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

AND

PURSUANT TO THE ENERGY CHARTER TREATY

NORD STREAM 2 AG

(Claimant)

vs

EUROPEAN UNION

(Respondent)

EUROPEAN UNION
REJOINDER ON THE MERITS & REPLY MEMORIAL ON JURISDICTION

The Tribunal

Professor Ricardo Ramírez Hernández

Professor Philippe Sands QC

Justice David Unterhalter SC

[redacted]

Legal Service

European Commission

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GLOSSARY

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

EPP	European People's Party
EU	European Union
FET	Fair and Equitable Treatment
[redacted]	[redacted]
Gas Directive	Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC
Gas Regulation	Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on Conditions for Access to the Natural Gas Transmission Networks and Repealing Regulation (EC) No 1775/2005
German FNA	German Federal Network Agency for Electricity, Gas, Telecommunications, Post and Railway (Bundesnetzagentur)
[redacted]	Gazprom Export
ICJ	International Court of Justice
IGA Decisions	2012 IGA Decision and 2017 IGA Decision
IGAs	Intergovernmental agreements in the field of energy
ILC	International Law Commission
Interinstitutional Agreement	Interinstitutional Agreement on Better Law-Making of 13 April 2016 between the European Commission, the European Parliament, and the Council
ISO	Independent system operator
ITO	Independent transmission system operator
ITRE	European Parliament Committee on Industry, Research and Energy
LNG	Liquefied natural gas
MEP	Member of the European Parliament
MFN	Most Favoured Nation
NDAA	National Defense Authorization Act
NEL	Northern European natural gas pipeline (Nordeuropäische Erdgasleitung)
NRA	National Regulatory Authority

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

1 SUMMARY

1.1 The Amending Directive pursues legitimate and achievable objectives

1. In its Reply the Claimant continues to assert that the Amending Directive's objectives are contradictory, lack clarity and cannot be achieved. The Claimant's assertions are premised on the assumption that the objectives of the Amending Directive, as described and explained by the European Union, are "fabricated", and that the Amending Directive's real purpose is to "harm the Claimant", which is "the only objective that it achieves".

2. As the European Union has demonstrated in its Counter-Memorial, that assumption is baseless. The Amending Directive does pursue legitimate and achievable objectives, which are clearly set out in the Amending Directive itself and accompanying documents. By clarifying that the EU internal market rules for gas established by the Gas Directive are applicable to all interconnectors, including interconnectors between the European Union and third countries, the Amending Directive contributes to the proper functioning of the EU's internal market in natural gas. By ensuring that the core rules of the gas internal market apply equally to all pipelines within the EU territory, the Amending Directive ensures a level playing field for all suppliers, enhances transparency and provides legal certainty to all market participants. It also enhances security of supply in the European Union.

3. In its Reply the Claimant seeks to rebut the explanations provided by the European Union by advancing a series of assertions which, as the European Union will demonstrate in Section 2, are unsubstantiated and incorrect.

1.2 The Amending Directive does not involve a "dramatic regulatory change"

4. In its Reply Memorial, the Claimant has abandoned its original claim that it made its investment on the understanding that the Gas Directive, until the Amending Directive was enacted, would not apply *at all* to Nord Stream 2. However, it still asserts that an alleged "dramatic regulatory change" resulted from the requirements of unbundling, tariff regulation and third party access having been rendered applicable to offshore sections of import pipelines, arguing that the original Gas Directive applied to such pipelines only as from the coastal terminal where they reached landfall in a Member State.

5. This new claim is as much without merit as the previous one. When the Claimant took its Investment Decision, there were numerous indications that the original Gas Directive imposed these Regulatory Requirements to pipelines such as Nord Stream 2 over the entirety of Member States' territory, including offshore, such

as (i) the express provisions of the original Gas Directive and the scope of EU Member States' territorial jurisdiction under international law; (ii) official statements by Commission representatives regarding Nord Stream and the comparable offshore South Stream project rendered public at the time the Investment Decision regarding Nord Stream 2 was taken; and (iii) EU decisions and opinions regarding comparable pipelines.

6. The Claimant's Reply does not offer alternative interpretations of the provisions of the original Gas Directive that already pointed to its applicability to the Nord Stream 2 pipeline. The Claimant does not engage, either, with the scope of EU Member States' territorial jurisdiction covering their territorial waters, in which the original Gas Directive is alleged not to have applied.

7. Most tellingly, the Claimant does not give convincing reasons why it should not have taken seriously the contemporaneous official EU statements referred to in the EU's Counter-Memorial, each of which would in itself have been a warning sign to a duly diligent investor that the original Gas Directive would apply to pipelines such as Nord Stream 2 both onshore and offshore. Only extreme recklessness or the bad faith intention of pre-empting the regulator's choices through the *fait accompli* of an implemented pipeline project can explain why the Claimant ignored these statements and abstained from contacting the EU authorities to seek clarification.

8. Instead, the Claimant in its Reply seeks to rely on informal statements conveying the unofficial views of individual EU representatives [redacted], i.e. about [redacted] after the Claimant made its Investment Decision. Such documents are to be disregarded *ratione temporis*. In any event, the informal statements invoked draw a picture of legal uncertainty and of a state of regulatory flux on which no duly diligent investor would have relied.

9. The Claimant's Reply also provides no convincing rebuttal to the European Commission opinions and decisions referred to in the Counter-Memorial, which indicated that the original Gas Directive applied to pipelines importing gas from third countries to the European Union. Rather, the Claimant downplays these opinions and decisions as relating to "less relevant pipelines" without this categorisation being rooted in the Gas Directive or being consistently applied by the Claimant itself.

10. The Claimant's depiction of EU Competition Law as irrelevant for the present proceedings sidesteps the EU's point that these Competition Law rules were an intrinsic part of the regulatory framework at the time the Claimant took its

Investment Decision and achieved a result equivalent to the Amending Directive. Its attempt at interpreting EU competition rules as not applying to Nord Stream 2 is not rooted in settled case law of the EU Court of Justice, on which any duly diligent investor would have based its assessment.

