrariness and discrimination under the FET standard and unreasonableness and discrimination under the explicit standard in Article 10(1) of the ECT jointly. The European Union first sets out the applicable

⁵⁰² Exhibit C-9, p. 1.

⁵⁰³ (Exhibit R-94), p. 4: “[t]he average length of procedure for acts adopted at first reading is just below 18 months for the 8th term (from adoption by the Commission to signature by the co-legislators); the figure rises to approximately 20 months for those that were negotiated”.

standard, before applying this standard to the facts of the dispute, showing that the Claimant's claims must be rejected.

3.1.7.1. Legal standard

549. Article 10(1) Energy Charter Treaty provides as follows:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and **no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal**. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party. (Emphasis added.)

550. In order to establish a violation of the clause to protect investors from unreasonable and discriminatory measures, the Claimant must demonstrate the existence of three elements:⁵⁰⁴

- a) there must be a "measure";
- b) the measure must possess the specified negative quality required by the ECT, that is, it must be arbitrary, discriminatory or unreasonable; and
- c) such a measure must significantly impair or negatively affect a protected investment.

551. Without significant impairment of the investment, there is no breach of this standard. The tribunal in *Electrabel v. Hungary* in this sense stressed that: "the Tribunal agrees with Hungary's submission that a breach of this standard requires the impairment caused by the discriminatory or unreasonable measure to be **significant**".⁵⁰⁵

⁵⁰⁴ See Exhibit (CLA-108): *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, (ICSID Case No. ARB/07/22, Award of 23 September 2010), paras. 10.3.2 and 10.3.3; see also (Exhibit R-105): Orsat Miljenić, "Energy Charter Treaty – Standards of Investment Protection", *Croatian International Relations Review*, XXIV (83) 2018, 52-83, at p. 69.

⁵⁰⁵ Exhibit CLA-84: *Electrabel S.A. v. Republic of Hungary*, (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012), paras. 7.152-7.153. (Emphasis added.)

552. In the next sub-sections, the European Union explains the legal standard for (i) arbitrary/unreasonable and (ii) discrimination in turn.

3.1.7.1.1. Arbitrary/unreasonable

553. The ECT does not define what constitutes an “unreasonable” measure. “Unreasonable” and “arbitrary” are in investment arbitration generally considered to be synonyms. Indeed, the tribunal in *National Grid v Argentina* noted that: “[i]t is the view of the Tribunal that the plain meaning of the terms ‘unreasonable’ and ‘arbitrary’ is substantially the same in the sense of something done capriciously, without reason”.⁵⁰⁶

554. Many investment treaty tribunals refer to the approach taken by the International Court of Justice (ICJ) in the *ELSI* case which defined “arbitrariness” as “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety”.⁵⁰⁷

555. The tribunal in the case of *Plama v. Bulgaria* concluded that: “unreasonable or arbitrary measures – as they are sometimes referred to in other investment instruments, are those which are not founded in reason or fact but on caprice, prejudice or personal preference”.⁵⁰⁸

556. In the case of *AES v. Hungary*, the tribunal – specifically considering Article 10(1) of the ECT – determined that it was necessary to analyse two elements to establish whether a state’s measure had been unreasonable:⁵⁰⁹

- a) the existence of a rational policy (described by the Tribunal as one that is “taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter”);⁵¹⁰ and
- b) the reasonableness of the act of the state in relation to the policy (a reasonable policy is one in which there is “an appropriate correlation between the state’s public policy objective and the measure adopted to achieve it.

⁵⁰⁶ (Exhibit RLA-157): *National Grid P.L.C. v. Argentine Republic*, (UNCITRAL, Award of 3 November 2008), para. 197.

⁵⁰⁷ (Exhibit RLA-99): International Court of Justice, Case concerning Elettronica Sicula S.P.A. (*ELSI*) (United States of America v. Italy, Judgement of 20 July 1989), para. 128. See (Exhibit RLA-158): *UAB E Energija (Lithuania) v. Republic of Latvia*, (ICSID Case No. ARB/12/33, Award, 22 December 2017), para. 841.

⁵⁰⁸ (Exhibit RLA-145) (CLA-105): *Plama Consortium v. Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008), para. 184.

⁵⁰⁹ (Exhibit RLA-122) (CLA-108): *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Republic of Hungary*, (ICSID Case No. ARB/07/22, Award of 23 September 2010), para. 10.3.7.

⁵¹⁰ (Exhibit RLA-122) (CLA-108): *AES Summit Generation Limited and AES-Tisza Erömu Kft. v. Republic of Hungary*, (ICSID Case No. ARB/07/22, Award of 23 September 2010), para. 10.3.8.

This has to do with the nature of the measure and the way it is implemented”⁵¹¹).

557. The same approach was repeated by the tribunal in *Micula*.⁵¹²

558. The tribunal in *Hydro Energy* warned nevertheless that “the criterion of ‘unreasonableness’ is **not to be used as an open-ended mandate to second-guess the host State’s policies**”.⁵¹³ Establishing some rational relationship to the alleged objective of a measure should be sufficient for a measure to be considered non-arbitrary, even if it is unwise, inefficient or not the best course of action in the circumstances. Indeed, in *Enron v. Argentina*, the tribunal noted that:

Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place.⁵¹⁴

559. The criteria identified by Professor Schreuer in the *EDF v. Romania* case have been widely accepted to be relevant for the determination of a measure as “unreasonable/arbitrary”:

- a) a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
- b) a measure that is not based on legal standards but on discretion, prejudice or personal preference;
- c) a measure taken for reasons that are different from those put forward by the decision maker;
- d) a measure taken in wilful disregard of due process and proper procedure”.⁵¹⁵

560. It follows that the required threshold to establish a violation of this provision is high.

⁵¹¹ (Exhibit RLA-122) (CLA-108): *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, (ICSID Case No. ARB/07/22, Award of 23 September 2010), para. 10.3.9.

⁵¹² (Exhibit RLA-151) (CLA-109): *Micula, S.C. European Food S.A. v. Romania* (ICSID Case No. ARB/05/20, Award of 11 December 2013), para. 525.

⁵¹³ (Exhibit RLA-159): *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, (ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum of 9 March 2020), para. 570. (Emphasis added.)

⁵¹⁴ (Exhibit RLA-141): *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, (ICSID Case No. ARB/01/3, Award, 22 May 2007), para. 281 (“Irrespective of the question of intention, a finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place”).

⁵¹⁵ Legal Opinion of Prof. Schreuer, cited in (Exhibit RLA-160): *EDF (Services) Limited v. Romania*, (ICSID Case No. ARB/05/13, Award dated 8 October 2009), para. 303.

3.1.7.1.2. Discriminatory

561. Dolzer and Schreuer have noted that in the context of the treatment of foreign investment, most of the arbitration practice dealing with discrimination focuses on nationality. They recall that: “*in fact, discrimination on the basis of nationality is addressed in investment treaties by way of two specific standards: national treatment and MFN treatment*”.⁵¹⁶ The latter two standards are contained separately in Article 10(7) of the ECT, which reads as follows:

Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

562. The tribunal in the case of *Plama v. Bulgaria*, examining discrimination in the context of the ECT, defined discriminatory measures as those measures that treat foreign investors in a way opposite to equal treatment. According to the tribunal: “[i]t entails like persons being treated in different manner in similar circumstances without reasonable or justifiable grounds”.⁵¹⁷

563. The tribunal in *Nykomb v. Latvia*, considering discrimination under Article 10(1) of the ECT, has noted that: “[i]n evaluating whether there is a discrimination in the sense of the Treaty one should only ‘compare like with like’”.⁵¹⁸ Hence, even in the absence of an explicit comparator clause in Article 10(1), such element must be examined since it is inherent to the logic and structure of the non-discrimination principle in international investment law. Indeed, this is the essence of discrimination law.⁵¹⁹

564. Further, the tribunal in the case of *Electrabel v. Hungary*, stated the following with regard to discrimination under Article 10(1) of the ECT:

⁵¹⁶ (Exhibit RLA-165): R. Dolzer and C. Schreuer, “Standards of Protection”, in *Principles of International Investment Law (2nd Edition)* 2012, p. 195.

⁵¹⁷ (Exhibit RLA-145) (CLA-105): *Plama Consortium v. Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 August 2008, para. 184.

⁵¹⁸ (Exhibit RLA-161): *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, (SCC, Award of 16 December 2003), section 4.3.2(a).

⁵¹⁹ (Exhibit RLA-118): Sornarajah, *The International Law on Foreign Investment* (Cambridge, 3d ed 2010), p. 337.

a **mere showing of differential treatment is not sufficient** to establish unlawful discrimination or, in this context, irrationality in breach of the ECT's FET standard. For discriminatory treatment, **comparators must be materially similar**; and there must then be **no reasonable justification** for differential treatment.⁵²⁰

565. Hence, merely showing differential treatment is not sufficient. It must also be established that the comparators are similar and that there is no reasonable justification for the differential treatment.

566. In sum, three elements need to be established by the Claimant in order to demonstrate the existence of discrimination:⁵²¹

- a) the investor who is allegedly discriminated against must be in a comparable situation, or like circumstances, to other investors that are allegedly treated more favourably (similarity of comparators);
- b) the investor's treatment is less favourable than the treatment of investors in like circumstances (less favourable treatment); and
- c) there is no reasonable justification for the differential treatment.

567. With regard to the first element – the standard of comparison – in principle, the foreign investor should be compared to another investor/investment that is like in all relevant aspects. The tribunal in *S.D. Myers v. Canada* considered that the determination of a suitable comparator requires an investigation of the facts of each case.⁵²² Certain tribunals have considered that investors are comparable when they are in the same business or sector.⁵²³ Many tribunals have based their conclusion on the comparability on competition in order to delimit the business or sector at stake.⁵²⁴ In *Total SA v. Argentina*, the tribunal stated that the criterion of "like situation" or "similarly situated" "requires the existence of some

⁵²⁰ (Exhibit RLA-127): *Electrabel S.A. v. Republic of Hungary*, (ICSID Case No. ARB/07/19, Award of 25 November 2015), para. 175. (Emphasis added.)

⁵²¹ See (Exhibit RLA-165): R. Dolzer and C. Schreuer, "Standards of Protection", in *Principles of International Investment Law (2nd Edition)* 2012, p. 199.

⁵²² (Exhibit RLA-163): *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL, Award of 13 November 2000), para. 249.

⁵²³ See for instance (Exhibit RLA-154):: *Marvin Roy Feldman Karpa v United Mexican States*, (ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002), para 171.

⁵²⁴ See, for instance, (Exhibit RLA-164): *United Parcel Service of America Inc. v. Government of Canada*, (ICSID Case No. UNCT/02/1, Award of 24 May 2007), para. 174; (Exhibit RLA-166) *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, (ICSID Case No. ARB (AF)/04/5, Award of 21 November 2007), para. 201. See (Exhibit RLA-167): N. Diebold, "Standards of non-discrimination in international economic law", ICLQ vol 60, October 2011 pp 831–865, p. 839; see also (Exhibit RLA-118): Sornarajah, *The International Law on Foreign Investment* (Cambridge, 3d ed 2010), p. 337 ("For discrimination to be found in this context, there must always be a comparison made between the two types of investor operating in the same sector **and competing with each other**").

competitive relation between those situations compared that should not be distorted by the State's intervention against the protected foreigner".⁵²⁵

568. Dolzer and Schreuer have noted that: "there seems to be agreement [among arbitral tribunals] that the overall legal context in which a measure is placed will also have to be considered when 'like circumstances' are identified and when the identity or difference of treatment is examined".⁵²⁶ That means that the examination whether investors are comparable must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest.

569. With regard to the second element in the test – less favourable treatment – the adverse effect of a general measure specifically on the investor must be compared to the treatment of other investors.

570. With regard to the third element in the test – the justification for the differentiation – differentiations are justifiable if rational grounds are shown, even in the absence of such explicit statement in the investment treaty.⁵²⁷ In *S.D. Myers v. Canada*, the tribunal found that: "[t]he assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest".⁵²⁸

571. Also, in *Belenergia S.A. v. Italian Republic*, the tribunal, interpreting Article 10(1) of the ECT, noted that:

Italy's differentiation between smaller plants, on the one hand, and medium and big power plants with nominal capacity in excess of 200kW, on the other, **is not discriminatory because it is based on objective and legitimate grounds**. This differentiated treatment is by no means based on the national or foreign origin of producers, but on their capacity, size, economic and commercial dimension. Thus, **differentiated treatment based on legitimate grounds leading to special protection of smaller plants is easily justifiable so far as it seeks to guarantee free competition in the energy sector**.⁵²⁹

⁵²⁵ (Exhibit RLA-153): *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 210.

⁵²⁶ (Exhibit RLA-165): R. Dolzer and C. Schreuer, "Standards of Protection", in *Principles of International Investment Law (2nd Edition)* 2012, p. 200.

⁵²⁷ (Exhibit RLA-165): R. Dolzer and C. Schreuer, "Standards of Protection", in *Principles of International Investment Law (2nd Edition)* 2012, p. 202.

⁵²⁸ (Exhibit RLA-163): *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL, Award of 13 November 2000), para. 250.

⁵²⁹ (Exhibit RLA-168): *Belenergia S.A. v. Italian Republic*, (ICSID Case No. ARB/15/40, Award, 6 August 2019), para. 631. (Emphasis added.)

572. The tribunal in *Consortium R.F.C.C. v. Kingdom of Morocco* similarly stressed that : “une mesure sera injustifiée, lorsqu’aucun motif objectif ne vient expliquer le comportement de l’Etat”.⁵³⁰

573. What matters is indeed whether a challenged measure makes “any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors”.⁵³¹ It is the Claimant who bears the burden to “fully substantiate” its allegations.⁵³² It is not the Tribunal’s role to second-guess the State policy choice leading to the distinction or the relative emphasis that might be placed upon different factors leading to the measure, but rather to verify that there is a rational or objective justification to apply differential treatment.

3.1.7.2. The Amending Directive does not constitute an arbitrary/unreasonable measure

574. The Amending Directive establishes a legal basis for the application of the Gas Directive to all interconnectors, both between EU Member States and between EU Member States and third countries. That means that all interconnectors selling oil and gas into the EU Single Market are subject to the obligations of TPA, unbundling and tariff regulation, creating a level playing field across the Single Market and ensuring that the equitable functioning of that market will not be undercut by entrants from third countries operating in the European Union but not subject to the same rules. This is the opposite of arbitrary: it is a deeply rational policy designed to secure key public policy goals. The fact that the Claimant disagrees with this policy and would like to function in the EU market without respecting its laws does not render the EU policy “arbitrary”, by any measure.

575. Moreover, the manner in which the Amending Directive was adopted was not arbitrary. Instead, as explained in Section 2.5, above, the procedure followed in relation to its adoption was appropriate and adapted to the circumstances. The proposal for an Amending Directive was made public. NSP2AG had ample

⁵³⁰ (Exhibit RLA-169): *Consortium R.F.C.C. v. Kingdom of Morocco*, (ICSID Case No. ARB/00/6, Final Award [French], 22 December 2003), para. 97.

⁵³¹ (Exhibit RLA-141): *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, (ICSID Case No. ARB/01/3, Award, 22 May 2007), para. 282. See also (Exhibit RLA-170): *Sempra Energy International v. Argentine Republic*, (ICSID Case No. ARB/02/16, Award, 28 September 2007), para. 319.

⁵³² (Exhibit RLA-171): *Siemens A.G. v. Argentine Republic*, (ICSID Case No. ARB/02/8, Award, 6 February 2007), para. 321.

- opportunity to express its views with regard to the proposal to the co-legislators. Contrary to what the Claimant argues, there is no disregard of due process.⁵³³
576. The policy objective that is sought to be achieved with the Amending Directive, which confirms that the referenced obligations of the Gas Directive are applicable to interconnectors with third countries, is taking positive steps in the creation of an internal market in natural gas, so as to achieve efficiency gains, competitive prices, and higher service standards, and to contribute to security of supply and sustainability.⁵³⁴ That is the “proper purpose”⁵³⁵ of the Amending Directive.
577. A well-interconnected and competitive EU gas market benefits consumers and market players. As a result, gas producers and suppliers can expand their activities by being able to use, under equal terms, the infrastructure; operators of gas transport pipelines and of other gas infrastructure (e.g., storage or LNG facilities) can offer access to the infrastructure to all interested users; and finally, gas consumers benefit from a wider choice and better prices as a result of competition.
578. A well-functioning gas market also contributes to the security of gas supply to the European Union. It guarantees that even in events of serious gas disruptions, such as those experienced in the winters of 2006 and 2009, gas can easily reach those who are in need, via diversified sources and routes of gas supply. The European Commission’s active policy against territorial restriction clauses⁵³⁶ and for more interconnection and so-called reverse flows, allowing diversification of supply sources, was pivotal to remove the serious security of supply problems of those Member States who previously depended on a single source of supply.
579. Finally, an integrated and competitive EU gas market also allows equal possibilities for all potential sources of gas supply – internal and external – to reach consumers. With nearly 66% of the gas consumed in the European Union being from imports, the EU gas market is open to all external sources of gas supply. The EU framework does not – neither *de jure* nor *de facto* – exclude or restrict any route or source of supply, or any supplier of a particular origin. It does precisely the opposite: it seeks to ensure equal access to the EU gas market

⁵³³ Claimant’s Memorial, paras. 398, 440.

⁵³⁴ See Recital (1) of the Gas Directive. See also (Exhibit R-64) Commission Staff Working Document of 8 November 2017, Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas {COM(2017) 660 final}, p. 2.

⁵³⁵ Claimant’s Memorial, para. 399.

⁵³⁶ See (Exhibit R-31): Case AT.37811 Territorial restrictions - ENI (IP/03/1345); (Exhibit R-31):: Case AT.38085 Territorial restrictions - OMV (IP/05/195); (Exhibit R-33):: Case AT.37811 Territorial restrictions - Sonatrach (IP/07/1074); (Exhibit R-34): Case AT.39816 Upstream gas supplies in Central and Eastern Europe.

of all potential sources of supply and equal opportunities for competition amongst them.

580. By clarifying that the obligations of the Gas Directive apply also to interconnectors with third countries, the Amending Directive serves to achieve this rational policy. The Amending Directive was intended to clearly establish in EU law a policy the European Commission had espoused for many years, to the effect that the Gas Directive applied equally to pipelines entering the EU Single Market from third parties.
581. The policy that is sought to be achieved by the Amending Directive is thus an entirely rational policy. It is “taken by [the European Union] following a logical (good sense) explanation and with the aim of addressing a public interest matter”),⁵³⁷ namely creating a competitive and well-interconnected gas market, where gas can flow unrestricted via a well-developed infrastructure, which can be accessed in a competitive manner by all market participants under non-discriminatory and transparent terms.
582. Before the introduction of the Amending Directive, there was legal uncertainty as to the application of the Gas Directive’s rules to interconnectors with third countries, risking distortions of competition within the EU’s internal energy market. Therefore, the Amending Directive shows “*an appropriate correlation between the state’s public policy objective and the measure adopted to achieve it*”.⁵³⁸
583. The Gas Directive, and the Amending Directive, ensure that flexibility is available to all pipelines, in particular in light of the significant investments involved, but subject this to conditions that seek to ensure competition in an effectively functioning internal EU energy market as well as security of supply (see above section 2.4). Indeed, interconnectors that are not completed by 4 August 2003 can apply for an Article 36 exemption, while interconnectors that are completed before 23 May 2019 can apply for an Article 49a derogation. The decision whether to grant such flexibility, and under what specific conditions, depends on the decision of the national authorities in the competent Member State, evaluating the application on a case-specific basis. Through these flexibilities, a balance is ensured between the objectives of the Gas Directive (competition in an integrated

⁵³⁷ (Exhibit RLA-122) (CLA-108): *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, (ICSID Case No. ARB/07/22, Award of 23 September 2010), para. 10.3.8.

⁵³⁸ (Exhibit RLA-122) (CLA-108): *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary*, (ICSID Case No. ARB/07/22, Award of 23 September 2010), para. 10.3.9.

market while ensuring security of supply) and the need to facilitate investment in infrastructure.

