AN AD HOC ARBITRATION UNDER THE RULES OF ARBITRATION OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1976
AND
PURSUANT TO THE ENERGY CHARTER TREATY

BETWEEN

NORD STREAM 2 AG

(Claimant)

- and -

THE EUROPEAN UNION

(Respondent)

CLAIMANT'S REPLY MEMORIAL & COUNTER-MEMORIAL ON JURISDICTION

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TABLE OF CONTENTS

I. INTRODUCTION

1. This Reply Memorial and Counter-Memorial on Jurisdiction (the "**Reply Memorial**") is filed by the Claimant, Nord Stream 2 AG (the "**Claimant**" or "**NSP2AG**"). This Reply Memorial is being submitted in Reply to the EU's Memorial on Jurisdiction dated 15 September 2020 (the "**EU's Jurisdiction Memorial**"), and the EU's Counter-Memorial on the Merits dated 3 May 2021 (the "**Counter-Memorial**") pursuant to the procedural timetable set out in Procedural Order No. 6 dated 30 July 2021. It is accompanied by two witness statements, submitted by [redacted] and [redacted], and three expert reports submitted by (i) Professor Peter Cameron, (ii) Mr Peter Roberts, and (iii) Swiss Economics SE AG, and 236 exhibits.

2. Factual and legal exhibits are referred to using the same numbering as in the Claimant's Notice of Arbitration dated 26 September 2019 (the "**Notice**") and Memorial dated 3 July 2020 (the "**Memorial**"), in the form C-* for factual exhibits, with additional factual exhibits starting at C-184, and in the form CLA-* for legal exhibits, with additional legal exhibits starting at CLA-176. The definitions used herein are the same as those used in the Notice and the Memorial unless otherwise defined or the context so requires.

3. This Reply Memorial contains 11 sections in addition to this Introduction:

   i. Section II sets out a summary of the Claimant's reply to the Counter-Memorial and the Claimant's reply to the EU's Jurisdiction Memorial.

   ii. Section III demonstrates that the Claimant has proven its factual allegations in relation to the basis on which its investment was made, and sets out the relevant regulatory environment.

   iii. Section IV demonstrates that the Claimant has proven its factual allegations in connection with the EU's concerted attempts to obstruct and frustrate the Nord Stream 2 project, including through the drafting and adoption of the Amending Directive which intentionally discriminates against Nord Stream 2 and breaches NSP2AG's legitimate expectations, and the flawed and unfair process by which this occurred.

   iv. Section V explains that the Amending Directive cannot contribute to its stated policy objectives in any event and cannot be justified by its purported aims.

   v. Section VI sets out the impacts that the Amending Directive has on NSP2AG's investment.

   vi. Section VII demonstrates that the relevant conduct is attributable to the EU, as a matter of international law, and the EU bears international responsibility for the breaches of the ECT occasioned thereby. The EU's repeated argument that

breaches of the ECT, if any, must be the international responsibility of Germany is wrong.

vii. Section VIII demonstrates that the EU has breached its obligations under the ECT.

viii. Section IX demonstrates that the Tribunal has jurisdiction: the fork-in-the-road provision in Article 26 has not been triggered.

ix. Section X demonstrates that the Tribunal has jurisdiction *ratione personae*.

x. Section XI explains that the Tribunal is entitled to grant and justified in granting the restitutionary remedy sought by NSP2AG.

xi. Section XII addresses the relief claimed by the Claimant in this arbitration.

II. SUMMARY OF CLAIMANT'S REPLY TO THE COUNTER-MEMORIAL

4. The Counter-Memorial is an exercise in obfuscation which cannot conceal the key issue in this case. The EU, with political motivation, developed and passed a piece of legislation which has the sole purpose and effect of deleteriously impacting one single offshore import pipeline, Nord Stream 2.

5. The EU's targeting of Nord Stream 2 is undeniable from the available documentary record and the many contemporaneous public statements made by EU officials. It was no secret that the Amending Directive was a "Lex Nord Stream 2". As most recently stated by Advocate General Bobek of the EU Court of Justice in his opinion in the CJEU Proceedings:

> "*Not only were the EU institutions **aware** that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the **very intention** of subjecting the appellant to that new regime. In addition, I note that the appellant has provided, at first instance, several documents, other than those excluded by the General Court, which suggest that the extension of the EU gas rules to the activities of the appellant was in fact one of the **main** reasons, if not the main reason, that prompted the EU institutions to adopt the contested measure.*
>
> *I would add, in passing, that all of this appears to be a matter of common knowledge. A cursory look at the press and academic articles concerning the adoption of the contested measure would seem to confirm the appellant's argument on this point. In that regard, I hardly need to point out that, in order to establish the relevant facts, the Court may also rely on matters of common knowledge. Justice is often depicted as being blind. However, at least in my recollection, that allegory is not meant to be interpreted as Justice being unable to see something that is blindingly obvious to everyone else*" (bold emphasis in original, underlined emphasis added).[1]

6. It was also clear to [redacted], that the Proposal was a "Lex Nord Stream 2", introduced with the intention of impacting the Nord Stream 2 project.[2]

7. As set out in this Reply Memorial, the EU's conduct in connection with the Amending Directive was in breach of its obligations under the ECT.

8. It is telling that the EU has submitted no witness evidence with its Counter-Memorial to speak to the EU's intentions. This is so notwithstanding that the majority of the key individuals involved with the Amending Directive remain employed by the Commission.

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1 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 197 and 198.

2 [redacted]

9. Moreover, the EU has disclosed practically no internal documents in this arbitration, whether voluntarily with its Counter-Memorial, or through the document production process, notwithstanding the requests made by the Claimant and upheld by the Tribunal. In particular:

   i. The EU has disclosed no internal documents or emails from any of the 11 key EU representatives identified by NSP2AG in relation to the "*initiative to amend the Gas Directive (through the proposal and adoption of the Amending Directive or otherwise)*" or in relation to the Commission's "*Proposal for the Amending Directive*" throughout its entire negotiating period, from 8 November 2017 to 17 April 2019 (Request 2), notwithstanding the Tribunal's order that it should do so.

   ii. The EU has not disclosed any "*Documents recording (or supporting) an assessment by the Commission or any other institution, body, agency, entity or individual representing the EU that the Amending Directive would contribute to the stated objectives of the Gas Directive, Gas Regulation and Amending Directive (in particular, strengthening the EU's security of supply, and enhancing competition and the functioning of the EU's internal market), dated or otherwise created in the period between 9 June 2017 and 17 April 2019*" (Request 12). When challenged on this, the EU has claimed that documents produced in response to other Requests "*touch upon the objectives and the expected impacts of the Amending Directive*",[3] but with no justification - none of the Documents produced by the EU to date in this arbitration provides any assessment of <u>why</u> or <u>how</u> the Amending Directive would contribute to its stated objectives.

   iii. The EU has not disclosed the "*study*" which it claims in its Counter-Memorial was carried out by the European Commission and that led to the Proposal for the Amending Directive, but that it did not provide as an exhibit.[4] The "*study*" would also have been included within the scope of the Claimant's Request 12 which the EU was ordered to produce, but was not provided.[5]

10. The Claimant will continue to pursue these matters through correspondence, but highlights these issues here as examples of the obfuscatory approach pursued by the EU since the beginning of this matter.[6]

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3 **Exhibit C-201**, Letter from the European Union to NSP2AG dated 8 October 2021.

4 Counter-Memorial, para 324.

5 See further para 199 below.

6 **Exhibit C-202**, Letter from NSP2AG to the European Union dated 30 August 2021; **Exhibit C-203**, Letter from the European Union to NSP2AG dated 14 September 2021; **Exhibit C-204**, Letter from NSP2AG to the EU dated 24 September 2021; **Exhibit C-201**, Letter from the European Union to NSP2AG dated 8 October 2021. The single additional document disclosed by the EU with its letter dated 14 September 2021 constitutes a presentation given by the Commission to all the Member States on the Amending Directive, which cannot be regarded other than as a key document in connection with this dispute (**Exhibit C-205**, Commission Energy Working Party presentation, "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

11. In any event, the EU's true intention in connection with the Amending Directive is plain from the existing record. This intention is clear, for example, from the public statements of Dr Klaus-Dieter Borchardt, a high-ranking official and ultimately Deputy Director-General of DG Energy of the Commission before he left the Commission in 2020, and on whose statements the EU itself relies in its Counter-Memorial.[7] Dr Borchardt explained to the European Parliament's ITRE Committee in a public meeting a month before the Proposal for the Amending Directive was issued that, unable to "*veto*" the Nord Stream 2 pipeline due to the constraints of the EU's WTO membership, the EU intended to introduce a piece of legislation with the purpose of regulating the Nord Stream 2 pipeline. The transcript of this presentation is exhibited to the Claimant's Memorial and referred to herein.[8] However, the Tribunal is also respectfully requested to watch the video of Dr Borchardt's presentation submitted with this Reply Memorial.[9]

12. As set out in the Memorial, other contemporaneous statements also make clear the EU's intentions.[10] Indeed, the EU's own presentation of its case only serves to underline its politically targeted motivations. This is clear from the very first paragraph of its substantive response to NSP2AG's claim:

> "*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*".[11]

13. However, NSP2AG is a Swiss-incorporated project company: it is not Gazprom and it is not Russia. NSP2AG is not denied the protections of the ECT because (i) it is owned by

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gas COM(2017) 660 final", 20 February 2018) – no explanation has been provided for why this was not disclosed previously.

7 Counter-Memorial, para 142.

8 **Exhibit C-92**, Transcript of Presentation by Dr Borchardt to a meeting of the European Parliament Committee on Industry, Research and Energy (ITRE), "Negotiation mandate for Nord Stream 2: state of play" (presentation accessible at https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy_20171011-1430-COMMITTEE-ITRE_vd), 11 October 2017.

9 **Exhibit C-206**, Recording of Dr Borchardt at the European Parliament Committee on Industry, Research and Energy (ITRE), 11 October 2017 (14:35 - 16:40), 11 October 2017.

10 Memorial, Section VI. Various documents disclosed by the EU also make this clear. See for example, European Committee of the Regions' presentation to stakeholders in Brussels on 9 February 2018 which questions "*Is a legal (1/0) answer to a political issue proportional? No change for Russian onshore investment*" (**Exhibit C-207**, European Committee of the Regions presentation for ENVE-VI/026 Stakeholders' meeting in Brussels on 9 February 2018, "Proposal for a Directive Amending Directive 2009/73/EC (Natural Gas)", 9 February 2018, at slide 4).

11 Counter-Memorial, para 4.

Gazprom;[12] or (ii) the Nord Stream 2 pipeline is intended to transport Russian gas. The EU has set forth no legal basis on which NSP2AG's claims can be defended based on either of these two factors. Indeed, the EU's position in equating NSP2AG with Gazprom and with Russia runs contrary to the very intention of the ECT, which is to depoliticise energy-related disputes.

14. Further, the Claimant cannot compel Gazprom, Gazprom Export, Russian state banks or the Russian government to act in a manner that addresses or mitigates the effects of the EU's breaches of the ECT, nor should it be expected to do so. NSP2AG is taking reasonable steps to mitigate its loss and to address the impact of the Amending Directive on the Project. [redacted] In any case, the EU's supposition as to what third parties may or may not do cannot afford the EU any defence to the claims that it has breached its obligations under the ECT in respect of its conduct in connection with the Amending Directive.

15. The EU, implausibly, denies that the Amending Directive was targeted at Nord Stream 2 (although the EU and Professor Maduro appear to concede that Nord Stream 2 was the "*trigger*" for the Amending Directive).[14] It seeks to defend itself against the allegations of breaches of the ECT by arguing that the Amending Directive is simply a legislative measure of "*general and abstract nature*" which only "*clarified*" the application of the law to all import pipelines. As explained in Section III of this Reply Memorial, these contentions are divorced from reality.

16. In particular, the EU seeks to re-write history: the Gas Directive did not apply to offshore import pipelines either legally or in practice until 23 May 2019 when the Amending Directive came into force. This is a fact, recognised (among others) by its own legal services and the EU's Advocate General.[15] None of the offshore import pipelines in a similar position to Nord Stream 2 was regulated by the Gas Directive.

17. So futile is this argument that the EU fails to maintain it coherently in this arbitration. In Sections 2.2.2 and 2.2.3 of the Counter-Memorial, the EU makes a number of contradictory claims about the applicability of the unamended Gas Directive to offshore import pipelines. It simultaneously states that:

    i. "*the Gas Directive applied*" (heading 2.2.2).

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12 [redacted]

13 [redacted]

14 Counter-Memorial, para 264 and Expert Report of Professor Maduro, para 273.

15 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 100. See further para 64 below.

ii. the unamended Gas Directive "*could reasonably have been interpreted so as to apply to offshore import pipelines such as the NS2 pipeline*" (paragraphs 131, 138, 140).

iii. "*it was foreseeable that the EU co-legislators would seek to ensure that EU market disciplines governed the operation of such pipelines*" (paragraph 134).

iv. "*the likely applicability of the Gas Directive to offshore pipelines such as the NS2 pipeline*" (paragraph 136).

v. "*There were indications that the Gas Directive would apply to the NS2 pipeline*" (heading of 2.2.3).

18. Professor Maduro's First Expert Report also confirms that the unamended Gas Directive did not apply to Nord Stream 2. While Professor Maduro repeatedly comments that the Amending Directive has "*clarified*" the position, he at no point writes that the unamended Gas Directive was applicable to similar pipelines or that it would have been applicable to Nord Stream 2 without the Amending Directive. Instead, he makes it clear that the unamended Gas Directive did not apply:[16]

i. "*Without the amendment of Article 2(17) the territory of the EU, either onshore or offshore, would be traversed by portions of gas transmission lines between Member States and third States which would not be subject to the EU gas regulatory framework originally set-forth by the Gas Directive for gas transmission lines between Member States*".

ii. "[…] *These obligations might surely be burdensome for undertakings, such as NS2AG, projecting to own and operate gas pipelines between member States and third Countries which, before the Amending Directive, would not be affected by such obligations*".

iii. "*Without the change made by the Amending Directive to article 2(17), such undertakings from third countries would not be subject to obligations to unbundle, at least as set forth by the Gas Directive*" (emphases added).

19. Accordingly, NSP2AG had no reason to believe that the Gas Directive applied to offshore import pipelines.[17] The Amending Directive introduced a fundamental change by extending the geographical scope of the Gas Directive to the Member States' territorial sea, thereby bringing offshore import pipelines within the scope of the Gas Directive for the first time.

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16 Expert Report of Professor Maduro, paras 219, 227 and 244 respectively.

17 As addressed in Section III.5 of this Reply Memorial, the EU's competition law framework does not affect NSP2AG's claim: the EU cannot defend the claim based on what may have happened but did not. In any case, competition law remedies comparable to the Gas Directive requirements could not have been imposed on Nord Stream 2.

20. NSP2AG did not expect, and could not reasonably have expected, such a dramatic regulatory change to the legal framework in which it was making its investment, not least one that was discriminatory, unreasonable and disproportionate.

21. Indeed, the impact of this dramatic change to the regulatory regime on existing investments was explicitly recognised by the EU. The Amending Directive provides at Recital 4 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*".

22. Article 49a of the Amending Directive, which provides for the derogation, is therefore a transitional provision which protects the legitimate expectations of the investors in those gas transmission lines. The EU has not sought to challenge this characterisation of Article 49a, nor could it credibly do so.[18]

23. However, as set out more fully in Section IV of this Reply Memorial, Article 49a was designed to exclude Nord Stream 2. Derogations are available only for pipelines "*completed before 23 May 2019*". The EU was well aware that Nord Stream 2 would not be completed by this date,[19] and that it would be the only pipeline to be practically affected by the Amending Directive.[20] The legitimate expectations of the Claimant should have been protected in the same way as those of investors in the other five offshore import pipelines.

24. Remarkably, the EU then seeks to argue that the impact of the Amending Directive should, as a matter of fact and of law, be seen as a consequence of decisions by Germany in the exercise of its implementing discretion, and for which decisions Germany and not the EU is responsible.

25. This argument, however, is misconceived. As the Claimant explains in Section IV.1 below, "*completed before 23 May 2019*" has an objective meaning as a matter of EU law and is not a matter of discretion for Germany. The EU's Advocate General has reached the same view, noting that the "*(in)applicability*" of Article 49a is "*entirely pre-determined by the EU rules,*

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18 On the contrary, the EU similarly characterises Article 49a as transitional in para 270 of the Counter-Memorial: "*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*" (emphasis added). The EU of course does not address the purpose of such a transitional provision, i.e. to protect the legitimate expectations of those who had already invested in such infrastructure.

19 **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, question 10.

20 As set out in paragraphs **Error! Reference source not found.**-**Error! Reference source not found.**, all of the other five offshore import pipelines potentially affected by the Amending Directive - Greenstream, Medgaz, MEG, Nord Stream 1 and Transmed – have now received Article 49a derogations.

since the national authorities ***lack any room for manoeuvre*** *and must thus act as a longa manus of the Union*" (emphasis in original).[21]

26. If NSP2AG (and the EU's Advocate General) is wrong on this point, the EU could simply confirm that it is open to Germany to interpret the words "*completed before 23 May 2019*" so as to allow Nord Stream 2 to be granted a derogation or amend the text of the Amending Directive in order to clarify it to this effect. The EU has not done so. This is in stark contrast to the fact, that the European Commission has published over 100 pages of guidance on the Gas Directive before the amendment in 2019 and that the EU has no compunction about giving its views on the interpretation of other aspects of the Gas Directive within the context of this arbitration.[22] The EU's studied insistence that it cannot give an interpretation of what it itself describes as the "*cut-off criteria*"[23] should therefore be seen for what it is - a ploy to maintain its position in this arbitration.

27. The Amending Directive, by applying such "*cut-off criteria*" to exclude Nord Stream 2, discriminates against NSP2AG in violation of the ECT.

28. In an attempt to exculpate itself, the EU seeks to apply a distorted meaning to Article 36 of the Gas Directive, which offers the possibility of an exemption for new pipelines. It argues, for example, that "*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*",[24] asserting that "[n]*othing in Article 36 of the Gas Directive prevents NSP2AG from applying for an exemption under that article*".[25]

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21 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 75.

22 **Exhibit C-35**, European Commission Staff Working Paper, "The Unbundling Regime: Interpretative Note on Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010, p 4; **Exhibit C-208**, European Commission Staff Working Paper, "Third-Party Access to Storage Facilities: Interpretative Note on Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010; **Exhibit C-209**, European Commission Staff Working Paper, "Retail Markets: Interpretative Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010; **Exhibit C-210**, European Commission Staff Working Paper, "The Regulatory Authorities: Interpretative Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010; **Exhibit C-211**, European Commission Staff Working Document, "Ownership Unbundling: The Commission's Practice in Assessing the Presence of a Conflict of Interest Including in Case of Financial Investors", 8 May 2013; **Exhibit C-44**, European Commission Staff Working Paper, "New Infrastructure Exemptions: 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", SEC(2009) 642 final, 6 May 2009.

23 Counter-Memorial, para 272. Although the EU slips up on at least one occasion, stating in para 280 of its Counter-Memorial, that Article 49a is "*available, subject to the objective conditions*" (emphasis added) – see further paragraph 132 below.

24 Counter-Memorial, para 272.

25 Counter-Memorial, para 294.

29. As explained in Section IV.3 below, however, and in Section VI.13 of the Memorial this is incorrect. Article 36 is not available to Nord Stream 2. It applies to proposed infrastructure in relation to which no final investment decision has been taken - NSP2AG's investment was made long before the Amending Directive entered into effect and applied the provisions of Article 36 to offshore import pipelines.

30. Again, the EU's Advocate General has reached the same conclusion:

> "*In the present case, as far as Articles 36 and 49a of the Gas Directive are concerned, that paternity cannot but be attributed to the EU legislature. None of the options offered by those provisions appears to be applicable to the appellant. The EU legislature decided that (i) the derogation is only applicable to gas transmission lines between a Member State and a third country 'completed before 23 May 2019', and (ii) the exemption is only available to major infrastructure projects in respect of which no final investment decision has been taken. As a matter of fact, at the time of the adoption of the contested measure (17 April 2019), the Nord Stream 2 pipeline had passed the pre-investment stage, but was not going to be completed, let alone operational, before 23 May 2019*".[26]

31. Neither does Article 36 provide an alternative in substance to a derogation under Article 49a. As set out in Section IV.3 below, Article 36 exemptions and the Article 49a derogation are intrinsically different. They address distinct situations and are composed of different elements, meaning that an Article 36 exemption is not an alternative to an Article 49a derogation and is not in any event suitable for a pipeline in the situation of Nord Stream 2. The question therefore, of whether Nord Stream 2 is or is not eligible for an Article 36 exemption is entirely irrelevant for the purposes of these proceedings.

32. Accordingly, as explained in Section IV.2 of this Reply Memorial and the First and Second Reports of Professor Cameron, there is no other pipeline now or in the future that can be in the same category of treatment under the Gas Directive as Nord Stream 2. Any future (theoretical) investors in an offshore import pipeline can seek an exemption under Article 36 before reaching a final investment decision. All existing pipelines in which investment has already been made have benefitted from a derogation under Article 49a. As intended by the EU, in breach of the ECT, Nord Stream 2 is the only pipeline to be practically affected by the Amending Directive.

33. Not only is the Amending Directive discriminatory, but it was adopted following an Improper Legislative Process – sacrificing NSP2AG's rights of due process to ensure its adoption before construction of Nord Stream 2 was complete. The EU's only answer to this claim is

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[26] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 74.

again to argue that the Amending Directive was merely "*clarificatory*",[27] but as already described, this is simply not true. The lengthy description in the Counter-Memorial of the EU's Interinstitutional Agreement and the EU's Better Regulation Guidelines serves only to underline why an impact assessment and ex-post evaluation/fitness check of existing legislation were demanded in the circumstances of the Amending Directive.[28]

34. Moreover, the EU has presented no evidence to rebut NSP2AG's claims that the Purported Objectives of the Amending Directive are specious and cannot be achieved. NSP2AG's arguments are based on the specific features of the regulatory regime and the actual practical effect of the Amending Directive. In its Counter-Memorial, the EU seeks to divert attention from those specific features and discuss matters at an abstract, theoretical level only. It fails to distinguish in any way between the application of the regulatory rules to a pipeline network within the internal market and their application to small sections of offshore import pipelines originating in third countries.[29]

35. In particular, as set out in Section V, the EU's case on the Purported Objectives and benefits of the Amending Directive entirely ignores the facts. The Amending Directive applies only to a 54 km section of Nord Stream 2, a pipeline which is 1,235 km long and starts in a third country. It is (incorrectly) taken for granted by the EU that the Purported Objectives of the Amending Directive can be achieved by extending the Gas Directive's territorial scope to a small section of one much longer import pipeline, and indeed in circumstances where all such offshore import pipelines enjoy derogations from the Amending Directive except one, Nord Stream 2.

36. Accordingly, many of the points raised by the Claimant and Professor Cameron remain unaddressed in the Counter-Memorial and Professor Maduro's report, and the arguments that the EU does make are flawed. Professor Maduro also raises additional points purportedly in support of the Amending Directive, which points were never made in support of the Amending Directive itself. These are dismantled in Section V.2.

37. Moreover, Nord Stream 2 constitutes only 16% of the third country gas import capacity. In the Counter-Memorial, the EU seeks to undermine this figure. However, as addressed in paragraph 218.vi, it does so by improperly comparing Nord Stream 2 to onshore import pipelines and incorrectly claiming that onshore import pipelines are also impacted by the Amending Directive. As the EU is unquestionably aware (because it indicated as much in its

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27 See Section III of this Reply Memorial.

28 Counter-Memorial, Section 2.5.4.

29 This distinction is clearly recognised in the EU's own documents: the European Committee of the Regions' presentation to stakeholders in Brussels on 9 February 2018 records that "*Gas import pipelines (≠ national gas grids) are NOT natural monopolies to be regulated*" (emphasis in the original) (**Exhibit C-207**, European Committee of the Regions presentation for ENVE-VI/026 Stakeholders' meeting in Brussels on 9 February 2018, "Proposal for a Directive Amending Directive 2009/73/EC (Natural Gas)", 9 February 2018, at slide 5).

February 2018 presentation to the Member States),[30] the Amending Directive has no practical impact on onshore import pipelines.

38. The result of the EU's conduct is to undermine the contractual framework concerning the Claimant's investment, and to place the Claimant in a position [redacted] Nord Stream 2 is now completed and ready to operate and generate returns on NSP2AG's investment, but it is unable to do so because of the need to comply with the Amending Directive.

39. [redacted]

40. [redacted]

41. In its Jurisdiction Memorial, supported by its Counter-Memorial, the EU also seeks to challenge the jurisdiction of the Tribunal. First, in what is likely a startling proposition for its Member States, the EU effectively argues that it cannot be responsible as a matter of international law for the consequences of EU Directives, and that this also requires the Tribunal to deny jurisdiction *ratione personae*.

42. In particular, the EU seeks to avoid responsibility for the impact of its conduct on NSP2AG by arguing that such impact should be attributed to the conduct of "*the Member States, in particular Germany…*".[32] The logical conclusion of the EU's argument is that it would never

30 **Exhibit C-205**, Commission Energy Working Party presentation, "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", 20 February 2018. As noted above, this presentation was initially withheld from the EU's Document Production and only provided when specifically requested by NSP2AG.

31 See further below, Section VI.

32 EU's Jurisdiction Memorial, para 211.

bear international responsibility for breach of its international obligation occasioned by a Directive, no matter how clear the language of the Directive, and how egregious its conduct.

43. Whether characterised as an objection to jurisdiction *ratione personae* (as the EU, wrongly, has done), or properly regarded as a question of the merits (as NSP2AG submits), the EU's argument does not withstand scrutiny. In Section VII below, the Claimant explains how the conduct complained of is conduct of the EU as a matter of fact, and is attributable to the EU as a matter of international law. Further, and in any case, the Claimant illustrates how the conduct of Germany, to the extent relevant at all, must properly be attributed to the EU as a matter of international law as Germany has no discretion with regard to the words "*completed before 23 May* 2019". To repeat, "*the national authorities **lack any room for manoeuvre** and must thus act as a longa manus of the Union*" (emphasis in original).[33] Indeed, when the EU's treatment of this claim is considered by reference to its own internal procedures on allocation of responsibility between the EU and its Member States, it is apparent that the EU's jurisdiction *ratione personae* objection is contrived.[34]

44. Further, in Section VII.7 below, the Claimant addresses the EU's misguided attempts to argue that its responsibility should be abrogated by the US sanctions and/or Gazprom's export monopoly.[35] It is the EU's conduct that constitutes breaches by the EU of the EU's treaty obligations under the ECT.[36]

45. Second, the EU argues that its unconditional consent to arbitration is vitiated by the triggering of the fork-in-the-road provision in Article 26(3)(a)(ii). This argument should also be rejected for all the reasons set out in Section IX.

46. In short, as a matter of both fact and law, NSP2AG's claims under the ECT are not pending in any other forum. This is the Alpha and Omega of this issue. The ordinary meaning of the ECT makes clear that it must be the same alleged breach of the ECT that is submitted to the other forum in order to trigger the fork-in-the-road provision. No such dispute has been submitted to any other forum and the EU's objection must fail accordingly. This is also true whether or not the *triple identity* or the *fundamental basis* test is applied.

47. The EU's arguments on the merits are as flawed as its arguments on jurisdiction. Its substantive legal arguments serve only to reinforce NSP2AG's case that the EU's conduct has breached multiple obligations under the ECT. It is telling that the EU has put forward no attempted justification for how its treatment of NSP2AG and its investment is either "*fair*" or "*equitable*". In NSP2AG's submission, this is because it is simply unable to do so. As set out in detail in Section VIII.1, the EU's conduct is contrary to each and every one of the various

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33 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 75.
34 See further Section X.4 below.
35 Counter-Memorial, Section 2.3.2.2.
36 Memorial, Section VI and para 381.

categories of treatment recognised by tribunals as forming part of the guarantee of fair and equitable treatment.

48. In particular, as fully described in the Memorial[37] and in Section VIII.1 of this Reply Memorial, the EU's discriminatory treatment of NSP2AG in connection with the Amending Directive breaches the EU's FET obligation, as well as the EU's express obligation to refrain from unreasonable or discriminatory measures that impair NSP2AG's investment under Article 10(1). In Section VIII.4, NSP2AG shows how the EU has also failed to meet its positive obligation to accord to NSP2AG most-favoured nation and national treatment. As is explained in the Memorial,[38] and in Sections VIII.1 and VIII.2 of this Reply Memorial, these breaches are obvious when the treatment of Nord Stream 2 is compared to the other offshore import pipelines.

49. The EU's other legal arguments fare no better. The EU attempts to narrow the scope of its obligation to provide constant protection and security under Article 10(1).[39] However, the EU's narrow interpretation is countered by the plain words of Article 10(1) and a body of jurisprudence. NSP2AG also explains how the EU's conduct breached the CPS standard, not least because the EU pursued a radical legislative change in order to complicate and disrupt Nord Stream 2.

50. The EU responds to NSP2AG's claim that the Amending Directive will give rise to an expropriation by portraying the Amending Directive as a legitimate exercise of police powers for "*public welfare*" purposes. However, as successive tribunals have made clear, the police powers doctrine cannot be used as a *carte blanche* in this way to enable a state (or international organisation) to negate its international law obligations. The EU makes no attempt to relate the Amending Directive to the "*public welfare*" purposes that determine the scope of the police powers doctrine. Nor could it do so: as noted above, the Amending Directive cannot achieve its Purported Objectives, but even if the specious objectives were taken at face value, the Amending Directive still could not be characterised as being for "*public welfare*".

51. Further, for all the reasons set out in Section VIII.5, the EU's conduct will give rise to an expropriation of NSP2AG's investment: indeed, the very purpose of the unbundling requirement in the Gas Directive is to divorce NSP2AG from control (and possibly ownership) of the German Section of the Pipeline. [redacted]

37 Memorial, Sections VIII.3 and VIII.4.
38 Memorial, paras 406 and 407.
39 Counter-Memorial, Section 3.2.1, addressed in paras 581-599.

52. In consequence, NSP2AG is asking the Tribunal in this arbitration to apply the principle of full reparation by restitution. It seeks an order (among other things) that the EU, by means of its own choosing, 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. The EU's objections to this form of relief are misplaced and are addressed in Section XI below.

53. In summary, the EU's objections to jurisdiction are unfounded and it has presented no credible defence to NSP2AG's claims that it breached Articles 10(1), 10(7) and 13 of the ECT. The relief sought by NSP2AG in this arbitration should be granted.

III. THE GAS DIRECTIVE DID NOT APPLY TO NORD STREAM 2 BEFORE THE AMENDING DIRECTIVE

III.1 Introduction

54. At the time when investments were planned and made in the Nord Stream 2 project, the Gas Directive (and the whole so-called Third Energy Package ("**TEP**"), of which the Gas Directive is the key element) did not apply to offshore import pipelines like Nord Stream 2. When the Amending Directive made the provisions of the Gas Directive applicable to offshore import pipelines it brought about a radical regulatory change for these pipelines, although, as the Claimant submits was intended by the EU, for all practical purposes this change has been imposed only on Nord Stream 2. The Respondent writes at length about the lack of a radical regulatory change for offshore import pipelines under EU law but has no credible arguments. Its real aim is to create a smokescreen of confusion with the aim of obscuring a reality that is straightforward and that can be summarised as follows.[40]

55. Import pipelines from third countries (whether onshore or offshore) terminate at the EU's borders where they physically connect to other pipeline infrastructure that can transport the gas further downstream inside the EU.

    i. Pipeline infrastructure on the EU network side of a border connection point is subject to the Gas Directive.

    ii. Pipeline infrastructure on the non-EU side of a border connection point is not subject to the Gas Directive.

56. For onshore pipelines, the border connection point always coincided with the legal border, i.e. before and after the Amending Directive. For offshore pipelines the border connection point was, prior to the Amending Directive, at the coastal terminal of the offshore pipelines. This can be seen on the map produced by the European Network of Transmission System Operators for Gas ("**ENTSOG**")[41] which indicates the cross-border connection points for the five existing offshore pipelines, Nord Stream 1, Greenstream, Transmed, Medgaz and MEG. The cross-border connection points are all between approximately 200m and 1km from the shore and inevitably do not coincide with the legal border of the territorial sea. See the below excerpts from the ENTSOG map and Google Maps for illustration:

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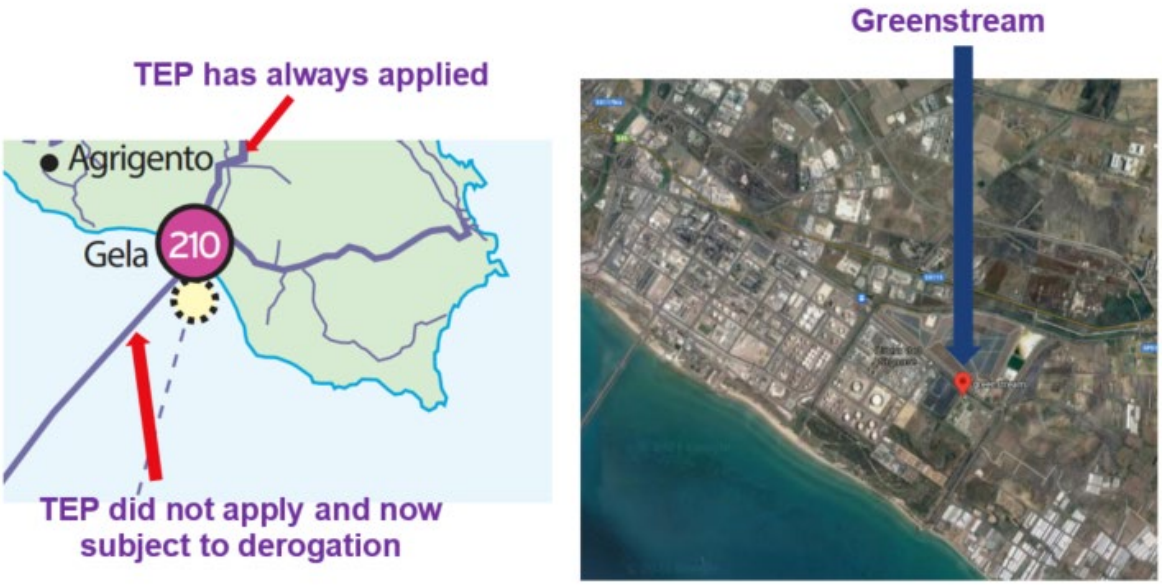
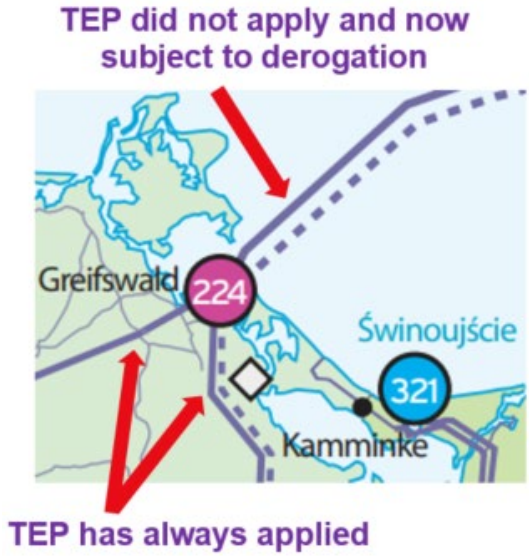
40 See also in this regard, the Second Expert Report of Professor Cameron, para 3.2.

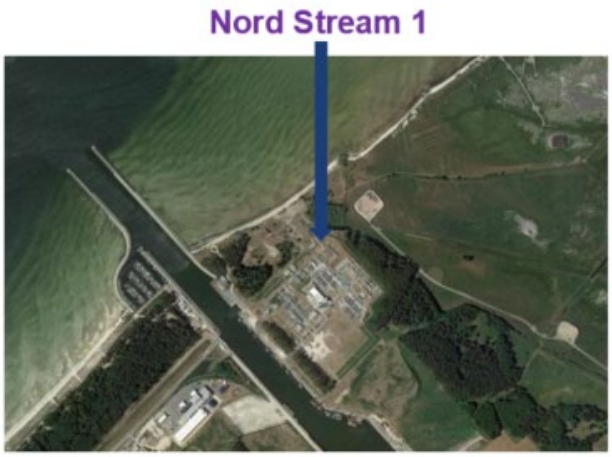
41 See **Exhibit C-29**, ENTSOG map, "The European Natural Gas Network 2019" (last accessed on 2 July 2020 at https://www.entsog.eu/sites/default/files/2020-01/ENTSOG_CAP_2019_A0_1189x841_FULL_401.pdf). For an explanation of ENTSOG and its role, see the Memorial, paras 97-98.

Maps 1 and 2: showing the Medgaz cross-border connection point / coastal landing terminal in Spain



Maps 3 and 4: showing the Greenstream cross-border connection point / coastal landing terminal in Italy

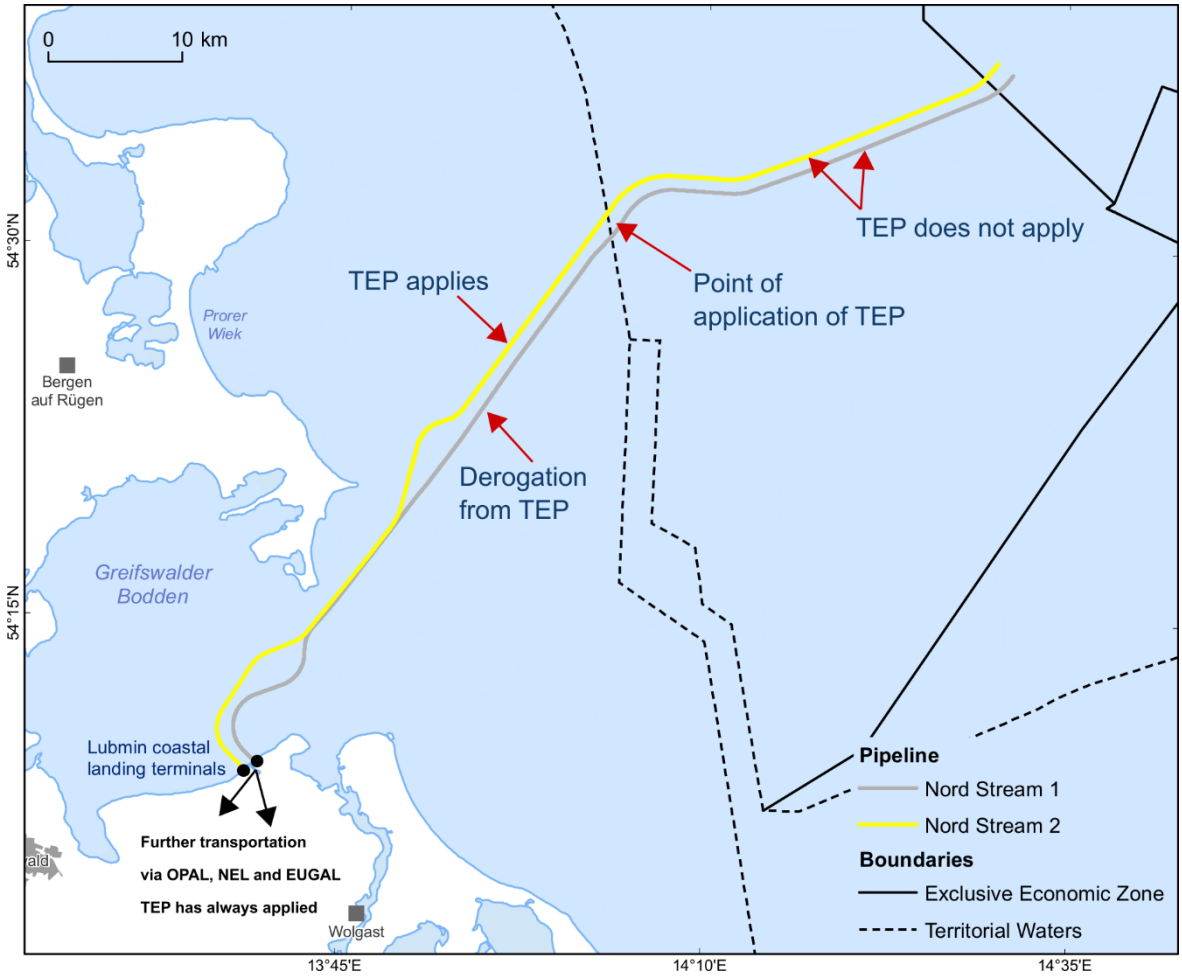




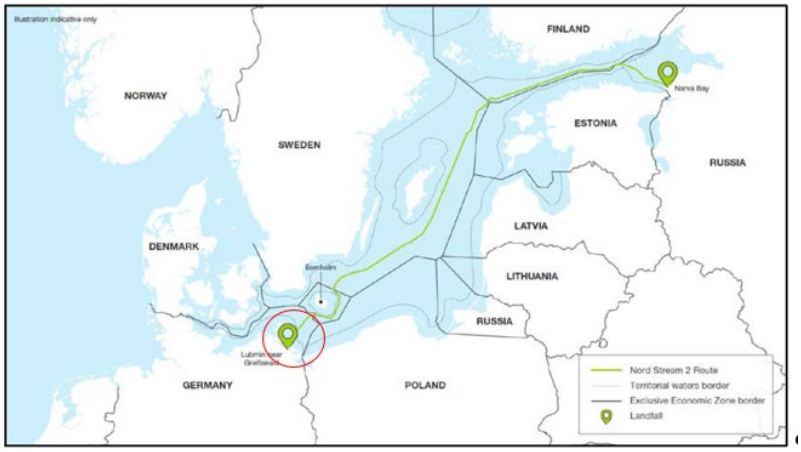
Maps 5 (point 224) and 6: showing the Nord Stream 1 cross-border connection point / coastal landing terminal in Germany.

Map 7 showing the coastal landing terminals for Nord Stream 1 and Nord Stream 2 in Germany.

57. The Amending Directive has changed, for offshore pipelines, the border connection point that is legally relevant for the scope of the Gas Directive from the coastal terminal to the legal border of the territorial sea. This is illustrated in the following map:



Map 8 showing Nord Stream 1 and Nord Stream and their regulatory treatment pursuant to the Amending Directive.



Map 9 indicating the approximate area shown in map 8.

58. The Amending Directive does not, however, affect onshore pipelines – they are not in the sea and their border connection point already coincided with the legal land border before the Amending Directive.

59. This was explicitly recognised by the European Commission in its Q&A document published with the proposal for the Amending Directive. The Commission responded to the question, "*Which existing pipelines are affected*", in the following terms:

> *"In principle, the proposal renders the Gas Directive applicable to all pipelines to and from third countries. In practice, a change in the legal situation will currently only be experienced by pipelines crossing into the EU jurisdiction across a sea border."*[42]

60. Similarly, in a presentation to the EU Member States on 20 February 2018,[43] the European Commission confirmed that the Amending Directive would have "*no practical impact*" on onshore import pipelines.[44]

61. As set out further in Section VIII below, the effect of this change through the introduction of the Amending Directive has been to apply the Third Energy Package to Nord Stream 2. Such a change was dramatic and unexpected, a fact recognised by the EU legislator through its provision for existing pipelines to enjoy a full derogation. The only pipeline which has not been eligible for such a derogation and that has therefore been impacted by the change – quite deliberately in NSP2AG's submission - is Nord Stream 2.

62. In the remainder of this Section the Claimant will address the following:

i. Decisive arguments demonstrate that the Gas Directive did not apply to offshore import pipelines such as Nord Stream 2 prior to the enactment of the Amending Directive (**Section III.2**).

ii. Nord Stream 2 must be compared with other offshore import pipelines, not with pipelines entirely on the EU network side of a border connection point with a third country (**Section III.3**).

iii. Statements by Commission officials referred to by the Respondent do not change the correct legal conclusion on the territorial scope of the unamended Gas Directive (**Section III.4**).

iv. The possible application of competition law is irrelevant and competition law was not applied in any event (**Section III.5**).

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42 **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 5.

43 **Exhibit C-205**, Commission Energy Working Party presentation, "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", 20 February 2018.

44 **Exhibit C-205**, *ibid.*, slide 10.

v. The regulatory change introduced by the Amending Directive was dramatic and not merely a matter of "clarification", codification or making explicit what was previously implicitly understood (**Section III.6**).

III.2 Offshore import pipelines were previously outside the legal scope of the Gas Directive

63. This Section first explains that the only correct conclusion is that the unamended Gas Directive did not apply to Nord Stream 2. It then briefly comments on arguments concerning the scope of the unamended Gas Directive that the Respondent continues to make even though the issue has clearly been decided by its own Institutions.

The unamended Gas Directive did not apply as a matter of law nor in practice

64. As set out in the Claimant's Memorial, the non-application of the unamended Gas Directive to offshore import pipelines such as Nord Stream 2 was confirmed on numerous occasions, including in particular, by:

i. The Council Legal Service:[45] As explained by the Council Legal Service in its 27 September 2017 legal opinion on the Recommendation,[46] the Gas Directive could not be interpreted as applying to offshore import pipelines such as Nord Stream 2, in particular, due to their exclusion from the existing Article 36 exemption regime, which is only applicable to interconnectors, LNG facilities and storage facilities. An offshore import pipeline could not be considered as an "interconnector" within the meaning of the Gas Directive, since the term then only applied to a transmission line which crossed a border between Member States, and, therefore, an offshore import pipeline could not be eligible for an Article 36 exemption. Consequently, it had to be concluded that the Gas Directive was not intended to apply to offshore import pipelines as this would otherwise essentially lead to discrimination between offshore import pipelines from non-EU countries, that were not eligible, and pipelines within the EU, which were eligible. The Council Legal Service further considered that this was corroborated by the fact that the Gas Directive did not provide for any specific rules to address the potential conflict of laws arising from a third country applying its own laws to the part of the pipeline under its jurisdiction, not even obligations for Member States' authorities to cooperate with third-country authorities.

ii. The Commission and its Legal Service:[47] As explained by the Commission in its proposal document for the Amending Directive itself, "*following legal analysis, it has*

45 Memorial, para 214.

46 **Exhibit C-101**, Opinion of the Council Legal Service, "Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline — Allocation of competences and related legal issues", 12590/17, 27 September 2017.

47 Memorial, paras 206-207 and 215.

been concluded that the rules applicable to gas transmission pipelines connecting two or more Member States, which fall within the scope of the definition of "interconnector", are not applicable to such pipelines entering the EU."[48] The accompanying staff working document further explained that this was because, among other things, offshore import pipelines would otherwise be excluded from the Article 36 exemption regime, meaning that this could not have been the intention of the Union legislator,[49] echoing the reasoning of the Council Legal Service opinion. An official spokesperson of the European Commission had already confirmed the position in March 2017, stating as follows: "*We don't like Nord Stream-2 politically* […] *This being said, there are no legal grounds for the Commission to oppose Nord Stream-2* […] *because* [EU] *rules do not apply to the offshore part of the pipeline*".[50]

iii. The German energy regulator:[51] In his 3 March 2017 letter to the Commission,[52] the President of the BNetzA explained that there was legal consensus between the BNetzA, the German Government and the Legal Service of the European Commission that the Gas Directive did not apply to an offshore import pipeline such as Nord Stream 2. The letter further stated that, "*it is long-standing regulatory practice of the European Commission not to regard such pipeline projects under the regime of the internal market. This applies to Nord Stream 1, but also to other import pipelines from third countries, such as Green Stream and MEDGAZ*" and that, "*It would constitute a discriminatory practice if other requirements were to apply to Nord Stream 2*".

iv. The EU legislature itself, which amended the Gas Directive in order to make it applicable. In particular, according to recital 3 to the Amending Directive: "*The amendments introduced by this Directive are intended to ensure that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the Union, to gas transmission lines to and from third countries*." Similarly, recital 4 states as follows: "*To take account of the lack of specific Union*

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48 **Exhibit C-46**, European Commission Proposal for the Amending Directive, COM(2017) 660 final, 2017/0294 (COD), 8 November 2017, Explanatory Memorandum, p 2.

49 **Exhibit C-4**, Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, SWD(2017) 368 final, 8 November 2017, pp 2-3.

50 Statement by the European Commission spokesperson for climate action and energy Anna-Kaisa Itkonen reported in **Exhibits C-98,** Wall Street Journal article, "EU Says It Can't Block Russia-Backed Nord Stream 2 Pipeline", 30 March 2017 (last accessed on 19 October 2021 at https://www.wsj.com/articles/eu-says-it-cant-block-russia-backed-nord-stream-2-pipeline-1490906474); **Exhibit C-99**, RT Business News article, "EU gives up blocking Russia's Nord Stream 2 pipeline – report", 31 March 2017 (edited on 11 April 2017) (last accessed on 19 October 2021 at https://www.rt.com/business/382934-russia-nord-stream2-eu/); attribution confirmed by Miss Itkonen on Twitter, see **Exhibit C-100**, Twitter statement by Anna-Kaisa Itkonen, 31 March 2017 (edited on 11 April 2017) (last accessed on 19 October 2021 at https://twitter.com/v_madalina/status/847804423208398848).

51 Memorial, paras 206-207.

52 **Exhibit C-45**, Letter from J. Homann (President of the Bundesnetzagentur) to D. Ristori (Director-General DG Energy), 3 March 2017.

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 […]" (emphasis added).

65. Dr Borchardt, a high ranking official in the European Commission who the EU itself refers to in its Counter-Memorial as an authoritative voice[53], openly admitted that the Gas Directive did not apply. In a recorded public hearing in the European Parliament on 11 October 2017, specifically concerned with Nord Stream 2, he explained that:

> "*The legal service of the Commission and recently the legal service of the Council took the view that the Gas Directive is not directly applicable to offshore pipelines such as Nord Stream 2. I would say fair enough but does this mean that we leave this pipeline in a legal void or - even worse - we accept that this pipeline, even when it comes on EU territory, is governed by Russian law?*"[54] (emphasis added).

66. It should further be noted that, as the Respondent has itself explained, the "certification" of the operator of a pipeline pursuant to the Gas Directive is an important indication of the applicability of the Gas Directive to that pipeline.[55] Without such certification (or approval) a company cannot own and operate gas transmission infrastructure within the scope of the Gas Directive. The procedure for obtaining such certification is set out in Article 10(4) to 10(6) of the Gas Directive and Article 3 of the Gas Regulation. While certification proceedings are primarily conducted before Member State authorities, draft certification decisions must be notified to the European Commission before adoption. The European Commission then adopts an opinion on that draft decision, of which the national authority must take "the utmost account" when adopting its final decision.[56] The European Commission maintains a list of its opinions on certifications since the entry into force of the Third Gas Directive.[57] In other words, the European Commission maintains a list of all operators of transmission infrastructure covered by the Gas Directive. This list does not mention the operators of the

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53 Counter-Memorial, para 142.

54 **Exhibit C-92**, Transcript of Presentation by Klaus-Dieter Borchardt to a meeting of the European Parliament Committee on Industry, Research and Energy (ITRE), "Negotiation mandate for Nord Stream 2: state of play" (presentation accessible at https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy_20171011-1430-COMMITTEE-ITRE_vd), 11 October 2017, p 2.

55 In paragraph 145(iii) of the Counter-Memorial and in its Redfern Schedule, the EU refers to the implication for Nord Stream 2 of the certification of the company "Gaz-System" as the operator of the Polish section of the Yamal pipeline. In its letter to the Tribunal dated 28 June 2021, the Respondent explains that a company owning and operating a transmission pipeline needs to be certified as compliant with the Gas Directive requirements pursuant to Article 10 of the Gas Directive. The specific question of the certification of the operator of the Polish section of the Yamal pipeline is irrelevant because this concerned a pipeline entirely on EU territory. However, the Respondent correctly identifies certification of the operator of a pipeline as an important indication of the applicability of the Gas Directive to that pipeline. Conversely, the lack of certification of an operator must also be a reliable indication for the non-application of the Gas Directive to that operator's pipeline.

56 **Exhibit CLA-6**, Gas Regulation, Article 3(2).

57 **Exhibit C-212**, DG Energy, List of TSO Certifications (last accessed on 19 October 2021 at https://ec.europa.eu/energy/sites/default/files/documents/certifications_decisions_0.pdf), 3 June 2021. This list also covers TSOs of electricity transmission networks.

five offshore import pipelines: Nord Stream 1, Greenstream, Transmed, Medgaz and MEG. None of the companies operating these pipelines is certified pursuant to the Third Gas Directive.

67. As explained in the Claimant's Memorial, the Nord Stream 2 pipeline was conceived as a second iteration of the Nord Stream 1 project and is essentially identical in terms of its route and entry point into EU territory. The only logical legal conclusion, therefore, was that Nord Stream 2 was also outside the scope of the Gas Directive.

68. The practice prior to the Amending Directive was entirely in line with the objective legal conclusion that the Gas Directive did not apply, as is clear from the First and Second Expert Reports of Professor Cameron.[58] Prior to the Amending Directive, none of the five existing offshore pipelines, Nord Stream 1, Greenstream, Transmed, Medgaz and MEG were compliant with the Gas Directive. Neither the Respondent nor Professor Maduro contests this.

69. The documents that the EU has disclosed in the context of this proceeding further confirm the position that the unamended Gas Directive did not apply to offshore import pipelines such as Nord Stream 2:

    i. In separate letters to the Energy Ministers of Denmark and Sweden, to the Energy Minister of Germany, and to the Energy Minister of Poland during 2017,[59] the European Commission Vice-President Šefčovič and Energy Commissioner Cañete discussed the application of the TEP to Nord Stream 2 and indicated that it did not apply to the offshore pipeline, stating that as things stand, it would be "*operated exclusively under the law of a third country or in a legal void*" and therefore that "*a specific legal regime would need to be established*". The letter to the Polish Energy Minister is particularly pertinent in this regard, as the Polish Energy Minister had previously written to the European Commission, stating that the European Commission already had the necessary legal means to enforce the full application of the TEP in relation to Nord Stream 2 within the jurisdiction of the EU Member States and inviting it to take action.[60] The European Commission however clearly dismissed Poland's invitation.

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58 First Expert Report of Professor Cameron, para 5.7 and Second Expert Report of Professor Cameron, para 2.4.

59 **Exhibit C-213**, Letters from European Commission Vice-President Šefčovič and Energy Commissioner Cañete to the Energy Ministers of Denmark and Sweden, 28 March 2017; **Exhibit C-214,** Letter from European Commission Vice-President Šefčovič and Energy Commissioner Cañete to the German Minister for Economic Affairs and Energy, 29 June 2017; and **Exhibit C-215**, Letter from European Commission Vice-President Šefčovič and Energy Commissioner Cañete to the Energy Minister of Poland, 6 September 2017.

60 **Exhibit C-216**, Letter from the Polish Energy Minister to Energy Commissioner Cañete, 19 May 2017.

ii. In a letter to the European Commission Vice-President Šefčovič and Energy Commissioner Cañete of 7 April 2017,[61] the German minister for economic affairs and energy – after referring to the position by the German government that offshore import pipelines from third countries are not subject to the TEP as well as the European Commission's own statements in this regard in the above mentioned letter to the Energy Ministers of Denmark and Sweden – expressed her surprise that the Commission called into question the existing legal framework and planned to apply the rules of the TEP retroactively to Nord Stream 2 via an international agreement with Russia. The minister also asked why an international agreement should be concluded in the case of Nord Stream 2 while this had not been the case for other existing import pipelines from third countries.

iii. In an email from 12 September 2017 to European Commission Vice-President Šefčovič and Energy Commissioner Cañete prior to the publication of the proposal for the Amending Directive, an MEP requested that the European Commission confirm in the European Parliament that the TEP applied to offshore import pipelines such as Nord Stream 2.[62] The Commission however, did not take up this invitation. The MEP's request was triggered by a statement given by the German government in response to questions in the German Bundestag. The German government noted that, according to its understanding, the offshore import pipelines in the Mediterranean were not subject to the TEP.[63]

70. In the discussions in relation to the proposal for the Amending Directive in the Council, numerous Member States repeatedly raised concerns in relation to the Commission's failure to carry out an impact assessment given the "drastic change" in the legal treatment of offshore import pipelines.[64] In this context, the Netherlands specifically mentioned: "*the possibility of a breach of the investment protection which is offered under the Energy Charter Treaty, in particular the protection against non-commercial risks*."[65] A "drastic change" in the legal treatment and the risk of a violation of the ECT could only arise if the unamended Gas Directive did not apply to offshore import pipelines.

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61 **Exhibit C-217**, Letter from the German Minister for Economic Affairs and Energy to European Commission Vice-President Šefčovič and Energy Commissioner Cañete (German original and English translation), 7 April 2017.

62 **Exhibit C-218**, Email from MEP Reinhard Bütikofer to European Commission Vice-President Šefčovič and Energy Commissioner Cañete, 12 September 2017.

63 **Exhibit C-219**, Responses from the German government to a "small inquiry" by Members of the German Parliament Annalena Baerbock, Oliver Krischer, Marieluise Beck (Bremen) and others from the parliamentary group Bündnis 90/Die Grünen, "Fortgang der russischen Ostsee-Pipeline Nord Stream 2", BT-Drucksache: 18/13083 (German original and English translation), 24 July 2017, reply to question 24. The answer specifically mentions five pipelines, namely MEG, Medgaz, Transmed, Greenstream and Galsi. The Galsi pipeline was a planned pipeline from Algeria to Italy but was never built.

64 **Exhibit C-220**, Council of the European Union Working Paper, "Netherlands comments on the Gas Directive", WK 3759/2018, 27 March 2018. See also statements set out in paragraphs 201 and 203 of this Reply.

65 **Exhibit C-220**, *ibid*.

71. Furthermore, in paragraphs 131 to 139 of its Counter-Memorial the Respondent puts forward a number of arguments as to why the Gas Directive would have applied to Nord Stream 2 anyhow including:

i. The alleged legislative intent as reflected in recitals (22), (35) and (37).

ii. The wording of provisions such as Article 1, 13(1)(a) and 34.

iii. EU Member States' territorial jurisdiction under international law.

72. These are presumably arguments that have been made in debate inside the EU Institutions with the Commission and Council Legal Services. However, that debate has been concluded and there is no doubt that, as a matter of EU law, the unamended Gas Directive did not apply to offshore import pipelines in the territorial sea of the Member States and was not applied "in practice" either. In light of the discussion above, there was never serious doubt about that conclusion. In his recent opinion, Advocate General Bobek calls these arguments "*untenable*".[66] In any event, by simply repeating flawed legal arguments as to why the unamended Gas Directive should have applied, the Respondent does not change the obviously correct legal conclusion that it did not. Consequently, these arguments go nowhere and should be rejected.

III.3 The correct comparison is between Nord Stream 2 and the five other offshore import pipelines. The numerous other pipelines referred to by the EU are irrelevant

73. This Section first provides background on EU gas import infrastructure that is essential to make valid comparisons between Nord Stream 2 and other pipelines. It then uses that information to demonstrate that regulatory treatment of other pipelines should not have caused the investor to consider that the unamended Gas Directive applied to Nord Stream 2.

EU gas import infrastructure

74. In Section IV.2 of the Memorial, the Claimant gave an overview of EU gas import infrastructure explaining that the great majority of imported gas (73% in 2019) was transported to the EU via large pipelines terminating at EU borders. Some connect via land borders and others via the sea.

75. The Claimant further explained that natural gas from Norway is imported into the EU via offshore pipelines that are subject to the Gas Directive pursuant to Norway's membership of the European Economic Area, but that these pipelines from Norway receive special and favourable regulatory treatment as a so-called "*upstream pipeline network*".

76. Leaving aside the Norwegian "*upstream*" pipelines, there are five offshore import pipelines: Greenstream (landfall in Italy), Transmed (landfall in Italy), Medgaz (landfall in Spain), MEG

[66] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 100.

(landfall in Spain) (these four defined as the "**North African pipelines**") and Nord Stream 1 (landfall in Germany). The Claimant further explained that these offshore import pipelines were outside the scope of the EU Gas Directive prior to the Amending Directive.[67]

77. Neither the Respondent nor Professor Maduro disagrees or engages with the description of the EU's gas import infrastructure in Section IV.2 of the Memorial. Furthermore, the Respondent says very little about the five offshore import pipelines identified by the Claimant, despite the fact that these are the only other offshore import pipelines, i.e. the only other comparable pipelines and, as the European Commission explained when tabling its proposal, the only gas pipelines impacted by this proposal (together with Nord Stream 2).[68]

78. The Respondent does mention a large number of other less relevant pipelines which it then seeks to compare with Nord Stream 2. However, it provides no or only very limited information on these other pipelines, which makes any proper comparison with Nord Stream 2 impossible, and seems primarily to be intended to confuse. For the purposes of the current discussion, there are only two types of pipelines: those on the EU side of a border connection point and those on the non-EU side of a border connection point. It does not matter whether the pipelines on the EU side transport domestic or imported gas or both. The only thing that matters is whether the pipeline is on the EU side, in which case EU law applies, or on the non-EU side, in which case EU law does not apply. As explained in the Memorial, the EU consciously restricted the scope of the Gas Directive to pipelines within the EU when the Gas Directive was first adopted (a point that neither the Respondent nor Professor Maduro have addressed).[69]

79. In the following paragraphs the Claimant will first identify the pipelines to which the Respondent refers (paragraph 80 below). It will then set out the essential features of each of these pipelines (paragraphs 81 and 82 below). Finally, it will discuss the comparisons made with the Nord Stream 2 pipeline (paragraphs 84 to 88 below).

80. The way in which the Respondent discusses and groups these pipelines is confusing,[70] incorrect and out of place. Because the position of these pipelines to the border point is fundamentally different from that of Nord Stream 2, they are irrelevant for the discussion.

    i. The Respondent refers to four specific pipelines in Section 2.2.3 of the Counter-Memorial, namely South Stream[71], Nabucco, the Trans Adriatic Pipeline[72] and the

67 Memorial, paras 103-105.
68 **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 5, reproduced above at paragraph 59.
69 Memorial, para. 64.
70 For instance, it is not clear why, in paras 305 and 306 of the Counter-Memorial, the Respondent places some connections between EU Member States and Ukraine in a first group and other connections between EU Member States and Ukraine in a second group.
71 Also mentioned in the Counter-Memorial, paras 366 and 383.
72 Also mentioned in the Counter-Memorial, paras 95, 126 and 138.

Yamal pipeline[73]. Elsewhere it also refers to the planned EastMed project[74] and the "Brotherhood pipeline".[75]

ii. The Respondent also refers to groups of pipeline connections that cross borders between the EU and non-EU countries, namely:

(a) Connections between EU Member States and Ukraine and Serbia.[76]

(b) Connections between EU Member States and Switzerland.[77]

(c) Connections between EU Member States and Russia and Turkey.[78]

(d) Connections between EU Member States and the UK.[79]

(e) Connections between EU Member States and Norway.[80]

81. For all these pipelines it is the case that, unsurprisingly, EU law applies on the EU side of the border connection point but not on the non-EU side. The essential features of these pipelines and groups of pipeline connections can further be summarised as follows.[81]

i. South Stream project: The complete South Stream project comprised a series of pipelines, including a subsea pipeline from Russia under the Black Sea making landfall on the Bulgarian coast. The project would then have continued with overland sections through Bulgaria, Serbia and Hungary and would have terminated in Austria. In addition, there were plans for sections to go through Croatia, Greece, Slovenia and Italy.[82] Each of the sections of the complete infrastructure was legally separate (i.e. the offshore section and the onshore sections in each EU Member State and Serbia). The project was not realised.

ii. Nabucco project: The complete Nabucco project comprised a series of onshore pipelines intended to transport natural gas originating in the Caspian region and Central Asia through Turkey to (and through) the EU. The Nabucco pipeline was planned to cross most of Turkey to the Turkish-Bulgarian border, after which it would cross Bulgaria, Romania, and Hungary and terminate in Austria. As in the case of the South Stream project, each of the national sections was legally separate. The project was not realised.

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73 The Yamal pipeline is also mentioned in the Counter-Memorial, paras 126, 306 and 585.
74 Counter-Memorial, paras 127 and 210.
75 Counter-Memorial, para 585.
76 Counter-Memorial, paras 126, 305 and 306.
77 Counter-Memorial, paras 126 and 309.
78 Counter-Memorial, paras 126 and 307.
79 Counter-Memorial, paras 126 and 308.
80 Counter-Memorial, para 137.
81 Maps depicting the route of the Yamal, Brotherhood, TAP and TANAP pipelines as well as the EastMed, South Stream and Nabucco pipeline projects can be found in **Exhibit C-221,** Document prepared by Herbert Smith Freehills LLP, "Maps of the Yamal, Brotherhood, TAP and TANAP pipelines as well as the EastMed, South Stream and Nabucco pipeline projects".
82 See **Exhibit R-21**, "South Stream bilateral deals breach EU law, Commission says", 4 December 2013.

iii. Trans Adriatic Pipeline (or "TAP"): TAP is a pipeline starting at a border connection point between Turkey and Greece. It crosses Greece, Albania and the Adriatic Sea and terminates in Italy. Albania is a party to the Energy Community Treaty.[83] At the Greece – Turkey border point TAP connects to the Trans Anatolian Pipeline ("TANAP") which was built around the same time as TAP and which is used to transport natural gas from the Caspian region to the border of the EU (i.e. through Turkey to the Greek-Turkish border). TAP (but not TANAP) qualified as an "interconnector" within the meaning of the Gas Directive prior to the Amending Directive (since it connects Greece, Italy and Energy Community member Albania) and was, therefore, eligible for an Article 36 exemption. TAP is owned and operated by a single project company which requested and received an Article 36 exemption before taking a final investment decision.

iv. Yamal is an onshore pipeline starting in Russia, crossing Belarus and entering the EU at a border point between Poland and Belarus. It then crosses Poland from East to West and terminates at the German-Polish border. Each of the national sections (in Russia, Belarus and Poland) is legally separate. Russian law applies to the Russian section, Belarusian law to the Belarusian section and EU law to the Polish section.

v. EastMed project. The planned EastMed pipeline is intended to start in the offshore natural gas fields Leviathan (Israel) and Aphrodite (Cyprus). The pipeline would then make landfall in Cyprus, continue west through the Mediterranean Sea, make a second landfall in Crete (Greece), then continue north under the sea and enter and continue through mainland Greece.[84]

vi. Connections between the EU and Switzerland, Russia and Turkey: There are a number of border connections points between the gas networks in these non-EU countries (owned by non-EU TSOs) and gas networks in EU Member States (owned by TSOs from those Member States, including Germany, Italy, Greece, Turkey, Finland, Estonia, Latvia and Lithuania). In each of these cases EU law applies to the networks on the EU side of the border point and Swiss, Russian and Turkish law respectively applies to the networks on the other side of the border point.

vii. Connections between EU Member States and Ukraine and Serbia. There are a number of border connection points between the network of the Ukrainian State-

83 For further explanation in relation to the Energy Community, see the Memorial, paras 66 and 253.

84 If this pipeline were to be built, the section from the Israeli gas field to Cyprus (if any) would be caught by the Gas Directive by virtue of the Amending Directive. By contrast, the Gas Directive would have applied to the sections from the Cypriot gas field and from Cyprus to Crete and mainland Greece with or without the Amending Directive. The sections from the gas fields to Cyprus would presumably be treated as an upstream pipeline network pursuant to recital (5) of the Amending Directive and Article 34 of the Gas Directive.

owned TSO LLC Gas Transmission System Operator and the networks of Poland,[85] Slovakia,[86] Hungary[87] and Romania.[88] There are also border connection points between the Serbian network of State-owned TSO Srbijagas and the networks of Bulgaria and Hungary. Again, unsurprisingly, EU law applies to the networks on the EU side of these border connection points and Ukrainian and Serbian law to the networks on the other side. The difference with Switzerland, Russia and Turkey is that Ukraine and Serbia in principle apply certain Gas Directive rules as contracting parties to the Energy Community Treaty. This does not mean that EU law applies in Ukraine and Serbia but that Ukraine and Serbia have implemented certain aspects of the Gas Directive in their national legislation pursuant to their obligations under the Energy Community Treaty.[89]

viii. Connections between EU Member States and the UK. There are two gas pipelines connecting the UK and the EU. The "IUK Interconnector" with Belgium and the "BBL" pipeline to the Netherlands. These pipelines were planned and constructed when the UK was still an EU Member State. The BBL pipeline received an Article 36 exemption. By virtue of the application of the Trade and Cooperation Agreement ("TCA") between the EU and the UK both pipelines remain subject to EU gas regulation in substance and the exemption for BBL remains valid.[90] The Amending Directive has no practical impact on these pipelines and their operation.

ix. The Brotherhood pipeline. In paragraph 585 the Respondent refers to the Brotherhood pipeline. This pipeline starts in Russia, crosses Ukraine and enters Slovakia. This pipeline is included in the group of pipelines that the Respondent otherwise refers to as connections between EU Member States and Ukraine. These are discussed in point (vii) above and there is no need to discuss or consider the Brotherhood pipeline separately.[91]

x. Connections between EU Member States and Norway. As explained above, the Gas Directive was applicable prior to the Amending Directive to pipelines from Norway (which is a member of the European Economic Area).[92] These pipelines receive special and favourable regulatory treatment as an "*upstream pipeline network*."

82. What all these pipelines have in common (to the extent they were built) is that their regulatory position was in practice unaffected by the Amending Directive. Their border connection point

85 H-gas.
86 Eustream.
87 FGSZ
88 Transgas.
89 Memorial, para 66.
90 See Title VIII (Energy) of the TCA and, in particular, Articles 306 to 309.
91 In Ukraine these pipelines are part of what is described as the Ukrainian transport system in the Memorial, para 55(iii).
92 The EEA countries are Norway, Iceland and Liechtenstein.

remained where it was before and the Gas Directive continued to apply on the EU side of that connection point as it did before. This is different for offshore pipelines, as the Amending Directive essentially moved their border connection point from the coast to the limit of the territorial sea.

The regulatory treatment of pipelines entirely within the EU should not have caused the investor to assume that the unamended Gas Directive applied to Nord Stream 2

83. Before addressing the Respondent's arguments on the regulatory treatment of Nord Stream 2, the Claimant notes that the Respondent incorrectly claims that the Nord Stream 2 pipeline crosses Danish territorial waters and that 140 km of the pipeline run through German or EU territorial waters.[93] This is factually wrong. The Nord Stream 2 pipeline is located entirely outside Danish territorial waters. As explained in the Memorial, approximately 54 km of the Nord Stream 2 pipeline is on German territory, more than 53 km of which is in German territorial waters).[94]

84. In paragraphs 126, 138, 145 and 305-311 of its Counter-Memorial, the Respondent refers to a number of pipelines that allegedly have been subject to the (unamended) Gas Directive. The EU claims that in light of this *"any reasonably informed financial investor familiarising itself with the Gas Directive and EU competition law 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"*.[95] This is intended to support the Respondent's argument that there was no fundamental change to the regulatory framework in which the Claimant invested. However, none of the pipelines identified by the EU in this context is an offshore import pipeline. They are, therefore, irrelevant for the discussion on Nord Stream 2.

85. For completeness the Claimant addresses the specific comments that the Respondent makes in relation to three pipelines in paragraph 145 of its Counter-Memorial:

    i. *Nabucco and its European Commission Article 36 exemption decisions*. The Respondent refers to the European Commission exemption decision for the Austrian section of the Nabucco pipeline[96] and its later prolongation decision.[97] However, none of these decisions, nor the European Commission exemption decisions in relation to the sections of the Nabucco pipeline in Bulgaria, Romania and Hungary,[98]

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93 Counter-Memorial, paras 24, 139 and 365.
94 Memorial, paras 119, 164, 420(i) and 463.
95 Counter-Memorial, para147.
96 **Exhibit CLA-38**, European Commission Exemption Decision on the Austrian section of the Nabucco pipeline, CAB D(2008)142, 8 February 2008.
97 **Exhibit CLA-179**, European Commission Decision on a prolongation of the effects of the exemption decision of NABUCCO Gas Pipeline International GmbH from third party access and tariff regulation granted under Directive 2003/55/EC, 16 May 2013.
98 **Exhibit CLA-37**, European Commission Exemption Decision on the Bulgarian section of the Nabucco pipeline, C(2009) 3037, SG-Greffe (2009) D/2299, 20 April 2009; **Exhibit CLA-36**, European Commission

contains anything suggesting that the Nabucco section in Turkey (or pipelines such as Nord Stream 1 or the pipelines originating in North Africa) would be covered by the Gas Directive.

ii. *TAP and its European Commission Article 36 exemption decisions*.[99] As explained above, TAP is a pipeline that starts and ends in an EU Member State after crossing Energy Community Member Albania and the Adriatic Sea. This makes it very different from Nord Stream 1, the North African pipelines and Nord Stream 2. Furthermore, the European Commission's exemption decisions contain nothing suggesting that an import pipeline terminating at the EU border (whether onshore such as TANAP or offshore such as Nord Stream 1 or the North African pipelines) would be subject to the Gas Directive. On the contrary, the TAP exemption decisions indicate only that the Gas Directive applies to TAP, i.e. on the EU side of the border connection point, but not to TANAP, i.e. on the Turkish side of the border connection point.

iii. The *Polish section of the Yamal pipeline and the Commission's certification opinion.*[100] This certification opinion is exclusively concerned with the Polish section of the Yamal pipeline. It only confirms, therefore, the uncontested point that a pipeline that starts and ends on EU territory and is on the EU side of a border connection point was subject to the Gas Directive.

86. In relation to the connections with Switzerland, the Respondent refers in paragraph 138 and footnote 56 of its Counter-Memorial to printouts of information from the PRISMA platform that can be used by TSOs to organise capacity bookings at entry-exit points to their network. The printouts relate to an entry point to the network of the Italian TSO Snam Rete which is the TSO for the entirety of Italy and to exit points of two German TSOs that own part of the network serving the "NetConnect Germany" market area covering the southern half of Germany.[101] These are entry and exit points to and from a Swiss network and are, therefore, part of the border connection points between Switzerland and Germany/Italy. As explained,

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Exemption Decision on the Romanian section of the Nabucco pipeline, C(2009) 5135, SG-Greffe (2009) D/3563, 23 June 2009; **Exhibit CLA-180,** European Commission Decision on the Exemption of the Hungarian section of the Nabucco pipeline, 20 April 2009.

99 **Exhibit CLA-39**, European Commission Decision on the Exemption of the Trans Adriatic Pipeline from the requirements on third party access, tariff regulation and ownership unbundling laid down in Articles 9, 32, 41(6), 41(8) and 41(10) of Directive 2009/73/EC, C (2013) 2949 final, 16 May 2013; **Exhibit CLA-181**, European Commission Decision prolonging the exemption of the Trans Adriatic Pipeline from certain requirements on third party access, tariff regulation and ownership unbundling laid down in Articles 9, 32, 41(6), (8) and (10) of Directive 2009/73/EC, 17 March 2015.

100 **Exhibit R-28**, European Commission Opinion pursuant to Article 3(1) of Regulation (EC) No 715/2009 and Article 10(6) and 11(6) of Directive 2009/73/EC - Poland - Certification of Gaz-System as the operator of the Polish section of Yamal-Europe Pipeline, 15 March 2015.

101 As mentioned in paragraph 91 of the Claimant's Memorial, there were two such zones in Germany. As from 1 October, these two zones were combined and Germany now has one gas market area.

it is not disputed that EU law applies to networks on the German and Italian side of border connection points with Switzerland.

87. In relation to all the other pipelines and connections the Respondent makes the general argument that these pipelines and connections were covered by the Gas Directive before the Amending Directive and that they have not received a derogation pursuant to Article 49a. But the Respondent itself further specifies that the application of the Gas Directive was on the EU side of border connection points, explaining that: "*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*" [102] (emphasis added), which as explained above, was also the case for the five existing offshore import pipelines.

88. In light of all the above it is clear that:

i. The Gas Directive has always been applicable to pipeline infrastructure on the EU side of a border connection point with a third country. The Claimant has never contested this and has explicitly stated in its Memorial that a pipeline such as EUGAL which connects to the exit point of Nord Stream 2 at the border connection point in Lubmin is subject to the Gas Directive, adding that: "*This is and was obviously the case with or without the Amending Directive*".[103]

ii. EUGAL is in this respect comparable to OPAL[104] (which connects to Nord Stream 1) and the Bulgarian sections of South Stream and Nabucco.

(a) EUGAL, OPAL and the Bulgarian Sections of South Stream and Nabucco are all (or were planned to be) pipelines within the EU connecting to an import pipeline at a third country border connection point (transporting imported gas further downstream into the EU). As the EU General Court has summarised it, OPAL "*is the terrestrial section, to the west, of the Nord Stream 1 gas pipeline, the point of entry to which is located close to the area of Lubmin, near Greifswald*".[105] Further, the EU General Court sets out that: "*natural gas can be supplied at the* [OPAL] *pipeline entry point close to Greifswald only by the Nord Stream 1 pipeline, used by the Gazprom group to transport gas from Russian gas fields*."[106] This is also reflected in OPAL's name which stands for "*Ostseepipeline-*

102 Counter-Memorial, para 95. See also para 305 for a similar statement.
103 Memorial, para 277.
104 OPAL has received a partial Article 36 exemption. The sponsors of the EUGAL pipeline did not seek an Article 36 exemption and EUGAL has been developed as regulated infrastructure. Both are, however, clearly within the scope of the Gas Directive.
105 **Exhibit CLA-182**, *Republic of Poland v. European Commission*, T-883/16 ECLI:EU:T:2019:567, Judgment, 10 September 2019, para 5 (upheld on appeal in **Exhibit CLA-205**, *Germany v. Poland,* Case C-848/19 P EU:C:2021:598, Judgment, 15 July 2021).
106 **Exhibit CLA-182,** *ibid.*, para 11.

Anbindungsleitung", i.e. "Baltic Sea pipeline connector" (and Baltic Sea pipeline is a reference to the original Nord Stream 1 project).

(b) However, Nord Stream 1 and OPAL were never treated as a single pipeline that is in its entirety subject to the Gas Directive. These are pipelines on different sides of a border connection point in Lubmin. Pursuant to the correct territorial application of the unamended Gas Directive, these two pipelines have received different regulatory treatment: the Gas Directive applied to OPAL on the EU side of the border connection point, but not to Nord Stream 1 on the non-EU side of the border connection point.

(c) The position of Nord Stream 2 is the same as that of Nord Stream 1. Its onshore extension EUGAL on the EU side of the border connection point was always subject to the Gas Directive, as it starts and ends on EU territory. EUGAL is in this respect similar to OPAL and the Bulgarian sections of South Stream and Nabucco. Nord Stream 2, by contrast, is on the non-EU side of the border connection point, like Nord Stream 1 and the North African pipelines.

iii. The Gas Directive did not apply to sections of import pipelines that are located on a Member State's legal territory but on the non-EU side of a border connection point (essentially sections in the territorial sea). The EU only ever considered extending the Gas Directive to these sections when it sought to target Nord Stream 2 through enacting the Amending Directive.

89. As a final point, the fact that the regulatory treatment of existing pipelines should not have alerted NSP2AG is further confirmed by the fact that six experienced, EU based gas network operators took the view that Nord Stream 2 was outside the scope of the Gas Directive as follows from their letter to Commission President Juncker of June 2017.[107]

III.4 Statements by Commission officials do not change the correct legal conclusion of the EU Institutions that the unamended Gas Directive did not apply to offshore import pipelines such as Nord Stream 2

90. As explained above at paragraph 64.i and 64.ii, the EU Institutions themselves undertook legal analysis of the applicability of the unamended Gas Directive to offshore import pipelines such as Nord Stream 2 and concluded that it did not apply.

91. In paragraphs 146 to 149 of its Counter-Memorial, the Respondent nonetheless appears to argue that the Claimant cannot rely on EU statements from 2017 or later to substantiate its

[107] **Exhibit C-222**, Letter from Fluxys, Gasunie, Gascade, Net4Gas, Gas Connect Austria and Ontras to Commission President Juncker, 22 June 2017. Fluxys, Gasunie and Net4Gas are the Belgian, Dutch and Czech TSOs who cover the entirety of their respective Member State. Ontras and Gascade are two German TSOs. Gas Connect Austria is an Austrian TSO.

point that the unamended Gas Directive did not apply to offshore import pipelines such as Nord Stream 1 and Nord Stream 2. It is certainly correct that the Claimant did not rely on these statements from 2017 and later when taking its investment decisions prior to those dates. Instead the Claimant relied on objective legal analysis that the Gas Directive did not apply to offshore import pipelines, unambiguously reflected in the practical reality of the non-application of the Gas Directive to Nord Stream 1 and the North African pipelines.[108] In the context of this case, however, there is nothing that would prevent the Claimant from relying on EU statements from 2017 and later to confirm that this objective legal analysis was correct.

92. In paragraphs 140 to 144 of its Counter-Memorial, the Respondent refers to a number of statements by the European Commission, in particular from Commissioner Oettinger (responsible for energy in 2014) and Dr Borchardt, a high ranking official in the Commission's Directorate-General Energy. According to the Respondent these statements should have made it clear to the Claimant that the Gas Directive applied even before September 2015. The weight that the Respondent seeks to attach to these statements is in stark contrast to its attempt to minimise the significance of similar statements (including by the same Dr Borchardt) concerning the discriminatory intent of the Amending Directive. In that context the Respondent argues that: "*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*".[109] On any analysis, the Respondent cannot credibly argue on the one hand that Dr Borchardt's statements about the EU's discriminatory intent are of limited value, and on the other hand that his statements could somehow trump the objectively correct legal conclusion of the non-application of the Gas Directive to offshore import pipelines.