11. Finally, contemporaneous evidence leaves no doubt that the Claimant was well aware of the prospect that the Regulatory Requirements would apply to Nord Stream 2 when it took its Investment Decision. Most notably, [redacted], the Claimant's sole shareholder Gazprom issued a prospectus in which it informed securities investors of the likelihood that these Regulatory Requirements would apply to Nord Stream 2 under the original Gas Directive.

1.3 There was no "deliberate exclusion" of the NS 2 pipeline project from the derogation regime nor any specific targeting

12. In its Reply, the Claimant alleges that the Amending Directive targets and deliberately discriminates Nord Stream 2, claiming that this "intention" is "obvious". The Claimant argues that this results in impairment by unreasonable or discriminatory measures under Article 10(1) ECT and breaches the most-favoured-nation and national treatment obligation under Article 10(7) ECT.

13. The European Union notes that every argument the Claimant makes with respect to the alleged targeting of NSP2AG or discrimination of NSP2AG starts from the assumption that the Amending Directive could have no other "intention" than to obstruct Nord Stream 2. The Claimant thereby refuses to look at the full legal framework established through the Gas Directive, as amended, in an objective and coherent way. The Amending Directive does not have the aim to obstruct NSP2AG. It has the objective of clarifying the application of the legal framework of the Gas Directive, making express the European Union's position that the Gas Directive's rules apply to transmission pipelines connecting the European Union with third countries. The isolated statements by certain individuals, in the margins of a much more complex legislative process, that the Claimant keeps on citing do not undermine this.

14. The Amending Directive does not discriminate "in effect" either. The Amending Directive clarifies the legal situation for *all* interconnectors with third countries, present and future ones, be they onshore or offshore. The Claimant assumes that, in this context, it should obtain an unconditional Article 49a derogation from the obligations in the Gas Directive. Yet, there exist at present pipelines connecting with third countries that do not benefit from an Article 49a derogation. In any event, if the Amending Directive is considered in the broader context of the Gas Directive, in particular the existence of several flexibilities

under that Directive, it is again obvious that the Amending Directive does not "target" NSP2AG. Indeed, even if an Article 49a derogation would not be granted, other flexibilities are available in a coherent system. In particular, the Claimant itself decided not to apply for an Article 36 exemption, claiming that this would not be available and not comparable to an Article 49a derogation. However, the European Union explains in detail the parallelism between Article 49a and Article 36. Both Article 36 and Article 49a form part of a coherent system of obligations and flexibilities under the Gas Directive. It was the Claimant's own deliberate choice not to apply for an Article 36 exemption, or any other flexibility, and bet everything on obtaining an unconditional Article 49a derogation.

15. For all these reasons, the Claimant cannot establish impairment by unreasonable or discriminatory measures under Article 10(1) ECT or a breach of the most-favoured-nation and national treatment obligation under Article 10(7) ECT.

1.4 The Amending Directive underwent a proper legislative process

16. The Claimant asserts that the legislative process for the adoption of the Amending Directive was hasty and followed an improper legislative procedure. These allegations are unfounded. The Amending Directive was adopted in accordance with the rules and procedures applicable to acts of its type.

17. The Claimant misunderstands the EU legislative process and wilfully misrepresents the circumstances in which consultations, evaluations or assessments are required.

18. First, based on the Better Regulation Toolbox 2017, the Commission evaluated the need to carry out an impact assessment and included such evaluation in the Explanatory Memorandum and in the Staff Working Document accompanying the Proposal, concluding that there was no need for an impact assessment.

19. Second, an *ex-post* evaluation is only necessary when the overall performance of the existing piece of legislation is assessed and a comprehensive review of a piece of legislation is envisaged. Instead, for targeted revisions an ex-post evaluation is not always needed. In the present case, since the purpose of the Amending Directive was simply to clarify that the Gas Directive also applies to gas transmission lines between a Member State and a third country, an ex-post evaluation of the Gas Directive was not necessary.

20. Third, a formal public consultation was not compulsory nor needed, given the limited scope of the proposed act. Nevertheless, stakeholders were actively involved in the legislative process through their answers to a request for feedback and participation in a public hearing.

21. Fourth, in the legislative process for the adoption of the Amending Directive, the parliamentary procedure was regular and proper, complied with the Rules of Procedure of the European Parliament 2017, and followed the practice.

22. Finally, the Amending Directive was adopted through democratic decision-making, where discordant opinions are inherent to the legislative process and decisions are taken by the majority.

23. To conclude, the ordinary legislative procedure that led to the adoption of the Amending Directive followed all of the necessary steps provided for in the TFEU and there was nothing unusual about it. The process respected the guidance provided for in the Interinstitutional Agreement and detailed in the Better Regulation Guidelines and the Better Regulation Toolbox. The negotiation process of the Amending Directive ensured the active participation of stakeholders and all the relevant political actors concerned.

1.5 The Amending Directive will not have the alleged "impact" on the Claimant's investment

24. The Claimant continues to allege the Amending Directive will have a "catastrophic impact" on its investment, while still being unable to demonstrate that any such impact has in fact occurred or is likely to occur.

25. Despite the factual developments since the Claimant's Memorial of 3 July 2020 cited by the Claimant, the "impact" of the Amending Directive on NSP2AG's investment in the NS2 pipeline remains highly uncertain. Therefore, the Claimant's allegations with regard to that "impact" remain speculative and premature.

26. The "impact" of the Amending Directive on the Claimant's investment continues to depend on measures that the German authorities may or may not adopt within the margin of discretion accorded to them by the Amending Directive, as well as on choices to be made by the Claimant itself within the framework of those measures (Section 6.2).

27. As the European Union will recall in the present Rejoinder, the Claimant could have avoided the alleged "impact" by exercising due diligence (Section 6.3.1). Moreover, the Claimant (and its controlling shareholders Gazprom and the Russian Federation) have failed to take action reasonably within their power in order to avert or mitigate the alleged impact, notably by requesting an exemption based on Article 36 of the Gas Directive (Section 6.3.2), by re-organising itself in accordance with Article 9(6) of the Gas Directive (Section 6.3.3), by abolishing or relaxing the export monopoly granted to Gazprom Export (Section 6.3.4), and/or by negotiating an IGA with the European Union (Section 6.3.5).