584. Nothing excludes the possibility that NSP2AG – if German courts were to confirm that that it cannot apply for an Article 49a derogation – might apply for an Article 36 exemption. Moreover, even if the competent NRA were eventually to decide that the NS2 pipeline project cannot obtain an Article 36 exemption, the NS2 pipeline is not in any unique situation. As explained in section 2.4.5 above, other third country pipelines importing gas – onshore and offshore – into the European Union are subject to the obligations of the Gas Directive. There is thus no “targeting ... [of] only [the NS2 pipeline]”⁵³⁹ and no lack of proportionality (see Section 3.2.4 above). The European Union thus strongly disputes the Claimant’s allegation that the achievement of the objectives of the EU’s legal framework are undermined by the inclusion of Article 49a and that the Amending Directive would “leave[] all pipelines other than [the NS2 pipeline] eligible for a derogation”⁵⁴⁰ or any other flexibility in the application of the regulatory regime.

585. As discussed in paragraphs 124-128 above, it is also incorrect to suggest, as the Claimant does,⁵⁴¹ that the full obligations of the Gas Directive apply only to approximately 16% of all EU third country import capacity. This figure appears to assume that the Gas Directive applies only to the NS2 pipeline project. As explained, it ignores that the Amending Directive also establishes the legal basis for applying the Gas Directive to existing onshore import pipelines (e.g., Yamal, Brotherhood pipelines). Further, it ignores that the future pipelines will also be subject to the Gas Directive, given its general and abstract nature.⁵⁴²

586. Taking into account the full legal framework in which the specific provisions of the Amending Directive operate, in light of its objective, the Amending Directive is thus a perfectly reasonable measure. It is “founded in reason”⁵⁴³ and is proportionate to the objective pursued.

⁵³⁹ Claimant’s Memorial, para. 400.

⁵⁴⁰ Claimant’s Memorial, para. 439(iii).

⁵⁴¹ Claimant’s Memorial, paras. 400 and 439(iii).

⁵⁴² Expert Report by Prof. Maduro, paras. 252-282.

⁵⁴³ (Exhibit RLA-142) (CLA-105): *Plama Consortium v. Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008), para. 184.

3.1.7.3. The Amending Directive does not constitute a discriminatory measure

3.1.7.3.1. Standard of comparison

587. In contrast to its arguments under FET in Article 10(1)⁵⁴⁴ and under National Treatment and Most Favoured Nation Treatment in Article 10(7) of the ECT⁵⁴⁵, the Claimant argues that it is unnecessary to identify and consider a comparator in relation to its allegations of discrimination pursuant to Article 10(1) of the ECT.⁵⁴⁶ However, as previously explained (paragraph 563 above), a comparative approach based upon the contrasting treatment of parties in like circumstances is the essence of discrimination law.⁵⁴⁷ The tribunal in *Nykomb v. Latvia* stated in respect of Article 10(1) of the ECT that “[i]n evaluating whether there is a discrimination in the sense of the Treaty one should only ‘compare like with like’”.⁵⁴⁸ Therefore, for the discrimination claim under the FET standard and the explicit prohibition on discrimination in Article 10(1) of the ECT, the Claimant bears the burden of establishing an appropriate basis of comparison.

588. The European Union also disagrees with the suggestion that the Amending Directive has been “*singling out and targeting* [the NS2 pipeline]”.⁵⁴⁹ The Gas Directive has a general and abstract character.⁵⁵⁰ As explained in Section 2.4, above, an objective assessment of the Gas Directive, after its amendment, shows that a coherent regulatory framework has been established with basic rules that apply to all interconnectors and flexibilities that can be applied for, without there being any “gap” where no flexibilities would be available at all for an interconnector. Indeed, so long as the appeal against the decision of the German FNA has not yet been decided, it remains possible that NSP2AG will obtain an Article 49a derogation. Furthermore, even if NSP2AG were to be denied an Article 49a derogation, it could still apply for an Article 36 exemption.

589. With regard to the appropriate comparator for pipelines that apply for an Article 36 exemption or an Article 49a derogation, as noted above, the determination of a suitable comparator requires an investigation of the facts of each case.⁵⁵¹ This includes considering the overall legal context in which a measure is adopted.⁵⁵²

⁵⁴⁴ Claimant’s Memorial, paras. 405-407.

⁵⁴⁵ Claimant’s Memorial, paras. 455-462.

⁵⁴⁶ Claimant’s Memorial, para. 441.

⁵⁴⁷ (Exhibit RLA-118): Sornarajah, *The International Law on Foreign Investment* (Cambridge, 3d ed 2010), p. 337.

⁵⁴⁸ (Exhibit RLA-161): *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, (SCC, Award of 16 December 2003), section 4.3.2(a).

⁵⁴⁹ Claimant’s Memorial, paras. 441-442.

⁵⁵⁰ Expert Report by Prof. Maduro, paras. 252-282.

⁵⁵¹ (Exhibit RLA-163): *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL, Award of 13 November 2000), para. 249.

⁵⁵² (Exhibit RLA-165): R. Dolzer and C. Schreuer, “Standards of Protection”, in *Principles of International Investment Law (2nd Edition)* 2012, p. 200.

In *S.D. Myers v. Canada*, the tribunal also found that "[t]he assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest".⁵⁵³

590. Decisions in respect of applications for an Article 36 exemption or an Article 49a derogation depend on a case-by-case analysis of the factual aspects of each project at issue in light of the applicable objective conditions. Therefore, this overall legal context conflicts with the Claimant's general comparison of the NS2 pipeline project to offshore third country import pipelines.⁵⁵⁴ When it comes to specific assessments of specific applications for an Article 36 exemption or an Article 49a derogation, it is inappropriate to compare pipelines merely on the basis of the fact that they would be in the same business or economic sector. Such general comparison is blind to the specific legal and factual context in which applications for such flexibilities are assessed.

591. The Claimant makes no effort to explain why the NS2 pipeline project would be comparable to the five offshore third country import pipelines which it mentions in paragraph 407 of its Memorial, even if it bears the burden to show this.⁵⁵⁵ The Claimant only states that these are in the "same economic sector, supplying gas to the EU".⁵⁵⁶ The Claimant adds that these projects have been commenced under the same legal framework as the NS2 pipeline and "are similarly affected should these requirements apply"⁵⁵⁷, thereby confusing the alleged impact of the measure with the comparator.

592. When assessing a discrimination claim in respect of decisions by Member State authorities to grant or deny an Article 36 exemption or an Article 49a derogation, the specific characteristics of the pipeline project at issue need to be considered and compared to the pipelines to which a comparison is made. Such comparison must be made in light of the legal conditions attached to such decisions, in particular the concerns about security of supply, the impact on competition and the functioning of the EU internal energy market. The Mediterranean import pipelines are all smaller in terms of capacity.⁵⁵⁸

⁵⁵³ (Exhibit RLA-163):: *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL, Award of 13 November 2000), para. 250.

⁵⁵⁴ Claimant's Memorial, paras. 443 and 406-407.

⁵⁵⁵ (Exhibit RLA-172): *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, (ICC Case No. 21537/ZF/AYZ, Award of 7 November 2018), para. 526.

⁵⁵⁶ Claimant's Memorial, para. 407.

⁵⁵⁷ Claimant's Memorial, para. 407.

⁵⁵⁸ Maghreb Europe: 12bcm; Medgaz: 8bcm; Transmed: 30bcm; Greenstream: 11bcm.

593. Because of its unique and specific characteristics, the NS2 pipeline project, considered in light of the conditions attached to the Article 36 exemptions and Article 49a derogations, is not comparable to the referenced pipelines. Indeed, the NS2 pipeline is a third country interconnector that duplicates supply capacity already provided by the Nord Stream 1 pipeline (55 bcm), arriving from Russia. The Mediterranean import pipelines are all smaller in terms of capacity.⁵⁵⁹ The NS2 pipeline is owned by Gazprom that has an export monopoly in Russia. When and if the relevant national authority comes to assess any NSP2AG request either for a derogation or for an exemption, its rational consideration of the specific and unique circumstances of Nord Stream 2 will lead that authority to take a decision. That decision might include a conclusion Nord Stream 2 fails to qualify for either, on the basis of objective criteria. That is not illegal “discrimination”; it is the rational and wholly justified exercise of a legitimate State regulatory power. Again, the fact that the Claimant might disagree with any such outcome does not per se render any such decision actionable.
594. Even if the Claimant’s much broader basis for comparison were to be used, its discrimination claim must be dismissed as unfounded. As stated, the Claimant compares NSP2AG to offshore third country import pipelines.⁵⁶⁰ The Claimant considers that these are “materially similar projects within the same economic sector, supplying gas to the EU market” and that “have been commenced under the same legal framework as the [NS2 pipeline] project”.⁵⁶¹
595. In taking such approach, the Claimant ignores the existence of many onshore third country import pipelines that are also supplying gas to the EU market and for which the Amending Directive made it clear that the legal framework in the Gas Directive applies to them. As previously explained in section 2.4.5, there are indeed several onshore and offshore interconnectors with third countries that are subject to the Gas Directive and do not benefit from an Article 49a derogation. From the perspective of the business sector in which they are active, there is no reason why onshore import pipelines would not be comparable to offshore pipelines, including the NS2 pipeline project. As explained in the next sub-section, when all these comparable pipelines, onshore and offshore, are taken into account, it is apparent that there is no discrimination or “targeting” of the NS2 pipeline.

⁵⁵⁹ Maghreb Europe: 12bcm; Medgaz: 8bcm; Transmed: 30bcm; Greenstream: 11bcm.

⁵⁶⁰ Claimant’s Memorial, paras. 443 and 406-407.

⁵⁶¹ Claimant’s Memorial, para. 407.

3.1.7.3.2. No differential treatment

596. When the treatment of NSP2AG is compared to investors in other offshore and onshore pipeline projects, it is apparent that NSP2AG is not “targeted” or the subject of discriminatory treatment. Prof. Maduro explains in his expert report that the Gas Directive, as amended, has a general and abstract character.⁵⁶² The Amending Directive does not target foreign investors, let alone NSP2AG specifically. Neither is there any targeting “in practice” of NSP2AG. Indeed, other interconnectors with third countries are subject to the obligations of the Gas Directive and do not benefit from an exemption or a derogation.
597. As a rule, NSP2AG is subject, like other offshore and onshore third country import pipelines, to the obligations laid down in the Gas Directive, in particular the obligations of unbundling, TPA and tariff regulation. Just like other offshore and onshore third country import pipelines, NSP2AG can apply to obtain flexibility under the Gas Directive. The European Union notes that NSP2AG decided to apply for an Article 49a derogation with the German FNA. The German FNA rejected this application and this decision is presently under appeal before the German courts. Nothing excludes, however – if it were to be established by the German courts that the NS2 pipeline project does not satisfy the “completed” condition in Article 49a – that NSP2AG may thereafter apply for an Article 36 exemption.
598. Moreover, even if NSP2AG fails to obtain an Article 49a derogation or an Article 36 exemption, one could not conclude on this basis that it had been the subject of discrimination. Applications under either of these regimes are assessed in accordance with specific objective criteria, on a case-by-case basis. Moreover, other comparable onshore pipelines that are also import pipelines supplying gas to the EU market (see the five groups of these interconnectors with third countries, mentioned in section 2.4.5 above) are equally subject to the Gas Directive’s obligations of unbundling, TPA and tariff regulation.
599. In addition, even if NSP2AG failed to obtain an Article 49a derogation or an Article 36 exemption, it cannot claim that it will necessarily be subject to full OU. As discussed in section 2.3.3.3 above, there are two other unbundling models available that may fit NSP2AG’s business plans. Moreover, as discussed in section 2.3.3.4 above, NSP2AG has not addressed the option to rely on Article 9(6) of the Gas Directive. Finally, as discussed in section 2.3.3.5 above, an IGA might also specify how the obligations would apply. All these options are unexplored by the Claimant and undermine its theory that the NS2 pipeline would be the only

⁵⁶² Expert Report by Prof. Maduro, paras. 252-282.

pipeline that is subject to the full application of OU, TPA and tariff regulation requirements.

600. Finally, the European Union also rejects the suggestion that there was intentional “targeting” of the NS2 pipeline network. To the contrary, the Gas Directive is equally applicable to other import pipelines supplying gas to the EU. What is more, the Claimant’s reliance on statements of certain individuals in media,⁵⁶³ certain EU Member States in the Council of the EU,⁵⁶⁴ certain members of the European Parliament⁵⁶⁵ etc. do not support the existence of discriminatory intent. These are expressions of individual opinions at a certain point in time. The analysis should be based on an objective assessment of the measure at stake.⁵⁶⁶

3.1.7.3.3. Justification of alleged differential treatment

601. Finally, even if the NS2 pipeline project failed to be granted any flexibility under Article 49a or Article 36 – a situation that the Claimant has failed to establish will necessarily be the case – or would not rely on other OU models, Article 9(6) or an IGA, the full application of the Gas Directive to the NS2 pipeline – which, as just explained, cannot be considered to be discriminatory – serves a legitimate objective. As already explained, the policy objective pursued by the Gas Directive is the creation of an EU internal market in natural gas, so as to achieve efficiency gains, competitive prices, and higher service standards, and to contribute to security of supply and sustainability.⁵⁶⁷ In order to achieve these objectives, potential abuses of dominant position and of monopoly circumstances must notably be disciplined.
602. Applying the obligations of unbundling to the NS2 pipeline project would address the foreclosure risks and risks for other anti-competitive practices that arise when production and transmission activities are combined in one company.⁵⁶⁸ The rules on unbundling of TSO and transmission systems ensure effective separation

⁵⁶³ See Claimant’s Memorial, paras. 195-196.

⁵⁶⁴ See Claimant’s Memorial, paras. 198-190.

⁵⁶⁵ See Claimant’s Memorial, para. 200.

⁵⁶⁶ See *also* Expert Opinion by Prof. Maduro, para. 282 (“[i]t would be, however, utterly simplistic and inappropriate to conclude, from the existence of possible subjective considerations/motives of politicians to support the adoption of certain amendments to EU legislation on energy matters, that such amendments are simply unfit for the pursuit of the objectives presented as justification for the adoption of such amendments. Or even less, that, because of such possible political considerations/motives, the introduction of such legislative amendments is deprived of the legal basis for which the Treaty granted the competence to the Council and European Parliament to legislate on such energy matters”).

⁵⁶⁷ See Recital (1) of the Gas Directive. See *also* (Exhibit R-64) Commission Staff Working Document of 8 November 2017, Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas {COM(2017) 660 final}, p. 2.

⁵⁶⁸ Expert Opinion by Prof. Maduro, para. 229.

between the activities of gas transmission (and related interests), on the one hand, and the activities of production and/or supply (i.e., sale) of gas (and related interests), on the other hand. The aim of separation/unbundling is to eliminate any conflict of interests between the activities of transmission and the activities of production and supply. By eliminating this conflict of interests, the unbundling regime ensures that TSOs take their decisions independently and will provide transparent and non-discriminatory access to the transmission networks to all users on the market and will not favour related producers or suppliers. This is not only relevant for the day-to-day decisions of TSOs, but also for their strategic investment decisions, which they will thus formulate in an independent manner. Such an independent and non-discriminatory operation of networks in turn contributes to efficient market functioning and security of supply in the Member State where the transmission network is located and in the European Union as a whole.

603. The TPA obligation ensures that access to the transmission network is not blocked for other gas producers. The regulated tariffs obligation again prevents a party such as NSP2AG from exploiting its monopoly position in imposing tariffs. In relation to access to the NS2 pipeline, NSP2AG would be required provide TPA to all interested parties in accordance with Article 32 of the Gas Directive and Article 14 of the Gas Regulation. Article 14 provides that TSOs shall ensure that they offer services on a non-discriminatory basis to all network users, provide both firm and interruptible third-party access services and offer both long and short-term services. Article 14 also provides that “where a transmission system operator offers the same service to different customers, it shall do so under equivalent contractual terms and conditions”. That means that NSP2AG could not impose less favourable conditions of access to the NS2 pipeline on other potential networks as compared to those granted to Gazprom. With regard to tariffs, Article 32 of the Gas Directive states that TPA shall be granted in return for approval⁵⁶⁹ by the NRA. Pursuant to Article 13 of the Gas Regulation, tariffs charged for TPA (in accordance with Article 32 of the Gas Directive) shall “reflect the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent” and “shall be applied in a non-discriminatory manner”. This means that NSP2AG could charge other networks users for the use of the NS2 pipeline only in accordance with published tariffs approved by the German regulatory authority, based on the regulator’s assessment of NSP2AG’s actual costs and efficiency. Moreover, NSP2AG could not

⁵⁶⁹ More specifically, the NRA shall approve either the access tariffs or the underlying methodology for the calculation of those tariffs.

charge other networks users more for the use of the pipeline than it charges Gazprom.

604. None of these regulatory outcomes are unreasonable or discriminatory. To the contrary, they are all rationally connected to the desire to maintain an open and competitive market for oil and gas within the Single Market. If Member State regulatory authorities were ultimately to conclude it imprudent to grant NSP2AG either a derogation or an exception based upon its objective circumstances, application of the above criteria would in no way engage the disciplines of the Energy Charter Treaty.

3.1.7.3.4. The Amending Directive does not significantly impair NSP2AG's investment

605. Finally, even if the Tribunal were to find the Amending Directive inherently unreasonable or discriminatory (*quod non*), the Amending Directive would in any event fail to violate Article 10(1) of the ECT, because the Claimant has failed to establish in evidence any negative impact its application would have on its investment. To the contrary, as explained in Section 2.3 above, the Amending Directive does not significantly impair⁵⁷⁰ NSP2AG's investment. Contrary to what the Claimant argues,⁵⁷¹ NSP2AG is not prevented from developing its investment project while at the same time complying with the applicable rules in the Gas Directive.

606. For all the above reasons, NSP2AG's claim under Article 10(1) of the ECT fails.

3.2. There is no breach of the CPS Standard under Article 10(1) of the ECT

3.2.1. Legal Standard

607. The Claimant argues that the adoption of the Amending Directive determined a breach of the CPS standard under Article 10(1) of the ECT.

608. Article 10(1) of the ECT provides that: "Investors shall also enjoy the most constant protection and security".

609. Several tribunals have emphasised that the CPS standard must be distinguished from the FET standard stipulated in Article 10(1) of the ECT. The FET standard affords protection against acts of the respondent State, whereas the CPS standard

⁵⁷⁰ Exhibit CLA-84: *Electrabel S.A. v. Republic of Hungary*, (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012), paras. 7.152-7.153. (Emphasis added.)

⁵⁷¹ Claimant's Memorial, para. 445.

is concerned with the obligation of the respondent State to afford protection against interferences by third parties.⁵⁷²

610. In a very recent case under the ECT (*Opera Fund et al. v Spain*), the tribunal noted to this effect that:

The wording of the ECT's most constant protection and security clause does not suggest that it extends to legal security. Rather, the protection and security is one directed against interferences by third parties. The alleged violations of the most constant protection and security obligation in the form of legal insecurity resulting from the Respondent's changing legal framework have been addressed in the Tribunal's discussion of the FET claims. Since these matters are directly emanating from the Respondent, they do not raise issues of protection against interferences by third parties.⁵⁷³

611. Contrary to the Claimant's allegations, the CPS standard is concerned with the duty to protect the investment only from physical damage due, for instance, to civil disturbances or similar events.⁵⁷⁴

612. Previous tribunals have further clarified that the obligation imposed by the CPS standard is not one of "strict liability", but rather "obliges States to use due diligence to prevent harassment and injuries to investors".⁵⁷⁵

⁵⁷² See, e.g., *El Paso v. Argentina*, para. 522 (the FPS standard "is no more than the traditional obligation to protect aliens under international customary law and that it is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party") (Exhibit RLA-137); *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 783 (Exhibit CLA-84); *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 353 ("... unless otherwise expressly defined in a specific BIT, the general FPS standard complements the FET standard by providing protection towards acts of third parties, i.e., non-state parties, which are not covered by the FET standard. Thus, where an incriminated act is done by a State-organ, the applicable standard is the FET standard, whereas where such act is done by a non-state entity, the applicable standard becomes the FPS standard") (Exhibit RLA-173).

⁵⁷³ *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, para. 576 (Exhibit RLA-126).

⁵⁷⁴ See, e.g., *Saluka v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, paras. 483-484 ("The 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence. The practice of arbitral tribunals seems to indicate, however, that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force".) (Exhibit RLA-150). See also *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007, paras. 323-328 (Exhibit RLA-140); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 668-669 (Exhibit RLA-174); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, paras. 622-623 (Exhibit RLA-175); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 632-635 (Exhibit RLA-176); *UAB E Energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, para. 840 (Exhibit RLA-158).