93. The Claimant further notes that, upon proper consideration, these early statements by Commission officials do not in any event support the conclusion that the unamended Gas Directive applied to Nord Stream 2.

    i. The Commission communication to the Russian Government made public on 14 August 2012, question 3.[110] The Respondent refers to the answer to question 3 which asks whether the Gas Directive will be applicable "*in particular to those parts of Nord Stream and South Stream that will be built on the* territory *of the EU*". The answer states that: "*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*." In a context in which the Gas Directive was not applied to Nord Stream 1 nor any other offshore pipeline, this reference could only

[108] First Expert Report of Professor Cameron, para 5.7 and Second Expert Report of Professor Cameron, para 2.4.
[109] Counter-Memorial, para 600.
[110] Counter-Memorial, para 141.

be understood as a reference to pipeline sections on the EU side of the border connection point. It should further be noted that, if it were genuinely the case that the unamended Gas Directive applied to offshore pipelines in the territorial sea of the Member States, the Commission would have said so explicitly in this response that was specifically concerned with South Stream and Nord Stream 1, both offshore pipelines. Finally, the same document confirms that an Article 36 exemption would not be available to Nord Stream 1 or the offshore section of South Stream as these are not connections between Member States.[111] As the Council and Commission Legal Services have pointed out,[112] the non-availability of this exemption is a strong indication that the unamended Gas Directive did not apply.

ii. Dr Borchardt's statements reported in the Euractiv article on South Stream.[113] This article describes the European Commission's criticism of the Member States that had concluded bilateral agreements with Russia to host the South Stream pipeline. As explained above, South Stream had a number of onshore sections crossing a number of Member States. Taking into account the correct legal interpretation of the Gas Directive and the corresponding practice of non-application to offshore pipelines, Dr Borchardt's statements will have been perceived (and were most likely intended) to refer to the South Stream sections on the EU side of the border connection point (i.e. onshore). Indeed, the article refers to six EU Member States but in five of these South Stream was a purely onshore project (as South Stream offshore only made landfall once, namely in Bulgaria). The article contains nothing suggesting that the Gas Directive would apply on the non-EU side of the border connection point in the territorial sea of Bulgaria. Furthermore, Dr Borchardt's statements about "*exemptions*" will have been perceived as confirming that he was discussing only the sections on the EU side of the border connection point, as an Article 36 exemption was not available for the offshore section terminating on the Bulgarian coast.

iii. The Commission's response to an MEP question published on 5 September 2014.[114] This question, submitted on 31 January 2014, asked whether an exemption had been provided "*for the Nord Stream pipeline*". The Commission responded that no exemption has been granted or requested for the Nord Stream pipeline project and that the South Stream promotors could apply for Article 36 exemptions. Contrary to what the Respondent writes in paragraph 143 of the Counter-Memorial, however, this question was not concerned with Nord Stream 2 but with "Nord Stream", which

111 See further response to question 7, **Exhibit R-20**, Reply to questions from Mr Shmatko on the Third package, 29 June 2010.
112 Reply, paras 64.i and 64.ii above.
113 Counter-Memorial, para 142.
114 Counter-Memorial, para 143.

is now referred to as "Nord Stream 1". In 2014, however, there was only "Nord Stream". Furthermore, the Commission's response contains nothing that could be seen as confirming that the Gas Directive applied to pipeline sections on the non-EU side of border connection points. As the response is focused on Article 36 exemptions, it is clear that the answer is primarily concerned with South Stream sections on the EU side of the border connection point (since such an exemption was not available for the non-EU section of South Stream).

iv. Commissioner Oettinger's statement of 4 May 2014.[115] This statement contains nothing suggesting that it is concerned with the offshore section of South Stream on the non-EU side of the border connection point. On the contrary, the discussion with Austria to which the Commissioner refers in that statement is obviously concerned with the Austrian section of the South Stream project which is of course onshore and entirely in the EU.

III.5 The possible application of competition law does not affect NSP2AG's claim and in any case competition law remedies comparable to the Gas Directive requirements could not have been imposed on Nord Stream 2

94. The Respondent argues that irrespective of the Amending Directive, requirements comparable to ownership unbundling, TPA and tariff regulation could have been imposed by the European Commission under EU competition law in order to address conduct by offshore pipeline operators which amounts to an abuse of a dominant position contrary to Article 102 TFEU.[116] The EU therefore argues that in light of Gazprom's position and the previous competition law investigations to which it has been subject, the Claimant could not have reasonably assumed, "*that EU regulatory frameworks would never apply to it*".[117] Similarly, Professor Maduro argues that, "*No undertaking from a third country could, in effect, reasonably expect to be purely and simply immune from EU Competition Law when constructing a massive gas pipeline with some segments at least located in the territory of EU Member States*" and therefore, "*one could expect the EU and Member States to be able to exercise their jurisdiction to prescribe* [rules]*, vis-à-vis undertakings from third countries, with respect to activities adopted by such undertakings producing, or capable of producing, anti-competitive effects in the EU*."[118]

95. This line of argument is irrelevant for this arbitration. The Claimant's claim is in respect of the enactment of the Amending Directive, not EU competition law, which moreover, has never been enforced in relation to Nord Stream 2. If the Respondent and Professor Maduro's position is that the Claimant should have expected the Amending Directive to be passed

115 Counter-Memorial, para 144.
116 Counter-Memorial, para 150.
117 Counter-Memorial, para 156.
118 Expert Report of Professor Maduro, para 248.

because the European Commission could have imposed similar requirements under EU competition law, this would be entirely counter-intuitive. Indeed, as the Respondent and Professor Maduro note, the Commission conducted a long-running and wide-ranging Article 102 TFEU investigation into the Gazprom group, which was formally opened in August 2012 and closed by way of commitment decision in May 2018.[119] Why enact legislation to address competition issues when the Commission was already investigating Gazprom under its competition law powers?

96. The argument also fails on its own terms in any event. While the Respondent and Professor Maduro refer to numerous examples of EU competition law enforcement by the European Commission in the gas sector,[120] upon proper consideration, there is nothing in this enforcement practice that would suggest that the Claimant should have expected that it would be made subject to requirements similar to those in the Gas Directive:

i. As the Respondent and Professor Maduro note, there have been a number of investigations under Article 102 TFEU in which the European Commission used its competition law powers to address similar types of market behaviour as that addressed by the Gas Directive.[121] In particular, the *RWE*,[122] *GDF*,[123] *E.ON*[124] and *ENI*[125] cases also concerned anti-competitive behaviour by vertically-integrated undertakings, mainly long-term capacity bookings and other capacity restrictions to the detriment of competing downstream operators. However, none of these cases concerned infrastructure comparable to Nord Stream 2, namely third country offshore import pipelines.[126]

ii. Furthermore, as mentioned, Gazprom was subject to a long-running and wide-ranging Article 102 TFEU investigation from August 2012 until May 2018. The

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119 **Exhibit R-7**, Commission Decision relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement, Case AT.39816 *Upstream gas supplies in Central and Eastern Europe*, 24 May 2018, referred to in the Counter-Memorial, para 156, and in the Expert Report of Professor Maduro, paras 98-100. It should be noted that a commitment decision, by its nature, does not establish the existence of any infringement of EU competition law, only that in light of the commitments made, there are no longer any grounds for action by the Commission (see **Exhibit CLA-190**, Regulation (EC) No 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 4 January 2003, recital 13).

120 Counter-Memorial, paras 155-156 and Expert Report of Professor Maduro, paras 90-100.

121 Counter-Memorial, para 155 and Expert Report of Professor Maduro, para 101.

122 **Exhibit R-2**, Commission Decision relating to a proceeding under Article 82 ECT and Article 54 of the EEA Agreement, Case COMP/39.402 *RWE Gas Foreclosure,* 18 March 2009.

123 **Exhibit R-3**, Commission Decision relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement, Case COMP/39.316 *Gaz de France,* 3 December 2009.

124 **Exhibit R-4**, Commission Decision relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement, Case COMP/39.317 *E.ON Gas,* 4 May 2010.

125 **Exhibit R-5**, Commission Decision relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement, Case COMP/39.315 *ENI,* 29 September 2010.

126 This omission is all the more notable in particular in the *ENI* case, which concerned ENI's conduct in relation to its import pipelines transporting gas into Italy. While ENI also jointly controlled the Transmed and Greenstream third country offshore import pipelines, commitments were only made with respect to the TENP / Transitgas and TAG import pipelines.

commitments ultimately concluded with the Commission, as set out by Professor Maduro,[127] were significant and far-reaching, such that the European Commissioner for Competition Margrethe Vestager issued a statement at the time proclaiming that, "*our decision provides a tailor-made rulebook for Gazprom's future conduct. It obliges Gazprom to take positive steps to further integrate gas markets in the region and to help realise a true internal market for energy in Europe*".[128]

iii. Yet, notwithstanding the breadth and depth of its investigation, the Commission did not raise any concerns in relation to Nord Stream 1 or the planned Nord Stream 2. Notably, the Commission did not question the long-term capacity bookings by Gazprom Export on Nord Stream 1 and Nord Stream 2, despite the fact that long-term capacity bookings and other capacity restrictions by vertically-integrated undertakings were among the Commission's main concerns in the *RWE*, GDF, *E.ON* and *ENI* cases.

iv. The Claimant further notes that during the latter stages of the Commission's Article 102 TFEU investigation into Gazprom, the Polish energy incumbent PGNiG submitted a complaint to the Commission making further allegations under Article 102 TFEU, including specifically in relation to Nord Stream 1 and Nord Stream 2. In particular, PGNiG claimed that Nord Stream 1 and the construction of Nord Stream 2 would allegedly "*facilitate Gazprom's long-lasting abusive conduct on the upstream gas supply markets*".[129] The Commission however comprehensively rejected PGNiG's complaint, and did not even consider it necessary to specifically address the allegations made in relation to Nord Stream 1 and Nord Stream 2 in its rejection decision.[130] In light of the above, the Respondent's allegation that the Claimant should have expected to be the subject of such intrusive competition law enforcement simply lacks any credibility and cannot evidence any lack of diligence on the part of the Claimant.

97. Moreover, it is inconceivable that the European Commission could have feasibly required remedies comparable to the ownership unbundling, TPA and tariff regulation requirements under the Gas Directive, in light of long-standing established principles of EU competition law:

i. Such far-reaching remedies, in particular the TPA requirements, could only be required under EU competition law where a dominant undertaking's infrastructure

127 Expert Report of Professor Maduro, para 100.

128 **Exhibit C-223**, Statement by Commissioner Vestager on Commission Decision imposing binding obligations on Gazprom to enable free flow of gas at competitive prices, SPEECH/18/3928, 24 May 2018, p 1.

129 **Exhibit CLA-183**, European Commission Decision on Case AT.40497 Polish Gas Prices, 17 April 2019 para 56.

130 **Exhibit CLA-183,** *ibid*.

could be qualified as an "essential facility" and its conduct amounts to an abusive "refusal to supply", such that mandatory access is the appropriate remedy. This is subject to very strict criteria under competition law – in particular: "*the refusal to make available must be liable to eliminate all competition on the relevant market from the competing undertaking;* [… and] *the infrastructure in question must be indispensable to the ability of the competing undertaking to carry on its business, in the sense that there is no actual or potential substitute*".[131]

ii. The Commission exceptionally found these criteria to be met in the *RWE*, *GDF*, *E.ON* and *ENI* cases, given the very fundamental nature of these undertakings' infrastructure which meant that they effectively controlled all physical access for gas to the relevant regional or national markets concerned:

(a) RWE and E.ON were both vertically-integrated transmission network operators, which owned and operated networks covering entire regions of Germany. They had booked almost the entire capacities on their transmission networks for themselves, which simply made it impossible for any competitor to supply gas in that region as competitors had no access to the gas transport infrastructure needed to reach customers.[132]

(b) GDF was a vertically-integrated undertaking which owned and operated all the main gas-pipeline border entry points in France, the interconnection between the North and South zone of the relevant gas network and all LNG terminals. It had reserved most of the import capacity into France for itself on a long-term basis and had also engaged in certain practices at its LNG terminals,[133] which had the effect of largely closing off access to the French gas market to other potential gas suppliers.[134]

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131 See **Exhibit CLA-184,** *Slovak Telekom v. European Commissio*n, C-165/19 P, EU:C:2020:678, Opinion of Advocate General Saugmandsgaard Øe, 9 September 2020, para 60, setting out the criteria originally laid down by the EU Court of Justice in **Exhibit RLA-73**, Case C-7/97 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG,* ECLI:EU:C:1998:569, para 41. See also **Exhibit CLA-185**, European Commission Communication, "Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", 24 February 2009, para 81 where the Commission itself sets out the same criteria. These strict criteria reflect the intrusiveness of the remedy, which interferes with the right to property and freedom of contract and negatively impacts firms' incentives to invest – see Commission Article 102 Enforcement Priorities, para 82 and the judgment of the EU Court of Justice in **Exhibit CLA-186**, *Slovak Telekom v. European Commission*, C-165/19 P, EU:C:2021:239, Judgment, 25 March 2021, para 46.

132 See **Exhibit R-2**, the *RWE* decision, recitals 22-28 and **Exhibit R-4**, the *E.ON* decision, recitals 32-41. According to the Commission, RWE also understated the capacity that was technically available to third parties, leading to unjustified refusals and deterring third parties from requesting capacities, and also failed to implement an effective congestion management system to manage the scarce capacities on its network, leading also to the same effect (see **Exhibit R-2**, the *RWE* decision, recitals 26-28).

133 Including a failure to undertake appropriate procedures for allocating capacity and strategic limitation of investment in additional capacity (see **Exhibit R-3**, the *GDF* decision, recitals 31-40).

134 See **Exhibit R-3**, the *GDF* decision, recitals 24-40.

(c) ENI was a vertically-integrated undertaking that solely or jointly controlled all import pipelines transporting gas into Italy and had engaged in capacity hoarding practices, refusing to offer available or unused capacity to other gas suppliers, meaning that other suppliers could not obtain access to indispensable gas transport capacity to Italy.[135]

iii. However, it cannot be seriously maintained that these strict criteria would be met in the case of Nord Stream 2, as a newly-built import pipeline that is added to supply into the established German and Northern European gas markets. Unlike the infrastructure at issue in the *RWE*, *GDF*, *E.ON* and *ENI* cases, Nord Stream 2 self-evidently is not an "*essential facility*" for gas suppliers competing with Gazprom to access the German and Northern European gas markets. Gazprom does not monopolise access to an EU region's entire gas network. Furthermore, many other avenues for importation of gas exist, including many from other gas sources than Russia, which competing gas suppliers have been using very effectively until now. Failure to grant access to Nord Stream 2 obviously would not result in the "*elimination of competition*" and such access is clearly not "*indispensable*" for competing gas suppliers within the meaning of the case-law.

iv. On the contrary, granting access to Nord Stream 2 would not have any impact on competition whatsoever due to Gazprom's legal export monopoly in Russia, meaning that no competing gas suppliers could make use of Nord Stream 2. This was recognised by the BNetzA in its Nord Stream 1 Article 49a derogation decision, in which it explained that granting a derogation from the Gas Directive's requirements would not have any negative effects on competition because, due to Gazprom's export monopoly, *"the Nord Stream pipeline will not be used by competitors, so there will be no change to the market shares, other market concentration indices or liquidity on the relevant product and geographical market.*"[136] Granting access to Nord Stream 2 could not therefore advance the interests of competition any further beyond the current status quo, in which the Gas Directive requirements are already applicable to the downstream infrastructure. In this context, it is important to understand that EU competition law is only concerned with conduct by "*undertakings*",[137] which are defined as any entity engaged in economic activities,

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135 See **Exhibit R-5**, the *ENI* decision, recitals 39-61. According to the Commission, ENI also engaged in capacity degradation practices, including delaying allocation of new available capacity or offering capacity only on a fragmented basis, as well as strategic limitation of investment and expansion of capacity, leading also to the same effect (see the *ENI* decision, recitals 51-60).

136 **Exhibit CLA-204,** Bundesnetzagentur Decision concerning an application for derogation from regulation by Nord Stream AG, BK7-19-108 (redacted) (German original and English translation), 20 May 2020.

137 For instance, **Exhibit CLA-42**, TFEU, Article 102, itself states as follows: "*Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*" (emphasis added).

i.e. the offering of goods or services on a market, and not the action of a Government acting in the exercise of the powers of a public authority.[138]

v. For the same reason, to the extent that the Commission were to consider that Nord Stream 2 would somehow lead to a restriction of competition, this would ultimately be attributable to Gazprom's Russian export monopoly, and therefore under established competition law principles, could not be attributed to the Claimant, meaning that the Commission would not be able to find an infringement of competition law.[139]

vi. The Respondent and Professor Maduro further neglect the positive effects that Nord Stream 2 has on competition. As explained in the expert opinion prepared by the economic consultancy Frontier Economics and the Energy Economics Institute of the University of Cologne (EWI),[140] Nord Stream 2 will have a positive impact on prices in Europe, including in each EU Member State individually due to the significant increase in market integration within Europe in recent years. Indeed, the European Commission itself has previously found that the Gazelle pipeline, which is effectively an extension of Nord Stream 1 into the Czech Republic, enhanced competition.[141]

98. For the avoidance of doubt, the Claimant denies that it could be considered as having a "*dominant position*" on a relevant market for the purposes of competition law in the present context, which is a prerequisite for Article 102 TFEU to be potentially applicable.[142] The

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138 See for example, **Exhibit CLA-187**, the judgment of the EU Court of Justice in *Compass-Datenbank GmbH v. Republik Osterreich*, C-138/11, EU:C:2012:449, Judgment, 12 July 2012, paras 35-36: "*In that regard, it is settled case-law that, for the purposes of the application of the provisions of European Union competition law, an undertaking is any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed* […]. *It is clear from established case-law that any activity consisting in offering goods and services on a given market is an economic activity* […]. *Thus, the State itself or a State entity may act as an undertaking* […]. *By contrast, activities which fall within the exercise of public powers are not of an economic nature justifying the application of the FEU Treaty rules of competition*" (emphasis added).

139 See for example, the judgment of the EU Court of Justice in **Exhibit CLA-188**, *Konkurrensverket v. TeliaSonera Sverige AB*, C-52/09, EU:C:2011:83, Judgment, 17 February 2011, para 49: "*it must be borne in mind that Article 102 TFEU applies only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 102 TFEU does not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings*."

140 **Exhibit C-104**, Frontier Economics and EWI, "Effects of Infrastructure Investments such as Nord Stream 2 Pipeline on the European Gas Market", Report on behalf of Nord Stream 2 AG, May 2020.

141 **Exhibit CLA-189**, see European Commission Decision on the Exemption of the "Gazelle" interconnector according to Article 36 of Directive 2009/73/EC, 20 May 2011; **Exhibit CLA-52**, European Commission Exemption Decision on the 'Gazelle' interconnector from ownership unbundling within the meaning of Article 9 of Directive 2009/73/EC, C (2011) 8777, 1 December 2011; which both conclude that: "*Gazelle will therefore positively affect the competitive situation on the Czech gas markets, without strengthening the position of dominant players on these markets*" and "[l]*ikewise no negative effects on competition can be expected in other Member States*" (recitals 28 and 33).

142 It should be noted that, in any event, the existence of a dominant position is not itself unlawful under EU competition law – there can only be an infringement if a dominant undertaking *abuses* its dominant position (see **Exhibit CLA-185**, European Commission Communication, "Guidance on the Commission's

existence of a dominant position cannot simply be presumed (as the Respondent appears to do), but must be the subject of rigorous examination in light of the particular relevant product and geographic markets and conduct at issue, with the burden of proof on the European Commission.[143] The Respondent and Professor Maduro have adduced no relevant evidence to this effect – in this regard, the Respondent's references to the Commission's provisional findings of dominance in the Gazprom investigation are of no object as they concerned Gazprom's market position in the Central and Eastern European Member States and not the German and Northern European gas markets into which Nord Stream 2 is primarily intended to supply.

99. Finally, the Claimant notes that the *GFU* case cited by Professor Maduro in his report is also without relevance to the current proceedings.[144] The case concerned joint gas sales by Norwegian gas producers through a single seller (GFU) and was assessed by the European Commission under Article 101 TFEU[145] which prohibits anti-competitive agreements and concerted practices. Gazprom is not entering into joint selling of gas with other gas producers. The other cases referred to by Professor Maduro in paragraph 94 of his report are equally irrelevant.[146]

III.6 The regulatory change introduced by the Amending Directive was dramatic

100. In Section 2.5.6 of the Counter-Memorial, the Respondent argues that the Amending Directive merely provided legal certainty and clarified an existing rule, a point of view that is also developed in Professor Maduro's First Expert Opinion.[147] The Respondent then links this to a discussion on EU rules and practice to ensure that Inter Governmental Agreements (IGAs) between Member States and third countries are compliant with the Gas Directive. The Respondent also comments briefly on certain statements made by the EU Institutions on the

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enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings", 24 February 2009, para 1).

143 See **Exhibit CLA-190**, Regulation (EC) No 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 4 January 2003, Article 2: "*In any national or* [Union] *proceedings for the application of Articles* [101] *and* [102] *of the Treaty, the burden of proving an infringement of Article* [101]*(1) or of Article 102 of the Treaty shall rest on the party or the authority alleging the infringement*." By way of a recent example, in the Commission's decision in the Google Search Article 102 TFEU case, the Commission's analysis of market definition and dominance extended to nearly 200 paragraphs of reasoning – see **Exhibit CLA-191**, European Commission Decision on Case AT/39740 Google Search (Shopping), 27 June 2017, Sections 5-6.

144 Expert Report of Professor Maduro, paras 90-92.

145 At the time Article 81(1) of the EC Treaty.

146 **Exhibit CLA-192**, European Commission Decision on Case COMP/M.1673 VEBA/VIAG, 10 July 2001, is a decision by the European Commission under the EU Merger Regulation which applied a very different legal test for intervention, namely, whether the merger would *create or strengthen a dominant position*. In the context of a competition law investigation under Article 102 TFEU, the relevant legal test is whether an undertaking has *abused* its dominant position. Finally, the *UK-French submarine interconnector* and *Skagerrak cable and Denmark-Germany interconnectors* cases related to electricity interconnectors between EU/EEA Member States and therefore concerned EU internal market integration issues, meaning that these cases are not relevant for offshore import pipelines.

147 Counter-Memorial, para 371: "*The Amending Directive intervened to clarify*…".

significance of the Amending Directive (that the Claimant referred to by way of illustration of the significance of the Amending Directive's impact).

101. The Claimant replies to each of these points below and also addresses an argument regarding the scope of Network Codes made by the EU in its Redfern Schedule and its letter to the Tribunal of 28 June 2021.

The Amending Directive is a legal fig leaf: it does not create legal certainty, nor does it confirm an existing position

102. The Respondent and Professor Maduro argue that the Amending Directive was adopted "*to bring about a greater degree of legal certainty*".[148] According to the Respondent: "*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*."[149]

103. This is simply misleading. As explained above at paragraphs 64 to 72, it was entirely clear that the Gas Directive did not apply as a matter of law to gas import pipelines on the non-EU side of a border connection point. The practical reality correctly reflected the legal situation: regulatory authorities applied the Gas Directive to pipelines such as OPAL but not to the offshore import pipelines Nord Stream 1 and the North African pipelines as explained in the First and Second Expert Reports of Professor Cameron.[150]

104. In this respect it should be noted that the Gas Directive functions in a manner that leaves little room for practical ambiguity about its scope. As discussed above and highlighted by the Respondent in its letter to the Tribunal of 28 June 2021, a company owning and operating a transmission pipeline within the scope of the Gas Directive needs to be certified as compliant with the rules.[151] Furthermore, transmission pipelines are of such a nature that they could never escape the attention of the authorities. In such a context it was not a coincidence that EU Member States consistently applied the Gas Directive to pipelines such as OPAL (and required certification),[152] and consistently did not apply it to pipelines such as Nord Stream 1 and the North African pipelines (and did not require certification). It is not the case that the relevant authorities simply neglected to apply the Gas Directive to these offshore import pipelines. Rather, they consciously did not do so because the scope of the unamended Gas Directive was clear: it applied to pipelines transporting imported gas on the EU side of the border connection point but not on the third country side.

148 Counter-Memorial, para 149 and Section 2.5.6.
149 Counter-Memorial, para 362.
150 First Expert Report of Professor Cameron, para 5.7 and Second Expert Report of Professor Cameron, para 2.4.
151 See paragraph 66 of this Reply.
152 **Exhibit CLA-193**, European Commission Opinion pursuant to Article 3(1) of Regulation No 715/2009 - Germany - Certification of OPAL Gastransport GmbH & Co. KG, 25 September 2017.

105. While the legal position was clear, some in the EU Institutions and certain Member States opposed Nord Stream 2 and sought to undermine the project, for political reasons, by arguing that the Gas Directive applied anyhow. This commenced around November 2015 and is described in Section VI.4 of the Claimant's Memorial. When this inevitably failed, the Gas Directive was amended to apply to Nord Stream 2 and only Nord Stream 2. It is farcical to describe this as the creation of legal certainty. To the extent that there were any "*differences of views as to the scope of the existing rules*", they only emerged around the Nord Stream 2 Project.[153] If anyone was ever confused about the territorial scope of the Gas Directive this was the consequence of deliberate disinformation on this issue by opponents of Nord Stream 2.

106. The Respondent refers to an article in the Bulletin of the Polish Institute of International Affairs to support its position that the unamended Gas Directive applied to offshore import pipelines.[154] However, this article does not support this position. It rather explains that the prevailing legal opinion within the European Commission was that the Gas Directive did not apply to offshore import pipelines on the non-EU side of a border connection point. The article then argues that this interpretation should be changed but that the Commission takes the view that the better option is to amend the Directive (which the author ultimately considers to be beneficial to Poland's interests):

i. "*the Commission firmly opposed attempts to exclude the portions of South Stream running through Bulgarian territory from coverage under EU law, but it proved to be much more lenient in relation to NS1 and NS2. It did not protest the unclear legal situation of NS1, though MEPs did*".[155]

ii. "*As can be deduced from statements made by EC representatives, the main reason for the differences could be that South Stream was to run through the territories of several Member States, which, according to the directive, allowed it to be classified as an "interconnector" while NS2 is to formally end on the German coast, with gas transported from there to the Czech Republic through the separate EUGAL pipeline*".[156]

iii. "*The interpretation accepted by the EC is not the only acceptable one. In light of international law, the territorial sea belt is an integral part of the territory of a state and where the law of the state is fully applicable*".[157]

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153 And not in the context of any other projects involving offshore import pipelines, such as South Stream.
154 Counter-Memorial, para 139; **Exhibit R-19**, Szymon Zaręba, in Bulletin No.104 (1044) of the Polish Institute of International Affairs (PISM), 3 November 2017.
155 **Exhibit R-19**, *ibid.*, p 1.
156 **Exhibit R-19**, *ibid.*, p 2.
157 **Exhibit R-19**, *ibid.*, p 2.

iv. "*Revision of the gas directive is not absolutely necessary since the same effects can be obtained by adopting a broader interpretation of the existing law. However, given the perceived unwillingness of the EC to choose the latter solution, the former becomes the only option to secure long-term EU interests in the field of security of supply and the development of competition in the gas market. From the point of view of Poland's interests, the EC's desire to ensure the application of EU regulations to gas pipelines from third countries should be considered beneficial*".[158]

107. This article does not provide an objective legal analysis but develops an argument in favour of changing the prevailing understanding that the Gas Directive did not apply to offshore import pipelines, with the aim of obstructing Nord Stream 2 (which the author considers an undesirable project). Furthermore, academic writing that does assess the applicability of the Gas Directive to offshore import pipelines concludes that it did not so apply. Hancher/Marhold noted for instance: *"In our view, it follows that on a literal as well as a more purposive reading the coverage of the Gas Directive only extends to transmission pipelines (and interconnectors) within the 'territory' of the EU – that is, at the first interconnection point in an EU Member State – the border of EU jurisdiction. As a result, we subscribe to the generally agreed view that sub-sea external gas pipelines such as Nord Stream 1 and Nord Stream 2 bringing gas from Russia to Germany are not covered by the current legislation, nor are similar sub-sea pipelines bringing gas from Algeria, Libya or Norway"*.[159]

108. Professor Maduro also argues that there was a need to "clarify" the scope of the Amending Directive, but the only support he provides for this is a reference to two articles.[160] The first is the article in the Bulletin of the Polish Institute of International Affairs discussed in the previous paragraphs. The second is an article by Mr Michał Długosz from the lobby group "Central Europe Energy Partners", which according to its website "*represents the interests of the energy and energy-intensive companies from Central Europe*". This article does not claim to provide an objective legal analysis and describes its aim as "*to briefly present the current state of play regarding this divisive investment project and speculate about potential developments*." Furthermore, Mr Długosz's article does not even say that the scope of the Gas Directive is unclear, but rather describes the politically driven attempts by certain Member States and DG Energy of the European Commission to try to undermine the Nord Stream 2 project by arguing that the Gas Directive applied to it (described in Section VI.4 of the Claimant's Memorial and paragraph 93 above).

109. Simultaneously Professor Maduro's First Expert Opinion does not take into account or address in any way:

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158 **Exhibit R-19**, *ibid.*, p 2.

159 **Exhibit C-224,** Hancher and Marhold, "A common EU framework regulating import pipelines for gas? Exploring the Commission's proposal to amend the 2009 Gas Directive", Journal of Energy & Natural Resources Law, 13 February 2019, pp 8-9.

160 Expert Report of Professor Maduro, footnotes 8 and 126.

i. The fact that no Member State regulator applied the Gas Directive to offshore import pipelines similar to Nord Stream 2.

ii. The fact that none of the operators of Nord Stream 1 or the North African pipelines was certified as required by the Gas Directive and the Commission had never questioned this.

iii. How to reconcile a possible application of the unamended Gas Directive to Nord Stream 2 with the fact that it was not eligible for an Article 36 exemption, which led the EU Institutions to conclude that the unamended Gas Directive could not have been applicable, as explained at paragraphs 64.i and 64.ii above.

110. In light of the above, the Tribunal cannot attach significant weight to Professor Maduro's view that the scope of the unamended Gas Directive was unclear. His Opinion does not provide a credible basis for this conclusion.

111. In any event, the outcome of the amendment was a dramatic regulatory change: from non-application of the Gas Directive to full application. The Respondent tries to construct an argument that the change was not so significant because the rules of the Gas Directive already applied, either through an alleged (but non-existent) practice or through the general competition rules, but as demonstrated above this argument is incoherent and legally incorrect.

112. Rather, as the Claimant has explained in its Memorial and as further developed in section IV below, the intention as well as the effect of the Amending Directive was to discriminate against Nord Stream 2. The Amending Directive is, in reality, a legal fig leaf to conceal the EU's objective to obstruct and disrupt Nord Stream 2.

The discussion on IGAs between Member States and third countries does not support the Respondent's position

113. In paragraphs 366 to 383 of the Counter-Memorial the Respondent discusses at length its rules and practice intended to ensure that IGAs between Member States and third countries are compliant with EU law. These paragraphs contain nothing, however, that clarifies what EU law compliance was required from offshore import pipelines on the non-EU side of a border connection point, prior to the Amending Directive. The entire discussion in those paragraphs is therefore irrelevant.

114. It is nevertheless notable that the Respondent does not refer to a single specific discussion with a Member State on a non-compliant IGA regarding offshore import pipelines on the non-EU side of a border connection point. The Respondent mentions South Stream, but this project comprised a series of onshore pipelines on the EU side of the border connection

point. The relevant Commission Report[161] explains that the Commission found six IGAs on the South Stream pipeline to be in conflict with the Gas Directive, namely those concluded by Bulgaria, Hungary, Slovenia, Austria, Greece and Croatia.[162] In relation to Bulgaria, the Respondent does not put forward any document demonstrating that the discussion with Bulgaria was concerned with the offshore section on the non-EU side of the border connection point in Bulgaria's territorial sea (as opposed to the onshore section crossing Bulgaria). Neither are there any such documents in the public domain. For the other five Member States, i.e. Hungary, Slovenia, Austria, Greece and Croatia, any discussion about South Stream in their territorial sea is in any event excluded (as South Stream was a purely onshore project in these Member States). Consequently, while the discussion on the IGAs confirms that the Gas Directive applied to sections of South Stream on the EU side of the border connection point (which is not in dispute), it contains nothing supporting the position that the Gas Directive applied in the territorial sea on the non-EU side of a border connection point.

115. The EU has now disclosed additional materials in relation to its exchanges with Member States regarding non-compliant IGAs,[163] comprising a series of letters to Member States raising concerns, including to Bulgaria, Hungary, Slovenia, Greece and Croatia on IGAs regarding the South Stream pipeline project and an internal note[164] assessing the compatibility of the South Stream IGAs with the Gas Directive. There are no indications in any of these materials that the EU was concerned with the application of the Gas Directive's transmission rules to offshore import pipelines on the non-EU side of a border connection point.

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161 **Exhibit C-28,** European Commission (DG Energy Market Observatory for Energy) report, “Quarterly Report on European Gas Markets”, Volume 12, Issue 4, Fourth Quarter of 2019.

162 **Exhibit C-128**, European Commission Staff Working Document, “Impact Assessment accompanying the 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 instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU”, SWD(2016) 27 final, p 10.

163 **Exhibit C-225**, Letter from the European Commission to Bulgaria regarding an assessment whether a submitted existing Intergovernmental Agreement raises doubts with regard to its compatibility with EU law according to Article 3(2) Decision No 994/2012/EU (Bulgarian original and English translation), 14 August 2013; **Exhibit C-226,** Letter from the European Commission to Croatia regarding an assessment whether a submitted existing Intergovernmental Agreement raises doubts with regard to its compatibility with EU law according to Article 3(2) Decision No 994/2012/EU (Croatian original and English translation), 14 August 2013; **Exhibit C-227,** Letter from the European Commission to Greece regarding an assessment whether a submitted existing Intergovernmental Agreement raises doubts with regard to its compatibility with EU law according to Article 3(2) Decision No 994/2012/EU (Greek original and English translation), 14 August 2013; **Exhibit C-228,** Letter from the European Commission to Hungary regarding an assessment whether a submitted existing Intergovernmental Agreement raises doubts with regard to its compatibility with EU law according to Article 3(2) Decision No 994/2012/EU (Hungarian original and English translation), 14 August 2013; **Exhibit C-229,** Letter from the European Commission to Slovenia regarding an assessment whether a submitted existing Intergovernmental Agreement raises doubts with regard to its compatibility with EU law according to Article 3(2) Decision No 994/2012/EU (Slovenian original and English translation), 14 August 2013.

164 **Exhibit C-230**, Internal note from the European Commission, "South Stream IGAs: compatibility with the IIIrd Energy Package".

116. In paragraphs 384 to 387 of its Counter-Memorial the Respondent takes issue with the Claimant's questioning of statements by the European Commission (made in the proposal for the Amending Directive) that the application of core principles of the Gas Directive to offshore import pipelines was "*an established practice*" and that "*these principles are incorporated in international agreements between Member States and third countries*".[165] The Claimant questions this *inter alia* on the basis that the Commission has found 17 IGAs concluded by Member States to conflict with the Gas Directive (out of 50 reviewed by the Commission). The Claimant argued that if these 17 IGAs conflict with the Gas Directive they cannot be "*incorporating its principles*".

117. In response, the EU questions the Claimant's point on the basis that 17 is only one third of 50 and seems to ask the Tribunal to assume that the other 33 IGAs incorporate the Gas Directive's principles, merely because they were not found to conflict with the Gas Directive. However, an absence of conflict with the Gas Directive cannot be equated with the incorporation of the Gas Directive's principles (as these IGAs could be concerned with matters that are not covered by the Gas Directive, such as facilitation of building permits). Consequently, the Tribunal cannot make such an assumption. If it were correct that there are 33 agreements between Member States and third countries incorporating the principle of the Gas Directive, it should be straightforward for the EU to provide clear evidence of that. However, the Respondent submitted not a single one of these 33 agreements.

The EU Institutions' statements about the impact of the Amending Directive support its significance

118. In the Memorial, the Claimant highlighted a number of statements from the EU Institutions stressing the importance of the Amending Directive at the relevant time, namely the press release from the European Commission commenting on the provisional political agreement in the Council; the statement from the European Commission listing the Amending Directive as one of the "*top 20 EU achievements*" for the period 2014-2019; and the press releases from the Parliament and Council upon approving the final version of the Amending Directive.[166] These statements corroborate that the Amending Directive resulted in a fundamental and substantial change with regard to the application of the Gas Directive to gas import pipelines in the territorial sea.

119. Revealingly, the Respondent only specifically addresses one of these statements, the press release from the European Commission,[167] but does not say anything meaningful that would cast doubt upon its significance. The Respondent does not comment at all on the other three

165 Memorial, paras 252(ii), (iii) and 253.
166 Memorial, paras 256-257, which sets out statements.
167 Counter-Memorial, paras 389-391.

statements, in particular, the European Commission's description of the Amending Directive as one of the "*top 20 EU achievements*" for the period 2014-2019.

The territorial scope of the Network Codes does not confirm that the unamended Gas Directive applied to Nord Stream 2

120. In its Redfern Schedule and its letter to the Tribunal of 28 June 2021, the Respondent argues that there is no dramatic regulatory change because two Network Codes[168] allow Member State regulatory authorities to declare these Network Codes applicable to connection points with third countries. As explained in paragraph 104 of the Memorial, this power is concerned with the exit point from (and entry point to) the infrastructure on the EU side of a border connection point with a third country. To use the example of OPAL (as reflected in the description by the EU General Court set out above[169]), the point in relation to which the national authorities can take such a decision is the entry point to OPAL, not the exit point of Nord Stream 1. This should be uncontroversial at least for the period prior to the Amending Directive, which is the relevant period for the current discussion. Therefore in the case of Nord Stream 2, prior to the Amending Directive, the point at which the national authorities could have decided to declare the Network Codes applicable would have only been the entry point to EUGAL, not the exit point of Nord Stream 2.

121. The Respondent makes a number or extraordinarily confusing arguments on this topic which go nowhere. For completeness these are addressed in the footnote.[170] In any event, there is

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168 **Exhibit CLA-28**, European 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, OJ L 72/, 17 March 2017; **Exhibit CLA-31**, European Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas, OJ L 72/29, 17 March 2017.

169 See Reply, para 88.ii(a) above.

170 The Respondent makes the following statements:

(i) In paragraphs 103 and 104 of the Counter-Memorial, the Respondent explains that in the post-amendment situation, it remains up to the BNetzA to decide whether or not to extend these Network Codes to Nord Stream 2 (but that the Network Codes will apply as the BNetzA has taken such a decision)

(ii) In footnote 47, however, the Respondent writes that in the post-amendment situation "*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)*" (emphasis added).

(iii) In the Staff Working Document accompanying the proposal for the Amending Directive, the Commission writes that the proposed Amendment would not lead to an extension of the applicability of the Network Codes: "*Network codes, to a large extent, do not apply to pipelines to and from third countries. This is due to specific provisions clarifying their scope. By way of example, Article 2(1) of the Network Code on capacity allocation mechanisms (Commission Regulation (EU) 2017/459) expressly states that entry and exit points to third countries are only subject to its requirements where this has been decided by the relevant national regulatory authority. The non-application of this Network Code automatically results in non-application of major parts of Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas (see Article 2 (1) thereof) although certain provisions (notably Chapters I, II and IV) of this Commission Regulation do apply. The proposed amendments will therefore only have a limited impact on the applicability of network codes*" (emphasis added). **Exhibit R-64**, Commission Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European

nothing in these Network Codes that suggests that they would be applicable on the non-EU side of a border connection point. The German regulator's decision of 14 August 2015 does indeed apply the CAM Network Code to the EU side of the border connection points, for instance, the entry point of OPAL. This decision contains nothing to suggest, however, that it would also apply on the non-EU side of the border connection point (i.e. the exit point of Nord Stream 1 or Nord Stream 2).[171] Finally, the German regulator did not require Nord Stream 1 to apply these Network Codes (nor any other Gas Directive related measure) to its exit point in Germany. Neither did Spain nor Italy apply these Network Codes to the exit points of the pipelines from North Africa.

122. The only reasonable conclusion that an investor could draw from the above is that the Gas Directive and associated rules such as the Network Codes did not apply to Nord Stream 1 and Nord Stream 2.

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, p 6.

While the statements in point (i) and (iii) can be reconciled, they conflict with the statement in point (ii). In its Redfern Schedule and its letter to the Tribunal, the Respondent then seeks to argue that these Network Codes applied to Nord Stream 2 even before the amendment and that this should have led NSP2AG to seek changes to the GTA in 2017. The Respondent argues as follows: "*The German FNA's competence is indeed limited to TSO's active in Germany, but NSP2AG aspires to meet this criterion in the future: in order to be the operator of a transmission network on German territory, NSP2AG will have to be certified first as a TSO*." (Respondent's letter to the Tribunal of 28 June 2021, p 3). However, this is a reference to the post-amendment situation and what the Claimant might do in the future. This has no bearing on the situation in 2017 when the Claimant should allegedly have sought changes to the GTA.

171 See **Exhibit R-12**, Decision of the Bundesnetzagentur in the administrative proceedings concerning adjustment of capacity provisions in the gas sector (implementation of the Network Code on Capacity Allocation Mechanism, KARLA Gas 1.1),14 August 2015, pp 35-36. See in particular: "*The scope of application of the CAM network code is being extended to cover all entry and exit points of German TSOs which connect German market areas with pipeline networks in adjacent third countries*" and "*the Ruling Chamber agrees* […] *that the CAM network code is not binding for TSOs in third countries. It does, however, consider it expedient to require the German TSOs in principle to aim at consistent application of the CAM network code at all their interconnection points*".

IV. THE AMENDING DIRECTIVE AND THE EU'S ATTEMPTS TO OBSTRUCT NORD STREAM 2

123. In Section VI of the Memorial, NSP2AG explained how the inception, development and ultimate adoption of the Amending Directive was targeted at, and designed to obstruct, Nord Stream 2. This is clear, among other things, from the Admissions of Targeting Nord Stream 2, including but not limited to the presentation of Dr Borchardt only weeks before the Proposal for the Amending Directive was published by the Commission.[172] The Deliberate Exclusion of Nord Stream 2 from the Derogation Regime has been achieved by the EU's use of what it described as a "*cut-off criteria*"[173] requiring a pipeline to be "*completed before 23 May 2019*" in order to be able to obtain a derogation. It is also clear that the Amending Directive cannot achieve, and therefore cannot be justified by, the Purported Objectives which are specious and seek only to provide a fig leaf to cover the EU's discriminatory conduct. As fully described in Section VIII of the Memorial and further addressed in Section VIII of this Reply, the EU's adoption of the Amending Directive, and its actions in connection therewith as set out in Section VI of the Memorial and further addressed in this Section VI, constitute multiple breaches of the EU's obligations under the ECT.

124. This Section IV addresses the EU's attempts in the Counter-Memorial to deny what is obvious (and recently has been described by the EU's own Advocate General as "*common knowledge*")[174]: that the Amending Directive targets and deliberately discriminates Nord Stream 2 and that the EU acted with the very purpose of subjecting Nord Stream 2 specifically to the requirements of the TEP:

i. This Section will first address the Respondent's argument that it is incapable of explaining what "*completed*" means and that this is a matter for Germany (**Section IV.1**).

ii. It will thereafter address the substantive point that the Amending Directive targets Nord Stream 2 and is intended to do so (**Section IV.2**).

iii. Subsequently, it will address the Respondent's arguments in relation to the exemption regime under Article 36 of the Gas Directive (**Section IV.3**).

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172 **Exhibit C-206**, Recording of Dr Borchardt at the European Parliament Committee on Industry, Research and Energy (ITRE), 11 October 2017 (14:35 - 16:40). See also **Exhibit C-92**, Transcript of Presentation by Klaus-Dieter Borchardt to a meeting of the European Parliament Committee on Industry, Research and Energy (ITRE), "Negotiation mandate for Nord Stream 2: state of play" (presentation accessible at https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy_20171011-1430-COMMITTEE-ITRE_vd), 11 October 2017.

173 Counter-Memorial, para 272.

174 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 197 and 198.

iv. Finally, it will reiterate that the Amending Directive was adopted pursuant to an improper legislative procedure (**Section IV.4**).

IV.1 "*Completed before 23 May 2019*" has an objective meaning as a matter of EU law and is not a matter of discretion for Germany

125. The EU claims that EU Member States have a wide margin of discretion when assessing whether or not an infrastructure was "*completed*" before 23 May 2019.[175] The Respondent also writes at length about a division of competences between the EU and its Member States regarding the interpretation of the concept "*completed*", which would allegedly prevent the EU from expressing a view on the meaning of that concept.[176]

126. At no point, however, does the Respondent write that Germany is free to interpret the concept "completed" as it sees fit and in a way that would cover Nord Stream 2. On the contrary, in paragraphs 409, 412 and 489 of its Counter-Memorial the Respondent explains that the definitive interpretation of the concept "completed" is a matter for the European Court of Justice. As a matter of EU law this is correct. The clear implication, however, is that "completed" is a legal term with an objective meaning that Member States must respect.

127. A further implication is that the Respondent's argument boils down to saying that it does not know what "completed" means until the Court of Justice has interpreted that concept. This is a litigation tactic. If this were to succeed, then parties to an international treaty would always be able to escape scrutiny by an international tribunal until their highest court has definitively interpreted a contentious provision of domestic law. This is not how international law operates.

128. According to established case law of the European Court of Justice, provisions of EU law must be interpreted in light of their wording, legislative history, context and objective pursued.[177] It is not credible for the EU to argue that it cannot apply these rules of interpretation to the concept "completed" and does not know what it decided when it adopted the Amending Directive on 17 April 2019. Neither is it credible for the EU to pretend the legislative history does not matter and does not exist.

129. In his recent opinion of 6 October 2021, the EU's Advocate General Bobek had no difficulty in interpreting the relevant provisions. He concluded as follows:

> "*Therefore, whereas those provisions do give some leeway to national authorities to grant an exemption or a derogation to certain operators in the future, that is not the*

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175 Counter-Memorial, para 192.
176 Counter-Memorial, paras 394-413.
177 See for example, **Exhibit CLA-194**, *Günter Hartmann Tabakvertrieb GmbH & Co. KG v. Stadt Kempten*, C-425/17, EU:C:2018:830, Judgment, 17 October 2018, para 18; **Exhibit CLA-195**, Case C-83/96 *Provincia Autonoma di Trento and Ufficio del Medico Provinciale di Trento v. Dega di Depretto Gino Snc,* C-83/96, EU:C:1997:414, Judgment, 17 September 1997, EU:C:1997:414, para 14.

case in respect of the appellant. In that regard, the (in)applicability of those provisions is entirely pre-determined by the EU rules, since the national authorities ***lack any room for manoeuvre*** *and must thus act as a longa manus of the Union. In that regard, I recall that the mere existence, in the abstract, of derogations or exceptions to the rules laid down in an EU act, cannot have any bearing on the position of an applicant if that applicant cannot manifestly avail himself of those exceptions or derogations*" (emphasis in original).

130. Furthermore, the Respondent (elsewhere in its Counter-Memorial) and Professor Maduro explain that the concept of "*completed*" has a clear objective meaning, namely one that excludes Nord Stream 2:

i. Professor Maduro, in the entire subsection G.3 and other parts of his First Expert Opinion, makes it clear that he has no difficulty interpreting "completed". He also takes the view that a pipeline in the situation of Nord Stream 2 was not "completed" before 23 May 2019. Professor Maduro states:

(a) "*As stated, pipelines already completed / capable of being in activity at the moment of entry into force of the Amending Directive are in an objectively different situation compared to those pipelines not yet completed at that moment of entry into force of the Amending Directive. The reasons invoked by the EU legislator to make that distinction, expressed in Recital 4 of the Amending Directive are understandable and, certainly, cannot be argued to be manifestly unreasonable.*

In theory, it would have been conceivable the adoption of a criterion whereby Member States would be allowed to grant derogations from the regulatory framework set forth by the Gas Directive, in respect of gas transmission lines between a Member State and a third country whose investment decisions had been adopted before 23 May 2019. But even if this criterion was possible in practice, and not only in theory, that does not make it better than the criterion of completion. More importantly, it certainly is not enough to render unreasonable the objective criterion of completion effectively adopted by the EU legislator. Moreover, I believe such alternative criterion would actually be worse, more subjective" (emphasis added).[178]

(b) "*the Amending Directive affects the NS2 pipeline, as it affects any other pipeline to be completed in the future, just like NS2, after the 23 May 2019*".[179]

178 Expert Report of Professor Maduro, para 186.
179 Expert Report of Professor Maduro, para 253.

(c) "*It is beyond doubt that Article 49a's derogation regime with respect to gas interconnectors between Member States and third countries sets a clear divide between pipelines completed before the entry into force of the Amending Directive and pipelines to be completed after that date*".[180]

ii. In paragraph 270 of the Counter-Memorial the Respondent writes that "*the 'completed' criterion is objective and appropriate since it enables an accurately* [sic] *assessment whether it is met*".

131. The Claimant and Professor Cameron have already explained that the legislative history shows that the EU legislature consciously and deliberately decided to use the words "*completed before 23 May 2019*" as a cut-off point. The EU considered and chose to exclude broader wording that would cover infrastructure that was physically incomplete but in respect of which (i) a final investment decision was taken; (ii) contracts were concluded; or (iii) works were commenced.[181] All such proposals were rejected despite the fact that there were clear precedents for such criteria in EU law. The documents that the EU has disclosed in the context of this proceeding further confirm the conscious decision to exclude projects in that position – i.e. Nord Stream 2 alone – from the scope of Article 49a. In the same vein:

i. As explained in paragraphs 19 and 249 of the Memorial, Director-General Ristori of the European Commission's DG Energy, during the legislative process, expressed the hope that the Amending Directive would enter into force "*before the completion of Nord Stream 2*".[182]

ii. Dr Borchardt stated the following about the concept of "*completed*", which is quoted in paragraph 7.10 of Professor Cameron's First Expert Report:

"*It's not up for interpretation. We are saying that we consider what is 'completed' or 'not completed' with regards to the rules that we apply. We can consider something that is completed in the sense that the operation can start. It's not arbitrary or discriminatory, it's objective*".[183]

As explained above, Dr Borchardt was a high-ranking European Commission official who was very closely involved in the legislative process of the Amending Directive and every policy initiative regarding Nord Stream 2. The Respondent itself also relies on statements by Dr Borchardt[184] and cannot, therefore, dismiss these statements as meaningless.[185]

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180 Expert Report of Professor Maduro, para 178.
181 See Memorial, Section VI.9; and the First Expert Report of Professor Cameron, paras 4.26 – 4.31.
182 **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's derogation application (German original and English translation), 15 May 2020, p 28.
183 First Expert Report of Professor Cameron, para 7.10.
184 Counter-Memorial, para 142.
185 See further, Reply Memorial, paras 92 and 93.ii above.

iii. The BNetzA concluded that it had to refuse the Claimant's derogation request since the EU legislator had consciously decided to exclude Nord Stream 2 from the scope of Article 49a:

"*when, as in the present case, the understanding of the term completion evolves in the context of a situation with political aspects and its reach and applicability are discussed during the legislative procedure, the final Directive expresses the will of the legislature – in this instance with regard to Article 49a of Directive 2009/73/EC, the understanding of constructional/technical completion*".[186]

iv. The Oberlandesgericht Düsseldorf (Higher Regional Court of Düsseldorf) (the "**OLG**"), in its judgment rejecting the Claimant's appeal against the BNetzA's Article 49a decision, explained that the term "completed" "*inherently contains an objective understanding*" and moreover, is "*unambiguous*" and "*does not allow several possible interpretations*".[187]

132. Finally, the EU's claims about its inability to adopt a view on the meaning of "*completed*" are in sharp contrast with its clear ability to interpret other provisions of the Gas Directive.

i. In paragraphs 294 and 296 of the Counter-Memorial, the Respondent effectively concludes that Nord Stream 2 is eligible for an Article 36 exemption. It is not clear, however, why the EU is able to take a view on the interpretation of Article 36 but not Article 49a. The EU also states on numerous occasions that the system of exceptions and derogations created by Articles 36 and 49a is "*fully coherent*".[188] If the EU can conclude that the system introduced by Articles 36 and 49a is "*fully coherent*" this must mean that it can interpret the scope of Article 49a and, therefore, the concept of "*completed*".

ii. In para 271 of its Counter-Memorial the EU explains that Article 2(33) of the unamended Gas Directive already used the concept of gas infrastructure that is "*completed"* by a particular date. This is correct and the concept was in fact introduced by the Second Gas Directive in 2003.[189] The same paragraph of the Counter-Memorial explains that "*the criterion made particular sense here, given that the Amending Directive sought essentially to clarify the regime*". If the concept of "*completed*" has appeared in the Gas Directive for 18 years and the EU takes the

186 **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's Derogation Application (English translation), 15 May 2020, pp 26-29.

187 **Exhibit CLA-196**, *Nord Stream 2 AG v. Bundesnetzagentur*, Decision of the Oberlandesgericht (Higher Regional Court) Düsseldorf of 25 August 2021, VI-3 Kart 211/20 [V], pp 20-21 (English translation). The Claimant appealed this judgment at the end of September 2021. The appeal is currently pending before the German Federal Supreme Court.

188 Counter-Memorial, paras 34, 272, 278, 280, 290 and 293.

189 **Exhibit CLA-148**, Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176 (Second Gas Directive), Article 2(33).

view that "*completed*" makes "*particular sense*" in a context where the main aim is merely to clarify, the EU surely must have a clear understanding of what "*completed*" means.

iii. The European Commission has also published over 100 pages of detailed guidance on the Gas Directive for Member States (as it does in many areas of EU law). These documents are described as intended to shed "*light on the Commission's services understanding of how these provisions of the Electricity and Gas Directive are to be interpreted*" with the aim "*to enhance legal certainty*" (while also pointing out that only the Court of Justice can provide a binding interpretation).[190] In this respect it bears emphasis that within the EU's constitutional structure the Commission has a general role of policing Member States' compliance with EU law for which it can bring so-called "infringement proceedings" before the European Court of Justice (as the Respondent itself explains in paragraph 820 of its Counter-Memorial). The Commission has reported on its enforcement activities in this area in a number of documents.[191] The Commission's extensive practice of issuing interpretative guidance and enforcement against non-compliant Member States further conflicts

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190 **Exhibit C-35**, European Commission Staff Working Paper, "The Unbundling Regime: Interpretative Note on Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010, p 4; **Exhibit C-208**, European Commission Staff Working Paper, "Third-Party Access to Storage Facilities: Interpretative Note on Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010; **Exhibit C-209**, European Commission Staff Working Paper, "Retail Markets: Interpretative Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010; **Exhibit C-210**, European Commission Staff Working Paper, "The Regulatory Authorities: Interpretative Note on Directive 2009/72/EC Concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC Concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010; **Exhibit C-211**, European Commission Staff Working Document, "Ownership Unbundling: The Commission's Practice in Assessing the Presence of a Conflict of Interest Including in Case of Financial Investors", 8 May 2013; **Exhibit C-44**, European Commission Staff Working Paper, "New Infrastructure Exemptions: 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", SEC(2009) 642 final, 6 May 2009.

191 **Exhibit C-231**, European Commission Report, "Energy markets in the European Union in 2011", 2012. Section 4 of this document provides an overview of Commission infringement procedures against Member States concerning the second and third energy package; **Exhibit C-232**, European Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Making the Internal Energy Market work", COM(2012) 663 final, 15 November 2012. Footnote 31 explains that: *"Since September 2011 the Commission launched 19 infringement cases for non-transposition of the Directive 2009/72/EC and 19 cases for non-transposition Directive 2009/73/EC. By 24 October 2012, only 12 cases have been closed and the rest of the proceedings are on-going. This is without prejudice to the right of the Commission to pursue at a later stage a failure to transpose certain provisions, should shortcomings be identified, e.g. in the context of a non-conformity check (all received notifications of national transposition measures are subject to examination as to conformity with EU law)";* **Exhibit C-233**, European Commission Report, "Monitoring the application of European Union Law 2017 Annual Report", 2018: *"the Commission's enforcement action in the energy sector in 2017 focused, among other things, on the implementation of the Third Energy Package Directives"*, p 16.

with the EU's allegations that it can have no opinion on the meaning of "*completed*" until the European Court of Justice has given an interpretation.

133. For the sake of completeness the Claimant addresses three further points made by the Respondent in its Counter-Memorial:

i. In paragraph 191, the Respondent claims that the Claimant has admitted that Germany has discretion to interpret "completed" by filing a derogation request with the BNetzA. However, the Claimant has no power to determine what the law means and the fact that the Claimant is pursuing all avenues to challenge the Amending Directive and to reduce its damage, including a request for derogation, does not represent any admission. As already stated in paragraphs 131.iii and 131.iv above, the BNetzA and the OLG were clear that they had no discretion to interpret "*completed*" as covering Nord Stream 2.

ii. In paragraph 192 the Respondent relies on a paragraph from the EU General Court Order of 20 May 2020 declaring the Claimant's action for annulment inadmissible. According to the Respondent this paragraph, cited in footnote 126 of its Counter-Memorial, confirms that EU Member States have a wide margin of discretion when assessing "completed". That paragraph, however, does not confirm this at all. It reads as follows:

"*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*".[192]

While this paragraph confirms that Member States have discretion to grant or to refuse an Article 49a derogation, it does not say that the concept of *"completed"* is a matter of discretion for the Member States rather than an objective concept. Indeed, the concept of *"completed"* rather acts as a gateway. Member States can only proceed to an assessment whether the remaining conditions of an Article 49a derogation are met once they have established that the pipeline is *"completed before 23 May 2019"* and thus falls within the scope of the provision. This is also illustrated by the decision of the BNetzA in relation to NSP2AG's request for an Article 49a

[192] Paragraph 115, of the EU General Court Order of 20 May 2020 (**Exhibit CLA-67**) which the Respondent incorrectly refers to as paragraph 122.

derogation. The BNetzA did not even proceed to a substantive assessment whether the derogation could be granted for objective reasons as it had to conclude that Nord Stream 2 was not *"completed"*: "*Because Nord Stream 2, as a gas interconnector within the meaning of section 28b EnWG, had not been completed before the reference date of 23 May 2019 set out in section 28b EnWG, an essential criterion for the derogation is missing. There is therefore no scope for the assessment of other conditions for the derogation*".[193] Furthermore, Advocate General Bobek very clearly concludes that Member States cannot consider Nord Stream 2 *"completed"*.[194]

iii. In paragraphs 394 to 413 of the Counter-Memorial the Respondent writes at length about the division of competences between the EU and its Member States, which would allegedly prevent the EU from expressing a view on the meaning of "completed". This argument is disingenuous as it could never be reconciled with the European Commission's role as an enforcer of EU law against the Member States (as discussed in paragraph 132.iii above) and the Commission's practice of issuing extensive and detailed guidance on the interpretation of EU law (as discussed in paragraph 132.iii above). Nor could it be reconciled with the statements that the EU makes in its Counter-Memorial about the application of Article 36 of the Gas Directive. If the EU genuinely were to have no power to explain the meaning of "*completed*" it would have no power to play any of these other roles. The division of competences between the EU and its Member States does not affect the ability of the EU and the European Commission to interpret, apply and enforce the rules that the EU has adopted.

134. In any event, even if one were to take the Respondent's argument at face-value, the Respondent fails to draw the proper conclusions from Article 288 TFEU, which it mentions, but does not meaningfully address.[195] Article 288 TFEU provides the basis for the EU to adopt measures in the form of directives, such as the Amending Directive. It provides that: "*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*." Applying this to the Amending Directive, the scope of the derogation regime provided by Article 49a, and therefore the meaning of "completed", falls squarely within "*the result to be achieved*" and therefore, as intended by the EU legislator, should not be the subject of any Member State discretion. It plainly does not relate to the "*choice of form and methods*" (for which Member States retain discretion), a point that was also confirmed by

193 **Exhibit CLA-17,** Bundesnetzagentur decision on NSP2AG's Derogation Application (English translation), 15 May 2020, p 37.

194 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 74, 75.

195 Counter-Memorial, para 411.

Advocate General Bobek.[196] The Respondent's position taken in this arbitration is directly at odds with its own constitutional requirements.

135. In light of all the above it will be clear that the EU's claim not to know what "*completed*" means is a transparent procedural ploy. The reality is that if the EU genuinely had no substantive problem with the Nord Stream 2 pipeline being eligible for a derogation, it could have resolved this dispute at the earliest stage by making a simple amendment to the wording of Article 49a. The EU has not done so, however.

IV.2 The Amending Directive is discriminatory as a matter of its practical effect and the EU's intention

136. This Section will first discuss the approach that the Respondent and Professor Maduro are asking the Tribunal to adopt, namely to ignore the factual background and only take into account the text of the Amending Directive. It will then discuss new documents disclosed by the EU in this proceeding confirming the discriminatory intent and effect and provide an update on the Article 49a derogations received by all the other five offshore import pipelines. It will further address the arguments by the Respondent and Professor Maduro that "*completed before 23 May 2019*" is an appropriate cut-off point and will finally provide a brief conclusion on the discriminatory effect and intent of the Amending Directive.

The Respondent and Professor Maduro ask the Tribunal to ignore the facts

137. In Section VI of its Memorial, the Claimant explained the process that ultimately resulted in the adoption of the Amending Directive, a process that was aimed at the obstruction of the Nord Stream 2 Project. Professor Cameron describes this in Sections 4 and 5 of his First Expert Report. Both the Memorial and Professor Cameron's report refer to and are supported by numerous statements and official EU documents evidencing this. These documents include:[197]

i. European Commission statements in the lead-up to the Amending Directive,[198] letters from significant numbers of EU Member States to the European Commission

196 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 81.

197 Memorial, paras 189-201, 208-229 and 239-243.

198 **Exhibit C-88**, European Commission, "Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline", COM(2017) 320 final, 9 June 2017 (under cover of 12 June 2017), Explanatory Memorandum, p 3; **Exhibit C-89**, European Commission Press Release, "Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2", 9 June 2017; **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 11; **Exhibit C-91**, European Commission Response to parliamentary question E-004084/2018, 24 September 2018.

in November 2015[199] and March 2016,[200] European Parliament resolutions[201] and questions to the European Commission,[202] and all expressing strong opposition against Nord Stream 2.

ii. The Commission's recommendation for a Council decision opening negotiations on a specific Nord Stream 2 treaty,[203] which was ultimately not progressed due to legal concerns raised by the Council Legal Service.[204]

iii. The Commission's response in the form of its proposal for the Amending Directive itself which followed shortly after these legal concerns were expressed. In that proposal the Commission was very clear that Nord Stream 2 was the only "*advanced*" project that would be affected by its proposal.[205] Furthermore the European Parliament's Research Services briefings recognised that the proposal was motivated by Nord Stream 2.[206]

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199 **Exhibit C-84**, Draft letter from Vazil Hudák, Ministry of Economy of the Slovak Republic on behalf of the ministers responsible for the energy policies of the Slovak Republic, the Czech Republic, Hungary, Poland, Lithuania, Latvia, Estonia, Romania, Bulgaria and Greece, to European Commission Vice-President Šefčovič, November 2015. The Claimant understands that the letter was ultimately sent. But it was *not* signed by Bulgaria, as reported in the press – see **Exhibit C-85**, Euractiv article, "Seven EU countries oppose Nord Stream", 1 December 2015 (last accessed on 22 June 2020 at https://www.euractiv.com/section/energy/news/seven-eu-countries-oppose-nord-stream/).

200 The following materials refer to the salient parts of the letter: **Exhibit C-86**, Permanent Representation of the Republic of Poland to the European Union in Brussels Press Release, "9 countries stressed objections against the Nord Stream II project", 18 March 2016; **Exhibit C-87**, Reuters article, "EU leaders sign letter objecting to Nord Stream-2 gas link", 16 March 2016 (last accessed on 23 June 2020 at https://www.reuters.com/article/uk-eu-energy-nordstream/eu-leaders-sign-letter-objecting-to-nord-stream-2-gas-link-idUKKCN0WI1YV).

201 **Exhibit CLA-45**, European Parliament Resolution on the implementation of the EU Association Agreement with Ukraine, 2017/2283(INI), 12 December 2018, para 79; **Exhibit CLA-46**, European Parliament Resolution on the state of EU-Russia political relations, 2018/2158(INI), 12 March 2019, para 29.

202 **Exhibit C-95**, Questions by Members of the European Parliament to the European Commission, P-002042/2017; E-002393/2017; P-003817/2018; E-003988/2018; and E-004084/2018.

203 **Exhibit C-88**, European Commission, "Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline", COM(2017) 320 final, 9 June 2017.

204 **Exhibit C-101**, Opinion of the Council Legal Service, "Recommendation for a Council decision authorising the opening of negotiations on an agreement between the European Union and the Russian Federation on the operation of the Nord Stream 2 pipeline — Allocation of competences and related legal issues", 12590/17, 27 September 2017.

205 **Exhibit C-90**, European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 10.

206 **Exhibit C-24**, European Parliamentary Research Service, "Common rules for gas pipelines entering the EU internal market", Briefing: EU Legislation in Progress (editions 1 to 4), PE 614.673, 23 January 2018, 3 July 2018, 27 March 2019, 27 May 2019.

iv. Comments from Germany, Belgium, Hungary, Austria, the Netherlands[207] and various European Parliamentarians[208] on the proposal for the Amending Directive, suggesting alternatives to the Article 49a derogation regime eligibility criterion of "*completed before*" the date of the entry into force of the Amending Directive, that would not have excluded Nord Stream 2. These proposals were rejected however, and the EU legislator therefore specifically decided to exclude Nord Stream 2 from the scope of the Article 49a derogation regime.

138. The discriminatory intent of the Amending Directive and its real aim of obstructing Nord Stream 2 is further confirmed by other documents, including many documents disclosed by the EU in these proceedings.

i. Nord Stream 2 and the interest of maintaining transit through Ukraine featured repeatedly in the discussions in the EU Institutions in relation to the proposal for the Amending Directive. In particular:

(a) In the meeting of the European Parliament's ITRE Committee on 11 October 2017 Dr Borchardt, then Director in the European Commission's DG Energy briefed the Committee on the latest developments regarding the mandate for the negotiation of a Nord Stream 2 treaty. He explained that: "*whether at the end of the day the Commission will get the mandate or not, we have to do something. (…) And that is the reason why the Commission has decided, and has the intention, to end the legal uncertainty on this point and will present without delay, most probably already next month, a legislative proposal on common rules for gas pipelines entering the EU gas market*."[209]

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207 **Exhibit C-114**, Council of the European Union Working Paper, "Written Comments by Germany on the Commission Proposal for the Amending Directive", WK 14673/2017 INIT, 11 December 2017; **Exhibit C-234**, Council of the European Union Working Paper, "Preliminary comments by Belgium on the proposal for the Amending Directive", WK 2677/2018 INIT, 2 March 2018; **Exhibit C-235**, Council of the European Union Working Paper, "Hungarian written comments to the discussion paper of the Austrian EU Presidency on the Gas Directive", WK 12559/2018 INIT (partially redacted), 19 October 2018; **Exhibit C-117**, Council of the European Union, "Second revised text for the Amending Directive", 2017/0294(COD), 14204/17, 21 November 2018; **Exhibit C-236,** Council of the European Union Working Paper, "Comments of the Netherlands on third revised text to amend the Gas Directive", WK 877/2019 INIT, 21 January 2019.

208 **Exhibit C-119**, European Parliament, "Amendment No 27, proposed by Hermann Winkler and Sven Schulze: Proposal for a directive Recital 4", 017/0294(COD), p 13, 28 January 2018; **Exhibit C-119**, European Parliament, "Amendment No 111, proposed by Paul Rübig: Proposal for a directive Article 1 – paragraph 1 – point 8", 017/0294(COD), p 67, 28 January 2018.

209 **Exhibit C-92**, Transcript of Presentation by Klaus-Dieter Borchardt to a meeting of the European Parliament Committee on Industry, Research and Energy (ITRE), "Negotiation mandate for Nord Stream 2: state of play" (presentation accessible at https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy_20171011-1430-COMMITTEE-ITRE_vd), 11 October 2017, p 3.

(b) In the vote in the European Parliament on the final compromise text of the Amending Directive on 4 April 2019, MEPs consistently voiced their opposition to Nord Stream 2 in their statements.[210]

(c) In a meeting of the European Committee of the Regions on 9 February 2018 in relation to the proposal, the European Committee of the Regions gave a presentation confirming that addressing Nord Stream 2 was the only motivation of the proposal.[211] The presentation stated as follows:

- "*NordStream 2 (2 new pipes, for total 55 bcm x year) offshore pipeline construction to be launched shortly*
- *Different views as to geopolitical/SoS consequences*
- *EC asked Council for mandate to negotiate*
- *EC/Council Legal Services denied there is a basis*
- *As a second move, EC quickly tabled a proposal, aimed at extending EU rules (unbundling/TPA/tariff regulation/transparency) to EU coastal waters and, indirectly but necessarily, to non-EU countries*".[212]

This presentation essentially mirrors the explanation provided by the Claimant of the origins of the proposal for the Amending Directive in the Memorial.[213] The presentation also goes on to mention the problem of discriminating against Nord Stream 2 in relation to derogations.[214]

(d) In a meeting of the European Council of Ministers on 11 June 2018 discussing the proposal, the debate was dominated by discussion of the Nord Stream 2 project and the situation with respect to gas transit through Ukraine.[215]

(e) In a meeting of Member State representatives in the Council on 20 June 2018 discussing the proposal, the then-ongoing negotiations between the European Commission, Russia and Ukraine in relation to a new gas transit

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210 **Exhibit C-237,** DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 1-5 April 2019, pp 10-12.
211 **Exhibit C-207**, European Committee of the Regions presentation for ENVE-VI/026 Stakeholders' meeting in Brussels on 9 February 2018, "Proposal for a Directive Amending Directive 2009/73/EC (Natural Gas)", 9 February 2018.
212 **Exhibit C-207,** *ibid*., slide 2.
213 Memorial, Section VI.
214 **Exhibit C-207**, European Committee of the Regions presentation for ENVE-VI/026 Stakeholders' meeting in Brussels on 9 February 2018, "Proposal for a Directive Amending Directive 2009/73/EC (Natural Gas)", 9 February 2018 slide 6.
215 **Exhibit C-238,** DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 11-15 June 2018, pp 2-3.

agreement, were raised and presented as being "*complementary*" to the Amending Directive.[216]

(f) In a meeting of the Council on 19 December 2018 discussing the proposal, the interest of maintaining transit through Ukraine was again raised.[217]

These discussions plainly reveal the true issues that lay behind the proposal for the Amending Directive.

ii. On 2 November 2018, during the latter stages of the negotiations over the Amending Directive in the Council, the Prime Minister of Estonia wrote to European Commission President Juncker, European Commission Vice-President Šefčovič and Energy Commissioner Cañete,[218] stating as follows:

"The Nord Stream II project that in our view is contrary to the EU's goal of enhancing energy security is progressing quickly. At the same time, the negotiations of the Natural Gas Directive have stalled in the Council. It is therefore of utmost importance that the Council agrees on the general approach on the directive as soon as possible in order for this file to be negotiated with the European Parliament still this year. You can count on our continued support in this matter. We are also counting on the Commission's help to finalise these negotiations."

This letter makes it very clear that the Amending Directive was aimed at Nord Stream 2 and that the imperative was to enact the Amending Directive as soon as possible in order to ensure that Nord Stream 2 would not be completed before its entry into force and therefore would not be eligible for a derogation.

iii. In summary notes of a debate on Nord Stream 2 during a plenary session of the European Parliament during September 2017 in advance of the proposal for the Amending Directive, it is recorded that: "*Political groups sent a strong and largely uniform message of opposition against NordStream-2*", with some MEPs going as far as to state that the project, "*should be stopped immediately*".[219]

iv. Similarly, in a letter of March 2017 entitled *"*[u]*rgent action required to stop the Nord Stream 2 project"* a number of MEPs stressed their *"strong opposition to Nord Stream 2"* and called upon the EU Commission and the Council *"to take urgent action*

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216 **Exhibit C-239,** DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 18-22 June 2018, pp 2-3.

217 **Exhibit C-240,** DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 17-21 December 2018, p 3.

218 **Exhibit C-241**, Letter from Estonia Prime Minister Ratas to European Commission President Juncker, European Commission Vice-President Šefčovič and Energy Commissioner Cañete, 2 November 2018.

219 **Exhibit C-242**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 11-15 September 2017, pp 9-10. The session concerned the Commission's recommendation for a Council decision opening negotiations on a specific Nord Stream 2 treaty.

to ensure, that this high-risk project does not go ahead".[220] The letter was signed by 65 MEPs including Mr Jerzy Buzek who was chair of the ITRE Committee in the European Parliament during 2014 and 2019 including at the time of the proposal for the Amending Directive and was also designated as the rapporteur for the proposal for the Amending Directive.[221]

v. Concerns in relation to the Article 49a derogation regime cut-off point of "completed before" the date of the entry into force of the Amending Directive were in fact repeatedly expressed by a number of EU Member States, including Germany, Austria, the Netherlands, the Czech Republic and Greece during the discussions in the Council. These Member States also repeatedly proposed alternatives that would not have excluded Nord Stream 2, including in particular, whether the final investment decision had been taken, whether construction had commenced and whether front-end-engineering and design (FEED) had commenced[222] (which would have been easily possible as discussed in paragraphs 131 and 156 to 160). Taking into account the comments along these lines already referenced in the Memorial and referred to above,[223] these concerns and proposals feature in no less than 15 documents. They were ultimately rejected by the EU Legislature, however.

139. The intent to target Nord Stream 2 through the Amending Directive is further demonstrated by the witness statement of [redacted] explains that it was very clear that the proposal for the Amending Directive was a "lex Nord Stream 2", introduced specifically as a reaction to the Nord Stream 2 project. This was apparent from, among other things, the deliberations in the ITRE Committee and the tremendous time pressure exerted on the Committee so that the Amending Directive would be passed before Nord Stream 2 finished construction.[224]

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220 **Exhibit C-243**, Letter from 65 MEPs to the President of the European Council and the President of the European Commission, "Urgent action required to stop the Nord Stream 2 project", 30 March 2017.

221 See also [redacted]

222 **Exhibit C-244**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 20-24 November 2017, pp 11-12; **Exhibit C-245**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 27 November-1 December 2017, p 9; **Exhibit C-246**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 11-15 December 2017, p 8; **Exhibit C-239**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 18-22 June 2018, pp 2-3; **Exhibit C-247**, Council of the European Union Working Paper, "Greece comments on Gas Directive", WK 3473/2018, 20 March 2018, p 4; **Exhibit C-248,** Council of the European Union Working Paper, "Austria comments on the Gas Directive", WK 14688/2017, 11 December 2017, p 1; **Exhibit C-249,** Council of the European Union Working Paper, "Austria comments on the Gas Directive", WK 2761/2018, 7 March 2018, pp 2-3; **Exhibit C-250,** Council of the European Union Working Paper, "Germany comments on the Gas Directive", WK 12531/2018, 18 October 2018, p 3; **Exhibit C-251,** Council of the European Union Working Paper, "Czech Republic comments on the Gas Directive", WK 12562/2018, 19 October 2018; **Exhibit C-252,** Council of the European Union Working Paper, "Czech Republic comments on the Gas Directive", WK 14837/2017, 13 December 2017.

223 Memorial, para 240.

224 [redacted]

140. It is telling that the EU in its Counter-Memorial, and Professor Maduro in his report, refuse to engage with the legislative history of the Amending Directive. They do not seek to rebut this clear discriminatory narrative because, in the Claimant's submission, they cannot. Their only argument instead is to claim that it should be ignored. In paragraph 600 of its Counter-Memorial the Respondent writes that:

> "*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*".

141. Similarly, Professor Maduro writes that:

> "*The political debates or motivations that may have played a role in the adoption of the Amending Directive cannot take precedence over a legal analysis of the rules actually adopted. They are only of relevance to the extent they can help illuminate a particular legal ground advanced to question the validity of the Amending Directive*".[225]

142. He further confirms his purely abstract approach in paragraph 255 in which he states the following:

> "*I should note that the extent to which Nord Stream 2 was indeed the dominant event that triggered the legislation at that time is a matter of fact that is contested and on which I am not supposed to take a position. My point is, instead, that, legally, that is of no relevance so long as, as we shall see, the legislation itself is drafted in such a way as to be of general and abstract application*" (emphasis in the original).

143. The approach of the Respondent[226] and Professor Maduro is of course not objective. They ask the Tribunal to assess the Amending Directive in a purely abstract manner, exclusively focused on its wording. This purely abstract approach is entirely misconceived and fundamentally undermines the Respondent's arguments and the value of Professor Maduro's report. It is, of course, a question of fact whether the legislation was triggered by or targeted at Nord Stream 2, and a legal question for the Tribunal whether this amounts to unlawful discrimination under the ECT. It is surprising that Professor Maduro considers this to be "legally" of no relevance. Were his, and the EU's, approach to be accepted, it would afford parties to an international treaty significant latitude to act inconsistently with their obligations thereunder so long as those actions are presented in the form of generally-applicable measures. This would lead to absurd results and provide States with a significant means of evading their obligations under international law.

144. The approach adopted by Professor Maduro is also in sharp contrast with that of Advocate General Bobek who had no difficulty taking into account the legislative history and considered

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225 Expert Report of Professor Maduro, para. 16.
226 Counter-Memorial, paras 264-277.

it highly relevant.[227] The Advocate General noted that NSP2AG has provided several documents "*which suggest that the extension of the EU gas rules to the activities of the appellant was in fact one of the* main *reasons, if not the main reason, that prompted the EU institutions to adopt the contested measure"*.[228] Advocate General Bobek further states that *"not only were the EU institutions* aware *that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the* very intention *of subjecting the appellant to that new regime*".[229]

All other offshore import pipelines have received derogations

145. As the Claimant had anticipated in the Memorial,[230] all of the five other offshore import pipelines have now received derogations.

146. The Spanish authorities granted derogations to the Medgaz and MEG pipelines in two stages. First, the pipelines were granted initial temporary derogations for 14 months.[231] These initial derogations were granted directly through legislation rather than by a decision following any kind of administrative procedure. Following this stage, the operators of the Medgaz and MEG pipelines applied for further derogations and following an administrative procedure, these derogations were granted by the Spanish Ministry for Ecological Transition and Demographic Challenge on 5 July 2021.[232]

147. The Medgaz pipeline, which has been operational since April 2011, was granted a derogation until 31 March 2031 which coincides with the initial term of its long-term transportation contracts. The MEG pipeline, which has been operational since November 1996, was granted a derogation until the end-date of the MEG pipeline operator's transit rights to the pipeline, which is 31 October 2021. The MEG pipeline operator is seeking to extend its transit rights and has expressly reserved the right to apply for a further derogation if it is successful in doing so. Due to political tensions between Algeria and Morocco the negotiations for a prolongation of gas transit through the MEG pipeline had not yet reached a positive outcome

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227 **Exhibit CLA-176,** Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 197, 198.

228 **Exhibit CLA-176,** *ibid.*, para 197.

229 **Exhibit CLA-176,** *ibid.*, para 197.

230 Memorial, Section VI.11.

231 **Exhibit CLA-197**, Royal Decree-Law 34/2020 of 17 November 2020, on urgent measures to support business solvency and the energy sector, and in tax matters (Spanish original and English translation).

232 **Exhibit CLA-198,** Ministry for Ecological Transition and Demographic Challenge, Order TED/740/2021 of 5 July, extending Medgaz gas pipeline's derogation from compliance with certain provisions relating to third-party access and unbundling obligations as a transmission company, Official State Gazette, No 167, 14 July 2021, Section I, p. 83906, 11684 (Spanish original and English translation); **Exhibit CLA-199,** Ministry for Ecological Transition and Demographic Challenge, Order TED/741/2021 of 5 July, extending the Maghreb-Europe gas pipeline's derogation from compliance with certain provisions regarding third-party access, Official State Gazette, No 167, 14 July 2021, Section I, p. 83910, 11685 (Spanish original and English translation). The Spanish Regulator, the National Commission of Markets and Competition issued a report as part of the administrative procedure.

at the time of filing of this Reply and indeed it is unclear whether transit of Algerian gas through the MEG pipeline will continue after 31 October 2021.[233]

148. The justifications provided in the Spanish Ministerial orders are very brief and high-level only (with the longer of the two documents itself being only 4 pages long).[234] In particular, in assessing whether the derogation for Medgaz could be justified on the basis of recovery of investments made, the Spanish Ministry simply states that the investment decision was made, that transportation contracts were concluded before the entry into force of the Amending Directive and that the repayment term of its debt extends until 2029. On security of supply, the Spanish Ministry merely refers to the percentage of national consumption each of these two pipelines individually accounts for and notes that such imports contribute to the security of supply of the Spanish gas system.

149. The Italian Ministry of Economic Development granted the Transmed and Greenstream pipelines a 10-year derogation on 22 May 2020.[235] The Greenstream pipeline has been operational since 2004 and its debt has been paid off on 20 December 2019. The Transmed pipeline has been operational since 1983 with further pipelines added in 1993. The derogations followed procedures which were completed within less than a month, and which resulted in brief and thinly-reasoned derogation decrees (with the documents themselves being only 5 pages long). As noted in the Memorial, it is striking that in March 2020 even before the administrative procedures had started, the Italian energy regulator already made a written submission to the Italian Parliament recommending that the pipelines receive derogations.[236]

150. In terms of the Italian Ministry's reasoning, one of the key justifications for the grant of the derogations was that the application of the Amending Directive would subject the pipelines to a dual regulatory regime which risks "*interference in the technical management (a proper technical functioning requires the gas transmission line to be operated in its entirety) and in the commercial management (the transmission agreements in place related to the gas*

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233 See **Exhibit C-253**, Reuters, "Morocco mulls reversal of pipeline flow if Algeria halts gas supply – official", 18 October 2021 (last accessed on 20 October 2021 at https://www.reuters.com/article/morocco-spain-algeria-gas-idINL1N2RE1UM).

234 While the accompanying reports by the Spanish Competition Authority are slightly longer, the explanations provided therein equally remain high-level. **Exhibit CLA-200**, Resolution issuing a report on the Ministry for Ecological Transition and Demographic Challenge's proposed Ministerial Order to extend the Medgaz gas pipeline's derogation from compliance with certain provisions relating to third-party access and the obligations of separation of activities as a transmission company, INF/DE/047/21 (Spanish original and English translation), 13 May 2021. **Exhibit CLA-201**, Resolution issuing a report on the Ministry for Ecological Transition and Demographic Challenge's proposed Ministerial Order to extend the Maghreb-Europe gas pipeline's derogation from compliance with certain provisions relating to third-party access, INF/DE/048/21 (Spanish original and English translation), 13 May 2021.

235 **Exhibit CLA-202**, Ministry of Economic Development, Decree granting a derogation to the Transmed pipeline (Italian original and English translation), 22 May 2020; **Exhibit CLA-203**, Ministry of Economic Development, Decree granting a derogation to the Greenstream pipeline (Italian original and English translation), 22 May 2020.

236 Memorial, paras 265-266.

transmission line do not envisage an unbundling and would therefore need to be amended) [of the pipelines]".[237] These reasons would of course apply to any third country offshore import pipeline, including Nord Stream 2.

151. Insofar as Germany and the Nord Stream 1 pipeline is concerned, as mentioned in the Memorial,[238] Nord Stream 1 submitted an application for derogation to the BNetzA on 19 December 2019. Following an administrative procedure, Nord Stream 1, which started operations in November 2011 with the second line following in 2012, received a 20-year derogation on 20 May 2020.[239] The derogation was granted on the basis of the positive contribution of Nord Stream 1 to security of supply.

152. Consequently, and as predicted by the Claimant, the impact of the Amending Directive falls fully and exclusively upon Nord Stream 2.

It was entirely possible to use another eligibility criterion than "completed"

153. The Respondent (in Section 2.4.3 of its Counter-Memorial) and Professor Maduro defend the use of the criterion "*completed before 23 May 2019*".

154. The Respondent argues that:

> *"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."*

155. Professor Maduro makes the same point in paragraphs 185 and 186 of his Opinion. He writes that using the adoption of an investment decision as the criterion was conceivable but not necessarily better.