28. The Claimant also has failed to substantiate its allegation that it has already suffered any financial losses attributable to the European Union resulting either from its current inability to operate the NS2 pipeline [redacted] (Section 6.4).

29. Finally, in assessing any alleged "impact" of EU measures on the Claimant, the Claimant's own contributions to such impacts must be taken into account in accordance with principles of international law. In the present case, the "impacts" resulting from actions or omissions of other entities belonging to the Gazprom group, or from the Claimant's ultimate owner and controller (the Russian Federation) are clearly attributable to the Claimant (Section 6.4). In turn, the "impact" resulting from the sanctions imposed or threatened by the United States with regard to the NS 2 project cannot be attributed to the European Union (Section 6.5).

1.6 The European Union has not breached its obligations under the ECT

30. The Claimant's arguments as set out in their Reply fail to demonstrate that the EU has breached the ECT. To the contrary, it is clear that there has been no breach of the fair and equitable treatment ("FET") standard under Article 10(1) of the ECT, no breach of the obligations to provide constant security and protection ("CPS") under Article 10(1) of the ECT, no breach of the most-favoured-nation ("MFN") and national treatment standards under Article 10(7) of the ECT, and no breach of the provisions regulating expropriation under Article 13 of the ECT.

1.6.1 There is no breach of the fair and equitable treatment standard under Article 10(1) ECT

31. The Claimant's allegations of breach of ECT obligations under the FET standard contained in Article 10(1) of the ECT are unsustainable, in light of the legal content of the standards alleged and the facts at issue in this dispute. The EU has fully complied with its obligations under the standards set out in Article 10(1) of the ECT: it ensured due process and justice and did not breach legitimate expectations; it acted proportionately, transparently, and in good faith; and there was no impairment by unreasonable or discriminatory measures.

32. First, the EU ensured due process and justice. The Claimant has failed to demonstrate a breach of the obligation to accord due process, a breach which requires a high threshold of severity and gravity. Indeed, no tribunal has ever sought to second-guess the decisions reached by a duly elected parliamentary assembly on the basis of alleged lack of "due process", under the FET standard or otherwise. Nothing in the various steps of the legislative process followed by the

EU or any of its constitutive organs (notably the European Parliament) has come close to violating a standard of "due legislative process", even if such a thing had been elaborated by investment treaty tribunals, which it has not. To the contrary, the process for adoption of the Amending Directive followed the ordinary legislative procedure as outlined in Article 294 of the TFEU and met all the requirements applicable to a legislative act of its nature and scope.

33. Second, the EU has acted in good faith. While the notion of good faith may underpin the interpretation of the FET standard, it is not an autonomous stand-alone obligation under Article 10(1). Moreover, in the absence of evidence of bad faith on the part of the EU, the European Union is presumed to have acted in good faith. In fact, the EU has acted and continues to act in good faith by providing the required clarification with regard to the regime applicable to offshore pipelines to and from third countries. It adopted the Amending Directive pursuant to a democratic decision-making process. The European Union has provided full evidence of the fact that the Amending Directive, like any other directive, is an act of general and abstract nature, which will apply to all gas transmission lines going forward.

34. Third, the EU has acted proportionately. The EU enjoys a wide margin of discretion in adopting policies in the public interest, and tribunals have been (rightly) cautious about appearing to second-guess the policy decisions of sovereigns. Instead, tribunals have found that measures are "disproportionate" only where there is a manifest disconnect between the stated policy objectives of the State and the measures actually adopted. None of these circumstances are present here. The Amending Directive did not cause any dramatic regulatory change, and the public benefits of the Amending Directive outweigh any practical adverse effects on interests of the Claimant – particularly in circumstances where the Claimant has not proven those effects and can try to mitigate any impact by applying for an exemption and where the Gas Directive, as amended, includes appropriate flexibilities.

35. Fourth, the EU did not breach any alleged legitimate expectations of the Claimant. There has been no regulatory change, let alone a dramatic or radical regulatory change, and the Claimant's claim of alleged breach of legitimate expectations with respect to the stability of the legal framework can be dismissed for this reason alone. In any event, none of the additional arguments advanced in the Claimant's Reply support a claim of a breach of alleged legitimate expectations because: (i) the protection of legitimate expectations is merely one element of the FET standard applicable under the ECT; (ii) legitimate

expectations require a specific investment-inducing regulatory framework, in the absence of which they do not guarantee a stable legal and business environment; (iii) NSP2AG's expectations were not reasonable, legitimate and justifiable; and (iv) the Claimant did not rely on the expectations it allegedly had at the time of the investment. Each of the above points would suffice individually to reject the claim of legitimate expectations.

36. Fifth, the EU has acted transparently. The Claimant has failed to meet the high threshold required to demonstrate a lack of transparent conditions under Article 10(1) of the ECT, and to establish that the EU did not act in a transparent manner. Consequently, the Claimant's claim must fail. Furthermore, the EU has acted transparently with respect to the three specific allegations raised by the Claimant: (i) the Amending Directive underwent a proper legislative process, where all the applicable rules were respected, all the relevant actors were involved, and the usual timetables were followed; (ii) the policy objectives of the Amending Directive are legitimate, suitable and achievable; and (iii) the EU ensured full transparency in its exchanges with NSP2AG, as supported by the evidence.

1.6.2 There is no impairment by unreasonable or discriminatory measures under Article 10(1) ECT

37. An objective assessment of the full legal framework established through the Gas Directive, as amended, demonstrates that the Gas Directive does not have the "intent" to specifically target or discriminate against the NSP2AG pipeline project. Neither can the Claimant demonstrate that the practical effect of the Gas Directive, as amended, is such that the Claimant is discriminated against. Moreover, even if the Tribunal were to find that the Claimant had sufficiently established that the Amending Directive is unreasonable or discriminatory (*quod non*), the Claimant has failed to demonstrate impairment with respect to the management, maintenance, use, enjoyment or disposal of its investment, as required by Article 10(1) of the ECT. Contrary to what the Claimant argues, NSP2AG is not prevented from developing its investment project while at the same time complying with the applicable rules in the Gas Directive. For these reasons, the Claimant cannot establish impairment by unreasonable or discriminatory measures under Article 10(1) ECT.