⁵⁷⁵ *Saluka v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para. 484 (Exhibit RLA-150). See also *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Final Award 30 March 2015, para. 821 (Exhibit RLA-149); *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 353 (Exhibit RLA-173): ("As such, under the FPS standard, an investor may not expect a State to ensure that the investor be treated "fairly and equitably" by any third party, but instead the investor has the right to expect that

613. The breaches of the CPS standard alleged by the Claimant do not result from “interferences by third parties” involving physical damage to the Claimant’s investment, but rather from regulatory action by the European Union. Therefore, they fall outside the scope of the CPS standard altogether.

614. In any event, as discussed below, in support of this claim the Claimant limits itself to reassert a series of factual allegations, which it had already invoked in support of its claims under the FET standard.⁵⁷⁶ The Claimant has failed to prove those factual allegations.

3.2.2. The European Union did not breach the CPS standard

615. The Claimant asserts that the CPS standard imposes:

- a) an obligation to provide investors with a legal framework offering legal protection;⁵⁷⁷ and
- b) a promise of legal security.⁵⁷⁸

This misstates the standard in material ways.

616. As explained above, the CPS standard under the ECT refers to the State’s duty to protect the physical integrity of an investment against interference or use of force by third parties⁵⁷⁹ and does not extend to legal security. For the sake of argument, if the Tribunal were to find that it includes the obligation to provide legal security, it would nevertheless find that the Claimant has failed to substantiate its claims.

617. A) The Claimant argues that the European Union has failed to provide investors with a legal framework offering legal protection.⁵⁸⁰

618. There was no impediment to the Claimant’s due access to the EU courts or to the courts of EU Member States. To the contrary, it availed itself of those courts. The EU General Court rendered a reasonably timely ruling on the Claimant’s application, while the appeal is currently pending before the ECJ.

619. Moreover, access to justice as regards the interpretation or validity of the Amending Directive can also be ensured in national proceedings through the preliminary ruling procedure laid down in Article 267 TFEU. Pursuant to Article

the State takes reasonable measures within its power to prevent wrongful injuries by third parties, and where such injuries have already happened, to punish them. This is why the FPS standard is often referred to and applied in the context of ‘use of force’ ...”)

⁵⁷⁶ Claimant’s Memorial, para. 451.

⁵⁷⁷ Claimant’s Memorial, para. 450.

⁵⁷⁸ Claimant’s Memorial, para. 451.

⁵⁷⁹ See paras. 611-613 of this Counter-Memorial

⁵⁸⁰ Claimant’s Memorial, para. 450.

267 TFEU, national courts or tribunals have the possibility⁵⁸¹ and in certain cases the obligation,⁵⁸² to refer questions pertaining to the interpretation or validity of EU law to the ECJ, which has sole jurisdiction to give binding preliminary rulings on those questions.⁵⁸³

620. Additionally, the Claimant made use of the legal tools to seek redress available under the German regulatory system, under which a decision of the German NRA can be challenged. On 15 June 2020,⁵⁸⁴ the Claimant appealed the 15 May 2020 decision of the German NRA⁵⁸⁵ before the Higher Regional Court of Düsseldorf, and the appeal is now pending.

621. The *Frontier Petroleum* tribunal, in the very case that the Claimant quotes in paragraph 450, specifies its understanding of “legal protection” within the meaning of the standard of Full Protection and Security:

“In this Tribunal’s view, where the acts of the host state’s judiciary are at stake, ‘full protection and security’ means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor”.⁵⁸⁶

622. The *Frontier Petroleum* tribunal clarifies that not every failure to obtain redress is a violation of the principle of full protection and security, and that a decision that in the eyes of an outside observer, such as an international tribunal, is “wrong” would not automatically lead to state responsibility.⁵⁸⁷

623. Nothing in the justice system of the Member States or of the European Union can be construed as meaning that there are no means of legal redress: it follows that there is no breach of the CPS standard, even if that standard included an obligation to provide investors with legal tools of redress.

624. B) The Claimant argues that the approval of the Amending Directive breached the European Union’s obligation to ensure legal security under the CPS clause based on the following allegations:

- i. the true objectives of the Amending Directive allegedly failed to correspond to the stated objectives;
- ii. the legislative process allegedly failed to follow the necessary steps;

⁵⁸¹ (Exhibit RLA-69), Article 267, second subparagraph, of the TFEU.

⁵⁸² (Exhibit RLA-69), Article 267, third subparagraph, of the TFEU.

⁵⁸³ (Exhibit RLA-69), Article 267 of the TFEU.

⁵⁸⁴ Claimant’s Memorial, para. 412.

⁵⁸⁵ Exhibit CLA-17, Bundesnetzagentur decision on NSP2AG’s Derogation Application (German original and English translation), 15 May 2020.

⁵⁸⁶ Exhibit CLA-110, para. 273.

⁵⁸⁷ Exhibit CLA-110, para. 273.

- iii. there was an allegedly unexpected, “dramatic” regulatory change; and
- iv. the European Commission allegedly unreasonably refused to provide information on the Amending Directive to the Claimant.⁵⁸⁸

625. The European Union reiterates that the CPS standard under the ECT does not include an obligation to provide legal security. Assuming, *arguendo*, that the Tribunal were to find that it does, the following paragraphs will explain why the Claimant’s allegations are baseless.

626. Concerning the objectives of the Amending Directive (i), as explained in detail in paragraphs 98-100 above, the Amending Directive’s objectives were clearly stated in its recitals as well as in the Explanatory Memorandum accompanying the Proposal, and they corresponded to the genuine purpose of the Amending Directive. The discrepancy that the Claimant alleges is evidently non-existent. Nothing in the objectives of the Amending Directive leads to a breach of the promise to ensure legal security under the CPS standard.

627. Regarding (ii), the legislative process was duly followed. All the necessary steps were taken, the relevant actors and stakeholders were involved, and the negotiation procedure between the Proposal and the adoption took eighteen months, which is in perfectly in line with the average of legislative acts adopted in first reading. Reference is made to Section 2.5 of this Counter-Memorial.

628. With regards to (iii) on the alleged “dramatic” regulatory change, as reflected in Section 2.2 of this Counter-Memorial, any duly diligent investor would have understood that the EU’s intention and position was that the Gas Directive applied to interconnectors between the European Union and third countries, such as the NS2 pipeline.

629. Concerning (iv) on the alleged lack of transparency, as explained in Section 2.6 of this Counter-Memorial, the European Union acted in full transparency and shared with the Claimant all information that was in its power to share.

3.2.3. Conclusions

630. It follows from the foregoing that the Claimant failed to properly define the applicable legal standard, gave the Tribunal an inappropriate interpretation of the content of the CPS obligation, and applied alleged facts that are unrelated to the CPS standard, which aims to prevent harassment and injuries by third parties.

⁵⁸⁸ Claimant’s Memorial, para. 451.

Instead, the alleged facts wrongly considered by the Claimant under the CPS standard pertain to the FET standard.

631. Even if the Tribunal were to hold that the CPS standard includes the obligation to ensure legal tools for redress (*quod non*), it should find no violation of this alleged standard, given that both the European Union's and Germany's judicial systems provide investors with the ability to ask for redress, and that the Claimant had the ability to use and indeed used both judicial systems, beyond the present arbitration.
632. Similarly, even if the Tribunal were to hold that the CPS standard includes an obligation to provide a legal framework that grants security and protects the investor against adverse actions by private persons as well as state organs (*quod non*), the Tribunal should still conclude that the European Union did not breach the CPS clause.
633. In fact: (i) the objectives of the Amending Directive corresponded to its stated aims; (ii) the legislative process followed all the necessary steps in proper time; (iii) the Claimant, as a diligent investor, was well aware that the provisions of the Gas Directive and the Gas Regulation co-existed with several public statements by the European Commission and exchanges with the Russian Government between 2008 and 2015,⁵⁸⁹ which were clear indications that the requirements of the Gas Directive and the Gas Regulation would apply to offshore import pipelines such as the NS2 pipeline. It also co-existed with the applicability of EU competition law to any conduct which might have anticompetitive effects liable to have an impact on the EU market,⁵⁹⁰ and with the EU approach requiring IGAs, to the extent they governed the operation of third country pipelines to the EU, to comply with EU law.
634. It follows from the foregoing that the European Union's actions did not breach any of the alleged components of the CPS clause – an obligation to provide investors with legal tools of redress and legal security – even if these formed part of the standard, which they do not; and still less did the European Union's actions breach

⁵⁸⁹ See <https://www.asktheeu.org/fr/request/168/response/558/attach/html/3/Annex%20reply%20GHP%20Shmatko%203rd%20package%202.pdf.html>, question 3, page 2: "Gas pipelines originating from a Third country and entering the territory of a Member State are subject to the rules of the Gas Directive on the territory of this Member State, unless the legal framework is amended by a valid public law agreement (see below)" (Exhibit R-20); See, e.g., <https://www.euractiv.com/section/competition/news/south-stream-bilateral-deals-breach-eu-law-commission-says/> (Exhibit R-21); OJ C 300, 05/09/2014. (Exhibit R-23); See <https://www.reuters.com/article/ukraine-crisis-pipeline-eu-idUSL6N0NU60U20140508> (Exhibit R-24)

⁵⁹⁰ See Case C-413/14 P, Intel Corporation v Commission, EU:C:2017:632 para 45. (Exhibit RLA-85), See also Case T-102/96 *Gencor* ECLI:EU:T:1999:65, paras 90-108. (Exhibit RLA-87),

the actual obligation under the CPS standard to use due diligence to prevent harassment and injuries to investors by third parties.

3.3. There is no breach of the National treatment and MFN treatment standards under Article 10(7) ECT

635. The Claimant also makes a claim of breach of Article 10(7) of the ECT, whereby it argues that the Amending Directive provides NSP2AG with treatment less favourably than which the EU would accord to investments of its own investors or of the investors of any other Contracting Party of the ECT or any third states. The Claimant thus argues a violation of national treatment and MFN treatment.

3.3.1. Legal standard

636. The text of Article 10(7) of the ECT reads as follows:

Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

637. National treatment and MFN treatment prohibit discrimination based on the origin of the investor. Therefore, the Claimant must demonstrate that the Respondent provided treatment to investors of the Respondent or of third countries that were in like circumstances to the Claimant that was more favourable than that it provided to the Claimant, and that there was no legitimate regulatory basis for that distinction in treatment, leading to the conclusion that the Respondent had discriminated against it based solely on nationality.

638. To this end, as with a discrimination claim under Article 10(1) of the ECT, one must first establish the basis of comparison. The Claimant must identify either EU or third-party State investors that were in like circumstances to the Claimant. As explained in section 3.2.7.1.2 above, in principle, a determination as to whether a party is in like circumstances will depend upon multiple factors, typically starting from whether the different investors were in the same sector of the economy and were direct competitors. They do not have to be substantively identical in all respects but nationality, but close enough in circumstances to merit comparison. The determination of a suitable comparator requires an investigation of the facts

of each case.⁵⁹¹ Certain arbitral tribunals have considered that investors are comparable when they are in the same business or sector⁵⁹² and others have focused on the competitive relationship between investors in order to delimit the business or sector at stake.⁵⁹³ The assessment must also take into account the overall legal context in which a measure is placed.⁵⁹⁴

639. Second, as explained in section 3.2.7.1.2 above, one must determine whether the claimant investor has received less favourable treatment than similarly situated investors of the host State or of a third-party State. In the case of national treatment, this would require a comparative analysis of the adverse effects of the challenged measure on respectively the foreign-owned investors compared to the domestic or third party State investors.

640. The Tribunal in *S.D. Myers v. Canada* indeed stated, in respect of national treatment in NAFTA:

The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, **the following factors should be taken into account:**

- whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals;
- whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty.

Each of these factors must be explored in the context of all the facts to determine whether there actually has been a denial of national treatment.

⁵⁹¹ (Exhibit RLA-163),: *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL, Award of 13 November 2000), para. 249.

⁵⁹² See, e.g., (Exhibit RLA-154),: *Marvin Roy Feldman Karpa v United Mexican States*, (ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002), para 171.

⁵⁹³ See, e.g., (Exhibit RLA-164),: *United Parcel Service of America Inc. v. Government of Canada*, (ICSID Case No. UNCT/02/1, Award of 24 May 2007), para. 174; (Exhibit RLA-166): *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, (ICSID Case No. ARB (AF)/04/5, Award of 21 November 2007), para. 201. See (Exhibit RLA-167),: N. Diebold, "Standards of non-discrimination in international economic law", ICLQ vol 60, October 2011 pp 831–865, p. 839; see also (Exhibit RLA-118),: Sornarajah, *The International Law on Foreign Investment* (Cambridge, 3d ed 2010), p. 337 ("For discrimination to be found in this context, there must always be a comparison made between the two types of investor operating in the same sector **and competing with each other**").

⁵⁹⁴ (Exhibit RLA-163): *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL, Award of 13 November 2000), para. 250. See also (Exhibit RLA-165): R. Dolzer and C. Schreuer, "Standards of Protection", in *Principles of International Investment Law (2nd Edition)* 2012, p. 200.

Intent is important, but **protectionist intent is not necessarily decisive on its own**. The **existence of an intent to favour nationals over non-nationals would not give rise to a breach** of Chapter 1102 of the NAFTA **if the measure in question were to produce no adverse effect on the non-national complainant**. The word “treatment” suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.⁵⁹⁵

641. The relevance of targeting foreign nationals (as opposed to nationals) was highlighted in *Corn Products v Mexico*:

But the Tribunal would add that, even if an intention to discriminate had not been shown, the fact that the adverse effects of the tax were felt exclusively by the HFCS producers and suppliers, all of them foreign-owned, to the benefit of the sugar producers, the majority of which were Mexican-owned, would be sufficient to establish that the third requirement of ‘less favourable treatment’ was satisfied.⁵⁹⁶

642. It is thus not sufficient to simply establish that the foreign investor is treated less favourably. It must also be established that this treatment is based on its origin⁵⁹⁷ and cannot be explained by something else. This is different from requiring a Claimant to show intent of nationality discrimination. This is indeed not required.⁵⁹⁸

643. As in the case of a discrimination claim under Article 10(1) (see section 3.2.7.1.2, above), the third element to examine is whether the alleged differential treatment is justified. Differentiations are justifiable if rational grounds are shown, even in the absence of such explicit statement in the investment treaty.⁵⁹⁹ In *S.D. Myers v. Canada*, the tribunal found that “[t]he assessment of ‘like circumstances’ must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest”.⁶⁰⁰ The tribunal in *Parkerings v. Lithuania* stressed that “to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it

⁵⁹⁵ (Exhibit RLA-163): *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL, Award of 13 November 2000), paras. 252-254. (Emphasis added.)

⁵⁹⁶ (Exhibit RLA-177): *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility of 15 January 2008), para. 138. See also (Exhibit RLA-165): R. Dolzer and C. Schreuer, “Standards of Protection”, in *Principles of International Investment Law (2nd Edition)* 2012, p. 201.

⁵⁹⁷ See, in the context of Article 10(1) of the ECT: (Exhibit RLA-168): *Belenergia S.A. v. Italian Republic*, (ICSID Case No. ARB/15/40, Award, 6 August 2019), para. 631.

⁵⁹⁸ (Exhibit RLA-146): *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case no ARB/05/8 Award of 11 September 2007), para 368.

⁵⁹⁹ (Exhibit RLA-165): R. Dolzer and C. Schreuer, “Standards of Protection”, in *Principles of International Investment Law (2nd Edition)* 2012, p. 202.

⁶⁰⁰ (Exhibit RLA-163): *S.D. Myers, Inc. v. Government of Canada*, (UNCITRAL, Award of 13 November 2000), para. 250.

*must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context”.*⁶⁰¹

3.3.2. The Amending Directive does not violate the national treatment or MFN treatment obligations in Article 10(7) of the ECT

644. The Claimant again simply compares NSP2AG and the NS2 pipeline to “*all offshore third country import pipelines*”,⁶⁰² stating that these pipelines have the “*same function, operate for the same purpose ... and the investment was made therein at a time when the Third Gas Directive did not apply to offshore third country import pipelines*”.⁶⁰³

645. However, by comparing pipelines, the Claimant does not establish that NSP2AG, as an *investor* in the NS2 pipeline project, would be in like circumstances to *investors* in the other mentioned pipelines. For this reason already, the Claimants argument under Article 10(7) of the ECT must fail.

646. Moreover, as explained above (section 3.2.7.3.1), whether the Gas Directive applies to the NS2 pipeline project to its full extent, or subject to an Article 49a derogation or Article 36 exemption depends on decisions by national authorities based on individual case-by-case assessments. That is indeed the legal context⁶⁰⁴ in which the treatment must be assessed. Therefore, as explained above, the comparison cannot be based on a general consideration of the business of importing gas into the EU. Each decision by a national authority whether or not to grant flexibility to a particular undertaking under the applicable rules depends upon the facts of each pipeline. In this sense one pipeline in its very specific circumstances, cannot be simply considered to be “like” any other pipeline subject to another decision.

647. In any event, even if the Claimant’s much broader basis for comparison is used, the discrimination must be dismissed as unfounded. As stated, the Claimant compares NSP2AG to offshore third country import pipelines.⁶⁰⁵ As explained above, in taking such approach, the Claimant ignores the existence of many onshore third country import pipelines that are also supplying gas to the EU

⁶⁰¹ (Exhibit RLA-146): *Parkerings-Compagniet AS v Republic of Lithuania* (ICSID Case no ARB/05/8 Award of 11 September 2007), para 368.

⁶⁰² Claimant’s Memorial, para. 461.

⁶⁰³ Claimant’s Memorial, para. 461.

⁶⁰⁴ (Exhibit RLA-165): R. Dolzer and C. Schreuer, “Standards of Protection”, in *Principles of International Investment Law (2nd Edition)* 2012, p. 200.

⁶⁰⁵ Claimant’s Memorial, para. 461.

market and for which the Amending Directive confirmed that the legal framework in the Gas Directive applies equally to them as well. As such, the Claimant cannot establish that “[a]ll other pipelines in like circumstances were prima facie entitled to a derogation under Article 49a of the Amending Directive”.⁶⁰⁶ There is instead a group of third country pipelines importing gas in the European Union that is subject to the obligations of unbundling, TPA and tariff regulation in the Gas Directive without benefiting from an Article 49a derogation – just like the NS2 pipeline would be, should the German courts definitely confirm the decision of the German FNA. There is thus no less favourable treatment between investors in like circumstances purely on the basis of the origin of the investor.

648. Beyond this, nothing excludes NSP2AG from applying for an Article 36 exemption, which would also provide flexibility with regard to the applicable rules.

649. Overall, when the full legal framework applicable to the NS2 pipeline project is considered, it is clear that there is no discrimination of NSP2AG compared to other investors in other pipelines.

650. Finally, the European Union refers to the reasonable justification of its measures in section 3.2.7.3.3, above.

651. For all the above reasons, the Claimant’s claim under Article 10(7) of the ECT must be rejected.

3.4. The European Union has not breached its obligations under Article 13 of the ECT

3.4.1. Introduction

652. NSP2AG claims that the Amending Directive breaches Article 13(1) of the ECT because it constitutes a “measure having an equivalent effect” to expropriation, or “indirect expropriation”, and does not comply with the requirements of that provision⁶⁰⁷.

653. More precisely, the Claimant alleges that the “consequential imposition on [the NS2 pipeline] of the obligations to unbundle, to provide [TPA] and to apply regulated tariffs has the effect of wholly depriving NSP2AG of the use of the German section of the Pipeline and undermining and substantially depriving NSP2AG of the value of the investment”.⁶⁰⁸

⁶⁰⁶ Claimant’s Memorial, para. 462.

⁶⁰⁷ Claimant’s Memorial of 3 July 2020, Section VIII.7.

⁶⁰⁸ Claimant’s Memorial of 3 July 2020, para. 464.

654. As will be demonstrated below, the Amending Directive, as transposed and implemented by Germany, does not constitute “indirect expropriation”. Instead, the Amending Directive is a regulatory measure aimed at achieving public welfare objectives. It is neither discriminatory nor disproportionate and was enacted in accordance with due process requirements. As such, the Amending Directive is a legitimate exercise of the EU’s police powers. In any event, the Claimant cannot show that the Amending Directive, as transposed and implemented by Germany, has an “equivalent effect” to expropriation, let alone the [REDACTED] on NSP2AG’s investment in the North Stream 2 pipeline alleged by the Claimant.