156. In its Memorial the Claimant argued that the choice of the "completed" criterion, taking into account the facts and circumstances of this case, constitutes a breach of the EU's obligations under the ECT (Section VI.9). The Claimant gave three examples of other situations in which the EU had sought to protect legitimate expectations of investors, also in the energy sector, and where the EU used other cut-off points that would have included Nord Stream 2, namely: (i) the final investment decision; (ii) conclusion of contracts, and (iii) start of works.[240] The question at issue, however, is not which of these cut-off points is, in the abstract, "*better*" or

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237 **Exhibit CLA-202**, Ministry of Economic Development, Decree granting a derogation to the Transmed pipeline (Italian original and English translation), 22 May 2020, p 3; **Exhibit CLA-203**, Ministry of Economic Development, Decree granting a derogation to the Greenstream pipeline (Italian original and English translation), 22 May 2020, p 3.

238 Memorial, para 263.

239 **Exhibit CLA-204,** Bundesnetzagentur Decision concerning an application for derogation from regulation by Nord Stream AG, BK7-19-108 (redacted) (German original and English translation), 20 May 2020.

240 Memorial, para 247.

"*less objective and precise*". The question is whether, taking into account the factual background of this case, the use of "completed" as a cut-off point violates the ECT.

157. Professor Maduro continues that using a final investment decision as the cut-off point would be more difficult to apply and that "*it would be easy for any current player to insure itself against any future unfavourable legislative amendment simply by making any thing that could qualify as an investment "decision*".[241]

158. This is a further instance in which the abstract nature of Professor Maduro's analysis, which he describes in paragraph 255 of his Report,[242] undermines the pertinence of his observations. As was well known when the Amending Directive was proposed and adopted, the only offshore import pipeline project that was not physically completed was Nord Stream 2. There were no other investors in the same position. Neither Professor Maduro nor the Respondent claim otherwise. There was no point of abstract principle for the EU to protect, rather the words were chosen deliberately to target Nord Stream 2.

159. Professor Maduro's criticism of possible alternative cut-off points is also otherwise unconvincing. He makes the general comment that "*any current player*" could "*insure itself*" against future legislative change by "*making any thing that could qualify as an final investment "decision"*". This is an overly general statement that ignores the EU's ability to address this type of issue in other contexts, including the three specific examples provided in paragraph 247 of the Claimant's Memorial.

160. Unlike Professor Maduro, the Respondent does address each of these three examples of alternative cut-off points and seeks, unconvincingly, to claim that they are inappropriate:

i. In paragraph 247(i) of its Memorial the Claimant referred to the Commission's certification opinion regarding the NEL pipeline, which like OPAL, is a German pipeline connecting to Nord Stream 1. In that opinion, the Commission referred to the criterion of whether the final investment decision had been taken, when assessing whether a transmission system "*belonged*" to a vertically integrated undertaking on 3 September 2009, so as to allow alternative unbundling regimes. In response, the Respondent argues that while the opinion mentions that no final investment decision had been taken, it does not consider this as decisive as the only relevant cut-off moment is that in Article 2(33) of the Gas Directive. This argument is simply incoherent as Article 2(33) concerns new infrastructure "*not completed by 4 August 2003*", whereas the alternative unbundling regimes are only available to infrastructure that existed on 3 September 2009 and not new infrastructure. The EU seems to fall victim to its own strategy of sowing maximum confusion and is mixing up the different cut-off points in its legislation. In any event, the Respondent does

241 Expert Report of Professor Maduro, para 188.
242 See paragraph 142 above.

not deny that the Commission referred to the criterion of the final investment decision in applying a provision seeking to protect existing situations and reduce the impact of new rules on historical investment (as explained in paragraph 247(i) of the Memorial).

ii. In paragraph 247(ii) of its Memorial, the Claimant explained that the EU's new Electricity Regulation banned certain public payments to high carbon emitting electricity generation installations. It further explained that it carved out from that ban existing contracts, irrespective of whether or not the underlying infrastructure had been completed. The EU's response was that such an approach was "*fit for purpose*" in this context, because payments will not be possible in the absence of existing contracts. This is not a response to the point made by the Claimant, however, which is that the EU used the signing of contracts as a cut-off point instead of the completion of underlying infrastructure.

iii. In paragraph 247 (iii) of its Memorial, the Claimant gave the example of EU State aid law in the energy sector. This protected those investments for which works had started from changes in the rules, in order to protect the legitimate expectations of investors whose projects would likely be completed. The Respondent argues that such a criterion would not be suitable in the case of the Amending Directive because pipelines may have a long or interrupted construction process. According to the Respondent this long or interrupted construction process would imply that such pipelines could qualify for derogation far in the future. This argument is without value for three main reasons. First, derogations had to be granted by 24 May 2020. Given the size and complexity of investments in offshore import pipelines the number of projects that could start works after the adoption of the Amending Directive and obtain a derogation by 24 May 2020 would be very close to zero. Second, Article 49a allows derogation for the significant period of 20 years, which can be renewed. The Respondent's alleged concern about length, therefore, cannot be real. Third, derogations granted to pipelines that are not physically completed could easily be granted with a fixed end date that is not influenced by the date of completion (such as 31 December 2040). The EU is well aware of this as it is what it routinely does for Article 36 exemptions.

No effective argument has therefore been provided by the EU as to why these alternative cut-off points would not have been appropriate with regard to regulation of offshore import pipelines or why they could not have been added to the criterion of *"completed".*

161. Finally, the Respondent also makes the illogical argument that the use of "completed" "*made particular sense*" because the Amending Directive "*sought essentially to clarify the*

regime",[243] and "*ensure that the rules were expressly aligned with its longstanding policy position*".[244]

162. Rather than making "particular sense", this makes no sense at all. If the Amending Directive was merely the legal codification of an existing practice, there would be no need for a derogation such as Article 49a in the first place. It is equally difficult to see a logical link between the alleged clarificatory nature of the Amending Directive and the need to use "*completed*" as a cut-off point.

Article 49a intentionally imposes obstacles for Nord Stream 2, making it the only transmission infrastructure on which the Amending Directive has a practical impact

163. In light of all the above, it could not be clearer that Nord Stream 2 is the only transmission infrastructure on which the Amending Directive will have a meaningful practical impact. As recipients of an Article 49a derogation, all other offshore import pipelines will be able to operate without having to comply with the core principles of the Gas Directive (ownership unbundling, third party access rules and tariff regulation). As explained in Section III of this Reply-Memorial, the Amending Directive has no practical impact on other types of pipelines.

164. Furthermore, the documents referred to in Section IV of the Memorial and Sections 4 and 5 of Professor Cameron's First Expert Report make it overwhelmingly clear that this targeting of Nord Stream 2 was intentional.[245] Professor Maduro effectively accepts this, for instance when making a comparison with the situation in relation to the proposed European Football Super League and the immediate reaction by national and European legislators in considering adopting legislation to prevent such closed leagues.[246]

165. Advocate General Bobek formulates it as follows:

> "*it is difficult to envisage a situation where, despite the contested measure being of general application, a more clear and specific connection between* [NSP2AG's] *situation and the contested measure could be identified*."[247]

166. In a document in which the European External Action Service comments on the proposal for the Amending Directive it is formulated as follows: *"it will be clear to the public that this proposal is very closely connected with NS2, there would be no sense denying this connection."*[248]

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243 Counter-Memorial, para 271.
244 Counter-Memorial, para 268.
245 In this regard, see also the Second Expert Report of Professor Cameron, paras 5.10-5.11.
246 Expert Opinion of Professor Maduro, para 15.
247 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para. 200.
248 **Exhibit C-254**, European External Action Service, "Fast-track Inter Service – Modification of the GAS DIRECTIVE (2009/73/EC)", p 4.

167. A note from DG Energy of January 2016 on the legal consequences of applying the Third Energy Package to offshore import pipelines, in particular Nord Stream 2, states that: *"*[…] *whatever approach for regulating NS2 is formulated, it would need to be applied also as regards other similar import pipelines with third countries, to the very least for offshore sections*".[249]

168. As mentioned above, the Respondent, confronted with the undeniable, tries to escape by asking the Tribunal to suspend reality and pretend this background does not exist or is legally irrelevant. This must of course be rejected.

IV.3 An Article 36 exemption is not a relevant alternative to an Article 49a derogation

169. The Respondent suggests that Article 36 exemptions and Article 49a derogations are very similar both in terms of their objectives as well as their substance. Indeed, according to the Respondent, an Article 36 exemption may be just "*as favourable*" to an operator as an Article 49a derogation.[250] The Respondent further denies that an Article 36 exemption is more "exceptional" than an Article 49a derogation in that Article 36 exemptions are reserved for infrastructure projects that are expected to have "*a particularly positive impact on competition and security of supply*", as had been maintained by the Claimant.[251] The Respondent claims that these same objectives are also set out in relation to Article 49a derogations.[252]

170. The Respondent and Professor Maduro also argue that both are part of a "*coherent regime for relaxing Gas Directive disciplines*" and that Articles 36 and 49a together do not leave any *"gap*".[253] They claim that operators of pipelines that are completed by the date of entry into force of the Amending Directive can apply for an Article 49a derogation, while operators of pipelines that were not yet completed by that date can apply for an Article 36 exemption.[254] The Respondent further denies that an Article 36 exemption is only available in the case of pipelines for which a final investment decision has not been taken, referring to the European Commission's Article 36 decision in relation to the OPAL pipeline and the fact that exemption decisions can be reviewed and conditions can be modified or added, even when the final investment decision had already been taken.[255] In light of the above, the Respondent argues that Nord Stream 2 would be eligible for an Article 36 exemption and that as a consequence, the Claimant's claim should fail.[256]

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249 **Exhibit C-255**, DG Energy, "Legal Consequences of applying the Third Energy Package to offshore import pipelines, in particular Nord Stream 2", 15 January 2016, p 8.
250 Counter-Memorial, paras 198 and 291.
251 Memorial, para 305.
252 Counter-Memorial, para 291.
253 Counter-Memorial, para 280; see also paras 34, 263, 272, 278, 290, 292-293 and 297. Expert Report of Professor Maduro, paras 178-179.
254 *Ibid*.
255 Counter-Memorial, paras 294-295.
256 Counter-Memorial, paras 584, 588, 597, 648 and 682-685.

171. The Respondent's arguments are fundamentally flawed. In the paragraphs below, the Claimant will demonstrate that, contrary to the Respondent's position, Article 36 exemptions and Article 49a derogations are intrinsically different. They address distinct situations and are composed of different elements, meaning that an Article 36 exemption is not an alternative to an Article 49a derogation and certainly is not suitable for a pipeline in the situation of Nord Stream 2. The question therefore, of whether Nord Stream 2 is or is not eligible for an Article 36 exemption, is entirely irrelevant for the purposes of these proceedings. In any event, the Claimant will demonstrate that Nord Stream 2 cannot be eligible for an Article 36 exemption as, contrary to the Respondent's position, such exemptions are only available as a matter of law in the case of pipelines for which a final investment decision has not yet been taken or, put differently, for which "a point of no return" has not yet been reached.

Article 36 exemptions and Article 49a derogations are fundamentally different – one is not a substitute for the other

172. Contrary to the Respondent's arguments, Article 36 exemptions and Article 49a derogations are intrinsically different as they address very different situations.

173. This is addressed in detail in the First and Second Expert Reports of Professor Cameron.[257] In particular, the Article 36 exemption regime is intended to encourage the construction of "*new infrastructure*" which is expected to have a particularly positive impact on competition and security of supply that outweighs any negative impact on the internal market due to the non-application of the Gas Directive. An exemption may therefore be granted if the level of risk attached to the investment is such that the investment would not take place without the exemption.[258] The Respondent agrees with this characterisation of the Article 36 exemption regime and explains that it "*seeks to incentivise investment in major new infrastructure*"[259] and "*must* […] *be limited to what is strictly necessary to realise the investment*" (emphasis added).[260] An Article 36 exemption, therefore, is completely unrelated to the protection of investors from a change in law.

174. The stated purpose of an Article 49a derogation on the other hand is to protect the interests of investors and owners of pipelines completed before the entry into force of the Amending Directive and which were outside the Gas Directive's scope (i.e. to protect them from a change in law).[261] Indeed, as the European Commission itself has stated, "*The logic of the derogation is* […] *very different than the one used in the exemption procedure under Article*

257 First Expert Report of Professor Cameron, Section 7 and Second Expert Report of Professor Cameron, Section 5.
258 Memorial, para 305 and First Expert Report of Professor Cameron, paras 7.21 and 7.42.
259 Counter-Memorial, para 282.
260 Counter-Memorial, para 285.
261 Memorial, para 305 and First Expert Report of Professor Cameron, para 7.3.

36 of the Gas Directive, which aims at exempting pipelines which would not be built otherwise and which bring competitive and security of supply benefits".[262]

175. Despite these clear differences, the Respondent makes every effort to present Article 36 and 49a as being part of a single, apparently logical, scheme without any "gap", asserting that:

> "*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*".[263]

176. The Respondent repeats this claim at least seven more times,[264] with the aim of creating the impression that what ultimately matters is not the limitation of the scope of Article 49a to "*completed*" pipelines but whether pipeline infrastructure is eligible for an Article 36 exemption or an Article 49a derogation. The Respondent further tries to create the impression that these two are very similar and that it does not much matter which of the two an investor receives.

177. This is a misrepresentation. While Article 36 is a systemic part of the regulatory regime created by the Gas Directive, Article 49a is merely a transitional provision:

i. Article 36 remedies the problem that the Gas Directive's requirements make investment in major new infrastructure unattractive. It allows the relaxation of these requirements for certain types of such major infrastructure that would benefit the internal market and security of supply. Article 36 has been a feature of the Gas Directive since 2003 and will continue to play a role in the future for future projects.

ii. Article 49a on the other hand is intended to reduce the impact of a regulatory change, namely, the extension of the Gas Directive to the section of offshore pipelines within the EU's territorial sea. Article 49a was introduced by the Amending Directive in 2019 and has no ongoing role in the system of the Gas Directive.

178. The Respondent and Professor Maduro also suggest that the scope of Article 36 is determined by the scope of Article 49a:

i. "*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*".[265]

ii. "*transmission lines between Member States and third countries, already completed by the date of entry into force of the Amending Directive, are eligible for an Article*

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262 **Exhibit C-90,** European Commission Fact Sheet, "Questions and Answers on the Commission proposal to amend the Gas Directive", 8 November 2017, answer to question 6.
263 Counter-Memorial, para 34.
264 Counter-Memorial, paras, 263, 272, 278, 280, 290, 292-293 and 297.
265 Counter-Memorial, para. 272. See also para. 290.

49a derogation, whereas transmission lines not yet completed by that date (23 May 2019), can request an Article 36 exemption".[266]

179. While it is convenient for the Respondent to present the situation in this manner, it is wrong and misleading. As the Respondent explains itself in its table in paragraph 290 of the Counter-Memorial, the temporal cut-off point for an Article 36 exemption is "*not completed by 4 August 2003*" (as per Article 2(33) of the Gas Directive). That is the cut-off date that the Gas Directive uses for Article 36 and not "not completed by 23 May 2019".

180. The actual cut-off date for Article 36 (i.e. 4 August 2003) also implies that it cannot be the only element that determines the scope of Article 36. In order to benefit from an Article 36 exemption infrastructure also has to be "*new*" (as per the heading of Article 36), in the sense that "*the investment would not take place unless an exemption was granted*" (as per Article 36(1)(b)). If all that mattered were the cut-off dates in the amended Gas Directive, then all pipelines "*not completed by 4 August 2003*" would be eligible for an Article 36 exemption. This would include three of the five offshore pipelines that have received an Article 49a derogation, namely Medgaz, Greenstream and Nord Stream 1, all of which were "*not completed by 4 August 2003*".[267] The logical outcome of the Respondent's argument is that, following the amendment of the Gas Directive, these pipelines could all obtain an Article 36 exemption and do not need an Article 49a derogation. In the same vein, the most rational approach would then have been to extend the Article 36 regime to the two other existing offshore pipelines (Transmed and MEG). This would have been much simpler than introducing a new Article 49a derogation, and all pipelines would have received the same treatment. The Amending Directive, however, adopts a very different approach.

181. An obvious reason why Article 49a was needed and Article 36 was not suitable for the five offshore pipelines that received a derogation is that they could never meet the criterion of being an "*investment* [that] *would not take place unless such an exemption was granted*" (Article 36(1)(b)) Gas Directive. The Respondent, however, cannot admit this because this criterion does not allow a distinction between these five pipelines and Nord Stream 2. In relation to that aspect all the offshore import pipelines, including Nord Stream 2, are in the same position. Consequently, the Respondent does what it can to obscure the discussion, including the introduction of the concept that pipelines completed before 23 May 2019 are not eligible for an Article 36 exemption but those completed after 23 May 2019 are. However, there is no basis whatsoever for this in the Gas Directive or anywhere else. The date of 23 May 2019 plays no role in relation to Article 36 and was purely chosen to exclude Nord Stream 2 from the scope of Article 49a.

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266 Maduro Report, para. 179.
267 See above paras 147, 149, 151 of this Reply.

182. In light of the above, the EU's argument that Article 49a and Article 36 are part of a "coherent regime" with harmonious temporal cut-off points has no merit. These are separate provisions and there is no meaningful logical link between them.

An Article 36 exemption cannot be as favourable as an Article 49a derogation

183. It is furthermore incorrect that an Article 36 exemption can be "*as favourable*" as an Article 49a derogation, and particularly so in the case of the Claimant.[268]

i. First, even ignoring the specific case of Nord Stream 2 and considering matters at the general level of principle, it is impossible for an Article 36 exemption to be as favourable as an Article 49a derogation:

(a) An Article 49a derogation is renewable and could therefore be extended indefinitely, whereas an Article 36 exemption is not.

(b) Unlike an Article 36 exemption, an Article 49a derogation also allows for derogation from certification by the relevant Member State's regulatory authority, pursuant to Articles 10 and 11 of the Gas Directive. This includes the additional requirements that apply under Article 11 of the Gas Directive in relation to transmission system operators and owners that are "*controlled by a person or persons from a third country or third countries*".

ii. Second, in the specific case of Nord Stream 2 it is also practically impossible for Nord Stream 2 to obtain an Article 36 exemption that is as favourable as an Article 49a derogation:

(a) The final decision-making for an Article 49a derogation rests with the Member State regulatory authority, whereas for an Article 36 exemption it is with the European Commission which has consistently expressed very negative views about Nord Stream 2, as set out in the Memorial.[269] In particular, the Commission has made it abundantly clear that it considers that Nord Stream 2, "*does not contribute to the Energy Union objectives of giving access to new supply sources, routes or suppliers and that it could allow a single supplier to further strengthen its position on the European Union gas market*"[270] and "*does not contribute to the EU's energy policy objectives such as energy security or diversification of supplies and for that reason does not support its construction*".[271] The EU continues to make

268 Counter-Memorial, paras 37, 198 and 291.
269 Memorial, paras 194-197.
270 Memorial, para 194(ii); **Exhibit C-89**, European Commission Press Release, "Commission seeks a mandate from Member States to negotiate with Russia an agreement on Nord Stream 2", 9 June 2017.
271 Memorial, para 194(iv); **Exhibit C-91**, European Commission Response to parliamentary question E-004084/2018, 24 September 2018.

such statements, even in these proceedings.[272] This effectively rules out the possibility of the European Commission approving an Article 36 exemption in light of its key condition that the infrastructure must have a positive impact on competition and security of supply.

(b) Furthermore, as mentioned above, unlike an Article 49a derogation, an Article 36 exemption does not exempt an operator from certification, including the additional third country certification requirements under Article 11 of the Gas Directive. In particular, pursuant to these third country certification requirements, the competent national regulatory authority "*shall refuse certification*" unless it has been demonstrated that "*granting certification will not put at risk the security of energy supply of the Member State and the* [Union]".[273] This means that even if Nord Stream 2 were somehow to obtain an Article 36 exemption, it would still be exposed to an additional procedure before the BNetzA – and, since this is a case of a third country certification, also the German Federal Ministry for Economic Affairs and Energy – that has the potential to lead to significant negative consequences for pipelines owned by third country investors.

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272 Already at the very beginning of the Counter-Memorial the Respondent makes clear how it views the Claimant: *"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.",* Counter-Memorial, para 4. Similarly in Counter-Memorial, para 687, the Respondent states *"*[…] *NSP2AG, which is controlled by Russia and may be presumed to act in accordance with the instructions of the Russian Government,* […]". The Respondent further refers to Gazprom as being *"effectively the petroleum arm of the Russian government*", Counter-Memorial, para 141. Furthermore, at various occasions in the Counter-Memorial, the Responded suggests that the Claimant likely has a dominant position: "*Completion of the NS2 pipeline was likely to bestow upon its operator a dominant position within the meaning of Article 102 of the TFEU,* […]*",* Counter-Memorial, para 25;"[The NS2 pipeline] *is likely to bestow upon its operator a dominant position,* […]*",* Counter-Memorial, para 152; "*The regulated tariffs obligation again prevents a party such as NSP2AG from exploiting its monopoly position in imposing tariffs*"; Counter-Memorial, para 603.

273 **Exhibit CLA-4,** Gas Directive, Article 11(3)(b).[274] Counter-Memorial, para 290. The Respondent's table also, somewhat superficially, underlines common words in both provisions, without any apparent appreciation of the remaining elements of those provisions which lead to very different meanings.

184. These key differences are either glossed over or entirely ignored in the Respondent's comparative table of the two provisions in its Counter-Memorial.[274] The Claimant therefore sets them out for clarity in the comparative table below:

	Article 36 exemption	**Article 49a derogation**
Type of infrastructure	Clearly within the scope of the Gas Directive at the time of investment Infrastructure with a specific beneficial impact for the internal market	Clearly outside the scope of the Gas Directive at the time of investment. Offshore third country import pipeline completed before 23 May 2019
Key conditions	Infrastructure must enhance competition and security of supply Investment would not go ahead without the exemption due to the level of risk	Derogation is for "objective reasons"; recovery of investment or security of supply are given as examples
Renewable	No	Yes
Final decision making	Commission	Member State regulatory authority
Scope (i.e. exempts / derogates from)	Ownership unbundling Third party access Tariff regulation	Ownership unbundling Third party access Tariff regulation Certification, including additional third country certification

185. In light of the above, it is clear that, contrary to the Respondent's position, Article 36 is not "*as favourable*" as Article 49a. This is correct as a general proposition, and even more so in the case of Nord Stream 2.

274 Counter-Memorial, para 290. The Respondent's table also, somewhat superficially, underlines common words in both provisions, without any apparent appreciation of the remaining elements of those provisions which lead to very different meanings.

In any event, the Claimant is <u>not</u> eligible for an Article 36 exemption and the procedural events in the OPAL case do <u>not</u> show otherwise

186. As set out above, Article 36 is only available for "*investment* [that] *would not take place unless an exemption was granted*". Such pipeline projects are inevitably still in the *planning phase*. This follows from the objective of Article 36 (on which both Parties agree), namely, to encourage the construction of "new infrastructure" which is expected to have a particularly positive impact on competition and security of supply that outweighs any negative impact on the internal market due to the non-application of the Gas Directive rules.

187. The final investment decision, as the point at which the decision to make major financial commitments is taken, represents the "point of no return" in relation to the investment. A project for which the final investment decision has been taken is therefore simply incapable of meeting the "risk" criterion under Article 36 as investment has already been committed irrespective of whether there is an exemption.

188. While the Respondent does not contest this, it appears to argue that the actual practice under Article 36 does not conform to this, referring to the OPAL pipeline exemption proceedings. The Respondent suggests that an exemption was granted in this case "*at a moment when all tubes for the pipeline had already been bought and where construction had already started*", which the Respondents alleges is "*similar*" to the situation of Nord Stream 2.[275]

189. This is incorrect. It is clear from the BNetzA's initial 25 February 2009 exemption decision in relation to OPAL,[276] which is cited by the Respondent,[277] that the BNetzA concluded that OPAL's final investment decision had *not* been taken. In its consideration of the "risk" criterion:[278]

    i. The BNetzA gave central weight to the final investment decision, explaining as follows: "*the causality between risk and the investment decision is lacking, if the investment decision has already been taken without reservation or if it is foreseeable that a positive investment decision will also be taken in the event that the exemption is refused*".[279]

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275 Counter-Memorial, para 294.

276 **Exhibit R-67**, Bundesnetzagentur Exemption Decision with respect to OPAL, 25 February 2009. Pursuant to the Article 36 process, this initial exemption decision was submitted to the Commission for approval, which issued its decision on 12 June 2009, imposing additional conditions (**Exhibit R-66**, Commission Decision on the exemption of the German Bundesnetzagentur for the OPAL pipeline, 12 June 2009). The Bundesnetzagentur issued its final exemption decision on 7 July 2009, incorporating these conditions (**Exhibit CLA-206,** Bundesnetzagentur Decision on the application by OPAL for an exemption (final), BK7-08-009 (German original and English translation), 7 July 2009).

277 Counter-Memorial, footnote 226.

278 **Exhibit R-67**, Bundesnetzagentur Exemption Decision with respect to OPAL, 25 February 2009, pp 62-63.

279 **Exhibit R-67**, *ibid.*, p 62.

ii. The BNetzA then noted that the applicant had maintained that no final investment decision had been taken, but that doubts about this arose, because it had already ordered significant quantities of pipes.[280]

iii. However, the BNetzA concluded that the ordering of these pipes did not mean that there was "*a* firm *intention to invest*". It explained that in the context of large infrastructure projects it is not unusual that investors enter into substantial financial commitments already prior to the final investment decision (for instance due to supply bottlenecks). Rather the critical question was whether the commitments entered into entail "*sunk costs of such a magnitude that a rational investor would consider the "point of no return" to have been passed*" (emphasis added). The BNetzA considered that this point had not been reached, as the pipes could have been resold, potentially even at profit.[281]

190. Furthermore, the Respondent's suggestion that construction of OPAL had already started is factually incorrect as OPAL did not even receive construction permits from the relevant German federal states through which it passes – Saxony, Mecklenburg-Western Pomerania and Brandenburg – until after the exemption had been granted. OPAL only obtained construction permits in Saxony on 9 July 2009, in Mecklenburg-Western Pomerania on 6 August 2009 and in Brandenburg for the southern section on 18 February 2010 and for the northern section in December 2009,[282] which were all after 7 July 2009 when the BNetzA issued its final exemption decision.[283] The EU does not cite any evidence for its claim that construction had already started, beyond the BNetzA's initial 25 February 2009 exemption decision, which itself says nothing of the sort. The simple explanation is that construction had not started.

191. The position of Nord Stream 2 is therefore clearly very different from the position in the OPAL case. There can be no doubt that the "point of no return" for Nord Stream 2 was crossed long before the Amending Directive came into force, in light of the very substantial expenditure and works that had already been completed as at 23 May 2019. Not only had construction works "*already started*" as at that date, clearly more than one thousand km of pipes had already been laid on the sea ground. The Respondent has not referred to any examples of

280 **Exhibit R-67**, *ibid*., p 62.
281 **Exhibit R-67**, *ibid*., p 63.
282 See the press releases of the federal state governments of Mecklenburg-Western Pomerania, Saxony and Brandenburg. **Exhibit C-256**, Press release of the state government of Mecklenburg-Western Pomerania regarding the planning approval for OPAL (German original and English translation), 6 August 2009; **Exhibit C-257**, Press release of the state government of Saxony regarding the planning approval for OPAL (German original and English translation), 13 July 2009; **Exhibit C-258**, Press release of the state government of Brandenburg regarding the planning approval for OPAL (German original and English translation), 18 February 2010.
283 **Exhibit CLA-206**, Bundesnetzagentur Decision on the application by OPAL for an exemption (final), BK7-08-009 (German original and English translation), 7 July 2009.

pipelines in the position of Nord Stream 2 that have received an Article 36 exemption, nor could it.

192. The Respondent's further argument that Article 36 exemptions may be reviewed and amended later on, even though the final investment decision has already been taken, is also not relevant. The ability to amend the scope of an exemption or conditions attaching thereto in light of new factual developments has no bearing on the questions of eligibility or suitability which are the issues here.

The Respondent again asks the Tribunal to suspend reality

193. In this context, the Respondent again asks the Tribunal to ignore the facts and suspend reality. It incomprehensibly argues that the Claimant's position, that the Gas Directive would have a negative impact on its investment, itself indicates that the rationale for an Article 36 exemption could apply. According to the Respondent, the relevant question is "*would the investment go ahead without the exemption due to the level of risk involved for the* [Nord Stream 2] *pipeline project?*"[284] But the Claimant's investment had already "*gone ahead*" and has now been jeopardised as a result of the Amending Directive.

194. In another denial of reality the Respondent argues that the Claimant could first continue its proceedings in Germany to obtain a derogation and, when this is appeal is finally decided, "*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*".[285] However, Nord Stream 2 is already completed and, at that point in time, will have been "*completed*" for some time. Consequently, even by the Respondent's own distorted reading an Article 36 exemption would no longer be available.

IV.4 The Amending Directive was adopted pursuant to an improper legislative procedure

195. In the Memorial, the Claimant explained that the proposal for the Amending Directive was tabled with extreme haste and that the Respondent failed to carry out the consultation, ex-post evaluation and impact assessment which are normally expected in relation to a substantive legislative initiative.[286]

196. This unusual speed is explicitly confirmed by statements of several key actors involved in that process at the time of the preparations, in particular:

i. During the meeting of the European Parliament Committee on Industry, Research and Energy ("**ITRE** Committee") on 11 October 2017, Dr Borchardt (the then Director

284 Counter-Memorial, para 296.
285 Counter-Memorial, para 297.
286 Memorial, paras 249-251.

at the Commission's Directorate-General for Energy) referred to the preparation of the Commission proposal as "*a very fast-track procedure*".[287]

ii. At the same ITRE Committee meeting, Dr Borchardt also noted that Jean-Claude Juncker (the then President of the Commission) had underlined his expectations that the proposal should be adopted and enter into force by the end of 2018 at the latest, indicating a clear political preference for the Commission to proceed fast.

iii. Again at the ITRE Committee meeting, Jerzy Buzek (the then Chair of the ITRE Committee) indicated that the European Parliament was "*prepared for fast-track*".

iv. As already noted in the Memorial, in its 11 December 2017 comments on the proposal for the Amending Directive, Germany criticised such haste and emphasised that it "*sees no need for haste in implementing the proposal*" and that, "*there has been no apparent reason why the changes to the Gas Directive need to be discussed and launched under time pressure*".[288]

v. Similarly, in its 11 December 2017 comments on the proposal, Austria noted it "*considers proper stakeholder consultations, impact assessments and a regulatory fitness check necessary and does not support the idea of a fast track procedure*".[289] (emphasis added)

vi. Further, a PowerPoint presentation by the EU Committee of the Regions for a meeting on 9 February 2018 states that the European Commission "*quickly tabled a proposal* [for the Amending Directive]" (emphasis added) as a "*second move*" after the Commission and Council Legal Services denied that there was a legal basis for a mandate enabling the Commission to negotiate an intergovernmental agreement with Russia on Nord Stream 2.[290]

vii. Finally, in a document by the European External Action Service, the Commission Proposal was characterised as *"unusually sudden"*.[291]

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287 **Exhibit C-92**, Transcript of Presentation by Dr Borchardt to a meeting of the European Parliament Committee on Industry, Research and Energy, "Negotiation mandate for Nord Stream 2: state of play", 11 October 2017 (presentation accessible at https://multimedia.europarl.europa.eu/en/committee-on-industry-research-and-energy_20171011-1430-COMMITTEE-ITRE_vd).

288 **Exhibit C-114**, Council of the European Union Working Paper, "Written Comments by Germany on the Commission Proposal for a Directive amending Directive 2009/73/EC", WK 14673/2017 INIT, 11 December 2017.

289 **Exhibit C-114**, Council of the European Union Working Paper, "Written Comments by Germany on the Commission Proposal for a Directive amending Directive 2009/73/EC", WK 14688/2017 INIT, 11 December 2017.

290 **Exhibit C-207**, European Committee of the Regions presentation for ENVE-VI/026 Stakeholders' meeting in Brussels on 9 February 2018, "Proposal for a Directive Amending Directive 2009/73/EC (Natural Gas)", 9 February 2018, slide 2.

291 **Exhibit C-254,** European External Action Service, "Fast-track Inter Service – Modification of the GAS DIRECTIVE (2009/73/EC)", p 3.

197. The unusual speed of progress specifically in the European Parliament is further elaborated on in the witness statement of [redacted], who highlights a number of significant irregularities in the process within the ITRE Committee. These include the use of a fast-track procedure referred to above, which [redacted] explains was very unusual and used only in exceptional cases, and the abbreviated timetable that was set for consideration of the proposal, which did not allow Committee members sufficient time to take into account feedback from the external stakeholders consultation and to adequately scrutinise and table amendments to the draft report produced by the rapporteur.[292]

198. The above statements demonstrate that the Respondent's allegation that there was nothing unusual about the speed of the process is false.[293] It is correct that the approval of the proposal by the Council and the European Parliament took 18 months. It remains the case, however, that the Commission proposal was prepared with extreme haste and without the normal procedural steps for such a legislative initiative with the clear intention of finalising the process before the construction of Nord Stream 2 was complete.

199. The EU claims that the Explanatory Memorandum accompanying the Commission Proposal *"was the result of a study carried out by the European Commission"*.[294] However, this "study" was not referred to in the Explanatory Memorandum. Furthermore, a copy of this alleged "study" was not exhibited by the EU to its Counter-Memorial nor was it disclosed amongst the documents produced by the EU on 13 August 2021 despite falling squarely within NSP2AG's request Number 12[295], as upheld by the Tribunal. The "study" was also not produced when specifically requested by NSP2AG in correspondence: indeed, the "study" was not addressed at all by the EU in its letter in response.[296] It seems, therefore, that the EU is referring to a study that does not exist.

200. As regards specifically the failure to carry out an ex-post evaluation of the (unamended) Gas Directive, and carry out an impact assessment of (and consult widely on) the proposal, the EU's main argument is linked to its attempt to portray the legislative change brought about by the Amending Directive as clarificatory in nature rather than substantial.[297]

201. As explained in Section III.1 above, the Amending Directive moves the point of application of the Gas Directive for offshore import pipelines to the border of the territorial sea. In doing so, it extends to offshore pipelines from non-EU countries complex rules that were designed

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292 [redacted]

293 Counter-Memorial, Sections 2.5.1 and 2.5.2.

294 Counter-Memorial, para 324.

295 Request 12 asked for *"Any Documents recording (or supporting) an assessment by the Commission or any other institution, body, agency, entity or individual representing the EU that the Amending Directive would contribute to the stated objectives of the Gas Directive, Gas Regulation and Amending Directive (in particular, strengthening the EU's security of supply, and enhancing competition and the functioning of the EU's internal market), dated or otherwise created in the period between 9 June 2017 and 17 April 2019".*

296 **Exhibit C-201,** Letter from the European Union to NSP2AG dated 8 October 2021.

297 Counter-Memorial, Sections 2.5.3 to 2.5.6.

for the meshed network of transmission pipelines inside the EU's internal market. This is a fundamental and substantial change which was also recognised and explicitly pointed out by several key actors in the legislative process, in particular:

i. In a letter from 10 January 2018, a number of MEPs noted that "*the wording of the proposal seems to significantly change the scope of the existing legislation*" and that "*it touches upon investment framework and multibillion infrastructure projects*"[298] (emphasis added).

ii. In written remarks on the Commission Proposal, Austria stated that: "*Given the extensive character of the envisaged initiative as explained, Austria considers proper stakeholder consultations, impact assessments and a regulatory fitness check necessary and does not support the idea of a fast track procedure*"[299] (emphasis added).

iii. Equally in written comments on the Commission Proposal, Germany pointed out: "*The Commission has so far justified the failure to undertake an impact assessment by alleging that the proposed change reflects practical reality. This is incorrect: offshore pipelines from third countries have not so far been regulated in line with the provisions of the third internal market package. This means that what is at stake here is not a clarification or codification of an existing "practice", but a clear expansion of the existing scope of the Gas Directive. Such an extension cannot take place without a well-founded impact assessment, since the proposal can involve substantial economic effects, firstly due to a high level of additional administrative burden for business, and secondly due to the possibility that the economic viability of ongoing projects might be imperilled*"[300] (emphasis added).

202. The proposal was falsely presented in the Explanatory Memorandum as being merely clarificatory with the aim of avoiding the normal ex-post evaluation and impact assessment. Of course, if these procedures had been followed properly, it would have become much more difficult to present the Amending Directive as a general measure of a clarificatory nature and obscure its true objective of targeting Nord Stream 2. This would, in turn, have made it more challenging to adopt the legislation in the Council and the European Parliament.

203. A number of key actors in the legislative process explicitly criticised this lack of an impact assessment and repeatedly called for one to be prepared, in particular:

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298 **Exhibit C-259**, Letter from MEPs to the Vice-President of the European Commission for Energy Union, the European Commissioner for Energy, the Chair of the ITRE Committee and others regarding the process of amendment of the Gas Directive, 10 January 2018, p 1.

299 **Exhibit C-248**, Council of the European Union Working Paper, "Austria comments on the Gas Directive", WK 14688/2017, 11 December 2017, p 3.

300 **Exhibit C-114**, Council of the European Union Working Paper, "Written Comments by Germany on the Commission Proposal for the Amending Directive", WK 14673/2017 INIT, 11 December 2017, p 5.

i. No less than seven Member States repeatedly criticised the absence of an impact assessment or asked for one to be prepared, namely Germany,[301] Cyprus,[302] the Netherlands, Belgium, Czech Republic, Hungary, [303] and Austria. [304] Indeed, Germany considered an impact assessment to be *"absolutely necessary"* and the lack thereof as *"a serious violation on the part of the Commission of the interinstitutional agreement on better law-making"*.[305]

ii. In the letter from 10 January 2018 referred to in paragraph 201 above, a number of MEPs noted that the Commission "*did not provide an impact assessment and did not conduct a public consultation*", that this was "*not in-line with the Commission's own Better Regulation Guidelines and with the Interinstitutional Agreement* [on Better Law Making] *of 13 April 2016*". In light of this, the MEPs requested that "*the Commission addresses the shortcomings by providing a thorough assessment of impacts from the proposed legislation*".[306] Similar statements were made during an ITRE Committee meeting on 11 January 2018[307] and amendments calling for an impact assessment to be carried out have been proposed by numerous MEPs in the draft ITRE report on the Commission Proposal.[308]

iii. As already mentioned in the Memorial, the European Economic and Social Committee pointed out in its opinion of 25 July 2018 that, "*there may be a range of legal challenges to the amendments and that there will certainly be significant political disagreements and also commercial concerns from some industry stakeholders. The absence of an impact assessment in these circumstances is therefore regrettable*".[309] It further stated that it was "*concerned that the Commission felt that an impact assessment was not required. It is evident that in this politically*

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301 **Exhibit C-260**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 13-17 November 2017, p 4, Section 1.2.3; **Exhibit C-244**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 20-24 November 2017, p 11, Section 1.5.2.

302 **Exhibit C-261**, Council of the European Union Working Paper, "Written Comments by Cyprus on the Commission Proposal for a Directive amending Directive 2009/73/EC", WK 5666/2018 INIT, 14 May 2018.

303 **Exhibit C-262**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 24-28 September 2018, p 10, Section 1.6.3.

304 **Exhibit C-248**, Council of the European Union Working Paper, "Austria comments on the Gas Directive", WK 14688/2017, 11 December 2017.

305 **Exhibit C-263**, Council of the European Union Working Paper, "Germany comments on the Gas Directive", WK 2772/2018 INIT, 6 March 2018, p 3.

306 **Exhibit C-259**, Letter from MEPs to the Vice-President of the European Commission for Energy Union, the European Commissioner for Energy, the Chair of the ITRE Committee and others regarding the process of amendment of the Gas Directive, 10 January 2018.

307 **Exhibit C-264**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 8-12 January 2018, pp 5-6, Section 2.1.1.

308 **Exhibit C-119**, European Parliament, "Amendments 8 – 142 on the proposal for an Amending Directive", 2017/0294(COD). See Amendments 13 - 17, 33 - 34, 40 - 41, 131, 141 - 142. Several proposed amendments even call for the Commission Proposal to be rejected due to *inter alia* the lack of an impact assessment (see Amendments 8-11).

309 **Exhibit C-22**, 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, OJ C 262/64, 25 July 2018, pp 64 – 68, para 1.7.

sensitive area where economic factors come into play evidence must be tabled to underpin the arguments being made for the proposed amendments".[310]

iv. Again, as mentioned in the Memorial, the Committee of the Regions noted in its opinion of 5 October 2018 "*the importance of the necessary impact assessment in accordance with the Interinstitutional Agreement on Better Law-Making*".[311]

204. Finally, the Respondent's claim, that the redundancy of an impact assessment in the present case is further corroborated by the absence of an impact assessment in 86% of amending Directives and amending Regulations adopted from 1 January 2019 to 17 February 2021, is misleading and without merit.[312] The sample submitted by the Respondent in Exhibit R-99 is unsuitable to support the Respondent's allegation. First, the Respondent neither explains the reasons for choosing this timeline nor how it reached this conclusion on the basis of the exhibit. Second, upon a closer look, more than half[313] of the amending acts listed in the exhibit are COVID or Brexit related measures and have not been subject to an impact assessment due to the urgency of the measure or the exceptional circumstances. As for the remaining acts, the reasons why no impact assessment has been carried out vary including that the act is part of a wider initiative for which an impact assessment has been carried out, or it is an act in relation to which other (technical) studies or analyses have been prepared. It cannot, therefore, be credibly inferred from Exhibit R-22 that the absence of an impact assessment for legislative acts like the Amending Directive is the norm rather than the exception.

310 **Exhibit C-22**, 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, OJ C 262/64, 25 July 2018, pp 64 – 68, para 4.5.

311 **Exhibit C-23**, 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, OJ C 361/72, 5 October 2018, pp 72-77, para 13.

312 Counter-Memorial, paragraph 345.

313 35 out of 65.

V. THE AMENDING DIRECTIVE CANNOT BE JUSTIFIED BY REFERENCE TO ITS PURPORTED OBJECTIVES

205. This Section will first explain that the Parties and expert witnesses are in broad agreement on the general regulatory background to this dispute, namely the role played by transmission infrastructure in the EU's internal market and the regulatory objectives pursued by the Gas Directive and its associated measures (**Section V.1**). It will thereafter address the Purported Objectives of the Amending Directive and the disagreement between the Parties and the expert witnesses on the Amending Directive's ability to achieve these objectives (**Section V.2**).

V.1 The Parties and expert witnesses are in broad agreement on the role and regulation of transmission infrastructure on the EU's internal gas market

206. In Section IV.3 of the Memorial, the Claimant explains the key features of EU internal market regulation for gas, including the concepts of unbundling, third party access and tariff regulation and the underlying policy objective of the so-called "Gas Target Model". This is supported by Sections 2 and 3 of the First Expert Report of Peter Cameron describing the First, Second and Third Gas Directive (and the Third Energy Package more generally).

207. The Respondent addresses broadly the same issues briefly in Sections 2.1.1.1 and 2.1.1.2 of its Counter-Memorial without disagreeing with the more extensive description in the Memorial and Professor Cameron's First Expert Report. Professor Maduro's First Expert Report also contains a description of the EU's Third Gas Directive and its predecessors combined with a wide ranging description of other aspects of EU energy policy.[314] Professor Maduro does not disagree with or object to the description that Professor Cameron has provided of the First and Second Gas Directive or the Third Energy Package.

208. The Claimant does not seek to the question Professor Maduro's wide-ranging description of EU energy policy and, therefore, will not address all issues raised in that description.

209. For the avoidance of doubt, the Claimant does question many of the other points that the Respondent and Professor Maduro make in relation to Gas Directive, including whether the unamended Gas Directive applied to offshore import pipelines (as set out in Section III above). There does, however, appear to be broad agreement on the more general regulatory background, removing the need to debate this further.

210. The relevant question for this section is whether the Amending Directive can be justified by its purported aims. As set out in the next sub-section, this is not the case, irrespective of how wide ranging the objectives of the EUs' broader energy policy are presented.

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[314] Expert Report of Professor Maduro, paras 31–86 and 102–130.

V.2 The Amending Directive's objectives are contradictory, lack clarity and cannot be achieved

211. The EU has put forward a mystifying range of objectives allegedly pursued by the Amending Directive, although none of these objectives is ever discussed in any meaningful detail. Neither does the EU substantiate how the Amending Directive can help to achieve those Purported Objectives. Some of these objectives were put forward during the legislative process but are no longer part of the EU's defence in this proceeding. Certain other objectives remain part of the discourse of the Respondent and Professor Maduro but without any reaction to the critique of the Claimant and Professor Cameron. Furthermore, the Respondent puts forward additional objectives in in its Counter-Memorial that did not feature in the legislative process and are entirely new.

212. The result is inevitably confusing and the Claimant has, therefore, organised this Section V.2 as follows. It will first summarise the objectives put forward during the legislative process and its criticism of those objectives as set out in the Memorial. When doing so it will highlight the objectives that have "disappeared" and the numerous points of criticism that neither the Respondent nor Professor Maduro address. It will then consider and rebut the counter-arguments that the Respondent does develop and the additional points raised by Professor Maduro. This Section ends with a discussion on the purported objective of security of supply (which the Respondent and Professor Maduro often refer to, albeit only in vague and general terms) and a general conclusion.

The objectives and reasons put forward during the legislative process

213. The objectives and reasons that were put forward during the legislative process (and addressed by the Claimant in its Memorial and Professor Cameron in his First Expert Report) are set out in (i) the proposal for the Amending Directive; (ii) the accompanying Staff Working Document; and (iii) Recital (3) of the Amending Directive. In particular, the Claimant and Professor Cameron discuss the following objectives put forward in these documents in paragraphs 272 - 282 of the Memorial and 6.32 to 6.36 of the First Expert Report respectively.

i. Removal of obstacles to the internal market.

ii. The risk that different Member States could apply different rules to import pipelines that cross several Member States once inside the EU.[315]

iii. An unspecified concern related to the fact that EU gas customers would have to bear the cost of connecting infrastructure such as EUGAL via regulated tariffs.

[315] **Exhibit C-4**, 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, SWD(2017) 368 final, 8 November 2017, p 3; see also Memorial, footnote 315.

iv. Ensure competition and security of supply.

v. Avoid stranded assets.

vi. Increase transparency.

vii. Unspecified concerns related to contradicting legal regimes and a lack of legal certainty.

214. In its Counter-Memorial, the Respondent does not develop further or address in any way Purported Objectives (iii.) (cost of connecting infrastructure) or (v.) (avoid stranded assets) in the list above. This in itself strongly suggests that these objectives were fabricated and cannot be substantiated.

Many of the arguments and considerations raised by the Claimant and Professor Cameron remain entirely unaddressed

215. The Claimant and Professor Cameron explained that the objectives put forward during the legislative process lacked clarity and contained significant contradictions.[316] Both then discussed in more detail what appeared to be the key objectives of the Amending Directive, namely removal of obstacles to the internal market and to ensure competition and security of supply in the internal market. In relation to these key objectives, the Claimant and Professor Cameron raised, in total, 13 arguments.

216. Of these 13 arguments, nine remain entirely unaddressed by the Respondent and Professor Maduro.[317] This lack of engagement by the EU underscores the weakness of its position and further confirms that many of the objectives put forward are fabricated and cannot be substantiated. The nine unaddressed arguments are the following.

i. The Claimant and Professor Cameron explained that even at a general level it is unclear what internal EU market policy objective could be achieved by extending the extensive and complex pro-competitive regulation of the EU gas market to the territorial sea section of a third country import pipeline without any objective of integrating that third country in the EU's internal gas market or providing meaningful cooperation.[318]

316 Memorial, paras 270-274; First Expert Report of Professor Cameron, paras 6.32-6.60.

317 The four arguments that the Respondent and/or Professor Maduro do address are the following: (i) the Gas Directive already applied to any pipeline on the EU side of a border connection point (Memorial, para 275), (ii) the EU had never set out with at least some precision how the Amending Directive would contribute to the Purported Objectives (Memorial, para 295 and First Expert Report of Professor Cameron, paras 6.32-6.33, and 6.36), (iii) that the Amending Directive would not contribute to legal certainty because in reality there was no lack of legal certainty (First Expert Report of Professor Cameron, paras 6.59-6.61), (iv) that the Amending Directive in any event only has practical impact on one pipeline namely Nord Stream 2 (Memorial, paras 302-303 and First Expert Report of Professor Cameron, paras 6.48-6.50). These are addressed in paragraphs 81 to 88, 211 to 214, 218, 102-112, 223 and Section IV.2 of this Reply.

318 Memorial, para 286 and First Expert Report of Professor Cameron, paras 6.37-6.39, 6.41 and 6.54-6.55.

While the Respondent does not answer this question, it has submitted as Exhibit R-10 a document confirming that this is a highly pertinent question. This is a European Commission Recommendation encouraging EU Member State regulators to treat the Contracting Parties to the Energy Community as if they are part of the EU internal market for gas and electricity (in relation to the status of their gas and electricity infrastructure and in relation to cooperation with their authorities). This is done on the basis that: "*the Contracting Parties to the Energy Community aim at integrating their energy markets with the EU internal energy market by adapting the EU internal market legislation for gas and electricity and incorporating it into their national legislation*."[319] Professor Maduro also explains that the Energy Community Treaty "*has created an integrated pan-European energy market*."[320]

This reinforces the point made by the Claimant and Professor Cameron, since there is no such treaty or EU policy objective to create an integrated energy market with Russia, Algeria, Morocco and Libya, i.e. the countries to which the EU is connected via the five existing offshore import pipelines and Nord Stream 2. Of course, an agreed integration of certain third countries in the EU internal energy market is completely different from a unilateral extension of EU legislation to the territorial sea section of offshore import pipelines (as the Amending Directive has done).

ii. The Claimant and Professor Cameron explained that the Gas Directive and associated rules are applied via extensive institutional arrangements organising the cooperation between the Member States and between regulatory authorities. There are no such arrangements for cooperation with third countries such as Russia and Algeria, their regulators and their network owners/operators which cannot participate in bodies such as ACER and ENTSOG. In the absence of such cooperation arrangements the complex rules of the Gas Directive and associated instruments cannot function in practice.[321] Neither the Respondent nor Professor Maduro address this.

iii. The Claimant and Professor Cameron explained that the EU's regulatory regime pursues a "Gas Target Model" based on "entry-exit systems" as a means of changing and influencing the structure of the market for trade in gas (as opposed to merely regulating means of transport). This is inherently related to the EU's own internal

319 **Exhibit R-10**, 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, Recital (1).

320 Expert Opinion of Professor Maduro, para 134.

321 Memorial, paras 94-98, 286 and footnotes 98 and 323; First Expert Report of Professor Cameron, paras 6.40 and 6.42-6.44.

market (as opposed to third countries).[322] Neither the Respondent nor Professor Maduro address this.

iv. The Claimant and Professor Cameron explained that the EU had expressed the intention of only extending the "core principles" of the regulatory framework to third country import pipelines and not all the detailed rules, including the Network Codes, meaning the offshore import pipelines affected by the Amending Directive would not become part of the "entry-exit" system. This in turn makes many of the most important rules meaningless.[323] Neither the Respondent nor Professor Maduro address the EU's explicit intention of applying only these "core principles" and what this means in practice.

v. The Claimant and Professor Cameron explained that pipelines bringing gas to the borders of the EU transmission network fulfil a different role than those making up the transmission network within the EU. The EU had itself described in the WTO how the different nature of these pipelines justifies different regulatory treatment. The EU had further explained in the WTO that the objective of EU regulation concerning transmission could be achieved by regulating at the point where the gas enters the EU transmission network.[324] Neither the Respondent nor Professor Maduro address this.

vi. The Claimant and Professor Cameron explained that none of the numerous and lengthy policy documents produced by the EU regarding the regulation of the gas market or security of supply ever identified the non-application of the Gas Directive to (offshore) import pipelines as a problem.[325] Neither the Respondent nor Professor Maduro address this.

vii. The Claimant points out that the Amending Directive simultaneously treats application of the rules to import pipelines as positive and negative for security of supply, which is logically inconsistent. In particular, the EU did not explain how it can be logically maintained on the one hand in the objectives that extending the rules to offshore import pipelines supports security of supply, while on the other hand providing in the text of Article 49a that the non-application of those rules further to an Article 49a derogation will also promote security of supply.[326] Neither the Respondent nor Professor Maduro address this.

viii. The Claimant and Professor Cameron explained that additional pipelines normally imply greater security of supply because they can be used in case of disruption (as

322 Memorial, para 287 and First Expert Report of Professor Cameron, para 6.46.
323 Memorial, para 288 and First Expert Report of Professor Cameron, para 6.47.
324 See Memorial, paras 292-294 and First Expert Report of Professor Cameron, paras 6.45, 6.52 and 6.58.
325 Memorial, para 299 and First Expert Report of Professor Cameron, para 6.34.
326 Memorial, para 298.

recognised in EU decision practice).[327] Neither the Respondent nor Professor Maduro address this.

ix. The Claimant pointed out that the EU had taken the view that Nord Stream 1, a completely unregulated pipeline, had a positive impact on its security of supply.[328] Neither the Respondent nor Professor Maduro address this.

217. In the following paragraphs the Claimant will address all the counter-arguments that the Respondent does make, as well as any additional points raised by Professor Maduro.

The counter-arguments that the Respondent does make are transparently weak and flawed

218. The Respondent makes the following counter-arguments, sometimes supported by Professor Maduro:

i. In paragraphs 88 to 91 of the Counter-Memorial the Respondent states that the objectives of the Amending Directive are set out in Recital (3). Professor Maduro refers to Recitals (3) and (15).[329]

The Claimant accepts that the objectives set out in Recitals (3) and (15) provide the reference framework for this discussion on the ability of the Amending Directive to achieve its Purported Objectives. For the avoidance of doubt, the Claimant takes the view that these Purported Objectives are fabricated and intended to obscure the real objective of harming the Nord Stream 2 project.

ii. In paragraph 94 of the Counter-Memorial the Respondent states that: "*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*". The Respondent develops this further in paragraphs 95 to 98, and Professor Maduro makes a similar point in paragraphs 140 to 149.

As explained in paragraphs 73 to 89 and 102 to 112 of Section III above, however, there was no problem of legal clarity or lack of level playing field. All pipelines received the same treatment: the Gas Directive applied on the EU side of the border connection point and <u>not</u> on the third country side. What has happened is that the border connection point for offshore pipelines has been moved by the Amending Directive from the coastal terminal to the legal border of the territorial sea. The real question of interest, however, is what benefit is achieved by the extension of the Gas Directive. There is no question that the extension has taken place.

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327 Memorial, para 300 and First Expert Report of Professor Cameron, para 6.57.
328 Memorial, para 301.
329 Expert Opinion of Professor Maduro, para 213.

In paragraph 97 of its Counter-Memorial the Respondent also argues that it was required to adopt the Amending Directive to ensure compliance with the EU principle of equal treatment. This is not a credible argument. It does not appear in Recital (3) nor in the Proposal or the Staff Working Document. Furthermore, it implies that the EU would have been in violation of a fundamental principle of EU law for more than 20 years since it adopted the First Gas Directive in 1998.

iii. In paragraphs 99 to 123 the Respondent describes what it refers to as "*specific benefits of the Amending Directive*". Professor Maduro adopts a similar approach in paragraphs 221, 227 and 229.

However, these paragraphs primarily contain a description of the general regime created by the Gas Directive. Neither the Claimant nor Professor Cameron argued or opined that the Gas Directive and its associated rules have no meaningful impact on the EU internal market. On the contrary, the Claimant and Professor Cameron both explained how the consecutive versions of the Gas Directive brought about a fundamental change of the gas sector in the EU.

Rather, the Claimant and Professor Cameron explained that what the Amending Directive achieves has no meaningful practical benefit, namely shifting the point of application of the Gas Directive for offshore import pipelines from the coastal terminal to the legal border of the territorial sea.[330] This case is concerned with the benefits achieved by the Amending Directive. It is not concerned with the benefits achieved and pursued by the Gas Directive more generally.

iv. The Respondent does mention one specific alleged benefit, namely its claim that there may at some point in the future be a request for another pipeline to be connected physically to Nord Stream 2 in the German territorial sea (and similarly for other offshore import pipelines).[331] This benefit was never mentioned during the legislative process.

The Respondent explains that the concept of third party access comprises two elements: (i) (new) physical connections between infrastructure assets owned by different infrastructure developers; and (ii) rules about the ability of gas suppliers (as opposed to infrastructure developers) to obtain access to the transportation infrastructure owned by an infrastructure developer/owner.[332]

The second element (use of infrastructure) is by far the most relevant for this case and is the element primarily discussed by the Parties, Professor Cameron and Professor Maduro. In relation to the first element, physical connection, the

330 See also the Second Expert Report of Professor Cameron, paras 4.2-4.3.
331 Counter–Memorial, paras 102 and 113.
332 Counter–Memorial, para 99.

Respondent refers to Article 8 and 23(2) of the Gas Directive and other relevant provisions are Article 13(2) and 13(4).

The Claimant submits that it is extremely unlikely that a third party infrastructure developer would ask to construct a physical connection with an offshore import pipeline in the territorial sea of an EU Member State. It would be much more efficient to build connecting infrastructure on land and connect at the coastal landing terminal (which is the practical reality for all offshore import pipelines, as discussed in Section III).

v. The Respondent argues that all onshore import pipelines are also covered by the Gas Directive and that these did not receive derogations.[333]

As explained in paragraphs 73 to 89 of Section III above, however, this was already the case prior to the Amending Directive and the Claimant does not dispute that the Gas Directive and associated rules have always applied on the EU side of a border connection point for onshore and offshore pipelines. It is only for offshore pipelines, however, that the point of application of the Gas Directive has been shifted to the legal border of the territorial sea (without any meaningful practical benefit for the internal market). Since the Amending Directive has no impact on onshore pipelines the lack of derogation does not affect them either.

The Respondent further argues that derogations granted to the five comparable offshore import pipelines are temporary and may be subject to conditions.[334]

The reality however, is that each of the five comparable offshore import pipelines has received a derogation either of extensive duration, or with the ability to re-apply for a longer duration (as explained at paragraphs 145 to 152 above), and it is only Nord Stream 2's application that has been rejected on the basis that it is "not completed".

vi. The Respondent also argues that the Claimant's assertion that the Amending Directive affects only 16% of third country import pipeline capacity is misleading and factually wrong.[335] Furthermore, according to the Respondent, the pipelines benefiting from an Article 49a derogation would cover only 27% of EU import capacity.

This is essentially another repetition of the Respondent's argument that onshore import pipelines are also affected by the Amending Directive and did not receive a derogation. In other words, the Respondent does not challenge the calculation or the underlying data, but rather the starting point that only Nord Stream 2 is affected. The

333 Counter-Memorial, paras 125-126.
334 Counter-Memorial, para 125.
335 Counter-Memorial, paras 124-128.

Claimant has demonstrated in Section III that the Amending Directive in practice affects only Nord Stream 2. Consequently, the Claimant's argument that only a small proportion of third country import pipeline capacity is affected is correct.[336]

Professor Maduro questions the accuracy of 16% as referred to by Professor Cameron.[337] However, Professor Maduro puts forward no basis for his doubts and does not address Exhibits C-135 and C-136 relied upon by Professor Cameron.[338]

The additional points raised by Professor Maduro are unconvincing

219. In Section V of his Expert Report, Professor Maduro raises a number of additional points regarding the Amending Directive's contribution to the internal market and competition in particular. However, Professor Maduro's views are based on the incorrect assumption that, prior to the Amending Directive, there could be unregulated offshore import pipelines on the EU side of a border connection point, which could even continue crossing several Member States. According to Professor Maduro:

> "*Without the amendment of Article 2(17) the territory of the EU, either onshore or offshore, would be traversed by portions of gas transmission lines between Member States and third States which would not be subject to the EU gas regulatory framework originally set-forth by the Gas Directive for gas transmission lines between Member States. Such segments of gas import pipelines located in the territory of EU Member States, without the clarification introduced by the Amending Directive, would be in an exceptional situation, a sort of regulatory limbo, vis-à-vis pipelines between Member States. They would not be subject to the jurisdiction of EU internal market law, although located in the territory of the EU."*[339]
>
> *"Moreover if those gas pipelines, to and from third countries, traversed several EU Member States, it is possible that they could be subject to different national regulatory frameworks, depending on the Member States crossed.*"[340]

220. This is a significant misunderstanding on a basic and fundamental point that affects most of the arguments that Professor Maduro makes in Section 5 of his Expert Opinion. As explained in Section III of this Reply and Section 3 of the Second Expert Report of Professor Cameron, the Gas Directive has always applied on the EU side of border connection points to pipelines such as OPAL and EUGAL that transport gas from the border connection point further downstream within EU. It was not possible for import pipelines (offshore or onshore) to

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336 The Respondent notes that according to the EU, Nord Stream 1 represents 11% of the EU's import capacity. Consequently, Nord Stream 2, which has the same technical capacity as Nord Stream 1, should also only represent 11% of total EU import capacity, which is an even smaller share than the 16% resulting from the Respondent's calculation.

337 Expert Report of Professor Maduro, para 192.

338 First Expert Report of Professor Cameron, footnote 156.

339 Expert Report of Professor Maduro, para 219.

340 Expert Report of Professor Maduro, para 234.

"continue" beyond the border connection point, inside the EU and cross different Member States unregulated. The Claimant had already explained this in paragraph 275 of the Memorial in relation to statements made in the Staff Working Document (and so had Professor Cameron in paragraphs 6.15 and 6.52 of his First Expert Report). The Respondent has not reacted to the Claimant's criticism of this Staff Working Document. Simultaneously Professor Maduro only refers to the same inaccurate discussion in the Staff Working Document to substantiate his view that this problem was real. Consequently, Professor Maduro's views are based on incorrect assumptions fundamentally undermining his conclusions in paragraphs 219, 224-226, 228 and 231-235, which make up the bulk of Section 5 of his Report.

221. Professor Maduro further claims that there was a problem of distorted competition between the unregulated import pipelines terminating at the EU borders and pipelines transporting gas within the EU.[341] However, as the EU itself explained in the WTO, pipelines with the characteristics of an import pipeline have as their sole purpose to bring gas from outside the EU to the borders of the EU transmission network (and not directly to the customer) so that gas can be transmitted further downstream.[342] By contrast, according to the EU itself, transmission pipelines within the EU "*concern a further sector downstream*" that "*collects gas from all possible sources*" and provides it to customers "*via meshed networks covering large areas*."[343] These two types of gas transport infrastructure fulfil different roles, which is inherently related to their different geographic features. Professor Maduro makes vague and general statements but does not explain with any precision how and to what extent (i) these different categories of pipelines would compete with each other; (ii) why the unamended Gas Directive distorted that competition between these categories; (iii) why the Gas Directive's continued lighter regulation of upstream pipelines would not cause a similar problem; and (iv) how shifting the point of application to the border of the territorial sea could address this alleged problem.

222. In Section 6 of his Report, Professor Maduro repeats two arguments he has made elsewhere: (i) that the Amending Directive applies to all import pipelines; and (ii) that unbundling rules promote competition. According to Professor Maduro, this implies that the Amending Directive also promotes security of supply. Since these two arguments have been addressed above, the Claimant refers back to the discussion at paragraphs 73 to 89 and 221, which it will not repeat here.

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341 Expert Report of Professor Maduro, para 233.

342 **Exhibit CLA-53**, Second Written Submission by the European Union in WTO Panel Proceedings DS476 (European Union and its Member States – Certain Measures Relating to the Energy Sector), 21 November 2016, para 162.

343 **Exhibit CLA-54**, First Written Submission by the European Union in WTO Panel Proceedings DS476 (European Union and its Member States – Certain Measures relating to the Energy Sector), 11 July 2016, para 450.

223. In Section 7 of his Report, Professor Maduro argues that the Amending Directive has contributed to enhanced transparency and legal certainty by explicitly extending the Gas Directive to third country import pipelines. As explained in Section III and by Professor Cameron in his Second Expert Report,[344] there was no lack of transparency or legal certainty, and this is a completely artificial concern created with the sole objective of creating a pretext to extend the Gas Directive to Nord Stream 2. In reality, it was entirely clear that the Gas Directive applied on the EU side of a border connection point but not on the non-EU side of a border connection point. Furthermore, to the extent that this can be taken into account as a legislative objective at all, it is circular. It boils down to saying that a benefit of the Amending Directive is that it amended the Gas Directive.

Nord Stream 2 cannot be a threat to security of supply

224. The Respondent and Professor Maduro refer on numerous occasions to the concept of security of supply, often suggesting that Nord Stream 2 constitutes a threat to the EU's security of energy supply. In paragraphs 227 and 297 to 301 of its Memorial the Claimant already explained that the EU's general references to security of supply lacked specificity and could not be reconciled with a number of other EU statements on security of supply, including by reference to the detailed analysis provided by the economic consultancy Frontier Economics and the Energy Economics Institute of the University of Cologne. This analysis concludes that Nord Stream 2 in fact improves security of supply in Germany and the EU and does not have a detrimental impact on the security of supply of individual EU Member States, and in particular, the traditional transit countries for Russian gas.[345] The same conclusion was reached by the German authority granting the planning permission for Nord Stream 2[346] and was not called into question by the German court which had to decide on an appeal against this permit.[347]

225. In particular, the Frontier Economics report explains that Member States such as Poland (and the EU more generally) have over the past years developed significant additional pipeline capacity, reducing and even completely removing the need to rely on gas transported in pipelines from Russia.[348] By way of example, Gaz-System, a company owned by the Polish state, is in the process of completing the final offshore section of the so-called "Baltic Pipe", a 950km pipeline that will transport Norwegian gas to the Polish coast and

344 Second Expert Report of Professor Cameron, para 4.5.

345 **Exhibit C-104**, Frontier Economics and EWI report, "Effects of Infrastructure Investments such as Nord Stream 2 Pipeline on the European Gas Market", May 2020

346 **Exhibit CLA-207**, Bergamt Stralsund, Decision on the planning permission for the construction and operation of the Nord Stream 2 pipeline (Excerpts of German original and English translation), Az. 663/NordStream2/04, 31 January 2018, pp 94, 96, 99.

347 **Exhibit CLA-208**, Oberverwaltungsgericht für das Land Mecklenburg-Vorpommern, Decision regarding interim proceedings against the planning permit for the Nord Stream 2 pipeline, 5 KM 213/18 OVG (German original and English translation), 31 May 2018, para 26.

348 **Exhibit C-104**, Frontier Economics and EWI report, "Effects of Infrastructure Investments such as Nord Stream 2 Pipeline on the European Gas Market", May 2020, pp 33-36.

make landfall approximately 100 km east of Lubmin where Nord Stream 2 makes landfall. The Baltic Pipe is subsidised by the EU and its specific objective is to enable Poland to stop using Russian gas completely.[349] It is planned to become operational in October 2022.

226. Of course, Nord Stream 2 cannot be a threat to Poland's security of gas supply if Poland is completely independent from supplies from Russia and is, therefore, unaffected by Nord Stream 2. On the contrary, new pipelines such as the Baltic Pipe and Nord Stream 2 significantly increase the transportation capacity and can only increase security of supply.

227. In the same vein, it is useful briefly to consider the "Joint Statement of the United States and Germany on Support for Ukraine, European Energy Security, and our Climate Goals" which addresses both Nord Stream 2 and the energy security of Ukraine.[350] This Statement expresses a joint will "*to safeguard and increase the capacity for reverse flow of gas to Ukraine, with the aim of shielding Ukraine completely from potential future attempts by Russia to cut gas supplies to the country*". Indeed, Ukraine has not purchased gas from Russia since November 2015.[351]

228. Irrespective of the different views one can adopt on this political question, it is undeniable that increasing the pipeline capacity to supply Ukraine with gas from the west rather than the east removes any possible threat that Nord Stream 2 could pose for Ukrainian energy security. On the contrary, since Gazprom cannot control the final destination of the gas that it sells to EU customers (as explained by Professor Maduro),[352] any Russian gas transported through Nord Stream 2 could be sold on by EU gas suppliers to customers in Ukraine and transported to Ukraine via the integrated EU transmission network (which also includes Ukraine as an Energy Community Contracting Party).[353]

229. While Nord Stream 2 could not negatively affect security of supply, it is at least theoretically possible that it affects the transit fees currently received by pipeline operators in Ukraine and EU Member States such as Poland and Slovakia (in case transport of Russian gas to Western Europe takes place via Nord Stream 2 rather than via onshore pipelines that pass through these countries). However, while this may affect the commercial and financial interests of pipeline companies in these countries, this is not a matter of security of energy

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349 **Exhibit C-265,** European Commission press release "Energy Union: Commission to endorse Baltic Pipe project, a pipeline that unites creating a new gas supply corridor in the European market", 15 April 2019; see also **Exhibit C-266**, Euractiv article, "Poland wins €215m EU grant for gas link to Norway", 15 April 2019 (last accessed on 21 October 2021 at https://www.euractiv.com/section/energy/news/poland-wins-e215m-eu-grant-for-gas-link-to-norway/).

350 **Exhibit C-267**, Joint Statement of the United State and Germany on Support for Ukraine, European Energy Security, and our Climate Goals, 21 July 2021.

351 **Exhibit C-142**, European Commission, “Quarterly Report on European Gas Markets”, Volume 10, Issue 4, Fourth Quarter of 2017, p 13.

352 First Expert Report of Professor Maduro, paras 98-100.

353 **Exhibit C-268**, Prognos report, "Status und Perspektiven der europäischen Gasbilanz" (status and perspectives of the European gas balance) (German original and English translation), January 2017, pp 2, 5, 32.

supply. Furthermore, there is a clear tension between (i) the fact that a State owned Polish company and the EU invest in infrastructure such as the Baltic Pipe to avoid buying Russian gas; and (ii) security of supply arguments put forward to protect the lucrative business of transporting gas to EU customers through Ukraine, Poland, Slovakia (and others). The EU and Poland cannot simultaneously support new pipeline infrastructure to make Poland independent from Russia while arguing that security of supply requires that Russian gas continues to be transported through Poland rather than Nord Stream 2.

Due to the derogations, the Amending Directive cannot achieve its Purported Objectives in any event

230. In light of all the above, it is clear that the objectives allegedly pursued by the Amending Directive are spurious. The Respondent and Professor Maduro have not been able to put forward a coherent explanation that is grounded in reality of the objectives allegedly pursued. The Respondent's arguments become even less credible, however, when taking into account that five of the six offshore import pipelines affected by the Amending Directive (i.e. all offshore import pipelines bar Nord Stream 2) have received a long term derogation pursuant to Article 49a.

231. The upshot could not be clearer: the Amending Directive is intended to harm the Claimant and this is the only objective that it achieves. Put differently, although the EU's defence strategy in this arbitration is to obfuscate this as much as possible, the EU Institutions are not so incompetent that they have adopted generally applicable legislation with conflicting objectives that can never be achieved in practice. Rather, the EU Institutions have adopted a measure targeted at Nord Stream 2 - the Amending Directive - that is entirely effective in achieving its true objective, that of harming the Claimant.

VI. THE IMPACT OF THE AMENDING DIRECTIVE ON NSP2AG AND ITS INVESTMENT IN NORD STREAM 2

232. This Section further explains the significant adverse impact which the Amending Directive is having and will continue to have on NSP2AG and its investment in Nord Stream 2.

233. The EU does not appear to dispute that the Amending Directive will have *some* impact on NSP2AG's investment. Among other things, the EU repeatedly acknowledges the need for the contractual framework underlying Nord Stream 2 to be renegotiated in order for the pipeline to be compliant with the Gas Directive.[354] Indeed, the EU cannot credibly dispute this in the face of its contention that the Amending Directive is designed to achieve particular effects for offshore pipelines like Nord Stream 2.

234. The EU spends considerable time in its Counter-Memorial criticising the Claimant for an alleged failure to substantiate [redacted], but the EU offers no evidence to suggest that there is any way for Nord Stream 2 to comply with the Amending Directive without impact. Rather, the EU exclusively focuses on contesting the *extent* of that impact and seeking to undermine the Claimant's explanation that [redacted] This is an issue which is at most relevant to the remedy sought by the Claimant rather than to the fact of the EU's breaches of the ECT and its consequent liability.

235. For the purposes of considering the EU's liability and its breaches of the ECT, it would therefore appear to be uncontested between the Parties that the Amending Directive will have an impact on NSP2AG and its investment. The question is only how significant this impact will be.

236. This Section explains that:

i. The Amending Directive has already had a significant negative impact on NSP2AG. Following its adoption, it was no longer possible to refinance [redacted] by way of project finance as had been intended. [redacted] (**Section VI.1**).

ii. Since NSP2AG filed its Memorial on 3 July 2020, construction of Nord Stream 2 has been completed and the pipeline has become capable of technical operation. On 4 October 2021, the gas-in procedure for the first line of the Nord Stream 2 pipeline started. The pipeline became capable of gas transportation on 18 October 2021 (**Section VI.2**).

354 Counter-Memorial, paras 31, 32, 163, and 241.

iii. Since then, NSP2AG has been unable to operate the pipeline despite being physically able to do so, because of the impact of the Amending Directive. In particular, since it has not received a derogation, NSP2AG is required to operate the pipeline in compliance with the requirements of the Gas Directive.

iv. This has two main aspects. First, NSP2AG must find a mode of operation consistent with the Amending Directive. These discussions with the BNetzA are ongoing [redacted] (**Section VI.3**).

v. Second, any solution found by NSP2AG and approved by the BNetzA would have to be implemented by NSP2AG which would require, in particular, the consent of a range of third parties, [redacted] Gazprom Export. [redacted] (**Section VI.4**).

vi. [redacted] (**Section VI.5**).

237. In order to provide further evidence to the Tribunal of these impacts and in response to the EU's criticisms, NSP2AG has instructed the technical economic expert consultancy, Swiss Economics, to provide an independent Expert Report assessing and modelling the impacts of the Amending Directive, to which reference is made below and elsewhere in this Reply Memorial.

238. This Section also responds to the EU's other criticisms in its Counter-Memorial in respect of the impact of the Amending Directive on NSP2AG and its investment. In particular:

i. The Claimant's claim is neither premature nor speculative. The Claimant has already suffered significant losses as a result of the adoption of the Amending Directive and will continue to do so (**Section VI.6**).

ii. The EU is wrong to suggest that NSP2AG [redacted] (**Section VI.7**).

iii. The alternative "solutions" about which the EU speculates are fanciful, and in any event entirely out of NSP2AG's control (**Section VI.8**).

239. For the avoidance of doubt, this Section reflects the factual situation as at the date of filing, 25 October 2021. This situation will continue to develop and the Claimant reserves the right to update the EU and the Tribunal in advance of the merits hearing scheduled for June 2022 on those developments and their significance for this arbitration.

VI.1 [redacted]

240. As explained in Section V.5 of the Memorial and in [redacted] First Witness Statement,[355] the Amending Directive has already had a significant negative impact on NSP2AG.

241. In particular, it was a fundamental assumption underlying NSP2AG's financing plan [redacted] would be refinanced by way of project finance obtained from Export Credit Agencies ("**ECAs**") when the pipeline was almost complete. [redacted] associated with Nord Stream 2 would therefore be financed in the long term through external project finance.

242. NSP2AG commenced discussions with the ECAs in March 2018 and the negotiation of the relevant project finance agreements progressed throughout that year. However, these discussions were terminated as a direct consequence of the Amending Directive being adopted, [redacted]

243. The consequence of NSP2AG's inability to obtain project finance for Nord Stream 2 [redacted]

[redacted]

244. [redacted]

355 [redacted]
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[redacted]

245. [redacted]

246. [redacted]

VI.2 The current status of the pipeline

247. On 4 October 2021, Nord Stream 2 became capable of technical operation, after the construction and pre-operational testing were successfully completed. On 18 October 2021, the gas-in procedure for the first line of the Nord Stream 2 pipeline was completed, enabling Nord Stream 2 to start gas transportation. However, due to the Amending Directive, Nord Stream 2 is not yet in operation.

248. NSP2AG has pursued all the avenues available to it to seek to avoid the application of the Amending Directive to Nord Stream 2, for example by applying for a derogation under Article 49a. As explained in Sections III to V above and in [redacted], none of these avenues has been successful to date.

249. Subject to the outcome of this arbitration, Nord Stream 2 will therefore ultimately need to comply with the Amending Directive, as set out in more detail below.

VI.3 [redacted]

The rules on unbundling, third party access and tariff regulation become applicable to Nord Stream 2

250. As a consequence of the Amending Directive, NSP2AG will need to comply with the rules of the Gas Directive including unbundling, third party access and tariff regulation. The impact of these rules is fundamental. As described by Advocate General Bobek, a regulated TSO (as NSP2AG has become in respect of the German Section) becomes "*legally precluded*

360 [redacted]

from acting as a normal market operator that is free to choose its customers and pricing policy".[361] Instead, it has to offer its transportation capacity as prescribed in detail by EU law. In return, it will receive a pre-determined revenue (the "allowed revenue" calculated by the BNetzA in line with EU rules). These rules are technical and complex and are summarised briefly below.

251. As explained in the Claimant's Memorial,[362] the rules on unbundling require a separation of the network business and the supply of gas. The basic unbundling obligation in the Gas Directive – full ownership unbundling – requires complete separation of: (i) the ownership of and control over gas transmission infrastructure; and (ii) gas production or supply. At the moment, NSP2AG does not have the necessary separation since it is considered to be a part of a vertically integrated undertaking, i.e. an operator of transmission infrastructure which is ultimately owned by Gazprom (which supplies gas to the EU via some of its subsidiaries).[363] The Gas Directive further allows Member States to introduce two alternative unbundling regimes, namely: (i) the independent system operator (ISO) model; and (ii) the independent transmission system operator (ITO) model**.** The different unbundling models are explained in more detail in paragraphs 75-84 of the Claimant's Memorial.

252. The rules on third party access and tariff regulation set out requirements for TSOs with regard to the allocation of transport capacity on their network as well as the tariffs that they are allowed to charge for that. As explained in the Claimant's Memorial, the Gas Regulation contains basic rules that have been further developed in considerable detail in the so-called Network Codes, which are directly applicable EU law in all Member States. [364]

253. The Network Code on Capacity Allocation Mechanisms ("**NC CAM**") covers the offering and allocation of transport capacity in gas transmission systems. It defines a number of standard transport capacity products (yearly, quarterly, monthly, daily and within-day) which must be offered to network users through auctions via a joint auctioning platform such as PRISMA. Capacity may only be offered for a maximum of 15 years ahead and TSOs need to set aside at least 20% of capacity at each interconnection point and offer it on a short and medium term basis.[365]

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361 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 96.

362 Memorial, paragraph 72.

363 In this regard, see the judgment of the EU Court of Justice in **Exhibit CLA-213,** *European Commission v. Federal Republic of Germany supported by Kingdom of Sweden,* Case C-718/18, ECLI:EU:C:2021:662, Judgment, 2 September 2021, which interpreted broadly the concept of a vertically integrated undertaking for these purposes.

364 Memorial, paragraph 88.

365 **Exhibit CLA-301**, 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 (NC CAM), 17 March 2017, Article 8(6) provides that "[a]*n amount at least equal to 20 % of the existing technical capacity at each interconnection point shall be set aside and offered in accordance with paragraph 7. If the available capacity is less than the proportion of technical capacity to be set aside, the whole of any available capacity shall be set aside. This capacity shall be offered in accordance with point (b) of paragraph 7, while any remaining capacity set aside shall be offered in accordance with point (a) of*

254. The Network Code on Harmonised Transmission Tariff Structures ("**NC TAR**") sets out rules that cover the way TSOs collect revenues by means of different tariffs associated with the provision of services at entry and exit points.[366] Tariff setting is a complex process which is *inter alia* demonstrated by the length of the implementation document published by ENTSOG which is over 200 pages long.[367]

255. A key aspect is the determination of a "revenue cap" and an "allowed revenue", two concepts that are largely interchangeable for the purposes of the discussion in this case and represent the total revenue that a TSO is entitled to obtain.[368]

256. Another important step in calculating transmission tariffs is the setting of the so-called "reference price methodology" which ultimately serves as a basis for deriving the transmission tariffs. The reference price methodology is set or approved by the national regulatory authority and must fulfil the requirements set out by the NC TAR.

257. Furthermore, the NC TAR foresees additional rules for entry-exit systems within a Member State where more than one TSO is active,[369] as is the case in Germany. While in many Member States an entry-exit zone (or "market area") is often operated by a single TSO, this is not the case in Germany where a number of different TSOs own different parts of the network constituting an entry-exit zone. This increases complexity and requires additional rules. These include the establishment of a so-called inter-TSO compensation mechanism, organising financial transfers between TSOs.[370]

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paragraph 7". **Exhibit CLA-301**, *ibid*., Article 8(7) NC CAM provides: *"Any capacity set aside pursuant to paragraph 6 shall be offered, subject to the following provisions: (a) an amount at least equal to 10 % of the existing technical capacity at each interconnection point shall be offered no earlier than in the annual yearly capacity auction as provided for in Article 11 held in accordance with the auction calendar during the fifth gas year preceding the start of the relevant gas year; and (b) a further amount at least equal to 10 % of the existing technical capacity at each interconnection point shall first be offered no earlier than the annual quarterly capacity auction as provided for in Article 12, held in accordance with the auction calendar during the gas year preceding the start of the relevant gas year*".

366 The general principles have been described in the Memorial, paras 85-89.

367 **Exhibit C-269**, ENTSOG, Implementation Document for the Network Code on Harmonised Transmission Tariff Structures for Gas, Second Edition (revised), July 2018.

368 The term "allowed revenue" is defined in **Exhibit CLA-302**, Commission Regulation (EU) 2017/460 of 16 March 2017 establishing a network code on harmonised transmission tariff structures for gas (NC TAR), 17 March 2017, Article 3(11), as meaning "*the sum of transmission services revenue and non-transmission services revenue for the provision of services by the transmission system operator for a specific time period within a given regulatory period which such transmission system operator is entitled to obtain under a non-price cap regime and which is set in accordance with Article 41(6)(a) of Directive 2009/73/EC*".

369 **Exhibit CLA-302**, *ibid*., Article 10.

370 **Exhibit CLA-302**, *ibid*., Article 10(3).