1.6.3 There is no breach of the constant protection and security standard under Article 10(1) ECT

38. Contrary to the Claimant's arguments, the CPS standard under Article 10(1) of the ECT has consistently been identified as an obligation to protect from physical interference (not to provide legal security), consistent with longstanding content of the equivalent "full protection and security" obligation under public international law. Even if the CPS standard under the ECT extended to legal security (*quod non*), it does not oblige the EU to "maintain through its legal and regulatory framework a secure investment environment" as the Claimant asserts.

39. In any event, nothing in the European Union's conduct amounts to a violation of even that misstatement of the CPS standard. Contrary to the Claimant's assertions, the Amending Directive pursues legitimate, suitable and achievable objectives, which are in line with the objectives of the Gas Directive. The Amending Directive underwent a proper legislative process, which respected all the applicable rules, involved all the necessary actors, and followed the usual timetables. Finally, the Amending Directive did not cause any dramatic regulatory change. Accordingly, even on the Claimant's misstated standard of the CPS obligation, the EU has not breached Article 10(1) of the ECT.

1.6.4 There is no breach of most favoured and national treatment standard under Article 10(7) ECT

40. An objective assessment of the full legal framework established through the Gas Directive, as amended, demonstrates that the Gas Directive does not have the "intent" to specifically target or discriminate against the NSP2AG pipeline project. Neither can the Claimant demonstrate that the practical effect of the Gas Directive, as amended, is such that the Claimant is discriminated against when compared to the treatment afforded to suitable comparators. For these reasons, the Claimant cannot establish a breach of the most-favoured-nation and national treatment obligation under Article 10(7) ECT.

1.6.5 There is no breach of the provisions on expropriation under Article 13 ECT

41. The Claimant has been unable to satisfactorily demonstrate that its investment has had the equivalent effect of an expropriation under Article 13 of the ECT, because there is no substantial impairment of the Claimant's investment. The Claimant has not been deprived of its ownership, use or enjoyment of the NS2 pipeline. Rather, the Claimant's claim under Article 13(1) of the ECT is built upon the speculation that the Amending Directive [redacted]

[redacted] Moreover, the Claimant has failed to prove that it has already suffered any losses attributable to the European Union resulting either from its current inability to operate the NS2 pipeline [redacted]. Finally, the Claimant could have prevented, and indeed can still prevent or at least substantially mitigate, the adverse impact of the Amending Directive alleged by the Claimant.

42. Even if there was a substantial deprivation of the Claimant's investment (*quod non*), the Claimant has been unable to rebut the EU's demonstration that the measures constitute a legitimate exercise of the police powers of the State. The Gas Directive and the Amending Directive are designed to pursue legitimate public welfare objectives of fundamental importance for the European Union, and were adopted in a non-discriminatory and proportionate way. Consequently, the Claimant's claim of unlawful expropriation under Article 13 of the ECT should be dismissed.

1.7 The tribunal lacks jurisdiction

43. Section 8 of this Reply Memorial on Jurisdiction addresses the Claimant's arguments in its Counter-Memorial on Jurisdiction regarding the jurisdictional objections the European Union raised in its Memorial on Jurisdiction. In Section 8 of this Reply Memorial on Jurisdiction, the European Union demonstrates that the Claimant has failed to overcome the European Union's objections that: (i) this Tribunal lacks jurisdiction pursuant to the ECT's fork-in-the-road provision (Section 8.1); and (ii) this Tribunal lacks jurisdiction *ratione personae* (Section 8.2).

1.7.1 The Tribunal lacks jurisdiction pursuant to the ECT's fork-in-the-road provision

44. With regard to the ECT's fork-in-the-road provision, the Claimant has not disputed the fact that it is also pursuing, in parallel with the present arbitration proceedings, proceedings before the Court of Justice of the European Union against the co-legislators of the European Union (Council and Parliament) with regard to the Amending Directive. Nor can the Claimant deny that its application before the Court of Justice of the European Union arises out of the same facts, makes essentially the same allegations and seeks essentially the same outcome as its request before this Tribunal.

45. These facts alone suffice for the Tribunal to find that it lacks jurisdiction over these proceedings. The Claimant's non-compliance with the ECT's fork-in-the-road clause results in a lack of consent to the present proceedings by the European Union. The Tribunal should disregard the Claimant's contention that the ECT's fork-in-the-road provision must be applied in a rigid and narrow fashion, as the Claimant's approach runs contrary to its wording and purpose and would deprive the ECT's fork-in-the-road provision of *effet utile*.

1.7.2 The Tribunal lacks jurisdiction *ratione personae*

46. In its Counter-Memorial on Jurisdiction, the Claimant has failed to provide any compelling response to the European Union's objection to the Tribunal's jurisdiction *ratione personae*. Contrary to the Claimant's assertions, the European Union's objection in this regard is appropriate, genuine and coherent with its parallel jurisdictional objection based on the Claimant's failure to respect the ECT's fork-in-the-road clause. Any effect that the Claimant ascribes to the Amending Directive may only flow (if at all) from the conduct of the EU Member States in the exercise of their margin of discretion in transposing and implementing the Amending Directive. The breaches that the Claimant alleges therefore may only result (if at all) from measures that cannot be attributed to the European Union and for which the European Union cannot be held responsible under international law.

1.8 The relief sought by the Claimant is inappropriate

47. The Claimant requests as its "primary relief" that the Tribunal order the European Union, "by means of its own choosing", to "remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive (i.e., those provisions which became applicable to Nord Stream 2 as a result of the Amending Directive to NSP2AG and Nord Stream 2)", thus "restoring the position that would have existed but for the EU's breaches of the ECT". In addition, for the first time, the Claimant also makes a request for "alternative relief" in the form of an interim injunction.