3.4.2. The Amending Directive is a regulatory measure aimed at a public welfare objective applied in a non-discriminatory and proportionate manner and enacted in accordance with due process requirements

655. It is well-established that, as a general principle, regulatory measures aimed at achieving legitimate public welfare objectives do not constitute indirect expropriation, even if they have adverse effects on the investment. This principle reflects customary international law⁶⁰⁹ and has been restated by many arbitral tribunals.⁶¹⁰

656. In *Feldman v. Mexico*, the tribunal explained the rationale of that principle as follows:

⁶⁰⁹ See, e.g., *Saluka v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para. 262 (“[T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are ‘commonly accepted as within the police power of States’ forms part of customary international law today”). (Exhibit RLA-150). See also *Methanex Corp. v. USA* (NAFTA), Final Award, 3 August 2005, Part IV-Chapter D-Page 4, para. 7, (Exhibit RLA-178).; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, para. 136, (Exhibit RLA-137).; and *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 301, (Exhibit RLA-117).

⁶¹⁰ In addition to the cases cited below, see also, for example: *Methanex Corp. v. USA* (NAFTA), Final Award, 3 August 2005, Part IV-Chapter D-Page 4, para. 7, (Exhibit RLA-178); *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability of 30 July 2010, para. 147, (Exhibit RLA-179); *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [Redacted], paras. 497-500, (Exhibit RLA-180); *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, paras. 139-140, (Exhibit RLA-133); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 197, Exhibit RLA-153; *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, paras. 145-148, (Exhibit RLA-181); *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 741, (Exhibit RLA-173); *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 291-301, (Exhibit RLA-117); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, para. 1329, (Exhibit RLA-182); *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, paras. 7.17-7.22, (Exhibit RLA-183)

[...] Governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.

[...] not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation [...] Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations [...] those changes may well make their activities less profitable or even uneconomic to continue.⁶¹¹

657. According to the award in *Tecmed v. Mexico*:

The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is indisputable.⁶¹²

658. Similarly, the tribunal in *El Paso v. Argentina* held that:

[...] in principle, general non-discriminatory regulatory measures, adopted in accordance with the rules of good faith and due process, do not entail a duty of compensation.⁶¹³

659. Arbitral tribunals have considered that non-discriminatory⁶¹⁴ regulatory measures adopted in accordance with the rules of due process⁶¹⁵ and designed to achieve legitimate general welfare objectives may constitute indirect expropriation only

⁶¹¹ *Marvin Feldman v Mexico*, ICSID case No ARB(F)/99/1, paras. 103 and 112, (Exhibit RLA-154).

⁶¹² *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 119 (Exhibit RLA-142)

⁶¹³ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 240, (Exhibit RLA-137)

⁶¹⁴ See, e.g., *Saluka v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006S, para. 262, (Exhibit RLA-150); *Methanex Corp. v. USA (NAFTA)*, Final Award, 3 August 2005, Part IV-Chapter D-Page 4, para. 7, (Exhibit RLA-178); *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award of 17 July 2006, para. 76(j), (Exhibit RLA-184); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 243, (Exhibit RLA-137)

⁶¹⁵ See, e.g., *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, 240, (Exhibit RLA-137); *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, para. 174, (Exhibit RLA-181)

when they are so severe in light of their purpose that they appear manifestly excessive.⁶¹⁶

660. The above general principle has been confirmed and codified in many recent investment agreements⁶¹⁷, including those concluded by countries which are among the main sources of foreign investment, such as the United States⁶¹⁸, Canada and the European Union and its Member States.

661. For example, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States contains a definition of “indirect expropriation”, which includes the following provision:

For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations⁶¹⁹.

⁶¹⁶ *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para.122 (“Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State [...] to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.”), (Exhibit RLA-142). See also, for example: *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 195, (Exhibit RLA-143); *Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award of 17 July 2006, para. 176(j)(Exhibit RLA-184); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 243, (Exhibit RLA-137); and *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, para. 174, (Exhibit RLA-181)

⁶¹⁷ See, e.g., ASEAN Comprehensive Investment Agreement (2009), Annex 2, Paragraph 4 (“Non-discriminatory measures of a Member State that are designated and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation of the type referred to in sub-paragraph 2(b) [indirect expropriation (Exhibit RLA-185); (available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaties-with-investment-provisions/3273/asean-comprehensive-investment-agreement-2009->)). See also Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018), Annex 9B, in particular point 3(b) (“Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances”) (Exhibit RLA-186) (available at: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng>); and Regional Comprehensive Economic Partnership (2020), Annex 10-B para 4: (“Non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, public morals, the environment, and real estate price stabilisation, do not constitute expropriation of the type referred to in subparagraph 2(b)”) (Exhibit RLA-187) (available at: <https://www.dfat.gov.au/sites/default/files/rcep-chapter-10-annex-10b.pdf>).

⁶¹⁸ See U.S Model Bilateral Investment Treaty (2012) Annex B, point 4(b) (“Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations”), (Exhibit RLA-188) (available at: <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>).

⁶¹⁹ Comprehensive Economic and Trade Agreement between the European Union and its Member States and Canada (CETA) Annex 8-A, Expropriation, Article 3 (Exhibit RLA-134). See also Investment

662. The tribunal in *Philip Morris v. Uruguay* considered that the above provision (and the analogous provisions included in other investment agreements), “whether or not introduced *ex abundanti cautela*, reflect the position under general international law”.⁶²⁰

663. Whereas, unlike more recent investment agreements, Article 13 (1) of the ECT does not include a definition of indirect expropriation, that provision must be interpreted and applied in accordance with the above described principle of international law.⁶²¹

3.4.2.1. The Gas Directive and the Amending Directive are designed to pursue legitimate public welfare objectives of fundamental importance for the European Union

664. In the present case, it has been amply demonstrated in Section 2.1 that the requirements on unbundling, TPA and tariff regulation provided for in the Gas Directive, as modified by the Amending Directive, pursue a legitimate public welfare objective of fundamental importance for the European Union, namely to ensure the functioning of a competitive market for natural gas in the European Union, while ensuring security of supply of natural gas.

665. It has been further demonstrated in Section 2.1 that, contrary to the Claimant’s allegations, the Amending Directive, by clarifying that those requirements apply to interconnectors connecting the Member States with third countries, does make a material contribution to those objectives.

3.4.2.2. The Amending Directive is not discriminatory

666. The legitimate welfare objectives pursued by the Gas Directive and the Amending Directive have been implemented in a non-discriminatory manner. As shown above in sections 2.4, 3.1.2, 3.1.7 and 3.3, the Gas Directive does not breach any

Protection Agreement between the European Union and its Member States and Vietnam, Annex 4, Understanding on Expropriation, in particular point 3 (“Non-discriminatory measures or series of measures by a Party that are designed to protect legitimate public policy objectives do not constitute indirect expropriation, except in the rare circumstances where the impact of such measure or series of measures is so severe in light of its purpose that it appears manifestly excessive.”) (Exhibit RLA-134); and Investment Protection Agreement between the European Union and its Member States and Singapore, Annex 1, Expropriation, in particular the last sentence (“For greater certainty, except in the rare circumstance where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non discriminatory measure or series of measures by a Party that are designed and applied to protect legitimate public policy objectives such as public health, safety and the environment, do not constitute indirect expropriation”) (Exhibit RLA-194)

⁶²⁰ Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 301, (Exhibit RLA-117)

⁶²¹ Cfr. Article 26(6)(6) of the ECT (“ [a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law”).

of the non-discrimination standards invoked by the Claimant under either Article 10(1) of the ECT or Article 10(7) of the ECT.

3.4.2.3. The Amending Directive is not disproportionate

667. As shown above in section 3.1.4, the impact of the Amending Directive on NSP2AG's investment in the North Stream 2 pipeline is not disproportionate in light of the legitimate public welfare objectives pursued by that measure.

3.4.2.4. The Amending Directive has been enacted in accordance with the rules of due process

668. Finally, as demonstrated above in section 2.5, the Amending was enacted with the utmost respect for procedural propriety and due process.

3.4.2.5. Conclusion

669. For the above reasons, the Amending Directive more than satisfies all the criteria for a non-expropriatory regulatory measure.

3.4.3. In any event, the Claimant cannot show that the Amending Directive has an "equivalent effect" to expropriation

670. It is well-established that not every interference of a regulatory measure with the investor's property rights amounts to an indirect expropriation. Rather, in order to show that a regulatory measure constitutes indirect expropriation it must be demonstrated that its impact on the investment is "equivalent" to the effect of a direct expropriation.

671. Many tribunals have highlighted that the effect of the measure must be a substantial or near total deprivation of the investment to be deemed expropriatory.⁶²²

⁶²² In addition to the cases cited below, see, e.g.: *Telenor Mobile Communications AS v. The Republic of Hungary*, Award of 13 September 2006, para. 65 9 ("Though different tribunals have formulated the test in different ways, they [...] all agreed that the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investment") (Exhibit RLA-190).; *Venezuela Holdings, B. V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case no. ARB/07/27, Award of 9 October 2014, para. 286 ("[...] a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to an effective deprivation of the investment as a whole. Such a deprivation requires either a total loss of the investment's value or a total loss of control by the investor of its investment, both of a permanent nature [...]), (Exhibit RLA-190).; *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V2014/168, Final Award, 29 April 2020 [Redacted], para. 460 ("The Tribunal finds no reason to depart from the existing line of jurisprudence. Therefore, the Tribunal will now assess whether (i) remaining the Prior Measures resulted in a total or near-total destruction of the investment's value; or (ii) they deprived the Claimant of control over its investment; and (iii) the effect of the Prior Measures was permanent. In view of the cumulative nature of this test, failure to prove any one of the three requirements would lead to the dismissal of the Claimant's indirect expropriation claim"), (Exhibit RLA-192).;

672. Thus, for example, in *Tecmed v. Mexico* the tribunal stated that:

To establish whether the Resolution is a measure equivalent to an expropriation [...], it must be first determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the Landfill or to its exploitation – had ceased to exist⁶²³.

673. In *Electrabel v. Hungary*, a case under the ECT, the tribunal summed up the case law on the standard of required effects for establishing the existence of expropriation in the following terms:

[T]he accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment⁶²⁴. (emphasis added)

674. It follows from the above standard that a mere loss in value of the investment is not an indirect expropriation. Rather, for a loss of value to be considered expropriatory it must be equivalent, in magnitude, to a deprivation of property.⁶²⁵ Accordingly, a measure cannot be considered as expropriatory simply because it renders the investment less profitable.⁶²⁶

675. Tribunals have stressed, moreover, that it is the effect on the investment “as a whole” which is relevant in determining whether the effect of the measure is expropriatory.⁶²⁷

676. A finding of expropriation further requires that the substantial deprivation, in fact, was caused by acts attributable to the State, rather than by the investor’s own actions or by economic conditions outside the control of either party.

⁶²³ *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 115, (Exhibit RLA-142).

⁶²⁴ *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 6.62, (Exhibit CLA-84)

⁶²⁵ Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain, SCC Case No. 062/2012, Award, 21 January 2016 [Spanish], paras. 464-465, (Exhibit RLA-120); Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, paras. 531-532, (Exhibit RLA-159).; Greentech Energy Systems A/S and others v. Kingdom of Spain, SCC Case No. V2015/150, Final Award, 14 November 2018, paras. 423-431, Exhibit (Exhibit RLA-193)

⁶²⁶ Burlington Resources Inc. v. Republic of Ecuador (hereafter, *Burlington v. Ecuador*), ICSID Case No. ARB/08/5, Award of 14 December 2012, para. 399 (Exhibit RLA-195).; Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 286 (Exhibit RLA-117).

⁶²⁷ *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 6.58, (Exhibit CLA-84).

677. As discussed below, on the facts of the present case, NSP2AG cannot come close to passing the above described test for establishing the existence of indirect expropriation.

3.4.3.1. The impact of the Amending Directive on NSP2AG's investment remains at this stage highly uncertain

678. In the first place, as explained in section 2.3, the "impact" of the Amending Directive on NSP2AG's investment remains at this stage highly uncertain. The Claimant's allegations of [REDACTED] and, on that basis, of indirect expropriation are, therefore, premature and speculative.

679. As further explained in section 2.3, the "impact" on NSP2AG's investment will depend, to a very large extent, on measures which the German authorities may or may not take with regard to North Stream 2 within the scope of the margin of discretion accorded to EU Member States by the Gas Directive. Moreover, the impact on NSP2AG's investment will depend as well on the choices to be made by NSP2AG itself within the framework of the measures taken by Germany for transposing and implementing the Directive.

680. The Claimant contends that the alleged indirect expropriation results from the "imposition on [the NS2 pipeline] of the obligations to unbundle, to provide third party access and to apply regulated tariffs".⁶²⁸

681. Yet, if the Claimant is granted the Article 49a derogation which it has requested from the German authorities, it may not be required to comply with any of those requirements.⁶²⁹

682. Even if the Claimant is not granted an Article 49a derogation, it could still request from the German authorities an Article 36 exemption from those requirements, with the same effects.⁶³⁰

683. While the German authorities could subject the granting of an Article 49a derogation or an Article 36 exemption to certain conditions, the ensuing "impact" of the Amending Directive on NSP2AG's investment would be far from [REDACTED] and would by no means amount to an indirect expropriation.

684. So far, however, the Claimant has refrained from requesting an Article 36 exemption. Instead, as recalled above,⁶³¹ the Claimant has requested an Article

⁶²⁸ Claimant's Memorial of 3 July 2020, para. 464.

⁶²⁹ Section 2.3.3.1.

⁶³⁰ Section 2.3.3.2.

⁶³¹ Section 2.3.3.2.

49a derogation, even though it has argued before this Tribunal that the North Stream 2 pipeline cannot possibly qualify for that type of derogation.⁶³²

685. The Claimant cannot legitimately complain that the Amending Directive amounts to an indirect expropriation, while at the same time refusing to avail itself of the possibility of requesting an Article 36 exemption from the regulatory requirements that, according to the Claimant, constitute an indirect expropriation.

686. Moreover, both the Claimant and Gazprom are controlled by the Russian Government, which is a “public body” within the meaning of Article 9(6) of the Gas Directive. Therefore, as a further alternative, Russia’s control over both Gazprom and the NS2 pipeline could be reorganised in accordance with that provision.⁶³³

687. As further explained in section 2.3,⁶³⁴ the alleged ██████████ of the Amending Directive on NSP2AG’s investment could also be addressed through the conclusion of an IGA between the European Union and Russia on the operation of the NS2 pipeline, as recommended by the European Commission. Yet NSP2AG, which is controlled by Russia and may be presumed to act in accordance with the instructions of the Russian Government, has systematically objected to the negotiation of such an IGA.

3.4.3.2. In any event, the Claimant cannot show that full compliance with the requirements of the Amending Directive, as transposed and implemented by Germany, would constitute indirect expropriation

688. Even if the requirements of the Amending Directive on unbundling, TPA and tariff regulation, as transposed and implemented by Germany, were to apply in full with regard to the NS2 pipeline, the Claimant cannot show that their impact on NSP2AG’s investment would amount to indirect expropriation.⁶³⁵

689. The Claimant complains repeatedly that compliance with the applicable requirements of the Amending Directive on unbundling, TPA and tariff regulation would prevent NSP2AG from operating the NS2 pipeline “as originally intended by NSP2AG”.⁶³⁶ Clearly, however, that would not amount to indirect expropriation in the light of the legal standard described above. Article 13(1) of the ECT does not confer upon NSP2AG a right to operate the NS2 pipeline “as originally intended”

⁶³² Section 2.3.3.2.

⁶³³ Section 2.3.3.4 and 2.3.4.1.1.

⁶³⁴ Claimant’s Memorial of 3 July 2020, para. 464.

⁶³⁵ Sections 2.3.4 and 2.3.5.

⁶³⁶ Claimant’s Memorial of 3 July 2020, Section VII.2. See also Claimant’s Memorial of 3 July 2020, paras. 477-478.

by NSP2AG, let alone a right to operate the NS2 pipeline free from any regulatory constraints, so as to be able to extract monopoly profits.

690. Unbundling has become “a cross-sectoral and global policy approach”⁶³⁷ to address the anti-competitive practices to which all network-bound industries are prone. Like the European Union, many other countries around the world, including Russia, have adopted unbundling measures.⁶³⁸ The European Union is not aware that any arbitral tribunal has ever ruled that unbundling measures are *per se* expropriatory. The Gas Directive, furthermore, provides for a flexible version of unbundling, in that the Member States are allowed to make available alternative unbundling models not involving OU.⁶³⁹

691. As explained above,⁶⁴⁰ the Gas Directive does not require NSP2AG to sell either the entire pipeline, or any part thereof, in order to comply with the unbundling requirements. In any event, the Claimant has failed to prove that it cannot sell the pipeline, or a part thereof, at fair market value.⁶⁴¹

692. The Claimant has nowhere alleged, let alone proved, that NSP2AG cannot comply with the alternative ISO or ITO unbundling models made available under German law. Indeed, Section VII of the Claimant’s memorial does not even address those two unbundling models. The Claimant limits itself to assert that, under those two unbundling models, “continued ownership of [the NS2 pipeline] will be in name only”.⁶⁴² But that is just a bald assertion, unsupported by any argument or evidence.

693. TPA constitutes the cornerstone of network industry regulation, whereas tariff regulation is one of the most usual tools for regulating any industry supplying essential goods or services.⁶⁴³ Again, neither TPA nor tariff regulation has ever been found to be expropriatory *per se*.

694. TPA does not substantially deprive NSP2AG from the ownership, use or enjoyment of the NS2 pipeline. It merely seeks to prevent NSP2AG from refusing access to the pipeline to gas suppliers other than Gazprom, an affiliated company. While

⁶³⁷ Tilman Michael Dralle, “Ownership Unbundling and Related Measures in the EU Energy Sector”, 2018, pp. 9-10, (Exhibit RLA-196)

⁶³⁸ *Ibid.*

⁶³⁹ Sections 2.1.1 and 2.3.3.

⁶⁴⁰ Section 2.3.4.1.1.

⁶⁴¹ Section 2.3.4.1.2.

⁶⁴² Claimant’s Memorial of 3 July 2020, para. 480.

⁶⁴³ See, e.g., *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 8.35 (“Regulatory pricing (by operation of law) was and remains an important measure available to State regulators in liberalised markets for electricity. It is, even at best, a difficult discretionary exercise involving many complex factors”), (Exhibit CLA-84)

this may well be “detrimental” to Gazprom’s interest in monopolising the use of the NS2 pipeline, Gazprom is not a protected investor under the ECT.

695. Likewise, tariff regulation does not substantially deprive NSP2AG from the ownership, use or enjoyment of the NS2 pipeline. It merely seeks to prevent NSP2AG from charging excessive or discriminatory prices for the use of the pipeline, while ensuring an appropriate remuneration for NSP2AG.

696. The Claimant further alleges that the requirements on unbundling, TPA and tariff regulation are incompatible with the GTA [REDACTED]. But the Claimant has not shown that the GTA [REDACTED] cannot be amended in order to allow the operation of the NS2 pipeline in accordance with the Amending Directive, as implemented and transposed by Germany.⁶⁴⁶ Indeed, the Claimant does not even argue that [REDACTED].

697. The Claimant asserts at several points that the implementation of any “other solutions” allowing NSP2AG to operate the NS2 pipeline in compliance with the Amending Directive would be [REDACTED]. Once again, however, those assertions are not supported by any argument or evidence. The only other “option” discussed in the Claimant’s Memorial is “separating the operation of the German Section from the remainder of the pipeline”.⁶⁴⁹ [REDACTED].

698. The mere fact that “other”, yet to be developed by the Claimant, “solutions” might [REDACTED], as compared to the operation of the North Stream 2 pipeline “as originally intended by NSP2AG”⁶⁵³ does not render the Amending Directive, as transposed and implemented by Germany, expropriatory. The Claimant has the burden of proving that the [REDACTED] is such as to

644 [REDACTED]
645 [REDACTED]
646 Section 2.3.4.3.
647 Ibid.
648 [REDACTED]
649 Claimant’s Memorial of 3 July 2020, para. 336.
650 [REDACTED]
651 [REDACTED]
652 [REDACTED]
653 Claimant’s Memorial of 3 July 2020, Section VII.2. See also Claimant’s Memorial of 3 July 2020, paras. 477-478.

amount to “the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment”.⁶⁵⁴ This is a very demanding legal standard, which the Claimant has not, and indeed cannot possibly meet.