258. The link between the concepts discussed above is illustrated in the following graphic published by ENTSOG:

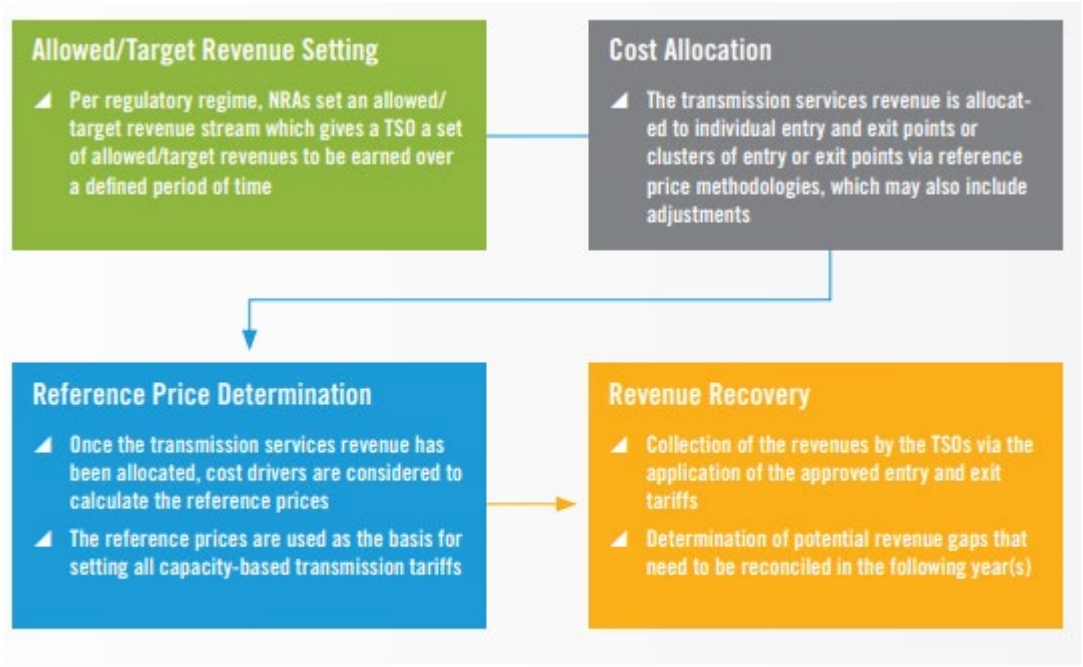

Figure 12: Link between revenue reconciliation, cost allocation, reference price determination and revenue recovery

Source: ENTSOG

259. In Germany, the BNetzA determines the allowed revenue for each TSO that operates within the German market for each calendar year of a five year regulatory period.[371] The allowed revenue is the result of an assessment of the TSO's costs and an efficiency comparison with the other TSOs operating in Germany.

260. In terms of reference price methodology, Germany applies the so-called uniform postage stamp methodology.[372] This implies that the same "reserve price" will apply to all entry and exit points within a system for the same "transport capacity product". This reserve price is the minimum price that has to be paid by the user in the auction.

261. Pursuant to the NC TAR, Germany has also put in place a compensation mechanism between TSOs.[373] The purpose of this mechanism is explained by the BNetzA as follows: *"the whole purpose of the compensation mechanism is to reconcile the transmission services*

371 The current regulatory period lasts until the end of 2022.

372 **Exhibit CLA-303**, Bundesnetzagentur Decision of 11 September 2020 concerning the periodic decision making regarding the reference price methodology and the other points listed in Article 26(1) of Regulation (EU) 2017/460 applicable to all transmission system operators (REGENT 2021), BK9-19/610, 11 September 2020.

373 **Exhibit CLA-304**, Bundesnetzagentur Decision of 11 September 2020 concerning the introduction of an effective inter-transmission system operator compensation mechanism within the single German market area (AMELIE 2021), BK9-19/607, 11 September 2020.

revenue obtained in the market area in such a way that every transmission system operator, in selling the volumes of gas on which tarification is based, really does obtain its allowed transmission services revenue by means of inter-transmission system operator compensation payments".[374] Pursuant to this compensation mechanism, TSOs that will collect more revenues than their allowed revenue need to make compensation payments to TSOs in the German market area with a negative balance, i.e. that will collect less than their allowed revenue.

[redacted]

262. As [redacted] explains in his Second Witness Statement,[375] NSP2AG has been considering every possible realistic route to find a way for Nord Stream 2 to comply with the Amending Directive. [redacted]

263. [redacted]

264. [redacted]

i. [redacted]

374 **Exhibit CLA-304**, *ibid*., para 13.
375 [redacted]
376

ii. [redacted]

265. As to the ITO Option, NSP2AG has applied to the BNetzA for ITO certification, formally lodging its application on 11 June 2021. [redacted]

266. [redacted]

267. [redacted]

268. [redacted]

269. [redacted]

377 [redacted]
378
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270. [redacted]

271. [redacted]

VI.4 [redacted]

[redacted]

272. [redacted]

273. [redacted]

274. As each of the three core elements of the Gas Directive are fundamentally incompatible with the contractual [redacted] on which NSP2AG made its investment in Nord

380 [redacted]
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Stream 2, this implementation will require amendments to the GTA [redacted]

275. [redacted]

276. [redacted]

277. [redacted]

[redacted]

382 [redacted]
383
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278. [redacted]

279. [redacted]

280. The situation is further complicated by the wider political climate, including both the existence of the US sanctions and wider hostility towards the project within the EU. [redacted]

281. [redacted]

389 [redacted]
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[redacted]

282. It bears emphasis, however, as discussed further in paragraphs 284 to 286 below that the US sanctions are not the cause of the challenges to re-negotiation faced by NSP2AG. That cause, quite straightforwardly, is the Amending Directive, and the changes to the contractual framework that it requires. Without the Amending Directive, the pipeline would already operate.

283. Mr Roberts, having considered these matters from his independent, expert, perspective, concludes as follows:[395]

[redacted]

The EU is fully liable for the consequences of its breaches of the ECT

284. The EU complains in its Counter-Memorial that NSP2AG "*seeks to rely on the effects of extraneous factors that are not attributable to the European Union*", attempting to evade responsibility for its own actions by asserting that "*the European Union cannot be held responsible for the "impact" of those U.S. sanctions*".[396]

394 [redacted]

395 [redacted]

396 Counter-Memorial, section 2.3.2.2-2.3.2.3.

285. The EU is incorrect. As set out above, the EU is responsible for the impact of the Amending Directive on NSP2AG. It must take its victim as it found it. The Claimant would not have been in a position where it had to consider or attempt the renegotiation of the entire contractual framework underpinning its investment if the EU had not adopted the Amending Directive. [redacted] Whatever these matters may be, and the challenges that they present, has no bearing on the EU's liability for illegitimately putting NSP2AG in that position in the first place. It was the EU's actions which gave rise to the need for any renegotiation at all, and without those actions no such renegotiation would be happening. It is the direct responsibility of the EU that NSP2AG finds itself in this position.

286. The irrelevance of US sanctions in terms of the EU's argument that it is not responsible for the breaches alleged by the Claimant is further addressed in Section VII.7 below.

VI.5 [redacted]

287. [redacted]

288. [redacted]

289. [redacted]

397 [redacted]

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292.

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[redacted]

293. [redacted]

294. [redacted]

[redacted]

295. [redacted]

[redacted]

296. [redacted]

400 [redacted]
401

[redacted]

297. [redacted]

298. [redacted]

299. [redacted]

[redacted]

300. [redacted]

301. [redacted]

[redacted]

302. [redacted]

402 [redacted]
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[redacted]

303. [redacted]

304. [redacted]

305. [redacted]

306. [redacted]

307. [redacted]

405 [redacted]
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[redacted]

308. [redacted]

309. [redacted]

310. [redacted]

[redacted]

410 [redacted]

VI.6 [redacted]

311. [redacted]

312. [redacted]

313. [redacted]

314. [redacted]

315. [redacted]

316. [redacted]

411 [redacted]
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VI.7 The EU is wrong to suggest that NSP2AG should have negotiated the contractual framework for Nord Stream 2 in anticipation of the EU legislating against it

317. The EU suggests that if NSP2AG had been "*diligent*" then it would have negotiated the contractual framework for Nord Stream 2, including the GTA [redacted], on the basis that the Amending Directive may be introduced, adopted and ultimately applied to the pipeline.[414] This is rejected.

318. For the reasons explained in Section III above, Nord Stream 2 was not subject to the Gas Directive prior to the Amending Directive being adopted. [redacted] explains in his Second Witness Statement that this understanding, shared by [redacted], Gazprom and Gazprom Export, was based in particular on the experience of Nord Stream 1 (which was not subject to the Gas Directive) and confirmed by legal opinions.[415]

319. NSP2AG, [redacted], Gazprom, and Gazprom Export, therefore all agreed in the years leading up to the GTA being concluded in 2017 that it was appropriate to base their contractual agreements on the regulatory position as it stood at the time they were executed. In particular, there was no indication that the EU would change the legal framework provided by the Gas Directive, and even less of a reason to consider that the EU would proceed to seek to change the regulatory position by specific reference to Nord Stream 2 so as to target and discriminate against that project.

320. Indeed, given the risks involved in a project of this nature and the very high sums invested by the different parties, it is not credible to suggest that any of those parties would have undertaken contractual commitments of this scale had they believed otherwise. [redacted]

321. [redacted] also explains the diligence with which NSP2AG monitored developments within the EU legislative machinery and the different positions of relevant Member States once the Proposal was introduced. As set out in the Memorial and [redacted] evidence, NSP2AG had a sound and reasonable basis to believe that the Amending Directive would not be adopted at least up to February 2019 when France and Germany reached a compromise in the negotiating process. This is also supported by the contemporaneous risk assessments carried out by NSP2AG, and presented to [redacted] Gazprom at regular

414 Counter-Memorial, section 2.3.6.
415 [redacted]
416 [redacted]

intervals throughout the period from NSP2AG's incorporation, [redacted]

322. There is therefore no legitimate basis to criticise NSP2AG for failing to mitigate against the introduction of a regulatory change which had not occurred, and was not reasonably anticipated, when it concluded the agreements underlying the investment.

VI.8 The 'alternative solutions' floated by the EU are unrealistic

323. Finally, the EU posits a range of what it characterises as "solutions" to NSP2AG's concerns. Notably, the EU suggests that:

i. The ownership unbundling requirement of the Gas Directive "*could be satisfied by Russia conferring control over NSP2AG and Gazprom to two separate public entities, such as two separate ministries*", making use of the possibilities offered by Article 9(6) of the Gas Directive.[419]

ii. Any impact could be addressed through an inter-governmental agreement (IGA) being concluded between the EU and Russia.[420]

iii. Gazprom's export monopoly is "*within the discretion of Russia*", and so any constraints that this imposes on the effectiveness of EU third party access rules could be resolved by Russia changing the terms of this export monopoly.[421]

324. All of these suggestions suffer from a common flaw: they all rely wholly on the actions and preferences of third parties which are entirely out of NSP2AG's control. The idea that NSP2AG, a Swiss company, could control the actions of sovereign states – including compelling the EU itself to negotiate and enter into an IGA with Russia – is absurd. For the purposes of a claim by NSP2AG under the ECT, they are also legally irrelevant.

325. Furthermore, some of these purported "solutions" could not in any event resolve the problems faced by the Claimant:

i. If Russia were to abolish its export monopoly this may help the EU to make third party access on Nord Stream 2 meaningful (whilst it is currently completely pointless). However, this would not avoid the requirement that the Claimant has to change its GTA.

ii. Even if NSP2AG, Gazprom and Russia were somehow to organise a restructuring of the ownership of Nord Stream 2 as suggested by the EU, it is not at all clear that this would be accepted as compliant with Article 9(6) of the Gas Directive. According

417 [redacted]
418
419 Counter-Memorial, paras 206-208; 221.
420 Counter-Memorial, paras 209-214.
421 Counter-Memorial, paragraphs 239-241.

to the guidance published by the European Commission, this requires that the public bodies must be *"truly separate"* and *"the Member State in question will need to be able to demonstrate that the requirements of ownership unbundling of Article 9 Electricity and Gas Directives are enshrined in national law and are duly complied with*".[422] In addition, the two separate public bodies must not be under the common influence of another public entity.[423] Even if one were to assume that this could be extended to non-EU countries, the Claimant notes that in its Counter-Memorial, the Respondent expresses the view that "*Gazprom is but a trade and political instrument of the Russian Government*" and that *"NSP2AG … is controlled by Russia and may be presumed to act in accordance with the instructions of the Russian Government"*.[424] It is not credible for the Respondent to simultaneously express this view and suggest that it is ready to consider Gazprom and Nord Stream 2 AG as "*truly separate*" for the purposes of Article 9(6) if they are owned by two separate Russian ministries. Moreover, any attempt to do so could be challenged in litigation by a Member State such as Poland, which would refer to the statements that the EU has made in its Counter-Memorial.

326. Moreover, most of these purported "solutions" would address, at most, only one of the requirements of the Gas Directive in isolation and would have no impact on the remainder and the impacts they have on NSP2AG. For example, even if Russia were to "*confer… control over NSP2AG and Gazprom to two separate public entities, such as two separate ministries*" as suggested by the EU,[425] this would not address the requirements of TPA and the application of regulated tariffs to the German Section, both of which are inconsistent with the GTA.

327. In any event, any such "solution" would not diminish the EU's liability for breaching the ECT in the first place by adopting the Amending Directive to target Nord Stream 2. The EU's conduct remains illegitimate and discriminatory, and as further explained in Section VIII below, represents a breach of the ECT.

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422 See **Exhibit C-35**, European Commission Staff Working Paper, "The Unbundling Regime: Interpretative Note on Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010, p 10.

423 **Exhibit C-35**, European Commission Staff Working Paper, "The Unbundling Regime: Interpretative Note on Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and Directive 2009/73/EC concerning Common Rules for the Internal Market in Natural Gas", 22 January 2010, p 10.

424 Counter-Memorial, paras 4 and 687: The EU further refers to Gazprom as being *"effectively the petroleum arm of the Russian government*", Counter-Memorial, para 141.

425 Counter-Memorial, para 207.

VII. THE CONDUCT THAT VIOLATES THE ECT IS ATTRIBUTABLE TO THE EU, NOT TO GERMANY (OR THE US), AND THE EU BEARS INTERNATIONAL RESPONSIBILITY UNDER THE ECT

VII.1 Introduction and summary

328. The EU claims that NSP2AG's claims relate to EU Directives (the Amending Directive and the Gas Directive), and that as a matter of EU law Directives cannot impose legal obligations on the Claimant.

329. From this, the EU argues that "*the alleged breaches of the ECT, and the alleged ensuing damages, would not result from those EU measures*", and that such breaches "*could only result from measures which the EU Member States may or may not take within the scope of the margin of discretion accorded to them when they transpose and implement the EU directives challenged by the Claimant*". It concludes that those measures taken at Member State level "*would not be attributable to the* [EU] *under international law*", and that the EU is not "*otherwise responsible under international law for any alleged breaches of the ECT resulting from those measures, because the alleged breaches would not be required by EU Law*".[426]

330. In short, the EU argues that it cannot bear international responsibility for alleged breaches in respect of a Directive. This section will demonstrate that this is fundamentally wrong.

331. Responsibility for the breaches of the ECT claimed by NSP2AG rests with the EU as a matter of international law. Simply put, it is the EU's conduct that constitutes breaches by the EU of the EU's treaty obligations under the ECT.[427] This is correct irrespective of whether the Amending Directive has "direct effect" or imposes legal obligations directly on the Claimant. Germany is bound by EU law to implement and apply it. As regards the provisions of the Amending Directive upon which NSP2AG relies, Germany had no relevant discretion.

332. In particular, and as described further below:

i. The conduct of the EU is attributable to the EU as a matter of international law, including under the ECT, the ILC's Draft Articles on the Responsibility of International Organizations ("**ARIO**") and the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("**ARS**") (**Section VII.2**).

ii. The EU's responsibility arises as a result of the overall conduct of the EU in connection with the Amending Directive, not simply the application of the Amending Directive to the Nord Stream 2 pipeline (**Section VII.3**).

426 EU's Jurisdiction Memorial, para 123 and Section 2.2.5.
427 Memorial, Section VI and para 381.

iii. The responsibility of the EU for the impact of the Amending Directive on the Nord Stream 2 pipeline and NSP2AG is clear from the ECT (**Section VII.4**).

iv. In any case, it is no excuse for the EU to claim that Germany "*transposed and implemented*" the Amending Directive - Germany was obliged to transpose and implement it by the EU in a way that gave rise to the violations of the ECT (**Section VII.5**).

333. It is also explained below how NSP2AG's position in the German Proceedings and this ECT arbitration is not inconsistent as alleged or at all (**Section VII.6**) and NSP2AG's claim is solely based on impacts attributable to the EU, not the US sanctions or Gazprom's export monopoly (**Section VII.7**).

334. Finally, the EU further characterises this argument as one undermining the Tribunal's jurisdiction *ratione personae*.[428] This argument is also misplaced, for all the reasons set out in Section X below. In short, it is the EU's conduct in connection with the Amending Directive that breaches the EU's obligations under the ECT, and the jurisdictional requirements for NSP2AG to bring such a dispute before this Tribunal are plainly satisfied. Any arguments that the EU has not committed the alleged breaches, or has not caused the alleged damage, go to the merits of the dispute and not to the question of the Tribunal's jurisdiction.

VII.2 <u>The breaches of the ECT are attributable to the EU as a matter of international law</u>

335. The starting point in considering the EU's international responsibility is international law (and not EU law - specifically the nature of a Directive - as argued by the EU):

> "*it is clear that international organisations are responsible under international law for breaches of international norms binding upon them*".[429]

336. The EU is a "Regional Economic Integration Organization" as defined in the ECT (a "**REIO**"). Under Article 1(3) of the ECT, a REIO is "*an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters*".

337. As a party to the ECT, the EU has therefore assumed the same obligations as the State parties to the ECT as regards matters within the scope of its competence.[430] The ECT sets

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428 EU's Jurisdiction Memorial, para 124 and Section 2.2.5. For the avoidance of doubt, NSP2AG reserves its rights to respond to all of the EU's purported jurisdiction *ratione personae* arguments, even if wrongly characterised by the EU as such, in its Rejoinder on Jurisdiction.

429 **Exhibit CLA-209**, P. Sands QC and P. Klein, *Bowett's Law of International Institutions*, 6th ed. (Sweet & Maxwell), 2009, p 523-524 (extract), para 15-100.

430 The Proposal for the Amending Directive itself was issued by the Commission pursuant to Article 194 TFEU and was a clear exercise of the EU's competence in the field of energy. The manner in which the Amending Directive was adopted, the results to be achieved and its ultimate effect are clearly all matters attributable to the EU and for which the EU is responsible.

the standard against which the conduct attributable to the EU is to be adjudicated. The EU is responsible for its conduct which breaches its obligations under the ECT.

338. More generally, the EU's responsibility for its wrongful acts as a matter of international law is enshrined in the ARIO.[431] Article 4 (Elements of an internationally wrongful act of an international organization) of the ARIO provides as follows:

> "*There is an internationally wrongful act of an international organization when conduct consisting of an action or omission:*
>
> *(a) is attributable to that organization under international law; and*
>
> *(b) constitutes a breach of an international obligation of that organization*".[432]

339. Article 4 of the ARIO accordingly makes clear that the question of attribution depends on international law.

340. Article 6 (Conduct of organs or agents of an international organization) of the ARIO addresses the conduct attributable to an international organisation. Article 6 provides that:

> "*The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization*".[433]

341. Accordingly, the conduct of the EU's organs and agents is considered to be an act of the EU under international law. As described further below, the conduct that forms the basis of NSP2AG's claim is the conduct of the EU's organs and agents and is attributable to the EU. That conduct constitutes a breach of the ECT, for which the EU is responsible.

342. Remarkably, the EU seeks to rely upon Article 4 of the ARIO to support its position that Germany, not the EU, should bear responsibility for its actions. It argues that "[t]*he breaches of the ECT alleged by the Claimant cannot possibly result from the EU directives cited by the Claimant because* […] *those directives impose no legal obligation on the Claimant*" as a matter of EU law. "*Instead, the alleged breaches could only stem from measures (including both actions and omissions) which Germany may or may not adopt in transposing and implementing the cited EU directives. Those measures of Germany, however, would not be*

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431 EU's Jurisdiction Memorial, para 196.

432 **Exhibit RLA-61**, International Law Commission, Draft Articles on Responsibility of International Organizations. Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para 88), appears in Yearbook of the International Law Commission, 2011, Vol. II, Part Two.

433 **Exhibit RLA-61**, International Law Commission, Draft Articles on Responsibility of International Organizations, *ibid.*

"attributable" to the European Union within the meaning of Article 4 ARIO. They would be "attributable" solely to Germany".[434]

343. In essence, the EU assumes, based on claimed principles of EU law, that the responsibility under international law for all of the matters complained of by NSP2AG rests with Germany.[435] The EU then relies on this assumption to argue that, as a matter of international law, Germany's conduct cannot be attributed to the EU.[436]

344. This argument is circular and misconceived. It also bypasses any proper international law analysis as to the question of attribution in relation to the conduct which is alleged to breach the ECT.

345. A correct analysis shows that in transposing and implementing the Amending Directive, the German legislature, BNetzA and German courts can be regarded as organs of the EU for the purposes of Article 6 of the ARIO. The Commission has argued as much "*in communications with the ILC, as well as in cases before Panels and the Appellate Body of the World Trade Organizations (WTO)*".[437]

346. The tribunal in *Electrabel v. Hungary* reached the same conclusion based on application, by analogy, of the ARS.[438] Article 4 (Conduct of organs of a State) of the ARS provides:

> "*1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
>
> *2. An organ includes any person or entity which has that status in accordance with the internal law of the State*".

347. Article 6 (Conduct of organs placed at the disposal of a State by another State) of the ARS provides:

> "*The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in*

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434 EU's Jurisdiction Memorial, para 197.

435 EU's Jurisdiction Memorial, para 197: "*The breaches of the ECT alleged by the Claimant cannot possibly result from the EU directives cited by the Claimant because, as explained, those directives impose no legal obligation on the Claimant. Instead, the alleged breaches could only stem from measures (including both actions and omissions) which Germany may or may not adopt in transposing and implementing the cited EU directives*".

436 EU's Jurisdiction Memorial, para 197: "*Those measures of Germany, however, would not be "attributable" to the European Union within the meaning of Article 4 ARIO. They would be "attributable" solely to Germany. This is confirmed by the basic principle of attribution codified in Article 4 of* [the ARS]".

437 **Exhibit CLA-305,** Professor Dr P.J. Kuijper, "Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?", 7 Intl. Organizations L. Rev. 9, 22 (2010), p 5.

438 **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary* (ISCID Case No. ARB/07/19, Award of 25 November 2015).

the exercise of elements of the governmental authority of the State at whose disposal it is placed".

348. In particular, the tribunal in *Electrabel* stated that:

> "*Whilst the European Union is not a State under international law, in the Tribunal's view, it may yet by analogy be so regarded as a Contracting Party to the ECT, for the purpose of applying Article 6 of the* [ARS]"*.*[439]

349. The *Electrabel* tribunal thereafter cited (with apparent approval), the work of Professor F. Hoffmeister, "*Litigating against the European Union and its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?*", noting that:

> "*Professor Hoffmeister there concluded that the conduct of a State that executes the law or acts under the normative control of an REIO (i.e. a Regional Economic Integration Organization as defined in Article 1 ECT) may be considered an act of that organisation under international law, taking account of the nature of the organisation's external competence and its international obligations in the field where the conduct occurred; and, specifically in regard to the ECT, Professor Hoffmeister expressed the view that "liability would normally fall upon the EU if Member States' organs were simply implementing EU law."*"[440]

350. The *Electrabel* tribunal concluded that if and to the extent that the act complained of was required by EU law, it could not give rise to liability for Hungary under the ECT.[441]

351. Accordingly, the converse is true: if an act by a Member State breaches the ECT, but the act is one which the Member State is legally bound to take, that act will be one for which the EU will bear international responsibility. As discussed in Section IV.1, Germany is legally bound to take the relevant actions connected with the Amending Directive.

VII.3 <u>The EU's responsibility arises as a result of its overall conduct, not simply the impact of the Amending Directive.</u>

352. As set out above, the Claimant relies on the EU's conduct through the process of adoption of the Amending Directive as constituting violations of the ECT, not simply the impact of the Amending Directive itself. It was the EU that instituted the Proposal for the Amending Directive causing a Dramatic and Radical Regulatory Change, caused a Deliberate

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439 **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary* (ISCID Case No. ARB/07/19, Award of 25 November 2015), para 6.74.

440 **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary* (ISCID Case No. ARB/07/19, Award of 25 November 2015), para 6.75. The Claimant notes that Professor Dr Frank Hoffmeister was a member of the European Commission's Legal Services, who represented the European Commission as a non-disputing party in the first phase of that arbitration.

441 **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary* (ISCID Case No. ARB/07/19, Award of 25 November 2015), para 6.76.

Exclusion of Nord Stream 2 from the Derogation Regime, passed the Amending Directive further to an Improper Legislative Process, and failed to accord to NSP2AG transparency.[442]

353. These matters do not concern Germany's (alleged) margin of discretion in respect of "*implementation or transposition*" of the Amending Directive. The EU cannot pass on responsibility for these aspects to Germany or any other third party.

354. As a matter of fact, the dispute precedes Germany's involvement and the implementation of the Amending Directive. This point is acknowledged by the EU in its Jurisdiction Memorial, stating that NSP2AG "*served its Trigger Letter under Article 26(1) ECT to the European Union already on 12 April 2019, i.e. even before the formal adoption of the Amending Directive on 17 April 2019 and its entry into force on 23 May 2019. The Letter of Notice was served to the European Union on 28 September 2019, nearly five months before the date (24 February 2020) by which the EU Member States were required to transpose the Amending Directive*".[443] The significance of the timing is that it reflects the focus of the Claimant's claims on conduct of the organs of the EU in performance of their functions, rather than on subsequent German implementation. If the Tribunal finds, as a matter of international law, that such conduct constitutes a breach of the EU's obligations under the ECT, then the EU bears international responsibility for it.

355. The EU's unlawful conduct in connection with the Amending Directive is fully set out in the Claimant's Memorial,[444] and will not be repeated here. But it is incontrovertible that the unlawful conduct is that of the EU, and not of Germany. The following examples serve to illustrate the very different roles of the EU and Germany:

i. The Commission initiated the Proposal for the Amending Directive.[445] In contrast, Germany questioned whether the EU even had the legislative power to do so.[446]

ii. The Commission drafted the text of the Amending Directive, including Article 49a.[447] Germany advocated for clarification to address situations in which a final investment decision had been taken and initial investments made.[448]

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442 Memorial, Section VI and para 381.
443 EU's Jurisdiction Memorial, para 127.
444 Memorial, Sections III and VIII.
445 Memorial, Section VI.7.
446 **Exhibit C-263**, Council of the European Union Working Paper, "Germany comments on the Gas Directive", WK 2772/2018 INIT, 6 March 2018.
447 Memorial, para 240; **Exhibit C-236**, Council of the European Union Working Paper, "Comments of the Netherlands on third revised text to amend the Gas Directive", WK 877/2019 INIT, 21 January 2019, p 3 ("*This new par. should in the first sentence speak about "In respect of gas transmission line**s** to and from third countries completed **or under construction** before*…"" (emphasis in original)).
448 Memorial, para 240(i). See also **Exhibit C-244**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 20-24 November 2017, p 11; **Exhibit C-245**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 27 November-1 December 2017, p 9; **Exhibit C-246**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 11-15 December 2017, p 8; **Exhibit C-239**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 18-22 June 2018, p 3.

iii. The EU decided, in order to accelerate the legislative progress,[449] that no impact assessment was required and failed to engage in the normal consultation process.[450] Germany commented: "*Like other Member States and members of the European Parliament and stakeholders, we continue to believe that a regulatory impact assessment is absolutely necessary. We continue to regard this as a serious violation on the part of the Commission of the interinstitutional agreement on better law-making. Contrary to what the Commission has stated regarding the proposed amendment, it is to be expected that that change will result in a substantial administrative burden, both on business and in the course of implementation of the provisions by national regulatory authorities*" (emphasis added).[451]

356. In respect of these wider aspects, therefore, the EU has made no suggestion whatsoever that it is not the correct Respondent.

VII.4 The responsibility of the EU for the impact of the Amending Directive on the Nord Stream 2 pipeline and NSP2AG is clear from the ECT

357. The Claimant of course also claims that the EU has violated the ECT through the adoption and impact of the Amending Directive. In response, the EU falls back on its flawed EU-law based argument regarding the legal effect of a Directive: "*the Amending Directive cannot, as such, breach the ECT. Rather, the alleged breaches of the ECT could only result from the measures which the Member States may or may not take in order to transpose and implement the Gas Directive, as modified by the Amending Directive… Member States have a broad margin of discretion when transposing and implementing the relevant provisions of the challenged EU directives. This excludes the international responsibility of the European Union for any alleged breaches of the ECT that result from measures of the Member States within that broad margin of discretion*".[452]

358. As explained further below, however, this argument is fundamentally misconceived.

359. It is well-accepted that the actions of the EU in connection with a Directive or Decision addressed towards a Member State can give rise to the liability of the EU for breach of its international obligations.[453]

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449 Memorial, para 250.

450 Memorial, paras 250-251.

451 **Exhibit C-263**, Council of the European Union Working Paper, "Germany comments on the Gas Directive", WK 2772/2018 INIT, 6 March 2018, p 3; **Exhibit C-260**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 13-17 November 2017, p 5; **Exhibit C-244**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 20-24 November 2017, p 11; **Exhibit C-262**, DG Energy Hebdo Note, Outcomes – Inter-institutional relations, 24-28 September 2018, p10. See also Memorial, para 254.

452 EU's Jurisdiction Memorial, para 153.

453 **Exhibit CLA-210**, Dr R. Happ, "The Legal Status of the Investor vis-à-vis the European Communities: Some Salient Thoughts", in International Arbitration Law Review, Vol 10 Issue 3, June 2007, pp.74-81 (extract), p 77: by reference to Article 249 EC (now Article 288 TFEU), "*The European Communities can thus affect an investor directly (through regulation or decision addressed to the investor) or indirectly (through directive or decision addressed to the Member State which then acted accordingly). Even where*

360. The ECT recognises the international responsibility of the EU in respect of the actions of its Member States:

i. Article 1(3) of the ECT provides that "*"Regional Economic Integration Organisation" means an organisation constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters*".[454]

ii. Article 1(3) therefore recognises that Member States cede competence to the EU in respect of certain matters which are governed by the ECT. Article 1(3) also recognises that the REIO (i.e. the EU) has the power to take decisions in respect of those matters which fall within the scope of the ECT and that the Member States have to implement those decisions. Article 1(3) thus *"acknowledges the principle of conferral (Article 5 TFEU) and the vertical power structure of the EU enshrined in Article 4(3) TEU and Articles 288 and 291(1) TFEU and says that Member States have an obligation under EU law to implement EU law. The ECT also acknowledges that the exercise of the regulatory powers of the organisation and its binding decisions on its Member States can affect the obligations under the ECT and, therefore, can cause a breach of the ECT…*".[455]

iii. Article 1(3) therefore implicitly addresses the EU's international responsibility in cases where a Member State is bound to implement EU law. Where a Member State breaches the ECT by doing something required by EU law, international responsibility lies with the EU. This was expressly recognised by the tribunal in *Electrabel v. Hungary* in the extract cited above.[456]

iv. Accordingly, international responsibility rests with a Member State when (i) the matter lies within Member State competence, or (ii) the Member State concerned has a clear margin of discretion which permits lawful implementation of EU law, but in fact implements it unlawfully, or (iii) the Member State implements EU law incorrectly.

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the European Communities does not act directly, the European Communities might nevertheless be the correct respondent. It is noteworthy that in WTO disputes, where authorities of the Member States acted in a field within the exclusive competence of the Community, the European Communities adopted the position that it (the EC) alone bears responsibility for those actions" (emphasis added).

454 **Exhibit CLA-1**, ECT, Article 1(3).

455 **Exhibit CLA-212**, *P.T.* Stegmann, Chapter 3.2 - "International Responsibility for Breaches of EU IIPAs under Leges Speciales", in P.T. Stegmann, *Responsibility of the EU and the Member States under EU International Investment Protection Agreements* (Springer), 2019 (extract), p 123.

456 See paras 346-350 above; **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary* (ISCID Case No. ARB/07/19, Award of 25 November 2015), para 6.72.

361. Contrary to the EU's assertion in its Jurisdiction Memorial,[457] therefore, as described in paragraph 360, the ECT provides the answer to the question of international responsibility in relation to the EU and its Member States.

362. The potential for the EU to be directly responsible to a claimant under the ECT is also clearly recognised by the EU itself. For example:

i. In its statement submitted to the ECT Secretariat pursuant to Article 26(3)(b)(ii) of the ECT, first in 1997 and updated in 2019 (the "**Article 26 Statement**"), the EU has recognised that it may have responsibility under the ECT (instead of any individual Member State) and declared the process by which this will be decided within the EU. It is regrettable that the EU has not complied with its commitment in that Statement in these proceedings.[458]

ii. Pursuant to Article 47 of the Treaty on European Union ("**TEU**") the EU has legal personality. Pursuant to Article 340 TFEU the EU is liable to make good damage caused by its institutions and the Amending Directive is undeniably an act of the EU's institutions. Article 216(2) TFEU provides that international agreements concluded by the EU (such as the ECT) "*are binding upon the institutions of the Union*". Even as a matter of general EU law, therefore, there is no doubt that the EU is the responsible party in respect of breaches of the ECT occasioned in connection with it as alleged by the Claimant.

iii. Furthermore, the EU's own internal Regulation 912/2014 on Allocation of Financial Responsibility makes provision for the EU to be responsible for its own conduct, as discussed further in Section X, paragraphs 802 and 803 below.[459]

iv. In Article 8.21 of the Comprehensive and Economic Trade Agreement between the EU and Canada, there is a default provision that applies if no determination is made by the EU as to the proper respondent to a claim under the investment chapter.[460] This provides that (a) if the measures identified in the notice are exclusively measures of a Member State of the EU, the Member State shall be the respondent;

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457 EU's Jurisdiction Memorial, footnote 228.

458 See further para 802 below.

459 **Exhibit CLA-139**, Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28 August 2014, Recital 7: "*where the Member State acts in a manner required by Union law, for example in transposing a directive adopted by the Union, the Union itself should bear financial responsibility in so far as the treatment concerned is required by Union law*".

460 **Exhibit RLA-134**, Comprehensive and Economic Trade Agreement between the EU and Canada, Article 8.21.

and (b) if the measures identified in the notice include measures of the EU, the EU shall be the respondent.[461]

v. At the hearing on the Respondent's Request for a Preliminary Phase on Jurisdiction on 8 December, 2020 (the "**Bifurcation Hearing**"), the EU clearly accepted that, in principle, the EU can be internationally responsible for the measures taken by a Member State:

"*the EU's position is that the EU is not responsible for the measures attributable to Member States unless such Member State measures are required by EU law*" (emphasis added).[462]

363. This latter point bears particular emphasis and is considered further in the following Section.

VII.5 It is in any event no excuse for the EU to claim that Germany implemented the Amending Directive - Germany was obliged to implement it by the EU in a way that gave rise to the violations of the ECT

364. As noted above, the EU appears to proceed from the position that a Directive cannot give rise to responsibility of the EU, because Directives typically provide a margin of discretion to the Member States in terms of implementation and transposition. However, the EU conveniently ignores the fact that Germany has no such discretion in those respects relevant to this arbitration, as was confirmed by the EU's Advocate General:

"*Therefore, whereas those provisions do give some leeway to national authorities to grant an exemption or a derogation to certain operators in the future, that is not the case in respect of the appellant. In that regard, the (in)applicability of those provisions is entirely pre-determined by the EU rules, since the national authorities **lack any room for manoeuvre** and must thus act as a longa manus of the Union*" (emphasis in original).[463]

"Completed before 23 May 2019" has an objective meaning that Germany must apply

365. The part of the Amending Directive that is at the core of this dispute is the meaning of the phrase "*completed before 23 May 2019*" in Article 49a. Germany transposed the Amending Directive essentially word for word into German law through an amendment to the German

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461 The EU acknowledges this in its Jurisdiction Memorial, para 195, footnote 228: "*The parties to an international agreement to which an international organisation is party may agree on specific rules regarding the allocation of international responsibility between the international organisation and its members vis-à-vis other parties. The European Union usually does so in its bilateral agreements with third countries providing for investment protection*".

462 **Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 12, line 4 to p 12, line 8.

463 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 75.

Energy Industry Act (*Energiewirtschaftsgesetz*).[464] It cannot be argued that the negative effect of this phrase is due to the discretion of Germany. As described fully in Section IV.1, this has an objective meaning in EU law, with the effect of excluding NS2 from the scope of the derogation.

366. This is not just the Claimant's argument in this arbitration, based on a plain reading of the words, and supported by the clear legislative intent of the EU. It has been recognised by every judicial and quasi-judicial authority that has considered the phrase. This includes the BNetzA, the OLG, and most recently the Advocate General of the CJEU itself.[465]

367. It is also undisputed that the decisions of the BNetzA and the German courts are ultimately policed by the CJEU. The European Commission has powers to bring infringement proceedings against those Member States which fail to achieve the result to be achieved by the EU's Directives. The European Commission (or, indeed, any Member State) may refer a potential infringement to the CJEU, which can, in turn, impose penalties on the non-compliant Member State.

368. The threat of infringement proceedings is not theoretical. On 2 September 2021, the CJEU issued its decision against Germany in the infringement proceedings under Article 258 TFEU initiated by the European Commission in respect of the Gas Directive, finding that, among other things, Germany had failed to ensure full respect of rules concerning the powers and independence of the national regulatory authority and did not implement correctly the European concept of a vertically integrated undertaking.[466]

It is not relevant that the Gas Directive affords Member States a margin of discretion in relation to certain other provisions

369. The EU does not in its Jurisdiction Memorial or Counter-Memorial address the fact that the BNetzA and German courts have to respect the objective legal meaning of "*completed before 23 May 2019*".

370. Instead, in its Jurisdiction Memorial, the EU refers to a number of other provisions of the Amending Directive that do provide scope for Member State discretion. In particular, it argues as part of its jurisdiction *ratione personae* defence, that "*in order to establish the existence of the alleged "practical effects" of discrimination against the Claimant, it is indispensable to take into consideration also the "practical effects" of other types of possible decisions which*

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464 Memorial, para 237.

465 **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's derogation application (German original and English translation), 15 May 2020; **Exhibit CLA-196**, *Nord Stream 2 AG v. Bundesnetzagentur*, Decision of the Oberlandesgericht (Higher Regional Court) Düsseldorf of 25 August 2021, VI-3 Kart 211/20 [V] (German original and English translation); **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021.

466 See **Exhibit CLA-213**, *European Commission v. Federal Republic of Germany supported by Kingdom of Sweden,* Case C-718/18, ECLI:EU:C:2021:662, Judgment, 2 September 2021.

the Member States may take under the Gas Directive and which may effectively accord no less favourable treatment to the Claimant than an Article 49a derogation".[467] The EU concludes that "*even assuming that the Amending Directive, as applied in practice by Germany, "undermined" NSP2AG's investment in North Stream 2 (quod non), the responsibility for such "practical effects" would not lie with the European Union*".[468] Similar arguments are made in the EU's Counter-Memorial.[469]

371. However, the matters to which the EU refers are not relevant to an assessment of whether the EU has breached its obligations under the ECT in connection with the Amending Directive.[470] As the EU well knows, the Claimant's argument relates to the prima facie question of whether or not the Directive should apply at all – in other words the exclusion of Nord Stream 2 from the scope of the Article 49a derogation. Member States have no discretion regarding the question of whether a pipeline is "*completed before 23 May 2019*", and therefore falls within the scope of the Article 49a derogation. This is made clear in the opinion of the EU's Advocate General.[471] In contrast, as described further below, the EU's arguments relate to areas of discretion afforded to Member States only once the Gas Directive has been applied to the pipeline in question. In particular:

i. The EU refers to the choice afforded to Member States under the Gas Directive of different unbundling models.[472] However, pipelines afforded a derogation are not subject to the requirements of unbundling imposed by Article 9 of the Gas Directive (as amended). By precluding Nord Stream 2 from being entitled to a derogation, the EU has already breached its obligations under the ECT. Such a breach could not be undone by whichever unbundling models may be made available to Nord Stream 2 by Germany now that Nord Stream 2 is obliged to comply with Gas Directive.

ii. Germany's margin of discretion in respect of tariff setting and approval is similarly irrelevant. The other offshore import pipelines that benefit from a derogation are not subject to these requirements. Had Nord Stream 2 been able to obtain a derogation, it would not be subject to such requirements at all.[473]

iii. The EU refers to the margin of discretion afforded to Germany under Article 36.[474] This is also irrelevant. Article 36 is fundamentally different to, and no substitute for,

467 EU's Jurisdiction Memorial, para 188.
468 EU's Jurisdiction Memorial, para 194.
469 Counter-Memorial, section 2.3.3.
470 EU's Jurisdiction Memorial, para 156.
471 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 75.
472 EU's Jurisdiction Memorial, paras 157-160.
473 EU's Jurisdiction Memorial, paras 161.
474 EU's Jurisdiction Memorial, paras 162-167.

the Article 49a derogation regime, as set out further in Section VI.13 of the Memorial, the First Expert Report of Professor Cameron[475] and Section IV.3 above.

iv. The margin of discretion afforded to Germany to grant a derogation to any pipeline that is "*completed before 23 May 2019*" for objective reasons is similarly irrelevant.[476] Germany has a discretion as to whether to grant a derogation for "*objective reasons, such as to enable the recovery of the investment made or for reasons of security of supply*".[477] However, such discretion can only be exercised in relation to pipelines that are "*completed before 23 May 2019*". Whether or not the pipeline is so "*completed*" is, simply put, a gateway issue. The discretion does not arise if the pipeline is not so "*completed*". As fully described in Section IV.1, "*completed before 23 May 2019*" is an objective legal concept under EU law.

372. These arguments were also raised by the EU in its opposition to NSP2AG's appeal to the admissibility of its annulment application, and have been comprehensively rejected by the Advocate General. In his opinion of 6 October 2021 he stated that:

> "*it is the contested measure* [i.e. the Amending Directive] *which immediately affects the position of the appellant* [i.e. NSP2AG] *and not merely the (subsequent) transposition measures. The manner in which the appellant is affected is exhaustively regulated in the contested measure. Member States do not have any discretion as far as the end result to be achieved is concerned. They may only oversee a (limited) choice in terms of how to achieve it, by opting for one of the three models of unbundling provided for by the EU legislature. Nevertheless, irrespective of which of the three models they choose, the appellant will be affected. In summary, Member States have no discretion over the* ***whether*** *and the* ***what****, as they are permitted only to choose one of the three pre-determined forms of the* ***how***" (emphasis in original).[478]

373. Finally, the EU argues that the impact of the extension of the Gas Directive's regulatory regime to Nord Stream 2 cannot be determined (or attributed to the EU) because Germany may seek authorisation from the EU to conclude an international agreement with Russia with regard to the operation of Nord Stream 2 pursuant to Article 49b of the Gas Directive.[479] This is pure conjecture. The EU acknowledges that, as at the date of the filing of its Jurisdiction Memorial, it had "*received no indication from the German authorities that they will seek*

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475 First Expert Report of Professor Cameron, sections 7(3) and 7(4).
476 EU's Jurisdiction Memorial, paras 168-172.
477 **Exhibit CLA-3**, Amending Directive, Article 49a.
478 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 81. This citation refers to the AG's consideration of the arguments made by the EU in relation to unbundling; similar observations are made in respect of the EU's arguments on Member State discretion in relation to tariff regulation and third party access in paragraphs 87-98.
479 EU's Jurisdiction Memorial, para 193.

authorization in order to open negotiations with Russia with regard to the operation of Nord Stream 2, pursuant to Article 49b of the Gas Directive".[480] The theoretical possibility of an IGA cannot support the EU's argument on jurisdiction *ratione personae*, nor undermine NSP2AG's factual case regarding the impact of the Amending Directive on its investment.

VII.6 NSP2AG's position in the German Proceedings and this ECT arbitration is not inconsistent as alleged or at all

374. NSP2AG's position in this arbitration and in the German Proceedings is not inconsistent, as alleged by the EU or at all. NSP2AG has brought the German Proceedings as is its right, as a matter of prudence in an attempt to mitigate the harm caused by the Amending Directive and to avoid any suggestion that it had failed to take all possible steps to avoid the impact of the Amending Directive on its investment.

375. As explained in the Memorial, in the German Proceedings, NSP2AG must "*argue not only against the plain and natural meaning of the words contained in the Amending Directive, but also against the clear and targeted nature of the measure made clear in the EU's Admissions of Targeting Nord Stream 2 and the Exclusion of Nord Stream 2 from the derogation regime*".[481] The EU has not, of course, addressed the plain and natural meaning nor, to the extent different, the EU legislator's intended meaning of the words "*completed before 23 May 2019*" in its Jurisdiction Memorial, nor its Counter-Memorial. The EU has also conspicuously failed to address the EU's Admissions of Targeting Nord Stream 2. Neither has it addressed the deliberate Exclusion of Nord Stream 2 from the Derogation Regime in any meaningful way.[482]

376. As noted above, NSP2AG has filed an appeal of the OLG's decision to the German Federal Supreme Court (the Bundesgerichtshof or "**BGH**"). NSP2AG should not be criticised for seeking to pursue every legal avenue in order to address the effects of the EU's discriminatory legislation that potentially affects its very existence.

VII.7 NSP2AG's claim is solely based on impacts attributable to the EU

377. The EU also seeks to minimise the impact of its breaches of the ECT by reference to extraneous factors, namely the presence of US sanctions and Gazprom's export monopoly in Russia.[483] However, neither of these factors affects NSP2AG's arguments as to the EU's breaches of the ECT, and the EU's responsibility for the impacts on NSP2AG.

480 EU's Jurisdiction Memorial, para 184.
481 Memorial, para 412.
482 Memorial paras 41 and 418(iii).
483 Counter-Memorial, Section 2.3.2.2.

The US sanctions do not abrogate the EU's responsibility for the impact of the Amending Directive

378. First, the EU refers to the US sanctions, suggesting that as a result of the US sanctions the pipeline may never become operational.[484]

379. The EU is usually intolerant of attempts by the US to impose sanctions with extra-territorial effect, particularly where such effects are felt within the territory of the EU and by EU nationals. One tool that the EU has used previously in such circumstances is Council Regulation (EC) No 2271/96, known as the EU Blocking Statute.[485] Despite reports that it was unhappy with the US sanctions,[486] however, the EU has chosen not to take any action to protect EU companies connected with the Project who have been expressly or impliedly targeted [redacted]

380. The US sanctions have not, in any case, prevented Nord Stream 2 from completing construction of the pipeline. Construction was completed in September 2021. For the avoidance of doubt, NSP2AG makes no claim in this arbitration in respect of sums attributable to delays to the construction of the pipeline occasioned by the US sanctions.

381. However, as described further in Section VI, the requirement to alter the contractual framework ([redacted] GTA [redacted]) described in the Memorial,[488] and in the First Witness Statement of [redacted],[489] arise as a direct result of the Dramatic and Radical Regulatory Change brought about by the Amending Directive. It is the Amending

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484 Counter-Memorial, para 160.

485 **Exhibit C-270**, European Commission publication, "Blocking statute" (last accessed on 19 October 2021 at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/blocking-statute_en). The EU has described the EU Blocking Statute as "*an important achievement of unified EU action to protect EU operators, whether individuals or companies, from the extra-territorial application of third country laws. The purpose of the European Union's blocking statute (Council Regulation (EC) No 2271/96) is to protect EU operators from the extra-territorial application of third country laws. The European Union* ***does not recognise the extra-territorial application of laws adopted by third countries*** *and considers such effects to be contrary to international law*" (emphasis in original).

486 For example, Ursula Von der Leyen was reported to have stated that "[t]*he EU Commission emphatically rejects sanctions against European companies that engage in projects in line with the law*" (**Exhibit C-271**, Radio Free Europe/Radio Liberty article, "European Commission President Criticizes U.S. Nord Stream Sanctions" (last accessed on 19 October 2021 at https://www.rferl.org/a/european-commission-president-criticizes-u-s-sanctions-on-nord-stream/30347898.html)

487 As explained in the [redacted]

488 Memorial, Section VII.

489 [redacted]

Directive that requires NSP2AG to amend its contractual framework, and the EU must bear the consequences if third parties are not prepared to do so, whether because of the US sanctions or for any other reason. As explained by Peter Roberts, [redacted][490]

Gazprom's export monopoly is not the cause of the impact

382. The EU refers to Gazprom's monopoly on export of gas from Russia, arguing that "*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*".[491] The EU deliberately misunderstands the relevance of Gazprom's export monopoly to NSP2AG's claim.

383. The Claimant's claim is based on the introduction by the EU of a piece of legislation that is deliberately discriminatory and targeted at Nord Stream 2. That targeted and discriminatory legislation prevents NSP2AG from complying with its contractual agreements, with the related impacts described in the Memorial and elsewhere in the Reply Memorial. Gazprom's monopoly is irrelevant to this analysis.

384. However, the fact that Gazprom is the only permitted exporter of Russian pipeline gas is clearly a relevant factor in assessing the question of whether the Amending Directive can achieve its Purported Objectives (which, as fully described in the Memorial,[492] the First Expert Report of Professor Cameron,[493] and Section V above, it cannot).

490 Expert Report of Mr Peter Roberts, para 31.
491 Counter-Memorial, para 171.
492 Memorial, Section VI.12.
493 First Expert Report of Professor Cameron, Section 6(5).

VIII. THE EU HAS BREACHED ITS OBLIGATIONS UNDER THE ECT

385. NSP2AG's case in respect of the EU's breaches of the ECT is fully set out in Section VIII of the Memorial.

386. This Section responds to the EU's arguments raised in its Counter-Memorial in relation to Article 10(1), Article 10(7) and Article 13 of the ECT. It demonstrates the following:

i. the EU's conduct is contrary to each and every one of the various categories of treatment recognised by tribunals as forming part of the guarantee of fair and equitable treatment under Article 10(1) (**Section VIII.1**) and, in particular, the EU's discriminatory treatment of NSP2AG in connection with the Amending Directive breaches the EU's FET obligation, as well as the EU's express obligation to refrain from unreasonable or discriminatory measures that impair NSP2AG's investment under Article 10(1) (**Section VIII.2**);

ii. the EU's interpretation of the scope of the duty to provide most constant protection and security in Article 10(1) is inconsistent with its ordinary meaning and unsupported by jurisprudence, and that the EU has failed to provide most constant protection and security in breach of Article 10(1) of the ECT (**Section VIII.3**);

iii. the EU has failed to provide NSP2AG with 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 in breach of Article 10(7) of the ECT (**Section VIII.4**); and

iv. the Amending Directive is not a legitimate exercise of the EU's police powers as argued by the EU and constitutes an "indirect expropriation" of the Claimant's investment (**Section VIII.5**).

387. In short, none of the EU's legal arguments undermines NSP2AG's case.

VIII.1 <u>The EU has breached the fair and equitable treatment standard under Article 10(1) of the ECT</u>

Introduction and summary

388. The EU denies that it has breached its obligations under Article 10(1) of the ECT. It argues that "*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*".[494]

[494] Counter-Memorial, para 424.

389. As explained fully in the Claimant's Memorial[495] and further below, however, the EU has by its conduct in connection with the Amending Directive failed to satisfy its clear and unqualified obligation to treat NSP2AG's investment both fairly and equitably.

390. The EU betrays the true motivations behind its unfair and inequitable treatment of Nord Stream 2 in the very first paragraph of its substantive response to NSP2AG's claim:

> "*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*".[496]

391. However, the EU's obligation under Article 10(1) is not diluted or undermined by the dynamic between the EU and Russia. On the contrary, this pernicious, politically motivated approach to foreign investment is the very treatment against which the guarantee of fair and equitable treatment is intended to protect.

392. The EU's conduct breaches each of the types or categories of conduct that may give rise to a finding of breach of the FET standard:[497]

i. The EU has failed to accord to NSP2AG due process and proper procedure: the obligation to accord due process is recognised by multiple tribunals to be broader than a denial of administrative or judicial justice and applies also in the context of legislative acts. The standard of due process is flexible and must be considered by reference to the relevant context. This context includes the EU deliberately, and by relying on a falsehood about the "clarificatory" nature of the Amending Directive, bypassing its own procedural safeguards designed to ensure legislative legitimacy and to safeguard private rights. It did so both to avoid proper scrutiny of the Amending Directive and to ensure that there was no delay in order that the Amending Directive would come into force before construction of Nord Stream 2 was completed.

ii. The EU failed to act in good faith (and, even though there is no requirement for NSP2AG to establish bad faith, the EU clearly evinced bad faith): the EU's attempt to rely on "*a presumption that* [it] *will perform* [the ECT] *in good faith*" is specious and

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495 Memorial, Sections III.2 and VIII.3.
496 Counter-Memorial, para 4.
497 Memorial, para 386.

must be rejected.[498] NSP2AG has set out ample evidence of the EU's lack of good faith. The EU has filed no witness or documentary evidence with its Counter-Memorial to support its assertion that the Amending Directive was, in substance (rather than form), of general and abstract application. On the contrary, it was plainly a "Lex Nord Stream 2".

iii. The EU has failed to act proportionately: An obligation to act proportionately is a key, separate and self-standing element of the FET standard. The EU's undeveloped allusion to "*a wide margin of appreciation when balancing regulatory interests and investors' interests*" does not undermine this requirement.[499] In any case, the EU has not established that there was regulatory (as opposed to political) interest supporting the Amending Directive. As has been explained in the Memorial and the First Expert Report of Professor Cameron, the Amending Directive cannot achieve its Purported Objectives.[500] The EU has put forward no substantive argument nor expert evidence explaining how it could possibly do so.[501] Accordingly, and by reference to the undeniably significant impact it has on the Claimant's investment, as recognised by the EU's Advocate General,[502] the Amending Directive lacks proportionality. The EU may not seek to achieve its objectives in a way which breaches its international obligations.

iv. The EU has not acted transparently: the EU's argument that "*transparency is not an element of the FET standard under the ECT*" is wrong and should be rejected.[503] The EU's argument that NSP2AG must demonstrate "*complete lack of transparency*" in order for the Tribunal to find that the EU's conduct was unfair or inequitable is similarly incorrect.[504] NSP2AG has shown that the EU's treatment of its investment was lacking in the required transparency, for example, the Purported Objectives are a fig leaf for the EU's true intention to target and disrupt Nord Stream 2 and the EU has failed to confirm the meaning of "*completed before 23 May 2019*".[505] Indeed, the very lack of transparency that marred the legislative process continues into this

498 Counter-Memorial, para 481.
499 Counter-Memorial, para 498.
500 Memorial, Section VI.12 and First Expert Report of Professor Cameron, para s 1.9-1.17 and 6.32-6.61.
501 Second Expert Report of Professor Cameron, Section 4.
502 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 103: "*Perhaps more significantly, as a matter of basic economic reality, pipelines are not clementines. Such a major infrastructure project is not a business activity that begins overnight. In the present case, given the pipeline's advanced stage of construction and the significant investment made by the appellant over a number of years, the contested measure will have numerous consequences on the appellant's corporate structure and manner in which it can operate its business. Some of the changes required of the appellant will necessarily have to be implemented even before its commercial activities begin…*".
503 Counter-Memorial, para 531.
504 Counter-Memorial, para 533.
505 Memorial, VI.12, First Expert Report of Professor Cameron, paras 1.9-1.17 and 6.32-6.61; Reply Memorial, para 132.

arbitration, with the EU attempting to maintain that the Amending Directive was "*clarificatory*" as the unamended Gas Directive already applied to offshore import pipelines, despite the overwhelming weight of evidence, including from its own legal services, to the contrary.[506]

v. The EU has breached NSP2AG's legitimate expectations: the EU puts forward a number of incorrect arguments that have been consistently rejected by tribunals, including that a breach of legitimate expectations can only be established when there is another breach of the FET standard,[507] or that there can only be a legitimate expectation in circumstances where there is a specific assurance from the host State.[508] On the contrary, NSP2AG had the reasonable, justifiable and legitimate expectation, protected by the ECT, that any changes to the legal framework would be made in a reasonable, proportionate, non-discriminatory way and would be in the public interest. The Amending Directive was none of those things. In particular, the EU ensured that Nord Stream 2 was the only pipeline unable to benefit from the transitional provision that protected investments made before the Gas Directive was made to apply to offshore import pipelines – i.e. the provision that was intended to protect, and does protect in relation to the other five offshore import pipelines, legitimate expectations. Contrary to the EU's assertions, NSP2AG relied on its legitimate expectations and was a diligent investor.

393. Further, the EU's actions have been arbitrary, unreasonable and discriminatory in breach of both the guarantee of FET and the EU's obligation not to impair NSP2AG's management, maintenance, use, enjoyment and disposal of its investment by way of unreasonable or discriminatory measures. The EU argues that the Amending Directive is of a general and abstract nature. But, in fact, when considered in context and with regard to its practical effect, it would be difficult to conceive of a more shocking and flagrant act of discrimination. This is particularly so given that the EU is an international organisation that purports to respect the rule of law as one of its fundamental values.[509] The EU's only answer, faced with the charge of discrimination of Nord Stream 2 compared to other offshore import pipelines, has been to suggest that onshore import pipelines are also suitable comparators, despite the fact that its

506 Reply Memorial, para 17; Reply Memorial, Section III.
507 Counter-Memorial, paras 42 and 509.
508 Counter-Memorial, para 511 and 527.
509 **Exhibit C-272**, European Commission publication, "Upholding the rule of law" (last accessed on 19 October 2021 at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law_en). The Commission states that "*the rule of law is one of the fundamental values of the Union, enshrined in Article 2 of the Treaty on the European Union. It is also a prerequisite for the protection of the all the other fundamental values of the Union, including for fundamental rights and democracy. Respect for the rule of law is essential for the very functioning of the EU: … for maintaining an investment friendly environment and for mutual trust*".

own documents demonstrate that the Amending Directive has no practical effect on such pipelines whatsoever.[510]

394. Notably, nowhere in the Counter-Memorial has the EU sought to convince the Tribunal that the application of the regulatory requirements of the Gas Directive to NSP2AG's investment or the exclusion of Nord Stream 2 from the Article 49a derogation regime (both of which are indisputable facts), were either "fair" or "equitable". It could not do so.

395. In summary, it is clear that the EU's conduct falls, in multiple ways, far short of the guarantee of fair and equitable treatment to which it has committed under the ECT. Each of the above points will be considered in further detail below.

The EU failed to accord due process

Lack of due process is a separate element of the FET standard and is broader than simply denial of administrative or judicial justice

396. The EU's steps in connection with the Proposal for, and adoption of, the Amending Directive represent a failure by the EU to afford NSP2AG due process, a key element of the standard of protection guaranteed under Article 10(1) of the ECT.[511] For the reasons fully set out in paragraphs 388 to 392 of the Memorial, it is clear not only that the guarantee of FET can be breached by a failure to accord due process, but also that the EU failed to accord due process.

397. In its Counter-Memorial, the EU asserts that NSP2AG conflates the concepts of due process and denial of justice and that, there having been no administrative proceeding which could give rise to a denial of justice, NSP2AG's claim should fail.[512] Such an argument is inaccurate (there was no such conflation as is apparent from paragraph 393 of the Memorial). On the contrary, it is the EU that conflates the two concepts.[513] Further, and in any case, the EU's argument does not undermine NSP2AG's claim that the EU's actions in connection with the Proposal for, and adoption of, the Amending Directive violate the guarantee of FET in Article 10(1). In particular, in erroneously characterising NSP2AG's arguments as relating to denial of justice,[514] the EU does not meaningfully address the allegations of lack of due process raised by NSP2AG.

398. Failure to accord due process and to observe procedural propriety has been recognised in a number of cases as being an independent element of the FET standard. In some cases the factual circumstances give rise to an overlap with denial of justice. However, the EU's

510 Reply Memorial, paras 56-60. 511 Memorial, paras 388-393.
511 Memorial, paras 388-393.
512 Counter-Memorial, para 441.
513 Counter-Memorial, paras 434 to 443, expressly so in particular in section 3.1.1.2 of the Counter-Memorial ("*Due process was ensured and justice was not denied*").
514 Counter-Memorial, Section 3.1.1.2.

argument that a claimant seeking to establish a failure to accord due process must meet the same standard as to establish a denial of justice, does not withstand scrutiny.

The EU's arguments on denial of justice are misguided: NSP2AG has not pleaded a case on denial of justice and the standard of denial of justice is not relevant when assessing a claim for breach of due process

399. The majority of the EU's rebuttal of the Claimant's legal case on due process focuses on the threshold for establishing a denial of justice, even though the EU itself acknowledges that "*the threshold for denial of justice is* […] *higher than that for breach of due process*".[515] The EU's arguments in relation to NSP2AG's potential claim for denial of justice are misplaced. They are not relevant to NSP2AG's arguments that the EU has failed to accord to the Claimant due process in connection with the Proposal for, and adoption of, the Amending Directive.

400. For example, the EU seeks to rely on the case of *Loewen v. USA* to state that:[516] "*Under international law, due process of law is regarded as the embodiment of "minimum standards in the administration of justice*"".[517] However, *Loewen v. USA* is primarily a case about denial of justice, the facts centred on the treatment of the investor in the Mississippi court. Due process is not discussed prominently in this case, and the paragraphs of the case on which the EU relies address denial of justice, rather than lack of due process.[518] Moreover, the case of *Loewen v. USA* does not mention the "*minimum standards in the administration of justice*" to which the EU refers,[519] and does not in fact set out any legal standard for assessing whether there has been a lack of due process.[520]

401. NSP2AG has reserved all of its rights in relation to the EU's actions in connection with the Annulment Application and the General Court's decision to dismiss NSP2AG's claim on grounds of inadmissibility, including to bring a claim for denial of justice and/or a claim for violation by the EU of its obligations under Article 10(12) of the ECT.[521] On 6 October, 2021

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515 Counter-Memorial, para 436.

516 **Exhibit RLA-98**, *Loewen v. USA* (ICSID, Award of 26 June 2003), para 129.

517 Counter-Memorial, para 427.

518 **Exhibit RLA-98**, *Loewen v. USA* (ICSID, Award of 26 June 2003), para 129.

519 Counter-Memorial, para 427.

520 The EU makes a number of other submissions that bear no relevance to the legal arguments made by the Claimant. For example, in para 435 of the Counter-Memorial, the EU states that "*errors, misinterpretations and misapplication of domestic law do not rise to the level of denial of justice, unless they result from "the clear and malicious misapplication of the law*"", citing an article by a PhD candidate on "*The EFT* [sic] *clause in the EU-Singapore Free Trade Agreement*" (**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, pp 10-11), which in turn cites **Exhibit RLA-107,** *Robert Azinian v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award of 1 November 1999, para 103. Aside from the fact that that the proposition in the article is not supported by the case which is cited, there is (as explained above), no denial of justice claim pursued in the Claimant's Memorial and, moreover, no argument based on the misinterpretation or misapplication of domestic law. To the extent that the EU is referring to the allegations that it misstated the objectives of the Amending Directive so as to be able to exercise its competence under Article 194(2) TFEU, this is not argued to constitute a denial of justice.

521 Memorial, para 393.

in a remarkably strongly worded opinion, the EU's Advocate General reached the view that NSP2AG is directly and individually concerned and NSP2AG's appeal should be allowed.[522] However, the Claimant is not in a position to address a claim for denial of justice as no determination of its appeal has yet been made by the CJEU. The Claimant therefore continues to reserve its rights to address the legal standard applicable to a claim for denial of justice at the appropriate time.

402. NSP2AG's case on failure to afford due process as fully set out in its Memorial is based not on the actions of the EU's judicial institutions, but on the EU's failures in the context of its legislative actions (and omissions) in connection with the Amending Directive. A claimant seeking to establish a breach of due process is not required to show a denial of justice (and, in many cases could not be expected to do so, given that, as acknowledged by the EU, "*a breach of due process can occur at any stage of the judicial or administrative proceedings*").[523] The EU's reliance on cases relating to denial of justice, particularly in the context of judicial proceedings, is therefore misplaced.

Other cases cited by the EU do not address a claim for failure to accord due process

403. In addition to citing cases on denial of justice, the EU has cited a number of other cases in the same section of its Counter-Memorial as apparently supporting its position.[524] However, these cases are not relevant to the question of breach of the FET guarantee in Article 10(1) by virtue of the failure to afford due process and their citation by the EU is misleading. In particular:

i. *ADC v. Hungary*:[525] the paragraph cited by the EU refers to "*due process of law*" being a requirement of a lawful expropriation under Article 4 of the relevant investment treaty, rather than as an element of the FET guarantee. Indeed, the paragraph relied on by the EU begins: "*The Tribunal agrees with the Claimants that "due process of law", in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it* […]" (emphasis added).[526]

ii. *Petrobart v. Kyrgyz Republic II*:[527] the paragraph cited by the EU purportedly with regard to "*due process*" under the FET standard, does not in fact deal with due

522 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 201.
523 Counter-Memorial para 440.
524 Counter-Memorial, paras 429-432.
525 **Exhibit RLA-101**, *ADC Affiliate Limited and ADC & ADMC Management Limited Claimants v. The Republic of Hungary*, Award, 2 October 2006, para 435.
526 **Exhibit RLA-101**, *ADC Affiliate Limited and ADC & ADMC Management Limited Claimants v. The Republic of Hungary*, Award, 2 October 2006, para 435.
527 **Exhibit RLA-102**, *Petrobart v. Kyrgyz Republic (II)*, SCC, Award, 29 March 2005, para 133.

process at all. It actually addresses the Kyrgyz Republic's failure to ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments under Article 10(12) of the ECT.[528]

iii. *Metalclad v. Mexico*:[529] the paragraphs cited by the EU set out certain facts of the case and do not offer any standard against which an allegation of lack of due process can be judged.[530]

iv. In *Genin v. Estonia*:[531] the paragraphs cited by the EU do no more than recite the tribunal's *decision* on the facts made by reference to "*the totality of the evidence*".

v. In *International Thunderbird Gaming v. Mexico*:[532] the tribunal similarly found that there was insufficient evidence of a lack of due process sufficient to amount to a breach of the minimum standard in the NAFTA.

It is well-established that a claim for breach of due process can be brought in the context of legislative acts

404. As NSP2AG explained in its Memorial, the principle of due process, as a key element of the FET standard, requires the application of a fair procedure.[533] In response, the EU adopts a simplistic interpretation of the obligation to ensure due process, stating that, since there were no administrative procedures between the EU and NSP2AG, no denial of fairness in the application of administrative procedures can be raised by the Claimant.[534] However, due process is a broad concept. The circumstances in which a failure to accord due process may occur cannot be reduced to the EU's binary presentation of administrative procedures or judicial procedures.

405. In particular, as confirmed by the tribunal in *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*,[535] the requirement to provide FET extends to all branches of government. A breach of FET can be caused not only by administrative acts, adopted by the government or its agencies targeting the investor or its investment directly, but also by legislation, approved by the legislative power, or regulation, adopted by a government, affecting citizens in general, and the protected investor and investment in particular.[536] Accordingly, a deliberate and

528 Counter-Memorial, para 430.
529 **Exhibit CLA-126**, *Metalclad v. Mexico* (ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000), paras 91 and 97.
530 Counter-Memorial, para 430.
531 **Exhibit RLA-103**, *Genin v. Estonia*, Award, 25 June 2001, paras. 363 - 365.
532 **Exhibit RLA-104**, *International Thunderbird Gaming Corporation v. The United Mexican States UNCITRAL, Award, 26 January 2006, para. 200.*
533 Memorial, para 388.
534 Counter-Memorial, para 433.
535 **Exhibit CLA-216**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016), para 523.
536 **Exhibit CLA-216**, *ibid*., para 523.

politically-motivated failure to follow procedural safeguards in the legislative process can amount to a failure to accord due process breaching the guarantee of FET.

406. The adoption of the Amending Directive through the EU's own process is in itself manifestly a procedure which is subject to the requirement of due process, and the very existence of procedural safeguards of the type ignored by the EU gives rise to a legitimate expectation that they would be followed. The position regarding due process that the EU asks the Tribunal to adopt would greatly (and arbitrarily), reduce the standard of protection afforded by the guarantee of fair and equitable treatment in Article 10(1).

The standard of due process is flexible and should be assessed in the relevant context and circumstances

407. In contrast to the EU's rigid presentation of the standard of due process guaranteed as part of FET,[537] the due process standard is in fact a flexible one to be considered by tribunals by reference to the circumstances of the individual case.

408. The EU states that: "*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*".[538] However, this proposition is made in the context of a discussion of denial of due process via judicial decision-making and, in any case, no cases are cited in support of it.

409. In the case of *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, the tribunal held that "*whatever process may be due depends on the particular context or circumstances of the claim*".[539] Such articulation undoubtedly follows from the fact that a requirement to accord due process is not an express requirement of most investment treaties (including the ECT), but rather falls within the scope of the guarantee of fair and equitable treatment, itself a flexible standard.[540]

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537 Counter-Memorial, para 432.

538 Counter-Memorial, para 432.

539 **Exhibit CLA-217**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1, Award of 25 August 2014), para 9.48.

540 Memorial, para 376, citing Professor Schreuer, "*the principle of fair and equitable treatment allows for independent and objective third-party determination of* [a respondent's] *behaviour on the basis of a flexible standard*", **Exhibit CLA-61**, C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6(3) The Journal of World Investment & Trade 357, p 365. See, for example, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, in which the tribunal found that "*the required threshold of propriety* [to establish a breach of the FET] *must be defined by the tribunal after a careful analysis of facts and circumstances, and taking into consideration a number of factors, including among others the following,* […] *- whether the State's actions or omissions can be labelled as arbitrary, discriminatory or inconsistent; - whether the State has respected the principles of due process and transparency when adopting the offending measures*" (emphasis added) (**Exhibit CLA-216**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016), para 524).

410. Similarly, in *AES v. Hungary*, the tribunal considered whether there was lack of due process in the context of the introduction of certain decrees.[541] The tribunal noted that "[t]*he standard is not one of perfection. It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety)*" (emphasis added).[542] It is clear that the question of whether an investor has been afforded due process cannot (as asserted by the EU) be considered against an abstract standard but must be regarded in the context of the relevant circumstances.

411. The EU seeks to distinguish *Tecmed v. Mexico*, on the basis that the tribunal "*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*".[543] However, the *Tecmed* tribunal notes that "*it is understood that the fair and equitable treatment principle included in international agreements for the protection of foreign investments expresses* […] *the international law requirements of due process, economic rights, obligations of good faith and natural justice"*" (emphasis added), citing *S.D. Myers, Inc. v. Government of Canada*.[544] The *Tecmed* tribunal addresses matters that may occasion a breach of the FET standard, including that "*the foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor* […]".[545] Procedural safeguards such as those flouted by the EU in the context of a clearly contentious and significant piece of legislation (and to the consternation of a number of Member States)[546] are of course intended to ensure consistency and transparency. The *Tecmed* tribunal also refers to the importance of transparency as to "*the goals of the relevant policies and administrative practices or directives*" and the investor's expectation that the State will "*use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments*".[547] Accordingly, it is plain that if a State subverts the purpose of a legislative power, by falsifying the objectives to be achieved, such conduct would be within the scope of that described by the *Tecmed* tribunal as constituting a breach of the FET standard. Whether the *Tecmed* tribunal expressly included within its description the words "*due process*" is irrelevant.

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541 **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), para 9.3.38-40.

542 **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)*, para 9.3.40.

543 Counter-Memorial, para 442.

544 **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003), para 153, footnote 189, citing **Exhibit CLA-72**, *S.D. Myers, Inc. v. Government of Canada* (Partial Award of November 13, 2000), 134, p. 29.

545 **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003), para 154.

546 Reply Memorial, para 201.

547 **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003), para 154.

412. The EU seeks to further minimise the relevance of the *Tecmed* award by mischaracterising it, stating that it "*wrongly suggest*[ed] *that an international tribunal should sit in review of the substantive basis of domestic decision-making*".[548] The *Tecmed* tribunal made no such suggestion, and the EU's assertion is unsupported by any reference to the *Tecmed* award.

413. The EU further asserts that "*in any event, the legal standard that the Claimant proposes is misleading and incorrect*". It is unclear to what "*legal standard*" proposed by the Claimant the EU refers to here, and the EU has, in any case, provided no reasons for asserting that it is "*misleading and incorrect*".[549]

414. These cases illustrate that the requirement of due process is a multi-faceted one which requires the consideration of the context, circumstances and outcome of the case.

The EU relied on the Purported Objectives in order to pass the Amending Directive and deliberately ignored processes designed to ensure legislative legitimacy and safeguard private rights

415. As described more fully in Section V above, and in the Memorial in Section VI.12, the Amending Directive cannot achieve its Purported Objectives. Nowhere in the EU's Counter-Memorial nor in the First Expert Report of Professor Maduro are the benefits of extending the regulatory regime to the territorial sea section only of an offshore import pipeline described. Further, the EU has provided no documents that assess or analyse the way in which extension of TPA, unbundling and regulated tariffs to 54 km of the 1,235 km Nord Stream 2 pipeline (or, indeed, the extension of the Gas Directive to the territorial sea in respect of any offshore import pipeline) can achieve any of the Purported Objectives.[550]

416. The Tribunal is accordingly invited to infer that such documents do not exist, and that there was no such analysis or assessment. Following the document production process, during which such documents were specifically sought by the Claimant and ordered to be produced by the Tribunal in the face of the EU's objections, it seems clearer than ever that the Purported Objectives were a fig leaf, sham or convenience.[551]

417. Further, it is clear from the EU's Admissions of Targeting Nord Stream 2, in particular Dr Borchardt's presentation to the ITRE committee, that the Amending Directive was not of general and abstract application and was a substitute for being able to "veto" the pipeline.

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548 Counter-Memorial, para 443.

549 Counter-Memorial, para 442.

550 NSP2AG had specifically sought such documents during the document production process through Request 12 which was granted by the Tribunal. Further to a review of the Documents produced by the EU, NSP2AG thereafter asked the EU to confirm which Documents, if any, had been produced in response to Request 12 (**Exhibit C-202**, Letter from NSP2AG to the European Union, 30 August 2021). Despite subsequent correspondence, the EU still has not indicated which Documents, if any, were produced in response to Request 12 (**Exhibit C-203,** Letter from the European Union to NSP2AG, 14 September 2021; **Exhibit C-204,** Letter from NSP2AG to the European Union, 24 September 2021; **Exhibit C-201**, Letter from the European Union to NSP2AG, 8 October 2021.)**.**

551 Memorial, paras 224 and 225.

The true motives were political: (i) political hostility towards the Russian Federation, which is identified with Nord Stream 2; (ii) support for Ukraine, and maintaining the transit route through Ukraine which benefits certain of its Member States, notably Poland and other eastern and central European Member States, including to promote their commercial interests by avoiding damage in terms of the loss of transit revenue; and (iii) reducing (or at least, not increasing) the EU's use of Russian gas.[552] This manipulation of the EU's legislative framework for political reasons undoubtedly constitutes a failure to accord due process and a breach of the FET guarantee.

418. The EU's Improper Legislative Process was egregious.[553] It did not involve simple procedural shortcomings. As explained in detail at paragraph 381(iii) of the Memorial: (i) there was no ex-post evaluation or fitness check of existing legislation; (ii) no impact assessment was carried out; and (iii) there was a failure by the EU to consult widely on the draft legislation.[554] Significantly, the due process failings were not incidental but deliberate in order that the EU could achieve its ultimate aim of passing a piece of legislation that discriminated against NSP2AG.[555]

419. The EU's own Admissions of Targeting Nord Stream 2[556] indicate that Exclusion of Nord Stream 2 from the Derogation Regime[557] was intentional. As noted by the BNetzA in its Derogation Decision, it was the intent of the EU to pass the Amending Directive before construction of Nord Stream 2 was complete.[558] The steps that the EU should have followed were therefore deliberately ignored in order that the Amending Directive would come into

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552 Aside from the issue of US sanctions themselves, discussed elsewhere in this Reply memorial, it is also the case that the EU has been subject to significant lobbying from the US in connection with Nord Stream 2. The US has for years sought to increase sales of LNG to Europe and in July 2018, the EU reached an agreement with the US to increase sales of US LNG in Europe (**Exhibit C-273**, Joint U.S.-EU Statement following President Juncker's visit to the White House, 25 July 2018). It is well recognised that Russian gas (including delivered through Nord Stream 2) represents direct competition for US LNG and that commercial interests have influenced US policy in connection with Nord Stream 2: "*The U.S., under both Biden and his predecessor Donald Trump, has asserted that the new export route would make its allies in Europe overly dependent on Russian energy supplies. Yet it's also clear that the U.S. has been keen to increase its own sales to Europe of what it calls "freedom gas." The Washington authorities were committed for many years to stopping the gas link, or at least putting significant hurdles in its way*" (emphasis added) (**Exhibit C-274**, Washington Post article, 13 September 2021 (last accessed on 24 October 2021 at https://www.washingtonpost.com/business/energy/why-the-world-worries-about-russias-nord-stream-2-pipeline/2021/09/10/303613ac-1239-11ec-baca-86b144fc8a2d_story.html)). See also, **Exhibit C-275**, Reuters article, "Column: U.S. gas industry increasingly relies on LNG exports", 26 March 2021 (last accessed on 24 October 2021 at https://www.reuters.com/article/us-column-global-gas-kemp-idUSKBN2BI2HV).

553 Memorial, Section VI.10 and Reply Memorial, Section IV.4.

554 Paragraph 381(iii) of the Memorial.

555 Reply Memorial, paras 195-198.

556 Memorial, para 382.

557 Memorial, para 381(i).

558 **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's derogation application (German original and English translation), 15 May 2020, p 28 referring to the comments of Dominique Ristori, then Director-General for Energy at the Commission in March 2019 who "*stressed on the sidelines of a meeting of EU energy ministers that the new Gas Directive would hopefully come into force "quickly, meaning definitely before Nord Stream 2 is finished"*".

force before construction of Nord Stream 2 was completed.[559] This has also been recognised by the EU's Advocate General:

> "*195. … At the time of the adoption of that measure and of its entry into force, the construction of its pipeline had not only started, but had reached a very advanced stage. At the same time, however, that pipeline could not be completed before the deadline set out in Article 49a of the Gas Directive. Consequently, the new regime would immediately apply to the appellant, which was caught between two stools: neither the derogation nor the exemption set out in the Gas Directive were applicable.* […]
>
> *197…. not only were the EU institutions* ***aware*** *that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the* ***very intention*** *of subjecting the appellant to that new regime.* [560] (bold emphasis in original, underlined emphasis added).

420. The EU has further failed to accord due process by virtue of its lack of transparency. As described above in paragraph 132, it is not credible that the EU institutions that were responsible for the drafting and promulgation of the Amending Directive can plead ignorance as to the meaning of the words "*completed before 23 May 2019*". The EU's reference to Member States "*defin*[ing] *the conditions for granting Article 49a derogations*" is disingenuous.[561] As the EU is well aware, the question of whether a pipeline has been "*completed before 23 May 2019*" is an objective threshold issue. The EU has been invited by the Claimant on repeated occasions, including in the Memorial itself,[562] to confirm whether Member States have a discretion with regard to the interpretation of "*completed*" such as to enable a meaning other than by reference to the completion of physical construction of a whole pipeline, but has repeatedly declined to do so, preferring to rely on confusion and obfuscation.[563]

421. In sum, the EU's conduct in connection with the Proposal for, and adoption of, the Amending Directive satisfies the threshold of lack of due process under Article 10(1): the unfair and unreasonable character of the EU's conduct is manifest in the present case.[564] Even if the EU's higher, rigid, standard were to be adopted, these shortcomings are in any case "*egregious and fundamental*".[565]

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559 Reply Memorial, Section IV.4.
560 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 195 and 197.
561 Counter-Memorial, para 457.
562 See Memorial, para 381.v(c) and para 433.
563 See further Reply Memorial, paragraphs 125-132 above.
564 Memorial, para 439.
565 Counter-Memorial, para 432.

The EU has not acted in good faith

The requirement that the EU act in good faith falls under the obligation to accord FET under Article 10(1)

422. As set out in the Memorial, the EU's actions in connection with the Amending Directive are inconsistent with the requirement of good faith that is a well-established category of treatment required by the fair and equitable treatment standard.[566] The EU has not, however, addressed NSP2AG's actual case adequately or at all.

423. Not only is the requirement that a treaty must be interpreted and performed in good faith a general principle of international law, as the EU accepts,[567] but good faith is also a central aspect of the FET standard. This proposition is supported by a significant body of case law assessing alleged breaches of the FET standard under Article 10(1) of the ECT,[568] and other investment treaties.[569] By way of example:

i. In *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhsta*n, the tribunal held that "*the fair and equitable treatment standard encompasses inter alia the following concrete principles:* […] *the State is obliged to act in good faith*".[570]

ii. Similarly, in *Mobil Exploration and v. Argentine Republic*, the tribunal stated that "*the fair and equitable treatment includes* […] *good faith*".[571]

iii. In *Deutsche Telekom v. India*, it was held that "*FET includes the protection of legitimate expectations, the protection against conduct that is arbitrary,*

566 Memorial, paras 416-418.

567 Counter-Memorial, paras 479-480.

568 **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (SCC No. V064/2008, Partial Award on Jurisdiction and Liability of 2 September 2009), para 221; **Exhibit CLA-105**, *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008), paras 175-176; **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19, Award of 25 November 2015), para 8.22; **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain* (SCC Case No. V2015/063, Final Award of 15 February 2018), paras 500 and 504.

569 **Exhibit CLA-68**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004), para 138; **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003), paras 153-154; **Exhibit CLA-89**, *Eureko v. Poland* (ad hoc Arbitration Rules, Partial Award of 19 August 2005), para 235; **Exhibit CLA-90**, *Gemplus S.A. v. Mexico* (ICSID Case No. ARB(AF)/04/3, Award of 16 June 2010), para 7-72; **Exhibit CLA-218**, *Indian Metals & Ferro Alloys Limited v. The Government of the Republic of Indonesia* (PCA Case No. 2015-40, Award of 29 March 2019), para 226; **Exhibit RLA-192**, *GPF GP S.à.r.l v. Republic of Poland* (SCC Case No. V2014/168, Final Award of 29 April 2020 [Redacted]), para 543; **Exhibit CLA-219,** *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5, Award of 3 June 2021), para 355.

570 **Exhibit RLA-174**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, (ICSID Case No. ARB/05/16, Award of July 29 2008), para 609.

571 **Exhibit CLA-220,** *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. The Argentine Republic* (ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability of 10 April 2013), para 914.

unreasonable, disproportionate and lacking in good faith, and the principles of due process and transparency" (emphasis added).[572]

iv. In *Casinos Austria v. Argentine Republic*, the tribunal explained that: "*Fair and equitable treatment has been interpreted* […] *to require public authorities to administer the applicable law in good faith*".[573]

Failure to act in good faith breaches the FET standard: there is no requirement of bad faith

424. The EU further states that "*a "failure to act in good faith" does not constitute, in and of itself, a breach of Article 10(1) of the ECT*".[574] This argument is fundamentally flawed for the following reasons:

i. NSP2AG is arguing that there is a requirement that the host State act in good faith which forms part of FET under Article 10(1). This requirement has been breached by the EU.

ii. While various categories of treatment (including the requirement to act in good faith), are well-recognised as falling under the FET standard, a breach of the requirement to accord any of these categories of treatment is sufficient to establish a breach of the obligation to provide FET under Article 10(1).[575] As such, while the EU has, in any case, breached various categories of treatment under the FET standard,[576] should the Tribunal find that the EU has not acted in good faith, this, taken by itself, would constitute a breach of the FET standard under Article 10(1).