48. Despite the Claimant's protestations, this request confirms that the Claimant seeks remedies of interim and final permanent injunctions, preventing the European Union from applying general rules of EU law. The requested relief lacks any secure foundations in general public international law, under the ECT or principles of investment law. Granting the Claimant's request would amount to an extraordinary and unprecedented incursion into the EU's sovereign right to regulate within the scope of their powers to promote public welfare objectives.

49. First, issuing an injunction remains an inappropriate remedy under international law with respect to investor-State disputes. While the Claimant seeks to ground its request in the principle of full reparation, it is clear that principles of international law developed in the State-to-State context cannot be transposed *in toto* to investment arbitration proceedings between a private entity and a State.

50. Second, the Claimant has failed to demonstrate that this Tribunal has the power to grant a final injunction under the ECT and principles of investment law. Contrary to the Claimant's assertions, a plain reading of Article 26(8) of the ECT makes clear that it fails to provide for final injunctive relief, either as an alternative or in priority. This plain reading is supported by the views of tribunals and commentators considering the scope of application of Article 26(8) of the ECT. In fact, the weight of ECT jurisprudence makes clear that the provision fails to empower the Tribunal to issue "restitution" of an entire legal regulatory framework and its application to a particular party, with no regard to the widespread implications such an order would have across European society as a whole.

51. Third, even if the Tribunal had the power to order a final or interim injunction (*quod non*), the Claimant has failed to demonstrate that issuing a final injunction is appropriate in the circumstances. The Claimant fails both on the high threshold required to grant either interim or final injunctive relief, and even on its own (inaccurate) standards. In particular, the relief the Claimant requests is impossible, and wholly disproportionate in light of the deference to be afforded to the sovereign regulatory powers of States.

52. Finally, the Claimant's request for "alternative relief" in the form of an interim injunction is entirely unsupported. The Claimant fails to elaborate on any argument as to the standard the Tribunal should apply in determining the appropriateness of an interim injunction, or provide factual arguments to demonstrate it meets those standards. In this respect, the Claimant's request is wholly deficient, and should be rejected out of hand.

2 THE AMENDING DIRECTIVE PURSUES LEGITIMATE AND ACHIEVABLE POLICY OBJECTIVES

2.1 Introduction

53. In its Reply[1], the Claimant maintains that the Amending Directive cannot be justified by its stated objectives. It argues that these objectives are

[1] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 205 to 231.

contradictory, lack clarity and cannot be achieved and claims that the Amending Directive would be deprived of any other meaningful objective than obstructing Nord Stream 2.

54. In support of its arguments, the Claimant produces a Second Expert Report of Professor Cameron.

55. The European Union has demonstrated in its Counter-Memorial[2] how, by clarifying the universal applicability of the Gas Directive to interconnectors with third countries regardless of whether they arrive by terrestrial or by sub-sea routes, the Amending Directive safeguards the full benefits of a competitive and well-functioning internal gas market, as well as enhances transparency and contributes to the security of supply within the EU's Single Market.

56. In the present Section, the European Union will respond to the core of the Claimant's allegations, following the order chosen by the Claimant in its Reply. The EU's decision not to address certain ancillary issues raised by the Claimant is based on their lack of relevance and materiality and should not be understood as an agreement with the Claimant. Moreover, the European Union takes note that the Claimant agrees with the presentation of the role and regulation of transmission infrastructures on the EU's internal market[3] and will therefore not address these issues further in the present Rejoinder.

57. In reply to the second Expert Report of Professor Cameron, the European Union is producing a Second Expert Report of Professor Maduro. It demonstrates how the Amending Directive is able to achieve its objectives under its Title C (paragraphs 20-39).

2.2 The legitimate objectives cited by the European Union are not "fabricated"

58. The Claimant alleges that the EU's absence of comment in its Counter-Memorial on two objectives mentioned in the Staff working document accompanying the proposal for the Amending Directive[4] ("reducing cost of connecting infrastructure" and "avoid stranded assets") means that these objectives were simply "fabricated".[5]

59. The Claimant's assertion is unfounded. While the European Union in its Counter-Memorial sought to focus on the most prominent objectives of the Amending Directive, the fact that it did not systematically review each and every of the

[2] *See* European Union Counter-Memorial on the Merits, 3 May 2021, Section 2.1.
[3] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 206-210.
[4] **Exhibit R-64**, European Commission Staff Working Paper accompanying the proposal for the Amending Directive, COM (2017) 660 final, of 8 November 2017.
[5] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 214-215.

objectives does not, as the Claimant wrongly alleges, suddenly render various sub-objectives mere "fabrications". To the contrary, and for the avoidance of any doubt, the objectives relating to the "cost of connecting infrastructure" and "avoiding stranded assets" are very real indeed.

60. Reducing the cost of connecting infrastructure is a subsidiary but nonetheless real goal of the Amending Directive. As explained in the European Commission's Staff working document accompanying the proposal for the Amending Directive,[6] failure to regulate part of an interconnected infrastructure would in effect leave users of the pipeline exposed to potentially unconscionably high tariff rates, as the owner of the interconnector sought to foist all of its costs onto pipelines users. These costs would in turn be imposed on consumers. Thus, the purpose of expressly extending regulatory oversight to interconnected pipelines is indeed to control the passing on of costs and by consequence the total cost of energy consumers in the European Union.

61. As regards the aim of avoiding stranded assets, the benefit is also real. By dissociating the operation of an interconnector from its vertically integrated owner and potentially allowing other suppliers to use the interconnector, the Amending Directive reduces the likelihood that a given interconnector and the connecting infrastructure within the European Union (the costs of which are partly socialised due to the manner in which tariffs are set) might become obsolete.

62. In conclusion, these benefits from the Amending Directive are real, if not the most decisive, and the Amending Directive can achieve both of them.