699. Finally, even if the Amending Directive, as transposed and implemented by Germany had the alleged [REDACTED] on NSP2AG’s investment (*quod non*) such impact would be, as explained above, the result of NSP2AG’s own lack of diligence⁶⁵⁵ and/or of other factors beyond the EU’s control such as the U.S. sanctions⁶⁵⁶ or the export monopoly granted under Russian law to Gazprom.⁶⁵⁷

3.4.4. Conclusion

700. For the above reasons, the European Union submits that the Claimant has failed to show that the Amending Directive, as transposed and implemented by Germany, constitutes an “indirect expropriation” of NSP2AG’s investment in the NS2 pipeline which breaches Article 13(1) of the ECT.

4. THE RELIEF SOUGHT BY THE CLAIMANT IS INAPPROPRIATE

701. The Claimant requests as its “primary relief” that the Tribunal order the European Union, “by means of its own choosing”, to “remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive (i.e., those provisions which became applicable to [the NS2 pipeline] as a result of the Amending Directive and from which derogations are permissible pursuant to Article 49a of the Gas Directive) to NSP2AG and [the NS2 pipeline], thus restoring the position that would have existed but for the [European Union]’s breaches of the ECT.”⁶⁵⁸

702. While the Claimant studiously avoids stating so plainly, its request for relief is nothing more than a request for an interim and permanent injunction preventing the European Union from applying a generally applicable legislative measure.

⁶⁵⁴ *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, para. 6.62, (Exhibit CLA-84)

⁶⁵⁵ Section 2.3.6.

⁶⁵⁶ Sections 2.3.2.2 and 2.3.2.3.

⁶⁵⁷ Section 2.3.2.2.

⁶⁵⁸ Claimant’s Memorial, para. 486.

703. Granting the Claimant's request would amount to an extraordinary and unprecedented incursion into the European Union's sovereign right to regulate within the scope of their powers to promote public welfare objectives.

704. As set out in the following, the Claimant's requested relief lacks any secure foundation in general public international law (Section 4.1). Power to grant such relief is not otherwise provided for under the ECT (Section 4.2). Even if a power to grant an interim or final injunction of the kind requested did exist (*quod non*), the Claimant manifestly fails to meet the conditions for it to be granted (Section 4.3). Even if it had the power to grant a permanent injunction (*quod non*), and the circumstances of urgency and necessity not compensable in damages were met (*quod non*), the Tribunal in any event lacks the jurisdiction to grant the requested relief, since the damages the Claimant alleges flow from measures that may or may not be adopted by Germany, rather than by the European Union (Section 4.4).

705. For the reasons set out in what follows, the European Union therefore calls on the Tribunal to reject the Claimant's remedial request.

4.1. The Claimant's Requested Relief Is Not Established in General International Law

706. The Claimant incorrectly asserts that its requested relief flow from established principles of reparation in Public International Law.⁶⁵⁹ To the contrary, neither general remedial principles nor the specific rules developed for State-to-State disputes establish a right to infringe State sovereignty by enjoining the exercise of State regulatory power, in the specific context of an investor-State dispute, under the guise of ordering "restitution in kind" to the exclusion of a remedy in damages.

4.1.1. Chorzow Factory in no way imposes a final injunctive remedy as a "primary remedy" in investor-State cases

707. The Claimant first harks back to general principles of reparation set out in the *Chorzów Factory* case.⁶⁶⁰ The Claimant notes that, as stated in that decision, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". The Claimant also asserts that this principle

⁶⁵⁹ Claimant's Memorial, paras. 488-492.

⁶⁶⁰ Claimant's Memorial, para. 488.

has been recognized by international tribunals, including those considering breaches of the ECT.⁶⁶¹

708. While *Chorzów Factory* sets out general remedial principles for a breach of international law, it fails to address when the specific remedy of restitution is appropriate, or the conditions for its application.

709. The foundational principles set out in the *Chorzów Factory* case notably fail to address when reparation might be appropriate, or the conditions of its application. *Chorzów Factory* notably says nothing about the availability of a final injunctive order as a remedy in the context of investment treaty arbitration. Nor do any of the cases citing *Chorzów Factory* suggest the decision supports that specific outcome.

710. In short, *Chorzów Factory* on its own does not provide any support for the Claimant's request in the investor-State dispute context.

4.1.2. The ILC Articles on the Responsibility of States expressly apply to the State-to-State context only

711. To bolster its reliance on the *Chorzów Factory* case, the Claimant points to the International Law Commission (ILC) Articles on State Responsibility, arguing that these confirm the customary international law position that reparation may take a number of forms.⁶⁶² This statement is uncontroversial as a general matter: the Commentary on the ILC Articles defines "restitution" broadly, stating that it may take the form of: (i) material restoration; (ii) reversal of some juridical action; or (iii) some combination of these.

712. However, the ILC remedial principles were expressly developed for the State-to-State dispute context. As set out in what follows, ILC principles cannot simply be translated into the distinct context of investor-State dispute settlement.

⁶⁶¹ Claimant's Memorial, para. 488, citing **Exhibit CLA-119**, *Petrobart Limited v. The Kyrgyz Republic* (SCC Case No. 126/2003, Award of 29 March 2005), pp. 77-78; **Exhibit CLA-59**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case No. ARB/05/18, Award of 3 March 2010), paras. 503-505; **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC Case No. V (061/2008), Final Award of 8 June 2010), paras. 42-43; **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC, Award of 16 December 2003), pp. 38-39; **Exhibit CLA-130**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA Case No. 2005-04/AA227, Final Award of 18 July 2014), para. 1766.

⁶⁶² Claimant's Memorial, para. 489, citing **Exhibit CLA-134**, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001); **Exhibit CLA-135**, *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment of 20 April 2010, para. 273; **Exhibit CLA-136**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v the United Mexican States* (ICSID Case No. ARB(AF)/04/05, Award of 21 November 2007), paras. 116 and 275; **Exhibit CLA-96**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22, Award of 24 July 2008), para. 776; **Exhibit CLA-137**, *Corn Products International Inc., v. The United Mexican States* (ICSID Case No. ARB(AF)/04/01, Decision on Responsibility of 15 January 2008), para. 76.

4.1.2.1. Remedial provisions of the ILC Articles on their face are limited to the State-to-State Context

713. At its most basic, the principles set out in the ILC cannot simply be translated outside of the State-to-State context, because the Articles themselves on their face prohibit this. The ILC Articles expressly provide that “This part [including Articles 34-37] **is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State**”.⁶⁶³

714. The ILC Articles resulted from lengthy reflection on the part of international experts on State responsibility, including consideration of the right to a remedy for breach of an international obligation in the very specific context of State-to-State disputes. These same experts expressly confirm that their conclusions on remedial principles in the Articles are limited to that context.

4.1.2.2. ILC remedial principles can only be extended to the investor-State context on the basis of consistent State practice and *opinio juris*

715. Since the ILC Articles are generally accepted as a statement of Customary International Law, any extension to the investor-State dispute context of customary international law rules established for State-to-State disputes would need to be based upon evidence of consistent State practice prompted by a sense of legal obligation (or *opinio juris*).⁶⁶⁴

716. None of the investment treaty tribunals the Claimant relies upon, which have purported (if only in principle) to extend the remedial provisions of the ILC Articles to the investor-State context, have grounded their conclusions in State practice and *opinio juris*. As such, they provide no basis for extending customary international law in the dramatic and radical way the Claimant here proposes.

717. Moreover, even to the extent investment treaty cases relied upon by the Claimant refer to the applicability of the ILC Articles, they do so in general terms; none specifically support the Claimant’s assertion that restitution should be the *primary*

⁶⁶³ **Exhibit CLA-134**, ILC Articles on State Responsibility, Article 33(2). [Emphasis added.]
⁶⁶⁴ See, e.g., *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL, Final Award of 8 June 2009), paras. 602-603 (Exhibit RLA-139) (“[t]he Tribunal acknowledges that it is difficult to establish a change in customary international law. As Respondent explains, establishment of a rule of customary international law requires: (1) “a concordant practice of a number of States acquiesced in by others,” and (2) “a conception that the practice is required by or consistent with the prevailing law (*opinio juris*).” The evidence of such “concordant practice” undertaken out of a sense of legal obligation is exhibited in very few authoritative sources”); *United Parcel Service of America, Inc. v. Government of Canada* (ICSID Case No. UNCT/02/1, Award on Jurisdiction of 22 November 2002), para. 84 (“[t]o establish a rule of customary international law two requirements must be met: consistent state practice and an understanding that that practice is required by law.”). See also BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (8th Ed.) James Crawford (Ed.), Oxford University Press 2012, pp. 25-27 (Exhibit RLA-197).

remedy in investment treaty cases. To the contrary, all of the ECT cases the Claimant cites in fact reject restitution as a remedy, and/or refer to financial compensation as the remedy applied in practice.⁶⁶⁵

718. The same is true of all non-ECT investment treaty cases the Claimant refers to: none stand for the proposition that restitution is the “primary” remedy under international law.⁶⁶⁶

719. As such, the Claimant is in effect asking this Tribunal to actively apply a remedy that no other investment treaty tribunal in the history of investment treaty dispute resolution has ever applied in practice, and in the absence of any evidence such a remedial power has any foundation in State practice or *opinio juris*.

⁶⁶⁵ **Exhibit CLA-119**, *Petrobart Limited v. The Kyrgyz Republic* (SCC Case No. 126/2003, Award of 29 March 2005), pp. 77-78 (“[t]he Arbitral Tribunal agrees that, in so far as it appears that Petrobart has suffered damage as a result of the Republic’s breaches of the Treaty, Petrobart shall so far as possible be placed financially in the position in which it would have found itself”); **Exhibit CLA-59**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia* (ICSID Case No. ARB/05/18, Award of 3 March 2010), para. 512 (“In the present case, it is clear that restitution is no longer possible. The Tribunal must therefore determine the amount of compensation owing to Mr. Kardassopoulos”); **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC Case No. V (061/2008), Final Award of 8 June 2010), para. 63 (“it is the Tribunal’s opinion that the circumstances here present render it materially impossible to implement a remedy of specific performance. Claimant’s request for this relief is therefore denied”); **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC, Award of 16 December 2003), p. 39 (“[r]estitution in the present case is conceivable, either through a juridical restitution of provisions of Latvian law [...] or through a monetary restitution. [...] The Arbitral Tribunal therefore finds the appropriate approach, for the time up to the time of this award, to be an assessment of compensation for the losses or damages inflicted on the Claimant’s investments.”); **Exhibit CLA-130**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA Case No. 2005-04/AA227, Final Award of 18 July 2014), para. 1758 (“the Tribunal will now determine the damages suffered by Claimants as a result of Respondent’s unlawful expropriation”).

⁶⁶⁶ **Exhibit CLA-132**, *Franck Charles Arif v Republic of Moldova* (ICSID Case No. ARB/11/23, Award of 8 April 2013), paras. 569-572 (where the tribunal sought to accommodate the expressed policy preference of the State to provide restitution instead of damages, not to impose restitution in any form as a final remedy); **Exhibit CLA-98**, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006). In the subsequent Award in this case, the tribunal ordered compensation. See *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1, Award of 25 July 2007), para. 265 (**Exhibit RLA-198**) (“[t]he Tribunal cannot compel Argentina to [annul legislative and administrative measures] without a sentiment of undue interference with its sovereignty. Consequently, the Tribunal arrives at the same conclusion: the need to order and quantify compensation”); **Exhibit CLA-133**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19, Award of 18 August 2008), para. 467 (“[u]nder international law, it is well established that the principal consequence of committing a wrongful act is the obligation for the party to repair the injury caused by that act. However, controversy remains regarding the applicable standard and measure of compensation as well as the proper method of calculating such compensation”); **Exhibit CLA-136**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v the United Mexican States* (ICSID Case No. ARB(AF)/04/05, Award of 21 November 2007), para. 278 (“[i]n the instant case, the principles upon which compensation should be awarded derive from the applicable international law rules”); **Exhibit CLA-96**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22, Award of 24 July 2008), para. 776 (“the BIT does not offer any guidance for evaluating the damages arising from such breaches. On the basis that this does not mean that compensation is excluded, the common starting point is the broad principle articulated in the well known Factory at Chorzow case”); **Exhibit CLA-137**, *Corn Products International Inc., v. The United Mexican States* (ICSID Case No. ARB(AF)/04/01, Decision on Responsibility of 15 January 2008 (where the Tribunal decided that Mexico had violated the NAFTA, but delayed the determination of the quantum compensation for the breach to a later phase of the proceeding).

4.1.2.3. The ILC Articles in any event incorporate important reservations regarding the availability of specific remedies

720. Even if, *arguendo*, one were to take the ILC Articles as a general statement of customary international law on the remedial powers of all international tribunals (*quod non*), the relevant articles themselves incorporate important reservations which, if interpreted in light of general international law in accordance with VCLT Article 31(3)(c), would in any event preclude the granting of such relief.

721. Notably, Article 35 provides that restitution shall be a primary remedy, “provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”.

722. It is precisely because imposing a policy outcome on a State would be “a burden out of proportion to the benefit deriving from restitution” that awards of monetary compensation are the primary remedy in the investment treaty context.

723. In one of the recent cases arising out of Spain’s amendments to its incentive scheme for renewable energy, the Tribunal noted that:

Moreover, as firmly established in the case-law, an international obligation imposing on the State to waive or decline to exercise its regulatory power cannot be presumed, given “the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.” The regulatory power is essential to the achievement of the goals of the State, so to renounce to exercise it is an extraordinary act that must emerge from an unequivocal commitment; more so when it faces a serious crisis. As stated by the *Continental* tribunal, “it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose.” Such a commitment would touch on core competences of the State, to which it is inconceivable the State would implicitly renounce. A treaty obligation, whereby the State guarantees the stability of its legal order relinquishing the exercise of its regulatory power must be explicit and cannot be assumed through an implicit declaration, diluted in general expressions.⁶⁶⁷

724. While this passage addressed the issue of State liability for regulatory change, the same principle should apply when considering the availability of a remedy for an alleged breach of an international investment agreement: that is, the State should not be presumed subject to an injunctive power on the part of an

⁶⁶⁷ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum of 30 November 2018), para. 244 (Exhibit RLA-199) (citations omitted).

investment tribunal limiting its right to regulate, save and except where the treaty expressly permits such a power.

725. To this same effect and more specifically focussed on the remedial issue, an Iran-US Claims Tribunal observed that: "... [i]n no system of law are private interests permitted to prevail over duly established public interest, making impossible actions required for the public good. Rather private parties who contract with the Government are only entitled to fair compensation when measures of public policy are implemented at the expense of their contract rights. No justification exists for a different treatment of foreign private interests ...".⁶⁶⁸

4.2. The Claimant's Requested Relief Is Not Established Under Article 26(8) of the ECT

726. The second tenet of the Claimant's argument is that the Tribunal has the power to grant the relief requested by the Claimant pursuant Article 26(8) of the ECT, and that other arbitral tribunals support this conclusion.⁶⁶⁹ The Claimant's interpretation of the ECT is incorrect, and the decisions on which it relies fail to provide such support.

4.2.1. The ECT does not expressly provide for a final injunctive remedy either as an alternative or in priority

727. The Claimant asserts that the ECT "expressly recognizes that awards in arbitrations brought pursuant to Article 26 may include remedies other than an award of damages", relying upon commentary by Anna de Luca and an ECT case, *Al-Bahloul v. Tajikistan*.⁶⁷⁰ Neither provide support for this proposition.

728. The ECT does not expressly provide for the grant of final injunctive relief. Read together with general rules of public international law cautioning against all but express limitations on State sovereignty, the ECT should not be read as extending remedial powers of final injunctive relief to investment tribunals.

729. Article 26(8) of the ECT provides as follows:

⁶⁶⁸ *Amoco International Corporation v. Islamic Republic of Iran, National Iranian Oil Company*, Partial Award, July 1987, 1988, para. 178 (Exhibit RLA-200).

⁶⁶⁹ Claimant's Memorial, para. 493.

⁶⁷⁰ Claimant's Memorial, para. 493, citing **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC Case No. V (061/2008), Final Award of 8 June 2010), para. 49; **Exhibit CLA-140**, A. De Luca. "Non-Pecuniary Remedies under the Energy Charter Treaties", Energy Charter Secretariat Knowledge Centre, 2015, p. 1.

*The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. **An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted.** Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards. [Emphasis added.]*

730. This language confirms that in the specific circumstances of an award concerning the measure of a sub-national government or authority of the disputing Contracting Party (i.e., State), that award shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. While the ordinary meaning of the ECT confirms that remedies beyond monetary compensation may be granted, these other potential remedies remain unspecified. Nor does the ECT set out the circumstances in which the grant of any such other remedies may be appropriate. Certainly, the ECT nowhere expressly grants the Tribunal a power to grant final injunctive relief, either as an alternative to monetary compensation or at all.
731. Consistent with this, to the extent more recent investment treaties do expressly allow tribunals to order even restitution of property (arguably a “softer” form of injunction, not as extreme as ordering suspension of State policy, as here), they also explicitly provide that the State can elect to pay compensation in lieu of complying with an order of restitution. This includes all EU investment chapters, and also the recently concluded investment chapter of CPTPP.⁶⁷¹ In other words, even where such remedial power is expressly granted to tribunals (unlike here), it is only granted subject to the State’s election.
732. Article 26(8) of the ECT should be interpreted in the general context of public international law, including the customary international rule that the exercise of

⁶⁷¹ For example, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) provides at Article 8.39(1) that “1. If the Tribunal makes a final award against the respondent, the Tribunal may only award, separately or in combination: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined in a manner consistent with Article 8.12” [Emphasis added.]; Comprehensive And Progressive Agreement for Trans Pacific Partnership (CPTPP) Article 9.29(1): “1. When a tribunal makes a final award, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.” These provisions pick up on the language of Article 1135(1) of NAFTA: “1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution”.

State sovereignty may be limited only on the basis of an express rule. A presumption in favour of the free exercise of State sovereignty is among the most fundamental rules of public international law.⁶⁷²

733. Indeed, the analysis by Anna de Luca to which the Claimant cites, published under the auspices of the ECT, argues in favour of precisely this conclusion:

State sovereignty as a fundamental principle of international law, limiting the power of arbitral tribunals to order specific performance or restitution against States in investment disputes with foreign investors, is not a new factor in international arbitration, but rather well established.⁶⁷³

734. The Claimant asserts in support of its argument that the tribunal in *Al-Bahloul v. Tajikistan* found that Article 26(8) of the ECT vests arbitral tribunals with the power to grant both pecuniary and non-pecuniary remedies.⁶⁷⁴

735. *Al-Bahloul v. Tajikistan* is indeed one of the few cases exploring the remedial powers of an investment tribunal in the ECT context. However, the Tribunal in that matter ultimately declined to grant the requested injunctive relief, finding that the implementation of the remedy would be materially impossible in light of the time that had elapsed and the fact that the injunctive relief could give rise to conflicting subsequent claims.⁶⁷⁵ In particular, the Tribunal expressly noted that while a non-monetary remedy was possible, it was not mandatory.⁶⁷⁶

736. Contrary to the views of the Claimant, the case fails to provide any secure precedent for the grant of a final injunction, as a primary remedy or at all.⁶⁷⁷

⁶⁷² See, e.g., *The Case of the S.S. "Lotus"*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), at para. 44 (Exhibit RLA-201) ("[i]nternational law governs relations between independent States. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed").

⁶⁷³ **Exhibit CLA-140**, De Luca, Non-Pecuniary Remedies, para. 8.

⁶⁷⁴ Claimant's Memorial, para. 493.

⁶⁷⁵ **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC Case No. V. (064/2008)), Final Award, 8 June 2010, paras. 52-62.

⁶⁷⁶ The reasoning in *Al-Bahloul v. Tajikistan* moreover suffers from the same flaws outlined above with regard to reliance on the ILC Articles on State Responsibility, in that it concludes on the basis of summary reasoning, and without any evidence of State practice and opinio juris, that remedial rules set out therein are expressly limited to the State-to-State context may simply be translated to the investor-State context. See **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* (SCC Case No. V. (064/2008)), Final Award, 8 June 2010, paras. 41-42, 44, 47-49.