425. Further, the EU contends that, in order to establish a breach of Article 10(1), it is necessary for NSP2AG to show that the EU has acted in bad faith (rather than just showing a failure to act in good faith).[577] As NSP2AG has explained in its Memorial,[578] whilst action in bad faith is also a violation of the FET standard under the ECT, it is not a requirement for its

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572 **Exhibit CLA-223,** *Deutsche Telekom AG v. The Republic of India* (PCA Case No. 2014-10, Interim Award of 13 December 2017), paras 333-336.

573 **Exhibit CLA-221,** *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/14/32, Decision on Jurisdiction of 29 June 2018), para 242.

574 Counter-Memorial, para 480.

575 Memorial, para 387. See also **Exhibit CLA-74**, *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 319-321; **Exhibit RLA-153**, *Total SA v. The Argentine Republic* (ICSID Case No ARB/04/1, Decision on Liability of 27 December 2010), para 110; **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain* (SCC Case No. V2015/063, Final Award of 15 February 2018), para 714.

576 Memorial, para 386.

577 Counter-Memorial, para 482.

578 Memorial, para 417.

violation.[579] What matters is whether the EU has failed to act in good faith, which, as explained in the Memorial,[580] and further below, is indeed the case.

426. In any event, in NSP2AG's submission the EU's use of a general and abstract measure to deliberately target the Nord Stream 2 pipeline is an act of bad faith.

The EU cannot rely on a presumption that it acted in good faith

427. The EU argues that it should enjoy a presumption that it acted in good faith.[581] This contention is not supported by any treaty cases, under the ECT or otherwise. Instead, the EU relies on a sentence in a WTO Appellate Body report.[582] The Appellate Body stated "*We must assume that Members of the WTO will abide by their treaty obligations in good faith, as required by the principle of pacta sunt servanda articulated in Article 26 of the Vienna Convention. And, always in dispute settlement, every Member of the WTO must assume the good faith of every other Member*".

428. Whatever the intended significance of this comment by the Appellate Body, there is no basis to extend it beyond the state to state dispute resolution context of the WTO into the investment treaty field so as to require an assumption of good faith in connection with a claim by an investor for breach of the guarantee of FET. Indeed, as discussed above, a positive obligation to act in good faith is a "*core part*" of the FET standard. It cannot simply be assumed.

NSP2AG has proven that the EU has failed to act in good faith

429. The EU complains that NSP2AG has repeated facts which it invokes in support of other alleged breaches of Article 10(1) of the ECT.[583] There is of course nothing to prevent NSP2AG relying on the same facts in support of the EU's lack of good faith as it relies on to establish other breaches by the EU. It is commonplace in dispute resolution proceedings for the same facts to give rise to different breaches.

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579 **Exhibit CLA-61**, C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) *Journal of World Investment & Trade* 357, p 383 – 385; **Exhibit CLA-92**, *Mondev. International LTD v. United States of America* (ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002), para 116 followed in **Exhibit CLA-93**, *Jan Oostergetel and Theodora Laurentius v. Slovak Republic* (UNCITRAL, Final Award of 23 April 2012), para 227; **Exhibit CLA-69**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8, Award of 25 April 2005), para 280; **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (ISCID Case No. ARB(AF)/00/2, Award of 29 May 2003), para 153; **Exhibit CLA-83**, *Azurix Corporation v. The Argentine Republic* (ICSID Case No. ARB/01/12, Award of 14 July 2006), para 372.

580 Memorial, paras 416- 418.

581 Counter-Memorial, para 481.

582 **Exhibit RLA-125**, WTO Appellate Body Report, EC – Sardines, para. 278.

583 Counter-Memorial, para 483.

430. The EU's main objection appears to be its claim that NSP2AG has failed to prove these factual allegations.[584] This is incorrect, for all the reasons set out elsewhere in this Memorial. However, in making this claim, the EU itself repeats unsubstantiated arguments.[585]

i. In the Memorial, NSP2AG explained that the Amending Directive was adopted by reference to the Purported Objectives, which do not correspond to the EU's true motivations for passing the Amending Directive.[586] The EU submitted in response that the Amending Directive "*clarified*" the legal framework applicable to interconnectors with third countries.[587] As explained above,[588] it was clear prior to the adoption of the Amending Directive that the Third Energy Package did not apply to offshore pipelines. Accordingly, the EU's claim that it was "*precisely good faith that has moved the European Union to adopt the Amending Directive*" which "*clarified*" the scope of the applicable rules, is disingenuous.[589]

ii. NSP2AG also explained in its Memorial that the EU lacked good faith by following an Improper Legislative Process.[590] The EU submitted in response that the legislative timetable followed in the adoption of the Amending Directive was not accelerated.[591] This is not the case as explained in Section IV.4 above. The absence of required processes was a matter of concern to the EU's own institutions, as well as some of its Member States.[592]

iii. NSP2AG has also explained that the EU has failed to respond to NSP2AG's concerns in a meaningful and transparent way.[593] The EU has sought to deny the obvious superficiality of its communications with NSP2AG prior to the commencement of this arbitration.[594] However, the EU's lack of good faith in this regard is underlined by its continued refusal to clarify the scope of its own legislation and the meaning of "*completed before 23 May 2019*". The EU hides behind arguments about the division of competences in the EU legal system, and its apparent inability to provide an interpretation of this phrase. However, the fallacy of this argument is laid bare by the fact that the EU has addressed fully its view of the scope of Article 36.[595] In particular, the EU has described Article 36 as providing "*objective criteria*",[596] and contends that "*reading the cut-off criteria in Article 49a of*

584 Counter-Memorial, para 483.
585 Counter-Memorial, paras 484-490.
586 Memorial, Section VI.12, and paras 418(i) and 439.
587 Counter-Memorial, para 485.
588 Reply Memorial, Section III.
589 Counter-Memorial, para 486.
590 Memorial, para 418(ii).
591 Counter-Memorial, para 487.
592 Memorial, Section VI.6 and para 255, Reply Memorial, para 196 .
593 Memorial, para 418(iii).
594 Counter-Memorial, paras 488-490.
595 Counter-Memorial, paras 37, 271 and 272, 280.
596 Counter-Memorial, para 37.

the Amending Directive and Article 36 of the Gas Directive together shows that the EU legislator has set up a coherent system".[597] In addition, the EU's reliance on the division of competences belies the true position: that the EU clearly had an intended interpretation of "*completed before*",[598] a view shared by the EU Advocate General**.**

iv. Moreover, the timing of the Amending Directive also demonstrates the EU's lack of good faith. If the (unidentified) "*obstacles to the completion of the internal market in natural gas*" were so significant, the EU could have ensured that the legal framework was amended at the time of the Third Energy Package. Instead, the EU's amendment of the legislative regime took place after NSP2AG had made a significant investment in the EU and at a time when the contractual framework for its investment had been agreed. The timing of the Amending Directive has therefore directly contributed to [redacted].

431. Finally, the EU has conspicuously failed to address NSP2AG's main argument in its claim that the EU has failed to act in good faith: the EU's Deliberate Targeting of Nord Stream 2.[599] The Admissions of Targeting Nord Stream 2 make clear that the objective of the Amending Directive was to disrupt Nord Stream 2.[600] The EU has not addressed these arguments in the context of its lack of good faith, and, in particular, the EU has failed to address NSP2AG's arguments that the Amending Directive was drafted in such a way that it would apply only to Nord Stream 2. The EU has provided no credible explanation for the cut-off date of 23 May 2019 for the purposes of obtaining an Article 49a derogation (notwithstanding arguments raised by Member States during negotiations that the date of the financial investment decision would be more appropriate, including in the context of express concerns that the proposed cut-off was discriminatory).[601]

432. Indeed, it was the conclusion of the BNetzA and the OLG that the wording was chosen specifically in the knowledge that it would exclude NSP2AG from Article 49a.[602] The Opinion

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597 Counter-Memorial, para 272.

598 Reply Memorial, Section IV.1.

599 Memorial, para 418.

600 Memorial, paras 382-384 and 439(iv).

601 Reply Memorial, para 137. **Exhibit C-111**, Council of the European Union Working Paper, "Germany's written comments on REV 3 modifying the Gas Directive proposed under the Romanian Presidency", WK 844/2019 INIT, 21 January 2019: "*We again underline that Germany is not in principle opposed to regulation of gas infrastructure that links the EU with third countries. At the same time, we reject the version of the Commission's current proposal set out in REV 3 which, if thought through to its logical end, is designed to regulate one infrastructure only and, for every other infrastructure, provides for all different kinds of exceptions*"; **Exhibit C-235,** Council of the European Union Working Paper, "Hungarian written comments to the discussion paper of the Austrian EU Presidency on the Gas Directive", WK 12559/2018 INIT (partially redacted), 19 October 2018: "*For the sake of equal treatment, all existing pipelines and pipelines under construction should be derogated*".

602 **Exhibit CLA-204**, Bundesnetzagentur Decision concerning an application for derogation from regulation by Nord Stream AG, BK7-19-108 (redacted) (German original and English translation), 20 May 2020; **Exhibit CLA-196**, *Nord Stream 2 AG v. Bundesnetzagentur*, Decision of the Oberlandesgericht (Higher Regional Court) Düsseldorf of 25 August 2021, VI-3 Kart 211/20 [V] (German original and English translation).

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of the Advocate General in the CJEU Proceedings confirms that it is the choice of words by the EU legislature that precludes Nord Stream 2 from a derogation:

> "*In the present case, as far as Articles 36 and 49a of the Gas Directive are concerned, that paternity cannot but be attributed to the EU legislature. None of the options offered by those provisions appears to be applicable to the appellant. The EU legislature decided that (i) the derogation is only applicable to gas transmission lines between a Member State and a third country 'completed before 23 May 2019', and (ii) the exemption is only available to major infrastructure projects in respect of which no final investment decision has been taken. As a matter of fact, at the time of the adoption of the contested measure (17 April 2019), the Nord Stream 2 pipeline had passed the pre-investment stage, but was not going to be completed, let alone operational, before 23 May 2019. Therefore, whereas those provisions do give some leeway to national authorities to grant an exemption or a derogation to certain operators in the future, that is not the case in respect of the appellant. In that regard, the (in)applicability of those provisions is entirely pre-determined by the EU rules*."[603]

433. This in itself is enough to demonstrate a lack of good faith. But in combination with the EU's other conduct, for example when it is understood that the Amending Directive cannot even achieve its Purported Objectives, the EU's Deliberate Exclusion of Nord Stream 2 from the Derogation Regime the absence of good faith is even clearer.

The EU has not acted proportionately

434. In the light of the EU's commitment to fair and equitable treatment, any change to the legal framework in which NSP2AG had invested must be proportionate to the legitimate policy aims of the EU. For the reasons explained in the Memorial, in Professor Cameron's First Expert Report and in Section V above, however, the purported policy objectives of the Amending Directive are a fig leaf – the Amending Directive is not capable of, and does not, achieve these objectives. Indeed, despite this obvious challenge, no meaningful attempt has been made by the EU, either during the legislative process or in this arbitration, to articulate how applying the Gas Directive rules to a short section of one offshore import pipeline "*addresses obstacles to the completion of the internal market*" (or indeed what those obstacles originally were).[604]

435. It follows, therefore, again as explained in further detail above,[605] that the burden placed on NSP2AG by the Amending Directive is out of proportion to any impact that could be had by

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603 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 74-75.

604 **Exhibit CLA-3**, Amending Directive, Recital 3; Memorial, para 439(i); First Expert Report of Professor Cameron, para 6.32; Second Expert Report of Professor Cameron, Section 4.

605 Reply Memorial, Section VI.

the Amending Directive towards its Purported Objectives.[606] This constitutes a breach of the FET standard of which a requirement of proportionality is indisputably part.

436. The EU's arguments to the contrary are without merit, as demonstrated further below.

The obligation to act proportionately is a key part of the FET standard under Article 10(1)

437. The EU argues that: "*Article 10(1) itself, upon which the Claimant relies, makes no express reference to an obligation of "proportionality"*"; and 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*".[607]

438. This argument is incorrect for a number of reasons. First, the authorities cited by the EU do not support its contentions:

i. The main case on which the EU relies, namely *OperaFund Eco-Invest v. Kingdom of Spain*, is cited selectively by the EU, as the tribunal did not need to decide whether the host State's obligation to act proportionately was a separate element of FET. The tribunal explained: "*the Tribunal has some doubts as to whether proportionality should be accepted as a separate element of FET. It may rather be considered as an inherent element when balancing regulatory state interests and investor interests in assessing stability obligations as well as legitimate expectations. The Tribunal is also not persuaded by the Claimants' reliance on Occidental, where the crucial issue was whether the host state's Caducidad Decree, which terminated a participation contract as a reaction to an investor's undisputed breach of contract, was "proportionate". It seems doubtful whether such considerations can be transferred tel quel to general legislative measures as Claimants suggest. However, again, there is no need for the Tribunal to finally decide this issue, as the two breaches of the FET standard found above by the Tribunal remain and suffice to establish that Respondent has breached its FET commitment*" (emphasis added).[608]

ii. The second case on which the EU relies to suggest that proportionality is not a separate element of FET is *Electrabel v. Hungary*, in which the tribunal considered proportionality as part of the investor's claims of arbitrariness and unreasonableness.[609] However, the fact that proportionality is discussed in another legal context, as part of a different claim under FET, does not, in and of itself, support

606 Memorial, Section VI.12 and paras 419-422.
607 Counter-Memorial, para 497.
608 **Exhibit RLA-126**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36, Award of 6 September 2019), para 555.
609 **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19, Award of 25 November 2015), where the proportionality of the measure is examined as part of the assessment of claims of arbitrariness and unreasonableness, para 179.

the EU's assertion that the requirement that the host State act proportionately is not a separate element of the FET standard.

439. Second, it has been accepted by many tribunals, both considering Article 10(1) of the ECT and other investment treaties, that the obligation to act proportionately is a key, separate, self-standing element of the FET standard.[610] By way of example:

i. In *RREEF v. Spain*, a claim under the ECT, the tribunal held that: "*the question whether or not the Respondent exercised its legislative power unfairly, unreasonably or inequitably in the present case cannot be answered at this stage of the reasoning: the answer depends (i) on the scope and content of the legitimate expectations of the Claimants when they made their investments and (ii) on whether or not the changes can be held as being reasonable and proportionate*" (emphasis added).[611]

ii. Similarly, in *Hydro Energy 1 v. Kingdom of Spain*, another ECT case, the tribunal stated that: "*the requirement of proportionality is part of the reasonableness standard and of the fair and equitable treatment standard*".[612] An identical statement is also made by the tribunal in the *Cavalum SGPS, S.A. v. Kingdom of Spain*, also a case under the ECT.[613]

iii. In *Occidental v. Ecuador*, the tribunal stated that: "*the obligation for fair and equitable treatment has on several occasions been interpreted to import an obligation of proportionality*".[614] The *Occidental* tribunal relied on *MTD Equity v. The Republic of Chile*, in which the respective tribunal similarly held that FET is "*a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, non-discrimination, and proportionality*" (emphasis added).[615]

iv. In *Deutsche Telekom v. India*, the tribunal held that "*FET includes the protection of legitimate expectations, the protection against conduct that is arbitrary,*

610 **Exhibit RLA-192**, *GPF GP S.à.r.l v. Republic of Poland* (SCC Case No. V2014/168, Final Award of 29 April 2020), para 543; **Exhibit CLA-222**, *Cavalum SGPS, S.A. v. Kingdom of Spain* (ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum of 31 August 2020), paras 411 and 414; **Exhibit RLA-130**, *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50, Award of 4 September 2020), para 410; **Exhibit CLA-219**, *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5, Award of 3 June 2021), para 355.

611 **Exhibit RLA-199**, *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 324.

612 **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 573.

613 **Exhibit CLA-222**, *Cavalum SGPS, S.A. v. Kingdom of Spain* (ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum of 31 August 2020), para 414.

614 **Exhibit CLA-78**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11, Award of 5 October 2012), para 404.

615 **Exhibit CLA-57**, *MTD Equity Sdn.Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7, Award of 25 May 2004), para 109.

unreasonable, disproportionate and lacking in good faith, and the principles of due process and transparency" (emphasis added).[616]

v. In *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, it was held that: "*the FET standard encompasses, inter alia, the following core principles:* […] *(6) the principle of proportionality*" (emphasis added).[617]

440. As explained in the Memorial,[618] it is also clear from investment arbitration awards that a host State's failure to act proportionately may amount to a breach of the FET standard on its own.[619]

The EU's margin of discretion is not unfettered and cannot excuse the EU's disproportionate actions

441. The EU notes that "*States enjoy a wide margin of appreciation when balancing regulatory interests and investors´interests*".[620] However, the EU fails to develop this statement further or to explain how this would negate its liability under the ECT. It is apparent from considering the cases on the requirement that host States act proportionately, that States' margin of appreciation is not limitless or unfettered.

442. The EU cites selectively from *PV Investors v. Kingdom of Spain*, the primary case on which it relies to plead that States enjoy a wide margin of appreciation.[621] In fact, the tribunal held in this case that: "*The requirement for reasonableness of the changes and the balancing test involving the investor's interests and the State's right to regulate are, in turn, linked to the requirement of proportionality of the measures*" (emphasis added).[622] Strikingly, the same paragraph which the EU cited in support of its argument continues:

> *"the margin of appreciation accorded to the State cannot be unlimited; otherwise the substantive treaty protections would be rendered wholly nugatory. In the Tribunal's view, the limits of the State's power are drawn by the principles of reasonableness*

616 **Exhibit CLA-223**, *Deutsche Telekom AG v. The Republic of India* (PCA Case No. 2014-10, Interim Award of 13 December 2017), para 336.
617 **Exhibit CLA-218,** *Indian Metals & Ferro Alloys Limited v. The Government of the Republic of Indonesia* (PCA Case No. 2015-40, Award of 29 March 2019), para 226.
618 Memorial, para 387.
619 **Exhibit CLA-107**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain* (ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum of 30 December 2019), para 600; **Exhibit CLA-224**, *The AES Corporation and Tau Power B.V. v. Republic of Kazakhstan* (ICSID Case No. ARB/10/16, Award of 1 November 2013), para 409; **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain* (SCC Case No. V2015/063, Final Award of 15 February 2018), para 657.
620 Counter-Memorial, para 498.
621 Counter-Memorial, para 198.
622 **Exhibit RLA-128**, *PV Investors v. Kingdom of Spain* (PCA Case No. 2012-14, Final Award of 28 February 2020), para 582.

and proportionality, which must guide a tribunal's assessment of the allegedly harmful changes in the legislation" (emphasis added).[623]

443. Another case on which the EU relies, and which the EU selectively cites, is *RREEF Infrastructure v. Spain*.[624] The tribunal in *RREEF Infrastructure* states that:

> "*the Respondent's margin of appreciation cannot be unlimited: otherwise there would be nothing to arbitrate and the Respondent's decisions would be unchallengeable; "discretionary" cannot be equated with "arbitrary"; margin of appreciation is different from unfettered discretion; the FET (and its components), as defined in the previous paragraphs of this Decision, constitute, in the present case the clearest limits of the Respondent's discretion*" (emphasis added).[625]

444. Similarly, in *Lemire v. Ukraine*, the tribunal held that the host State has a "*sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors*" (emphasis added).[626] As explained further below, the impact of the Amending Directive on Nord Stream 2 is disproportionate to any alleged benefit to be gained from the extension of the Gas Directive rules to a 54km section of Nord Stream 2 (or indeed from the extension of the Gas Directive rules to all offshore import pipelines within the territorial waters of the Member State of the first interconnection point).[627]

445. In *Ekosol v. Italy*, another case upon which the EU itself seeks to rely to suggest that its right to regulate should prevail over NSP2AG's rights,[628] it was held that:

> "*The Tribunal accepts in principle that part of assessing compliance with the fair and equitable treatment standard is determining whether State measures were disproportionate, in the sense of imposing burdens on foreign investment that went*

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623 **Exhibit RLA-128,** *PV Investors v. Kingdom of Spain* (PCA Case No. 2012-14, Final Award of 28 February 2020), para 583.

624 Counter-Memorial, para 498.

625 **Exhibit RLA-129**, *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 468.

626 **Exhibit CLA-70**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010), para 285.

627 See Reply Memorial, Section V; Memorial, Section VII. First Expert Report of Professor Cameron, para 6.55: "*It may well also be asked, moreover, how competition in EU gas markets is going to be enhanced, if at all, by the introduction of the measure. One of the goals of the internal market in gas is to use common rules on transmission to establish the kind of network conditions that make competition possible and allow an integrated wholesale market for gas to develop within the EU. The Amending Directive cannot be seen, however, as contributing to the achievement of that since the countries of origin for import pipelines remain outside EU jurisdiction. The Amending Directive cannot affect the rest of the pipeline and cannot affect competition between suppliers at the third country end (not least because the question of which entity is permitted to export gas may be and is regulated by the third country). All the Amending Directive can achieve has to be done in the space up to the Member State border, including the territorial sea. Therefore, even if the Amending Directive applied to all the pipelines without any derogations it would not produce any benefit to the internal energy market and its goal of increased competition*" (emphasis added); Second Expert Report of Professor Cameron, Section 4.

628 Counter-Memorial, paras 499-500.

far beyond what was reasonably necessary to achieve good faith public interest goals" (emphasis added).[629]

446. As explained further below, the Purported Objectives of the Amending Directive are specious.[630] As such, it cannot be credibly argued that the adoption of the Amending Directive was "*reasonably necessary to achieve good faith public interest goals*".[631]

447. In *Cavalum v. Spain*, the tribunal held that regulatory changes "*should be done in a manner which is not disproportionate to the aim of the legislative amendment, and should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources*".[632] It follows that host States' right to regulate does not exempt them from having due regard to the interests of foreign investors and to act in a proportionate way.

448. In addition, the same tribunal held that: "*A measure must be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved, and involves a balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate with regard to the affected rights and interests*" (emphasis added).[633] As such, the EU's right to regulate is not absolute, and should be balanced against NSP2AG's rights and interests. However, here, there has been no such balancing exercise: on the contrary, the Amending Directive has a political aim and is deliberately intended to affect NSP2AG's rights and interests.

The EU acted disproportionately in adopting the Amending Directive

449. The case of *SolEs Badajoz GmbH v. Kingdom of Spain*, a claim under the ECT, provides an example of what constitutes disproportionate treatment by the host State. In this case, the tribunal held that:

> "*The Second Set of Disputed Measures was disproportionate in the sense that the term was used in Charanne, because those measures suddenly and unexpectedly removed the essential features of the regime in place when Claimant invested. The Second Set of Disputed Measures did not meet Claimant's legitimate expectations. Additionally, the Second Set of Disputed Measures was disproportionate in that the severity of the impact of those measures on the value of Claimant's investment exceeded that which a prudent investor could have reasonably anticipated in light of*

629 **Exhibit RLA-130**, *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50, Award of 4 September 2020), para 410.
630 Reply Memorial, para 452, Section V; Memorial, Section VI.12 and para 385.
631 **Exhibit RLA-130**, *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50, Award of 4 September 2020), para 410, cited by the EU in the Counter-Memorial, para 499.
632 **Exhibit CLA-222**, *Cavalum SGPS, S.A. v. Kingdom of Spain* (ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum of 31 August 2020), para 411.
633 **Exhibit CLA-222,** *ibid.*, para 415.

the stability that inhered in the Original Regulatory Regime, even taking into account Spain's need to address its tariff deficit" (emphasis added).[634]

450. In other words, the tribunal considered in this case that the sudden change of regulations which removed the essential features of the regime in which the claimant had invested was disproportionate. This is precisely what has happened in this dispute. The EU has changed the essential features of the regulatory regime in place when NSP2AG invested by adopting the Amending Directive and requiring the application of the Third Energy Package to Nord Stream 2. This Dramatic Regulatory Change was disproportionate and amounts to a breach of the FET standard under Article 10(1).

451. In its Memorial, NSP2AG explained that the Practical Effects of the Amending Directive impose a burden on NSP2AG which outweighs any arguable public benefit of the Amending Directive.[635] The EU has argued that NSP2AG has not proven that the Amending Directive would indeed have the practical effects stated by NSP2AG.[636] However, in making this statement, the EU completely ignores an entire section of the Memorial, Section VII, which explains the Practical Effects of the Amending Directive and the impact thereof, fully substantiated by the First Witness Statement of [redacted].[637] These practical effects and impacts on NSP2AG of the application of the Amending Directive are further explained and updated in Section VI of this Reply Memorial, and in the Second Witness Statement of [redacted].

452. Furthermore, NSP2AG explained in its Memorial[638] and in the First Expert Report of Professor Cameron[639] that the Amending Directive cannot achieve its stated aims. The Purported Objectives of the Amending Directive are specious and belie the EU's true motivations for adopting the Amending Directive. The EU states that it disagrees with these arguments,[640] however, it has manifestly failed to prove the contrary.[641]

453. Finally, the EU suggests that its actions are not disproportionate because the Amending Directive would not apply only to Nord Stream 2. However, as explained above, this is untrue.[642] All other offshore pipelines to which the Amending Directive applies have obtained derogations. Nord Stream 2 is the only offshore pipeline to which the Third Energy Package will apply. This has been recognised by the EU's Advocate General Bobek:

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634 **Exhibit CLA-225,** *SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38, Award of 31 July 2019), para 462.
635 Memorial, paras 420-421.
636 Counter-Memorial, para 503.
637 First Expert Report of Professor Cameron, paras 6.48-6.52.
638 Memorial, Section VI.12 and para 421.
639 First Expert Report of Professor Cameron, paras 1.9-1.17, 6.32-6.61.
640 Counter-Memorial, para 504.
641 Reply Memorial, Section V and Second Expert Report of Professor Cameron, Section 4.
642 Reply Memorial, paras 145-152 and paras 163-168

"*First, the appellant belongs to a group of persons that was closed and identifiable at the time when the contested measure was adopted. In fact, only two pipelines were, in theory, to be immediately affected by the extension of the scope of the Gas Directive: Nord Stream 2 and the Trans-Adriatic. Nevertheless, since an* [exemption] [643] *had already been obtained for the latter pipeline, it is more appropriate to speak of the appellant as the only company belonging to that (purely theoretical) group of individuals affected by the contested measure*".[644]

454. NSP2AG reiterates that the adoption of the Amending Directive was disproportionate, and in breach of the FET standard under Article 10(1).

Even if the EU's policy objective were legitimate, it cannot seek to achieve it in a way which breaches its international obligations

455. Finally, the EU argues that the Purported Objectives of the Amending Directive can be achieved in the future by means of application of the Gas Directive to new offshore import pipelines.[645] In particular, the EU states that:

> *"Like any Directive in EU law,* [the Amending Directive] *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*".[646]

456. As stated further above, this is also a spurious argument, and provides no defence to NSP2AG's claim of a lack of proportionality.[647] No such pipelines are currently in development, and in light of the energy transition none is foreseen or expected. Further, the reference to the "oil and gas industry" is most puzzling since the Gas Directive is concerned with gas transportation networks. It does not apply to the "oil industry" in any way.

457. Further, if the EU's position were to be accepted, it would follow that the EU's Purported Objectives of the Amending Directive may be achieved <u>without</u> the application of the Gas Directive to Nord Stream 2, i.e. by allowing Nord Stream 2 to benefit from the protection of the transitional provision of Article 49a.

458. The tribunal in *SD Myers v. Canada* conducted a proportionality analysis: it analysed Canada's policy goal and determined it was legitimate, but then considered that there were

643 The Opinion in its English version uses the word "extension" instead of "exemption", however it seems clear from other language versions that this is a typographical error.
644 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021.
645 Counter-Memorial, paras 127 and 264. Expert Report of Professor Maduro, paras 235-236.
646 Counter-Memorial, para 264.
647 See further Reply Memorial, paras 163-168.

a number of ways in which Canada could have achieved that goal. It concluded that the method chosen by Canada was not one that was open to it in the light of the guarantees it had given under the NAFTA. The tribunal commented that "*the indirect motive was understandable*, *but the method contravened Canada's international commitments under the NAFTA*". The tribunal thus recognised that Canada had curtailed its choices as to how it would achieve its domestic policy goals by virtue of the international law obligations it had voluntarily assumed.[648]

459. Accepting for the sake of argument that the EU's policy aims could be achieved, the EU could have sought to achieve those aims in a proportionate way. If the EU's case pertaining to the "*general and abstract nature of the Amending Directive*" were accepted, a proportionate way of achieving the Purported Objectives of the Amending Directive would be to permit a derogation for all offshore import pipelines in which planning and financial investment had taken place under the existing legal framework, permitting all such pipeline investors the opportunity to recoup the investment made, and not to exclude just one pipeline. It follows from the alleged "*general and abstract nature of the Amending Directive*" and its application to future infrastructure that it could achieve its aims even if Nord Stream 2, together with the five other offshore import pipelines, could seek a derogation under Article 49a.

The EU has not acted transparently

460. In its Memorial,[649] NSP2AG demonstrated how the EU's amendment of the Gas Directive lacked transparency, and in particular, how the EU's legislative process did not afford the Proposal the usual manner of scrutiny by way of an impact assessment or a public consultation and how the EU has refused (and continues to refuse) to elucidate the meaning of the key words "*completed before 23 May 2019*". None of the EU's arguments in its Counter-Memorial bears scrutiny as demonstrated below.

The requirement that the EU act transparently forms part of the FET standard under Article 10(1)

461. The EU seeks to argue that "*transparency is not an element of the FET standard under the ECT*".[650] The EU does not rely on any treaty jurisprudence to support its position. The UNCTAD report - the only "authority" which the EU cites - cannot offer any support.[651] It presents a high level summary in a single sentence, which does not differentiate between different treaties and is not supported by any case law, but only by reference to two academic works published in 2010 (and therefore not reflecting any treaty jurisprudence since).

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648 **Exhibit CLA-72**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL, Partial Award of 13 November 2000), para 255.
649 Memorial, paras 381 and 429-434.
650 Counter-Memorial, para 531.
651 Counter-Memorial, para 531.

462. The EU's position is contradicted by the many investment tribunals that have considered that the FET standard under Article 10(1) requires the host State to act transparently.[652] By way of example:

i. In *Plama v. Bulgaria*, the tribunal held that "*the condition of transparency, stated in the first sentence of Article 10(1) of the ECT, can be related to the standard of fair and equitable treatment. Transparency appears to be a significant element for the protection of both the legitimate expectations of the Investor and the stability of the legal framework*".[653]

ii. The tribunal held in *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* that, in accordance with the FET standard, the host State must "*act in an open manner and consistent with commitments it has undertaken*".[654] It also stated that: "*The notion of transparency as an element of fair and equitable treatment has been expounded upon in a number of investment treaty arbitration decisions*".[655]

iii. In *Electrabel*, the tribunal stated that: "*the obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently*".[656]

iv. In *Foresight v. Spain*, it was also held that: "*the purpose of the ECT is to ensure that national legal frameworks are "stable, transparent, and compliant with international legal standards*"". Accordingly, the FET standard must be interpreted in this context.[657]

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652 **Exhibit RLA-199**, *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 415; **Exhibit CLA-226**, *Greentech Energy Systems A/S (now Athena Investments A/S), NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic* (SCC Case No. V(2015/095), Final Award of 23 December 2018), paras 456-458; **Exhibit CLA-227**, *I.C.W. Europe Investments Limited (United Kingdom) v. The Government of the Czech Republic* (PCA Case No. 2014-22, Award of 15 May 2019), paras 579-580; **Exhibit CLA-228**, *Photovoltaik Knopf Betriebs-GmbH (Germany) v. The Government of the Czech Republic* (PCA Case No. 2014-21, Award of 15 May 2019), paras 535-536; **Exhibit CLA-231,** *Voltaic Network GmbH (Germany) v. The Government of the Czech Republic* (PCA Case No. 2014-20, Award of 15 May 2019), paras 539-540; **Exhibit CLA-225,** *SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38, Award of 31 July 2019), para 308; **Exhibit CLA-107**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. United Kingdom of Spain* (ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum of 30 December 2019), para 658; **Exhibit RLA-128**, *PV Investors v. Kingdom of Spain* (PCA Case No. 2012-14, Final Award of 28 February 2020), para 565; **Exhibit CLA-222,** *Cavalum SGPS, S.A. v. Kingdom of Spain* (ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum of 31 August 2020), para 403; **Exhibit RLA-130**, *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50, Award of 4 September 2020), para 416.

653 **Exhibit CLA-105**, *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008), para 178.

654 **Exhibit CLA-229**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (SCC Case No. V(064/2008), Partial Award on Jurisdiction and Liability of 2 September 2009), para 185.

655 **Exhibit CLA-229**, *ibid.*, para 183.

656 **Exhibit CLA-84**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012), para 7.74.

657 **Exhibit RLA-193**, *Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Kingdom of Spain* (SCC Case No. V2015/150, Final Award of 14 November 2018), para 350.

v. In *WA Investments-Europa Nova Limited v. Czech Republic*, the tribunal stated that: "*It is clear that the FET standard entails a transparency component*".[658]

vi. In *Silver Ridge Power BV v. Italian Republic*, it was held that "*stability and transparency in the legal framework are important ingredients of the host State's* [fair and equitable treatment] *obligation*".[659]

463. It is indisputable that the FET standard can be breached by a failure to act transparently.

The EU has misstated the threshold of the requirement under Article 10(1) to act transparently

464. The EU argues that the threshold for successfully arguing that the host State failed to act transparently is high, and that a "*complete lack of transparency*" is required.[660]

465. First, the EU's argument is false from a legal perspective. Tribunals have been much more nuanced in their expression of the requirement that a host State act transparently, and there is no established principle that a "*complete lack of transparency*" is required.

i. In *Electrabel v. Hungary,* the tribunal explained that: "*The reference to transparency can be read to indicate an obligation to be forthcoming with information about intended changes in policy and regulations that may significantly affect investments, so that the investor can adequately plan its investment and, if needed, engage the host State in dialogue about protecting its legitimate expectations*".[661]

ii. In *WA Investments-Europa Nova Limited v. Czech Republic*, the tribunal explained that: "*Dolzer and Schreuer define transparency as follows: "Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced back to that legal framework." In addition, the Tribunal considers that transparency must include a requirement that information about relevant changes in the investment framework are communicated well in advance*".[662]

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658 **Exhibit CLA-230**, *WA Investments-Europa Nova Limited (Cyprus) v. The Government of the Czech Republic* (PCA Case No. 2014-19, Award of 15 May 2019), para 625. See also **Exhibit CLA-227**, *I.C.W. Europe Investments Limited (United Kingdom) v. The Government of the Czech Republic* (PCA Case No. 2014-22, Award of 15 May 2019), paras 579-580; **Exhibit CLA-228**, *Photovoltaik Knopf Betriebs-GmbH (Germany) v. The Government of the Czech Republic* (PCA Case No. 2014-21, Award of 15 May 2019), paras 535-536; **Exhibit CLA-231**, *Voltaic Network GmbH (Germany) v. The Government of the Czech Republic* (PCA Case No. 2014-20, Award of 15 May 2019), paras 539-540.

659 **Exhibit CLA-232**, *Silver Ridge Power BV v. Italian Republic* (ICSID Case No. ARB/15/37, Award of 26 February 2021), para 413.

660 Counter-Memorial, para 533.

661 **Exhibit CLA-84**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012), para 7.79.

662 **Exhibit CLA-230**, *WA Investments-Europa Nova Limited (Cyprus) v. The Government of the Czech Republic* (PCA Case No. 2014-19, Award of 15 May 2019), paras 626.

iii. In *Stadtwerke München v. Kingdom of Spain*, the tribunal explained that "*a finding of lack of transparency sufficient to constitute a violation of Article 10(1) of the ECT must be manifested in a continuing pattern of non-transparent actions by a government over time*".[663]

466. As explained in the Memorial,[664] the Improper Legislative Process and the EU's refusal to clarify the meaning of the Amending Directive did not allow NSP2AG to "*adequately plan its investment"*.[665] These circumstances comprised "*a continuing pattern of non-transparent actions by a government over time*",[666] and did not make "*the legal framework for the investor's operations* […] *readily apparent*".[667]

467. Second, even if this Tribunal finds that there must have been a "*complete lack of transparency*", this threshold would be satisfied in the current case. As explained further below,[668] the EU (i) has followed an Improper Legislative Process,[669] and (ii) has refused (and continues to refuse) to clarify the meaning of "*completed*" within the meaning of Article 49a.[670]

468. Finally, the EU notes that "[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: "there 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*". [671] This is an example of the EU's straw man tactic. NSP2AG did not argue that the EU should have been "*completely transparent*". NSP2AG's position, fully substantiated by reference to the EU's actions, is that it failed, and continues to fail, to accord to NSP2AG a level of transparency consistent with its obligation to provide fair and equitable treatment to NSP2AG's investment.

The EU has failed to act transparently

469. The EU has failed to act transparently in a number of different ways. First, the EU's lack of transparency is demonstrated by the Improper Legislative Process. The EU has failed to follow its normal process involving (i) an ex-post evaluation or fitness check of existing legislation, (ii) conduct an impact assessment, and (iii) consultation of stakeholders.[672]

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663 **Exhibit RLA-144**, *Stadtwerke Munchen GmbH and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1, Award of 2 December 2019), para 311.
664 Memorial, Section VIII.
665 **Exhibit CLA-84,** *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012), para 7.79.
666 **Exhibit RLA-144**, *Stadtwerke Munchen GmbH and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1, Award of 2 December 2019), para 311.
667 **Exhibit CLA-230**, *WA Investments-Europa Nova Limited (Cyprus) v. The Government of the Czech Republic* (PCA Case No. 2014-19, Award of 15 May 2019), para 626.
668 Reply Memorial, para 470-472.
669 Memorial, para 432, Reply Memorial, Section IV.4.
670 Memorial, para 433, Reply Memorial, para 132.
671 Counter-Memorial, para 232.
672 Memorial, para 381(iii).

These matters are fully addressed in the Memorial, and above.[673] The EU's repeated insistence that no impact assessment was required because the Amending Directive was "*clarificatory*" no more withstands scrutiny in the context of this arbitration than it did when it was questioned at the time.[674]

470. The EU argues that the Proposal was published and open to feedback from stakeholders "*for a period of eight weeks, from 6 December 2017 to 31 January 2018*".[675] As the Claimant pointed out in the Memorial, the "*public feedback*" process "*took place after the proposal for the Amending Directive had been tabled by the European Commission on 8 November 2017 and therefore could not have had any impact in shaping the European Commission's proposal*".[676] In addition, and for the reasons explained in the Memorial, the process was superficial compared to a formal stakeholder consultation.[677]

471. Second, the EU's presentation of spurious objectives for the Amending Directive, falsely trying to present a measure targeted at the Claimant as a general measure that merely "clarifies" already applicable law, also breaches the requirement of transparency.

472. Third, in relation to NSP2AG's requests to the EU for further clarification on the application of the Amending Directive, the EU states in its Counter-Memorial that: "*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*".[678] However, this is another "straw man". There is no question here of "*competing interpretations*". In fact, no interpretation about the meaning of "*completed*" as set out in Article 49a has been put forward by the EU at all. It has simply refused to provide one.

473. The EU's refusal to do so is not a matter of the balance of competences, but an exercise designed to maintain its defence of these proceedings and to avoid making a statement as to the interpretation of "*completed before*" that could be relied upon by NSP2AG in the German Proceedings. However, as demonstrated above, a swathe of documentary evidence attests to the fact that the Amending Directive was intended to be a "lex Nord Stream 2", and that the inclusion of the words "*completed before 23 May 2019*" in Article 49a was designed to cover all offshore pipelines except Nord Stream 2.[679]

673 Memorial, para 381(iii) and Section VI.10, Reply Memorial, Section IV.4.
674 Memorial, paras 252-260.
675 Counter-Memorial, para 538-539.
676 Memorial, para 250(i) and footnote 276.
677 Memorial, para 250(i) and footnote 276.
678 Counter-Memorial, para 535.
679 See further Reply Memorial, Section IV above; see also **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 75.

The EU has breached NSP2AG's legitimate expectations

474. Having guaranteed to provide FET under the ECT, in changing its legal framework, the EU is under the obligation to treat all investments, including the Nord Stream 2 project, fairly and equitably. As part of this obligation, NSP2AG had a legitimate expectation with respect to the stability of the legal framework in which it decided to invest and in which it invested, and a legitimate expectation that any changes to that legal framework would be made in a reasonable, proportionate, non-discriminatory way and would be in the public interest. Further, such an expectation is explicit in the EU's international law commitment in the ECT "*to create stable, equitable, favourable and transparent conditions*".[680]

475. In its Counter-Memorial, the EU has sought to minimise the significance of the protection of legitimate expectations in a number of ways. In this section, NSP2AG explains the following:

i. The EU wrongly argues that the FET standard under the ECT does not entail the protection of legitimate expectations.[681] The protection of the investor's legitimate expectations is long-established as a core element of the FET standard, as is clear from the awards of numerous arbitral tribunals.[682]

ii. The EU wrongly contends that a breach of legitimate expectations can only be established when there is another breach of the FET standard.[683] A breach of any one of the categories of treatment set out at paragraph 392, which include the protection of the investor's legitimate expectations, is sufficient to establish a breach of the obligation to provide FET.[684]

iii. The EU's claim that NSP2AG could not have legitimate expectations as no specific commitments were made to it is incorrect.[685] It is well-understood that the investor's legitimate expectations, including to a stable legal and business framework, can be established without a specific commitment by the host State.[686]

iv. NSP2AG's expectations were legitimate. NSP2AG did not expect the Dramatic and Radical Regulatory Change and had no reason to do so. At the time it made its investment, the Third Energy Package did not apply to offshore import pipelines.[687] The fact that the EU included a transitional provision in Article 49a to protect investments made before the change in law further demonstrates that NSP2AG's expectations that it would not be retrospectively affected by regulatory change were objectively reasonable and legitimate.

680 **Exhibit CLA-1**, ECT.
681 Counter-Memorial, para 508.
682 Reply Memorial, para 478.
683 Counter-Memorial, para 509.
684 Reply Memorial, para 481.
685 Counter-Memorial, paras 512 and 514.
686 Reply Memorial, paras 486-496.
687 Reply Memorial, Section III.

v. NSP2AG relied on the legal framework applicable at the time it decided to make its investment and its expectations that this framework would be stable.[688]

Legitimate expectations are protected as a core part of the FET guarantee in Article 10(1)

476. As fully explained in the Memorial, the protection of legitimate expectations is a well-established category of treatment protected by the FET standard: "*A number of cases confirm that a key element of the FET standard relates to the investor's expectation that the host state will maintain a stable legal and business environment*". The Claimant set out in detail how the adoption of the Amending Directive by the EU breached NSP2AG's legitimate expectations.[689]

477. In its Counter-Memorial, the EU responds that: "*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*".[690] In other words, the EU appears to contend that the FET standard under the ECT does not entail the protection of foreign investors' legitimate expectations, or at least, not to the allegedly "*far-reaching*" extent argued by NSP2AG.

478. This contention is incorrect. The following ECT cases all confirm that the protection of legitimate expectations forms part of FET, and indeed that it forms an "*essential*", "*dominant*" or "*key*" part:[691]

i. In *Charanne v. Spain*, the tribunal stated that: "*To analyse whether the 2010 norms violate other obligations provided in Article 10(1) of the ECT, the existence of legitimate expectations of the investor is a relevant factor*".[692]

ii. In *Novenergia II v. Spain*, the tribunal agreed with the Respondent that "*the FET's primary element is the legitimate and reasonable expectations of the Claimant*".[693]

iii. The tribunal stated in *RREEF Infrastructure v. Spain* that, "*while it is not expressly mentioned in Article 10(1), the Tribunal is of the opinion that respect for the legitimate*

688 Reply Memorial, paras 501-519.
689 Memorial, para 427.
690 Counter-Memorial, para 508.
691 See also **Exhibit CLA-233**, *CEF Energia B.V. v. The Italian Republic* (SCC Case No. V(2015/158), Award of 16 January 2019), para 185; **Exhibit RLA-144**, *Stadtwerke Munchen GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, para 256; **Exhibit RLA-128**, *PV Investors v. Kingdom of Spain* (PCA Case No. 2012-14, Final Award of 28 February 2020), para 565.
692 **Exhibit CLA-102**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain* (SCC Case No. 062/2012, Award of 21 January 2016), para 486.
693 **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain* (SCC Case No. V2015/063, Final Award of 15 February 2018), para 648.

expectations of the investor is implied by this provision and is part of the FET standard".[694]

iv. The tribunal accepted in *NextEra v. Spain* that "*the protection of legitimate expectations is an essential element of the provision of fair and equitable treatment and this applies under Article 10 of the ECT*".[695]

v. In *Belenergia S.A. v. Italian Republic*, the tribunal agreed with the claimant that "*the protection of legitimate expectations is a key element of FET*".[696]

vi. In *OperaFund Eco-Invest SICAV PLC v. Spain*, the tribunal held that "*the FET commitment in particular includes the respect of the legitimate expectations of the investor.* […] *The Tribunal also notes that other arbitral tribunals have considered the protection of legitimate investor expectations as even the "dominant" or "primary element", the "dominant feature", or "one of the major components" of FET*".[697]

vii. Similarly, in *Cavalum SGPS, S.A. v. Spain*, the tribunal stated that "*the protection of legitimate expectations can be considered the dominant or most important component of the investor-State FET treaty standard that is reflected in Article 10(1) the ECT*".[698]

A breach of legitimate expectations alone can give rise to a breach of the FET standard; in any case, the EU's actions are contrary to many of the "categories" of protected treatment

479. Next, the EU appears to accept that legitimate expectations are a "*relevant factor*" to the application of the FET standard, but claims that they "*are not, as such, a source of legal obligations*" and 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*".[699]

694 **Exhibit RLA-199**, *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 260.

695 **Exhibit CLA-234**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles of 12 March 2019), para 582.

696 **Exhibit RLA-168**, *Belenergia S.A. v. Italian Republic* (ICSID Case No. ARB/15/40, Award of 6 August 2019), para 570.

697 **Exhibit RLA-126**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36, Award of 6 September 2019), para 426.

698 **Exhibit CLA-222**, *Cavalum SGPS, S.A. v. Kingdom of Spain* (ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum of 31 August 2020), para 404.

699 Counter-Memorial, para 509.

480. This is incorrect, and unsubstantiated. As NSP2AG has demonstrated in its Memorial,[700] a breach of any one of the categories of treatment is sufficient to establish a breach of the obligation to provide FET.[701]

481. Further, numerous tribunals have found that a breach of the investor's legitimate expectations amounts to, and can be determinative of a claim for, breach of FET. By way of example:

i. The tribunal held in *Saluka Investments B.V. v. the Czech Republic* that: "*The standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in* [the treaty] *the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations*".[702]

ii. In *AWG Group Ltd. v. Argentine Republic*, the tribunal held that: "*In an effort to develop an operational method for determining the existence or nonexistence of fair and equitable treatment, arbitral tribunals have increasingly taken into account the legitimate expectations. Where a government through its actions subsequently frustrates or thwarts those legitimate expectations, arbitral tribunals have found that such host government has failed to accord the investments of that investor fair and equitable treatment*" (emphasis added).[703]

iii. In *Mobil v. Argentina*, the tribunal expressly agreed with the claimant's statement that: "*It has become clear that the basic touchstone of fair and equitable is to be found in the legitimate expectations of the parties*".[704]

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700 Memorial, para 387.

701 See, for instance, **Exhibit RLA-174**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16, Award of July 29, 2008), para 609: "*The parties rightly agree that the fair and equitable treatment standard encompasses inter alia the following concrete principles: - the State must act in a transparent manner; - the State is obliged to act in good faith; - the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; - the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations*" (emphasis added).

702 **Exhibit CLA-64**, *Saluka Investments B.V. v. the Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 302.

703 **Exhibit RLA-133**, *AWG Group Ltd. v. Argentine Republic* (UNCITRAL, Decision on Liability of 30 July 2010), paras 222-223.

704 **Exhibit CLA-220**, *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. The Argentine Republic* (ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability of 10 April 2013), para 914.

iv. In *OI European Group B.V. v. Venezuela*, it was held that: "*The obligation of FET can be violated* […] *by means of general legislative actions, enacted by the State, if the new regulation contradicts the investor's legitimate expectations*".[705]

v. In *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, the tribunal found a breach of Article 10(1) based on Spain's breach of the investor's legitimate expectations.[706]

482. Accordingly, it is clearly established that a finding that the EU had undermined NSP2AG's legitimate expectations alone would support a finding that the EU had breached its obligation under Article 10(1) to provide FET.

483. In any case, while NSP2AG has presented compelling arguments that its legitimate expectations have been breached constituting a breach of the FET standard, NSP2AG does not rely solely on these arguments.[707] NSP2AG has devoted an entire section of its Memorial to addressing the EU's breaches of the guarantee of FET to NSP2AG under Article 10(1).[708] As this Section also further demonstrates, the EU's actions and omissions fall far short of its obligations in relation to all of the categories of treatment recognised as comprising the FET standard.

Protected legitimate expectations can arise without specific commitments given to the investor

484. In its Counter-Memorial, the EU asserts that: "*Legitimate expectations require specific commitments inducing investments*".[709] It argues that NSP2AG has not invoked any specific commitments addressed to it,[710] and could have had no legitimate expectations. However, the EU has (i) selectively cited the "authorities" on which it has relied in support of this contention, and (ii) entirely ignored the authoritative line of cases in which tribunals found a breach of the foreign investor's legitimate expectations in the absence of specific commitments of the type described by the EU. These points are addressed in turn below.

485. First, the "authorities" on which the EU relies – the EU's other treaties, and *Masdar v. Spain* – do not support the EU's position:

i. The EU states that: "*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*".[711] In support of this contention, the EU has stated

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705 **Exhibit CLA-235**, *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25, Award of 10 March 2015 [unofficial translation]), para 491.
706 **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain* (SCC Case No. V2015/063, Final Award of 15 February 2018), paras 551-560.
707 Memorial, para 386.
708 Memorial, Section VIII.3.
709 Counter-Memorial, Section 3.1.5.1.
710 Counter-Memorial, paras 512 and 514.
711 Counter-Memorial, para 511.

at footnote 455 of the Counter-Memorial that: "*This is highlighted in all recent investment agreements concluded by the European Union, its Member States and, e.g., Canada, Singapore, Mexico*".[712] However, these other investment agreements are not authorities for the EU's proposition. They are not applicable in the present case, and the question of how the FET standard is described in them is irrelevant. As explained further below,[713] the elements required to establish a breach of legitimate expectations are set out in case law under the ECT and other investment treaties which is directly relevant to this case, but which the EU has ignored. These elements do not include a requirement that the State make specific commitments to the investor in order that an investor's legitimate expectations are protected.

ii. The EU also seeks to rely on the case of *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain.* But this case also does not support the EU's position.[714] Indeed, the tribunal in that case explained that "*leading commentators state that the starting point to determine an investor's legitimate expectations is the "legal order" or "legal framework" of the host State at the time when the investor made its investment. That proposition finds support in the case law*" (emphasis added).[715] It also stated: "*If the general legislation is to be regarded as a source of an investor's legitimate expectations, the investor must demonstrate that it has exercised appropriate due diligence and that it has familiarised itself with the existing laws*".[716] Where there is no specific representation by the State, and the foreign investor relies on the general legislation as the source of its expectations, this case suggests that the relevant question in order to assess whether the investor's expectations were legitimate is whether the investor was diligent. As discussed further below, NSP2AG has acted as a diligent investor and familiarised itself with the existing laws at the time of its investment.[717]

486. Second, there is a significant line of cases in which investment tribunals have considered that an investor's legitimate expectations could be breached in the absence of specific commitments or representations by the State. Indeed, these cases represent the majority in terms of the approach taken by tribunals to this issue.

487. In its decision on liability, the tribunal in *Total v. Argentina*, made this expressly clear:

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712 Counter-Memorial, footnote 455.
713 Reply Memorial, paras 487-495.
714 Counter-Memorial, para 511; **Exhibit RLA-135**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, (ICSID Case No. ARB/14/1, Award of 16 May 2018), para 493.
715 **Exhibit RLA-135**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, (ICSID Case No. ARB/14/1, Award of 16 May 2018), para 491.
716 **Exhibit RLA-135**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, (ICSID Case No. ARB/14/1, Award of 16 May 2018), para 494.
717 See Reply Memorial, paras 520-526 and [redacted].

"*The fair and equitable treatment standard of the BIT has been objectively breached by Argentina's actions, in view of their negative impact on the investment and their incompatibility with the criteria of economic rationality, public interest (after having duly considered the need for and responsibility of governments to cope with unforeseen events and exceptional circumstances), reasonableness and proportionality. A foreign investor is entitled to expect that a host state will follow those basic principles (which it has freely established by law) in administering a public interest sector that it has opened to long term foreign investments. Expectations based on such principles are reasonable and hence legitimate, even in the absence of specific promises by the government*" (emphasis added).[718]

488. Indeed, it is well accepted that an investor has a legitimate expectation that the host State will not amend the relevant regulatory framework in an unreasonable way, including by doing so in a disproportionate manner or without the justification of public interest. Such a legitimate expectation is not reliant on any specific representation of the host State. In *Saluka*, the tribunal gave a clear indication that the investor had legitimate expectations in relation to the legal framework governing its investment by virtue of the state having assumed the obligation of FET:

"*The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the "fair and equitable treatment" standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations. As the tribunal in Tecmed stated, the obligation to provide "fair and equitable treatment" means:*

to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.

[…]

The expectations of foreign investors certainly include the observation by the host State of such well-established fundamental standards as good faith, due process, and nondiscrimination. And the tribunal in OEPC went even as far as stating that:

the stability of the legal and business framework is thus an essential element of fair and equitable treatment.

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718 **Exhibit RLA-153**, *Total SA v. Argentine Republic* (ICSID Case No ARB/04/1, Decision on Liability of 27 December 2010), para 333.

This Tribunal would observe, however, that while it subscribes to the general thrust of these and similar statements, it may be that, if their terms were to be taken too literally, they would impose upon host States' obligations which would be inappropriate and unrealistic.

Moreover, the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.

[…]

The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions). In applying this standard, the Tribunal will have due regard to all relevant circumstances" (emphasis added).[719]

489. In *PSEG Global*, the tribunal summarised the conclusion of the *Saluka* tribunal with regard to legitimate expectations:

> "*While noting that no investor "may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged," the Tribunal in Saluka held that the investor can still expect that the conduct of the host State subsequent to the investment will be fair and equitable as the investor's decision to invest is based on "an assessment of the state of the law and the totality of the business environment at the time of the investment"*" (emphasis added).[720]

490. In *El Paso v. Argentina,* the tribunal supported in principle the existence of a legitimate expectation on the part of an investor that there will be no unreasonable or unjustified modification of the legal framework in which the investor invested:

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719 **Exhibit CLA-64**, *Saluka Investments BV v. Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 309.

720 **Exhibit CLA-99**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5, Award of 19 January 2007), para 255. The PSEG tribunal confirmed at para 279 that there was a violation of the claimant's legitimate expectations which led to a breach of the treaty: "*The rights that were affected one way or the other, including the Claimants' legitimate expectation, have indeed resulted in a finding of breach of the standard of fair and equitable treatment* …".

"*(ii) The Definition of Fair and Equitable Treatment*

(a) Fair and Equitable Treatment Implies that there Is No Unreasonable or Unjustified Modification of the Legal Framework

329. "See Christoph Schreuer, for whom the FET "is not absolute and does not amount to a requirement for the host state to freeze its legal system for the investor's benefit. A general stabilization requirement would go beyond what the investor can legitimately expect. It is clear that a reasonable evolution of the host state's law is part of the environment with which investors must contend".[721]

491. While focusing its attention on the limits of the doctrine of legitimate expectations (and in no way advocating an expansionist view), the *El Paso* tribunal provided a detailed analysis of the doctrine and, importantly, described the relevance of specific representations in the context of a legitimate expectations case. Specific representations, it found, are relevant where the regulatory change complained of is reasonable:

> *"A reasonable general regulation can be considered a violation of the FET standard if it violates a specific commitment towards the investor. The Tribunal considers that a special commitment by the State towards an investor provides the latter with a certain protection against changes in the legislation…*".[722]

492. In the case of *Impregilo SpA v. Argentine Republic*, the tribunal considered that a general stabilisation requirement cannot be legitimately expected unless there is a specific representation of such. However, there was no requirement of a specific assurance where the modification is unreasonable. As the tribunal explained:

> *"The legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but certainly investors must be protected from unreasonable modifications of that legal framework"* (emphasis added).[723]

493. More recently in *Charanne v. Kingdom of Spain*, the tribunal reached the same conclusion regarding the relevance of reasonableness of the host State's legislative action when assessing the investor's legitimate expectations as to changes to the legal framework, as well as the other relevant criteria of proportionality and acting consistently with the public interest:

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721 **Exhibit RLA-137,** *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15, Award of 31 October 2011), para 329.

722 **Exhibit RLA-137,** *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15, Award of 31 October 2011), para 375.

723 **Exhibit CLA-236**, *Impregilo S.p.A v. Argentine Republic* (ICSID Case No ARB/07/17, Award of 21 June 2011), para 291.

"*In the Statement of Claim, the Claimants submit in this regard that "the legitimate expectations of the investor* [...] *are frustrated, even in the absence of specific commitments, when the receiving State performs acts incompatible with a criterion of economic reasonableness, with public interest or with the principle of proportionality.*

The Arbitral Tribunal accepts the principle behind this approach. In fact, an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest" (emphasis added).[724]

494. These requirements are similarly addressed by the tribunal in *Total v. Argentina*:

"An evaluation of the fairness of the conduct of the host country towards an investor cannot be made in isolation, considering only their bilateral relations. The context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account".[725]

495. Finally, in *Gavrilovic v. Croatia*, the tribunal held that:

"*Although there was no specific representation or assurance from the Respondent to this precise effect, that is not determinative. As the tribunal in Saluka v. Czech Republic opined, "reasonable expectations to be entitled to protection under the treaty need not be based on an explicit assurance", it is sufficient that the claimant when making its investment could reasonably expect that the State would act in a consistent and even-handed way*".[726]

496. In conclusion, therefore, and contrary to the EU's position, there is no rule which prevents a tribunal from considering that the investor has a legitimate expectation of certain treatment notwithstanding that there has been no specific representation by the host State that it would not alter the legal regime in the way that it has. The jurisprudence demonstrates that the doctrine is appropriately dynamic and responds to the circumstances to which it is applied:

"As one can see by looking at all these pronouncements, there is no single answer to the question as to when a change of regulatory framework (absent a specific commitment) would entail a violation of fair and equitable treatment. The tests proposed by the tribunals vary, ranging from consideration of the extent of the change (El Paso), to the way change occurs (PSEG), up to the discriminatory effect

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724 **Exhibit CLA-102**, *Charanne v. Kingdom of Spain* (SCC Case No V 062/2012, Award of 21 January 2016), paras 513 and 514.

725 **Exhibit RLA-153**, *Total SA v. The Argentine Republic* (ICSID Case No ARB/04/1, Decision on Liability of 27 December 2010), para 123.

726 **Exhibit CLA-238**, *Georg Gavrilovic and Gavrilovic D.O.O. v. Republic of Croatia* (ICSID Case No ARB/12/39, Award of 26 July 2018), para 1017.

(Toto and Parkerings) or the unreasonable nature (Impregilo) of such change. The impression one receives is that in some instances the legal test was dictated by the specific facts of the case (and possibly also the different industry sectors at stake). Perhaps a definition of the exact (and abstract) threshold that would be applicable in all types of situations is an impossible endeavour."[727]

497. There is no basis for the Tribunal to consider itself restricted in the way in which it applies the doctrine, provided that, in its application, the Tribunal judges the EU's actions against the guarantee of fair and equitable treatment in Article 10(1) of the ECT.

Legitimate expectations of a "stable legal and business environment" are protected under the FET standard

498. The EU further argues that: "*It is well understood that an obligation of according FET does not entail a right to regulatory stability on the part of investors*" (emphasis added).[728] However, it (selectively) cites only one case in support of this contention, *Ioan Micula v. Romania*.[729] The *Micula* tribunal stated that: "*the fair and equitable treatment standard does not give a right to regulatory stability per se.* […] *the Claimants' "regulatory stability" argument must be analyzed in the context of the protection of an investor's legitimate expectations*" (emphasis added).[730] In other words, this case supports the position that the State's right to regulate is not absolute.[731]

499. The EU also argues that NSP2AG has misstated the legal standard for breach of legitimate expectations, as "*there is no general obligation under the ECT or otherwise under international law for a legal and regulatory environment to remain frozen in time*".[732] However, this is a mischaracterisation of NSP2AG's position, i.e. another straw man.

500. On the contrary, NSP2AG argued, and reiterates, that "*a key element of the FET standard relates to the investor's expectation that the host state will maintain a stable legal and business environment and moreover that the right to regulate is not unlimited*".[733] NSP2AG recognises the EU's right to regulate, as explained at the outset of its arguments on its legitimate expectations set out in the Memorial,[734] and it does not argue that it had a legitimate expectation that the EU would apply a "*regulatory freeze*". However, NSP2AG's

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727 **Exhibit CLA-237**, M. Potesta, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept", pre-print version, p 35.
728 Counter-Memorial, para 527.
729 Counter-Memorial, para 527, citing **Exhibit RLA-151**, *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* (ICSID Case No. ARB/05/20, Award of 11 December 2013), para 666.
730 **Exhibit RLA-151,** *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* (ICSID Case No. ARB/05/20, Award of 11 December 2013), para 666.
731 Memorial, para 425.
732 Counter-Memorial, para 524.
733 Memorial, para 425.
734 Memorial, paras 423-425.

legitimate expectation was that its investment would not be "*subject to unreasonable or unjustified modification*",[735] and that it would be protected from a "*radical or fundamental change to legislation*".[736]

501. Therefore, NSP2AG submits that it had a legitimate expectation that the business and regulatory environment in which it has invested would remain stable, not "*frozen in time*" as asserted by the EU.[737] A stable environment would accommodate changes that are reasonable, justifiable by reference to rational policy objectives, proportionate and take into account the legitimate expectations of investors. As is clear from the cases referred to in paragraphs 486 to 495 above, an investor's legitimate expectations as to the stability of the legal and business framework are protected by the guarantee of FET.

502. By way of further example, this issue is specifically addressed:

i. In *Plama v. Bulgaria*: "*The stability of the legal framework has been identified as "an emerging standard of fair and equitable treatment in international law*"" which should be balanced against the State's right to regulate.[738]

ii. In *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*: "*when a State that has created certain investor expectations through its laws, regulations, or other acts that has caused the investor to invest, it is often considered unfair for a State to take subsequent actions that fundamentally deny or frustrate those expectations*" (emphasis added).[739]

503. Further, the EU relies on the case of *El Paso Energy International Company v. Argentina*, to suggest incorrectly that NSP2AG allegedly expected a regulatory freeze.[740] However, in that case the tribunal took the position that: "*There can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless very specific commitments have been made towards it or unless the alteration of the legal framework is total*" (emphasis added).[741]

504. For the reasons explained in the Memorial,[742] and above, the change to the legal environment impacting NSP2AG's investment was not reasonable, not justifiable by

735 **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1, Award of 16 May 2018), para 484. Memorial, para 425.
736 **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain* (SCC Case No. 2015/063, Final Award of 15 February 2018), para 654.
737 Counter-Memorial, para 524.
738 **Exhibit CLA-105**, *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008), para 177.
739 **Exhibit RLA-144**, *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1, Award of 2 December 2019), para 263.
740 Counter-Memorial, para 524.
741 **Exhibit RLA-137**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15, Award of 31 October 2011), para 374.
742 Memorial, paras 426-427.

reference to rational policy objectives, nor a proportionate way to achieve those objectives (even if it were accepted that such objectives could be achieved through the Amending Directive, which is denied).

505. Indeed, what is particularly remarkable about the EU's breach of legitimate expectations in this case, is that the Amending Directive itself recognised that it would impact on investment, and thus undermine the legitimate expectations of investors in offshore pipelines. Recital (4) to the Amending Directive states: "*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*". This recital is the explanation for the inclusion of Article 49a and its derogation regime, which was made available to all offshore import pipelines other than Nord Stream 2. In other words, the EU protected the legitimate expectations of all other investors affected by the Amending Directive, except for NSP2AG.

NSP2AG's expectations were reasonable, legitimate and justifiable

506. Contrary to the EU's arguments,[743] it is clear that NSP2AG's expectations as to the regulatory framework applicable to its investment were reasonable, legitimate and justifiable.

507. NSP2AG did not expect the Dramatic and Radical Regulatory Change and had no reason to do so. As explained in the Memorial and fully addressed in Section III above, at the time it made its investment, the Third Energy Package did not apply to offshore import pipelines. The arguments made by the EU that it applied (legally or in practice) are unsustainable.

508. The EU argues that NSP2AG's awareness of a complex political dynamic represented the "*undertaking of a business risk*".[744] To support its argument, the EU relies on the case of *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*.[745] In that case, Duke acquired a majority shareholding in Electroquil, the first private power generator in Ecuador. The investment was made against the background of Ecuador's energy crisis and national shortages. At that time, Electroquil had failed to meet its obligations under its power purchase agreement with the State and had been fined through a contractual mechanism on six separate occasions in the past. At the time of investment, Duke was aware of those fines. When Duke disputed the imposition of fines, the tribunal held that Duke *"was thus aware of the risk that Electroquil could be fined for non-performance and it assumed the related business risk*".[746] However, this case can clearly be distinguished on its facts – Duke had knowledge of the potential of fines for past violations, whereas NSP2AG did not know at the

743 Counter-Memorial, Section 3.1.5.2.
744 Counter-Memorial, para 521.
745 Counter-Memorial, para 521.
746 **Exhibit RLA-148**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19, Award of 18 August 2008), para 351.

time of its investment decision that the regulatory landscape applicable to Nord Stream 2 would change fundamentally, still less that it would do so in an unreasonable and discriminatory way which failed to protect its legitimate expectations (whilst protecting the legitimate expectations of other investors).

509. Further, and in any case, an investor cannot be understood to assume or accept, "*as a business risk*", the risk of a politically-motivated, discriminatory change to the legal framework, such that the protections of an investment treaty are undermined.[747] Indeed, if the EU's position in this regard were to be accepted, investment treaties would offer no protection against the most egregious state actions if that state could demonstrate, for example, that it had previously shown that it was inclined to act unreasonably, in a discriminatory fashion or driven by political motivations without regard to the impact on private rights and investors' expectations. As described more fully in the Claimant's Memorial, the whole framework of the investment chapter of the ECT is to offer investors some basic insulation against the risk of politically motivated decision-making in the energy sector.[748] The protections would be worthless if they could not be relied upon in circumstances in which an investment was "*progressed against a complex political dynamic*".[749] It is unacceptable for the EU to seek to excuse its breaches of international law on the basis that its egregious conduct could have been anticipated by NSP2AG due, for example, to the EU's political hostility towards Russia or any of the other political considerations that motivated the EU to take the actions which are the subject matter of this dispute.[750]

NSP2AG's expectations at the time of making its investment were legitimate and reasonable

510. As is explained in the Memorial and further below,[751] NSP2AG relied on the legal framework applicable at the time it decided to make its investment and its expectations that this framework would not be altered in an unreasonable, discriminatory or disproportionate way.

511. Prior to the adoption of the Amending Directive, the pipeline infrastructure on the EU network side of a border connection with third country pipeline infrastructure was subject to the Gas Directive. The pipeline infrastructure on the non-EU side of that border connection was not subject to the Gas Directive. This is a matter of fact.[752]

747 Counter-Memorial, para 521.
748 Memorial, Section III.1.
749 Counter-Memorial, para 521; Memorial, para 428.
750 Memorial, para 16, Section VI.3.
751 Memorial, Section V.4 and para 426.
752 See further Reply Memorial, Section III.

512. [redacted] categorically states that "*it was clear to us that the Gas Directive, before the Amending Directive was adopted, did not apply to Nord Stream 2*".[753] [redacted] explains that the experience of those involved the Nord Stream 1 project, which had been well-received in the EU, contributed significantly to NSP2AG's reliance on what it expected to be a stable regulatory framework.[754] The TEP did not apply to Nord Stream 1, which had been operating since 2011. Further, this position was confirmed by NSP2AG's own legal advice, and by the BNetzA in meetings with [redacted], in connection with both Nord Stream 1 and Nord Stream 2.[755]

513. This view was shared by [redacted]

514. As noted above, this was also the view of the Council and Commission's own legal services.[758]

515. Nor was there any reason, at the time NSP2AG decided to make its investment, to believe that the applicable regulatory regime would be changed to apply the Gas Directive to Nord Stream 2, or that Nord Stream 2 would be treated differently to Nord Stream 1 (or any of the other offshore import pipelines).[759]

516. This too reflected the views of the [redacted]

517. This is supported by the Expert Report of Mr Peter Roberts. As Mr Roberts explains:

753 [redacted]
754 [redacted]
755 [redacted]
756 [redacted].
757 [redacted]
758 See Reply Memorial, para 64.
759 [redacted]
760 [redacted]

[redacted]

518. Accordingly, the contractual framework that was agreed with third parties in the form of the GTA, [redacted], reflected that: (i) the TEP did not apply; and (ii) the TEP was not expected to apply.[762] Notably, there is no suggestion by any third party, [redacted], that NSP2AG misrepresented the risk in relation to the TEP.

519. There was certainly no reason to believe that any regulatory change would not recognise the significant investment that had been made in pipeline infrastructure under the existing legal framework. As already noted, the regulatory change that happened did recognise the legitimate expectations of such investors (as reflected in Recital 4 and Article 49a of the Amending Directive, which latter also recognises that one of the objective reasons for the grant of a derogation may be "*to enable the recovery of investment made*"), but it did so in a way that intentionally excluded Nord Stream 2.[763]

NSP2AG was a diligent investor

520. The EU asserts that "*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*".[764] NSP2AG was a diligent investor and, as described above, NSP2AG's diligence (including but not limited to the legal opinions it received), enabled it to conclude that the Gas Directive did not apply to offshore import pipelines. This conclusion was shared [redacted]. For all the reasons explained in Section III above, it was also entirely correct. The Gas Directive did not apply to offshore import pipelines until the law was changed by the Amending Directive.

761 Expert Report of Mr Peter Roberts, para 26.

762 [redacted]

763 The EU argues that NSP2AG cannot point to Article 49a as the basis for its legitimate expectations (Counter-Memorial, para 513). This is yet another straw man. Plainly NSP2AG relies on Article 49a in support of its argument that its legitimate expectations were reasonable and justified: if it were unreasonable and/or unjustified for investors to have had a legitimate expectation that the regulatory framework would not be amended in the way that it was, Article 49a would not have been included at all in the Amending Directive.

764 Counter-Memorial, para 628.

521. NSP2AG also performed regular and continuous assessments of all risk concerning the project, and in particular, the risk of the TEP being extended to apply to Nord Stream 2. These risk assessments are the hallmark of a diligent investor.

522. [redacted]

523. [redacted]

524. [redacted]

525. [redacted]

526. The EU's position that NSP2AG was not a diligent investor is simply not supported by the facts.

765 [redacted]

766 [redacted]

767 [redacted]

768 [redacted]

769 [redacted]

770 [redacted]

771 [redacted]

772 [redacted]

773 [redacted]

774 [redacted].

775 [redacted]

NSP2AG relied on its legitimate expectations when making its investment

527. Further, NSP2AG relied upon its legitimate expectations in making the investment. The risk assessments described above also contained an assessment of the potential impact of the application of the Gas Directive, were this very unlikely event to occur. As set out in the Second Witness Statement of [redacted]

528. [redacted]

529. Put simply, as Peter Roberts explains in his Expert Report: "*Nord Stream 2 would not have been developed and financed in the way that it was if there was a likelihood that the TEP would have applied to the development of the pipeline*".[779]

The EU has frustrated NSP2AG's legitimate expectations

530. The Amending Directive fundamentally denied and frustrated NSP2AG's expectations.[780] As discussed further at Section III.6,[781] the adoption of the Amending Directive, which was the result of the Improper Legislative Process and achieved the deliberate Exclusion of Nord Stream 2 from the Derogation Regime, is not a minor legislative change, but a "*total*" one,[782] which changed the essential characteristics of the legal regime on which NSP2AG relied when it made its investment, thereby breaching NSP2AG's legitimate expectation of a stable legal and business environment.[783] The significance of the legislative change, and its impact

776 [redacted]

777 [redacted]; Expert Report of Swiss Economics, Chapter 7 and in particular paras 181-183.

778 [redacted]; Expert Report of Mr Peter Roberts, paras 25-26.

779 Expert Report of Mr Peter Roberts, para 21.

780 *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1, Award of 2 December 2019), para 263.

781 Reply Memorial, paras 550-555. See also Memorial, paras 417, 436-440.

782 **Exhibit RLA-137**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15, Award of 31 October 2011), para 374.

783 Memorial, para 425.

on existing investment in offshore import pipelines is expressly recognised in Recital 4 and the Article 49a derogation regime. It has also been recognised by Advocate General Bobek:

> "*However, perhaps more significantly, as a matter of basic economic reality, pipelines are not clementines. Such a major infrastructure project is not a business activity that begins overnight. In the present case, given the pipeline's advanced stage of construction and the significant investment made by the appellant over a number of years, the contested measure will have numerous consequences on the appellant's corporate structure and manner in which it can operate its business*".[784]

An overriding public interest does not justify the frustration of NSP2AG's legitimate expectations

531. NSP2AG has recognised in its Memorial,[785] and also in this Reply Memorial,[786] that States have the right to regulate, but argues that this right is not unlimited.[787] The EU in its Counter-Memorial, however, has taken the unsupported position that "*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*" (emphasis added).[788] This statement is not only unsupported by any authority, but is a blatant misstatement of the law – it is incorrect that the State's right to regulate overrides the investors' legitimate expectations.

532. As explained above,[789] in NSP2AG's submission, the host State's right to regulate must be balanced against the investor's legitimate expectation that the State will maintain a stable legal and business environment.[790] There is no rule or consensus that indicates that the State's right to regulate must always prevail, or override the investors' interests, even if there is a public interest in the regulation. The question of whether the investor's legitimate expectations were breached is a factual one,[791] and the prevailing interest is to be determined on a case-by-case basis as a result of a balancing act of the host State's and investor's competing interests. As the tribunal explained in the case of *Saluka:* "*The determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing*

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784 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 103.
785 Memorial, para 425.
786 Reply Memorial, para 478.
787 Memorial, para 425.
788 Counter-Memorial, para 529.
789 Reply Memorial, para 447-448.
790 Memorial, para 425.
791 **Exhibit CLA-109**, *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* (ICSID Case No. ARB/05/20, Award of 11 December 2013), para 667.

of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other".[792]

533. In any case, even if it were accepted that in principle the EU's right to regulate should prevail if the Amending Directive pursued an overriding legitimate public interest, the EU should have demonstrated that such an interest was being pursued. As explained in Section V above and in Section VI.12. and para 385 of the Memorial,[793] the Purported Objectives of the Amending Directive are conflicting, entirely specious, and cannot be achieved.

534. In particular, the EU has not provided any meaningful evidence either before the Proposal or after, indicating how the Amending Directive can achieve its Purported Objectives, let alone demonstrated an "*overriding public interest*" in extending the Gas Directive's regulatory regime to the short sections of offshore import pipelines, in particular, in circumstances where the only such pipeline affected by the Amending Directive is Nord Stream 2.[794] If such "*overriding public interest*" existed, it begs the question as to why the EU had not made such amendments at an earlier date, and how the derogation regime can be justified at all.

VIII.2 The EU's actions have been arbitrary, unreasonable and discriminatory in breach of the guarantee of fair and equitable treatment and the EU's "non-impairment" obligation

The EU mischaracterises the relationship between FET and the express requirement not to impair an investment by unreasonable or discriminatory measures in Article 10(1)

535. As set out fully in the Memorial,[795] the EU has also breached its guarantee of FET by its arbitrary, unreasonable and discriminatory treatment of NSP2AG and Nord Stream 2 and has impaired NSP2AG's management, maintenance, use, enjoyment and disposal of its investment by way of a measure – the Amending Directive - which is both unreasonable and discriminatory. The EU mischaracterises the Claimant's case and improperly seeks to subsume the elements of the FET standard into the express obligation not to impair an investor's management, maintenance, use, enjoyment and disposal of its investment by unreasonable or discriminatory measures. As explained below, there is some overlap

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792 **Exhibit CLA-64**, *Saluka Investments BV (the Netherlands) v. Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 306.

793 Memorial, Section VI.12 and para 385.

794 NSP2AG expressly requested that the EU produce, among other things, "*Any Documents recording (or supporting) an assessment by the Commission or any other institution, body, agency, entity or individual representing the EU that the Amending Directive would contribute to the stated objectives of the Gas Directive, Gas Regulation and Amending Directive (in particular, strengthening the EU's security of supply, and enhancing competition and the functioning of the EU's internal market), dated or otherwise created between 9 June 2017 and 17 April 2019*". No such Documents were forthcoming. The evidential picture surrounding the development of the Proposal points overwhelmingly to the intent to disrupt and complicate the development and operation of the Nord Stream 2 pipeline and not to a legitimate public interest objective.

795 Memorial, Section VIII.3.

between the two obligations in terms of the way in which tribunals have assessed whether there has been a breach, and the same facts may give rise to a breach of both FET and the obligation of non-impairment. However, it is clear that the two obligations are distinct.

536. The EU does not dispute that the guarantee of fair and equitable treatment requires states to refrain from arbitrary, capricious or discriminatory measures against an investor's investment, or that conduct which is "*arbitrary, grossly unfair, unjust or idiosyncratic,* [or] *discriminatory*" will accordingly be a breach of a state's FET obligations.[796]

537. The EU incorrectly argues, however, that NSP2AG conflates the legal standard required and the relevant facts to establish breach of (i) the FET guarantee by way of arbitrary and discriminatory treatment and (ii) the express requirement not to impair an investment by unreasonable or discriminatory measures. It complains that the Claimant has "*fail*[ed] *to distinguish between the two standards*"[797] and, by reference to this complaint, the EU justifies addressing only the obligation of non-impairment by unreasonable or discriminatory measures in the Counter-Memorial.[798] In taking this approach, the EU has failed properly to address the Claimant's case.

538. The Claimant's case on the relationship between the two treaty protections is clear from its Memorial.[799] It is further summarised below:

i. The non-impairment provision in Article 10(1) is a separate and distinct treaty protection to the guarantee of FET.[800]

ii. Article 10(1) provides for an express obligation not to "*impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal*". It is clear that an unreasonable or discriminatory measure impairing an investment would, by definition, fail to be fair or equitable and would therefore automatically constitute a breach of FET.[801] However, the obligation to provide FET has a far broader meaning than non-impairment of "*unreasonable or discriminatory measures*". Accordingly, conduct which is unreasonable or discriminatory may constitute, or contribute cumulatively, to a breach of the guarantee of FET, without the claimant having demonstrated an impairment of the "*management, maintenance,*

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796 Memorial, para 394, citing **Exhibit CLA-68**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004), para 98; **Exhibit CLA-69**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8, Award of 12 May 2005), para 290.

797 Counter-Memorial, para 472 and 476.

798 Counter-Memorial, Section 3.1.7.

799 Memorial, Section VIII.4.

800 **Exhibit CLA-64**, *Saluka Investments BV (the Netherlands) v. Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), paras 435-445.

801 **Exhibit CLA-70**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010), para 259; **Exhibit CLA-239**, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. The Republic of India* (PCA Case No. 2013-09, Award on Jurisdiction and Merits of 25 July 2016), para 480; **Exhibit RLA-137**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15, Award of 31 October 2011), para 230.

use, enjoyment or disposal" of the investment (whether "*significant*", as alleged by the EU, or otherwise).[802]

iii. The express prohibition against impairment in Article 10(1) can be violated by measures that are unreasonable, even if they are not discriminatory.[803] This has not been challenged by the EU.

iv. Unlike Article 10(7), the prohibition on discrimination in Article 10(1) does not refer to any comparative element. Regardless of whether another investor or investment is factually in the same position as Nord Stream 2, the EU is capable of breaching Article 10(1) even just by singling out and targeting Nord Stream 2 (and such targeting is undoubtedly unreasonable, as well as discriminatory). Further, and in any case, and as fully described in the Memorial and in Section IV above, Nord Stream 2 has been discriminated against when compared to pipelines in like circumstances.

v. In assessing whether conduct is arbitrary, unreasonable or discriminatory, tribunals have tended to apply the same legal tests, whether the conduct is being reviewed against the guarantee of FET, or against an express obligation not to treat the investment arbitrarily, unreasonably or in a discriminatory manner or both. For the reasons summarised above, this does not, of course, mean that the two protections are co-extensive.

vi. Moreover, as the EU recognises, the same set of facts may give rise to breaches of both the FET standard and the express obligation not to impair an investment by unreasonable or discriminatory measures.[804] The EU's criticism of the Claimant's "*explicit factual cross-references between the two* [standards]" is therefore unwarranted.[805]

539. For the reasons explained in the Memorial,[806] the EU has breached its obligation not to impair the management, maintenance, use, enjoyment or disposal of the Claimant's investment by unreasonable or discriminatory measures. However, the discriminatory nature of the Amending Directive itself and the EU's conduct in deciding to embark on a course of regulatory action with the specific aim of impacting the Nord Stream 2 project (and not other like pipelines) also constitute a clear breach of the EU's guarantee to provide FET. It was (and is) entirely appropriate for the Claimant to address these two breaches separately.

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802 **Exhibit CLA-64**, *Saluka Investments BV (the Netherlands) v. Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 461.
803 Memorial, para 435.
804 Counter-Memorial, para 473, citing **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).
805 Counter-Memorial, para 476.
806 Memorial, Sections III.3, VIII.2-4.

540. For coherence in this responsive submission, and without prejudice to the Claimant's position that there are two distinct protections (both of which have been breached by the EU), in the remainder of this sub-section the Claimant addresses the EU's arguments as they have been presented in section 3.1.7 of the Counter-Memorial.

Breach of FET does not require "impairment", and "impairment" need not be "significant", to breach the "non-impairment" standard

541. The EU argues that, "*in order to establish a violation of the clause to protect investors from unreasonable and discriminatory measures, the Claimant must demonstrate … 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*".[807]

542. To the extent that the EU argues that this represents the elements that NSP2AG must show to establish a breach of the FET standard, it is plainly wrong. In order to demonstrate that arbitrary, discriminatory, or unreasonable conduct constitutes a breach of the FET standard, there is no requirement that there is a "*measure*" and there is no requirement to show "*impairment*", let alone "*significant impairment*". NSP2AG has demonstrated in the Memorial that the EU's actions are arbitrary, unreasonable and discriminatory and accordingly unfair and inequitable.[808] Nothing further is needed to establish the EU's breach of the FET standard.