2.3 The arguments and considerations that the Claimant considers as "entirely unaddressed" by the European Union are irrelevant and unfounded

63. In its Counter-Memorial,[7] the European Union explained in detail the benefits of clarifying the applicability of the regulatory framework of the Gas Directive to offshore import pipelines. These benefits arise even in the case of pipelines connecting the European Union with third countries not aiming at integrating themselves with the EU internal gas market.

64. In its Reply the Claimant argues,[8] essentially, that because the Russian Federation – its ultimate controlling shareholder – is a third country which

[6] **Exhibit R-64**, European Commission Staff Working Paper accompanying the proposal for the Amending Directive, COM (2017) 660 final, of 8 November 2017, at p. 3, last paragraph.
[7] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 92-128.
[8] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 216 (i-ii-iii).

(contrary to the Members of the Energy Community) has not signed any arrangements on cooperation and integration of its energy market with the European Union, the Amending Directive will be unable to achieve its objectives.

65. This assertion is incorrect. While institutional arrangements between the different EU Member States and their National Regulatory Authorities, or between EU Member States and Members of the Energy Community, certainly enhance the benefits of applying the rules of the Gas Directive, such arrangements are not a necessary condition for the Amending Directive to achieve its objectives.

66. The core principles of gas market regulation (i.e. third-party access through both grid connection and access to capacity; unbundling; tariff regulation) are set out in the Gas Directive. The application of such principles, in itself, puts in place a framework for the operation of pipeline undertakings entering the European Union. Member States have a margin of discretion in determining how to implement requirements such as third-party access. However, Gas Regulation (EC) 715/2009 already set out detailed rules on the provision of third-party access, criteria for capacity allocation and congestion management. As such, this regime becomes applicable to undertakings entering the EU territory from third countries, regardless of the existence of any cooperation agreements between the European Union and such third countries.

67. As Advocate General Pitruzzella clarified in his recent Opinion in case C-718/18[9] (followed by the Court in its Judgement), unbundling rules apply to all pipeline operators active in the European Union, regardless of whether the shareholder is inside or outside the European Union.

68. Hence, the National Regulatory Authority of the EU Member State to which the import pipeline connects is perfectly capable to apply the rules on unbundling, tariff regulation and third-party access without the cooperation of the authorities of the third country from which the pipeline originates. Indeed, this is currently exemplified by the on-going certification process for Nord Stream 2 before the German NRA.[10]

69. Moreover, nothing prevents the authorities of the Russian Federation from cooperating with the European Union and the German authorities with respect to

[9] **Exhibit RLA-301** , European Commission v Federal Republic of Germany, Case 718/18, ECLI:EU:T:2019:567, Opinion, 14 January 2021, para. 29-48.
[10] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 265.

the regulation of Nord Stream 2. Indeed, such cooperation would be welcome from the EU's point of view.[11]

70. The clarification of the applicability of EU law to interconnectors between the European Union and third countries also does not exclude the negotiation and conclusion of inter-governmental agreements (IGAs) between the European Union and the third countries from which such pipelines originate to establish common rules rendering the regulatory framework even more efficient.

71. While certain aspects governed by EU regulatory and competition provisions could certainly be better implemented with Russian cooperation, this does not exclude the application of core rules of the EU's regulatory framework to the portion of the pipeline in EU territory, e.g. anti-foreclosure rules such as unbundling, tariff regulation, grid connection and third party access, as well as rules for the control and safe operation of the pipeline in the European Union.

72. It is also perfectly possible to apply these core rules without applying the Network Codes. Indeed, a network code is a set of technical rules designed to facilitate system operation and grid connection. There are currently four gas Network Codes covering capacity allocation, tariffs, balancing rules, interoperability and data exchange rules, along with a Guideline on congestion management[12]. These rules are mostly designed to ease onshore transport and distribution. The Claimant simply asserts, without further substantiating its claim, that the absence of application of the Network Codes would make "many of the most important rules meaningless"[13]. However, if it were so, the European Union would not have waited several years before adopting the Network Codes. Indeed, the Gas Directive was adopted in 2009 and, according to its Article 54, had to be transposed by the EU Member States by March 2011. The first Network Code was not adopted until 2014 and the two most recent Network Codes were adopted in 2017. This shows that the rules of the Gas Directive could be, and were in fact applied on their own even before the first Network Code was adopted. The rules set out in the Network Codes are designed to improve the functioning of the internal market, but are not a pre-condition for its effective working and the applicability of the core rules of the EU internal market. While the Network Codes have further harmonised the detailed rules already set out in the Gas Regulation,

[11] **Exhibit R-205,** Questions and Answers on the Commission proposal to amend the Gas Directive (2009/73/EC), answer to question 9, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_4422

[12] **Exhibit R-202**, European Commission, DG Energy's website, "Network Codes", https://energy.ec.europa.eu/topics/markets-and-consumers/wholesale-energy-market/gas-network-codes_en

[13] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. para 216 iv.

the principles (and the related rules in the Gas Regulation) were applicable well before the Network Codes for gas were adopted and fulfilled their purpose of ensuring an equal access to infrastructure and a level playing field on commodity markets.

73. The Claimant further argues that the EU's regulatory system is based on "entry-exit systems" and, therefore, is not relevant to third countries[14]. This is incorrect. An interconnector such as Nord Stream 2 can be added to an existing entry-exit system or be regulated as a separated entry-exit system. Moreover, if as a result of Russia's failure to cooperate it proved difficult to operate Nord Stream 2 as an entry-exit system, this would not exclude the application of the core rules on unbundling, tariff regulation and third-party access to the section of the pipeline in EU territory, including in the EU Member States' territorial waters.

74. As explained by Professor Maduro in its Second Expert Report,[15] even if the effects and benefits of the application of the EU regulatory framework to pipelines between Member States and third countries may have a lower degree of effectiveness than the effects and benefits of the application of that framework to pipelines between EU Member States, this can in no way support the conclusion that the former effects and benefits are non-existing. This does not demonstrate that the Amending Directive is ineffective as regards the pursuit of its objectives.