⁶⁷⁷ There appears to be only one other case under the ECT that deals with the remedial powers of a tribunal in ordering specific performance. In *Nycomb v. Latvia*, the ECT tribunal ordered the State to honour the terms of a contractual undertaking to pay a double tariff for electric power delivered in connection with a new electricity generating installation, going forward for a period of eight years in accordance with the contract, but declined to award future damages beyond the agreed contractual terms: **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v The Republic of Latvia*, Arbitral Award, 16 December 2003, sec. 5.2 b), p. 41. While framed as "specific performance", the remedy in practice remained a monetary payment, one that moreover simply reflected the State's prior sovereign decision to bind itself to particular contractual terms.

4.2.2. Investor State tribunals have failed to order cessation or discontinuance of an allegedly wrongful State measure as a final remedy

737. The Claimant also refers to an ICJ, *Rainbow Warrior*, in support of the proposition that arbitral tribunals have inherent powers to order the cessation or discontinuance of a wrongful act.⁶⁷⁸ The Claimant states that this test has been adopted by tribunals in investment cases, namely *Enron v. Argentina*, and *Micula v. Romania*, relying on academic commentary by Professor Schreuer.⁶⁷⁹

738. None of these materials offer any sound support to the Claimant's argument.

739. *Rainbow Warrior* arose in the completely distinct State-to-State context. As such, for reasons reviewed above, its reasoning cannot simply be translated into the investor-State context.

740. Investment treaty cases such as *Enron* or *Micula* purport to find a right to order restitution as a final remedy in the investment treaty context. Yet neither case provides sound authority for their conclusion, basing it on only sparse, ill-developed analysis. Moreover, both merely assert a theoretical right to restitution as a final remedy; neither provides this remedy in practice. As such, they provide no secure authority in support of an actual grant of the requested relief.

741. *Enron v. Argentina* is indeed the case most commonly cited by commentators as "evidence" investment treaty tribunals have a power to grant final injunctive remedies.⁶⁸⁰ The dispute arose from the investment made by Enron and its subsidiary, Ponderosa Assets L.P. in Transportadora de Gas del Sur (TGS), a gas transportation company. In their original claim, the Claimants took issue with stamp taxes allegedly imposed by certain Argentinean provinces on their investment. The Claimants not only sought a declaration that the taxes in question amounted to an unlawful expropriation, but asked that the tribunal decree the taxes annulled and to permanently enjoin their collection.

742. At the preliminary jurisdictional stage of the case, Argentina challenged the tribunal's power to order such injunctive relief. The tribunal found that it had the power in theory to award specific performance, stating:

⁶⁷⁸ Claimant's Memorial, para. 494, citing **Exhibit CLA-141**, Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986, between the two States and which related to the problems arising from the Rainbow Warrior Affair (the "Rainbow Warrior"), 30 April 1990, United Nations Reports of International Awards, Vol. XX, pp 215-284 (2006), p. 270.

⁶⁷⁹ Claimant's Memorial, paras. 496-497, citing **Exhibit CLA-142**, *Enron Corp. and Ponderosa Assets, LP v. Argentine Republic* (ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004, paras. 79-81; **Exhibit CLA-109**, *Micula, S.C. European Food S.A. v. Romania* (ICSID Case No. ARB/05/20, Award of 11 December 2013), para. 1313.

⁶⁸⁰ **Exhibit CLA-142**, *Enron Corp. and Ponderosa Assets, LP v. Argentine Republic* (ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004.

An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt that these powers are indeed available... The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts. Jurisdiction is therefore also affirmed on this ground.⁶⁸¹

743. The *Enron* tribunal justified its potential exercise of this power by relying on statements by the ICJ in *Rainbow Warrior*, one of several State-to-State claims relied upon by the Claimants in the *Enron* matter:

The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time when the order is issued.⁶⁸²

744. The *Enron* tribunal otherwise relied on the speculative commentary of Christoph Schreuer in his 2004 article, and on the decision of an investment treaty tribunal in *Goetz v. Burundi*.

745. The doctrinal reference to Professor Schreuer's analysis is no more than an argument *ad auctoritatem*, an authority that moreover (as set out below) has not been followed for the past 16 years in actually granting any final injunctive remedy.

746. As for *Goetz v. Burundi*, the tribunal in that matter expressly noted that a decision to prefer restitution over damages was within the sovereign choice of Burundi.⁶⁸³ This was not a case of a tribunal imposing a final injunction on a Respondent State.⁶⁸⁴

747. Further reducing its value as even persuasive precedent, the tribunal in *Enron v. Argentina* did not grant any injunctive relief as a practical matter. This was because, between the initial stages of the matter and the final award, the Claimants changed the focus of their claim and abandoned their original requests.

⁶⁸¹ *Ibid.*, paras. 79, 81.

⁶⁸² *Ibid.*, citing *Rainbow Warrior (New Zealand vs. France)* (Award) (1990 XX RIAA 217), para. 114.

⁶⁸³ *Antoine Goetz et consorts v. République du Burundi* (ICSID Case No. ARB/95/3, Award of 10 February 1999) (Exhibit RLA-202).

⁶⁸⁴ In this sense *Goetz v. Burundi* is similar to *Arif v. Moldova*, where the tribunal ordered either restitution or compensation, at the Respondent State's election.

748. The final award in *Enron* instead deals with an ancillary claim regarding Argentina's refusal to allow tariff adjustments in accordance with the US Producer Price Index (PPI) and the enactment of a law that nullified PPI adjustments and the calculation of tariffs in US dollars. In its Award on the Merits the tribunal framed the issue of restitution as follows:

The Treaty does not specify the damages to which the investor is entitled in case of breach of the standards of treatment different from expropriation, i.e., fair and equitable treatment or the breach of the umbrella clause. Absent an agreed form of restitution by means of renegotiation of contracts or otherwise, the appropriate standard of reparation under international law is compensation for the losses suffered by the affected party, as was established by the Permanent Court of International Justice in the *Chorzów* Case [...]⁶⁸⁵

749. Ultimately, the tribunal decided to grant damages for breach of the treaty without further reference to restitution in kind, which remained a theoretical option in the interim award.

750. The *Enron* tribunal's comment with regard to the availability of injunctive relief therefore remains entirely theoretical, and leaves no guidance as to whether that tribunal would indeed have awarded an injunction as a final remedy. Moreover, the tribunal's reasoning on the point is summary. In referring to "ample practice", the tribunal in fact referred only to State-to-State cases. Moreover, the assertion of an international tribunal's inherent authority must take account of other inherent limitations at international law, notably the principle that a sovereign right of action should only be deemed limited through the explicit consent of the State.

751. Since the *Enron* award was issued, not a single investment treaty tribunal to our knowledge has in fact relied upon the decision to award a final injunction.

752. In *Micula v. Romania*, the tribunal was faced with a request that a previously-granted interim injunctive remedy be continued on a permanent basis. The tribunal (citing *Enron v. Argentina*, and Christoph Schreuer) concluded that it would have the power to grant such relief as part of its mandate to resolve disputes, and that neither the ICISD Convention nor the BIT placed any limitations on the remedies that could be awarded.⁶⁸⁶ However, the tribunal rejected the request, stating that there was no continuing right to maintaining any status quo

⁶⁸⁵ *Enron Corp. and Ponderosa Assets, LP v. Argentine Republic* (ICSID Case No. ARB/01/3, Award of 22 May 2007), para. 359 (Exhibit RLA-141).

⁶⁸⁶ **Exhibit CLA-109**, *Micula v. Romania* (ICSID Case No. ARB/05/20, Award of 11 December 2013), paras. 1312-1313.

following the dismissal of the claimants' claim on the merits, and that it was not practicable for the tribunal to grant measures that might need to be reconsidered after the tribunal had become *functus officio*.⁶⁸⁷

753. Thus, the *Micula* tribunal, while purporting to assert a theoretical power, again failed to exercise the power, and moreover pointed to further jurisdictional and practical impediments militating against such remedy.

754. The paucity of actual precedent is indeed reflected in Professor Schreuer's more recent consideration of this remedial issues, updating his original theoretical article relied upon by the *Enron* tribunal.⁶⁸⁸ Close inspection of the alleged "precedents" cited confirm to the contrary the absence of any precedent for alleged remedial right to a final injunction. Of the cases Professor Schreuer cites to "demonstrate" his thesis, none in fact impose a mandatory final injunction on the State:

- In several cases, the cited investment tribunals expressly acknowledged their lack of jurisdiction to order a non-pecuniary remedy.⁶⁸⁹

⁶⁸⁷ *Ibid.*, para. 1320.

⁶⁸⁸ Christoph Schreuer first proposed his theory in favour of admitting non-pecuniary remedies in investment treaty arbitration in his article "Non-Pecuniary Remedies in ICSID Arbitration", 20 *Arbitration International* (2004) 325. He most recently updated his position in this regard in a keynote address at the Fourth Annual Damages in International Arbitration Conference in Vienna on 2 October 2015. His remarks were adapted into an article, "Alternative Remedies in Investment Arbitration", 3 *Journal of Damages in International Arbitration* (2016) 1 (Exhibit RLA-203) (Schreuer, *Alternative Remedies in Investment Arbitration*). As this survey shows, in fifteen years, not a single arbitral tribunal has in fact imposed a final injunction as a remedy in this period.

⁶⁸⁹ *LIAMCO v. Libya*, Award, 12 April 1997, 20 *International Legal Materials* (1981) 1 at 63, 65. *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*, Award (Merits), 10 October 1973, 53 *International Law Reports* 297, para. 200 (Exhibit RLA-204): "when by the exercise of a sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalisation of the enterprise and its assets in a manner which implies finality, **the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages**" [Emphasis added.]; See *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1, Award of 25 July 2007), *LG&E Energy Corp.*, para. 265 (Exhibit RLA-198): "the Tribunal cannot go beyond its fiat in the Decision on Liability. **The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty. Consequently, the Tribunal arrives at the same conclusion: the need to order and quantify compensation**" [Emphasis added.]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11, Decision on Provisional Measures of 17 August 2007), para. 79 (Exhibit RLA-205). The claimants in *Occidental* sought to enjoin Ecuador from occupying their facilities and from carrying on their economic activity pending resolution of the dispute. Relying on the express limitations in Article 35 ILC, the tribunal rejected as "legally impossible" the request for restitution, holding that: "[i]t is well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor's entitlement, specific performance must be deemed legally impossible." The tribunal also rejected restitution as disproportionate interference with Ecuador's sovereignty: "**To impose on a sovereign State reinstatement of a foreign investor in its concession, after a nationalization or termination of a concession license or contract by a State, would constitute a reparation disproportional to its interference with the sovereignty of the State when compared to monetary compensation.**" (*Ibid.*, para. 84).

- In other cases, restitution was simply cited as an option at the State's election, should it prefer a non-pecuniary remedy.⁶⁹⁰
- In still other cases, the investment tribunal asserted a right to order restitution in theory, but failed to do so in practice.⁶⁹¹

755. Cases cited by Professor Schreuer in other categories similarly fail to impose mandatory final injunctions. In certain cases, the final award was framed as an obligation on the part of the State to adopt a certain course of action, but the action in question was either to reimburse or to pay certain monies.⁶⁹²

756. In other cases, the final award was framed as declaratory relief, i.e., an express finding on the part of the investment treaty tribunal to the effect that the State had breached its international obligations (as opposed to an award of damages, or indeed of any other relief) (i.e., satisfaction).⁶⁹³

⁶⁹⁰ *Antoine Goetz et consorts v. République du Burundi* (ICSID Case No. ARB/95/3, Award of 10 February 1999) (Exhibit RLA-202): in this case, the tribunal addressed a claimant's request for restitution of a withdrawn free zone certificate and in the alternative the payment of damages. Finding the withdrawal of the certificate tantamount to expropriation, the tribunal offered Burundi the choice between returning the free zone certification and related tax and customs exemptions, or paying the claimants an adequate and effective indemnity, acknowledging that choice to be within Burundi's sovereign discretion: **...il incombe à la République du Burundi, en vue d'établir la licéité internationale de la décision litigieuse de retrait de l'agrément, d'accorder aux requérants l'indemnité adéquate et effective prévue à l'article 4 de la Convention belgo-burundaise de protection de investissements, à moins qu'elle ne préfère leur restituer le bénéfice du régime de la zone franche. Le choix relève de la décision souveraine du Gouvernement burundais.** Faute de prendre dans un délai raisonnable aucune de ces deux mesures, la République du Burundi commettrait un acte internationalement illicite dont il appartiendrait au Tribunal de tirer les conséquences appropriées. (para. 133) [Emphasis added.]; **Exhibit CLA-132, Mr. Franck Charles Arif v. Republic of Moldova**, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 571: "[t]he Tribunal considers restitution to be the preferable remedy, but **as in the present case Respondent has not been able to confirm that restitution is possible, and the Tribunal cannot supervise any restitutionary remedy, the best course is to order restitution and compensation as alternatives, with the remedy of compensation suspended for a period of ninety days.** This provides Respondent with the opportunity, in light of the findings of this award, to formulate and propose to Claimant the exact mechanism of restitution. If restitution is not possible, or the terms of the restitution proposed by the Respondent are not satisfactory to Claimant then the damages awarded will satisfy the violation of Claimant's right to fair and equitable treatment. This solution provides a final opportunity to preserve the investment, while also preserving the Claimant's right to damages if a satisfactory restitutionary solution cannot be found". [Emphasis added.] In *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2, Award of 18 May 2010) (Exhibit RLA-206), the State in a contractual dispute with the investor had legislatively extinguished a right to arbitration under the contract, forcing the investor to go before domestic Jordanian courts. The Tribunal in its award elected to enforce the arbitration clause in the original contract, as the remedy that would most effectively implement the Chorzow standard of full restitution. However, in so doing, **...the Tribunal notes that the Respondent has already indicated its willingness to accept such an order".** *Ibid.*, para. 131. Thus, the situation was not one in which the tribunal sought to impose a mandatory injunction on a State over the latter's objections. Rather, the State itself had indicated its openness to this outcome, which in any event simply implemented an express contractual undertaking already entered into by the State.

⁶⁹¹ *Enron Corporation Ponderosa Assets, L.P., v. Argentine Republic* (ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004) (Exhibit RLA-207); **Exhibit CLA-109, Micula v. Romania** (ICSID Case No. ARB/05/20, Award of 11 December 2013), paras. 1312-1313.

⁶⁹² For example, in *Semos v. Mali*, the tribunal ordered the State to reimburse an unduly collected stamp duty: *Société d'Exploitation des Mines d'Or de Sadiola SA ("Semos") v. Republic of Mali*, Award, 25 February 2003, 10 ICSID Reports 114 (Exhibit RLA-208). See also *Nycomb v. Latvia*, as discussed in n. # above. While in theory distinct from a pure award of damages in that they were directed at the non-collection, restitution, and payment of money by way of specific performance, in practice they essentially amounted to an award of monetary compensation.

⁶⁹³ *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2, Award of 16 September 2015), paras. 554-560 (Exhibit RLA-209).

4.2.3. The Claimant's heavy reliance on *Chevron v. Ecuador* simply demonstrates a contrario the absence of any support for its requested relief

757. Lacking any secure precedent for the extraordinary relief it now asks of this Tribunal, the Claimant instead places heavy reliance on *Chevron v. Ecuador*, which it describes as a "significant recent example where a tribunal considered it appropriate to grant relief of a similar nature to that sought by NSP2AG in this arbitration".⁶⁹⁴ As set out below, the tribunal's remedial order in *Chevron v. Ecuador* came in circumstances markedly different from those at issue in this arbitration. Moreover, the relief awarded by the *Chevron* tribunal was markedly different from that requested here. All in all, the Claimant's heavy reliance on *Chevron v. Ecuador* simply underscores the absence of any secure precedent for its currently-requested relief.

4.2.3.1. The concrete circumstances of *Chevron* (judicial corruption) are significantly different from those at issue here

758. The treaty dispute in *Chevron v. Ecuador* stemmed from a USD 9.5 billion judgment issued by a court in the Ecuadorian town of Lago Agrio, which found Chevron and Texaco Petroleum (together, the investors) liable for environmental damage at the site of an oil concession (the impugned Judgment). The investors brought a dispute under the United States-Ecuador bilateral investment treaty (US-Ecuador BIT), alleging that they had been released from environmental liability as a result of a 1995 settlement agreement with Ecuador but that, in breach of that agreement, the Lago Agrio litigation had been commenced by private plaintiffs in 2003. The central element of the investors' claims in the dispute under the US-Ecuador BIT was that this domestic litigation was subject to serious procedural failings, including corrupt collusion by the principal judge in the case with the private plaintiffs.

759. The *Chevron* tribunal split its consideration of the dispute into three "tracks": Track I considered limited jurisdictional issues, notably whether Chevron was covered by certain agreements which limited Texaco Petroleum's liability for environmental harm; Track II considered additional issues of jurisdiction and the merits (the phase cited by the Claimant in the present case and discussed further below); Track III is pending, and will principally examine issues of quantum, including compensation for injuries claimed by the investors (such as reimbursement for sums collected through the enforcement of the impugned

⁶⁹⁴ Claimant's Memorial, para. 499, citing **Exhibit CLA-145**, *Chevron Corporation and Texaco Petroleum Company v. the Republic of Ecuador* (UNCITRAL, PCA Case No 2009-23, Second Partial Award on Track II of 30 August 2018) (*Chevron v. Ecuador*), paras. 9.6-9.9.

Judgment), moral damages for non-pecuniary harm suffered, indemnities, miscellaneous reimbursements, payments, expenses and interest, as well as any remaining issues of non-compensatory restitution.⁶⁹⁵

760. The Claimant in its argument in the present proceeding relies on the Second Partial Award (Track II) in *Chevron v. Ecuador*. In that decision, the tribunal concluded that the judge in the domestic Lago Agrio proceedings had been bribed USD 500,000 to permit the plaintiffs to “ghostwrite” the judgment in their favour. Not surprisingly, the tribunal found that this resulted in a denial of justice under customary international law and under the US-Ecuador BIT.⁶⁹⁶ The tribunal also upheld claims of a breach of the umbrella clause (i.e., the need to respect “any other agreement” entered into by the State), finding that the 1995 settlement agreement with Ecuador protected the investors from any collective or diffuse liability for environmental harm.⁶⁹⁷ However, the tribunal dismissed the investors’ broader claims of “institutional corruption” within the Ecuadorian legal system as a whole, finding that it did not need to rule on these claims based on its findings that the Judgment itself had been impugned.⁶⁹⁸

761. The finding of a denial of justice was central to the relief granted. The tribunal reiterated that, given the presumption that domestic courts act properly, the threshold for denial of justice is high, and “a court is permitted a margin of appreciation before the threshold of a denial of justice can be met”.⁶⁹⁹ However, the tribunal held that “[the Judge’s] conduct was grossly improper by any moral, professional and legal standards”,⁷⁰⁰ based upon “the most thorough documentary, video and testimonial proof of fraud ever put before an arbitral tribunal”.⁷⁰¹ The tribunal noted that it had no powers to declare the ruling of the Judge void, as this was an “internal remedy” available only to Ecuador. In light of this limitation and its findings, the tribunal instead ordered Ecuador to suspend the enforceability of the ruling; to take steps to preclude all third parties from enforcing the ruling; and to notify any other state where enforcement was sought of the tribunal’s findings (including proceedings in Ecuador, Brazil, Canada and Argentina).

762. In granting this relief, the tribunal in *Chevron v. Ecuador* recognized that “reparation for an internationally wrongful act varies, depending upon the

⁶⁹⁵ **Exhibit CLA-145**, *Chevron v. Ecuador*, Second Partial Award, paras. 9.119 and 9.121. See also *Chevron v. Ecuador*, Claimants’ Memorial on the Merits (6 September 2010), Part V (Exhibit RLA-210).

⁶⁹⁶ **Exhibit CLA-145**, *Chevron v. Ecuador*, Second Partial Award, paras. 8.71, 8.76.

⁶⁹⁷ *Id.*, 8.4-8.11, 8.78.

⁶⁹⁸ *Id.*, paras. 8.74-8.75.

⁶⁹⁹ *Id.*, para. 8.42.

⁷⁰⁰ *Id.*, para. 8.59.

⁷⁰¹ *Id.*, para. 8.54.

concrete circumstances surrounding each case and the precise nature and scope of the inquiry under international law”.⁷⁰²

763. Factually, the “concrete circumstances” before the tribunal in *Chevron v. Ecuador* (including extraordinary circumstances of judicial corruption that the tribunal considered “violate[d] international public policy”⁷⁰³) were significantly different from those at issue in the present dispute.