543. Further, the EU's contention that "*without <u>significant</u> impairment of the investment, there is no breach of* [the non-impairment] *standard*" is not supported.[809] In *ESPF Beteiligungs GmbH v. Italy*, the majority of the tribunal found that: " *The ECT's clear language provides that <u>any impairment</u> will be sufficient to establish a breach of the ECT*" (emphasis added).[810] The tribunal continued:

> "*Accordingly, the majority of the Tribunal finds that there is <u>no requirement</u> that the impairment be "significant" in order for a claim to succeed. Rather, impairment "in any way" is all that is required. In the majority's view, the ECT protects against <u>any impairment</u> of the operation, management, maintenance, use, enjoyment or disposal of an investment, provided it is caused by unreasonable or discriminatory measures. The majority of the Tribunal notes that the majority of the authorities cited to it and those that it finds most persuasive have adopted this interpretation. For instance, the Saluka v. Czech Republic tribunal found that, in accordance with its ordinary*

807 Counter-Memorial, para 550.
808 Memorial, Section VIII.3.
809 Counter-Memorial, para 551.
810 **Exhibit CLA-240**, *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic* (ICSID Case No. ARB/16/5, Award of 14 September 2020), para 698.

meaning (Article 31 of the VCLT), "impairment" means "any negative impact or effect by 'measures'" taken by the host state, and that measures cover any act, step, proceeding or omission by the state, regardless of their content or aim" (emphasis added).[811]

544. The Claimant's investment is patently impaired by the Amending Directive: in particular, NSP2AG is forced to comply with unbundling and TPA requirements and to accept a regulated tariff on the German Section of Nord Stream 2, as opposed to the contractually agreed tariff under the GTA. It is forced to try to renegotiate the GTA [redacted] As a result of the Amending Directive, the planned project financing was not able to be achieved, [redacted]

545. Finally, the Saluka tribunal held that the term "*enjoyment*" means "*the exercise of a right which includes the beneficial use, interest and purpose to which property may be put, and implies* [the] *right to profits and income therefrom*".[816] It is clear that the Amending Directive has impaired the operation, management, use and enjoyment of the Claimant's investment in a "*significant*" way in that it requires the unbundling of the German section, TPA and the application of a regulated tariff, all of which undermine the GTA with Gazprom Export by which the Claimant intended to generate its "*profits and income*". As Advocate General Bobek has observed, a regulated TSO (as NSP2AG has become in respect of the German Section) becomes "*legally precluded from acting as a normal market operator that is free to*

811 **Exhibit CLA-240,** *ibid.*, para 700 and footnote 944, citing by way of example: "*Saluka v. Czech Republic: CL-057, ¶¶ 458-459 (citing Fisheries Jurisdiction Case (Spain v. Canada), Judgment on Jurisdiction of the Court, 4 December 1998, ICJ Reports (1998) ("Fisheries Jurisdiction"), ¶ 66); CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, 25 May 2005 ("CMS v. Argentina"): CL-071, ¶ 292 (noting that arbitrariness must result in the impairment of the investment); Azurix v. Argentina (Award): CL-082, ¶ 393 ("The question for the Tribunal is whether the measures taken by the Province can be considered to be arbitrary and have impaired 'the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal' of the investment of Azurix in Argentina.")*".

812 [redacted]

813 Expert Report of Mr Peter Roberts, para 31.

814 Expert Report of Swiss Economics, Chapter 6 and in particular 162-173; [redacted]

815 [redacted]

816 **Exhibit CLA-64**, *Saluka Investments BV (the Netherlands) v. Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 458.

choose its customers and pricing policy".[817] The Amending Directive impairs the Claimant's use of the German section of Nord Stream 2 with the consequential impact on the operation, management, use and enjoyment of the rest of the Nord Stream 2 pipeline.

The "non-impairment" obligation requires the Respondent's conduct to be both related to a rational policy and implemented in a reasonable way, with due regard for the consequences imposed on investors

546. The EU appears to agree with the Claimant's exposition of what constitutes an unreasonable or arbitrary measure, citing the same awards as the Claimant in many instances.[818] The EU also cites with approval the approach of the tribunal in *Micula v. Romania*.[819] The *Micula* tribunal, in the paragraph cited by the EU, confirmed that:

> "*for a state's conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state's acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors*" (emphasis added).[820]

547. However, the EU also states that: "*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*".[821] Such a proposition is entirely unsupported.[822] Indeed, it is contradicted by the principles cited by the EU in its preceding paragraphs, which make clear that "*it is not sufficient that* [a measure] *be related to a rational policy*" (emphasis added).[823]

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817 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 96.

818 Counter-Memorial, paras 555-556, citing **Exhibit RLA-145/Exhibit CLA-105**, *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24, Award of 27 August 2008) and **Exhibit RLA-122/Exhibit CLA-108**, A*ES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22, Award of 23 September 2010).

819 Counter-Memorial, para 557, citing **Exhibit CLA-109**, *Micula, S.C. European Food S.A. v. Romania* (ICSID Case No. ARB/05/20, Award of 11 December 2013), para 525.

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

821 Counter-Memorial, para 558.

822 The EU's proposition is plainly not supported by the paragraph it cites from *Enron v. Argentina* in paragraph 558 of the Counter-Memorial. The statement of the *Enron* tribunal must, in any case, be understood by reference to the measure in question and the "*unfolding crisis*" to which it was addressed (**Exhibit RLA-141/Exhibit CLA-97**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3, Award of 22 May 2007), para 281).

823 **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). See also **RLA-122/Exhibit CLA-108**, A*ES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22, Award of 23 September 2010), cited by the EU in para 556 of the Counter-Memorial, which makes clear that the policy in itself must be "rational" and that the challenged measure must also be reasonable ("*That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented*").

548. Further, the EU cites the criteria identified by Professor Schreuer in *EDF v. Romania* as having been "*widely accepted to be relevant for the determination of a measure as "unreasonable/arbitrary"*".[824] The EU provides no support for its assertion that the criteria are "*widely accepted*", although the Claimant accepts that these criteria are indicative of a measure which is arbitrary or unreasonable, such as to potentially violate the non-impairment obligation in Article 10(1) of the ECT (assuming that impairment can be shown).

549. Moreover, the EU does not substantiate its proposition that: "*It follows* [from the criteria elucidated by Professor Schreuer and summarised by the *EDF* tribunal] *that the required threshold to establish violation of this provision* [i.e. the non-impairment obligation in Article 10(1)] *is high*".[825]

550. In any case, the EU's conduct in connection with the Amending Directive clearly meets three of the four alternative "*criteria*" identified by Professor Schreuer and applied by the *EDF* tribunal. In particular:

i. The Amending Directive is a measure that inflicts damage on the investor without serving any apparent legitimate purpose as described in the Memorial, Section VI.12 and in Section V above. In particular, while the EU argues that the Amending Directive was promulgated to address the Purported Objectives, it is clearly explained in the Memorial, in the First Expert Report of Professor Cameron[826] and in Section V above, why these Purported Objectives are specious.

ii. The Amending Directive is a measure taken for reasons that are different from those put forward by the decision-maker as described in the Memorial, Section VI and in Section IV and V above.

iii. The Amending Directive was passed in wilful disregard of due process and proper procedure as described in the Memorial, Section VI.10 and in Section IV.4 above.

551. In paragraphs 574 to 582 of its Counter-Memorial, the EU sets out a very high level explanation justifying the Amending Directive by reference to what it says is a "*rational policy*" with regard to the Single Market. In particular, the EU asserts that "*the policy objective* […] *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. That is the "proper purpose" of the Amending Directive*".[827] However, as is fully described in Section V of this Reply Memorial (as well as in the Memorial and the First and Second Expert Reports of Professor Cameron), these objectives cannot be achieved by the extension of the Gas Directive rules to the sections of

824 Counter-Memorial, para 559, Legal Opinion of Prof. Schreuer, cited in **Exhibit RLA-160**, *EDF (Services) Limited v. Romania*, (ICSID Case No. ARB/05/13, Award of 8 October 2009), para 303.
825 Counter-Memorial, para 560.
826 First Expert Report of Professor Cameron, Sections 6(5) and 6(6).
827 Counter-Memorial, para 576.

third country offshore import pipelines in EU territory (still less when it in practice applies to only one of them). In particular, there is no treaty or EU policy objective to create an integrated energy market with Russia, Algeria, Morocco and Libya, and the integration of these third countries in the EU internal energy market is not achieved by the unilateral extension of EU legislation to the territorial sea section of offshore import pipelines. For all the discussion of the EU internal market, the EU's description makes no attempt to relate its purported policy objective to the steps that it has actually taken and the practical effects of those steps.

552. Moreover, the EU argues by reference to onshore import pipelines that the impact of the Amending Directive will not be limited to approximately 16% of all EU third country import capacity (as asserted by NSP2AG). As described in paragraph 218.vi such argument is unsustainable. As demonstrated by the Claimant in the Memorial, and in Section III above, the Amending Directive in practical reality affects only Nord Stream 2. Consequently, the Claimant's argument that only 16% of third country import pipeline capacity is affected is correct.

553. Furthermore, none of the EU's explanations of the purported policy rationale address Article 49a. This provision, in itself, by its use of the words "*completed by 23 May 2019*" to distinguish between Nord Stream 2 and all other offshore import pipelines, is both arbitrary and unreasonable. In support of its argument that the Amending Directive supports a rational policy, the EU claims that: "*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 … 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*".[828] For the reasons fully explained in Section IV.3 above, the "*coherent regulatory framework*" described by the EU is a fallacy.[829] Article 36 is not available for pipelines in relation to which the final investment decision has already been made. Article 36 provides that "*Major new gas infrastructure* […] *may* […] *be exempted under the following conditions:* […] *the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted*".[830] Accordingly, Article 49a is (as described in Recital 4 of the Amending Directive itself), a transitional provision intended to

828 Counter-Memorial, para 583.
829 Reply Memorial, paras 172-182.
830 **Exhibit CLA-3**, Amending Directive; Second Expert Report of Professor Cameron, para 5.3(ii). See also First Expert Report of Professor Cameron, para 7.22. Professor Cameron also notes that if Article 36 had been available for pipelines in which investment had already been made, Article 49a would not have been needed at all.

protect existing investment, and Nord Stream 2 was excluded from its scope because the Amending Directive is specifically targeted at Nord Stream 2.

554. The specific targeting of Nord Stream 2 was achieved further to the Improper Legislative Process, the EU's defence of which is inadequate as described further in Section VI.10 of the Memorial and Section IV.4 above.

555. The Amending Directive is therefore arbitrary and unreasonable, so as to constitute a breach by the EU of both its obligation to provide fair and equitable treatment and its obligation not to impair the management, maintenance, use, enjoyment or disposal of the Claimant's investment through unreasonable or discriminatory measures.

Discrimination need not be on the grounds of nationality to violate Article 10(1) of the ECT

556. The EU observes that: "*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*".[831] The purpose of this statement is unclear but to the extent that this is intended to suggest that the discrimination against an investor must be based on its nationality or foreignness, this is not borne out by the wording of the ECT nor jurisprudence.[832] In order to establish that the Amending Directive is a discriminatory measure, it is not necessary for NSP2AG to show that Nord Stream 2 is treated differently from other like pipelines on the grounds of the nationality of NSP2AG.

557. As discussed in the Memorial, in Section IV above, and further summarised below, the discrimination against Nord Stream 2 in comparison to the like pipelines is patent. Nord Stream 2 was not just the "*trigger*" for the Amending Directive (as described by the EU),[833] it was its *raison d'être.*

Determination of a suitable comparator depends on the circumstances: the circumstances demonstrate that the relevant comparators are other offshore import pipelines

558. The parties agree that the determination of a relevant comparator for the purposes of establishing discrimination depends on the circumstances.[834] In the Memorial,[835] and in Section III.2 of this Reply Memorial, the Claimant has explained fully, by reference to the

831 Counter-Memorial, para 561.
832 **Exhibit CLA-85**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL, Award of 26 January 2006), para 177.
833 Counter-Memorial, para 264. See also First Expert Report of Professor Maduro, para 273.
834 Memorial, para 405 and Counter-Memorial, para 567, in both cases citing *S.D. Myers v. Canada* **(Exhibit CLA-72**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL, Partial Award of 13 November 2000).
835 Memorial, para 406 and 407.

purpose for which the comparison is being made and the relevant circumstances, why the other offshore import pipelines are the relevant comparators to Nord Stream 2.[836]

559. The EU's assertion that "*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*" is simply untrue.[837] Paragraphs 406 and 407 of the Claimant's Memorial read:

> "*406. In the present case, the appropriate comparators for NSP2AG and its investment in the Nord Stream 2 pipeline are other offshore third country import pipelines, in which investment had been made at the time when the Amending Directive was brought into force.*
>
> *407. These are all materially similar projects within the same economic sector, supplying gas to the EU market. These are projects which have been commenced under the same legal framework as the Nord Stream 2 project (i.e. before the requirements of unbundling, third party access and tariff regulation were applicable to the offshore elements of those pipelines within the territorial sea of an EU Member State) and are similarly affected should these requirements apply. It is undeniable that Nord Stream 2 and NSP2AG are in a like position to all the other offshore import pipeline projects in relation to which a decision to invest was made, significant investment committed, and substantial construction having taken place before the Gas Directive became legally applicable to offshore import pipelines. Moreover, NSP2AG is in a like position to the investors in these other pipelines in its need to be able to recoup its investment*" (emphasis added).

560. As described in Section III.2 above, all other offshore import pipelines, (namely the MEG, Medgaz, Transmed, Greenstream and Nord Stream 1 pipelines), were unregulated and now, because of the Amending Directive, fall within the scope of the Gas Directive. These are the five pipelines that would, had they not been granted a derogation under Article 49a, be forced to reconsider and undo the contractual arrangements currently in place in relation to the use of the pipelines to accommodate TPA, a regulated tariff and the requirements of unbundling on the section within EU territorial waters. As noted in the Memorial, the Commission itself explained when tabling its Proposal, that along with Nord Stream 2 these are the only gas pipelines impacted by the Amending Directive.[838] This was also confirmed in the Commission's presentation to the Member States on 18 February 2018.[839]

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836 Memorial, para 407.
837 Counter-Memorial, para 591.
838 Memorial, Section VI.11 and para 512(ii).
839 **Exhibit C-205**, Commission Energy Working Party presentation, "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", 20 February 2018.

561. The EU provides no reason as to why it is not appropriate for the Tribunal to consider these five pipelines as suitable comparators when analysing whether the EU's actions in connection with the Amending Directive are discriminatory. On the contrary, the EU acknowledges that these are comparable pipelines but argues that the comparison should be broader, stating that "*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*".[840]

562. As explained in Section III.3 above, the EU's attempts to muddy the water by reference to other pipelines should be rejected. It is clear that the various pipelines referred to by the EU are not relevant for the purposes of the comparison as to the "circumstances" surrounding the Amending Directive.

563. In particular, the EU's reference to "onshore" import pipelines as being logical comparators to Nord Stream 2 is nonsensical.[841] The Amending Directive does not affect "onshore" import pipelines, as fully explained in Section III.1 by reference to numerous of the EU's own documents that confirm this. The EU's argument that "onshore" pipelines are relevant comparators is inexcusably misleading.

564. Further, the EU has sought to bring into "*the circumstances*", the analysis that would be made by the relevant National Regulatory Authority under Article 36 or Article 49a as to whether an individual pipeline should be granted an exemption or derogation, as the case may be. It states that "*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*".[842] The EU then argues that the "*comparison must be made in light of the legal conditions attached to such decisions* [under Article 36 and Article 49a]*, in particular the concerns about security of supply, the impact on competition and the functioning of the EU internal energy market*".[843]

565. This analysis of course ignores the true focus and intent of the EU's discriminatory actions: the Deliberate Exclusion of Nord Stream 2 from the derogation regime. By use of the words "*completed before 23 May 2019*", there is no "*specific assessment*" of a "*specific application*" for a derogation under Article 49a for Nord Stream 2 by reference to the criteria in Article 49a. This is confirmed by the decisions of the BNetzA and the OLG, and the Opinion of Advocate General Bobek.[844] Under Article 49a, the broad discretion to grant a derogation

840 Counter-Memorial, para 595.
841 Counter-Memorial, para 594-595.
842 Counter-Memorial, para 590.
843 Counter-Memorial, para 592.
844 **Exhibit CLA-196**, *Nord Stream 2 AG v. Bundesnetzagentur*, Decision of the Oberlandesgericht (Higher Regional Court) Düsseldorf of 25 August 2021, VI-3 Kart 211/20 [V] (German original and English

"*for objective reasons, such as to enable the recovery of investment made or for reasons of security of supply*" only applies "*in respect of gas transmission lines between a Member State and a third country completed before 23 May 2019*".[845]

566. The EU's reference to Article 36 is also a distraction and ignores the circumstances that form the relevant background to the Tribunal's evaluation of whether NSP2AG has been discriminated against.[846] As explained in the Memorial,[847] the First Expert Report of Professor Cameron,[848] the Second Expert Report of Professor Cameron[849] and Section IV.3 above, Article 36 is substantially different from Article 49a. None of the comparator pipelines need to (or could) apply for an exemption under Article 36.

567. Finally, the EU appears to try to distinguish Nord Stream 2 from the other five offshore import pipelines by reference to its "*unique and specific characteristics*", being that it duplicates supply capacity provided by Nord Stream 1, has greater capacity than the Mediterranean import pipelines and is owned by Gazprom that has an export monopoly in pipeline gas in Russia.[850] For all these reasons, Nord Stream 1 is of course an almost identical comparator to Nord Stream 2. Nor is any serious attempt made to distinguish the other four offshore import pipelines on the grounds of these characteristics.[851]

568. Instead the EU asserts that the "*unique and specific characteristics*" of Nord Stream 2 may influence the BNetzA to refuse to grant a derogation or exemption, which would not be "*illegal "discrimination"*", but "*the rational and wholly justified exercise of a legitimate State regulatory power*".[852] Of course, this deliberately misses the point. Nord Stream 2 has not been denied a derogation based on these considerations, but on the basis that it was not "*completed before 23 May 2019*". Supposition about what the BNetzA may have decided had it been in a position to grant a derogation for any other reason is irrelevant. Notably, the BNetzA did grant a derogation to Nord Stream 1, which as the EU notes, is of exactly the same capacity as Nord Stream 2, and transports gas from Russia to Germany via a very similar route.

The EU has the burden of proving why differential treatment in like circumstances is justified

569. The EU argues that "*the examination whether investors are comparable must also take into account circumstances that would justify governmental regulations that treat them differently*

translation); **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021.

845 **Exhibit CLA-3**, Amending Directive, Article 49a.

846 Counter-Memorial, paras 590-592.

847 Memorial, Section VI.13.

848 First Expert Report of Professor Cameron, paras 7.1-7.46.

849 Second Expert Report of Professor Cameron, para 5.3.

850 Counter-Memorial, para 593.

851 Further, as noted in paragraph 561, the EU includes the five offshore import pipelines within the scope of the "*comparable pipelines*" that it urges the Tribunal should consider (Counter-Memorial, para 595).

852 Counter-Memorial, para 593.

in order to protect the public interest".[853] This confuses two elements of the discrimination standard and does not follow from the statement cited by the EU.[854]

570. The EU cites Dolzer & Schreuer:[855] "*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*".[856] This statement is uncontroversial. However, it does not give rise to the conclusion that the examination of whether like circumstances exist should include considering any justification as to the differential treatment.[857] The question of whether differential treatment is justified in like circumstances represents a second stage of enquiry and a shifting of the burden of proof from the investor to the respondent. This is clear from *Nykomb v. Latvia*, which is cited with approval by the EU:

> "*The Arbitral Tribunal accepts that in evaluating whether there is discrimination in the sense of the Treaty one should only "compare like with like". However, little if anything has been documented by the Respondent to show the criteria or methodology used in fixing the multiplier, or to what extent Latvenergo is authorized to apply multipliers other than those documented in this arbitration. On the other hand, all of the information available to the Tribunal suggests that the three companies are comparable, and subject to the same laws and regulations. In particular, this appears to be the situation with respect to Latelektro-Gulbene and Windau. In such a situation, and in accordance with established international law, the burden of proof lies with the Respondent to prove that no discrimination has taken or is taking place. The Arbitral Tribunal finds that such burden of proof has not been satisfied, and therefore concludes that Windau has been subject to a discriminatory measure in violation of Article 10 (1)*" (emphasis added).[858]

571. The majority of the tribunal in *Feldman v. Mexico* made clear that the burden shifts from the claimant to the respondent when considering discrimination:

> "*On the question of burden of proof, the majority finds the following statement of the international law standard helpful, as stated by the Appellate Body of the WTO: …*

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853 Counter-Memorial, para 568.
854 Counter-Memorial, para 568.
855 Counter-Memorial, para 568.
856 **Exhibit RLA-165**, R. Dolzer and C. Schreuer, "Standards of Protection", in *Principles of International Investment Law* (2nd Edition) 2012, p 200.
857 The statement to this effect by the tribunal in *SD Myers v. Canada* referred to by the EU must be considered in context. The tribunal continued "*The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector"*" (**Exhibit CLA-72**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL, Partial Award of 13 November 2000), para 250).
858 **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC, Award of 16 December 2003), p34 at 4.3.2(a).

various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption. Here, the Claimant in our view has established a presumption and a prima facie case that the Claimant has been treated in a different and less favorable manner than several Mexican owned cigarette resellers, and the Respondent has failed to introduce any credible evidence into the record to rebut that presumption" (emphasis added).[859]

572. The majority's conclusion that there was discrimination was based on finding that "*the burden of proof was shifted from the Claimant to the Respondent, with the Respondent then failing to meet its new burden, and on an assessment of the record as a whole*".[860]

573. In *Pope & Talbot v. Canada*, the tribunal held that:

> "*A formulation focusing on the like circumstances question, on the other hand, will require addressing any difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments. That is, once a difference in treatment between a domestic and a foreign-owned investment is discerned, the question becomes, are they in like circumstances? It is in answering that question that the issue of discrimination may arise*".[861]

574. Further, as the tribunal in *Saluka* explained, "*the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor*" such that any measures which treat similarly situated entities differently without justification will be considered a discriminatory measure.[862]

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859 **Exhibit CLA-86**, *Feldman v. Mexico* (ICSID Case No. ARB (AF)/99/1, Final Award of 16 December 2002), para 177.

860 **Exhibit CLA-86**, *Feldman v. Mexico* (ICSID Case No. ARB (AF)/99/1, Final Award of 16 December 2002), para 176.

861 **Exhibit CLA-76**, *Pope & Talbot Inc. v. The Government of Canada* (NAFTA Case, Award on the merits of phase 2, 10 April 2001), para 79.

862 **Exhibit CLA-64**, *Saluka Investments B.V. v. The Czech Republic* (UNCITRAL, Partial Award of 17 March 2006), para 460 and see also para 313: "*State conduct is discriminatory if, (i) similar cases are (ii) treated differently (iii) and without reasonable justification*".

575. The EU's statement that it must be "*established by the Claimant that* […] *there is no reasonable justification for the differential treatment*" is wrong.[863] NSP2AG has established that it is in a comparable situation to the five other offshore import pipelines. NSP2AG has established that it is being treated differently to those comparable pipelines due to the Deliberate Exclusion of Nord Stream 2 from the Derogation Regime. The EU argues vociferously that, contrary to all evidence, the Amending Directive is a measure of general and abstract application and not discriminatory. In such circumstances, it would be incongruous to suggest also that NSP2AG should have the burden of proving the negative proposition i.e. that there is no reasonable justification for the discrimination which the EU denies exists. If there is such reasonable justification (which is denied), it is for the EU to set it out in compelling terms.[864] It has not done so. Until the EU puts forward a proper case on why NSP2AG can legitimately be distinguished from the other offshore import pipelines, NSP2AG clearly has no burden to discharge in relation to the reasonableness or otherwise of the differential treatment.

576. There is no reasonable justification for the targeting and treatment of Nord Stream 2 in connection with the Amending Directive, as evidenced by the deliberate Exclusion of Nord Stream 2 from the Derogation Regime and the EU's Admissions of Targeting Nord Stream 2, and its different treatment from the other offshore import pipelines. The EU has provided no justification – by reference to the characteristics of Nord Stream 2 or otherwise – as to how the imposition of the Gas Directive Rules on the German Section of the pipeline will remove obstacles to the completion of the internal gas market.

VIII.3 The EU has breached the duty of most constant protection and security

577. Article 10(1) of the ECT provides that "*Investments shall also enjoy the most constant protection and security*" ("**CPS**" or "**FPS**").[865]

578. As explained in the Memorial:[866]

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863 As is the EU's assertion that "*it is the Claimant who bears the burden to "fully substantiate" its allegations"* and show that the challenged measure makes "*any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors*". *It is the Tribunal's role … to verify that there is a rational or objective justification to apply differential treatment*". This is both a misstatement of the standard applicable to establish discrimination (as demonstrated by the EU's reference to **Exhibit RLA-171**, *Siemens v. Argentina*, in support of its assertion) and a misstatement of the role of the Tribunal. In the paragraph of *Siemens v. Argentina* cited by the EU, the tribunal held that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.

864 This accords with the EU's statement that the Tribunal should "*verify that there is a rational or objective justification to apply differential treatment*" (Counter-Memorial, para 573).

865 Bilateral investment treaties traditionally refer to "*full protection and security*" (or "**FPS**"). As set out in the Claimant's Memorial at para 448, the terms "*constant*" and "*full*" are used interchangeably and there is no substantive difference. This proposition was not challenged by the EU and appears to have been accepted. Therefore, the case law analysis of the FPS standard in this section can be applied to the CPS standard under the ECT.

866 Memorial, Section VIII.5.

i. the CPS standard in the ECT extends beyond a mere requirement for physical security and obliges the EU to maintain through its legal and regulatory framework a secure investment environment for NSP2AG's investment;

ii. the EU breached that obligation by (i) manipulating its legislative process to target NSP2AG through a piece of legislation purportedly of general application; (ii) bringing the Amending Directive into effect through the Improper Legislative Process; (iii) causing the Dramatic and Radical Regulatory Change; and/or (iv) the EU's Lack of Transparency.

579. The EU makes three principal arguments in its Counter-Memorial:

i. First, it contends that the scope of the CPS standard is limited to an obligation of due diligence to prevent actual physical damage by third parties and does not extend to an obligation to provide legal security.[867]

ii. Second, it argues that even if the CPS standard encompasses legal security, it only goes as far as requiring the EU to provide effective judicial redress.[868]

iii. Third, it asserts that in any event its conduct did not breach the CPS standard even on a broad reading of the ECT. It argues that the Amending Directive's stated objectives reflect its genuine purpose; that the legislative process was duly followed; that the Claimant should have understood that the EU's intention was that the Gas Directive applied to the Nord Stream 2 pipeline; and that it acted in full transparency.[869]

580. The Claimant explains below, in turn, why each of these arguments is incorrect and should be rejected.

The scope of the obligation to provide most constant protection and security in Article 10(1) of the ECT extends beyond mere physical protection

581. The EU asserts,[870] and the Claimant agrees, that whatever the scope of the CPS standard, it imposes only an obligation of due diligence which requires the EU to exercise reasonable care in the protection of NSP2AG's investment. It is not a strict liability standard. The EU has, however, failed to meet the standard guaranteed under Article 10(1). As explained below, in contrast to providing constant protection and security in line with its obligation under the ECT, the EU has taken positive steps to harm the Claimant's investment by enacting the Amending Directive.

867 Counter-Memorial, paras 609-613.
868 Counter-Memorial, paras 616-623.
869 Counter-Memorial, paras 626-629.
870 Counter-Memorial, para 612.

582. The parties disagree whether the CPS standard in Article 10(1) protects only from physical damage or interference by third parties (the narrow reading espoused by the EU), or whether it encompasses the maintenance of a secure legal environment (as set out by the Claimant). The Claimant's submits that its position is correct on a proper interpretation of Article 10(1) and being well-supported by authorities.

583. The starting point for determining the proper scope of the CPS standard is Article 10(1) of the ECT, interpreted consistently with the principles of treaty interpretation in Articles 31 and 32 of the VCLT. It is telling that the EU has made no attempt whatsoever to construe the terms of the ECT. That is because, if properly construed, the CPS standard in Article 10(1) has the meaning for which the Claimant contends.

584. Applying the test in Article 31 of the VCLT, the ordinary meaning of the phrase "*constant protection and security*" is not on its face limited to physical security. On the contrary, the use of the word "*constant*" indicates that the guarantee is unfettered in scope and goes beyond mere physical security.

585. Thomas Wälde wrote of the CPS obligation in the ECT:

> "*This obligation would not only be breached by active and abusive exercise of State powers but also by the omission of the State to intervene where it had the power and duty to do so to protect the normal ability of the investor's business to function... a duty, enforceable by investment arbitration, to use the powers of government to ensure the foreign investment can function properly on a level playing field, unhindered and not harassed by the political and economic domestic powers that be*".[871]

586. A number of tribunals have reached the same conclusion when construing identical or similar wording in other treaties.

587. In *National Grid*, the tribunal, addressing Article 2(2) of the Argentina – UK BIT,[872] held that:

> *"the phrase 'protection and constant security' as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets. This conclusion is reinforced by the inclusion of this commitment in the same article of the Treaty as the language on fair and equitable treatment. In applying this standard of protection to the facts of the instant case, the Tribunal finds that the changes introduced in the Regulatory*

871 **Exhibit CLA-241**, T.W. Wälde, "Energy Charter Treaty-based Investment Arbitration: Controversial Issues", Journal of World Investment & Trade, vol. 5, no. 3, June 2004, p. 391.

872 **Exhibit CLA-242**, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (the UK-Argentina BIT), 11 December 1990. The relevant part of Article 2(2) of the UK-Argentina BIT provides that "*Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party*."

Framework by the Measures, […] *are contrary to the protection and constant security which the Respondent agreed to provide for investments under the Treaty*" (emphasis added).[873]

588. Similarly, the tribunal in *Azurix* construed an FPS provision in substantively the same terms as Article 10(1).[874] It held that:

> "*It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view" with the consequence that "when the terms "protection and security" are qualified by "full" and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security".*[875]

589. The tribunal in *Biwater Gauff* referred to *Azurix,* and confirmed that:

> *"when the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments*".[876]

590. In *Vivendi II*, the tribunal interpreted the FPS guarantee in Article 5(1) of the France – Argentina BIT,[877] and concluded that:

> "*the text of Article 5(1) does not limit the obligation to providing reasonable protection and security from "physical interferences", as Respondent argues. If the parties to the BIT had intended to limit the obligation to "physical interferences", they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific*

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873 **Exhibit RLA-157**, *National Grid P.L.C. v. Argentina Republic* (UNCITRAL, Award of 3 November 2008), para 189.

874 **Exhibit CLA-243**, Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (the USA-Argentina BIT), 14 November 1991. Article II(2)(a) of the USA-Argentina BIT provides that the "*Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law*".

875 **Exhibit CLA-83**, *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12, Award of 14 July 2006), paras 407-408.

876 **Exhibit CLA-96**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22, Award of 24 July 2008), para 729.

877 **Exhibit CLA-244**, Agreement between the Government of the French Republic and the Government of the Argentine Republic on the Reciprocal Promotion and Protection of Investments (the France-Argentina BIT), 3 July 1991. Article 5(1) of the France-Argentina BIT provides in relevant part that: "*investments … shall enjoy … protection and full security in accordance with the principle of fair and equitable treatment referred to in Article 3 of this Agreement*".

wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment".[878]

591. The CPS standard in Article 10(1) of the ECT is not expressly linked to the FET standard as it is in Article 5(1) of the France-Argentina BIT, which was under consideration in *Vivendi II*. Yet, the *Vivendi II* tribunal's reasoning applies here with equal force: had the parties to the ECT intended to limit Article 10(1) to protection from physical violence, they would have expressly said so.

592. Most recently, the tribunal in *Global Telecom Holding S.A.E. v. Canada*, dealing with Article II(2)(b) of the Canada – Egypt BIT,[879] held that:

> "*The Tribunal has reviewed the terms of the BIT in accordance with Article 31 of the VCLT and in light of the authorities adduced by the Parties, and has noted that the terms "protection" and" security" in Article II(2)(b) are qualified by "full" without any exclusion or limitation. The Tribunal therefore agrees with GTH that the standard of "full protection and security" as set in the BIT is not limited to safeguards against physical interference by State organs and private persons, but extends to accord legal safeguard for the investment and the returns of the investor*".[880]

593. The *Global Telecom* tribunal continued:

> "*Canada's reference to recent treaty practice limiting FPS to ensuring the physical safety of the foreign investment shows that, had the Contracting States wished to limit FPS in such a way, they could have spelled the limitation out in the treaty itself. No such attempt was made in the BIT. The investors are therefore entitled to the full extent of the unqualified assurance of full protection and security that each of the two Contracting States has committed in Article II(2)(b) to accord investments or returns of investors of the other Contracting State*".[881]

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878 **Exhibit CLA-245**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No ARB/97/3, Award of 20 August 2007), para 7.4.15.

879 **Exhibit CLA-246**, Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments (the Canada-Egypt BIT), 13 November 1996. Article II(2) of the Canada–Egypt BIT provides that "*Each Contracting Party shall accord investments or returns of investors of the other Contracting Party (a) Fair and equitable treatment in accordance with principles of international law, and (b) Full protection and security*."

880 **Exhibit CLA-247**, *Global Telecom Holding S.A.E. v. Canada* (ICSID Case No. ARB/16/16, Award of 27 March 2020) (redacted), para 664.

881 **Exhibit CLA-247**, *ibid*., para 666. See also, **Exhibit CLA-112**, *Renée Rose Levy de Levi v. Republic of Peru* (ICSID Case No. ARB/10/17, Award of 26 February 2014), para 406: "[…] *the standard of full protection and security has gone from referring to mere physical security and has evolved to include, more generally, the rights of investors."*; **Exhibit CLA-248**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL, Partial Award of 13 September 2001), para 613: "*The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued*."; **Exhibit RLA-171**, *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8, Award of 6 February 2007), para 303: "*The obligation to provide full protection and security is wider than "physical" protection and security.* […]

594. Furthermore, NSP2AG's reading of the CPS provision in Article 10(1) is supported by other sections of the ECT, which the Tribunal can take into account pursuant to Article 31 of the VCLT.

i. First, the Objectives of the European Energy Charter make clear that one of its aims is to "*create a climate favourable to the operation of enterprises and to the flow of investments*".[882] According to the tribunal in *Azurix*,[883] maintaining a stable legal environment is of great importance to investors and is directly linked to the objective of the treaty. That militates in favour of a broad reading of the CPS standard, not one limited to physical protection and security.

ii. Second, the definition of "*Investment*" in Article 1(6) of the ECT is broad as it covers "*every kind of asset*", which expressly includes intangible assets. The inclusion of intangible assets suggests that the treaty protections were intended to have a broader scope than mere physical security: it is meaningless to speak of the physical security of an intangible asset. The tribunal in *Siemens v. Argentina* adopted similar reasoning in construing the Germany – Argentina BIT.[884]

595. The EU refers to *OperaFund et al. v. Spain* in support of its argument for an unduly narrow interpretation of the CPS protection in Article 10(1).[885] However, the *OperaFund* tribunal did not have any need to analyse the CPS standard in any depth. The CPS argument was raised at an early stage of the proceedings and the claimant seems to have abandoned it before its Reply Memorial.[886] The tribunal held that it "[did] *not have to address and decide* [on the argument]".[887] The statement the EU relies upon was made almost in passing and without relying on any authorities.[888]

In the instant case, "security" is qualified by "legal"; **Exhibit CLA-249**, *Anglo American plc v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/14/1, Award of 18 January 2019), para 482: "*if there are no express limits in the Treaty, this obligation is not limited to physical security, but also comprises a duty to afford legal security to investments*".

882 **Exhibit CLA-2**, European Energy Charter Title I: Objectives, p 29. The objectives of the European Energy Charter have been implemented into the ECT through Article 2 of the ECT, which provides that "*this Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter*" (emphasis added).

883 **Exhibit CLA-83**, *Azurix Corporation v. Argentine Republic* (ICSID Case No ARB/01/12, Award of 14 July 2006*),* para 408.

884 **Exhibit CLA-58**, *Siemens A.G. v. Argentine Republic* (ICSID Case No ARB/02/08, Award of 17 January 2007), para 303.

885 **Exhibit RLA-126**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36, Award of 6 September 2019), para 576.

886 **Exhibit RLA-126**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36, Award of 6 September 2019), para 574.

887 **Exhibit RLA-126**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain* (ICSID Case No. ARB/15/36, Award of 6 September 2019), para 576.

888 The tribunal in *OperaFund* does refer to *Mamidoil v. Albania* which only supports that the CPS standard requires due diligence, rather than strict liability. See **Exhibit RLA-149**, *Mamidoil Jetoil Greek Petroleum Products S.A. v. Albania* (ICSID Case No ARB/11/24, Award of 30 March 2015).

596. The EU also contends that "*the CPS standard must be distinguished from the FET standard stipulated in Article 10(1) of the ECT*".[889] The Claimant acknowledges that there is a close relationship between the FET and CPS protections in the ECT – they are addressed in the same sentence of the same article of the Treaty. However, if anything, that relationship militates in favour of a broad reading of the CPS standard. That was the approach taken by the tribunal in *National Grid v. Argentina*.[890] Having noted that the FET and FPS provisions were contained in the same sentence of Article 2(2) of the UK – Argentina BIT,[891] the tribunal held that:

> "*Given that these terms are closely associated with fair and equitable treatment, which is not limited to such physical situations, and in the context of the protection of investments broadly defined to include intangible assets, the Tribunal finds no rationale for limiting the application of a substantive protection of the Treaty to a category of assets –physical assets– when it was not restricted in that fashion by the Contracting Parties*".[892]

597. After affirming the decision in *CME*,[893] the tribunal took the view that:

> *"the phrase "protection and constant security" as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets. This conclusion is reinforced by the inclusion of this commitment in the same article of the Treaty as the language on fair and equitable treatment*".[894]

598. The tribunal concluded that the legislative changes made by Argentina to the regulatory framework in place at the time of National Grid's investment effectively dismantled that framework and were therefore contrary to the constant protection and security that Argentina was obliged to provide. These changes also amounted to a breach of the FET standard.[895] The parallels with this case are obvious: the enactment of the Amending Directive through the Improper Legislative Procedure resulted in the Dramatic and Radical Regulatory Change.

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889 Counter-Memorial, para 609.

890 **Exhibit RLA-157**, National Grid P.L.C. v. Argentina Republic (UNCITRAL, Award of 3 November 2008), para 187.

891 **Exhibit CLA-242**, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (the UK-Argentina BIT), 11 December 1990. The relevant part of Article 2(2) of the Argentina – UK BIT provides that: "*Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party*".

892 **Exhibit RLA-157**, *National Grid PLC v. Argentine Republic* (UNCITRAL, Award of 3 November 2008), para 187.

893 **Exhibit CLA-248**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL, Partial Award of 13 September 2001).

894 **Exhibit RLA-157**, *National Grid PLC v. Argentine Republic* (UNCITRAL, Award of 3 November 2008), para 189.

895 **Exhibit RLA-157**, *National Grid PLC v. Argentine Republic* (UNCITRAL, Award of 3 November 2008), para 189.

The Amending Directive, brought about by the EU's actions, constitutes a breach of the EU's obligation to accord most constant protection and security to NSP2AG's investment. That those actions also amount to a breach of the FET standard is no impediment to finding a separate breach of the CPS standard, and indeed logically follows given the close link between the two standards.

599. It follows from the above that the protection afforded by the CPS standard is not limited to protection against the actions of third parties and the wording of Article 10(1) in any case contains no such limitation. This is further confirmed by arbitral case law.[896]

The CPS standard is not limited to requiring effective judicial redress

600. The EU argues that even if the CPS standard encompasses legal security, it only goes as far as requiring the EU to provide effective judicial redress.[897] This is incorrect. The duty to provide CPS consists of two elements: (i) substantive provisions to protect investments and (ii) appropriate procedures that enable investors to vindicate their rights.[898] The EU fails to address the first element in its entirety.

601. The EU selectively cites – and misrepresents – the *Frontier Petroleum* case in support of its assertion. The *Frontier Petroleum* tribunal first makes a general analysis of the FPS obligation under Article III(1) of the Canada – Czech Republic BIT,[899] and comes to the conclusion that:

> "*it is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors – <u>including both substantive provisions to protect investments</u> and <u>appropriate procedures that enable investors to vindicate their rights</u>*" (emphasis added).[900]

602. The tribunal then clarifies "*the appropriate procedures that enable investors to vindicate their rights*". The section the EU misrepresents is clear: "*<u>where the acts of the host state's judiciary are at stake</u>, "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*" (emphasis

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896 **Exhibit CLA-96**, *Biwater Gauff v. Tanzania* (ICSID Case No. ARB/05/22, Award of 24 July 2008), para 730: "*The Arbitral Tribunal also does not consider that the 'full security' standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself*".

897 Counter-Memorial, paras 617-623.

898 Memorial, para 450.

899 **Exhibit CLA-250**, Agreement between Canada and the Czech Republic for the Promotion and Protection of investments (Canada-Czech BIT), 29 April 2009. The relevant part of Article III(1) of the Canada – Czech BIT provides: "*Investments or returns of investors of either Contracting Party shall at all times be accorded treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security."*

900 **Exhibit CLA-251**, *Frontier Petroleum Services Ltd. v. The Czech Republic* (UNCITRAL, Final Award of 12 November 2010), para 263.

added).[901] It does not limit the scope of the FPS guarantee to a failure to provide judicial redress; it simply analyses only part of the FPS standard because that is how the claim was pleaded.

The EU has breached the CPS standard in Article 10(1) of the ECT

603. As set out in the Claimant's Memorial, the EU breached its CPS obligations under Article 10(1) of the ECT.[902] Specifically:

i. First, the EU distorted the intention and objective of its legislative endeavour in order to target NSP2AG. It is clear that the reasons expressed by the EU Institutions for enacting the Amending Directive, both in the context of the European Commission's original proposal and in the final text of the Amending Directive, are entirely specious and the Amending Directive is simply incapable of achieving the EU's stated objectives.[903]

ii. Second, with the derogation eligibility criterion of being "*completed before*" the date of entry into force of the Amending Directive in mind, the EU Institutions rushed through the legislative procedure in order to enact the Amending Directive before NSP2AG finished construction of the pipeline and became operational. In doing so, the EU adopted the Improper Legislative Process.[904]

iii. Third, by enacting the Amending Directive, the EU caused the Dramatic and Radical Regulatory Change. Applying the decisions in *Azurix v. Argentina*[905] and *National Grid v. Argentina*[906], such a radical legislative amendment amounts to a failure to accord most constant protection and security.

VIII.4 The EU has breached Article 10(7) of the ECT

604. As explained in Section VIII.6 of the Memorial, the EU's actions breach Article 10(7) of the ECT which obliges the EU "*to accord* […] *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*".[907]

605. The EU agrees that in order to establish a breach of Article 10(7), it is not necessary for the Claimant to show an intent to discriminate based on nationality, but argues that "*it is thus not*

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901 Counter-Memorial, para 621; **Exhibit CLA-251**, *Frontier Petroleum Services Ltd. v. The Czech Republic* (UNCITRAL, Final Award of 12 November 2010), para 273.
902 Memorial, para 451.
903 See further Reply Memorial, Section V above.
904 See further Section IV.4 above.
905 **Exhibit CLA-83**, *Azurix Corporation v. Argentine Republic* (ICSID Case No ARB/01/12, Award of 14 July 2006).
906 **Exhibit RLA-157**, *National Grid PLC v. Argentine Republic* (UNCITRAL, Award of 3 November 2008).
907 **Exhibit CLA-1**, ECT, Article 10(7).

sufficient to simply establish that the foreign investor is treated less favourably. It must also be established that this treatment is based on its origin and cannot be explained by something else".[908]

606. The EU's statements are not reconcilable and it is not correct that the Claimant must establish that the treatment it receives is "*based on its origin*" (whatever the EU intends this to mean). In particular, this does not follow from the case cited by the EU in alleged support. The tribunal in *Corn Products v. United Mexican States* recognised three elements by reference to the treaty in question: (i) the respondent State has accorded to the foreign investor or its investment "*treatment* […] *with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition*" of the relevant investments; (ii) the foreign investor or investments must be "*in like circumstances*" to an investor or investment of the Respondent State (the "*comparator*"); and (iii) the treatment must have been less favourable than that accorded to the comparator.[909] The tribunal did not expand upon this test by articulating that the less favourable treatment must be based on origin. In the paragraph cited by the EU,[910] the tribunal merely confirmed that the fact that the adverse effects of the measure were felt by certain foreign-owned producers and suppliers to the benefit of domestic producers "*the majority of which were Mexican-owned*", would be "*sufficient*" to establish treatment less favourable than accorded to the comparator.[911] There was no limitation placed on what could satisfy this third element of the test.

607. Further, the EU's interpretation turns Article 10(7) on its head. Article 10(7) imposes a positive obligation on the EU. It has to accord to any Investor treatment no less favourable than that which it accords to the Investments of its own Investors (i.e. EU investors) and Investors of any other Contracting Party or third state (whichever is more favourable), as well as granting treatment no less favourable to activities related to that Investment, including but not limited to the "*management, maintenance, use, enjoyment, or disposal*".

608. The parties appear to agree that the Tribunal is required to consider whether the investors or investments in question are in like circumstances, determining the appropriate comparator and whether there are legitimate grounds for distinguishing between investors or investments.[912] The parties disagree as to the appropriate comparators.

609. For the reasons fully explained in the Memorial, and reiterated in this Reply Memorial at Section III.3, the other offshore import pipelines are in like circumstances to Nord Stream 2.

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908 Counter-Memorial, para 642.
909 **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 117.
910 Counter-Memorial, para 641.
911 **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.
912 Memorial, para 456; Counter-Memorial, para 639.

The EU points out that the comparator(s) "*do not have to be substantively identical in all respects but nationality, but close enough in circumstances to merit comparison*".[913]

610. Accordingly, the treatment that the EU has accorded to the Investments of its own Investors and Investors of any Contracting Party or third state is to enable them to apply for a derogation pursuant to Article 49a of the Amending Directive. To satisfy its obligation under Article 10(7), the same treatment must be accorded to Nord Stream 2 and NSP2AG. The EU has not accorded the same treatment to Nord Stream 2 and NSP2AG as the other offshore import pipelines and their respective investors. Further, the EU has failed to grant "*treatment no less favourable*" to activities related to that Investment including but not limited to the "*management, maintenance, use, enjoyment, or disposal*". The other offshore import pipelines are not subject to unbundling, to the requirements of third party access and are not subject to a regulated tariff.

611. Further, in the same way as it seeks to avoid liability under Article 10(1), the EU refers to the possibility that a Member State national regulatory authority may exercise its discretion in relation to an Article 36 exemption or Article 49a derogation. According to 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*".[914] This is incorrect for two main reasons: (i) the EU's Deliberate Exclusion of Nord Stream 2 from the derogation regime by the words "*completed before 23 May 2019*" ensures that there is no relevant discretion;[915] And (ii) by the EU's flawed logic, investors in pipelines could never identify investors in "*like circumstances*" and therefore relevant comparators, and could therefore never plead a breach of Article 10(7) – this is simply wrong, and the Claimant refers again to its submissions above that the five offshore import pipelines are clearly relevant comparators.

612. As fully described in Section V, the treatment of NSP2AG cannot be justified by the Purported Objectives of the Amending Directive. The Amending Directive has been drafted to fulfil the EU's political motives and there is no "*rational ground*" for "*a differentiation*" between Nord Stream 2 and the other offshore import pipelines.[916]

VIII.5 The EU has breached Article 13 of the ECT

613. In its Memorial, NSP2AG set out why the Amending Directive breaches Article 13 of the ECT by amounting to an unlawful indirect expropriation of NSP2AG's investment.[917] In particular, it explained that "*the consequential imposition on Nord Stream 2 of the obligations to*

913 Counter-Memorial, para 638.
914 Counter-Memorial, para 646.
915 Reply Memorial, Section IV.1.
916 Counter-Memorial, para 643.
917 Memorial, para 466.

unbundle, to provide third party access 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 its investments".[918] Indeed, the very purpose of the unbundling requirement of the Gas Directive is to remove NSP2AG's ability to control and operate the German Section of the Pipeline (howsoever that unbundling is effected).[919]

614. In its Counter-Memorial, the EU first seeks to argue that the adoption of the Amending Directive does not constitute an indirect expropriation on the basis that it "*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*".[920]

615. The EU then argues that *"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".*[921]

616. The EU is wrong in both arguments, for the reasons set out below.

The Amending Directive is not a legitimate exercise of the EU's police powers

617. As explained further below, the Amending Directive is in fact an indirect expropriation which does not comply with the requirements set out in Article 13(1) of the ECT, as it is: "*(a) not for a purpose which is in the public interest; (b) discriminatory; (c) not carried out under due process of law; and (d) not accompanied by the payment of prompt, adequate and effective compensation*".[922]

618. Contrary to the EU's argument, the "*police powers defence is not a carte blanche; a State's actions must be justified, meet the international standards of due process, and inter alia be proportional to the threat to public order to which it purports to respond*".[923]

619. Further, and in particular, the requirements set out under Article 13(1) of the ECT are cumulative, and non-compliance with any one of them will therefore result in a breach of Article 13.[924]

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918 Memorial, para 464.
919 Memorial, paras 75-84.
920 Counter-Memorial, para 654.
921 Counter-Memorial, para 654.
922 **Exhibit CLA-1**, ECT, Article 13.
923 **Exhibit CLA-252**, *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt* (PCA Case No. 2012-07, Final Award of 23 December 2019), para 230.
924 **Exhibit CLA-222**, *Cavalum SGPS, S.A. v. Kingdom of Spain* (ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum of 31 August 2020), para 646-647.

Contrary to the EU's claim, the Amending Directive is not intended to, and cannot, achieve "public welfare" objectives

620. In an attempt to establish the lawfulness of the expropriation of the Claimant's investment, the EU claims that the adoption of the Amending Directive aims to achieve public welfare objectives.[925] However, this claim is flawed for three principal reasons.

621. First, the Amending Directive does not fall within the scope of the police powers doctrine. The doctrine will only apply to measures adopted in pursuit of certain types of public welfare objectives and does not apply to all measures. A "*blanket exception for regulatory measures would create a gaping loophole in international protections against expropriation*".[926] The tribunal in *Magyar Farming Company Ltd v. Hungary* held that:

> "*a review of investment awards shows that measures annulling rights of the investor – as in the present case – can be exempt from the otherwise applicable duty of compensation only in a narrow set of circumstances. These circumstances can be categorized in two broad groups:*
>
> *First, the exemption from compensation may apply to generally accepted measures of police powers that aim at enforcing existing regulations against the investor's own wrongdoings, such as criminal, tax and administrative sanctions, or revocation of licenses and concessions.* […]
>
> *The second group consists of regulatory measures aimed at abating threats that the investor's activities may pose to public health, environment or public order. This line of case law relates to measures such as the prohibition of harmful substances, tobacco plain packaging, or the imposition of emergency measures in times of political or economic crises*".[927]

622. The tribunal found that the amendment which was the subject of the claim "*was inspired by Hungary's decision to change its agricultural land holding policy. While Hungary was fully entitled to change its policies, in doing so it was required to respect vested rights*" (emphasis added). It concluded that it was "*not immediately apparent why this policy change - which purportedly benefited Hungarian society as a whole - should have been carried out at the expense of the Claimants' vested rights*", finding that "*unlike in the above two groups of situations, there is no rationale that would justify exempting Hungary from its duty to pay compensation under Article 6 of the BIT*".[928]

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925 Counter-Memorial, Section 3.4.2.1.

926 **Exhibit CLA-76**, *Pope & Talbot Inc. v. The Government of Canada* (NAFTA Case, Interim Award of 26 June 2000), para 99.

927 **Exhibit CLA-253**, *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, (ICSID Case No. ARB/17/27, Award of 13 November 2019), para 366.

928 **Exhibit CLA-253**, *ibid.*, para 367.

623. The Amending Directive is purportedly intended to "*address obstacles to the completion of the internal market in natural gas which result from the non-application of Union market rules to gas transmission lines to and from third countries*", by extending the Gas Directive rules to offshore import pipelines which would purportedly "*establish consistency of the legal framework within the Union while avoiding distortion of competition in the internal energy market in the Union and negative impacts on the security of supply. It will also enhance transparency and provide legal certainty to market participants, in particular investors in gas infrastructure and system users, as regards the applicable legal regime*".[929] Even taking this at face value, the Amending Directive does not fall within the category of "*public welfare*" objectives within the scope of the police powers doctrine.

624. Second, and in any case, as the Claimant has set out in detail in the Memorial and in the First Expert Report of Professor Cameron, the Purported Objectives of the Amending Directive are specious, and cannot be achieved.[930] The EU has addressed these points only on the most superficial level in its Counter-Memorial. The Expert Report of Professor Maduro omits any meaningful explanation of how the Purported Objectives of the Amending Directive could be achieved, and simply assumes that they can.[931] The fallacies in the EU's position are further described in Section V of this Reply Memorial and the Second Expert Report of Professor Cameron.[932] Simply repeating that the Amending Directive can achieve its Purported Objectives does not make this correct.

625. Accordingly, the EU's indirect expropriation of NSP2AG's investment cannot be justified under the police powers doctrine as being for the "*public welfare*" by reference to the Purported Objectives. Moreover, for the same reasons, the Amending Directive is also clearly not "*for a purpose which is in the public interest*" as required by Article 13(1)(a) of the ECT.[933]

626. Third, for the EU to rely on the purported "*public welfare*" objectives of the Amending Directive in the context of its defence to NSP2AG's claim of expropriation, the Tribunal must also consider "*whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the*

929 **Exhibit CLA-3**, Amending Directive, Recital 3.

930 Memorial, Section VI.12; First Expert Report of Professor Cameron, Section 6(5) and Second Expert Report of Peter Cameron, Section 4.

931 Expert Report of Professor Maduro, paras 220 and 221: "*there is no logical reason to assume that there are no advantages for the EU internal gas market when that regulatory framework contained in the Gas Directive is applied to transmission lines between Member States and third States which provide natural gas to the EU internal gas market … No reason is put forward by Professor Cameron on why should there be any difference in the advantages of this regulatory regime depending on where the transmission lines start*." See Second Expert Report of Professor Cameron, para 4.1.

932 Second Expert Report of Professor Cameron, Section 4.

933 **Exhibit CLA-1**, ECT, Article 13(1)(a).

proportionality".[934] The tribunal in *Tecmed v. Mexico* further explained that: "*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 in light of Article 5(1) of the Agreement 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*".[935]

627. NSP2AG has explained in detail how the Amending Directive not only cannot achieve the Purported Objectives, but also how it is neither reasonable nor proportionate by reference to those Purported Objectives.[936] The Amending Directive deprives NSP2AG of its economic rights and undermines its legitimate expectations.[937]

628. Finally, an enquiry into whether a measure has been adopted pursuant to police powers also requires "*consideration of the purpose of the measures and the degree to which the State's public policy concern is genuine as opposed to the process by which the measures were created*".[938] As noted above, the Amending Directive was not only flawed in its pursuit of the Purported Objectives, those Purported Objectives were a fig leaf to disguise the EU's true motives – to undermine and complicate the use of the Nord Stream 2 pipeline.

629. In any event, even if the EU were able to establish that the Amending Directive was passed for a public purpose or for public welfare reasons or is a measure in the public interest (all of which are denied), this does not immunize the Amending Directive from being found to be expropriatory on the grounds that it otherwise fails to satisfy the requirements of Article 13(1) of the ECT.[939]

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934 **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico* (ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003), para 122.

935 **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico* (ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003), para 122.

936 Reply Memorial, paras 434-454, and Memorial, para 439.

937 Reply Memorial, paras 474-534, and Memorial, paras 246-247 (as to the purpose of Article 49a being to protect legitimate expectations), and 423-428.

938 **Exhibit CLA-254**, *Eco Oro Minerals Corp. v. The Republic of Colombia* (ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021), para 629.

939 **Exhibit CLA-113**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (Vivendi I), ICSID Case No. ARB/97/3, Award, 20 August 2007, para 7.5.21: "*If we conclude that the challenged measures are expropriatory, there will be violation of Article 5(2) of the Treaty, even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid. Respondent's public purpose arguments suggest that state acts causing loss of property cannot be classified as expropriatory. If public purpose automatically immunises the measure from being found to be expropriatory, then there would never be a compensable taking for a public purpose. As the tribunal in Santa Elena correctly pointed out, the purpose for which the property was taken "does not alter the legal character of the taking for which adequate compensation must be paid. The legal element in question is whether the act is expropriatory or not". If Respondent's invocation of public purpose were correct, Costa*

The Amending Directive is a discriminatory measure

630. In addition, the EU argues that the adoption of the Amending Directive is a legitimate exercise of its police powers because the legitimate welfare objectives which it allegedly pursues have been implemented in a non-discriminatory manner.[940]

631. It is well-established that discriminatory measures are not a legitimate exercise of a State's police powers.[941] By way of illustration, in *Eco Oro v. Colombia*, the tribunal considered whether the challenged measures were a legitimate exercise of Colombia's police powers by asking if "*a nondiscriminatory measure or series of measures* [were] *designed and applied to protect the environment. If the answers to these questions are both yes, there is no indirect expropriation unless they comprise a rare circumstance*".[942]

632. The EU itself recognises that the requirement of non-discrimination is crucial for a finding that a measure did not amount to indirect expropriation, by relying on the following cases:[943]

i. In *Methanex v. USA*, the tribunal held that "*an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation*".[944]

ii. In *El Paso Energy v. Argentine Republic*, the tribunal stated that: "*a general regulation is a lawful act rather than an expropriation if it is non-discriminatory* … ".[945]

iii. In *Fireman's Fund Insurance Co. v. United Mexican States*, the tribunal explained: "*To distinguish between a compensable expropriation and a non-compensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure*" (emphasis added).[946]

633. As NSP2AG has explained in detail, the Amending Directive is a discriminatory measure. It was designed to achieve the Deliberate Exclusion of Nord Stream 2 from the Derogation Regime.[947] In addition, the EU's own Admissions of Targeting Nord Stream 2 demonstrate

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Rica would have prevailed in the Santa Elena case and thus would not have faced the prospect of having to compensate" (emphasis added).

940 Counter-Memorial, Section 3.4.2.2.

941 **Exhibit CLA-255**, *Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21, Award of 30 November 2017), paras 457-458; **Exhibit CLA-128**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2, Award of 16 September 2015), para 202.

942 **Exhibit CLA-254**, *Eco Oro Minerals Corp. v. The Republic of Colombia* (ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum of 9 September 2021), para 635.

943 Counter-Memorial, paras 658-659.

944 **Exhibit RLA-178**, *Methanex Corp. v. USA* (NAFTA, Final Award of 3 August 2005), Part IV-Chapter D-Page 4, para 7.

945 **Exhibit RLA-137**, *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15, Award of 31 October 2011), para 240.

946 **Exhibit RLA-194**, *Fireman's Fund Insurance Co. v. United Mexican States* (ICSID Case No. ARB(AF)/02/01, Award of 17 July 2006), para 176(j).

947 Memorial, Section VI, paras 381(ii), 402-415 and 441-445; Reply Memorial, Section IV.2.

that the adoption of the Amending Directive was a discriminatory measure.[948] As such, the adoption of the Amending Directive cannot constitute a legitimate exercise of the EU's police powers.

634. The discriminatory nature of the Amending Directive is a violation of Article 13(1)(b) of the ECT which provides that:

> "*Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: … (b) not discriminatory*" (emphasis added).[949]

The adoption of the Amending Directive is a disproportionate measure

635. The EU further repeats that the impact of the Amending Directive is not disproportionate in the light of the "*legitimate public welfare objectives*" which it allegedly pursues.[950] This is not credible. Even if the adoption the Amending Directive were a legitimate exercise of police powers in pursuit of legitimate public welfare objectives (which, for the reasons explained above, it is not),[951] this measure still amounts to indirect expropriation, as it is so severe in light of its effects that it is disproportionate.

636. It is well-established that, to avoid a finding that an (indirect) expropriation has occurred, the interference with the private rights of a foreign investor should be proportionate to the public interest pursued. By way of example:

i. In *El Paso Energy v. Argentine Republic*, the tribunal stated that "*a disproportionate regulation* [means] *a regulation in which the interference with the private rights of the investors is disproportionate to the public interest. In other words, proportionality has to exist between the public purpose fostered by the regulation and the interference with the investors' property rights*".[952]

ii. In *Tecmed v. Mexico*, the tribunal held that, in order to decide whether a measure is expropriatory, "*whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality*".[953]

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948 Memorial, Section VI and para 382; Reply Memorial, Section IV.2.
949 **Exhibit CLA-1**, ECT, Article 13.
950 Counter-Memorial, Section 3.4.2.3.
951 Counter-Memorial, para 667.
952 **Exhibit RLA-137**, *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15, Award of 31 October 2011), para 243.
953 **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico* (ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003), para 122.

iii. In *Fireman's Fund Insurance Co. v. United Mexican States*, the tribunal also considered "*the proportionality between the means employed and the aim sought to be realized*".[954]

637. As set out in Section VIII.1, the Amending Directive is not proportionate, even if the specious objectives of the Amending Directive were to be accepted as legitimate and their attainment in the interests of public welfare (both of which are denied).

638. The EU appears to accept this test in principle, submitting that "*regulatory measures adopted in accordance with the rules of due process and designed to achieve legitimate general welfare objectives may constitute indirect expropriation only when they are so severe in light of their purpose that they appear manifestly excessive*".[955] However, the EU's characterisation of the standard by which a measure may be found to be expropriatory – "*manifestly excessive*" – overstates the standard test set out above of proportionality, and is not supported by case law. The paragraph of the *Tecmed* award, and the other cases cited by the EU in footnote 616 of the Counter-Memorial, do not support the EU's contention: all of these cases refer to a proportionality test and do not refer to "*manifest excess*".[956]

639. The EU attempts in its Counter-Memorial to rely on the provisions of certain other treaties that contain a "*manifestly excessive*" standard. These treaties are, of course, irrelevant. The Tribunal is asked to consider whether there is a breach of Article 13 of the ECT, which includes no such language. Moreover, the EU's contention that this standard somehow reflects a "*principle of international law*" of relevance to an interpretation of Article 13 falls at the first hurdle. The sole authority upon which the EU relies, *Philip Morris v. Uruguay*, does not support the its position.[957] Once again, the EU misrepresents the tribunal's position in that case. The tribunal was discussing what it considered to be a more general evolution in the police powers doctrine, in the context of "*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*", and not the standard to be applied to assess whether a measure is proportionate.

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954 **Exhibit RLA-194**, *Fireman's Fund Insurance Co. v. United Mexican States* (ICSID Case No. ARB(AF)/02/01, Award of 17 July 2006), para 176(j).

955 Counter-Memorial, para 659.

956 The EU refers to four cases in support of its position (Counter-Memorial, para 659, footnote 616). The tribunal in **Exhibit RLA-143**, *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 adopted the *Tecmed* test. The tribunal in **Exhibit RLA-184**, *Fireman's Fund Insurance Co. v. United Mexican States* (ICSID Case No. ARB(AF)/02/01, Award of 17 July 2006), para 176(j) adopted a proportionality test as described in this Reply Memorial. In **Exhibit RLA-137**, *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15, Award of 31 October 2011), para 243 adopted a proportionality test as described in this Reply Memorial. The tribunal in **Exhibit RLA-181**, *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6, Award of 7 July 2011), para 174, referring to proportionality.

957 **Exhibit RLA-**117, *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).

640. In any event, as described elsewhere in this Reply Memorial and in the Memorial, the discriminatory effect of the Amending Directive is "*manifestly excessive*", not least in terms of its impact upon NSP2AG compared against its illusory claimed benefits.[958] Therefore, even applying the EU's (incorrect) test of "*manifest excess*" instead of simply a test of proportionality, when comparing the interference with the foreign investor's rights with the public welfare benefits, the Amending Directive amounts to an indirect expropriation.

The Amending Directive was not adopted in accordance with rules of due process

641. The EU argues that the Amending Directive was adopted "*with the utmost respect*" for the rules of due process and is therefore not an indirect expropriation.[959] As has already been clearly shown at Section IV.4 above, the EU's assertions in this regard are unfounded.[960] Accordingly, the Amending Directive is for this reason not a legitimate exercise of police powers nor consistent with Article 13(1)(c).

The adoption of the Amending Directive was not accompanied by the payment of prompt, adequate and effective compensation

642. NSP2AG reiterates that a key requirement of Article 13 of the ECT is that a lawful expropriation be "*accompanied by the payment of prompt, adequate and effective compensation*".[961] The expropriation of NSP2AG's investment has not been accompanied by any payment of compensation whatsoever, and, as such, cannot constitute an expropriation permissible under Article 13 of the ECT.[962]

The application of the Amending Directive will result in a substantial deprivation of NSP2AG's investment

The EU bears responsibility for the measures amounting to an indirect expropriation of NSP2AG's investment

643. The EU argues that:

> "[T]*he "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 Nord 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*

958 Counter-Memorial, para 659.
959 Counter-Memorial, Section 3.4.2.4.
960 Memorial, Sections VI.3 and VI.10, and paras 381(v), 388-392; Reply Memorial, paras 396-421.
961 Memorial, para 465.
962 Memorial, para 484.

measures taken by Germany for transposing and implementing the Directive" (emphasis added).[963]

644. As explained in Section VI above, the precise level of impact of the Amending Directive will depend on whether any solution can be found for NSP2AG to comply with the Amending Directive. Every regulatory solution for Nord Stream 2 to comply with the requirements of the Gas Directive not only has to be approved by the BNetzA, but also requires a restructuring of the Nord Stream 2 project, in particular amendments to the GTA [redacted][964] However, whatever the ultimate impact, it will have been caused by the actions of the EU in adopting the Amending Directive.

645. The EU is therefore responsible for the indirect expropriation of NSP2AG's investment for the reasons set out below.

It is already clear that the Amending Directive has substantially deprived NSP2AG of its investment

646. The EU argues further that the impact of the Amending Directive on NSP2AG's investment remains "*at this stage highly uncertain*", as there are various factors which it claims could influence NSP2AG's position.[965] The EU refers to various scenarios, including NSP2AG obtaining an Article 49a derogation,[966] or an Article 36 exemption,[967] the reorganisation of the control of Russia over Gazprom and the Nord Steam 2 Pipeline,[968] and the negotiation of an IGA between the EU and Russia on the operation of Nord Stream 2.[969] Each of these scenarios is addressed elsewhere in this Reply Memorial, and none is realistic.[970]

The impact of the Amending Directive is caused by the EU, not by factors outside of the EU's control

647. The EU also argues that the impact of the Amending Directive would be "*the result of NSP2AG's own lack of diligence and/or of other factors beyond the EU´s control such as the U.S. sanctions or the export monopoly granted under Russian law to Gazprom*".[971] This argument is incorrect and does not assist the EU in avoiding its responsibility for breach of Article 13.

963 Counter-Memorial, para 679.
964 See Reply Memorial, Section VI, and the [redacted]
965 Counter-Memorial, paras 680-687.
966 Counter-Memorial, paras 681-682 and 684.
967 Counter-Memorial, paras 683-685.
968 Counter-Memorial, para 686.
969 Counter-Memorial, para 687.
970 Reply Memorial, Section VI.8.
971 Counter-Memorial, para 699.

648. First, as explained at Section VIII.1[972] and the Second Witness Statement of [redacted],[973] NSP2AG was a diligent investor.

649. Second, as explained in paragraph 380, the US sanctions have not prevented NSP2AG from completing the construction of the Nord Stream 2 Pipeline and have no relevance when considering the impact of the Amending Directive on NSP2AG's investment.[974]

650. Third, as explained in Section VII.7, Gazprom's export monopoly is not the cause of the impact of the Amending Directive.[975] Gazprom's monopoly is irrelevant to the analysis of the impact of the Amending Directive; NSP2AG's claim is based on the introduction by the EU of a discriminatory piece of legislation that indirectly expropriates NSP2AG's investment.[976] The indisputable fact is that the EU's Amending Directive is what requires Nord Stream 2 to comply with the rules on unbundling, tariff regulation and third party access set out in the Gas Directive, and is what has forced NSP2AG to pursue the various options for compliance outlined at Section VI.2

Howsoever NSP2AG is able to comply with the Gas Directive, NSP2AG is nonetheless substantially deprived of investment

651. The EU argues that the options available to NSP2AG to comply with the Amending Directive do not substantially deprive NSP2AG of the ownership, use or enjoyment of the Nord Stream 2 Pipeline.[977] As explained in the Memorial and as described further below, the options do in fact deprive NSP2AG of its investment.

The EU misstates NSP2AG's case on Article 13 of the ECT

652. The EU argues that "*Article 13(1) of the ECT does not confer upon NSP2AG a right to operate the NS2 pipeline "as originally intended" 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*".[978] However, this statement deliberately distorts NSP2AG's argument and is yet another straw man.

653. NSP2AG stated in its Memorial that:

> *"It is clear that, consistent with the very purpose of the internal market rules to separate the ownership and control over gas transmission infrastructure and gas production or supply, the cumulative consequences of the application of the*

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972 Reply Memorial, paras 520 to 530.
973 [redacted]
974 Reply Memorial, paras 290-294, explaining how Swiss Economics' modelling takes into account the delay attributable to US sanctions in the Base Case against which the impacts of the Amending Directive are measured.
975 Reply Memorial, paras 382-384.
976 Reply Memorial, Section IV.2.
977 Counter-Memorial, Section 3.4.3.2.
978 Counter-Memorial, para 689.

Amending Directive to NSP2AG and Nord Stream 2 will constitute a substantial interference with NSP2AG's ability to deal with the Pipeline in the manner which was envisaged at the time the investment was made, and constitute a breach of Article 13 of the ECT" (emphasis added).[979]

654. NSP2AG's position as to its expectations (and their legal relevance in this arbitration) is set out fully in the Memorial,[980] and at paragraphs 474 to 534 of this Reply Memorial. However, NSP2AG's expectations are not relevant to its expropriation claim and the question of whether NSP2AG did expect, or should have expected, a regulatory measure (expropriatory or otherwise) is irrelevant.

655. In a further example of the EU misstating the Claimant's case, the EU asserts that the Amending Directive "*merely seeks to prevent NSP2AG from refusing access to the pipeline to gas suppliers other than Gazprom, an affiliated company*" and that "*while 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*".[981]

656. The impact on, or detriment to, Gazprom Export is, however, clearly irrelevant. The issue that the Tribunal is determining is the impact on NSP2AG. NSP2AG has invested [redacted] in constructing a pipeline which it could build, own, manage and operate itself. NSP2AG entered into the GTA in respect of the capacity of that pipeline, on the basis that the GTA would provide NSP2AG with the revenue [redacted]

657. Following the adoption of the Amending Directive, NSP2AG can no longer own, manage and operate the whole of the pipeline. This is not denied by the EU. In particular, pursuant to unbundling requirements, NSP2AG can no longer control the German Section and may even have to sell it. Furthermore, the German Section will have to be operated in accordance with the requirements of third party access and tariff regulation, resulting in a situation which Advocate General Bobek has described as being "*legally precluded from acting as a normal market operator that is free to choose its customers and pricing policy*".[982] Therefore, NSP2AG cannot perform its contractual obligations under the GTA. [redacted] This is the unlawful expropriation that NSP2AG submits should be declared by the Tribunal.

979 Memorial, para 483.
980 Memorial, Section V.4 at paras 157 to 158, [redacted]
981 Counter-Memorial, para 694.
982 **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, Nord Stream 2 AG v. European Parliament and Council of the European Union), 6 October 2021, para 96.

The Amending Directive deprives NSP2AG of the enjoyment of its investment

658. The application of the Amending Directive to Nord Stream 2 essentially entails the application of three core elements of the Gas Directive: (i) tariff regulation, (ii) third party access requirements; and (iii) unbundling requirements.[983] All of these aspects deprive NSP2AG of the use and enjoyment of its investment.

659. The very purpose of the unbundling requirement is to separate NSP2AG from control of the German Section of the pipeline. For the reasons explained in the Second Witness Statement of [redacted].[984] Both of these options would require significant changes to the contractual framework underpinning Nord Stream 2, [redacted]

660. The EU argues that "*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*".[986] This argument entirely ignores the GTA already in place for use of the pipeline [redacted].

661. The application of tariff regulation as envisaged under the Gas Directive would cap the revenue which NSP2AG could earn from the operation of Nord Stream 2, which would result in [redacted].[988]

662. In addition, NSP2AG must comply with TPA requirements on the German Section. As described in Section VI and the Second Witness Statement of [redacted] with the remaining capacity being offered on a short-term or medium-term basis via capacity auctions. [redacted]

663. As explained in the Second Witness Statement of [redacted] and Section VI above, [redacted]

983 [redacted]; Reply Memorial, Section VI.3; Memorial, paras 80-82.

984 [redacted]

985 [redacted]

986 Counter-Memorial, para 695.

987 [redacted]

988 [redacted]

989 [redacted]

[redacted]

664. [redacted]

665. [redacted]

666. [redacted]

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It is not relevant that unbundling has become "a cross-sectoral and global policy approach"

670. Finally, the EU argues that unbundling has been accepted in many jurisdictions and that "*the European Union is not aware that any arbitral tribunal has ever ruled that unbundling measures are per se expropriatory to its knowledge*".[1004] Similarly, the EU argues that "*neither TPA nor tariff regulation has ever been found to be expropriatory per se*".

671. Whether or not a claim has been brought previously to challenge unbundling or other measures is not of course relevant to the claims before this Tribunal. Each matter must be considered on its own merits. The Tribunal must investigate the nature of the measure impugned, the impact it causes and assess it against the requirements of Article 13 of the ECT. For all the reasons explained above, NSP2AG's claim arises from a discriminatory measure lacking any public benefit which has caused substantial deprivation to NSP2AG's investment. Such a determination cannot rest on the question of whether or not any other tribunal has previously found unbundling, third party access or tariff regulation "*per se*" expropriatory. The Amending Directive constitutes an indirect expropriation of NSP2AG's investment for the purposes of Article 13.

1002 [redacted]

1003 [redacted]

1004 Counter-Memorial, para 690.

IX. THE TRIBUNAL HAS JURISDICTION: THE FORK-IN-THE-ROAD PROVISION IN ARTICLE 26 HAS NOT BEEN TRIGGERED

IX.1 Introduction

672. The EU has argued in its Jurisdiction Memorial that the Tribunal has no jurisdiction to determine NSP2AG's claim for the breaches by the EU of the ECT because the EU's unconditional consent to arbitration has been vitiated by the so-called fork-in-the-road provisions in Article 26 of the ECT.

673. It claims in this context that the "*fundamental basis*" of the dispute in the ECT arbitration is the same as: (i) the CJEU Proceedings in which NSP2AG is bringing an action for annulment of the Amending Directive in respect of its illegality as a matter of EU law;[1005] and (although this is not entirely clear from its submissions) (ii) the German Proceedings, in which NSP2AG appealed to the OLG, the decision of the BNetzA declining to grant a derogation to Nord Stream 2 under Article 49(a) of the Gas Directive as amended by the Amending Directive.[1006] In particular, the EU argues that the "*fundamental basis*" test is met on the alleged basis that the "*fundamental cause*" of the claims in the disputes before this Tribunal and in the CJEU Proceedings are the same, and that those claims "*seek for the same effects*".[1007]

674. The EU's fork-in-the-road argument is without merit for the following reasons, addressed in detail below:

i. Properly interpreted, Article 26 of the ECT provides a complete answer to the question of whether the EU's unconditional consent to arbitration is vitiated in this case. There is no "*dispute*" concerning an alleged breach of an obligation of the EU under Part III of the ECT pending in any other forum.

ii. Contrary to the EU's argument, such proper interpretation does not deprive Article 26(3)(b)(i) of its "*effet utile*".

iii. The EU's interpretation of Article 26 in this arbitration is inconsistent with the EU's interpretation in its declaration to the Energy Charter Secretariat pursuant to Article 26(3)(b)(ii) ("**Article 26 Statement**").

1005 Further to the pleas of the Council and the European Parliament, the CJEU Proceedings have been declared inadmissible by the General Court on the basis that NSP2AG cannot demonstrate an interest in bringing the action and is not directly and individually concerned by the Amending Directive. NSP2AG is pursuing an appeal of the General Court's decision to the CJEU. In a remarkably strongly worded opinion, the EU's Advocate General reached the view that NSP2AG is directly and individually concerned and NSP2AG's appeal should be allowed (**Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, Nord Stream 2 AG v. European Parliament and Council of the European Union), 6 October 2021).

1006 As noted above, the OLG has dismissed this appeal and NSP2AG is now appealing to the German Federal Supreme Court.

1007 EU's Jurisdiction Memorial, para 33, citing **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017), para 310.

iv. NSP2AG's interpretation of Article 26 is supported by the annotation to Article 26(2)(a) of the ECT set out in Understanding 16 of the Final Act of the European Energy Charter Conference.

v. In any case, the German Proceedings cannot vitiate the EU's consent to arbitration as Article 26(3)(b)(i) can only be engaged when the Investor has "*previously submitted the dispute under subparagraph 2(a) or (b)*". Quite aside from the fundamental point that the German Proceedings do not represent a submission of "*the dispute*" under the ECT, they were also commenced on 15 June 2020, whereas the Notice of Arbitration was filed on 26 September 2019.

vi. If it is necessary to apply a "*test*", the "*triple identity*" test is the appropriate test, as it is supported by the weight of authority (including three fork-in-the-road decisions under the ECT) and consistent with the text of Article 26.

vii. The "*triple identity*" test is not satisfied in this case: there is no identity of cause of action, object or respondent parties.

viii. The EU's request that the Tribunal should apply a "*fundamental basis*" test should be rejected – it is an outlier and the three cases in which it has been applied can be readily distinguished.

ix. The "*fundamental basis*" test is mis-stated by the EU and, on a proper articulation of the test, is not satisfied in this case.

x. Even applying the "*fundamental basis*" test as incorrectly articulated by the EU, it is still not satisfied in this case.

xi. Finally, Article 26(2) gives a right for the investor to "*choose*" in which forum to submit a dispute concerning an alleged breach of the ECT for "*resolution*". The fork-in-the-road provision, properly interpreted, cannot therefore be triggered by proceedings in which the court seised finds the claim to be inadmissible.

IX.2 Don Quixote's Windmills: NSP2AG's ECT claims are not pending before any other forum

675. In raising the fork-in-the-road objection, the EU is following in the unfortunate footsteps of Don Quixote. The EU is tilting at windmills. The EU's fork-in-the-road objection is fundamentally undermined at the outset by one simple fact. NSP2AG has not previously submitted its dispute with the EU concerning the EU's breaches of the ECT in any other forum. Neither the CJEU Proceedings, nor the German Proceedings, contain claims brought by NSP2AG under the ECT.

676. At the Hearing on 8 December 2020, the Tribunal enquired as to whether any reference to the ECT was made in the CJEU Proceedings:

"*PROFESSOR SANDS: I think the question that Justice Unterhalter was asking--and it is my question, too--is: Does the Application reference in any way the text of the Energy Charter Treaty? And if you're not able to answer that, that's fine, but perhaps we could be provided in due course with a copy of the actual Application that initiated that case. And so the question is very simple: Was any reference made to the Energy Charter Treaty in that Application in any way?*

DR. HOBÉR: Thank you, Professor Sands. To the best of my knowledge, no, but we obviously are happy to provide you with the actual Application. I haven't looked at that myself for some time, but if there is any reference to the ECT in that Application, it's not in the sense of being a legal ground or a legal basis or a legal argument but probably, if that is the case, just as a piece of information".[1008]

677. In an email on 9 December 2020, the Claimant confirmed to the Tribunal that the only references to the ECT claim in the CJEU Proceedings are: (i) a factual reference to the trigger letter contained in paragraph 85 of the Annulment Application and (ii) four references in the appeal to the CJEU, (a) in paragraph 4(3) in the context of a factual update to the Court regarding the commencement of the ECT arbitral proceedings; and (b) in paragraphs 3(b), 63 and 64 in the context of an aspect of the Appeal concerning the decision of the General Court that certain EU documents should not be released to NSP2AG).[1009]

678. The reason for this is clearly apparent from the substance of the three claims. In this ECT arbitration, NSP2AG argues that the adoption of the Amending Directive, and the EU's conduct in connection with it, constitute violations of the EU's obligations under the ECT. In particular, and as is fully set out in the Memorial and Section VIII of this Reply Memorial, NSP2AG claims that the EU has breached its obligations under Articles 10(1), 10(7) and 13 of the ECT, in that the EU has failed to accord NSP2AG's investment fair and equitable treatment, impaired NSP2AG's investment by unreasonable and/or discriminatory measures, failed to accord most constant protection and security to NSP2AG's investment, breached its guarantee of national and/or most-favoured nation treatment, and has expropriated NSP2AG's investment. NSP2AG therefore seeks relief that would right the wrongs committed by the EU, including to remove the application to NSP2AG and Nord Stream 2 of specifically identified articles of the Third Gas Directive, and compensation in

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1008 **Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 59, line 10 - p 60, line 1. The full exchange between Mr Justice Unterhalter, Professor Sands, and Claimant's Counsel begins at p 58, line 8.

1009 **Exhibits CLA-170A,** Nord Stream 2 AG v. European Parliament and Council – Application for Annulment pursuant to Article 263 TFEU brought before the General Court of the European Union (Case T-526/19), 25 July 2019, and **CLA-171A,** Nord Stream 2 AG v. European Parliament and Council – Appeal to the Court of Justice of the European Union pursuant to Article 56 of the Statute against the order of the General Court of the European Union of 20 May 2020 in Case T-526/19 (Case C-348/20 P), 28 July 2020.

order that NSP2AG is placed in the same situation that existed before the Amending Directive was adopted.

679. Whereas in the CJEU Proceedings, NSP2AG argues that the Amending Directive is unlawful as a matter of EU law and seeks its annulment from the moment of its adoption. NSP2AG relies on Article 263 TFEU which provides a mechanism by which EU acts can be reviewed as to their legality as a matter of EU law. As a matter of substance, NSP2AG relies on specific principles of EU law, including the general EU law principles of equal treatment, proportionality and legal certainty, breach of essential procedural requirements grounded in EU law,[1010] misuse of powers under Article 194(2) of the TFEU, and a failure to state reasons pursuant to Article 296 TFEU.[1011] NSP2AG does not rely in the CJEU Proceedings upon, or refer in any substantive way to, the obligations of the EU under the ECT.[1012]

680. In the German Proceedings, NSP2AG has challenged the decision of the German regulatory body, the BNetzA, to refuse to grant a derogation to Nord Stream 2 under Article 49a of the Gas Directive as amended by the Amending Directive. Similarly in these proceedings, it does not rely upon or refer in any substantive way to obligations under the ECT. NSP2AG argues that section 28b of the German Electricity and Gas Supply Act should be applicable to it. It argues that Nord Stream 2 should not be precluded from a derogation based on the BNetzA's insistence on a constructional-technical interpretation of the word "*Fertigstellung*" ("completion") in the legislation, and that this requirement should instead be interpreted by the BNetzA with regards to the German legal system, the purpose of the provision and the higher-ranking primary law and constitutional requirements.

681. In conclusion, as a factual matter, NSP2AG's claims are not pending before any other forum and the EU's fork-in-the-road argument must fail.