75. The Claimant further criticises Professor Maduro's explanation that there was a problem of distorted competition between unregulated import pipelines terminating at the EU borders and pipelines transporting gas within the European Union.[16] According to the Claimant, this would be contradicted by the views expressed by the European Union in a WTO dispute brought by Russia against the European Union (case DS476, *EU-Energy Sector*).[17] According to the Claimant, the European Union argued in that dispute that "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".[18] On the other hand, according to the Claimant, the European Union argued in the same dispute that "transmission pipelines within the EU 'concern a further sector downstream' that

[14] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 216 iii.
[15] Prof. Maduro's Second Expert Responsive Report, paras. 31-33.
[16] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 216.v and 221.
[17] WTO Panel Proceedings DS476 (European Union and its Member States – Certain Measures relating to the Energy Sector).
[18] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 221.

'collects gas from all possible sources' and provides it to customers 'via meshed networks covering large areas'".[19]

76. The Claimant misrepresents the EU's submissions to the WTO Panel in DS476. The European Union was not referring to "import pipelines", such as Nord Stream 2, but instead to "upstream pipeline networks". The latter are defined in Article 2(2) of the Gas Directive as "any pipeline or network of pipelines operated and/or constructed as part of an oil or gas production project, or used to convey natural gas from one or more such projects to a processing plant or terminal or final coastal landing terminal".

77. Upstream pipeline networks are subject to lighter regulation (which nonetheless still mandates third-party access pursuant to Article 34 of the Gas Directive) because their characteristics reduce the likelihood of potential interests of competitors in using such infrastructure to access other markets and, hence, the likelihood that the network operator might be exposed to a conflict of interest that may require stricter regulation such as unbundling. By contrast, interconnectors such as Nord Stream 2 and other import pipelines, link national gas transmission systems (in the case of import pipelines, those of a third country and an EU Member State), and are thus more likely to be used by different suppliers (notably traders, not only producers) as a means of accessing the connected gas markets. This justifies the full application of third-party access rules (underpinned by unbundling rules) and tariff regulation.

78. In his First Expert Report, Professor Maduro compares the treatment accorded to gas transmission pipelines located in the territory of the European Union and crossing borders between EU Member States with the treatment accorded to gas transmission pipelines, also located in the territory of EU Member States, but crossing borders between EU Member States and third countries. Professor Maduro concludes that subjecting the first category of gas transmission pipelines to the requirements of the Gas Directive while not doing so with respect to the second category would distort competition.[20]

79. In contrast, as explained above, in the WTO dispute DS 476, *EU-Energy Sector*, the European Union was comparing the treatment accorded to gas transmission pipelines with the treatment accorded to upstream pipeline networks within the meaning of Article 2(2) of the Gas Directive. In that dispute, Russia seems to have acknowledged that in 2016 no Russian pipelines – including Nord Stream 1,

[19] *Ibid.*, quoting the EU's submissions in WTO case DS476.
[20] First Export Report of Prof. Maduro, para. 232.

which was at that time in operation – would qualify as an upstream pipeline network.[21]

80. Like Nord Stream 1, Nord Stream 2 is not an upstream pipeline, as it does not connect a production facility in Russia to the EU transmission network. The Claimant's criticism aims in fact at calling into question Professor Maduro's expert evidence that there may be competition problems in according different regulatory treatment to two types of gas transmission pipelines (pipelines between EU Member States, regulated; and pipelines between EU Member States and third countries, unregulated). The Claimant does so by falsely alleging that the European Union in the WTO dispute DS476, *EC-Energy Sector*, stated that these two types of pipelines fulfil different roles and should not be subject to the same rules. But the European Union did not state so in that dispute. Rather, the European Union stated that *gas transmission pipelines* and *upstream pipelines network* fulfil different roles and should not be subject to the same rules. The EU statements in the WTO case DS 476, *EC-Energy Sector*, in no way undermine Professor Maduro's explanation in his First Expert Report, as they were addressing a different situation altogether than the one at issue here.

81. The Claimant further argues that none of the policy documents produced by the European Union regarding the gas market identified the "non-application" of the Gas Directive to offshore import pipelines as a problem for the effective functioning of the internal market.[22] However, the issue was not the "non-application" of the Gas Directive. As explained at length by the European Union in its Counter-Memorial, as well as in Section 3 of this Rejoinder, the applicability to offshore import pipelines needed to be clarified. But it was never the European Commission's view that EU law simply did not apply to those pipelines. Moreover,

[21] **Exhibit R-200**, 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, at para 177:
"177. Third, if there are currently no Russian pipelines that qualify as upstream pipelines, this is because they do not meet the conditions of the definition. The reason why the existing Russian pipelines would not fall under the definition of upstream pipeline networks is not related to the part of this definition challenged by Russia (that upstream pipeline networks are not only those that connect to a processing plant but also a final coastal landing terminal) but to the very beginning of the definition – the fact that upstream pipeline networks connect a production facility.
178. In fact, Russia itself does not dispute this element of the definition. Russia notes that 'no Russian pipelines are currently 'used to convey natural gas from one or more such [gas production] projects to a processing plant or terminal or final coastal landing terminal'. According to Russia, this is because 'Russian pipelines that transport Russian-origin gas typically travel overland from Russia to the EU' and '[e]n route, the Russian gas transported via these pipelines enters the Russian transmission system.' This is precisely why it is justified not to treat these pipelines as 'upstream pipeline networks'. The underlying reason for the specific rules for upstream pipeline networks (i.e. the operational specificities and the related absence of a comparable competitive concern applicable to transmission pipelines) is thus entirely absent for the current Russian pipelines, which form a large and interlinked transmission system: the existing Russian pipelines are connecting a transmission network to another transmission network rather than a production facility to a transmission network." (emphasis added)

[22] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 216 vi.

the fact that the European Commission did not raise the issue of import pipelines in its policy documents does not mean that the issue did not exist, or that the Amending Directive would not be able to address it. Indeed, after the adoption of the Third-Energy Package, the main objective of the policy documents published by the Commission was, in the first place, to ensure the proper interpretation and application of the new rules, not to reflect on a possible need to amend them. However, anyone who followed the discussion on energy regulation and policy between 2013 and 2015 was aware that the applicability of EU law to offshore import pipelines such as South Stream was among the most prominent issues addressed in energy-related publications and in Commission statements.[23] When, at a later stage, the need to clarify the application of the Gas Directive also to import pipelines became apparent in the context of pipeline projects such as South Stream or Nord Stream 2, the European Commission did take the initiative to propose the Amending Directive, setting out the underlying reasons in the explanatory memorandum for the proposal and other accompanying documents.