4.2.3.2. The remedy issued in *Chevron* differs substantially from that requested here

764. The remedy issued by the *Chevron* tribunal differs substantially from the remedy the Claimant requests in the present matter – contrary to the Claimant’s assertion that the grant of relief requested is of a “similar nature”.⁷⁰⁴

765. First, in terms of the circumstances, the tribunal’s order in *Chevron* followed on from repeated attempts by the tribunal to stay enforcement of the Ecuadorean proceedings by interim orders pending the outcome of its enquiries, which attempts Ecuador simply had defied.

766. The tribunal first ordered a stay of the enforcement proceedings in an Order on Interim Measures on 9 February 2011, and repeated this order in interim awards on interim measures rendered on 25 January 2012 and 16 February 2012. In these awards, the tribunal had ordered the Respondent “to take all measures at its disposal” and “to take all measures necessary” to suspend or cause to be suspended the enforcement and recognition both within and without Ecuador of the impugned Judgment.⁷⁰⁵ Despite this, in violation of these orders, Ecuador made the impugned Judgment final, enforceable and subject to execution on 3 August 2012. In its Fourth Interim Award on Interim Measures, the tribunal rebuked Ecuador’s actions, and found that the status accorded by Ecuador to the impugned Judgment “led directly to what the Tribunal was seeking expressly to preclude temporarily by its orders and awards on interim measures, namely the attempted enforcement and execution of the [impugned Judgment] [...] not only within but also outside Ecuador, currently in the state courts of Canada, Brazil and Argentina and possibly in the near future also in the state courts of other

⁷⁰² *Id.*, para. 9.11.

⁷⁰³ *Id.*, para. 9.16 (“judicial bribery must rank as one of the more serious cases of corruption, striking directly at the rule of law, access to justice and public confidence in the legal system; and also, as regards the foreign enforcement of a corrupt judgment, at the law of nations”). In considering appropriate remedies, the Tribunal also made specific reference to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Basic Principles on the Independence of the Judiciary and the UN Convention on Corruption.

⁷⁰⁴ Claimant’s Memorial, para. 499.

⁷⁰⁵ *Chevron v. Ecuador*, Order on Interim Measures (9 February 2011), pp. 3-4 (Exhibit RLA-211).

countries”.⁷⁰⁶ The tribunal stated that it was “difficult now to exaggerate the risks” and that Ecuador’s actions had resulted in “increasingly grave risks that enforcement and execution” of the impugned Judgment “will imperil to a very significant extent the overall fairness and the efficacy of these arbitration proceedings”.⁷⁰⁷

767. The tribunal’s orders in the Second Partial Award (Track II) clearly are a continuation of the interim orders it already had rendered over a number of years. Moreover, the issues relating to the earlier interim awards have not been finally resolved. In Track II, the tribunal confirmed that it has yet to consider either claims of compensation by the investors for the breach of the interim awards, or Ecuador’s application of reconsideration of all of these awards.⁷⁰⁸ Furthermore, as noted above, the tribunal in *Chevron v. Ecuador* has not yet considered the arguments on quantum as a whole,⁷⁰⁹ and the final outcome of the case remains to be determined.

768. The tribunal’s award in *Chevron* therefore effectively amounted to an interim order, issued in order to avoid exacerbating a dispute and pending full and final outcome of the claim; it was issued as an interim stay on a judicial decision notoriously based upon corruption, where failure to respect an earlier interim order to the same effect risked undermining the fairness and equity of the arbitral proceedings.

769. These circumstances are entirely distinct from those of the present case, where the Claimant effectively demands a permanent final injunction as a primary remedy, and where that final injunction seeks to suspend the legitimate exercise of a State’s regulatory powers.

4.2.3.3. The relief granted in *Chevron* was akin to an anti-suit injunction

770. The relief granted by the tribunal in *Chevron v. Ecuador* was more akin to an anti-suit injunction rather than to an order suspending State regulatory power.

771. Anti-suit injunctions are a relatively common phenomenon in multi-jurisdictional proceedings, unlike the final injunction the Claimant requests here (for which there is no clear precedent in international arbitration). The difference in the

⁷⁰⁶ *Chevron v. Ecuador*, Fourth Interim Award on Interim Measures (7 February 2013), para. 80 (Exhibit RLA-212).

⁷⁰⁷ *Id.*, para. 85.

⁷⁰⁸ **Exhibit CLA-145**, *Chevron v. Ecuador*, Second Partial Award, para. 9.121.

⁷⁰⁹ *Id.*, para. 10.14 (“all issues as to reparation in the form of compensation for any injuries sustained [...] and denied by the Respondent, including any assessment of the amount of compensation, moral damages, indemnities, reimbursements, payments, expenses and interest, are currently assigned for further submissions by the Parties to Track III. These issues are not decided in this Award”).

nature of the relief requested again disallows *Chevron* as a relevant precedent for the Claimant's request in the present matter.

772. Anti-suit injunctions are aimed at discouraging parallel proceedings by ordering a party to an arbitration to refrain from commencing or continuing a suit in another forum,⁷¹⁰ to reduce the risk of contradictory decisions, wasted resources and to avoid the risk of duplicate proceedings oppressing one of the parties.⁷¹¹ In considering applications for anti-suit injunctions, tribunals and national courts have commonly applied principles such as the likelihood of success of the claim before them, the risk of irreparable harm to one of the parties, the balance of convenience in granting the order, and the principle of international comity.⁷¹² All of these factors applied in *Chevron v. Ecuador* where, as noted above, the tribunal had expressly found that enforcement or recognition actions arising directly from the impugned Judgment remained pending against Chevron in Ecuador, Canada, Brazil and Argentina, causing grave harm to the investors and undermining the fairness and efficacy of the US-Ecuador BIT proceedings.⁷¹³ In particular, the tribunal found that, based on its findings of gross corruption in rendering the impugned Judgment, "[a]s a matter of international comity, it must follow that the [Judgment] should not be recognised or enforced by the courts of other States".⁷¹⁴

773. The tribunal's findings on this issue were clearly aimed at these successive and ongoing proceedings which arose as a direct result of the impugned Judgment, which could not be addressed by damages alone. The investors had, for example, argued that "a judgment may be filed anywhere in the world and take on a life of its own" and that if the plaintiffs succeeded in enforcing the impugned Judgment, the investors would be "extremely unlikely to collect any monetary award that this Tribunal may render".⁷¹⁵

⁷¹⁰ Emmanuel Gaillard, "Reflections on the Use of Anti-Suit Injunctions in International Arbitration" in Loukas A. Mistelis and Julian David Mathew Lew (eds), *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* (Kluwer Law International 2006), p. 201 (Exhibit RLA-213).

⁷¹¹ See International Law Association, *RECOMMENDATIONS ON LIS PENDENS AND RES JUDICATA AND ARBITRATION*, adopted by ILA Resolution No. 1/2006, para. 2 (Exhibit RLA-214).

⁷¹² See, e.g., Julie Bédard and Shannon T. Lazzarini, "Anti-suit Injunctions in International Arbitration", in Laurence Shore, Tai-Heng Cheng, et al. (eds), *INTERNATIONAL ARBITRATION IN THE UNITED STATES*, (Kluwer Law International 2017), pp. 290, 293 (Exhibit RLA-215); Nadja Erk-Kubat, *PARALLEL PROCEEDINGS IN INTERNATIONAL ARBITRATION: A COMPARATIVE EUROPEAN PERSPECTIVE* (Kluwer Law International 2014), pp. 219-220 (Exhibit RLA-216).

⁷¹³ **Exhibit CLA-145**, *Chevron v. Ecuador*, Second Partial Award, para. 1.68 and Annex 4 to Part I; *Chevron v. Ecuador*, Fourth Interim Award on Interim Measures (7 February 2013), para. 85 (Exhibit RLA-212).

⁷¹⁴ **Exhibit CLA-145**, *Chevron v. Ecuador*, Second Partial Award, para. 9.16.

⁷¹⁵ See *Chevron v. Ecuador*, Claimants' Memorial on the Merits (6 September 2010), paras. 545-546 (Exhibit RLA-210). The Tribunal seemingly recognized these concerns in one of its Orders on Interim Measures, stating "NOTING the Claimants' further concerns as to immediate attempts thereafter to enforce such judgment by the Lago Agrio plaintiffs (within and without Ecuador), potentially rendering these arbitration proceedings inefficacious and, if not thereby thwarting the Claimants' claims against

774. By contrast, no such circumstance exists in the present case. The present dispute is not the subject of multiplying enforcement actions adversely affecting the rights of the Claimant in ways that cannot be remedied through compensation.

4.2.3.4. The Chevron remedy amounts to an order enjoining a Court-ordered financial penalty

775. Indeed, the *Chevron* case is more akin to the few cases Professor Schreuer relies upon as alleged evidence of a right to impose a “final” injunction, which are in fact interim orders substituting or relieving claimants from purely financial penalties pending the final resolution of a dispute. As described in section 4.2.2, above, such cases are not good precedent for requests for orders for a final injunction seeking suspension of State regulatory power.

776. The tribunal in *Chevron* was seeking to avoid the direct imposition by the Ecuadorian court of a financial penalty (an award of damages) on the Chevron investors, in circumstances where the impugned Judgment had been found manifestly to result from corruption. Had that award or fine already been levied in the domestic litigation, the tribunal presumably would simply have ordered payment of an equivalent award of damages. Instead, the tribunal sought to avoid the imposition of any financial penalty on the investors, while deferring considerations on indemnification against Ecuador in connection with financial implications of the impugned Judgment until Track III of the proceedings.⁷¹⁶ This is substantially different from ordering the suspension of application to a particular party by the European Union of a generally applicable directive addressed to all EU Member States, as a final remedy.

4.2.3.5. The Chevron tribunal in effect recognized it lacked a general power to reverse State action

777. Finally, the tribunal in *Chevron v. Ecuador* reached its remedial decision having first recognized that it lacked the power to simply reverse the decision of the domestic court, despite having found a clear denial of justice.⁷¹⁷ Indeed, the tribunal in its decision repeatedly stressed that a declaration of nullity of the impugned Judgment “is not an appropriate remedy under international law”.⁷¹⁸

778. The tribunal therefore found itself in a situation where it recognized that it lacked the power to reverse or nullify a State court decision. Faced with this impasse, it

the Respondent, causing loss to the Claimants not compensatable in damages payable by the Respondent”. See *Chevron v. Ecuador*, Procedural Order and Further Order on Interim Measures (28 January 2011), p. 2.

⁷¹⁶ **Exhibit CLA-145**, *Chevron v. Ecuador*, Second Partial Award, paras. 9.43-9.45.

⁷¹⁷ *Id.*, paras. 9.14, 9.16.

⁷¹⁸ See, e.g., *id.*, paras. 9.38, 9.61, 9.63.

adopted the fudge of ordering Ecuador to suspend its enforcement “by any means the State might choose”. This was in the highly specific circumstances of Ecuador having repeatedly defied the tribunal’s interim directions, thereby putting the integrity of the *Chevron* proceedings at risk. This is quite different from ordering the suspension of the application of a general regulatory regime by a State as a final remedy.

779. In other words, far from supporting the Claimant’s remedial request either for an interim or for a final injunction, the *Chevron* decision instead supports the position that an international arbitration tribunal lacks the power to reverse State decision-making.

780. Overall, the relief requested and granted in *Chevron v. Ecuador* is far from relief of a “similar nature” to that requested by the Claimant. Given the radical difference in circumstances and in relief requested, *Chevron* does not stand as a precedent for what the Claimant requests in the present case. If anything, the fact that the Claimant placed such importance on the case in its argument suggests its failure to find any truly relevant precedent for the final relief it now requests.

4.3. The Claimant Fails to Meet the Standard for Any Type of Injunction

4.3.1. The Claimant is in fact requesting that the Tribunal grant a permanent injunction against the exercise of a sovereign right to regulate

781. As the third tenet of its request for relief, the Claimant argues that the relief it requests is “necessary to prevent the [REDACTED] the Amending Directive would otherwise cause”.⁷¹⁹

782. The Claimant avoids characterizing its remedial request as a final injunction, instead using terms such as “the relief requested” or simply, “restitution”,⁷²⁰ and attempts to distinguish its request from “interim injunctive relief”.⁷²¹ This seems a tacit recognition by the Claimant that the Tribunal would lack power to grant the final injunction that it requests.

783. Regardless, the Claimant ultimately is forced to acknowledge that “**injunctive relief would be one way of describing the relief sought by NSP2AG in these proceedings**”.⁷²² Given the nature of its request (to permanently enjoin

⁷¹⁹ Claimant’s Memorial, para. 487(iii).

⁷²⁰ The Claimant implicitly recognizes that it is seeking injunctive relief through the discussion of cases and commentary, which it cites as support for its claim that the Tribunal has power to award final injunctive relief. See, e.g., Claimant’s Memorial, paras. 496-498.

⁷²¹ Claimant’s Memorial, para. 513.

⁷²² *Id.*, para. 497.

the European Union from applying the Gas Directive to the Claimant), an injunction is in fact exactly what the Claimant is requesting.

784. Accordingly, apart from the issue of whether the Tribunal has the power to grant such a final injunction, at all (*quod non*), the Claimant must first demonstrate that conditions for injunctive relief of any kind have been met in the present case. It has failed to do so.

4.3.2. The Claimant seeks to substitute its own self-serving test for granting injunctive relief

785. The Claimant avoids using the term “injunction” in order to gloss over and ignore the circumstances in which injunctive relief might potentially be granted in lieu of damages. Instead, the Claimant concocts and applies a test of its own making: (i) that damages would not be an “adequate” remedy;⁷²³ (ii) that the requested relief is appropriate because it is “not materially impossible”;⁷²⁴ (iii) that the requested relief “does not ... involve a burden out of all proportion to the benefit derived from granting restitution instead of compensation”;⁷²⁵ and (iv) that the requested remedy “would have no material impact on the Respondent”.⁷²⁶

786. The Claimant provides no legal authority for its self-serving test. On the facts alone, properly assessed, the Claimant would fail even this test of its own making, as outlined below. More importantly, however, the principles the Claimant has cobbled together do not constitute the proper test for injunctive relief.

787. In asking that the Tribunal “order that the EU, by means of its own choosing, remove the application of the [Gas Directive]”,⁷²⁷ the Claimant makes a transparent attempt to adopt the language of the tribunal in *Chevron v. Ecuador*.⁷²⁸ However, as outlined above, the tribunal’s finding in *Chevron v. Ecuador* is not analogous to the circumstances here. As explained, in that case the tribunal recognized it had no power to order a declaration of nullity of the impugned Judgment, stating that it “is not an appropriate remedy under international law”⁷²⁹ and instead granted in effect continuing interim relief to the investors in light of Ecuador’s repeated disavowal of its interim orders with respect to the recognition and enforcement of a corrupt judgment. This is different from

⁷²³ *Id.*, paras. 487(iii), 507.

⁷²⁴ *Id.*, para. 503.

⁷²⁵ *Id.*, para. 503.

⁷²⁶ *Id.*, para. 512.

⁷²⁷ *Id.*, para. 486.

⁷²⁸ See, e.g., **Exhibit CLA-145**, *Chevron v. Ecuador*, Second Partial Award, para. 10.13(i) (“[t]he Respondent shall ... [t]ake immediate steps, of its own choosing, to remove the status of enforceability from the Lago Agrio Judgment”).

⁷²⁹ See, e.g., *id.*, paras. 9.38, 9.61, 9.63.

the present circumstances, where the Claimant is requesting a final injunction of State legislative action as its primary form of remedy.

788. Furthermore, the tribunal in *Chevron v. Ecuador* did in fact apply a more stringent test in granting the early interim relief which ultimately led to the orders in the Second Partial Award (Track II).⁷³⁰

789. The discussion of the *Chevron* tribunal of factors such as urgency and irreparable harm is consistent with the approach of investor-State tribunals and national courts, as set out below.

4.3.3. The ECT provides no guidance on when or how injunctions may appropriately be granted

790. Even if a tribunal were to conclude that the ECT, in principle, gave it jurisdiction to grant a final injunction, that tribunal would nonetheless need to take guidance from existing rules governing the grant of such relief, notably those applicable to the grant of interim injunctions.

791. The ECT provides no guidance on when or how injunctions may appropriately be granted. However, the mere fact that the grant of such relief might be possible in no way requires a tribunal to order it, even if requested by a claimant.

792. To the contrary, all available sources of guidance suggest that the remedy of a final injunction in any circumstances would be exceptional. Notably, applicable rules strongly favour granting an injunction only if the loss is not quantifiable in damages.⁷³¹

793. The Claimant is here requesting final injunctive relief *prior* to any determination of damages, precisely in order to frustrate the application of established rules providing that even an interim injunction is available only where the loss cannot be compensated in damages.

⁷³⁰ *Chevron v. Ecuador*, Second Interim Award on Interim Measures, para. 2 (Exhibit RLA-217) (“[t]he Tribunal determines further that the Claimants have established, for the purposes of their said applications for interim measures, (i) a sufficient case as regards both this Tribunal’s jurisdiction to decide the merits of the Parties’ dispute and the Claimants’ case on the merits against the Respondent; (ii) a sufficient urgency given the risk that substantial harm may befall the Claimants before this Tribunal can decide the Parties’ dispute by any final award; and (iii) a sufficient likelihood that such harm to the Claimants may be irreparable in the form of monetary compensation payable by the Respondent in the event that the Claimants’ case on jurisdiction, admissibility and the merits should prevail before this Tribunal”). See also **Exhibit CLA-145**, *Chevron v. Ecuador*, Second Partial Award, para. 9.1 (“[t]he Tribunal here addresses the Claimants’ and the Respondent’s material requests for relief ... in light of the decisions taken in this Award, together with the Tribunal’s earlier awards, decisions and orders”).

⁷³¹ See paras 795-796, *infra*.

4.3.4. The threshold for obtaining even an interim injunction is high

794. Investor-State tribunals have been consistent in their findings that the grant of even an *interim* injunction is an exceptional remedy, and subject to stringent conditions.

795. In particular, tribunals have considered that the following conditions, *inter alia*, must be met:

- a. urgency and necessity (the latter being interpreted as, the harm caused by failure to grant the injunction is not of the kind that could be compensated in damages).⁷³²
- b. that urgent and irreparable harm to the claimants exists, and “greatly” outweighs the harm that would be caused to a respondent State (that is, that the balance of convenience favours the grant of injunctive relief).⁷³³
- c. that the loss must not be compensable in damages.⁷³⁴

4.3.5. Domestic courts similarly subject injunctive relief to a high threshold

796. Such rigorous standards are also applied by domestic courts, in considering whether to grant injunctions. For example:

- in the United States, to seek a permanent injunction, an applicant must prove: (i) that they have suffered irreparable injury; (ii) that remedies available at law, such as monetary damages, are inadequate to compensate for the injury; (iii) that the remedy in equity is warranted upon consideration of the balance of hardships between the parties; and (iv) that the permanent injunction sought would not hurt public interest.⁷³⁵
- In the United Kingdom, the test for a court to grant an injunction likewise requires consideration of four key questions: (i) whether there is a serious issue to be tried; (ii) whether damages would be an adequate

⁷³² Provisional measures must be necessary to avoid irreparable harm and not merely convenient or appropriate; there must be an imminent danger of serious prejudice. See *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* (UNCTRAL, Order on Interim Measures of 2 September 2008), para. 39 (Exhibit RLA-218); *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38, Procedural Order No. 2 on Application for the Grant of Provisional Measures of 24 November 2014), paras. 46, 49 (Exhibit RLA-219); *Komaksavia Airport Invest Ltd. v. Republic of Moldova* (Arbitration SCC EA 2020/130, Emergency Award on Interim Measures of 2 August 2020), paras. 77-78 (Exhibit RLA-220).

⁷³³ See, e.g., *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38, Procedural Order No. 2 on Application for the Grant of Provisional Measures of 24 November 2014), para. 91 (Exhibit-219).

⁷³⁴ See, e.g., *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19, Decision on Claimant’s Request for Provisional Measures of 17 May 2006), para. 34 (Exhibit RLA-221); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11, Decision on Provisional Measures of 17 August 2007), para. 92 (Exhibit RLA-205); *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24, Order [on Provisional Measures] of 6 September 2005), para. 38 (Exhibit RLA-222); *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information Regarding ICSID Case ARB(AF)/97/1 of 27 October 1997), para. 8 (Exhibit RLA-223).