IX.3 The ordinary meaning of Article 26

682. That the conclusion under Section IX.2 effectively determines the issue in favour of the Claimant is confirmed by the language of Article 26 of the ECT. The starting point of any interpretative exercise is the text of the treaty itself.[1013] While so-called fork-in-the-road clauses may be categorised and described in a generic sense, the terms of the fork-in-the-road clause in each treaty may be different. Therefore, in order for a tribunal to determine

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1010 Specifically, Protocol 1 on the Role of National Parliaments in the European Union and Protocol 2 on Subsidiarity and Proportionality to the TEU and TFEU, the Interinstitutional Agreement on Better Law-Making,

1011 **Exhibit RLA-2**, Action brought on 25 July 2019 – *Nord Stream 2 v. Parliament and Council* (Case T-526/19) (2019/C 305/80), O.J. 9 September 2019 C 305/70.

1012 The only references to the ECT arbitration in the CJEU proceedings were described in the email to the Tribunal dated 9 December 2020 (**Exhibit C-276**, Email from HSF to the Tribunal, "PCA Case No. 2020-07: Nord Stream 2 AG (Switzerland) v. The European Union" (attachments omitted), 9 December 2020).

1013 **Exhibit CLA-257**, as stated by the ICJ, "*interpretation must be based above all upon the text of the treaty*", *Case Concerning the Territorial Dispute, Libyan Arab Jamahiriya v. Chad* (Judgment of 3 February 1994), ICJ Reports 1994, p. 6, para 41.

whether it has jurisdiction in respect of the claim before it, it must consider the text of the treaty in question and interpret that treaty in accordance with the accepted rules of treaty interpretation. The starting point for the interpretative exercise in this case is therefore Article 26 of the ECT.

683. Article 26 of the ECT is to be interpreted in accordance with Article 31(1) of the VCLT, namely "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*".[1014] Under Article 31(1): "*If the relevant words in their natural and ordinary meaning make sense in their context*", no further inquiry is required.[1015] As this section proceeds to explain, on such an interpretation, and without the need for recourse to any further "test", it is clear that the EU's unconditional consent to arbitration of this dispute is not vitiated under Article 26(3)(b)(i).[1016]

684. Article 26 of the ECT reads:[1017]

> Article 26: Settlement of Disputes between an Investor and a Contracting Party
>
> **(1) Disputes** between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, **which concern an alleged breach of an obligation of the former under Part III** shall, if possible, be settled amicably.
>
> (2) If **such disputes** cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to **the dispute** requested amicable settlement, the Investor party to **the dispute** may choose to submit it for resolution:
> (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
> **(c) in accordance with the following paragraphs of this Article.**
>
> (3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.
>
> (b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously **submitted the dispute under subparagraph (2)(a)** or (b).
>
> (b)(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

1014 **Exhibit CLA-56**, Vienna Convention on the Law of Treaties, signed on 23 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980), Article 31(1). As noted by the EU, Article 31(1) reflects customary rules of interpretation of international law, and the principles of interpretation in Article 31(1) are accepted and relied upon by the EU in support of its flawed interpretation of Article 26 ECT (see, EU's Jurisdiction Memorial, paras 19 and 23).

1015 **Exhibit CLA-258**, *Case Concerning the Arbitral Award of 31 July 1989, Guinea-Bissau v. Senegal* (Arbitral Award of 31 July 1989, Judgment of 12 November 1991), I.C.J Reports 1991, p. 53, para 48 (citing Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, ICJ Reports 1950, p. 8).

1016 **Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 36, line 15 - p 37, line 20.

1017 **Exhibit CLA-1**, ECT (emphasis added). The Claimant's demonstrative exhibit addressed at the Bifurcation Hearing is included as Appendix 1 to this Reply Memorial.

685. Article 26(3)(b)(i) of the ECT sets out the so-called fork in the road provision of the ECT. It reads:

> *"The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)"* (emphasis added).[1018]

686. The meaning of the words "*the dispute*" in Article 26(3)(b)(i) can be readily understood by reference to the preceding provisions of Article 26. Article 26(1) provides:

> *"Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III…"* (emphasis added).[1019]

687. The disputes addressed by Article 26 are therefore disputes concerning an alleged breach of Part III of the ECT by a Contracting Party.

688. Article 26(2) sets down what happens "*if such disputes*" cannot be amicably settled according to the provisions of Article 26(1):

> *"If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*
>
> *(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;*
>
> *(b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
>
> *(c) in accordance with the following paragraphs of this Article".*

689. The Investor party to "*the dispute*" may therefore "*choose*" to submit "*it*" (i.e. "*the dispute*") for resolution in one of three ways: (i) under Article 26(2)(a), to the courts of the Contracting Party to "*the dispute*"; (ii) under Article 26(2)(b), in accordance with any previously agreed dispute settlement procedure; or (iii) under Article 26(c), in accordance with the provisions of Article 26.

690. Article 26(3)(a) provides that, "*subject only to* [Article 26(3)(b)] *and* [Article 26(3)(c)]*, each Contracting Party* […] *gives its unconditional consent to the submission of a dispute*", i.e. "*a dispute concern*[ing] *an alleged breach of an obligation of* [that Contracting Party] *under Part III*" as described in Article 26(1) – "*to international arbitration or conciliation in accordance with the provisions of* [Article 26]". Therefore, only if Article 26(3)(b) or Article 26(3)(c) is

[1018] **Exhibit CLA-1**, ECT, Article 26(3)(b)(i).
[1019] **Exhibit CLA-1**, ECT, Article 26(1).

satisfied may the unconditional consent of a Contracting Party to submit "*a dispute*" to international arbitration or conciliation be altered.

691. Article 26(3)(b)(i) provides that certain Contracting Parties do not give such unconditional consent "*where the Investor has previously submitted the dispute under subparagraph 2(a) or (b)*". As noted above, Article 26(2)(a) and 2(b) address the resolution of a dispute concerning an alleged breach by the Contracting Party of Part III of the ECT. The unconditional consent of a Contracting Party to submit "*a dispute*" to international arbitration can therefore only be vitiated under Article 26(3)(b)(i) if a dispute concerning "*an alleged breach of an obligation of the* [Contracting Party] *under Part III*" has been submitted for resolution under Article 26(2)(a) or 2(b).

692. The EU's contention that "*there is no definition of "dispute" in the ECT*" is wrong.[1020] This contention flows from the deliberate omission by the EU from its analysis of Article 26(1) of the words "*Disputes … which concern an alleged breach of an obligation … under Part III*". Only by neglecting these words can the EU assert that Article 26(1) "*does not impose specific limitations on what may constitute the "same dispute"*" for the purpose of Article 26(3)(b)(i) and claiming that Article 26(1) "*leaves the definition* [of dispute] *open-ended*".[1021] This is clearly not the case. Moreover, Article 26(3)(b)(i) does contain the phrase "*the same dispute*" (as is stated by the EU).[1022] It refers to "*the dispute*", i.e. the dispute defined in Article 26(1) as a dispute which "*concerns an alleged breach of an obligation… under Part III*".

693. The words of the ECT should be the start and the end of the enquiry as to the circumstances in which the EU's consent is vitiated.[1023] The interpretation of Article 26 is clear on its face. The EU's forced interpretation and the application of any kind of "*test*", whether "*triple identity*", "*fundamental basis*" or otherwise, should be rejected.

IX.4 The ordinary meaning of Article 26(3)(b)(i) is confirmed by the context

694. The ordinary meaning of Article 26(3)(b)(i) is confirmed by the context provided by the other terms in Article 26.[1024] Although the EU seeks to argue that the word "*dispute*" in Article 26(3)(b)(i) refers not just to the dispute concerning the breach of the ECT, but to "*a dispute*

1020 EU's Jurisdiction Memorial, para 22.
1021 EU's Jurisdiction Memorial, para 28.
1022 EU's Jurisdiction Memorial, para 28.
1023 See also *Nissan v. India*, in which the tribunal commented that "*in the Tribunal's view, the Parties have expended significant energy in a doctrinal debate about fork-in-the-road clauses generally, which is interesting and important academically but ultimately unnecessary to address for purposes of this particular case. That is because the plain text of Article 96(6) of the CEPA is unusually clear, leaving very little to be decided regarding the applicable test*" (**Exhibit CLA-178**, *Nissan Motor Co., Ltd. v. The Republic of India* (PCA Case No. 2017-37, Decision on Jurisdiction of 29 April 2019), para 208).
1024 The "context" includes the text of the treaty (Art. 31(2) of the VCLT).

in substance akin to a breach of the ECT",[1025] it is apparent from the use of the word "*dispute*" throughout Article 26 that this cannot be the case:

695. Article 26(3)(c) refers to "*a dispute arising under the last sentence of Article 10(1)*". The last sentence of Article 10(1) provides that "*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*". The respondent's interpretation of "*a dispute*" in Article 26(3)(c) also encapsulating disputes "*in substance akin*" to a breach of the ECT makes no sense in this context.

696. Article 26(4) states: "*In the event an Investor chooses to submit the dispute for resolution under subparagraph 2(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:*" arbitration under (i) the ICSID arbitration rules; (ii) the ICSID Additional Facility Rules; (iii) the UNCITRAL Rules; or (iv) the SCC Rules. The words "*the dispute*" in Article 26(4) cannot be substituted for the words "*a dispute in substance akin to a breach of the ECT*". Indeed, the consequence of applying the EU's suggested meaning to "*the dispute"* in Article 26(4) would be a purported expansion of a tribunal's jurisdiction *ratione materiae* beyond disputes "*concerning an alleged breach of an obligation of* [a Contracting Party] *under Part III*".[1026]

IX.5 The ordinary meaning of Article 26 is confirmed by the object and purpose of the ECT

697. The ordinary meaning of Article 26(3)(b)(i) is also confirmed when it is considered by reference to the object and purpose of the ECT.

698. The EU embarks on its analysis of Article 26 from the overly broad and unsupported premise that "*a fork-in-the-road clause … explicitly expresses the intention of the parties to the agreement (such as the Energy Charter Treaty) not to agree to parallel proceedings*" (emphasis in original).[1027] The EU thereafter draws on this flawed premise to confirm the correctness of its own analysis. It states that the "*fundamental basis*" test "*reaches the correct result*",[1028] and ultimately the EU delivers the unsubstantiated and incorrect conclusion that "*the "purpose" of Article 26(3)(a) is to avoid multiple litigation arising out of the same facts, with the resulting multiplication of cost, risk of contradictory outcomes, and unfairness to the State Respondent (and its stakeholders)*".[1029] Accordingly, in the EU's Jurisdiction Memorial, the "*object and purpose*" of the ECT is substituted for the alleged "*object and purpose*" of Article 26 (which itself is divorced from its ordinary meaning).

1025 **Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 56, lines 16 to 22.
1026 **Exhibit CLA-1**, ECT, Article 26(1).
1027 EU's Jurisdiction Memorial, para 18.
1028 EU's Jurisdiction Memorial, para 20.
1029 EU's Jurisdiction Memorial, para 31.

699. Contrary to the EU's argument, the "*object and purpose*" of the ECT is discerned from examining the ECT more generally. The "*purpose*" of the ECT is addressed in Article 2, "*Purpose of the Treaty*". This provides:

> "*This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the* [European Energy] *Charter*".[1030]

700. The European Energy Charter, Title I (Objective) provides in relevant part:

> "*Within the framework of State sovereignty and sovereign rights over energy resources and in a spirit of political and economic co· operation,* [the signatories] *undertake to promote the development of an efficient energy market throughout Europe, and a better functioning global market, in both cases based on the principle of non-discrimination and on market-oriented price formation, taking due account of environmental concerns. They are determined to create a climate favourable to the operation of enterprises and to the flow of investments and technologies by implementing market principles in the field of energy*".[1031]

701. In the context of achieving these objectives, Title II (Implementation) of the European Energy Charter provides in relevant part:

> "*Promotion and protection of investments*
>
> *In order to promote the international flow of investments, the signatories will at national level provide for a stable, transparent legal framework for foreign investments, in conformity with the relevant international laws and rules on investment and trade. They affirm that it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security and enable the use of investment risk guarantee schemes…*".[1032]

702. The object and purpose of the ECT, is therefore to provide a legally binding agreement "*on the promotion and protection of investments which ensure*[s] *a high level of legal security*" (emphasis added). Accordingly, the intent of the ECT is both to establish a regime "*to promote and protect investments*", and for that regime to "*ensure a high level of legal security*".

703. The "*ordinary meaning*" of Article 26 is to be interpreted in the light of this "*object and purpose*", and not the narrow alleged "*purpose*" conceived by the EU. The true "*object and purpose*", including the "*protect*[ion] *of investments*" and the "*high level of legal security*" to

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1030 **Exhibit CLA-1**, ECT.
1031 **Exhibit CLA-2**, the European Energy Charter, Title I: Objectives, p 29.
1032 **Exhibit CLA-2**, the European Energy Charter, Title II: Implementation, p 33.

be provided to investors by the ECT, confirms the "*ordinary meaning*" set out in Section IX.3 above. In summary, the unconditional consent of the Contracting Parties to international arbitration can only be vitiated in respect of those Contracting Parties listed in Annex 1D where the Investor has chosen to submit the dispute concerning breach by a Contracting Party of its obligations under Part III of the ECT to the courts or administrative tribunals of the Contracting Party to the dispute, or in accordance with any applicable, previously agreed dispute settlement procedure.[1033] The EU's interpretation – with its substitution of the clear words "*the dispute*" in Article 26 with the vague words "*a dispute in substance akin to a breach of the ECT*" - would not offer a high level of legal security for protected investments.[1034] Indeed, it would enable the Contracting Parties listed in Annex 1D a broad opportunity to deny to investors the recognised benefit of international arbitration in respect of a claim for breach of the substantive protections in the ECT.

IX.6 Jurisprudence and commentary supports NSP2AG's interpretation of Article 26

704. Further, the EU's interpretation of Article 26 is not "*consistent with past arbitral awards*" as the EU alleges. On the contrary, the ordinary meaning of Article 26(3)(b)(i) as described above was upheld by the tribunal in *PV Investors v. Republic of Spain*, in which the tribunal noted:

> "*323. It is important to read Article 26(3)(b)(i) in the context of the whole of Article 26 and in particular of its first two paragraphs. Article 26(1)-(3) may be broken down as follows:*
>
> *The fork-in-road clause of Article 26(3)(b)(i) is triggered "where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b)";*
>
> *Subparagraph (2) of Article 26, in turn, offers a choice of fora to a qualifying investor. The text of this provision sets forth that "the Investor party to the dispute may choose to submit" the dispute to one of the dispute settlement options, including domestic courts (a) and any previously agreed dispute settlement procedure (b).*

1033 **Exhibit CLA-260**, *The Czech Republic v. European Media Ventures SA*(UNCITRAL, Judgment of the English High Court of Justice on the Application to Set Aside Award on Jurisdiction of 5 December 2007, 2007 EWHC 2851 (Comm)), para 23, noting that, under investment treaties, investors are given substantive and procedural rights, which may be pursued in their own right (rather than by the their home state on their behalf), and that investment treaties give rise to consensual agreements to arbitrate between an investor and a State, arising out of (but distinct from) the treaty itself, and concluding that "*in these circumstances it seems … plain that in interpreting a BIT the Court is entitled to take into account that one of the objects of the treaty was to confer rights on an investor, including a valuable right to arbitrate*".

1034 **Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 54, line 24-p 55, line 13, and p 56, lines 16-25.

The dispute that "the Investor party to the dispute may choose to submit" to either option is a dispute pursuant to Article 26(1) of the ECT, i.e., a dispute "which concern[s] *an alleged breach of an obligation* [...] *under Part III" of the ECT.*

324. From the combined reading of the first three paragraphs of Article 26 it is clear that for the fork-in-the-road clause in Article 26(3)(b)(i) of the ECT to apply:

…

The dispute brought to arbitration and to one of the two options under subparagraph (2)(a) or (b), must concern an alleged breach <u>of Part III</u> [of] *<u>the ECT</u>*".[1035]

705. Further, NSP2AG's interpretation is supported by commentary on Article 26:[1036]

"*Article 26(1) defines the relevant "dispute" narrowly as one that "concern[s] an alleged breach of an obligation of the* [Respondent] *under Part III" of the ECT. Accordingly, it bars only a prior dispute in which the claimant alleged a breach of the Energy Charter Treaty itself and not some other source of law. In contrast, the NAFTA and CAFTA require the claimant to broadly waive all proceedings referring to the same "measure" at issue in the treaty arbitration. In practice, given the narrow scope of Article 26(1) of the ECT, it will likely be rare that Contracting Parties will successfully invoke that article to bar a claim*".

IX.7 <u>Giving Article 26 its ordinary meaning does not deny Article 26 of its "effet utile"</u>

706. The EU argues that to read the reference to "[d]*isputes … which concern an alleged breach of an obligation of the* [Contracting Party] *under Part III*" in Article 26(1) "*in good faith in accordance with the ordinary meaning*" deprives it of effect. In particular, it argues that it would violate the principle of "*effet utile*" by requiring that the investor must have "*cited ECT norms in exactly the same terms before national courts for it to constitute the "same dispute*"".[1037] The essence of the EU's argument, as it relates to the wording of Article 26, is

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1035 **Exhibit CLA-177**, *PV Investors v. Kingdom of Spain* (PCA Case No. 2012-14, Preliminary Award on Jurisdiction of 13 October 2014), paras 323 and 324. See also, para 258: "*The following provisions in Article 26 set out a range of possible dispute settlement fora which are available to a qualifying investor. These include (i) the domestic courts of the host state; (ii) "any applicable, previously agreed dispute settlement procedure"; and (iii) international arbitration (Article 26 (2)-(4)). If an investor elects to resort to international arbitration, the ECT provides four possible avenues …*". Similarly, in *Middle East Cement v. Egypt*, the tribunal rejected Egypt's argument that the submission of disputes to the Egyptian court triggered the fork-in-the-road provision of the Egypt-Greece Agreement for the Promotion and Reciprocal Protection of Investments on the basis that domestic dispute could not be characterized as an investment dispute. The Egypt-Greece BIT defined an investment disputes as "[d]*isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement*" (see **Exhibit CLA-261,** *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case no. ARB/99/6, Award of 12 April 2002)), para 71.

1036 **Exhibit CLA-22**, E. Gaillard & M McNeill, "Chapter 2 – The Energy Charter Treaty", in K. Yannaca-Small (ed.), Arbitration Under International Investment Agreements: A Guide To The Key issues, 2nd ed. (Oxford, OUP), 2018, p 52.

1037 EU's Jurisdiction Memorial, para 29.

encapsulated in an exchange between Mr Justice Unterhalter and the EU's counsel, Mr Bondy, at the Bifurcation Hearing on 8 December 2020:

> "*ARBITRATOR UNTERHALTER: … Do you agree with the interpretation given to Article 26(3)(b)(i) that the dispute that is being referenced there simply concerns a dispute about a breach of the ECT? And if you do not, then what are the disputes that you say are contemplated in that language?*
>
> *MR. BONDY: Thank you, Justice Unterhalter. Our point is a somewhat different one, that the disputes that are referred to are disputes in relation to obligations of the ECT. But, for the purposes of applying a "fork in the road" clause, we are asking you to apply a substantive approach rather than a labelling approach, and to consider whether the claims that are raised before the European Court and the General Court of the European Union are, in substance, aligned with and duplicative of the claims that are raised before the ECT.*
>
> *…*
>
> *ARBITRATOR UNTERHALTER: So, just to follow up, to be sure I have your point, you would then read the language of (3)(b)(i) to mean previously submitted a dispute in substance akin to a breach of the ECT?*
>
> *MR. BONDY: Yes, we do take that position because, in practice, another reading of this would render this a dead letter. If one were to say that the only possible place one could have submitted a BIT dispute elsewhere is before the domestic court, well, of course, one can't do that*".[1038]

707. This exchange serves as a clear illustration of at least two fundamental flaws in the EU's argument. First, it denies the plain reading of the words as already described above, by requiring that other words be read into the text. To make out the EU's argument, it is not enough that "*the dispute*" be referred to resolution in a different forum. The EU's argument effectively requires instead that the words "*or any dispute akin to the dispute*" be added into the text of the ECT. Such an argument must be rejected. This approach is not consistent with the principles of interpretation under Article 31 of the VCLT.

708. Second, the EU's argument rests on a fallacy: that a claim for breach of the ECT could not be brought in a domestic court or tribunal.[1039] This is simply not the case. An Investor could

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[1038] **Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 54, line 24-p 55, line 13; p 56, lines 16-25.

[1039] The EU asserts that it would be "*likely impossible*" to "*cite ECT norms in exactly the same terms before national courts for it to constitute the "same dispute"*" (EU's Jurisdiction Memorial, para 29). This position was repeated in the Hearing of 8 December, 2020 during which it was asserted that "*if one were to say that the only possible place one could have submitted a BIT dispute elsewhere is before the domestic court, well, of course, one can't do that*" (**Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union*

choose to bring a claim for breach of the ECT in the domestic courts of the Contracting Parties to the ECT.[1040]

709. The EU's Statement made to the Energy Charter Treaty Secretariat on 17 November 1997 (and later replaced with the EU's Statement made to the ECT Secretariat on 2 May 2019, (the "**Statement**")[1041]) itself clearly indicates that the ECT may be invoked before the Court of Justice of the European Union ("**CJEU**") and EU Member State courts.

710. In particular, paragraphs 4-5 and footnote 3 of the Statement, provide as follows:

> *"4. The Court of Justice of the European Union, as the judicial institution of the European Union and Euratom, is competent to examine any question relating to the application and interpretation of the constituent treaties and acts adopted thereunder, including international agreements concluded by the European Union and Euratom, which under certain conditions may be invoked before the Court of Justice.*
>
> *5. Any case brought before the Court of Justice of the European Union by a claimant of another non-EU Contracting Party in application of the forms of action provided by the constituent treaties of the Union falls under Article 26(2)(a) of the Energy Charter Treaty.(3) Given that the Union's legal system provides for means of such action, neither the European Union nor Euratom has given its unconditional consent to the submission of a dispute to international arbitration or conciliation.*
>
> [Footnote (3) to Paragraph 5] *Article 26(2)(a) is also applicable in the case where the Court of Justice of the European Union may be called upon to examine the application or interpretation of the Energy Charter Treaty on the basis of a request for a preliminary ruling submitted by a court or tribunal of a Member State in accordance with Article 267 of the Treaty on the Functioning of the European Union"* (emphasis added).[1042]

(PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 56, line 24 to p 57, line 2).

1040 Notably under Article 26(3)(c) of the ECT, certain Contracting Parties listed in Annex 1A do not give their "*unconditional consent with respect to a dispute arising under the last sentence of Article 10(1)*" (i.e. an umbrella clause claim). Accordingly, such disputes will have to be resolved under Article 26(2)(a) (i.e. in a domestic court) or Article 26(2)(b) (in accordance with an agreed dispute resolution procedure). It logically follows that all other disputes between an investor and a Contracting Party under the ECT can be resolved in the domestic courts under Article 26(2)(a).

1041 **Exhibit CLA-262**, Statement submitted by the European Communities to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT on 17 November 1997; **Exhibit CLA-211**, Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, Official Journal of the European Union, L 115/1, 2 May 2019.

1042 **Exhibit CLA-262**, Statement submitted by the European Communities to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT on 17 November 1997; **Exhibit CLA-211**, Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, Official Journal of the European Union, L 115/1, 2 May 2019.

711. The Statement therefore indicates that international treaties concluded by the EU may themselves, under certain conditions, be invoked before the CJEU, which may also be called upon to examine the application of interpretation of the ECT itself due to its invocation in proceedings in EU Member State courts.

712. This is confirmed by practice. The ECT, and its Article 10 in relation to the promotion, protection and treatment of investments, have been invoked in and applied by the EU Courts, for example in the *Dunamenti Erőmű*[1043] and *Tisza Erőmű*[1044] cases in 2014. While the EU Courts in those cases dismissed the arguments based on Article 10 of the ECT on the substance, they did not question the ability of the applicants to invoke this provision in the proceedings.

713. Similarly, and more recently, in its judgment of 15 April 2021, the CJEU considered the application of the ECT and its Article 10 in the context of a preliminary reference from the Italian domestic courts concerning alterations to an Italian support scheme for photovoltaic energy operators.[1045] While the CJEU considered that the ECT was inapplicable to the specific dispute at hand, there was no question that the ECT was, as a matter of general principle, capable of being invoked in domestic proceedings.[1046]

714. Further, in an even more recent judgment of 2 September 2021, the CJEU stated that an investor from an EU Member State could in principle invoke the ECT in the national courts of another Member State. The CJEU also considered that the Court of Justice of the EU was competent to respond to preliminary questions concerning the interpretation of the ECT, in order to ensure the uniform application thereof throughout the EU. The CJEU stated:

> "*It should in particular be noted in this regard that that court* [i.e. a referring court] *could find it necessary, in the context of a case falling directly under EU law, such as a dispute concerning a dispute between an operator of a third State and a Member State, to decide on the interpretation of these same provisions of the* [ECT]*. This would be possible not only, as in the present case, in the context of a request for the annulment of an arbitral award rendered by an arbitral tribunal whose seat is established in the territory of a Member State, but also in the event that proceedings*

1043 **Exhibit CLA-263**, *Dunamenti Erőmű Zrt. v. European Commission*, Case T-179/09, EU:T:2014:236, Judgment, 30 April 2014, paras 99-103.

1044 **Exhibit CLA-264**, *Tisza Erőmű kft v. European Commission,* Case T-468/08, EU:T:2014:235, Judgment, 30 April 2014, EU:T:2014:235, paras 320-324.

1045 **Exhibit CLA-265**, *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others (C-798/18) and Athesia Energy Srl and Others (C-799/18) v. Ministero dello Sviluppo economico, Gestore dei servizi energetici (GSE) SpA,* Joined Cases C-798/18 and C-799/18, EU:C:2020:876, Judgment, 15 April 2021.

1046 **Exhibit CLA-265**, *ibid*., paras 67-70.

have been brought before the courts of the respondent Member State in accordance with Article 26 (2) (a) of the [ECT]" (emphasis added).[1047]

715. It is apparent that the ECT has been invoked by investors in Member State courts.[1048] Similarly, other investment treaties have also been invoked in domestic courts.[1049]

716. More generally, the CJEU has consistently held that once an international treaty concluded by the EU enters into force, its provisions form "*an integral part*" of EU law,[1050] and there are numerous examples of provisions of international treaties being invoked in the EU Courts against EU and Member State measures and being applied by the EU Courts. These include bilateral agreements,[1051] as well as multilateral agreements addressing particular sectors, like the ECT.[1052]

717. In light of the broad potential for provisions of international treaties to be invoked in the EU Courts, the EU has, in the case of certain international treaties, sought to preclude this possibility. For some treaties, it has included specific provisions to this effect in the treaties themselves.[1053] It has also included statements to this effect in the EU Council decisions

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1047 See **Exhibit CLA-266**, *Republic of Moldova v. Komstroy LLC, successor in law to the company Energoalians*, Case C-741/19 EU:C:2021:164, Judgment, 2 September 2021, para 31.

1048 **Exhibit CLA-177**, *PV Investors v. Kingdom of Spain* (PCA Case No. 2012-14, Preliminary Award on Jurisdiction of 13 October 2014), para 308; **Exhibit RLA-168**, *Belenergia v. Italian Republic* (ICSID Case No. ARB/15/40, Award of 6 August 2019), para 209; **Exhibit CLA-226**, *Greentech Energy Systems A/S (now Athena Investments A/S), NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic* (SCC Case No. V(2015/095), Final Award of 23 December 2018), para 202, **Exhibit CLA-306**, Administrative Chamber of the Spanish Supreme Court Decision of 18 July 2012, Roj: STS 5035/2012 (Spanish original and English translation).

1049 The Spanish courts have accepted jurisdiction over a claim brought under the Spain-Equatorial Guinea bilateral investment treaty (see **Exhibit CLA-267**, *Grupo Francisco Hernando Contreras SL v. Republic of Equatorial Guinea,* Madrid Provincial Court Decision of 26 April 2017, Roj: AAP M 1500/2017 (Spanish original and English translation)).

1050 See for example, **Exhibit CLA-268,** *R. & V. Haegeman v. The Belgian State*, Case C-181/73, EU:C:1974:41, Judgment, 30 April 1974, para 5; **Exhibit CLA-269,** *Hauptzollamt Mainz v. C. A. Kupferberg & Cie. KG a.A.,* Case C-104/81, EU:C:1982:362, Judgment, 26 October 1982, para 13; **Exhibit CLA-270,** *A. Racke GmbH & Co. v. Hauptzollamt Mainz,* Case C-162/96, EU:C:1998:293, Judgment, 16 June 1998, para 41.

1051 Such as the EU-Morocco Cooperation Agreement **Exhibit CLA-271**, *Office national de l'emploi (Onem) v. Bahia Kziber*, Case C-18/90, EU:C:1991:36, Judgment, 31 January 1991; the EU-Russia Partnership Agreement, **Exhibit CLA-272**, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol,* Case C-265/03, EU:C:2005:213, Judgment, 12 April 2005; and the EU-Tunisia Euro-Mediterranean Agreement, **Exhibit CLA-273**, *Mohamed Gattoussi v. Stadt Rüsselsheim,* Case C-97/05, EU:C:2006:780, Judgment, 14 December 2006.

1052 Such as the Convention for the Protection of the Mediterranean Sea against Pollution and its Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources**, Exhibit CLA-274**, *Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région v. Électricité de France (EDF),* Case C-213/03*,* EU:C:2004:464, Judgment, 15 July 2004; and and the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, **Exhibit CLA-275**, *The Queen,* on the application of *International Air Transport Association and European Low Fares Airline Association v. Department for Transport,* Case C-344/04, EU:C:2006:10, Judgment, 10 January 2006.

1053 Including, by way of example, **Exhibit CLA-276**, Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (EU-Vietnam BIT), at Article 17.20: "*Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law. Vietnam may provide otherwise under Vietnamese domestic law*"; **Exhibit CLA-277**, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union, of the other part, Article 30.6(1): "*Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the*

authorising the signing and the provisional application of some treaties.[1054] No such provision or statement has been included or made in the case of the ECT, however. In other words, unlike for certain other treaties concluded by the EU, there are no indications that the EU has taken steps to exclude the possibility of invoking the ECT in EU courts. On the contrary, as explained above, the EU's Statement in relation to the ECT, recently refreshed on 2 May 2019, indicates that the ECT can be invoked in the EU courts, and the CJEU accepts this in practice.

718. In light of all the above, the EU's statement that it is "*of course*" impossible to invoke the ECT in the CJEU or EU Member State courts, is plainly wrong.[1055] There can be no argument that Article 26(3)(b)(i) of the ECT would lose its useful effect if its scope is limited to disputes concerning breaches of the ECT. The EU's own Statement acknowledges this. It follows that the EU's claim that a natural reading of Article 26 would violate the principle of *effet utile* is wrong, and should be rejected.

719. Further, the EU's interpretation of Article 26 is inconsistent with the recognition in paragraph 5 of the EU's Statement that the EU considers the Court of Justice of the European Union to qualify as a "*court or administrative tribunal*" of a Contracting Party for the purposes of Article

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Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties"; **Exhibit CLA-278**, 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, Article COMPROV.16(1): "*Without prejudice to* […]*, nothing in this Agreement or any supplementing agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement or any supplementing agreement to be directly invoked in the domestic legal systems of the Parties*."

[1054] Including by way of example, **Exhibit CLA-279**, Council Decision of 16 June 2014, on the signing, on behalf of the European Union, and the provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (2014/494/EU), Article 6: "*The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals*"; **Exhibit CLA-280**, Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (2011/265/EU), Article 8: "*The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals*"; **Exhibit CLA-281**, Council Decision of 16 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (2014/492/EU), Article 6: "*The Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals*"; and the WTO Agreements, **Exhibit CLA-282**, Council Decision of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (94/800/EC), final recital of the preamble: "*Whereas, by its nature, the Agreement establishing the World Trade Organization, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts*".

[1055] The EU asserts that it would be "*likely impossible*" to "*cite ECT norms in exactly the same terms before national courts for it to constitute the "same dispute"*" (EU's Jurisdiction Memorial, para 29). This position was repeated in the Hearing of 8 December, 2020 during which it was asserted that "*if one were to say that the only possible place one could have submitted a BIT dispute elsewhere is before the domestic court, well, of course, one can't do that*" (**Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 56, line 24 to p 57, line 2).

26(2)(a) of the ECT. If a dispute which concerns an alleged breach of Part III of the ECT were brought before the CJEU, it would trigger the so-called fork-in-the-road provision in Article 26(3)(b)(i).

720. Indeed, considering Paragraph 4 of the EU's Statement together with footnote (3) to Paragraph 5, it is clear that Paragraph 5 is only concerned with claims in which an applicant seeks to invoke an ECT provision in the CJEU, and not with claims which do not invoke the ECT:

i. Footnote 3 states that "*Article 26(2)(a) is also applicable in the case where the* [CJEU] *may be called upon to examine the application or interpretation of the Energy Charter Treaty on the basis of a request for a preliminary ruling under* [TFEU Art 267]" (emphasis added).

ii. Footnote 3 thus clarifies that Paragraph 5 does not only apply to cases brought directly before the CJEU but also to cases that are referred to the CJEU by way of preliminary reference from a Member State court.

iii. Footnote 3 makes it clear however that it is only concerned with cases involving "*the application or interpretation of the Energy Charter Treaty*". Logically, therefore, Paragraph 5 itself should be understood also to refer only to cases regarding the application or interpretation of the ECT.

721. NSP2AG's interpretation of Article 26 of the ECT is also supported by the annotation to Article 26(2)(a) of the ECT set out in Understanding 16 of the Final Act of the European Energy Charter Conference. This states that "*Article 26(2)(a) should not be interpreted to require a Contracting Party to enact Part III of the Treaty into its domestic law*".[1056]

722. Understanding 16 accordingly supports the view that Article 26(2)(a) may be relied upon to bring a claim in the courts of a Contracting Party both in circumstances where the ECT has been implemented in domestic law,[1057] or where the ECT is directly actionable in the courts and administrative tribunals of the Contracting Party without domestic implementation.[1058] As such, it is clearly contemplated that a dispute concerning "*an alleged breach of an obligation of the* [Contracting Party] *under Part III*" can be submitted for resolution to the courts or the administrative tribunals of the Contracting Party to the dispute (and may trigger

1056 **Exhibit CLA-21**, Final Act of the European Energy Charter Treaty Conference, 17 December 1994.

1057 For example, the United Kingdom takes a dualist approach to international law, requiring international law to be implemented in domestic law before the rights granted by international law can be relied on in the domestic courts. The ECT was designated as an EU Treaty in the UK European Communities (Definition of Treaties) (The Energy Charter Treaty) Order 1996/1639, and so was implemented in UK law through the UK European Communities Act 1972. Now that the UK has left the EU, implementation of the ECT will be ensured by section 4(1) of the European Union (Withdrawal) Act 2018 (**Exhibit CLA-283**, Command Paper No 286, Explanatory Memorandum on the Final Act of the International Conference and Decision by the Energy Charter Conference in respect of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty).

1058 As it is in the EU, as described in paras 712 to 715 and in Member State courts, as noted in para 715.

fork-in-the-road) consistent with NSP2AG's interpretation of Article 26, as described above, and that the ordinary meaning of Article 26(3)(b)(i) does not deprive it of its *effet utile*.

IX.8 The German court proceedings were commenced after the ECT arbitration and cannot vitiate the EU's unconditional consent to arbitration.

723. The EU's argument that the so-called fork-in-the-road provision is triggered by the German Proceedings is also doomed to failure because the German Proceedings cannot, in any case, vitiate the EU's unconditional consent to arbitrate NSP2AG's claims under the ECT.

724. Article 26(3)(b)(i) can only be engaged when the Investor has "*previously submitted the dispute under subparagraph 2(a) or (b)*". The German Proceedings were not commenced until 15 June 2020, whereas the Notice of Arbitration was filed on 26 September 2019. NSP2AG had not, therefore, "*previously submitted*" any dispute to the German courts at the time when it filed its Notice of Arbitration.

IX.9 If it is necessary to apply a "*test*", the "triple identity" test is appropriate

725. If, notwithstanding the above, the Tribunal is minded to consider a "*test*" as to whether the EU's unconditional consent has been vitiated by the CJEU Proceedings or the German Proceedings, the appropriate test is the "*triple identity*" test.

726. The EU argues that the "*triple identity*" test should be overlooked on the basis that all the tribunals that applied that test "*incorrectly substituted the actual language of the clause in the treaty for elements of a completely different test, borrowed from the distinct context of "lis pendens"*", and that these cases can be "*distinguished from the present case because they concern (i) different fork-in-the-road clauses; (ii) completely different facts; and (iii) … ignored the object and purpose of fork-in-the-road clauses*".[1059] It argues instead for the application of a "*fundamental basis*" test, described further below.

727. However, to the extent that the Tribunal considers that it is necessary to consider any kind of "*test*", the "*triple identity*" test is the more suitable test in the context of interpreting Article 26 of the ECT. The "*triple identity*" test – unlike the "*fundamental basis*" test – does not require the unambiguous wording of Article 26 to be manipulated or ignored.[1060] In contrast, applying the "*triple identity*" test would allow the tribunal to take account of the wording of Article 26 as described below.

IX.10 The "triple identity" test is supported by the weight of authority

728. The "*triple identity*" test has been applied by the large majority of investment treaty tribunals called upon to interpret fork in the road provisions in investment treaties including all ECT

[1059] EU's Jurisdiction Memorial, para 60.
[1060] See Reply Memorial, para 707.

tribunals that referred to a test to interpret the ECT's fork-in-the-road provision.[1061] Furthermore, as explained below at paragraphs 756 to 770, the decisions of the three tribunals applying the "*fundamental basis*" test as opposed to the "*triple identity*" test can readily be distinguished. In summary, there is strong authority for the use of the "*triple identity*" test, whereas cases using the so-called "*fundamental basis*" test favoured by the EU remain outliers.

729. Significantly, the EU does not make any reference in the EU's Jurisdiction Memorial to the fork-in-the-road cases in which Article 26 of the ECT has been considered and the "*triple identity*" test has been applied:

i. In *Yukos Universal Limited (Isle of Man) v. The Russian Federation*,[1062] the Russian Federation argued that the term "*dispute*", "*should be interpreted as a dispute between essentially the same parties relating to the same material facts or injuries that constitute the basis of the dispute*" before the tribunal, on the basis that a narrower interpretation defeated the object and purpose of the fork-in-the-road clause in Article 26. The tribunal recognised (and the respondent conceded) that there was "ample authority" for application of the "*triple identity*" test and to that extent, there was "no question" that the various Russian court proceedings and applications to the European Court of Human Rights cited by the Russian Federation "*failed to trigger the "fork-in-the-road provision" of the ECT*".

ii. In *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd v. Mongolia*,[1063] the tribunal "*saw no reason to go beyond the triple identity test" as there was "ample authority for its application*".[1064] The tribunal rejected Mongolia's argument that applying the "triple identity" test would deprive Article 26(3)(b)(i) of its "*effet utile*". It noted that:

"it must first be replied that the test for the application of fork in the road provisions should not be too easy to satisfy, as this could have a chilling effect on the

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1061 As described above, in *PV Investors v. Kingdom of Spain*, the tribunal considered that the interpretation of Article 26 was clear and did not have recourse to a "*test*" when determining that the Kingdom of Spain's fork-in-the-road argument should fail (**Exhibit CLA-177**, *PV Investors v. Kingdom of Spain* (PCA Case No. 2012-14, Preliminary Award on Jurisdiction of 13 October 2014).

1062 **Exhibit CLA-168**, *Yukos Universal Limited (Isle Of Man) v. The Russian Federation* (PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility of 30 November 2009), para 598

1063 **Exhibit CLA-169**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd v. Mongolia* (PCA Case No. 2011-09, Decision on Jurisdiction of 25 July 2012), para 390.

1064 **Exhibit CLA-169**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd v. Mongolia* (PCA Case No. 2011-09, Decision on Jurisdiction of 25 July 2012), para 390, citing **Exhibit CLA-87,** *Lauder v. Czech Republic* (UNCITRAL Arbitration Rules, Final Award of 3 September 2001), paras 163-66; **Exhibit RLA-22**, *CMS v. Argentina* (ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction of 17 July 2003), para 80; **Exhibit RLA-23**, *Azurix v. Argentina* (ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003), paras 88-91; **Exhibit RLA-29**, *Pan American Energy LLC et al. v. Argentina* (ICSID Case No. ARB/04/8, Decision on Preliminary Objections of 27 July 2006), paras 154-157; **Exhibit RLA-19**, *Toto Costruzioni Generali SpA v. Lebanon* (ICSID Case No ARB/07/12, Decision on Jurisdiction of 11 September 2009), paras 211-212.

submission of disputes by investors to domestic fora, even when the issues at stake are clearly within the domain of local law. This may cause claims being brought to international arbitration before they are ripe on the merits, simply because the investor is afraid that by submitting the existing dispute to local courts or tribunals, it will forgo its right to later make any claims related to the same investment before an international arbitral tribunal".[1065]

iii. In *Charanne BV v. The Kingdom of Spain*,[1066] the tribunal rejected the respondent's fork-in-the-road argument based on the fact that the "*triple identity*" test was not satisfied.

iv. In an award that post-dated the EU's Jurisdiction Memorial, in *FREIF Eurowind Holdings Ltd (United Kingdom) v. The Kingdom of Spain*, [1067] the tribunal acknowledged that applying the "*triple identity*" test is not a requirement when considering a fork in the road provision, but concluded that:

"Nonetheless, the triple identity test has been used by numerous tribunals in their analysis of the "electa una via" provision under the ECT, including in a case against Spain. Therefore, it is the Tribunal's view that the triple identity test developed through jurisprudence is compatible with the ordinary meaning of the express terms of Article 26(3)(b)(i) of the ECT and is a framework that can appropriately assist tribunals when considering whether the "electa una via" provision has been engaged".[1068]

The tribunal therefore applied the "*triple identity*" test to the facts of the case, concluding that it was not satisfied, including because the requirements of identity of objects and causes of action were not satisfied. The tribunal determined that:

"Although there appears to be some overlap in the factual background raised in the Spanish Lawsuits and the present Arbitration, the object of the Spanish Lawsuits was to strike down the New Regulatory Regime on the basis that it violated Spanish law. They were brought on the basis of Spanish statutory law, the Spanish Constitution, and EU law and involved a different legal standard. The subject of the

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1065 **Exhibit CLA-169**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd v. Mongolia* (PCA Case No. 2011-09, Decision on Jurisdiction of 25 July 2012), para 391.

1066 **Exhibit CLA-102**, *Charanne B.V. and Construction Investments S.A.R.L. v. The Kingdom of Spain* (SCC Arbitration No. 062/2012, Final Award of 21 January 2016), paras 405-408.

1067 **Exhibit CLA-284**, *FREIF Eurowind Holdings Ltd. (United Kingdom) v. Kingdom of Spain* (SCC Case V 2017/060, Final Award of 8 March 2021).

1068 **Exhibit CLA-284**, *ibid.*, paras 419-420, citing **Exhibit CLA-102**, *Charanne B.V. and Construction Investments S.A.R.L. v. The Kingdom of Spain* (SCC Arbitration No. 062/2012, Final Award of 21 January 2016).

dispute in the present Arbitration is an investment treaty dispute concerning compensation for alleged breaches of objections under the ECT".[1069]

v. As explained in paragraph 704 above, in *PV Investors v. Spain* the tribunal did not apply any "*test*"[1070], which, in NSP2AG's submission and for the reasons explained above, is the correct approach.

730. Not only does the EU refuse to engage with the decisions of previous ECT tribunals, its attempts to distinguish the multitude of cases that support the use of the "*triple identity*" test are unconvincing. The EU argues that the factual scenarios in the cases applying the "*triple identity*" test are different to the factual scenario in the present arbitration. However, such an argument does not address the legal reasoning in these cases or explain why (as they argue) a different test altogether (i.e. the "*fundamental basis*" test) should be used in the context of Article 26 of the ECT. In particular:

i. The EU seeks to distinguish *CMS v. Argentina*,[1071] on the basis that "*all of* [the] *circumstances are fundamentally different from those of the present case*".[1072] However, the tribunal reached its decision that the fork-in-the-road provision had not been triggered on the basis that the claimant parties and "*the causes of action under separate instruments*" were different. It confirmed that "*as contractual claims are different from Treaty claims, even if there had been or there currently was a recourse to the local courts from breach of contract* [by the claimant]*, this would not have prevented submissions of the Treaty claims to arbitration*" i.e. because the "cause of action" was not the same.[1073] The EU does not address why the same reasoning would not apply in respect of NSP2AG's claim under the ECT – i.e. that fork-in-the-road is not triggered where there is no identity of cause of action.

ii. The same reasoning as applied in *CMS v. Argentina* was relied upon by the tribunal in *Azurix v. Argentina*.[1074] The *Azurix* tribunal noted, citing *Benvenuti & Bonfant v. Congo*,[1075] that:

"In one of the first cases that an ICSID tribunal had to decide on the existence of a pending suit and its relevance to the ICSID proceedings, the tribunal "declared that

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1069 **Exhibit CLA-284**, *FREIF Eurowind Holdings Ltd. (United Kingdom) v. Kingdom of Spain* (SCC Case V 2017/060, Final Award of 8 March 2021), para 427.

1070 **Exhibit CLA-177**, *PV Investors v. Kingdom of Spain (*PCA Case No. 2012-14, Preliminary Award on Jurisdiction of 13 October 2014) (see para 704 above).

1071 **Exhibit RLA-22***, CMS Gas Transmission Co v. Republic of Argentina* (ICSID Case No. ARB/01/8. Decision on Objections to Jurisdiction of 17 July 2003).

1072 EU's Jurisdiction Memorial, para 69.

1073 **Exhibit RLA-22,** *CMS Gas Transmission Co. v. Republic of Argentina* (ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction of 17 July 2003), para 80.

1074 **Exhibit RLA-23**, *Azurix v. Argentina* (ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003).

1075 **Exhibit RLA-21**, *Benvenuti & Bonfant s.r.l. v. People's Republic of the Congo* (ICSID Case No. ARB/77/2, Award of 8 August 1980), 21 I.L.M. 740 (1982).

there could only be a case of lis pendens where there was identity of the parties, object and cause of action in the proceedings pending before both tribunals. This line of reasoning has been consistently followed by arbitral tribunals in cases involving claims under BITs, unless … the controlling agreement provided otherwise, as in the case of NAFTA".[1076]

iii. It found that it had jurisdiction as the fork-in-the-road provision had not been triggered – there was no identity of parties or cause of action. The EU's conclusion that "*as in CMS, the key to the finding was that the proceedings concerned different issues, were brought by different parties, and sought different relief…*"[1077] overlooks the reference to different causes of action in both *CMS* and *Azurix*, and again, does not elucidate why the "*test*" it asks the Tribunal to adopt in this case should be different, either based on the wording of Article 26 of the ECT or otherwise.

iv. The *Enron v. Argentina* case is dismissed by the EU for similar reasons, and again with no reference to the legal reasoning of the *Enron* tribunal.[1078] The EU further suggests that the tribunals in *CMS*, *Azurix* and *Enron*, were "*searching for reasons to decline Argentina's request*" to deny jurisdiction and that this supports the EU's plea that the approach in these cases should not be relied on by the Tribunal.[1079] Such unwarranted speculation as to the motivation of the tribunals in these cases does not advance the EU's claim that the "*triple identity*" test should be overlooked in favour of a "*fundamental basis*" test.

v. The EU again seeks to distinguish *Occidental v. Ecuador*[1080] on the basis of differences in the factual circumstances. In particular, the EU argues that the claimant's "*pursuit of administrative relief before Ecuador's courts was dictated by the very short timeline for such proceedings under Ecuadorian law*", whereas NSP2AG was not "*forced*" to pursue claims before the European Courts.[1081] However, in order to avoid the risk of losing its right to challenge the legality of the Amending Directive under EU law, NSP2AG was required by Article 263 TFEU to submit the Annulment Application within 2 months and 24 days of the Directive's publication. It was therefore not possible for NSP2AG to await the outcome of this ECT arbitration before commencing proceedings in the EU courts. In any event, the factual differences do not justify (let alone require) the use of a different "*test*" and neither does the motivation for bringing domestic proceedings within a certain period

1076 **Exhibit RLA-23**, *Azurix v. Argentina* (ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003), paras 88-89.
1077 EU's Jurisdiction Memorial, para 70.
1078 **Exhibit RLA-24**, *Enron Corp. v. Argentine Republic* (ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004).
1079 EU's Jurisdiction Memorial, para 71.
1080 **Exhibit RLA-25**, *Occidental v. Ecuador* (LCIA Case No. UN 3467, Final Award of 1 July 2004).
1081 EU's Jurisdiction Memorial, para 74.

of time alter the question of whether those proceedings trigger the fork-in-the-road provision.

vi. Moreover, the EU selectively quotes the *Occidental* case when it suggests that the tribunal's "*focus is on the essential identity between disputes before an investment treaty tribunal and before local courts*".[1082] In fact, the *Occidental* tribunal found that to reject the fork-in-the-road objection it "*probably would suffice*" to consider that the issue in the domestic courts related to the interpretation of Ecuadorian legislation, whereas the issue before the tribunal was a question of the investor's rights under a treaty.[1083] In this context, the tribunal referred to Azurix in which the tribunal had applied the "*triple identity*" test and found that no identity of cause of action existed.

vii. Similarly, the EU relies on the cases of *Pey Casado v. Chile*,[1084] and *Toto Construzioni v. Lebanon*,[1085] as examples where claims in the arbitration proceedings and in the local courts or tribunals were fundamentally different.[1086] It then seeks to contrast that with the present case, arguing that NSP2AG's claims before the European Courts and before this arbitration tribunal are both "*essentially the same 'public law' claims*".[1087] However, as already explained above, the ECT Proceedings and the CJEU Proceedings are fundamentally different and are not "*essentially the same 'public law' claim*". In any event, any such difference in the characterisation of the claims, is not relevant to the choice of test to be applied by the tribunal in order to assist with the interpretation of the ECT's fork-in-the-road provision. As the tribunal in *Toto Costruzioni v. Lebanon* confirmed:

"*In order for a fork-in-the-road clause to preclude claims from being considered by the Tribunal, the Tribunal has to consider whether the same claim is "on a different road," i.e., that a claim with the same object, parties and cause of action is already brought before a different judicial forum*".[1088]

This general statement of approach was then applied by the tribunal to the facts before it.

731. The EU refers to a number of other cases in which it asserts that the decision to refuse the application of the fork-in-the-road clause was "*based on an element of the test*".[1089] However,

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1082 EU's Jurisdiction Memorial, para 74.
1083 **Exhibit RLA-25**, *Occidental v. Ecuador* (LCIA Case No. UN 3467, Final Award of 1 July 2004), para 47.
1084 **Exhibit RLA-18**, *Pey Casado v. Republic of Chile* (ICSID Case No. ARB/98/2, Award of 8 May 2008).
1085 **Exhibit RLA-19**, *Toto Costruzioni v. The Republic of Lebanon* (ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009).
1086 EU's Jurisdiction Memorial, paras 76-77.
1087 EU's Jurisdiction Memorial, para 75.
1088 **Exhibit RLA-19**, *Toto Costruzioni v. The Republic of Lebanon* (ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009), para 211, cited by the EU in EU's Jurisdiction Memorial, para 77.
1089 EU's Jurisdiction Memorial, para 78.

it simply lists the basis upon which the test was not met in those cases.[1090] It does not explain – by reference to the wording of the applicable treaty in each case, or otherwise – why the legal reasoning of those tribunals should not be applicable in this case. On the contrary, the EU explains that, in two of those cases, the lack of identity of the respondents was the reason for refusing to deny jurisdiction based on fork-in-the-road.[1091] However, this is a point of similarity with NSP2AG's case, and not a point of distinction. NSP2AG's claims in the CJEU Proceedings, the German Proceedings, and this arbitration are brought against different respondents.[1092]

732. In any case, it is clear that the cases referred to in paragraph 78 of the EU's Jurisdiction Memorial cannot be distinguished based on the legal reasoning. Nor can they support an argument that, if a "*test*" is required, the "*fundamental basis*" test is the appropriate one.[1093]

1090 EU's Jurisdiction Memorial, para 78, citing **Exhibit RLA-26**, *Olguin v. Republic of Paraguay* (ICSID Case No. ARB/98/5, Decision on Jurisdiction of 8 August 2000); **Exhibit RLA-27**, *Lauder v. Czech Republic* (UNCITRAL Award of 3 September 2001); **Exhibit RLA-28**, *LG&E Energy Corp., v. Argentine Republic* (ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction of 30 April 2004); **Exhibit RLA-29**, *BP America Prod. Co. v. Argentine Republic* (ICSID Case No. ARB/04/8, Decision on Preliminary Objections of 27 July 2006), and **Exhibit RLA-30**, *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1, Decision on Liability of 27 December 2010).

1091 **Exhibit RLA-26**, *Olguín v. Republic of Paraguay* (ICSID Case No. ARB/98/5, Decision on Jurisdiction of 8 August 2000), and **Exhibit RLA-29**, *BP America Prod. Co. v. Argentine Republic* (ICSID Case No. ARB 04/8, Decision on Preliminary Objections of 27 July 2006).

1092 The CJEU Proceedings are brought against the Council and the EU Parliament, being the co-legislators in the EU framework. The German Proceedings are brought against the BNetzA, the German regulator.

1093 In *Olguín v. Republic of Paraguay*, the claimant's application in the courts of Paraguay was for a declaratory judgment of bankruptcy and liquidation of a commercial corporation which could not "*have the same juridical effect as a claim against the Republic of Paraguay*". Therefore, the tribunal implicitly found that one of the elements of the "triple identity" test was not met (**Exhibit RLA-26**, *Olguín v. Republic of Paraguay* (ICSID Case No. ARB/98/5, Decision on Jurisdiction of 8 August 2000), para 30); in *BP America Prod. Co. v. Argentine Republic*, the tribunal concluded that there was "*neither identity of the parties nor identity of the cause of action. In the local claim, the Government of Argentina is not a party* […] *The cause of action is also different. The local claim is not based on an alleged violation of the BIT, even though the BIT was referred to in passing*". Accordingly, the tribunal applied the "triple identity" test (**Exhibit RLA-29**, *BP America Prod. Co. v. Argentine Republic* (ICSID Case No. ARB 04/8, Decision on Preliminary Objections of 27 July 2006), para 157); in *LG&E v. Argentina*, the tribunal concluded that under Article VII(3) of the relevant treaty, the investor had a choice of which arbitral forum and that, the claimants not having submitted the dispute to the Argentine courts or to any other dispute settlement mechanism mentioned in Article VII(2) or (3), "*no question*" regarding the fork-in-the-road provision arose (**Exhibit RLA-28**, *LG&E Energy Corp v. Argentine Republic* (ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction of 30 April 2004), para 76); in *Lauder v. Czech Republic*, the tribunal analysed the meaning of "investment dispute" in the relevant treaty, "*i.e. "an alleged breach of any right conferred or created by this Treaty with respect to an investment*", and concluded that the purpose of the treaty provision was "*to avoid a situation where the same investment dispute ("the dispute") is brought by the same claimant ("the national or the company") against the same respondent (a Party to the Treaty) for resolution before different arbitral tribunals and/or different state courts of the Party to the Treaty that is also a party to the dispute*". It concluded that "*all other arbitration or court proceedings referred to by the Respondent involve different parties, and deal with different disputes*". The tribunal therefore applied the requirements of the treaty to the facts at hand in a similar manner to that in which, if a test were needed, NSP2AG asks the Tribunal to do in this case (**Exhibit RLA-27**, *Lauder v. Czech Republic* (UNCITRAL, Award of 3 September 2001), paras 160 to 166); in *Total v. Argentina*, the tribunal rejected Argentina's fork-in-the-road argument because "*the two proceedings have a different object. The object of the arbitration before this Tribunal is the alleged breach of the BIT by Argentina's demand for retroactive tax payment; the claim before Argentina's domestic courts is that the* [tax] *demand is in breach of Argentina's law*". The tribunal also highlighted that there was no identity of parties. Accordingly, two elements of the "triple identity" test were not met (**Exhibit RLA-30**, *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1, Decision on Liability of 27 December 2010), para 443).

733. The EU's assertion that the "*factual circumstances drew tribunals into a "triple identity" type of analysis*" fundamentally misunderstands the task in hand for the tribunals in question (and, indeed, this Tribunal) in determining whether the fork-in-the-road clause has been triggered.[1094] This is an exercise that begins with the fork-in-the-road provision itself - as it is the treaty that defines the scope of the tribunal's jurisdiction - and applies that provision to the facts in hand. It would therefore be surprising if the tribunals in the "*triple identity*" cases had derived the appropriate test from the facts, as the EU asserts. Indeed, on closer inspection, it is apparent that they did not do so.

734. The EU's argument that the "*triple identity*" test is not the appropriate one is also not supported by the distinction it draws between claims in contract and under an investment treaty on the one hand, and the alleged "*public law*" claims that it wrongly asserts that NSP2AG brings in the ECT arbitration and CJEU Proceedings.[1095] A number of tribunals have considered the question of whether a fork-in-the-road clause has been triggered in the context of proceedings based on domestic law, or being of a "public law" nature, and have applied the "*triple identity*" test, concluding, among other things, that there was no identity of cause of action.[1096]

IX.11 The "triple identity" test is, in any event, not satisfied in this case

735. The "*triple identity*" test is in any event not satisfied in respect of the ECT arbitration and the CJEU Proceedings or the German Proceedings. There is both a different cause of action and object, as well as different respondent parties. In particular, the EU's argument that the "*triple identity*" test is met rests on: (i) an interpretation of the requirement of identity of "*cause of action*" that finds no basis or support in the authorities and which is simply another way of arguing its "*fundamental basis*" test, the flaws in which are described in Section IX.12 below; and (ii) an unsustainable attempt to equate the "object" of the two sets of proceedings.

736. The "*triple identity*" test, as applied by investment treaty tribunals, involves examination of the following three elements:

1094 EU's Jurisdiction Memorial, para 80.

1095 EU's Jurisdiction Memorial, para 75.

1096 For example, **Exhibit CLA-220**, *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. The Argentine Republic* (ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability of 10 April 2013), paras 144-146, concerning amparo actions that invoked, *inter alia*, provisions of the Argentine Constitution (the right to equality, property rights and the due process of law). The tribunal concluded that "*the amparo actions have a different cause of action and a different purpose and object than this ICSID arbitration. This is so even if decisions rendered in amparo proceedings become res judicata in relation to any subsequent claims for damages in the event that a measure is held to be unlawful. To conclude, this Tribunal has no jurisdiction to set aside any of the laws or regulations envisaged in the amparo actions or declare them void under Argentine law*"; and **Exhibit RLA-30**, *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1, Decision on Liability of 27 December 2010), para 443, in which the tribunal considered the same issue albeit under the guise of identity of object rather than identity of cause of action. It considered that "*the two proceedings have a different object. The object of the arbitration before this Tribunal is the alleged breach of the BIT by Argentina's demand for retroactive tax payment; the claim before Argentina's domestic courts is that the demand is in breach of Argentina's law*."

i. the same parties or *persona*;

ii. the same cause of action or *causa petendi*, referring to the legal grounds on which the claim for relief is based;[1097] and

iii. the same object or *petitum*, meaning that the same type of relief is sought in different proceedings.

737. When any one of these three elements is not present, the "*triple identity*" test is not satisfied and the fork-in-the-road provision is not triggered. In this case, none of the three elements of the "*triple identity*" test is satisfied and the EU's fork-in-the-road objection fails.

No identity of cause of action or causa petendi

738. As discussed further below, NSP2AG's rights in this ECT arbitration are grounded in the international law obligations which the EU assumed to Investors of other Contracting Parties when it became a Contracting Party to the ECT. The rights of NSP2AG as an investor under the ECT are the cause of action or *causa petendi* in this arbitration. In contrast, in the CJEU Proceedings, NSP2AG filed an application under Article 263 TFEU on the grounds of the Amending Directive's illegality as a matter of EU law. EU law supplies the cause of action or *causa petendi.* As confirmed by NSP2AG during the Hearing on 8 December, 2020[1098] as well as in a subsequent email of 9 December 2020, NSP2AG's annulment application in the EU courts "*in no way relies upon the protections under the Energy Charter Treaty*".[1099]

739. There is therefore no identity of cause of action between the ECT arbitration and the CJEU Proceedings. This is decisive as far as application of the "*triple identity*" test is concerned: the "*triple identity*" test is not met. This outcome cannot be remedied by way of a comparison of the manner in which the two claims are pleaded or by drawing attention to superficial similarities between the words used.[1100] Indeed, the EU's attempt to circumvent the requirement of identity of cause of action in this way has led it to conflate this prerequisite with the requirement as to identity of object, as discussed further in paragraph 748 below.

740. The EU also argues that an Investor could "*circumvent* [fork in the road] *clauses by remodelling some of the claims before one Court or Tribunal*"[1101] but this is not the case. If a claimant relies on treaty protections as the legal ground for its claims in two fora, it will be

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1097 By way of example, see **Exhibit RLA-19**, *Toto Costruzioni v. The Republic of Lebanon* (ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009), para 211, referred to in paragraph 730.vii of this Reply Memorial, and **Exhibit RLA-29**, BP America Prod. Co. v. Argentine Republic (ICSID Case No. ARB 04/8, Decision on Preliminary Objections of 27 July 2006), para 157, referred to in footnote 1093 of this Reply Memorial .

1098 **Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), from p 58.

1099 **Exhibit C-276**, Email from HSF to the Tribunal, "PCA Case No. 2020-07: Nord Stream 2 AG (Switzerland) v. The European Union" (attachments omitted), 9 December 2020.

1100 EU's Jurisdiction Memorial, para 90.

1101 EU's Jurisdiction Memorial, para 88.

readily apparent that it has done so as the court or administrative tribunal would be required to scrutinise the source of the legal rights on which the claim is based.

741. Further, as any "*test*" is applied as an aid to application of the specific wording of the applicable fork-in-the-road clause (in this case, Article 26 of the ECT), it must be consistent with the wording in the treaty.[1102] In this case, the ECT's fork-in-the-road clause refers specifically to claims "*under Part III*" of the ECT. This can be contrasted with other treaties under which all court proceedings relating to the same state "*measure*" can trigger the fork-in-the-road provision.[1103] Article 26 itself therefore supports a narrow understanding of the "identity of cause of action" requirement of the "*triple identity*" test, which can be satisfied only if an Investor brings a claim "*concerning an alleged breach of Part III of the ECT*" in another forum under Article 26(2)(a) or (b).

742. For completeness, and although the EU has not put forward any arguments as to why the German Proceedings vitiate its unconditional consent to arbitration (whether by application of the "*triple identity*" test or the "*fundamental basis*" test), there is no identity of cause of action between the ECT arbitration and the German Proceedings. As described in paragraph 680 above, the German Proceedings are brought further to NSP2AG's rights under German law and EU law to appeal the decision of the BNetzA, to the OLG and the BGH. The German Proceedings are not brought pursuant to, or in reliance on, any of NSP2AG's rights as an investor under the ECT.

No identity of object

743. There is no identity of object – or *petitum* - between the ECT arbitration and the CJEU Proceedings. An action for annulment is a legal procedure before the CJEU that "*guarantees the conformity of EU legislative acts, regulatory acts and individual acts with the superior rules of the EU legal order*",[1104] i.e. a review of the legislative act itself. The CJEU Proceedings have as their object the annulment of the Amending Directive on the basis that it is in breach of EU law. An annulment would therefore affect not only NSP2AG's investment

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1102 This appears to be accepted by the EU which appeared to criticise previous arbitral decisions on the basis that the application of the test ignored the actual wording of the specific treaty (EU's Jurisdiction Memorial, para 60).

1103 **Exhibit CLA-22**, in which the authors Gaillard and McNeill refer to NAFTA and CAFTA as examples for treaties under which investors waive their right to bring local court proceedings with respect to the "measure" that they argue in the arbitration to be a breach of their treaty rights.

1104 **Exhibit C-183**, European Parliamentary Research Service, "Action for Annulment of an EU Act", Briefing: Court of Justice at work, PE 642.282, November 2019 (last accessed on 14 October 2020 at https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642282/EPRS_BRI(2019)642282_EN.pdf), p 1. See also p 8: "*The action for annulment is an important element of the judicial architecture of the European Union. In comparison to national law, it fulfils a double function – on the one hand, it is the equivalent of a constitutional complaint, which enables the Court of Justice to perform constitutional review, i.e. verify the conformity of EU legislation with primary law (the Treaties, the Charter). On the other hand, it is the equivalent of a complaint to an administrative court, which enables the Court of Justice to perform judicial review of administrative action, i.e. verify the legality of individual administrative decisions taken by EU institutions, agencies and bodies with regard to individuals*".

but have *erga omnes* effect. In contrast, the object of this arbitration is to remedy breaches of NSP2AG's rights under the ECT. An award in favour of NSP2AG would only affect NSP2AG's legal position.

744. In other words, the CJEU Proceedings are concerned with the objective legality of the Amending Directive as a matter of EU law. NSP2AG's pleas in the CJEU Proceedings therefore address the alleged breaches of EU law, whereas the focus of this ECT arbitration is on NSP2AG's subjective rights as an Investor and how a breach of these rights might be remedied.

745. The difference is further illustrated in the remedies sought in the two proceedings. The remedy sought in the CJEU Proceedings is the annulment of the Amending Directive. In the ECT arbitration, such an annulment is not requested, and it is not within the power of the tribunal to order it. In the ECT arbitration, NSP2AG seeks, *inter alia*, an order that the EU, by means of its own choosing, remove the application of certain articles of the Gas Directive to NSP2AG and, in addition, reserves the right to claim damages in respect of the losses that have been and are being caused by the EU's breaches of the ECT, to the extent not avoided by the primary relief claimed.

746. Moreover, as a further clear line of difference, damages are not even available in the CJEU Proceedings. In fact, even in the event of a successful appeal to the General Court's decision on inadmissibility and the annulment of the Amending Directive, NSP2AG would be unable to obtain compensation for losses caused by the introduction of the annulled Directive through the CJEU Proceedings.[1105] The EU's reference to NSP2AG seeking an "*order to pay the applicant's costs in* [the CJEU Proceedings]"[1106] is a hopeless attempt at construing an identity in the remedies sought. This must be rejected: a claim for costs cannot be equated with a claim for damages.

747. In summary, the object of the CJEU Proceedings and this ECT arbitration are different in terms of the pleas made in support of the remedies sought and in the effect these remedies would have for NSP2AG. Again, this difference, on its own, would be sufficient to establish that the "*triple identity*" test is not satisfied.

748. In the EU's Jurisdiction Memorial, the EU argues that "*"identity of cause of action" cannot mean that identical pleas or arguments must be submitted in different fora*".[1107] It then embarks upon an exercise that compares six pleas in law made in the CJEU Proceedings with the claims brought in the arbitration, which it argues "*demonstrates clearly the correspondence and parallelism of the cause of action*".[1108] However, this confuses two

[1105] NSP2AG notes that the CJEU can, in principle, order damages; however, this would require a separate claim under Article 268 TFEU; see below at paragraph 777.
[1106] EU's Jurisdiction Memorial, para 86.
[1107] EU's Jurisdiction Memorial, para 88.
[1108] EU's Jurisdiction Memorial, para 90.

elements of the "*triple identity*" test: identity of cause of action (*causa petendi*) and identity of object (*petitum*). As discussed in paragraph 738 above, tribunals applying the "*triple identity*" test have considered the "*cause of action*" by reference to the legal right on which the claim is based.[1109] In the absence of jurisprudential support, the EU justifies its approach by arguing that interpreting identity of "*cause of action*" so as to require identical pleas or arguments to be submitted in different fora would deprive the fork-in-the-road clauses of their "*effet utile*".[1110] This is not correct. As noted above,[1111] such an argument has been expressly rejected.[1112]

749. Even if the EU's comparative exercise were to be accepted as relevant to assessing identity of cause of action or identity of object (which is denied), it has not demonstrated anything more than the most superficial similarity between the manner in which NSP2AG's claims in the CJEU Proceedings, and the claims for breach of the ECT in this arbitration, are expressed. While some of the general principles of EU law relied upon in the CJEU Proceedings have similarities with some of the international law guarantees in the ECT, one cannot pluck a word, concept, or allegation from the Claimant's ECT Memorial - such as "*discrimination*", "*arbitrariness*" or "*breach of due process*", find the same reflected in the Pleas in Law in the CJEU Proceedings, and then simply conclude that the requirement of identity of cause of action or object is met. It is not. The CJEU Proceedings and the ECT arbitration are based on different legal protections deriving from different legal systems and requiring NSP2AG to meet different standards to demonstrate that they have been infringed.

750. For example:

i. The EU refers to NSP2AG's claim in this arbitration regarding the EU's breach of the non-discrimination obligation in Article 10(7) ECT and seeks to equate it with NSP2AG's plea in the CJEU Proceedings in relation to the EU law principle of "*equal treatment*".[1113] There is no attempt to demonstrate how the legal standards under one legal order - EU law - equate to the legal standards to be met by NSP2AG in establishing a breach of the ECT. The EU has failed to demonstrate that both are, beyond the superficial label, identical or even comparable. Nor could it do so.

ii. The EU equates NSP2AG's claim in this arbitration that the EU failed to afford due process and denied NSP2AG justice in breach of the guarantee of fair and equitable treatment standard, with NSP2AG's plea in the CJEU Proceedings that the EU misused its powers. This comparison is drawn on the basis that both claims in the

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1109 **Exhibit RLA-19,** *Toto Costruzioni v. The Republic of Lebanon* (ICSID Case No. ARB/07/12, Decision on Jurisdiction of 11 September 2009), para 214.
1110 EU's Jurisdiction Memorial, para 88.
1111 See paragraph 729.ii.
1112 **Exhibit CLA-169**, *Khan Resources Inc., Khan Resources BV., and Cauc Holding Company Ltd. v. Mongolia* (PCA Case No. 2011-09, Decision on Jurisdiction of 25 July 2012), para 391.
1113 EU's Jurisdiction Memorial, para 103.

proceedings concern the EU's alleged motivation for the Amending Directive.[1114] However, these two matters cannot be equated. As the EU itself explains,[1115] the question of misuse of powers in EU law is related to a key feature of the EU's unique institutional framework, namely the need to ensure that the EU does not use the powers conferred on it by its Member States for purposes other than those for which a specific power was conferred.[1116] This ground in the CJEU Proceedings, therefore, could never be equated to a claim under the ECT, whether based on the guarantee of fair and equitable treatment or otherwise. Further, in establishing a breach of the ECT on the grounds of failure to accord fair and equitable treatment, NSP2AG is not required to prove the motive for the EU's conduct. On the EU's case, in order for the Amending Directive to be vitiated on the basis of a misuse of powers, this requires a finding "*on the basis of objective, relevant and consistent evidence*" that the measure "*has been taken solely or at least chiefly, for ends other than those for which the power in question was conferred or with the aim of evading a procedure specifically prescribed by the Treaties for dealing with the circumstances of the case*".[1117] The EU's description of the matters which must be established in order to achieve the object of annulling the Amending Directive in the CJEU Proceedings are clearly different from the matters alleged, and to be established by, NSP2AG in the ECT arbitration.

iii. In relation to other pleas, the EU's comparison is even more tenuous. For example, the EU argues that NSP2AG's claim for expropriation under Article 13 ECT is equivalent to its pleas in the CJEU Proceedings relating to proportionality and legal certainty. Not only are these pleas based on wholly different legal systems (EU law, and international law under the ECT), but no meaningful comparison can be made between them. In the ECT arbitration, NSP2AG alleges that its investment is expropriated because it is prevented from owning and operating the German Section by the unbundling requirements, third party access requirements and tariff regulation imposed by the Amending Directive. NSP2AG's unlawful expropriation claim does not rest on arguments as to lack of proportionality, nor legal certainty.

751. No attempt is made by the EU to establish an identity of object – or *petitum* - between the ECT arbitration and the German Proceedings. Indeed, any such attempt would be futile: the

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1114 EU's Jurisdiction Memorial, paras 92-93.

1115 EU's Jurisdiction Memorial, para 93.

1116 Article 5(2) TEU states: "*Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*" (**Exhibit RLA-40**). Further, per Article 13(2) TEU: "*Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them*" (**Exhibit RLA-49**).

1117 EU's Jurisdiction Memorial, para 93.

object of the German Proceedings and this ECT arbitration is wholly different. In the German Proceedings, NPS2AG appeals against the BNetzA's decision to refuse to grant NSP2AG a derogation based on its interpretation of the words "*completed before 23 May 2019*". Were NSP2AG to be successful in its appeal against the BNetzA's decision, the BNetzA would consider whether NSP2AG was entitled to a derogation. In this ECT arbitration, NSP2AG argues that the EU has breached various of its obligations under the ECT and seeks restitution and/or compensation in respect of those breaches.

No identity of parties

752. Finally, there is also no identity of parties. The respondent in this ECT arbitration is the EU, as an REIO, which is a Contracting Party to the ECT. The EU has signed the ECT in exercise of its external competence. In contrast, the respondents in the CJEU Proceedings are two specific institutions of the EU: the Council of the European Union and the European Parliament, the bodies internally responsible for the adoption of the Amending Directive.

753. This difference was simply ignored by the EU in its Memorial on Jurisdiction.[1118] However, it is significant. The difference in respondent parties has been a relevant factor in the decisions of a number of tribunals to reject a jurisdictional objection based on fork-in-the-road.[1119] Further, it is undeniable that the parties to the German Proceedings and the ECT arbitration are different. The German Proceedings are brought against the BNetzA, the German regulator.

754. In summary, therefore, there is no identity of cause of action, no identity of object and the respondent parties to the two sets of proceedings are different. The "*triple identity*" test is not satisfied.

IX.12 <u>The EU's request that the Tribunal apply a "fundamental basis" test should be rejected</u>

755. In order to support an argument that its unconditional consent to arbitration is vitiated under Article 26(3)(b)(i) of the ECT, the EU argues that the Tribunal should ignore the plain language of the treaty and instead apply a "*fundamental basis*" test, broadly comparing the

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[1118] EU's Jurisdiction Memorial, para 85. The EU glosses over this difference when saying that "*the Defendants in Case T-526/19 are the European Parliament and the Council of the European Union, the legislators of the European Union. The arbitration proceedings are <u>also</u> brought against the European Union*" (emphasis added). Further, the EU notes that fork-in-the-road arguments have been rejected on the basis that there was no identity of the respondent parties (EU's Jurisdiction Memorial, para 78, citing **Exhibit RLA-26**, *Olguin v. Republic of Paraguay* (ICSID Case No. ARB/98/5, Decision on Jurisdiction of 8 August 2000) and **Exhibit RLA-29**, *BP America Prod. Co. v. Argentine Republic* (ICSID Case No. ARB 04/8, Decision on Preliminary Objections of 27 July 2006).

[1119] **Exhibit RLA-23**, *Azurix v. Argentina* (ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003), para 90, in which the tribunal found that no identity of parties existed because Argentina was the respondent in the BIT arbitration, whereas the Argentinian Province of Buenos Aires was the respondent in the local court proceedings. See also **Exhibit RLA-26**, *Olguin v. Republic of Paraguay* (ICSID Case No. ARB/98/5, Decision on Jurisdiction of 8 August 2000) and **Exhibit RLA-29**, *BP America Prod. Co. v. Argentine Republic* (ICSID Case No. ARB 04/8, Decision on Preliminary Objections of 27 July 2006) (referred to in footnote 1093 of this Reply Memorial).

dispute in the ECT arbitration on the one hand, with the dispute in the EU Proceedings on the other.[1120] Such an argument is flawed and should be rejected for the following summary reasons, as explained in more detail below:

i. The "*fundamental basis*" test has been applied in only three cases.

ii. Even those three cases do not support the "*fundamental basis*" test as described and relied on by the EU. None of them concerns a claim under the ECT and all three of them can readily be distinguished from this case.

iii. In any case, even if the "*fundamental basis*" test should be applied to the fork-in-the-road clause in the ECT (which is denied), the test is not met in respect of either the CJEU Proceedings or the German Proceedings.

The "fundamental basis" test is an outlier and the three cases in which it has been applied can be readily distinguished

756. Without prejudice to the Claimant's position that the starting point for application of a so-called fork-in-the-road provision is the interpretation of the treaty itself, there is a body of jurisprudence in which such provisions are considered and from which a usual approach can clearly be discerned. As discussed in Section IX.10 above, in circumstances in which tribunals have considered it necessary to have regard to a "*test*" to establish whether a particular fork-in-the-road provision has been triggered, they have applied the "*triple identity*" test. The "*fundamental basis*" test has been rejected in a number of cases.[1121]

757. Nevertheless, the EU pursues an argument in this case that the Tribunal should apply the "*fundamental basis*" test to establish whether its unconditional consent to arbitration has been undermined by the CJEU Proceedings.[1122] It relies on the only three cases in which this test was upheld:

1120 See Reply Memorial, paras 706-707.

1121 **Exhibit CLA-169**, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd v. Mongolia* (PCA Case No. 2011-09, Decision on Jurisdiction of 25 July 2012), para 390, rejecting the "fundamental basis" test on the grounds that the tribunal saw "*no reason to go beyond the triple identity test. There is ample authority for its application*" (citing multiple awards); **Exhibit CLA-178**, *Nissan Motor Co., Ltd. v. The Republic of India* (PCA Case No. 2017-37, Decision on Jurisdiction of 29 April 2019), para 215, in which the tribunal found it unnecessary to "take any position in the doctrinal debate as to whether a "triple identity" test or a "fundamental basis" test might be more appropriate in the absence of expressly defined treaty terms, to achieve what a tribunal otherwise might intuit to have been the "object and purpose" of the Contracting Parties in including a fork-in-the-road clause"; **Exhibit CLA-285**, *Jin Hae Seo v. Republic of Korea* (HKIAC Case No. 18117, Concurring Opinion of Arbitrator Dr Benny Lo of 24 September 2019) (redacted), para 29 observing that it was "*unclear why the "fundamental basis test" should be applicable, given the materially different treaty language (e.g., the Greece-Albania BIT) in which this test was said to apply elsewhere*".

1122 Whilst the EU argues generally that its consent to unconditional arbitration has been vitiated by the German Proceedings, it sets out no argument as to why the "fundamental basis" test is satisfied. NSP2AG reserves the right to address any such argument if necessary in due course.

i. *Pantechniki v. Albania*;[1123]

ii. *H&H v. Egypt*;[1124] and

iii. *Supervision y Control v. Costa Rica*.[1125]

758. As further explained below, these cases may be readily distinguished from the current arbitration.

759. *Pantechniki v. Albania*[1126] concerned, among other things, the enforcement by the investor of contractual provisions against the Albanian Road Directorate in respect of the risk of losses caused by civil disturbance. When the investor was not paid, the investor brought a case in the Albanian courts. The claim was denied on the basis that the contractual provision was unenforceable as a matter of Albanian law. The investor filed, then withdrew, an appeal to the Albanian Supreme Court and thereafter sought to invoke the Greece-Albania BIT.[1127] The investor's claim was based, in part, on Albania's failure to honour the contractual obligation to pay the investor the agreed compensation. Albania argued that the fork-in-the-road clause in the BIT was triggered by the Albanian court proceedings.

760. The question of the correct test to apply did not arise in this case, as the sole arbitrator proceeded on the basis that it was "*common ground that the relevant test is…: whether or not the "fundamental basis of a claim" sought to be brought before the international tribunal is autonomous of claims to be heard elsewhere*" (emphasis added).[1128] On this basis, he concluded that, in the circumstances, he "*must determine whether the claim* [in the arbitration] *truly does have an autonomous existence outside the contract*".[1129] As the investor's claim arose out of the same "*purported entitlement that it invoked in the contractual debate*" in the Albanian courts, the sole arbitrator concluded that the two claims shared the same "*fundamental basis*".[1130] The sole arbitrator's conclusion was supported by the fact

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1123 **Exhibit RLA-10**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21, Award of 28 July 2009).

1124 **Exhibit RLA-9**, *H&H Enters. Invs., Inc. v. The Arab Republic of Egypt* (ICSID Case No. ARB/09/15, Award of 6 May 2014).

1125 **Exhibit RLA-11,** *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017).

1126 **Exhibit RLA-10,** *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21, Award of 28 July 2009).

1127 **Exhibit CLA-287**, Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments (the Greece-Albania BIT), 1 August 1991.

1128 **Exhibit RLA-10**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21, Award of 28 July 2009), para 61. It is explained in commentary cited by the EU in support of its position that the sole arbitrator's presentation of this test as having been "confirmed and applied in many … cases" was untrue and his claim that it was "revitalised by the ICSID Vivendi annulment decision" was "misconceived" (Exhibit RLA-8, M. Petsche, The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches, 18 Wash U. Global Stud L. Rev. 391 (2019) at p. 417, citing Pantechniki v. Albania, para 61).

1129 **Exhibit RLA-10**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21, Award of 28 July 2009), para 64.

1130 **Exhibit RLA-10**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21, Award of 28 July 2009), para 67.

that, if the investor's prayer for relief in the (abandoned) Supreme Court proceedings had been accepted, the investor would have been granted exactly the same payment as it sought in the arbitration and on the same basis, i.e. on the basis of the same contractual entitlement. However, the investor's other substantive claims were considered to have an independent basis under the treaty.

761. In *Pantechniki*, the contractual entitlement that had already been litigated was the normative source of the claim in the arbitration. The investor submitted, apparently as a separate head of claim in the arbitration, that "*Albania failed to honour an obligation* [i.e. the contractual obligation] *to pay to the Claimant agreed compensation for its losses*".[1131]

762. The position in the current proceedings could not be more different. As discussed further below, even if the "*fundamental basis*" test were to be accepted by the Tribunal as the proper test, the "*normative source*" of the ECT arbitration and the CJEU Proceedings (or the German Proceedings) is not the same.

763. Further, Article 10(1) of the Greece-Albania BIT refers to "[a]*ny dispute …. concerning investments…*".[1132] This wording is different to Article 26 of the ECT, and the definition of a "*dispute*" in Article 10(1) that may trigger the fork-in-the-road provision far broader and more opaque than Article 26 of the ECT. Moreover, as already discussed in the previous section, the underlying cause of action and relief sought in this arbitration is fundamentally different to that sought in the CJEU and German Proceedings.

764. In *H&H v. Egypt*,[1133] the dispute concerned a contract concluded between H&H and an Egyptian government owned company, GHE, in relation to a resort. H&H brought a counterclaim concerning its rights under the contract in a Cairo-seated arbitration brought by GHE and thereafter court proceedings in Egypt claiming damages for breach of contract. H&H then brought a claim under the US-Egypt BIT[1134] based on the alleged interference by GHE with its rights under the contract. Egypt argued that the fork-in-the-road provision in Article VII (3)(a)(ii) and (iii) of the BIT should apply. H&H argued that the tribunal should apply the "*triple identity*" test.