⁷³⁵ See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) (Exhibit RLA-224); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987) (Exhibit RLA-200).

remedy; (iii) whether a balance of convenience can be struck; and (iv) whether there are any other special factors.⁷³⁶

- In Canada, the Supreme Court has adopted the same test for the grant of interlocutory injunctions as laid down by the courts in the United Kingdom.⁷³⁷ The Ontario Court of Appeal has held specifically that, to obtain a permanent injunction, a party must establish: (i) its legal rights; (ii) that damages are an inadequate remedy; and (iii) that there is no impediment to the court's discretion to grant an injunction.⁷³⁸
- In EU law, the EU General Court hearing an application for interim measures may order the suspension of operation of an act, or other interim measures, if it is established that (i) such an order is justified, *prima facie*, in fact and in law; and (ii) that it is urgent in so far as, in order to avoid serious and irreparable harm to the interests of the party seeking those measures, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, with the result that an application for interim measures must be dismissed if any one of them is absent.⁷³⁹ The judge hearing an application for interim relief is also required (iii) to undertake, when necessary, a weighing of the competing interests.⁷⁴⁰ In principle, a harm that is purely pecuniary in nature does not constitute a serious and irreparable harm, since it is, by definition, capable of being compensated in its entirety. Case law has confirmed that the possibility of bringing an action for damages is in itself sufficient to demonstrate that financial damage is, as a rule, reparable, despite the uncertainty of success attaching to such an action.⁷⁴¹

⁷³⁶ See the seminal test as captured by Lord Diplock in *American Cyanamid Co Ltd v Ethicon Ltd* [1975] AC 396 (Exhibit RLA-225). Lord Diplock's conclusions have been relied upon by a number of common law jurisdictions. See, e.g., *Australia (Australian Broadcasting Corporation v O'Neill)* [2006] HCA 46 (Exhibit RLA-226); *India (M/S Power Control Appliances and Others v. Smeet, Supreme Court of India, Civil Appeal Nos. 2551-2552 and 2553 of 1993 (8 February 1994)* (Exhibit RLA-227); *Colgate Palmolive (India) Ltd v. Hindustan Lever Ltd, Supreme Court of India, Judgment 18 August 1999* (Exhibit RLA-228).

⁷³⁷ See *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, Supreme Court of Canada [1987] 1 S.C.R. 110 (Exhibit RLA-229); *RJR-MacDonald Inc. v. Canada (Attorney General)*, Supreme Court of Canada [1994] 1 SCR 311 (Exhibit RLA-230). The test has been further clarified by the Supreme Court in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, para. 18 (distinguishing between mandatory interlocutory injunctions and prohibitive injunctions) (Exhibit RLA-231).

⁷³⁸ *1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, paras. 77-80 (Exhibit RLA-232) (which in turn adopted the test set out by the *British Columbia Court of Appeal in Cambie Surgeries Corp. v British Columbia (Medical Services Commission)*, 2010 BCCA 396, paras. 27-28 (Exhibit RLA-233) ("[i]n order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, per se, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief"). This approach has not been adopted by the Supreme Court, though was endorsed in the dissenting opinion of Côté and Rowe JJ in *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 (Exhibit RLA-234).

⁷³⁹ See Order of the President of the General Court of 11 July 2018 in *GE Healthcare A/S v. Commission*, Case T-783/17R, EU:T:2018:503, paras. 16-18 (Exhibit RLA-235), and the case law quoted therein.

⁷⁴⁰ See Order of the President of the General Court of 8 May 2019 in *Sumitomo Chemical and Tenka Best v. Commission*, Case T-734/18R, EU:T:2019:314, para. 17 (Exhibit RLA-236), and the case law quoted therein.

⁷⁴¹ Order of the President of the Court of 5 October 2011, *Computer Resources International (Luxembourg) S.A. v. Commission*, Case T-422/11 R, ECLI: EU:T:2011:566, paras. 26-27 (Exhibit RLA-237); Order of the President of the General Court of 9 July 2010, *Alcoa Trasformazioni srl. v. Commission*, Case T-177/10 R, ECLI:EU:T:2010:306, para. 58 (Exhibit RLA-238); Order of the President of the General Court of 17 May 2018, *Transtec v. Commission*, Case T-228/18 R, ECLI:EU:T:2018:281, para. 23 (Exhibit RLA-239).

797. The consistent theme when national courts consider whether or not to grant an injunction is two-fold:

- a. first, that the test applicable for granting an interim injunction is equally applicable to final injunctions; and
- b. second, that damages must not be an adequate remedy.

798. In light of the strict criteria applied by tribunals in respect to even temporary interim orders, and by national courts in respect of both temporary and final injunctive relief, at a minimum such conditions must also apply to a consideration of final injunctive relief.

4.3.6. The high threshold for granting injunctive relief reflects Public International Law's caution on restricting the exercise of State sovereignty

799. Such stringent conditions must also apply to any consideration of final injunctive relief in light of public international law's caution when restricting the exercise of State sovereignty.

800. Reflecting the latter principle, cases in which even *interim* injunctions have been granted by investment tribunals against States have focused on preserving procedural rights, rather than on limiting the exercise of State sovereignty.⁷⁴² The power generally is applied to preserve procedural rights, pending outcome of the arbitration, rather than to enjoin the normal exercise of State power.⁷⁴³ Tribunals have been careful not to impede on the general exercise of State sovereignty in considering applications for provisional measures. For example, the tribunal in *Nova Group v. Romania* stated:

⁷⁴² For example, requests for an interim injunction focus on such issues as the need to preserve evidence and to avoid aggravating the dispute pending the outcome of the arbitration (see, e.g., *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2, Decision on Provisional Measures of 25 September 2001) (Exhibit RLA-240); *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5, Procedural Order No. 1 on [Claimants'] Request for Provisional Measures of 29 June 2009) (Exhibit RLA-241); *Rizzani de Eccher S.p.A., Obrascón Huarte Lain S.A. and Trevi S.p.A. v. State of Kuwait* (ICSID Case No. ARB/17/8, Decision on Provisional Measures of 23 November 2017) (Exhibit RLA-242) or used to prevent the pursuit of other parallel proceedings (anti-suit injunctions); *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18, Order No. 1 on Claimant's Request for Provisional Measures of 1 July 2003) (Exhibit RLA-243); *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) I* (ICSID Case No. ARB/06/21, Decision on Provisional Measures of 19 November 2007) (Exhibit RLA-244).

⁷⁴³ One exception to this rule are the few cases where an interim injunction has been granted by an investment treaty tribunal preventing certain State actions "so as not to exacerbate the dispute", for example by engaging in a public campaign against the investor while the arbitration is ongoing, harassing or indeed physically threatening the investor. This is not the same as an injunction not to apply its normal regulatory regime pending the outcome of the arbitration.

[The Tribunal] certainly agrees that provisional measures are an "exceptional" remedy in any case, and that tribunals should be particularly cautious about granting such remedies where the context involves potential future State action in quintessentially sovereign areas.⁷⁴⁴

801. Tribunals have typically limited the scope of their orders for interim injunctions to only what is necessary to allow the tribunal to proceed with its work and ultimately determine liability. The grant of an interim injunction is without prejudice to the ultimate remedy.
802. Indeed, when considering requests for an interim injunction, tribunals have been sensitive to the prospect that doing so might be tantamount to granting ultimate relief, and in such circumstances have refused even an *interim* injunction.
803. For example, in *Tanzania Electric Supply v. Independent Power Tanzania*, the tribunal declined to grant a request for provisional measures that would be tantamount to seeking specific performance of the alleged agreement subject to the dispute. In so doing, the tribunal made an apt distinction between preserving rights pending the determination of the dispute, and the enforcement of such rights.⁷⁴⁵
804. Similarly, the tribunal in *Helnan v Egypt* found that "it is only in exceptional circumstances that an Arbitral Tribunal, as any other jurisdiction, should grant provisional measures which amount in practice to the final relief sought by a party".⁷⁴⁶ In *Helnan*, the request for provisional measures included a request to reinstate the Claimant as the manager and operator of the hotel subject of the dispute; for the Respondent to desist from taking further actions to interfere with this right; and for the Respondent to refrain from selling the hotel (which it presumably had seized). The tribunal rejected the requested interim relief because the proposed provisional measures were very similar to the final relief requested, and because monetary compensation amounted to an adequate remedy.⁷⁴⁷

⁷⁴⁴ *Nova Group Investments, B.V. v. Romania* (ICSID Case No. ARB/16/19, Procedural Order No. 7 Concerning the Claimant Request for Provisional Measures of 29 March 2017), para. 250 (Exhibit RLA-245). Likewise, the tribunal in *Gavrilovic v. Croatia* noted the importance of "ascertain[ing] what test is appropriate in the circumstances of a case, such as this, where the relief sought would interfere with the exercise of a sovereign State's rights and duties to investigate and prosecute crime." See *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39, Decision on Provisional Measures of 30 April 2015), para. 189 (Exhibit RLA-246).

⁷⁴⁵ *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures of 20 December 1999), para. 13 (Exhibit RLA-247).

⁷⁴⁶ *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19, Decision on Claimant's Request for Provisional Measures of 17 May 2006), para. 32 (Exhibit RLA-221).

⁷⁴⁷ *Ibid.*, para. 34.

805. Furthermore, and of particular relevance here, tribunals have also found that preserving the rights of a disputing party does not extend to enjoining State action, even on an interim basis, simply to reduce overall damages. Thus, the tribunal in *Occidental v Ecuador* held that provisional measures could not be ordered merely to mitigate the amount of damages that might ultimately be payable.⁷⁴⁸ The tribunal in *Cemex v Venezuela* likewise refused the claimants' request for provisional measures, holding that the "only consequence" of declining the claimants' request for provisional measures was to "increase the Claimants' damages".⁷⁴⁹
806. Overall, even if the present Tribunal were to assert the right *in theory* to grant a final injunction, the grant of such relief *in practice* would be disciplined by the tests typically applied by international investment tribunals and by national courts in deciding whether or not to grant even an interim injunction.
807. As set out in what follows, the Claimant's cryptic comments allegedly demonstrating that the conditions for relief are met clearly fail to meet that standard.

4.3.7. The Claimant's cryptic, self-serving justifications fail to meet any standard for granting injunctive relief

808. In its arguments in favour of granting the injunctive relief it seeks, the Claimant puts forward only brief self-serving allegations, that entirely fail to fulfil any of the applicable criteria.
809. The Claimant first attempts to argue that damages would not be an appropriate remedy because it "would no longer be able to fulfil the sole purpose for which it was incorporated".⁷⁵⁰ This argument bears little relevance to the question of whether damages are a sufficient remedy for an alleged breach suffered.

⁷⁴⁸ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11, Decision on Provisional Measures of 17 August 2007), para. 97 (Exhibit RLA-205) ("[p]rovisional measures are not designed to merely mitigate the final amount of damages. Indeed, if they were so intended, provisional measures would be available to a claimant in almost every case. In any situation resulting from an illegal act, the mere passage of time aggravates the damages that can be ultimately granted and it is well known that this is not a sufficient basis for ordering provisional measures").

⁷⁴⁹ *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15, Decision on the Claimants' Request for Provisional Measures of 3 March 2010), para. 58 (Exhibit RLA-248) ("[t]he Tribunal observes that this request for provisional measures is based on the fact that Venezuela's efforts to seize [the assets] will, if they succeed 'increase the Claimants' damages' to be awarded by the Tribunal. According to the Claimants themselves, the only consequence for them of those seizures would be a financial loss. Such a loss could be readily compensated by a damages award. Thus, the alleged harm is not 'irreparable' and there is neither necessity, nor urgency to grant the requested provisional measures").

⁷⁵⁰ Claimant's Memorial, para. 507.

810. Furthermore, the Claimant's related reasoning [REDACTED] [REDACTED] or that it can no longer fulfil its purpose of designing, building and operating the NS2 pipeline⁷⁵²) is entirely unsubstantiated.⁷⁵³ Nonetheless, even if the Claimant had provided any evidence in support of its assertions, such arguments would be insufficient to demonstrate that damages are not an adequate remedy in this case.
811. Tribunals considering whether or not to grant interim injunctions have indeed rejected assertions that interim injunctions are the "primary remedy" to protect a company's interest in an oil pipeline,⁷⁵⁴ or to protect a company's reputation.⁷⁵⁵ In *Chevron v. Ecuador*, the investors were only able to successfully demonstrate the need for a stay on enforcement proceedings on the basis of tangible evidence that, if the private plaintiffs would succeed in enforcing the impugned Judgment, the investors would be "extremely unlikely" to collect any compensation awarded by the tribunal.⁷⁵⁶ The same cannot be argued here.
812. The Claimant further contends that any possible solutions to enable the NS2 pipeline to continue to operate are "time consuming, expensive, and difficult" and would lead to an "uncertain and challenging future".⁷⁵⁷ Again, the Claimant has failed to prove its assertion.⁷⁵⁸ Moreover, even if the Claimant's allegations with respect to the "possible solutions" were accurate (*quod non*) the fact that an operation is "expensive" is surely the very definition of an effect that can be remedied by financial compensation.⁷⁵⁹
813. In a single cursory paragraph, the Claimant closes its argument by stating that the requested relief "does not involve a burden out of all proportion to the benefit derived from granting restitution instead of compensation"⁷⁶⁰ and that the requested remedy "would have no material impact on the Respondent."⁷⁶¹ The

⁷⁵¹ [REDACTED]

⁷⁵² *Id.*, para. 507.

⁷⁵³ See Section 2.3 *supra*.

⁷⁵⁴ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11, Decision on Provisional Measures of 17 August 2007, para. 75 (Exhibit RLA-205)).

⁷⁵⁵ *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19, Decision on Claimant's Request for Provisional Measures of 17 May 2006), para. 34 (Exhibit RLA-221).

⁷⁵⁶ *Chevron v. Ecuador*, Claimants' Memorial on the Merits, para. 546 (Exhibit RLA-210). As evidence for this claim, the investors pointed to comments of the President of Ecuador that Ecuador would not "pay a single penny" of an arbitral award in favour of a foreign oil company, and would expel any foreign oil company that chose to file international claims against Ecuador.

⁷⁵⁷ Claimant's Memorial, paras. 508-509.

⁷⁵⁸ See Section 2.3 *supra*.

⁷⁵⁹ See, e.g., *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11, Decision on Provisional Measures of 17 August 2007), para. 99 (Exhibit RLA-205) ("[t]he harm in this case is only 'more damages', and this is harm of a type which can be compensated by monetary compensation, so there is neither necessity nor urgency to grant a provisional measure to prevent such harm.").

⁷⁶⁰ Claimant's Memorial, para. 503.

⁷⁶¹ *Id.*, para. 512.

Claimant again fails to develop any semblance of an argument in support of the actual test required: that is, to demonstrate that a grant of a final injunction “greatly” outweighs the harm that would be caused to a respondent State.⁷⁶² Instead, the Claimant merely asserts – without evidence⁷⁶³ – that the reasons expressed by the European Union for enacting the Amending Directive “are entirely spurious as the Amending Directive is simply incapable of achieving the EU’s stated objectives”⁷⁶⁴ and that because NS2 pipeline is the “only pipeline impacted by the Amending Directive granting the relief sought would not have any broader legal impact on any third parties”.⁷⁶⁵

814. The Claimant’s unfounded allegations regarding what it considers the EU’s “spurious” objectives for enacting the Amending Directive – allegations that are flatly contradicted by the EU’s extensive evidence on the legitimate public policy goals of the Amending Directive – are not nearly sufficient to demonstrate that the balance of convenience requires the Tribunal to grant a final injunction. Moreover, as noted above, the absence of any third parties involved in this dispute undermines the Claimant’s reliance on *Chevron v. Ecuador*, which turned precisely on the multiplying effects of enforcement actions in third States.

815. Overall, the Claimant not only applies an incorrect test of its own making, but provides no legal authorities or factual evidence in support of the incorrect test it does seek to apply. It makes no attempt to demonstrate the urgency and necessity for a final injunction, or why the threat of irreparable harm tips the balance of convenience in favour of granting such an exceptional remedy. Instead, it makes a series of unsubstantiated assertions, none of which are sufficient bases to grant final injunctive relief.

4.4. Measures adopted by Germany in any event amount to “measures of a sub-national Government or authority” within the meaning of Article 26(8) of the ECT.

816. Even if it had the power to grant a permanent injunction (*quod non*), and the circumstances of urgency and necessity not compensable in damages were met (*quod non*), the Tribunal in any event lacks the jurisdiction to grant the requested relief, for the reasons set out in detail in the EU’s Memorial on Jurisdiction.

817. To recall, the Amending Directive imposes no legal obligation on the Claimant as a matter of EU law. The damages the Claimant alleges do not flow from the

⁷⁶² See, e.g., *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/13/38, Procedural Order No. 2 on Application for the Grant of Provisional Measures of 24 November 2014), para. 87 (Exhibit RLA-219).

⁷⁶³ See Section 2.1 *supra*.

⁷⁶⁴ Claimant’s Memorial, para. 512(i).

⁷⁶⁵ *Id.*, para. 512(ii).

Amending Directive. Rather, they flow from measures that may or may not be adopted by Germany when transposing and implementing the Amending Directive, within the scope of the margin of discretion granted to EU Member States under the Amending Directive.⁷⁶⁶ Therefore, the European Union is not responsible under international law for those actions of Germany.⁷⁶⁷

818. In the event that, notwithstanding the jurisdictional objection raised by the European Union, the Tribunal were to deem the European Union responsible under international law for the actions of Germany, the latter's measures legally would amount to "measures of a sub-national Government or authority". Where the EU (or any Regional Economic Integration Organisation (REIO)) is the respondent, the term "national" must be understood as referring to measures of the organs of the REIO and the term "sub-national" as including any measures taken by the organs of the Member States of that REIO for which the REIO is responsible under international law. In such circumstances, Article 26(8) of the ECT would be engaged. Article 26(8) of the ECT precludes the granting in such circumstances of anything but monetary relief.

819. The reasoning inherent in Article 26(8) of the ECT confirms this result in the context of the European Union being held responsible at international law for measures adopted by an EU Member State.

820. EU Member States are bound by the international agreements to which the European Union is a party.⁷⁶⁸ If an EU Member State breaches an international agreement, the EU may bring infringement proceedings before the ECJ⁷⁶⁹ and, as a last resort, impose fines (which is the functional equivalent of compensation).⁷⁷⁰ But the European Union cannot force an EU Member State to provide specific performance.

821. Therefore, if measures adopted by Germany in order to transpose and implement the Amending Directive are found to breach protections afforded under the ECT, and if the European Union is held responsible for this outcome, the European Union will have no mechanism to force Germany to change its measures.

822. The European Union, and not Germany, is the sole Respondent in this dispute. Since the only remedy the European Union has vis-à-vis Germany is monetary, the only remedy the Tribunal can provide the Claimant is monetary compensation.

⁷⁶⁶ Respondent's Memorial on Jurisdiction and Request for Bifurcation, Section 2.2.4.

⁷⁶⁷ Respondent's Memorial on Jurisdiction and Request for Bifurcation, Section 2.2.5.

⁷⁶⁸ Article 216.2 of the TFEU (Exhibit RLA-69).

⁷⁶⁹ Article 258 of the TFEU (Exhibit RLA-69).

⁷⁷⁰ Article 260 of the TFEU (Exhibit RLA-69).

823. This is without prejudice to the EU's primary submission that the Tribunal in any event lacks the power to grant a permanent injunction as a final remedy; and that in any event the Claimant has failed to demonstrate that even an interim, let alone a permanent injunction, is justified in this case.

5. RELIEF SOUGHT

824. On the basis of the foregoing, the European Union respectfully requests that the Tribunal:

- 1) Reject the Claimant's requests for an order declaring the European Union in breach of any substantive obligations under the Energy Charter Treaty;
- 2) Decline to order the EU to remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive to NSP2AG and Nord Stream 2;
- 3) Decline to order that the EU pay compensation to NSP2AG, in the alternative to granting the relief requested in (2);
- 4) Order that the Claimant pay the costs of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of legal representation and applicable interest;
- 5) Order such other and further relief as to the Tribunal may seem just.

All of which is respectfully submitted on behalf of the European Union by:

[REDACTED]
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