765. The tribunal noted that in order to decide whether the fork-in-the-road provision was triggered, it must interpret the US-Egypt BIT in accordance with Article 31 of the VCLT.[1135]

1131 **Exhibit RLA-10**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21, Award of 28 July 2009), para 28.

1132 Article 10 (Settlement of Disputes between an Investor and a Host State), Article 10(1), "*Any dispute between either Contracting Party and an investor of the other Contracting Party concerning investments or the expropriation or nationalization of an investment shall, as far as possible, be settled by the disputing parties in an amicable way*" (emphasis added).

1133 **Exhibit RLA-9**, *H&H Enters. Invs., Inc. v. The Arab Republic of Egypt* (ICSID Case No. ARB/09/15, Award of 6 May 2014).

1134 **Exhibit CLA-288**, Treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments (the US-Egypt BIT), 11 March 1986.

1135 **Exhibit RLA-9**, *H&H Enters. Invs., Inc. v. The Arab Republic of Egypt* (ICSID Case No. ARB/09/15, Award of 6 May 2014), para 365.

It found that the language of the treaty required that the "*dispute at hand not be submitted to other dispute resolution procedures*", concluding that "*what matters therefore is the subject matter of the dispute*".[1136] Therefore, the tribunal's interpretation of the US-Egypt BIT led it to consider whether the treaty claims had the same fundamental basis as the claims submitted before the local fora.

766. The tribunal noted that the investor's expropriation claim did not have an autonomous existence outside the contract, as it was based on the same alleged contractual violations as has been determined in the Cairo-seated arbitration. Similarly, the investor's allegations of other breaches of the BIT rested on the matters raised as counterclaims in the Cairo-seated arbitration and the Egyptian courts – i.e. the alleged breaches of the contract. In summary, in order to invoke its treaty rights, the investor relied on alleged rights under a contract, and the claims in respect of those alleged rights had already been both arbitrated in the Cairo-seated arbitration and the Egyptian court proceedings. As described further below, NSP2AG does not rely on the EU law rights asserted in the CJEU Proceedings to found its claim as to the EU's breaches of the ECT, nor does it seek to establish in the ECT arbitration that the Amending Directive is illegal as a matter of EU law (which is the question that NSP2AG seeks to have litigated in the CJEU Proceedings). On the contrary, NSP2AG's claim as to the EU's multiple breaches of the ECT is autonomous.

767. Similarly, in *Supervision y Control v. Costa Rica*,[1137] the investor's claims under the Spain-Costa Rica BIT[1138] rested on the alleged failure by the host state to comply with the requirements of its concession contract for vehicle inspection services. The investor alleged that Costa Rica had failed to implement annual increases to its rates, that were enshrined in the contract and reflected in an executive order. By a number of subsequent executive orders, the procedure for readjustment of the rates was changed and the public transport council given greater powers to control the rates. The executive orders in connection with the rates were challenged in administrative proceedings and also in local arbitration proceedings for alleged breach of the concession contract, which arbitration ended for lack of jurisdiction.

768. The tribunal found that Article XI.3 of the Spain-Costa Rica BIT constituted a waiver clause limiting the selection of dispute resolution mechanisms (rather than a fork-in-the-road clause), requiring the investor to waive or withdraw actions it has initiated or could initiate before national courts or arbitral tribunals once an international arbitration is initiated under the BIT, "*in order to avoid conflicting decisions and eliminate the possibility of obtaining*

1136 **Exhibit RLA-9**, *H&H Enters. Invs., Inc. v. The Arab Republic of Egypt* (ICSID Case No. ARB/09/15, Award of 6 May 2014), para 367.

1137 **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017).

1138 **Exhibit CLA-289**, Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Costa Rica (the Spain-Costa Rica BIT) (Spanish original and English translation), 8 July 1997.

double recovery for the same acts".[1139] The tribunal applied the "*fundamental basis*" test and found that:

> "*since the claims were all based on the violation of the Contract and share the same normative source, based on the approach established in Pantechniki v. Albania, one can conclude that the claims presented before local tribunals are the same as the ones presented before this Tribunal*".[1140]

769. The tribunal also considered the "*effects pursued in each proceeding*",[1141] finding that the proceedings:

> *"coincide*[d] *in relation to the compensation claims …They consist of the compensation for lost profits derived from the conduct or omissions of Costa Rica, which are alleged in the local proceeding as violating national law, while in the arbitration proceedings, the conduct of Costa Rica is alleged as contrary to the provisions of Treaty. In both cases Respondent's acts are essentially qualified as illegal because Claimant considers that the adjustment of rates was not done as agreed to in the Contract"* (emphasis added).[1142]

770. Both sets of proceedings therefore concerned whether the failure to comply with contractual obligations was unlawful and sought the same relief in terms of compensation. As described further below, the same cannot be said of the ECT arbitration and the CJEU Proceedings.

The "fundamental basis" test is not satisfied

771. The "*fundamental basis*" test as set out in *Pantechniki v. Albania*,[1143] and relied upon in *H&H v. Egypt*,[1144] and *Supervision y Control v. Costa Rica*,[1145] is not satisfied in this case. Even if the Tribunal were to apply the "*fundamental basis*" test as mis-stated by the EU, it still would not be satisfied.

1139 **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017), para 297.

1140 **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017), para 316.

1141 **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017), para 317. The approach in *Supervision y* Control was relied on and described by the EU at the Bifurcation Hearing on 8 December, 2020 as the "*normative basis and effects sought test*", recognising that the tribunal in *Supervision y* Control relied on satisfaction of these two elements when assessing whether the claim under the BIT was precluded (**Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 16, lines 10-14).

1142 **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017), para 318.

1143 **Exhibit RLA-10**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21, Award of 28 July 2009).

1144 **Exhibit RLA-9**, *H&H Enters. Invs., Inc. v. The Arab Republic of Egypt* (ICSID Case No. ARB/09/15, Award of 6 May 2014).

1145 **Exhibit RLA-11,** *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017).

The "fundamental basis" test is mis-stated by the EU and, on proper interpretation, is not satisfied in this case

772. The EU's case is that the "*fundamental basis*" test requires (i) the "*fundamental cause*" of the two proceedings to be the same; and (ii) for the two proceedings to "*seek for the same effects*".[1146] With regard to the "*fundamental cause*" element of the purported test, the EU argues for a general comparison between the two sets of proceedings - the ECT arbitration and: (i) the CJEU Proceedings; and (ii) the German Proceedings, the complaints raised therein and the factual matters relied upon.

773. However, the EU's articulation of the "*fundamental basis*" test, and its purported application in this case, is not supported by *Pantechniki v. Albania*, nor by the only two other cases which purport to follow its reasoning. Indeed, the sole arbitrator in *Pantechniki v. Albania* explained that he was:

> "*not persuaded that such generalities are helpful in deciding individual cases. The same facts can give rise to different legal claims. The similarity of prayers for relief does not necessarily bespeak an identity of causes of action. What I believe to be necessary is to determine whether claimed entitlements have the same normative source. But even this abstract statement can hardly be said to trace a bright line that would permit rapid decision. The frontiers between claimed entitlements are not always distinct. Each situation must be regarded with discernment*" (emphasis added).[1147]

774. As explained above, the sole arbitrator regarded the claims in both proceedings to be on the same "*purported entitlement*" – i.e. the contractual promise in respect of the liability – which entitlement had been held to be unenforceable in the Albanian court proceedings. This was the "*normative source*" of the investor's treaty claim: the tribunal was asked to adjudicate on the contractual rights and obligations so as to support a finding of a breach of the treaty. The same analysis was applied in *H&H v. Egypt*, and *Supervision y Control v. Costa Rica*. This approach is clearly distinct from the EU's general notion of the claims being of the same or similar "*fundamental cause*".[1148]

775. It is clear that, applying the "*fundamental basis*" test as described in the cases on which the EU relies, the ECT arbitration and the CJEU proceedings cannot be characterised as constituting the same "*dispute*".

776. The "*normative source*" of the dispute in each forum is not the same. Unlike the cases cited by the EU, the complaints in each of the ECT arbitration and the CJEU Proceedings are

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1146 EU's Jurisdiction Memorial, para 44, citing **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017), para 310.

1147 **Exhibit RLA-10**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21, Award of 28 July 2009), para 62.

1148 EU's Jurisdiction Memorial, paras 47-55.

based on a different set of rights afforded by different legal instruments. The "*normative source*" of the dispute in the CJEU Proceedings is NSP2AG's rights under EU law. The ECT arbitration is based on the rights afforded to NSP2AG's as an investor into the area of the EU as to the standards of treatment to be guaranteed to its investment. The claimants in the "*fundamental basis*" test cases argued that the host state's failure to comply with contractual obligations constituted a breach of its treaty obligations, which claim required the treaty tribunal to reach a finding of whether a contractual obligation existed. The contractual obligation could therefore be characterised as the "*normative source*" in both proceedings. In contrast, NSP2AG does not argue that the EU's alleged failure to comply with EU law constitutes a breach of the ECT. It argues that the EU's conduct in itself violates the obligations that the EU has assumed under international law. Accordingly, neither claim is determinative of the other and (unlike in the three cases relied upon by the EU) there is no risk of inconsistent outcomes as neither claim requires a finding in respect of the matters raised in the other. A decision of the CJEU on the merits would be a finding as to the legality of the Amending Directive as a matter of EU law. In order to find that the EU has breached its obligations under the ECT, the Tribunal is not required to consider the legality of the EU's actions as a matter of EU law, let alone to reach a determination on those matters. Indeed, the legality of the EU's conduct as a matter of EU law would not be a defence to the claim that the EU has breached its treaty obligations. Conversely, if the CJEU was to reach a decision that the Amending Directive is unlawful, NSP2AG would still be entitled to claim in this arbitration that the EU had breached the ECT and to claim compensation for the damage caused by the EU's actions.

777. The claims in each of the ECT arbitration and the CJEU Proceedings do not "*pursue the same effect*".[1149] As explained in paragraph 745 above, the outcome of the CJEU Proceedings could not be the same as the ECT Arbitration, as the remedies sought are entirely different. In particular, in the ECT arbitration, NSP2AG asks, among other things, the tribunal to order that certain provisions of the Gas Directive should not apply to it. However, in the CJEU Proceedings, NSP2AG seeks annulment of the Amending Directive *ex tunc*. No such remedy could be awarded by the Tribunal in the ECT arbitration.

778. Further, as discussed in paragraph 746 above, no damages can be granted in the CJEU Proceedings and NSP2AG has not pursued any separate claim for damages under Article 268 TFEU. At the Hearing on 8 December, 2020, the EU recognised this. It argued that "*if a finding was found in favor* [sic] *of the Claimant, the Claimant could thereafter go on to make a request for damages* [before the General Court of the European Union]".[1150] The EU's

[1149] **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017), para 317, "*the effects pursued in each proceeding are essentially the same*".

[1150] **Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 57, lines 11-16.

unconditional consent to arbitration clearly cannot be vitiated under Article 26(3)(b)(i) by the prospect of a damages claim that NSP2AG might bring at an undefined time in the future depending, among other things, on the outcome of the CJEU Proceedings (in which the EU's Council and European Parliament have successfully argued, and continue to argue, that NSP2AG's claims are inadmissible).[1151] Such an argument is wholly inconsistent with the clear wording of Article 26(3)(b)(i) which refers to the dispute having been "*previously submitted*" under Article 26(2) (a) or (b) and cannot be sustained. Contrary to the EU's submissions,[1152] there is no risk of double recovery.[1153]

779. The contrast between the two sets of proceedings in this case and the claims in the cases relied upon by the EU could not be more stark. The ECT arbitration and the CJEU Proceedings neither share the same "*fundamental basis*" by reference to their "*fundamental cause*", nor do the two sets of proceedings "*pursue the same effect*".

780. The "*fundamental basis*" test as properly understood is also clearly not satisfied in respect of the ECT arbitration and the German proceedings. Indeed, the EU has not asserted that it is.

Even applying the "fundamental basis" test as mis-stated by the EU, it is not satisfied

781. Even applying the mis-conceived and broadly-defined "*fundamental basis*" test expounded by the EU, the CJEU Proceedings and the ECT arbitration do not share the same "*fundamental basis*". As with its flawed approach to the "*triple identity*" test discussed in Section IX.11 above, the comparative exercise that is carried out by the EU in support of its position that "*the substance of the two procedures is fundamentally the same*" rests on superficialities and unsupported assertions.

782. In summary, the EU requires the Tribunal to accept that the claims in both proceedings can be bundled under two conveniently broad headings: (i) discrimination; and (ii) the undermining of NSP2AG's investment in Nord Stream 2. The EU then concludes that if NSP2AG's claims/pleas in each of the two proceedings can, when described at a superficial level, be shoe-horned into each of these categories, the "*fundamental basis*" of the claims must be the same.

783. Even a brief review of the EU's "analysis" reveals its fatal lack of substance. For example:

1151 The EU also seeks, in the context of its "triple identity" test argument, in an attempt to show an identity of object, to conflate NSP2AG's claim for costs in the CJEU Proceedings with a damages claim (EU Memorial, paras 56, 86 and 87). Such an argument is equally absurd.

1152 EU's Jurisdiction Memorial, para 31.

1153 According to the tribunal in *Supervision y Control v. Costa Rica*, the purpose of fork-in-the-road clauses and waiver clauses is "*to avoid the duplication of procedures and claims, and therefore to avoid contradictory decisions*" (**Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4, Award of 18 January 2017), para 294).

i. The EU points to the fact that "*discrimination*" is referred to in each of the ECT arbitration and the CJEU Proceedings and concludes that the "*fundamental basis*" of the two sets of proceedings is the same. However, "*discrimination*" of course is a legal concept, and the EU fails to address the fact that it has different meanings in different legal systems applicable in each of those proceedings.

ii. The EU does not, and could not, articulate how NSP2AG's claim in this arbitration that its investment has been impaired by unreasonable and discriminatory measures is reflected in the CJEU Proceedings which, in seeking an annulment of the Amending Directive for its unlawfulness as a matter of EU law, do not rest on showing an impairment to NSP2AG's investment.[1154]

iii. NSP2AG's assertion that actions of the EU infringe the guarantee of fair and equitable treatment in Article 10.1 of the ECT, do not equate to certain of NSP2AG's claims in the CJEU Proceedings that the Amending Directive itself infringes principles of EU law.[1155]

iv. NSP2AG's claim that its investment has been expropriated by the EU in breach of Article 13 of the ECT, cannot be understood to equate to or share the same "*fundamental basis*" with any of the pleas in law in the CJEU Proceedings, all of which address the illegality of the Amending Directive as a matter of EU law.

IX.13 Article 26(2) gives a right for the investor to "choose" in which forum to resolve a dispute concerning an alleged breach of the ECT.

784. The EU argues that its consent to this arbitration is vitiated based on the fact that the "*same dispute*" has been submitted to resolution in the CJEU Proceedings, whilst at the same time arguing that NSP2AG's claim is inadmissible on the basis that NSP2AG cannot demonstrate an interest in bringing the action and is not directly and individually concerned by the Amending Directive. Not only is this argument incoherent, it is contrary to a proper interpretation of Article 26. Indeed, if the EU's position were to be accepted, the EU will be able to prevent NSP2AG from obtaining the substantive resolution of the dispute concerning the EU's breaches of Part III in any forum.

785. On a proper interpretation of Article 26, read in accordance with Article 31 of the VCLT, the object and purpose of that provision is to prevent parallel proceedings in respect of a dispute concerning an alleged breach of an obligation under Part III of the ECT by a Contracting Party. Under Article 26(2), if such a dispute cannot be settled in accordance with Article 26(1) within a period of three months from the time either party requests amicable settlement, "*the*

[1154] EU's Jurisdiction Memorial, paras 50 and 53.
[1155] EU's Jurisdiction Memorial, paras 51(i) and 55(i).

Investor party to the dispute may choose to submit [the dispute] *for resolution*" in accordance with Article 26(a) to (c).

786. Accordingly, under Article 26(3)(b)(i), the EU's unconditional consent to arbitration is vitiated only where the Investor "*choose*[s]" to "*submit* [the dispute] *for resolution*" in accordance with Article 26(a) or 26(b). When interpreting Article 26 in good faith, and in light of its object and purpose, the so-called fork-in-the-road provision in Article 26(3)(b)(i), depriving the Investor of a right to resort to international arbitration, cannot be triggered in respect of an allegation made in proceedings in which the court or administrative tribunal lacks competence to "*resol*[ve]" the dispute (emphasis added).[1156]

787. NSP2AG cannot be taken to have exercised its right to "*choose*" to have the dispute "*resol*[ved]" in the General Court of the EU, such as to vitiate the EU's consent to arbitration, in circumstances in which the Council and the European Parliament have argued (and continue to argue) that the dispute cannot be resolved in that forum, and the General Court has upheld the argument that NSP2AG's claim is inadmissible.

[1156] In *Jin Hae Seo v. Republic of Korea*, Arbitrator Dr Benny Lo considered the Republic of Korea's argument that the fork-in-the-road provision of the KORUS FTA had been triggered. Arbitrator Lo considered that an "effective election" of another forum was necessary: "*The allegation of breach must be made in a court or administrative tribunal of Korea that is competent to adjudicate upon that allegation and grant relief for it. It is most unlikely that any such allegation made in a domestic forum that is incompetent to do so would deprive an investor's right to resort to international arbitration under the KORUS FTA. That could not in my view be the meaning and effect of Annex 11-E when interpreted in good faith in the light of its object and purpose*" (**Exhibit CLA-285**, *Jin Hae Seo v. Republic of Korea* (HKIAC Case No. 18117, Concurring Opinion of Arbitrator Dr Benny Lo of 24 September 2019) (redacted), para 14).

X. THE TRIBUNAL HAS JURISDICTION RATIONE PERSONAE

X.1 Introduction

788. The EU asserts that the Tribunal lacks jurisdiction *ratione personae* on the basis that (i) the Amending Directive cannot impose any obligations on NSP2AG as a matter of EU law, and therefore (ii) the breaches of the ECT and resulting damage could only result from measures which the Member States may take within the scope of their discretion when transposing and implementing the Amending Directive, and (iii) responsibility for those measures cannot be attributable to the EU under international law.[1157] The EU's argument is wrongly characterised as one of jurisdiction *ratione personae.* It is also, in any event, fundamentally flawed, and should be rejected.

789. In this section it will be demonstrated that the jurisdictional requirements of Article 26 of the ECT are met, and that the Tribunal has jurisdiction over the EU to determine NSP2AG's claims. The EU's so-called jurisdiction *ratione personae* objection is properly a question of the merits and not of jurisdiction: it is a matter of the merits to determine whether there is a breach of the ECT and to whom that breach is attributable. As set out in Section VII, the conduct that forms the basis of this claim is properly attributable to the EU, and the EU therefore bears responsibility for the breaches of the ECT as a matter of international law.[1158] Accordingly, and as set out in this section, the Tribunal has jurisdiction to determine those claims.

X.2 <u>The jurisdictional requirements set out in Article 26 of the ECT are clearly met</u>

790. A tribunal established under Article 26(4) of the ECT is required to decide the issues in dispute – including issues characterised as jurisdictional – in accordance with "*the* [ECT] *and applicable rules and principles of international law*".[1159]

791. The law applicable to the question of the Tribunal's jurisdiction *ratione personae* is the ECT.[1160] The jurisdictional requirements imposed by the ECT are set out in Article 26 of the ECT.

1157 EU's Jurisdiction Memorial, para 4 and Section 2.2.

1158 **Exhibit CLA-1**, ECT, Article 26(6).

1159 **Exhibit CLA-1**, ECT, Article 26(6). See **Exhibit CLA-84**, *Electrabel S.A. v. Republic of Hungary* (ISCID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012), paras 4.192 and 4.193, in which the jurisdiction of the tribunal to determine a claim against Hungary under the ECT was disputed by the European Commission in its submission as a non-disputing party.

1160 **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary* (ISCID Case No. ARB/07/19, Award, 25 November 2015), para 4.46, citing Professor Christian Tietje, "The Applicability of the Energy Charter treaty in ICSID Arbitration of EU Nationals vs. EU Member States" 78 Beiträge zum Transnationalen Wirtschaftsrecht 1 (2008): "*It can be concluded that with regard to the jurisdiction of an arbitral tribunal as well as the merits of a respective case, the arbitral tribunal is required to exclusively apply the ECT as a treaty of public international law and if applicable additional relevant sources of public international law. In this respect, there is no margin regarding the application of national or EC legislation*".

792. A tribunal constituted under Article 26(4) has jurisdiction in respect of "*a dispute between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern*[s] *an alleged breach of the former under Part III*".[1161]

793. The jurisdiction *ratione personae* requirements of Article 26 accordingly are met:

i. This is a dispute between a Contracting Party - the EU - and an Investor of another Contracting Party – NSP2AG, an Investor of Switzerland.

ii. The dispute relates to NSP2AG's investment in the Area of the EU, in relation to which NSP2AG alleges breaches of the EU under Part III ECT.

794. None of these matters is disputed. The Tribunal clearly has jurisdiction to examine the question of whether the EU is responsible for the breaches of the ECT claimed by NSP2AG. The question of whether the EU is internationally responsible for the breaches of the ECT alleged by NSP2AG is clearly a matter of the merits, and is addressed in Section VII above.

795. It is nevertheless necessary to address the EU's jurisdictional arguments further in this section, although given their evident lack of merit this can be done briefly.

X.3 The legal effect of the Amending Directive as a matter of EU law is irrelevant to the question of the Tribunal's jurisdiction

796. The conclusion that the Tribunal has jurisdiction over the EU *ratione personae* is not undermined by the EU's lengthy exposition as to the legal effect of the Amending Directive as a matter of EU law.

797. As further described in the following paragraphs, the EU's case on jurisdiction *ratione personae* appeared to change in the time between the EU's Jurisdiction Memorial filed on 15 September 2020 and the Bifurcation Hearing on 8 December 2020. Consequently, the EU's position on the relevance to the question of the tribunal's jurisdiction *ratione personae* of the lack of "*direct effect*" of Directives as a matter of EU law is unclear. In any case, in either of its guises, the EU's argument that the Tribunal lacks jurisdiction *ratione personae* due to the legal effect of the Amending Directive as a matter of EU law is flawed.

798. As described further in Section VII above, the conclusion that the EU asks the Tribunal to draw in its Jurisdiction Memorial is that, despite the EU's international law obligations as an REIO under the ECT, a tribunal can never have jurisdiction *ratione personae* over the EU in respect of a Directive. Accordingly, on the EU's case, the Tribunal would not be able to examine the EU's actions in connection with the legislative process that led to a Directive, including to consider whether there was a lack of due process, arbitrariness, capriciousness, or a lack of transparency. Indeed, on the EU's case, the Tribunal would not be able to

[1161] **Exhibit CLA-1**, ECT, Article 26(1).

consider the EU's liability for a breach of the ECT no matter if the purpose of a Directive proposed and passed by the EU was to target and impair a specific investment in a discriminatory manner.

799. At the Bifurcation Hearing on 8 December 2020, the EU appeared to change its position. It argued that "*it's not the EU's position that the EU can never be responsible for the measures of its Member States. Rather, the EU's position is that the EU is not responsible for the measures attributable to Member States unless such Member State measures are required by EU law*".[1162] It clarified further that "*the Claimant is trying to make this into an attempt, a broad attempt, by the EU to exculpate itself from responsibilities for directives generally. That's just not the case. Every directive, our position is, needs to be considered in its context in the particular language of the directive*".[1163] This reformulation of the EU's jurisdiction *ratione personae* objection does not make it any more meritorious as a jurisdictional objection (or, indeed, at all).

800. Whichever of the two formulations of its jurisdiction *ratione personae* argument the EU finally alights upon, both are flawed for the same reason. The Tribunal's analysis of its jurisdiction *ratione personae* does not rest on a consideration of the legal effect of the Amending Directive as a matter of EU law. The Tribunal's analysis of its jurisdiction must start with the scope of its jurisdiction under applicable law, i.e. the ECT. As explained above, all of the jurisdictional requirements of Article 26 of the ECT are satisfied. The legal effect of the Amending Directive as a matter of EU law is not relevant to an analysis of the Tribunal's jurisdiction. Indeed, Section 2.2 of the EU's Jurisdiction Memorial provides no explanation as to how it is relevant, and does not address Article 26 (or any other provision of the ECT) at all.

X.4 The EU's jurisdiction *ratione personae* objection is contrived and does not reflect the EU's actions

801. Further, it is clear that the EU's jurisdiction *ratione personae* objection is contrived for the purposes of these proceedings. The EU's actions have been consistent with a position that it is in fact the proper respondent.

802. First, the EU's actions in relation to the Article 26 Statement demonstrate that the EU considered itself to be the proper respondent:

i. The EU's Article 26 Statement contains references to the EU's internal regulation concerning the division of responsibility for investment treaty claims between the EU and its Member States - Regulation (EU) No 912/2014 of the European Parliament

[1162] **Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 12, line 4 – p 12, line 8.

[1163] **Exhibit CLA-259**, *ibid*., p 46, line 21 – p 47, line 1.

and of the Council establishing a framework for managing financial responsibility linked to investor-to-state-dispute settlement tribunals established by international agreements to which the European Union is party (the **Financial Responsibility Regulation**).[1164]

ii. In particular, the EU's Article 26 Statement states that having made a determination of who shall act as respondent in a dispute in accordance with the Financial Responsibility Regulation, the EU will inform the claimant within 60 days from the date on which the claimant has given notice of its intention to initiate a dispute.

iii. If, on receipt of NSP2AG's request for consultations, the EU had regarded the dispute as concerning treatment afforded fully or partially by a Member State, according to both the Financial Responsibility Regulation and the Article 26 Statement, the EU should have discussed with Germany who should be the appropriate respondent, and should then have notified NSP2AG of the outcome of that discussion (in the case of the May 2019 Article 26 Statement, within 60 days from the date on which NSP2AG gave notice of its intention to initiate a dispute).

iv. NSP2AG's Trigger Letter is dated 12 April 2019. NSP2AG does not know whether the EU held discussions with Germany in accordance with the EU's Article 26 Statement. But, in any event, the EU did not inform NSP2AG of the outcome of those discussions. The EU did not inform NSP2AG that Germany shall act as a respondent to the dispute within 60 days from the date of the Trigger Letter in accordance with its Article 26 Statement, or at all. Indeed, at all times until the receipt by NSP2AG of the EU's Jurisdiction Memorial on 15 September 2020, some 12 months after submission of NSP2AG's Notice of Arbitration, and around 17 months after its Trigger Letter, the EU held itself out to be the proper respondent to this arbitration. Further, the EU implies that Germany is the proper respondent but does not say so

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[1164] In its initial Statement when ratifying the ECT in 1997, the EU indicated that "*The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days*" (with a footnote stating that "*This is without prejudice to the right of the investor to initiate proceedings against both the Communities and their Member States*") (**Exhibit CLA-286**, Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (98/181/EC, ESC, Euratom), OJ L 69/1**,** 9 March 1998). On 15 April 2019, the EU purported to replace this with a new, amended Statement, published on 2 May 2019, that "*Having made a determination of who shall act as respondent in a dispute in accordance with the above provisions of Regulation (EC) No 912/2014, the European Union will inform the claimant within 60 days from the date on which the claimant has given notice of its intention to initiate a dispute. This is without prejudice to the division of competences between the European Union and the Member States for investment*" (para 3C) (**Exhibit CLA-211,** EU Statement submitted to the Energy Charter Treaty Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, OJ L 115/1, 2 May 2019).

clearly. The whole strategy of the EU in this case is to seek to avoid taking any responsibility for Article 49a.

803. Second, the EU's actions in relation to the Financial Responsibility Regulation demonstrate that it considered itself to be the proper respondent:[1165]

i. The EU has followed the procedure provided for in Section 1 of Chapter III of the Financial Responsibility Regulation ("on disputes concerning treatment afforded by the Union"). This is confirmed in the "Report from the Commission to the European Parliament and the Council on the operation of Regulation (EU) No 912/2014 on the financial responsibility linked to investor-to-state dispute settlement under international agreements to which the European Union is party" dated 19 November 2019.

ii. This Report clearly confirms that the EU accepted that it should act as the respondent in the circumstances of this arbitration. It states in particular that: "[o]*n 26 September 2019, Nord Stream 2 submitted a notice of arbitration against the Union pursuant to Article 26(2)(c) and 26(4)(b) of the ECT. The* Commission *informed the European Parliament and the Council in accordance with Article 4 of the Financial Responsibility Regulation on 1 October 2019*".[1166]

iii. Article 4 is entitled "*Treatment* afforded *by the Union*". It provides:

"*1. The Union shall act as the respondent where the dispute concerns treatment afforded by the institutions, bodies, offices or agencies of the Union.*

2. Where the Commission receives a request for consultations from a claimant or a notice by which a claimant states its intention to initiate arbitration proceedings in accordance with an agreement, it shall immediately notify the European Parliament and the Council."

iv. Further, the EU has <u>not</u> followed the procedure provided for in Section 2 of Chapter III of the Regulation ("*on disputes concerning treatment afforded by a Member State*").[1167] This is the case notwithstanding that, further to Article 5, Section 2 applies even in disputes "*partially*" concerning *treatment afforded by a Member State*". In particular, Section 2, Article 7 (Request for consultations) provides that:

1165 See also, **Exhibit CLA-211**, Statement submitted to the Energy Charter Treaty (ECT) Secretariat pursuant to Article 26(3)(b)(ii) of the ECT replacing the statement made on 17 November 1997 on behalf of the European Communities, Official Journal of the European Union, L 115/1, 2 May 2019..

1166 **Exhibit C-139**, Regulation (EU) 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 28 August 2014.

1167 E.g. no representatives of Germany were part of the Union's delegation to the consultations between the EU and the Claimant (as required by Article 7(2)).

"*1. Where the Commission receives a request for consultations from a claimant in accordance with an agreement, it shall immediately notify the Member State concerned. …*

2. Representatives of the Member State concerned and of the Commission shall form part of the Union's delegation to the consultations".

v. No process was undertaken pursuant to Article 9 of the Regulation to determine who should act as the respondent in disputes concerning treatment afforded by a Member State.[1168]

804. Third, the EU's role in the consultations held with NSP2AG on 25 June 2019 following its receipt of the Trigger Letter demonstrates that it considered itself to be the proper respondent. In particular:

i. The EU's delegation to the consultations comprised 15 members of Commission staff and one member of the European External Action Service.[1169] The delegation did not contain any representatives of Germany.

ii. The EU's presentation at those consultations addressed a number of points, but did not address the question of whether the EU was the proper respondent to NSP2AG's claim.[1170] The only point raised by the EU concerning jurisdiction was that the EU queried whether NSP2AG had substantial business activities in Switzerland (a point which the EU has now sensibly dropped).[1171]

805. Fourth, the EU's Response to the Notice of Arbitration contains a section entitled "Jurisdiction", which states only that: "*The European Union does not agree that NSP2AG fulfils all the conditions to request arbitration pursuant to Article 26(2) of the ECT*".[1172] There

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1168 This Article provides that the respondent will often be the Union even if the dispute concerns treatment afforded by a Member State.

1169 **Exhibit C-8**, Letter from NSP2AG to the Commission, dated 8 July 2019. The delegation is similarly described in the EU's Response to the Notice of Arbitration dated 24 October 2019, section 2, para 6.

1170 **Exhibit C-8**, Letter from NSP2AG to the Commission, dated 8 July 2019. The EU's response did not contest this summary (**Exhibit C-9**, Letter from the Commission to NSP2AG, dated 26 July 2019).

1171 The suggestion made on behalf of the EU that the consultations addressed the matter of whether the treatment complained of by NSP2AG was afforded by the EU or Germany (for the purposes of the Financial Responsibility Regulation or at all) is incorrect (**Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 11, lines 14-18*)*. This is clear from the Claimant's letter to the EU summarising the consultation (**Exhibit C-8**) and the EU's response thereto (**Exhibit C-9**). Moreover, the fact that the EU's later treaties with third countries make provision for the EU and the Member States to determine which of them will be the respondent under the Financial Responsibility Regulation and that this determination is alleged to be binding on the claimant, is irrelevant (**Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 11, lines 6-14). There is no such provision in the ECT (as was expressly confirmed by the Respondent - **Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 11, lines 12-14), and, in any case, as explained in paragraph 803, the EU has determined under the Financial Responsibility Regulation that the dispute concerns treatment afforded by the EU, and not Germany.

1172 EU's Response to the Notice of Arbitration dated 24 October 2019, section 4, para 27.

is no suggestion in the EU's Response that it intends to contest jurisdiction *ratione personae*, on the basis that the EU is not responsible for the matters alleged by NSP2AG.

806. In summary, there can be no doubt that the EU recognises that NSP2AG's claim is properly brought against the EU, in respect of the conduct of the EU in connection with the Amending Directive, and for which the EU is responsible at international law under the ECT.

X.5 The EU's jurisdictional objections are inconsistent

807. As described in NSP2AG's Response to the Respondent's Request for a Preliminary Phase on Jurisdiction and Admissibility dated 16 October 2020 ("**Bifurcation Response**"), the EU's two jurisdictional objections are fundamentally inconsistent.[1173] They are inconsistent in two particular ways, as summarised below.

808. First, the EU's fork-in-the-road argument is that the Claimant is precluded from pursuing a claim against the EU before this tribunal established under the ECT, because the Claimant is pursuing a claim against certain EU institutions before the CJEU.[1174] In particular, it argues that the EU's consent to arbitration under Article 26 of the ECT is vitiated by the CJEU Proceedings being brought against its institutions.

809. The EU's fork-in-the-road objection is therefore predicated on the EU being the proper respondent to this arbitration. However, in its *ratione personae* objection, the EU seeks to deny that the EU is the proper respondent in these ECT proceedings. This is clearly inconsistent. It also implies that the EU's jurisdiction *ratione personae* objection is a mere afterthought.[1175]

810. Second, in order to make its two jurisdictional objections, the EU has to contort its reading of NSP2AG's case in order to maintain two different, contrasting portrayals. In arguing its fork in the road objection, the EU seeks to draw a comparison between the Claimant's claims made in this arbitration for breach of the ECT, and its claims made in the CJEU proceedings for breach of EU law. This comparison is drawn based on arguments made by the Claimant as to the manner in which the Amending Directive was passed by the EU (including, for example, the Claimant's arguments as to the lack of transparency and lack of due process afforded to it by the EU in connection with the legislative process).

1173 **Exhibit CLA-290**, *Nord Stream 2 AG v. The European Union*, (PCA Case No. 2020-07, Claimant's Response to the EU's Request for a Preliminary Phase on Jurisdiction and Admissibility of 16 October 2020), paras. 64 to 67.

1174 The EU makes this argument notwithstanding of course that the CJEU has so far declared NSP2AG's claim against the EU inadmissible, as discussed further in footnote 1007 above.

1175 The EU's counsel, Mr Bondy, acknowledged this inconsistency at the Bifurcation Hearing, suggesting that the two jurisdictional objections may be relied on in the alternative (**Exhibit CLA-259**, *Nord Stream 2 AG v. The European Union* (PCA Case No. 2020-07, Transcript of Hearing on the Request for a Preliminary Phase on Jurisdiction of 8 December 2020), p 23, line 16). This is not how the EU's case was set out in the EU's Counter-Memorial.

811. Whereas in its *ratione personae* objection, the EU conveniently purports to confine the Claimant's allegations of breach of the ECT to only the "practical effects" of the Amending Directive having been implemented and applied by Germany. Indeed, as described in paragraph 50 of NSP2AG's Bifurcation Response, the EU's objection to jurisdiction *ratione personae*, with its focus on "practical effects", entirely neglects the Claimant's allegations of breach of the ECT by the EU in connection with the passing of the Amending Directive (such as the allegations of lack of due process and lack of transparency), which the Claimant alleges (inter alia) constitute breaches of the guarantee of fair and equitable treatment.

812. Both characterisations of the Claimant's case cannot be correct, and their inconsistency further confirms the flawed nature of both of the EU's jurisdictional objections.

813. In conclusion, the Tribunal clearly has jurisdiction *ratione personae* to consider the Claimant's claims against the EU: both to adjudicate the question of whether the EU has breached its obligations under the ECT, and to grant relief in respect of those breaches as described further in Section XI below.

XI. THE TRIBUNAL HAS THE POWER TO AWARD A RESTITUTIONARY REMEDY AND ITS EXERCISE OF THAT POWER IS JUSTIFIED IN THIS CASE

XI.1 Introduction

814. In its request for relief the Claimant has, among other things, sought "*An order that the EU, by means of its own choosing, 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*".[1176] Over some thirty pages of its Counter-Memorial, the EU argues that the Tribunal should not, and is unable to, grant this requested relief, claiming that it is "*inappropriate*"[1177] and, echoing its flawed position on breach considered in Section VIII above, an "*unprecedented incursion into the European Union's sovereign right to regulate within the scope of their powers to promote public welfare objectives*".[1178]

815. In summary, the EU bases its arguments on the following grounds: (i) the requested relief "*lacks any secure foundation in public international law*"; (ii) the power to grant the requested relief is not found in the ECT; (iii) even if a power to grant "*an interim or final injunction exists*", the Claimant does not satisfy the conditions for it to be granted; and (iv) if the Tribunal were to find the EU responsible under international law for the actions of Germany, the Tribunal would be precluded by Article 26(8) from granting anything but monetary relief.

816. None of these arguments withstand scrutiny. As described below, the Claimant seeks a restitutionary remedy, restitution being the primary remedy for breach of an international obligation (**Section XI.2**) and recognised as such in the ILC Articles and investment treaty jurisprudence (**Section XI.3**). Moreover, as set out further in this section, the remedy sought is one which the Tribunal has the power to grant (**Section XI.4**). and the EU's arguments as to the constraints placed on the Tribunal by Article 26(8) of the ECT are flawed (**Section XI.5**). Finally, the remedy sought is neither materially impossible nor disproportionate, and the circumstances justify the Tribunal granting it (**Section XI.6**).

XI.2 The Claimant asks the Tribunal to apply the principle of full reparation in a manner clearly established under international law: application of the *Chorzów Factory* case supports the remedy sought

817. Among other things, NSP2AG is asking the Tribunal in this arbitration to apply the principle of full reparation by restitution by ordering that the EU, by means of its own choosing, 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. Whilst the EU characterises the requested relief as being in the nature of an injunction, such characterisation is both inaccurate and irrelevant. The

1176 Memorial, para 527(vi).
1177 EU's Counter-Memorial, Heading of Section 4.
1178 Counter-Memorial, paragraph 703.

remedy sought by the Claimant is founded upon the application of well-established principles of international law, and the EU makes no cogent argument to the contrary.

818. As described by the Claimant in its Memorial,[1179] the basic guiding principle of full reparation for all internationally-wrongful acts is that provided by the Permanent Court of Justice in the *Chorzów Factory* case. In that case, it was held that "*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. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear* " (emphasis added).[1180]

819. The EU accepts that "*Chorzów Factory sets out general remedial principles for a breach of international law*".[1181] Such general principles must therefore be applicable in investor-State disputes, including in disputes under the ECT. The EU does not deny that the principles in *Chorzów Factory* should be applied by the Tribunal.

820. The EU seeks to claim that *Chorzów Factory* "*on its own does not provide any support for the Claimant's request in an investor-State dispute context*", on the basis that the case does not "*address when the specific remedy is appropriate, or the conditions for its application*".[1182] But this does not rebut the fundamental point of principle, that restitution is the primary remedy for a breach of international law. Moreover, "*reparation must as far as possible, … re-establish the situation which would, in all probability, have existed if that act had not been committed*".[1183] These principles, which have been applied by many investor-state tribunals, [1184] underpin the Claimant's request that the Tribunal order that the application of certain provisions of the Gas Directive should be removed from NSP2AG or Nord Stream 2.

821. Therefore, following the principle of the *Chorzów Factory* case, a compensatory award of damages would be appropriate only if restitution in kind – i.e. to re-establish the situation which would, in all probability, have existed if that act had not been committed – is "*not possible*". The relief sought by the Claimant is, of course, possible.

1179 Memorial, para 488.

1180 **Exhibit CLA-131**, *Case Concerning the Factory at Chorzów (Germany v. Poland),* ICJ Judgment No. 13, Merits of 13 September 1928, p 47.

1181 Counter-Memorial, para 708.

1182 Counter-Memorial, paras. 708 and 710.

1183 **Exhibit CLA-131**, Case Concerning the Factory at Chorzów (Germany v. Poland), ICJ Judgment No. 13, Merits of 13 September 1928, p 47.

1184 In the context of ECT arbitrations in particular, see for example, **Exhibit CLA-104**, *Greentech Energy System A/S. Foresight Luxembourg Solar 1 S.A.R.L, Foresight Luxembourg Solar 2 S.A.R.L, GWM Renewable Energy I S.P.A, GWM Renewable Energy II S.P.A. v. Kingdom of Spain* (SCC Case No. 2015/150, Final Award of 14 November 2018), para 548 (and in relation to the acceptance of a general principle in international investment law, paras 433-438); **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1, Award of 16 May 2018), paras. 547-552.

XI.3 The ILC Articles on State Responsibility support the remedy sought by the Claimant

822. In the Memorial, the Claimant explained that the ILC Articles on State Responsibility support the position that restitution is the primary form of relief under international law for internationally wrongful acts.[1185]

823. In its Counter-Memorial, the EU appears to accept this in principle, but argues that: "[a]*t its most basic, the principles set out in the ILC* [Articles] *cannot simply be translated outside of the State-to-State context* [and into investor-State dispute settlement]*, because the Articles themselves on their face prohibit this. The ILC Articles expressly provide that "This part* [including Article 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'"*** (emphasis in the Counter-Memorial).[1186]

824. This reading of Article 33(2) is unsupported, and counter-intuitive. Article 33(2) preserves the rights of non-State actors under treaties to invoke state responsibility, not only in the context of investment protection, but also in the areas of human rights and environmental protection. It does not prohibit the application of the principles in the ILC Articles by analogy, and, in particular, the provisions on full reparation, in claims brought by investors. Indeed, the ILC Articles are routinely cited, and upheld, in many investor-State cases.[1187]

825. The Claimant does not seek to "*extend … customary international law*" in a "*dramatic and radical way*" as alleged by the EU.[1188] On the contrary, the Claimant has cited a number of ECT investment treaty cases in support of the proposition that "*a wronged party should be placed in the position it would have been in, but for the internationally wrongful acts taken by the respondent*".[1189]

826. The Respondent has not engaged in any material way with these cases, save to note that the applicability of the ILC Articles is referred to by the respective tribunals "*in general terms*", rather than supporting restitution as the primary remedy, and that the tribunals "*in fact reject restitution as a remedy, and/or refer to financial compensation as the remedy applied in practice*". These observations, however, have no impact on the Claimant's case. Each of these cases supports the Claimant's position that restitution is the primary remedy for an international wrong:

i. *Petrobart Limited v. The Kyrgyz Republic*: the parties agreed that "*specific performance is the primary remedy for breach of obligations in international law*". The tribunal considered that, in the circumstances, "*specific performance is no longer a practical option and finds that also in regard to lost profits monetary*

1185 Memorial, paras 489-491.
1186 Counter-Memorial, para 713, citing **Exhibit CLA-134**, ILC Articles on State Responsibility, Article 33(2).
1187 Memorial, para 489, footnote 560.
1188 Counter-Memorial, para 716.
1189 Memorial, para 488.

compensation would be the only appropriate remedy in this case".[1190] It was therefore implicit in the tribunal's finding that restitution by way of specific performance was the primary remedy.

ii. *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*: the tribunal referred to Article 36 of the ILC Articles on State Responsibility, citing that a "'*state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution*" and that such compensation "*shall cover any financially accessible damage, including loss of profits insofar as it is established*"'.[1191] In its assessment of the circumstances, the tribunal determined that "*restitution is no longer possible" and that it "must therefore determine the amount of compensation owing to* [the Claimant]".[1192] Accordingly, the tribunal clearly considered the primary remedy to be restitution.

iii. *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*: the tribunal highlighted the fact that "*an international tribunal has the power to grant specific performance*" and that "*the Energy Charter Treaty does not preclude this power*".[1193] In this case, the tribunal accepted the Claimant's request for specific performance, stating that the "*Claimant…has a right to formulate his request for relief in whichever manner he chooses*".[1194] Accordingly, the tribunal first considered whether a remedy of specific performance would be possible in the circumstances, before concluding that "*the circumstances here present render it materially impossible to implement a remedy of specific performance*".[1195] It is therefore clear that the tribunal turned to a restitutionary remedy first, and that it considered that there was no limitation on remedies in the ECT.

iv. *Nykomb Synergetics Technology Holding AB v. Latvia*: the tribunal held, and the parties also agreed, that the question of remedies must find "*its solution in accordance with established principles of customary international law*".[1196] The tribunal cited Articles 34 and 35 of the ILC Articles on State Responsibility, stating that "*restitution is considered to be the primary remedy for reparation*" and that

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1190 **Exhibit CLA-119**, *Petrobart Limited v. The Kyrgyz Republic* (SCC Case No. 126/2003, Award of 29 March 2005), p 78.

1191 **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 532-534.

1192 **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 512.

1193 **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 47-48.

1194 **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 50.

1195 **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.

1196 **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC, Award of 16 December 2003), page 38.

"*restitution must primarily be seen as an appropriate remedy in a situation where the Contracting State has instituted actions directly against the investor*". [1197] In accordance with this analysis, the tribunal ordered that the Republic "*fulfil its obligation under the Treaty to protect the Claimant's investment*", which in this case, was to ensure the Claimant's right to a double tariff for the remainder of the eight year contractual period following the tribunal's award. [1198] In doing so, the tribunal effectively considered specific performance to be the most appropriate remedy for potential losses that are uncertain and speculative.

v. *Yukos Universal Limited (Isle of Man) v. The Russian Federation*: the tribunal referred to the principles on reparation for injury as expressed in Article 35 of the ILC Articles on State Responsibility, stating that *"only to the extent where it is not possible to make good the damage caused by restitution is the State under an obligation to compensate"*. [1199] The tribunal confirmed that the State was *"in the first place obliged to make restitution by putting the injured party into the position that it would be in if the wrongful act had not taken place",* therefore making it clear that restitution should be considered as the primary remedy for reparation. [1200]

827. As explained in the Memorial, [1201] in accordance with Article 35 of the ILC Articles, as a consequence of its internationally wrongful act, the EU is under an obligation to make restitution, that is, to re-establish the situation which would have existed had the wrongful act not been committed, "*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*". [1202] For the reasons explained in Section XI.6, the relief sought by NSP2AG is neither materially impossible nor disproportionate.

XI.4 <u>The Tribunal has the power to award the remedy requested by NSP2AG</u>

828. More generally, the EU argues in its Counter-Memorial that the Tribunal has no power to award the remedy requested by NSP2AG. [1203] However, as described below none of its arguments withstands scrutiny.

829. First, the EU makes an overarching argument that the Tribunal has no power to award the remedy requested by NSP2AG on the basis that "*no other investment treaty tribunal in the*

1197 **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC, Award of 16 December 2003), page 39.
1198 **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia* (SCC, Award of 16 December 2003), page 41.
1199 **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.
1200 **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.
1201 Memorial, paras 487-490.
1202 **Exhibit CLA-134**, ILC Articles on State Responsibility, Article 35.
1203 Counter-Memorial, Section 4.2.1.

history of investment treaty dispute resolution has ever applied [it] *in practice*".[1204] As the Claimant noted in its Memorial by reference to the *Chevron v. Ecuador* case, this is not correct.[1205] In any event, it would not mean that the Tribunal does not have the power to order it. In the majority of investor-state cases this form of relief is unlikely to be appropriate and/or is not sought, as the investors were bringing claims based on, and to recover, historic damages in circumstances where they have left or are leaving the host State. Commentators agree that arbitral tribunals generally have the power to grant non-pecuniary remedies.[1206] Moreover, the EU can point to no authority to support its position that the Tribunal does not have the power to order the remedy sought.

830. Second, the EU argues that the Claimant's request would amount to "*an extraordinary and unprecedented incursion in the European Union's sovereign right to regulate… to promote public welfare objectives*".[1207] However, there is nothing "*extraordinary*" or "*unprecedented*" about the requested remedy in circumstances where the Tribunal can award "*any…remedy*" and the EU has agreed to carry out "*any…award*" under the ECT.[1208] The EU has "*voluntarily curtailed its domestic sovereignty*" by becoming a party to the ECT, and accordingly "*should not be allowed to argue that an award ordering the appropriate remedy to ensure that* [it] *complies with such obligations would amount to 'excessive interference'*".[1209] This is

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1204 Counter-Memorial, para 719.

1205 Memorial, paras 499 to 501 discussing **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), paras 9.6-9.9.

1206 See **Exhibit CLA-292**, "Chapter 9 – Compensation", in C. McLachlan, L. Shore, et al., *International Investment Arbitration: Substantive Principles* (Second Edition), Oxford International Arbitration Series, (Oxford University Press 2017), pp. 413 - 458, paras 9.158 and 9.159: "*To date, the remedy awarded by almost all tribunals has been the payment of monetary compensation. Yet this past practice should not obscure the fact that tribunals have the power to be much more flexible in their choice of remedy…. Tribunals should be willing to consider preliminary orders to lift discriminatory treatments or to seek other administrative remedies that can provide full satisfaction to investors before moving to award compensation*"; and **Exhibit CLA-293**, "Chapter XXI – Compensation, Damages, and Restitution", in B. Sabahi, N. Rubins, et al., *Investor-State Arbitration*, 2nd ed. (Oxford University Press 2019), pp. 703 - 773, para 21.13: "*Although compensation is the most prevalent form of reparation in investor-state arbitration, non-pecuniary remedies are possible, including restitution (returning seized property or restoring a legal situation), specific performance, and injunctive relief*".

1207 Counter-Memorial, para 703.

1208 **Exhibit CLA-1**, ECT.

1209 **Exhibit CLA-294,** A.C. Sinclair and E.E. Triantafilou, "Specific Performance Under Commercial Contracts with Sovereign States", in M. Scherer (ed), *Journal of International Arbitration*, (Kluwer Law International; Kluwer Law International 2017, Volume 34 Issue 5), pp. 747 – 774 at p.766. See also **Exhibit CLA-295,** "Chapter 3 – EU Investment Agreements", in T. Fecak , *International Investment Agreements and EU Law*, (Kluwer Law International; Kluwer Law International 2016), p 213: "*Even though in the overwhelming majority of cases the investment treaty tribunals have awarded financial compensation to aggrieved investors, it cannot be a priori excluded that an investment tribunal may order restitution, injunctive relief or specific performance instead of or in cumulation with the compensation. The authority to order non-pecuniary obligations is inherent to any binding international dispute settlement mechanism and should as such not lead to incompatibility of such mechanism with EU law. Normally, where an international court or tribunal awards such a remedy, repeal or amendment of challenged act would not be the immediate and necessary consequence of the tribunal's decision, but will require further steps by the EU institutions.*"

recognised in the ECT Secretariat's publication "*Non-Pecuniary Remedies under the Energy Charter Treaty*", (mis)cited with approval by the EU:[1210]

> "*Since the ECT explicitly vests, as a rule, arbitral tribunals with the power to award specific performance against a Contracting State to an investment dispute with a foreign investor, in derogation of the principle of State sovereignty, the Contracting Party's obligation to enforce an award rendered pursuant to the ECT is not limited to the pecuniary obligations imposed thereby (as it is generally provided in the ICSID Convention).*
>
> *The obligation to implement ECT awards extends to negative or positive injunctions. For instance, an arbitral tribunal instituted under the ECT might order a Respondent State to repeal or modify a legislative measure as primary remedy, except in the case of subnational governments' (or authorities') measures*".[1211]

There is no "*excessive* interference" particularly in a case in which the Claimant seeks only to remove the application to its investment of a piece of discriminatory and thereby unlawful legislation. The Claimant has already made its views clear in Section VIII regarding the EU's purported exercise of its right to regulate for the "*public welfare*" in the circumstances of this case – the Amending Directive was not such a measure.[1212]

831. In particular in this context, the EU relies on *RREEF v. Spain*.[1213] However, as indeed is acknowledged by the EU, this case does not address the question of the tribunal's power to award a non-pecuniary remedy. In the *RREEF* case, as highlighted by the specific paragraph of the award cited by the EU (paragraph 244), the tribunal found that in order to establish that, under international law, a State has guaranteed the stability of its legal order, this guarantee must be explicit in the relevant treaty. The tribunal in this paragraph was simply addressing the narrow point as to the State's substantive international obligations with regard to the stability of the legal framework in the context of its liability for breach of the ECT. The question of whether the ECT provides an explicit guarantee of the stability of a legal order is irrelevant when determining the power of an ECT tribunal to order remedies. The *RREEF* case therefore provides no basis for the EU's argument.

832. Third, the EU relies on an argument that the ECT does not specify remedies other than monetary compensation, or the circumstances in which any such remedies are

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1210 Counter-Memorial, para 733. The EU cites the following paragraph from **Exhibit CLA-140**, De Luca, Non-Pecuniary Remedies: "*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*". However, this is another case of a misleading citation. As is clear from paragraph 64 of **Exhibit CLA-140**, cited in paragraph 830 above, the ECT differs in this regard. An ECT tribunal does have a power to order specific performance or restitution "*in derogation of the principle of state sovereignty*".

1211 **Exhibit CLA-140**, De Luca, Non-Pecuniary Remedies, paras 64-65.

1212 Section VIII, paras 620-629.

1213 Counter-Memorial, paras 723 and 724.

appropriate.[1214] This argument is misplaced, however. Any lack of specific reference in the ECT would not result in the conclusion that the remedy requested by NSP2AG may not be awarded – on the contrary, it would mean such remedies were not precluded. If the Contracting Parties had wished to limit the powers available to the tribunal they would have done so expressly. Indeed, the tribunal in *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan* considered whether an international tribunal had the power to grant the relief sought and confirmed that the ECT does not preclude this power.[1215]

833. The Claimant's position is also underlined by Article 26(8) of the ECT. As explained in paragraph 493 of the Memorial, Article 26(8) of the ECT: (i) vests an arbitral tribunal constituted under the ECT with the power to grant "*any…remedy*", i.e. both pecuniary and non-pecuniary; and (ii) only requires a tribunal to provide in the alternative for damages in the event that it awards non-pecuniary remedies in the case of unlawful measures of sub-national governments or authorities of a Contracting State. This has been confirmed by commentators. For example:

> *"The Energy Charter Treaty (ECT), which was negotiated around the time of the NAFTA but entered into force some years later,(40) approaches the remedies issue from a somewhat different perspective but equally shows that its drafters recognized a tribunal's power to make non-pecuniary awards.*
>
> […]
>
> *Although it suggests a reversal of remedial powers (an award 'shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted') as opposed to NAFTA's first recognizing the power to award monetary damages and then the power to order restitution of property or damages in lieu thereof, the ECT nevertheless contemplates non-pecuniary remedies being granted*" (emphasis added).[1216]

834. Further:

> "[Article 26(8)] *provides that: '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.' The premise is that an arbitral tribunal has the power not only to award monetary compensation but also to grant injunctive relief*" (emphasis added).[1217]

1214 Counter-Memorial, Section 4.2.1, in particular para 730.

1215 **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 47-48.

1216 See **Exhibit CLA-296**, M. Bradfield and C. Thomas, "Non-Pecuniary Remedies: A Missed Opportunity?", in M. Kinnear and C. McLachlan (eds), *ICSID Review - Foreign Investment Law Journal*, (Oxford University Press 2015, Volume 30 Issue 3), pp. 635 – 664 at 643.

1217 **Exhibit CLA-297**, T. Roe and M. Happold, "Chapter 7 – Contracting Parties' international responsibility for breaches of Part III of the ECT", in T. Roe and M. Happold (ed.), *Settlement of Investment Disputes under*

835. Fourth, the EU seeks to argue that the ECT should be interpreted in accordance with a "*presumption in favour of the free exercise of State sovereignty*",[1218] which may affect the power of the tribunal to award remedies (and, in particular, a right of election as to the form of reparation).[1219] The language of Article 26(8) makes clear, however, that this is not the case. It provides, in relevant part, that "*the awards of arbitration…shall be final and binding upon the parties to the dispute"* and that "[e]*ach 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).

836. Accordingly, in view of the express undertaking of the Contracting Parties in Article 26(8) to carry out "*any … award*", the EU's argument is not sustainable. The drafters of the ECT were well aware of the provisions in Article 26(8) and the power granted to the tribunal as to remedies.[1220]

837. Fifth, the EU argues that NSP2AG *"seemingly*" tacitly recognises "*that the Tribunal would lack power to grant the final injunction that it requests*".[1221] This is wishful thinking. NSP2AG simply uses the appropriate terminology to reflect the international law principles in which its request for relief is grounded. There is no "r*ecognition*", "*tacit*" or otherwise, that the Tribunal lacks power. On the contrary, the Tribunal has the power to award NSP2AG the relief it seeks for all the reasons explained in the Memorial,[1222] and in this Section XI.

The other treaties referred to by the EU are of no relevance to the power of the Tribunal under the ECT

838. The EU's reference to the NAFTA, the CETA and the CPTPP does not add any force to its arguments.[1223] The EU points to later treaties in support of its position, arguing that:

> *"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…*

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the Energy Charter Treaty (New York: Cambridge University Press), 2011, at p 166. See also See **Exhibit CLA-140**, A. De Luca. "Non-Pecuniary Remedies under the Energy Charter Treaties", *Energy Charter Secretariat Knowledge Centre*, 2015, para 4: "*By only limiting the power of tribunals to award non-pecuniary remedies in the case of unlawful measures of sub-national governments or authorities of Contracting States, the provision vests, as a rule, arbitral tribunals instituted under the ECT with the authority to grant both pecuniary remedies (i.e., compensation) and non-pecuniary remedies (i.e., orders for specific performance) in all other cases*".

1218 Counter-Memorial, para 732.

1219 Counter-Memorial, para 731.

1220 See **Exhibit CLA-140**, A. De Luca. "Non-Pecuniary Remedies under the Energy Charter Treaties", *Energy Charter Secretariat Knowledge Centre*, 2015, paras 30-53.

1221 Counter-Memorial, para 782.

1222 Memorial, Section IX.3.

1223 Counter-Memorial, para 731, footnote 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".[1224]

839. However, the ECT must of course be interpreted on its own terms, in accordance with the VCLT. Applying the general principles of interpretation in Article 31 VCLT, and interpreting Article 26(8) ECT in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, it is clear in the Claimant's submission that there is a power to award the remedy sought by NSP2AG. There is, therefore no need for recourse to supplementary means of interpretation under Article 32 of the VCLT. However, even if there were, this would not permit later (unrelated) treaties between different parties to be used as tools of interpretation.

840. In any case, the treaty provisions referred to by the EU are entirely different from the equivalent provisions in the ECT. The provisions of those treaties limit: (i) the relief that may otherwise be available under the general principles of customary international law to monetary damages or restitution of property;[1225] as well as (ii) tribunals' power to award non-pecuniary remedies against States, specifying that where "*restitution of property*" is ordered by a tribunal the award "*shall provide that the respondent may pay monetary damages*" instead. No such limitations are found in the ECT and the ECT cannot be interpreted so as to include them. Indeed, the existence of such limiting language in the later treaties rather suggests that the drafters intended to move away from the broader formulation of the ECT.

841. As noted previously,[1226] the negotiating history of the ECT shows that Canada sought to include a provision excluding non-pecuniary remedies similar to Article 1135(1) NAFTA, but that this proposal was rejected by the other contracting parties.[1227] Accordingly, any parallels between Article 1135(1) (as well as the relevant provisions of the CETA and CPTPP, which, according to the EU, "*pick up on the language of … NAFTA*"[1228]) and Article 26(8), would be unjustified.

1224 Counter-Memorial, para 731.

1225 See **Exhibit CLA-277**, Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union, of the other part, 30 October 2016. Article 8.39(1) CETA provides, in relevant part, that "…*the Tribunal may only award, separately or in combination: (a) monetary damages and any applicable interest; (b) restitution of property…*" (emphasis added). Similarly, Article 9.29(1) CPTPP provides, in relevant part, that *"…the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property…*" (emphasis added) (**Exhibit CLA-298**, "Chapter 9 – Investment", The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018). Likewise, Article 1135(1) NAFTA provides, in relevant part, that "…*the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property…"* (emphasis added) (**Exhibit CLA-299**, "Chapter Eleven – Investment", North American Free Trade Agreement (NAFTA)).

1226 See Memorial, para 493, footnote 564.

1227 See **Exhibit CLA-140**, A. De Luca. "Non-Pecuniary Remedies under the Energy Charter Treaties", Energy Charter Secretariat Knowledge Centre, 2015, paras 33-40.

1228 Counter-Memorial, footnote 671 to para 731.

Jurisprudence supports the existence of a power to grant the relief sought

842. Despite its lengthy and strident protests that the Tribunal lacks the power to grant the remedy sought, the EU does not address in any meaningful way the jurisprudence cited by NSP2AG.

843. Notably, the EU takes a self-serving approach in citing international law sources, addressing them selectively to fit its own arguments. For example:

i. The EU criticises NSP2AG for relying on *Rainbow Warrior*, an inter-state case,[1229] but nevertheless relies on a number of state to state cases itself.[1230] In any case, as the Claimant explained in its Memorial, the International Court of Justice in the *Rainbow Warrior* was clearly considering the powers of international courts and tribunals in general and its dicta were not confined to a state to state context.[1231] Accordingly, it has been relied on by investment tribunals in support of the Claimant's position. The EU has provided no justification for why it should not be relied on in an investor-state case under the ECT.

ii. Where the EU disagrees with the outcome or reasoning of relevant cases, it rejects them allegedly because they have been incorrectly decided, in particular and without justification accusing the *Enron* and *Micula* tribunals of "*sparse, ill-developed analysis*".[1232]

***Chevron v. Ecuador* has unambiguous precedential value**

844. The EU seeks to convince the Tribunal that *Chevron v. Ecuador* has limited precedential value for present purposes, stating that the Claimant's "*heavy reliance*" on this case "*demonstrates* a contrario *the absence of any support for its requested relief*".[1233] However, the EU comes up with no credible argument why *Chevron v. Ecuador* should not be regarded as suitable precedent for the relief sought (should the Tribunal consider that it needs one). In making this argument, the EU also ignores or arbitrarily dismisses the many other cases cited by the Claimant, as described above.[1234] The EU's argument is all the more ironic, given its own position is entirely unsupported by case law.

845. In the first instance, the EU seeks to distinguish the *Chevron v. Ecuador* case on its facts. However, inevitably each investment treaty case rests on its own unique set of facts. A recognition that "*the reparation for an internationally wrongful act varies, depending upon the concrete circumstances surrounding each case and the precise nature and scope of the inquiry under international law*",[1235] represents no more than an uncontroversial recognition

1229 Counter-Memorial, paras 737-739.
1230 Counter-Memorial, para 732.
1231 Memorial, para 494.
1232 See, for example, Counter-Memorial, paras 716 and 740.
1233 Counter-Memorial, Section 4.2.3.
1234 Memorial, paras 494-498.
1235 Counter-Memorial, paras 762-763, citing the *Chevron* award, para 9.11.

that reparation may take many forms. It does not support the EU's argument that, if the circumstances differ from those in the *Chevron* case, the approach to the remedy granted must necessarily be different.[1236]

846. The *Chevron* award supports the position that a tribunal has, in principle, the power to order the respondent to remove the effects of unlawful acts by taking steps of its own choosing.[1237] The factual differences between the present case and *Chevron v. Ecuador* referred to by the EU[1238] do not detract from this outcome.

847. Second, the EU argues that the award in *Chevron* "*effectively amounted to an interim order*".[1239] This is plainly incorrect. An order to implement "*corrective measures as necessary to "wipe out all the consequences" of … internationally wrongful acts, so as to re-establish the situation which would have existed if those internationally wrongful acts had not been committed by the Respondent*",[1240] is by its nature final. There is no suggestion that the *Chevron* tribunal will revisit the decision at the quantum stage. The EU's characterisation of the order made by the *Chevron* tribunal as "*akin to an anti-suit injunction*" is not correct, and in any event is irrelevant. In that case, the tribunal had found a judgment to be flawed on the grounds, inter alia, of corruption - the order of the tribunal recognised that the judgment constituted a denial of justice (and therefore a breach of the relevant treaty) and sought (so far as possible) to provide restitution for that breach in the most practical manner.

848. As explained previously,[1241] to the extent that the requested relief can be characterised as a final injunction, there is no doubt that the Tribunal has a power to grant it if it "*is necessary to ensure that the breach will be redressed*".[1242]

XI.5 The EU's interpretation of Article 26(8) is wrong and NSP2AG's claim does not concern "*measures of a sub-national Government or authority*"

849. Finally, the EU argues that (i) where any REIO is the respondent, the term "*national*" in Article 26(8) must be understood as referring to measures of the organs of the REIO, and the term "*sub-national Government or authority*" in Article 26(8) should be interpreted as "*organs of the Member States*" of that REIO for which the REIO is responsible under international law; and therefore (ii) Article 26(8) "*is engaged*"; and (iii) "*Article 26(8) of the ECT precludes the*

1236 Counter-Memorial, para 763.
1237 **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), para 9.14.
1238 See Counter-Memorial, Sections 4.2.3.1. 4.2.3.3 and 4.2.3.4.
1239 Counter-Memorial, para 768.
1240 **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), para 9.17. See also the orders at para 10.13(i), (ii) and (iv).
1241 See Memorial, para 497.
1242 **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.

granting in such circumstances of anything but monetary relief".[1243] As set out in detail in Sections VII and X, the subject matter of NSP2AG's claim is the conduct of the EU. However, even accepting that the Tribunal may find the EU responsible for the actions of Germany, the EU's argument concerning Article 26(8) of the ECT is a distraction, flawed for numerous reasons, and should be rejected.

850. The EU's interpretation of the terms "*national*" and "*sub-national Government or authority*" in Article 26(8) is wrong:

i. There is no basis for such an interpretation of the ECT, and indeed no explanation has been offered by the EU for why these terms should be applied in this way to the EU and its Member States. Article 26(8) must be interpreted in accordance with the general principles in Article 31 of the VCLT, namely in good faith in accordance with its ordinary meaning in its context and in the light of the ECT's object and purpose.

ii. The "*context*" of these terms includes other provisions of the ECT. In particular, Article 26(8) must be read with Article 23. Article 23 provides:

"*(1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.*

(2) The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of the Contracting Party" (emphasis added).[1244]

The term "*sub-national authority*" is used as the title to Article 23. Article 23(1) uses the words "*regional and local governments and authorities within its Area*" as being synonymous with "*sub-national authority*".[1245] By analogy, the term "*sub-national government or authority*" under Article 26(8) must be taken to mean "*regional and local governments and authorities*". Article 23 addresses the responsibility of Contracting Parties for acts of all organs of government, be they at the national, regional or local level. [1246] It is also consistent, and should be read, with Article 4 of the ILC Articles which reads in relevant part:

1243 Counter-Memorial, para 818.

1244 **Exhibit CLA-1**, ECT.

1245 See also **Exhibit CLA-300**, T.W. Waelde and P.K. Wouters, "State Responsibility and the Energy Charter Treaty: The Rules Regarding State Enterprises, Entities, and Subnational Authorities." Hofstra Law and Policy Symposium, 2, 1997, HeinOnline, pp. 117-134 at p 128: "*Article 23 covers regional and local governments and authorities under the umbrella term "subnational authorities*"".

1246 **Exhibit CLA-300**, *ibid*., p 129: "*Article 23 requires contracting states to use reasonable efforts in supervising the actions of regional and local governments and authorities. This reflects to some degree the difficulties associated with a federal system and might be aimed at the particular case of the*

"*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State*".[1247]

iii. If the Tribunal were to accept the EU's case in relation to Article 26(8) (i.e. equating the term "*sub-national Government or authority*" to "*organs of the Member States*"), then it would imply that the EU was also responsible under Article 23 for the observance of the provisions of the ECT by all the Member States, and would be obliged to "*take such reasonable measures as may be available to it to ensure such observance*" by all the Member States.[1248] This, clearly, is not the case.

851. Finally, the EU misrepresents the proper scope and meaning of Article 26(8). Article 26(8) does not "*preclude the granting* […] *of anything but monetary relief*" in circumstances in which the claim concerns "*a measure of a sub-national government or authority of the disputing Contracting Party*", as alleged by the EU.[1249] Article 26(8) states that an ECT award "*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*" (emphasis added). This language is unambiguous. Article 26(8) does not affect or deny the Tribunal's power to award a non-pecuniary remedy whether or not the award concerns a measure of a sub-national government. On the contrary, the very premise of Article 26(8) is that a tribunal is perfectly entitled to award other restitutionary relief.[1250]

XI.6 The remedy sought by the Claimant is not materially impossible nor disproportionate and is not subject to any further tests

852. No tests for granting the requested relief were "*concocted*" by NSP2AG, as alleged by the EU.[1251] Instead the Claimant has supported its position with reference to the well-established

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Commonwealth of Independent States" … "*Article 23 implicates the state indirectly for the action of subnational authorities through the threat of the dispute resolution mechanisms referred to in subsection (2). This is as far as the ECT permits intrusion into domestic politics. The interrelationship between federal and subnational authorities is likely, in some cases, to be beyond unilateral control by the state. The drafters of the ECT have employed a formula that circumvents this problem by making the state liable for the conduct of subnationals indirectly through the application of the dispute settlement provisions of the Treaty*" (emphasis added).

1247 **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).

1248 The EU's interpretation of national to mean REIO.

1249 Counter-Memorial, para 818.

1250 **Exhibit CLA-297**, T. Roe and M. Happold, "Chapter 7 – Contracting Parties' international responsibility for breaches of Part III of the ECT", in T. Roe and M. Happold (ed.), *Settlement of Investment Disputes under the Energy Charter Treaty* (New York: Cambridge University Press), 2011, p 166 "[Article 26(8)] *provides that: 'An award of arbitration concerning as 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.' The premise is that an arbitral tribunal has the power not only to award monetary compensation but also to grant injunctive relief*".

1251 See Counter-Memorial, para 785.

principles in the *Chorzów Factory* case[1252] and the requirements of Article 35 of the ILC Articles on State Responsibility[1253], as set out in paragraphs 818 and 827 above, which are satisfied on the facts.[1254]

853. The requested relief is appropriate as it is not materially impossible:[1255]

i. As has been stated: "[r]*estitution will be materially impossible in situations such as where the subject-matter of the dispute has been destroyed, has irremediably deteriorated (for example, when a confiscated ship has been sunk), has perished and where it has passed into the hands of a bona fide third party*".[1256] In *Al-Bahloul v. Tajikistan* for example, the claimant sought an order that the respondent issue the necessary hydrocarbon exploration and development licences. The tribunal acknowledged that specific performance was "*a permissible remedy in international law*", but concluded that it was not materially possible to order Tajikistan to issue the licences, as nine years had lapsed since the claimant had left Tajikistan and during this period, "*third parties had become active in the areas where* [the] *Claimant had been promised exclusive licenses*".[1257] It is clear that no comparable circumstances apply in this case. Further, there is no question of legal impossibility.

ii. Save in the context of circumstances in which the EU is found to be internationally responsible for a breach of the ECT occasioned by measures adopted by Germany[1258] (addressed in paragraph iii. below), the EU has not suggested that it would be impossible for it to comply with an award granting the relief requested by the Claimant. Nor could it do so. The EU could simply further amend the Gas Directive in order to comply with the Tribunal's award.

iii. The EU argues that "*if measures adopted by Germany in order to transpose and implement the Amending Directive are found to breach the protections afforded under the ECT, and if the European Union is responsible for this outcome, the European Union will have no mechanism to force Germany to change its measures*". This argument is based on an erroneous premise. As fully explained in Section VII, the Claimant does not argue that breaches of the ECT are occasioned by measures adopted by Germany to transpose and implement the Amending Directive. If the EU

1252 Memorial, para 488.
1253 Memorial, para 489.
1254 See Memorial, Section IV.4.
1255 **Exhibit CLA-134**, ILC Articles on State Responsibility, Article 35.
1256 **Exhibit CLA-293**, "Chapter XXI – Compensation, Damages, and Restitution", in B. Sabahi, N. Rubins, et al., *Investor-State Arbitration*, 2nd ed. (Oxford University Press 2019), pp. 703 - 773, at para 21.16, quoting Martin Endicott, Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards, in New Aspects of International Investment Law 540–41 (Kahn & Wälde eds, Martinus Nijhoff Publishers 2007).
1257 **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 47, 54-56.
1258 Counter-Memorial, para 821.

were to be found responsible for the measures taken by Germany, this would reflect a factual finding that Germany was compelled to take such measures by EU law. This is because, for all the reasons discussed in Section IV.1 and as confirmed by the EU's Advocate General, Germany must apply the objective EU law meaning of "*completed before 23 May* 2019" and has no discretion. Accordingly, it would be open to the EU to amend the Gas Directive to comply with any award ordering the relief sought by the Claimant, with the consequence that Germany would be compelled to reflect those amendments in its national legislation.

iv. In any case: "*Under Article 32* [of the ILC Articles], *the respondent State is not entitled to invoke the political or administrative obstacles resulting from its internal law as justification for the failure to provide full reparation*".[1259]

854. The requested relief does not involve a burden out of all proportion to the benefit derived from granting restitution instead of, or as well as, compensation:

i. This would require:

"*a grave disproportionality between the burden and the benefit, although it has been suggested that this may only be the case 'if the delinquency can also be atoned by a pecuniary indemnification.' This bar to restitution is based on considerations of equity and reasonableness. The* [ILC Articles] *indicate a preference for the wishes of the injured State in any case where the balancing exercise does not clearly favour compensation over restitution. The balance will also favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability*."[1260]

ii. This is not the case in the current circumstances. The Claimant asks that the Tribunal order the EU to remove the application of certain provisions of the Gas Directive to Nord Stream 2 (the only offshore import pipeline to which those provisions are applied). The burden on the EU, for example, in amending the Gas Directive, would not be significant and the EU has not argued otherwise. Whereas the impacts of the wrongdoing more than justify the relief sought.[1261] As set out in Section VI and the First and Second Witness Statements of [redacted]

[1259] **Exhibit CLA-293**, "Chapter XXI – Compensation, Damages, and Restitution", in B. Sabahi, N. Rubins, et al., *Investor-State Arbitration*, 2nd ed. (Oxford University Press 2019), pp. 703 - 773, at para 21.16, quoting Martin Endicott, Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards, in New Aspects of International Investment Law 540–41 (Kahn & Wälde eds, Martinus Nijhoff Publishers 2007).

[1260] **Exhibit CLA-293**, *ibid.*.

[1261] See further Section VI above.

855. The relevant test in connection with the question of whether the Tribunal should order the relief requested is therefore clearly satisfied.

856. Whereas the EU asserts that the Claimant has "*cobbled together*" principles which "*do not constitute the proper test for injunctive relief*",[1262] the boot is clearly on the other foot. The EU has not suggested an alternative test for the Tribunal to adopt when assessing the Claimant's request for a restitutionary remedy. Instead it refers to a collection of authorities applicable to interim injunctions at international[1263] and domestic levels[1264]. These authorities are inapposite in the circumstances, in particular because:

i. NSP2AG does not seek an injunction as its primary remedy; and

ii. in any case, a final injunction, where the guiding principle would be to achieve a fair outcome in the circumstances of the case (pursuant to the principles referred to above), is distinct from an interim injunction, which is a temporary measure required to preserve the *status quo*.

857. Further, the remedy that NSP2AG seeks is the appropriate one by reference to well-established principles of international law.[1265] It requires the Tribunal to conclude only that the relief is not materially impossible nor disproportionate. There is no need therefore to pick from one of the many tests or standards summarised by the EU.

858. Indeed, the relief sought by NSP2AG is not only possible and proportionate, but <u>appropriate</u> in all the circumstances of the case:

i. NSP2AG is engaged in a long-term project.[1266]

ii. The EU has passed a measure which applies to a 54km section of Nord Stream 2, a pipeline of 1,235 km. The impact of the measure however, is felt across the whole of the pipeline, and likely for the duration of the pipeline's operation. [redacted]

iii. The Amending Directive is a discriminatory measure. It is targeted at, and has practical effect in relation to one, sole pipeline – Nord Stream 2. This is undeniable, as confirmed by the recent opinion of the EU's Advocate General, in which the Advocate General found that "*not only were the EU institutions aware that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the very intention of subjecting the*

1262 Counter-Memorial, para 786.
1263 Counter-Memorial, Section 4.3.4.
1264 Counter-Memorial, Section 4.3.5.
1265 Memorial, Section IX.4.
1266 [redacted]
1267 Section VI.

appellant to that new regime".[1268] This fact alone entirely undermines the EU's arguments that restitution should not be available.

iv. These circumstances depart entirely from those found in most investor-state claims, whereby the investor will not continue with the investment after the damage by the host State and there is no benefit to be derived from a restitutionary remedy. In those cases the investor seeks damages by way of compensation for loss and harm already caused.

v. In these circumstances, and in the knowledge that it has the power and the justification to do so, the Tribunal should conclude that the relief sought by NSP2AG is the most appropriate remedy and award such relief.

XI.7 Alternative Relief

859. As NSP2AG has explained in detail in this Reply Memorial, the factual picture continues to evolve as NSP2AG endeavours to adapt to the regulatory requirements which impact on its investment by means of the discriminatory and unlawful Amending Directive. [redacted] the outcome of the application of the provisions of the Gas Directive to the Nord Stream 2 pipeline caused by the Amending Directive is dependent on the actions and decisions of a number of third parties, including but not limited to the BNetzA, the Commission, Gazprom Export, [redacted]. Accordingly, NSP2AG reserves its rights to apply to the Tribunal for permission to file further submissions and evidence to update the Tribunal if it becomes necessary to do so for the purposes of the Tribunal's determination of the dispute. NSP2AG also reserves its right to apply for interim injunctive relief as described in Section XII below.

860. The developing factual picture does not undermine NSP2AG's request for a final restitutionary remedy. As explained above, restitution is the primary remedy for breach of an international obligation. If the Tribunal concludes, on the basis of the facts as they currently exist, that the EU has breached the ECT, it should award NSP2AG the remedy sought, unless it finds that it would be materially impossible or disproportionate to do so.

861. However, if due to the developing factual picture with regard to the impact of the Amending Directive on the pipeline, the Tribunal is minded at this stage not to grant, on a final basis, an order that the EU, by means of its own choosing, 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 (NSP2AG's primary relief), NSP2AG requests in the alternative an interim order in the same terms pending conclusion of the subsequent phase of this arbitration and for the Tribunal to determine NSP2AG's request for such an order on a final basis in that subsequent phase.

[1268] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 197. See also paras 194-198 and 200.

862. Under the 1976 UNCITRAL Rules, the powers of the Tribunal relating to interim measures are set out in Articles 15(1), 26(1) and 26(2), which provide as follows:

> *Article 15(1):*
>
> *"Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."*
>
> *Article 26(1):*
>
> *"At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods."*
>
> *Article 26(2):*
>
> *"Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures."*

863. Article 26(1) of the UNCITRAL Rules therefore grants an arbitral tribunal a broad power to order any interim measures which it deems necessary, the only limitation being that they be "*in respect of the subject-matter of the dispute*".[1269]

864. In the event that the Tribunal does not grant the primary relief sought by NSP2AG at this stage of the arbitration, NSP2AG will be forced to comply with the requirements of the amended Gas Directive, and will face [redacted]. An award of interim relief in the same terms as the primary relief requested by the Claimant would be justified in order to avoid such impacts pending the Tribunal's determination of the Claimant's primary relief.

[1269] **Exhibit CLA-307**, "Chapter 17 – Provisional Relief in International Arbitration", in G.B. Born, *International Commercial Arbitration*, 2nd ed. (Kluwer Law International 2014), pp. 2424 - 2563, at p.2441.

XII. **RELIEF SOUGHT**

865. On the basis of the foregoing, without limitation and fully reserving its right to amend or supplement this request, NSP2AG requests the following relief:

i. A declaration that the Tribunal has jurisdiction to determine NSP2AG's claim against the EU;

ii. A declaration that the EU has breached Article 10(1) of the ECT by taking unreasonable or discriminatory measures that have impaired NSP2AG's management, maintenance, use, enjoyment or disposal of its investments;

iii. A declaration that the EU has breached Article 10(1) of the ECT by failing to ensure fair and equitable treatment of NSP2AG's investments;

iv. A declaration that the EU has breached Article 10(1) of the ECT by failing to ensure that NSP2AG's investments enjoy the most constant protection and security;

v. A declaration that the EU has breached Article 10(7) of the ECT by failing to ensure that NSP2AG is accorded treatment no less favourable than that which the EU accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third states and their related activities;

vi. A declaration that the EU has breached Article 13 of the ECT by expropriating the Claimant's investments or subjecting them to a measure or measures having effect equivalent to expropriation;

vii. An order that the EU, by means of its own choosing, 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;

viii. In the alternative to (vii) above, an interim order that the EU, by means of its own choosing, 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, pending the conclusion of the subsequent phase of this arbitration;

ix. If the Tribunal declines to make the order requested in (vii) above, in a subsequent phase of this arbitration, an order that the EU, by means of its own choosing, 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;

x. In a subsequent phase of this arbitration, an order that the EU pay compensation in an amount to be assessed, being the amount of NSP2AG's losses resulting from the EU's breaches of the ECT;

xi. An order that the EU pay the costs of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of legal representation and interest thereon;

xii. An order that the EU pay all other costs incurred by NSP2AG as a result of its breaches of the ECT and interest thereon in accordance with the ECT; and

xiii. Such other and further relief as the Tribunal considers appropriate, in the circumstances.

866. NSP2AG reserves the right to apply for interim injunctive relief, if necessary, to preserve its position pending the outcome of its requests for relief at paragraph 865.vii and 865.viii above.

867. NSP2AG further reserves the right to supplement or amend its claims and relief sought, and to present further argument and evidence, up to the date of the Final Award or any earlier date set by the Tribunal.

Submitted for and on behalf of
NORD STREAM 2 A.G.

Professor Dr Kaj Hobér
and

Herbert Smith Freehills LLP

Herbert Smith Freehills LLP
25 October 2021

APPENDIX 1: CLAIMANT'S DEMONSTRATIVE EXHIBIT NO. 1 AT BIFURCATION HEARING ON 8 DECEMBER 2020

Extract from Article 26 of the Energy Charter Treaty (Exhibit CLA-2)

PCA CASE No. 2020-07:
Nord Stream 2 AG vs the European Union

Hearing on the EU's Request for a Preliminary Phase on Jurisdiction and Admissibility: 8 December 2020

Claimant's Demonstrative Exhibit No. 1

Extract from Article 26 of the Energy Charter Treaty (Exhibit CLA-2)

Article 26: Settlement of Disputes between an Investor and a Contracting Party

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, **which concern an alleged breach of an obligation of the former under Part III** shall, if possible, be settled amicably.

(2) If **such disputes** cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to **the dispute** requested amicable settlement, the Investor party to **the dispute** may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;

(b) in accordance with any applicable, previously agreed dispute settlement procedure; or

(c) in accordance with the following paragraphs of this Article.

(3)(a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously **submitted the dispute under subparagraph (2)(a)** or (b).

(b)(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.