82. The Claimant alleges[24] that there is a contradiction insofar as the European Union states that applying the rules of the internal gas market to import pipelines is beneficial for the security of supply, while, at the same time, Article 49a of the Amending Directive foresees the possibility for the EU Member States to grant a derogation for reasons such as security of supply. There is no contradiction at all but, to the contrary, full consistency of the EU legal framework as this only shows how central the objective of security of supply is in the EU gas legislative framework. Indeed, this objective has to be taken into account for most decisions under the Gas Directive. For example, this is an essential criterion for granting a derogation (see Article 49a, paragraph 1 of the Amended Directive), for granting an exemption (see Article 36, paragraph 1, a) and e) of the Amended Directive), as well as for granting a certification (see Article 11, paragraph 3, b) and paragraph 7 of the Amended Directive). Under Article 49a, a derogation can be granted for security of supply reasons if, in the case at hand, the Member State considers that security of supply is better served by granting the derogation, for a limited period of time. This is due to the fact that gas transmission lines between a Member State and a third country completed before 23 May 2019 were already functioning and that the adaptation of this framework may take time. A transitory derogation may allow to ensure the continuity of functioning of the pipeline and therefore protect security of supply. In any event, according to

[23] See Section 3.2.2 Indications from contemporaneous Commission statements, in this Rejoinder and the documents referred to there.
[24] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 216 vii.

Article 49a, a derogation (for whichever "objective reason") may not be granted if it is "detrimental (…) to security of supply in the Union". Therefore, the possibility to grant temporary derogations in no way contradicts the fact that the clarification of the scope of the EU legal framework fosters security of supply.

83. The Claimant argues[25] that additional pipelines normally imply greater security of supply because they can be used in case of disruption. A new pipeline may indeed increase security of supply. A new pipeline may, however, also be perceived as a security of supply risk, for instance if it does not increase competition but reinforces dominant positions on transport or supply markets. In any event, the relevance of this argument is unclear: the Claimant fails to explain why the benefit of enhancing security of supply by additional pipelines would occur only if those additional pipelines are not subject to the general rules of the internal gas market, at least on EU territory. This argument seems to – again – be founded on the erroneous assumption that the amendment of the Gas Directive, and the clarification of its scope to include interconnectors with third countries, has as its sole objective to prevent the construction of additional pipeline linking the EU market to third countries (and more specifically, Nord Stream 2). The European Union does not contest that the increasing problems with Gazprom's dominance on EU markets[26] were among the factors that led the European Commission to propose a clarification of the rules in the Amending Directive. By refusing to look at the real objectives pursued by the Gas Directive, as amended, in an objective and coherent way, the Claimant tries to discuss the merits of the purported intention of the European Union to obstruct new interconnectors, which is pointless as this assumption is wrong and unsubstantiated.

84. Lastly, the Claimant refers to the fact that Nord Stream 1, despite being an "unregulated" pipeline, is considered to have a positive impact on the EU security of supply, in support of its allegation that applying EU rules to interconnectors with third countries cannot be deemed useful to ensure security of supply.

85. The Claimant's premise is incorrect because Nord Stream 1 is not an "unregulated" pipeline. Before the Amending Directive came into force, the application of the Gas Directive to Nord Stream 1 was subject to the same legal uncertainty as its application to any other existing import pipeline. Indeed, it was

[25] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 216 vii.
[26] See, for example, **Exhibit R-7,** Commission Decision of 24 May 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement (Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe), C(2018) 3106.

this legal uncertainty that led the European Union to adopt the Amending Directive in the first place. After the Amending Directive came into effect and was transposed into the laws of EU Member States, Nord Stream 1 applied to the German NRA for a derogation pursuant to Article 49a of the Gas Directive and received such a derogation, following a thorough assessment by the German NRA and subject to conditions.

86. In any event, the Claimant's argument is wide of the mark: despite their obvious similarities, in that they run physically in parallel and both link Russian gas supplies directly to Germany, the two pipelines were conceived and built at different times, and in a very different legal, competitive and geopolitical context. Most importantly, Nord Stream 2 is not "just another pipeline", but a *major* import pipeline, doubling the capacities of Nord Stream 1, thereby creating a completely new competitive situation (e.g. with regard to the market for gas transport services of Russian gas to the European Union). The impact of these two pipelines on competition and security of supply of the European Union is therefore entirely distinct, and (as in the case of all major undertakings) must be considered and addressed individually in light of all relevant circumstances.

87. Furthermore, Nord Stream 1 was initiated well before the Third Energy Package was adopted, which brought about significantly strengthened rules on unbundling, third-party access and tariff regulation compared to the previous Second Energy Package. As it had already been operating for several years by the time the Amending Directive was adopted, the special derogation regime could apply, where the German NRA was able to assess its impact on the internal energy market and the EU's security of supply when deciding to grant the derogation.

88. Thus, the fact that the German NRA granted a derogation to Nord Stream 1 does not contradict the fact that, as a general rule, clarifying that the rules of the internal gas market apply to import pipelines with third countries serves the objective of protecting competition and security of supply.

89. Hence, the situation of Nord Stream 1 cannot put into question that the Directive pursued legitimate objectives. Here again, the Claimant seems to assume that the Amending Directive's objective was to make the construction of Nord Stream 2 impossible, an assumption which is both unsubstantiated and incorrect.

2.4 The Claimant has failed to provide any compelling response to the EU's rebuttal

90. In paragraph 218 of its Reply, the Claimant summarises the EU's rebuttal without developing any legal arguments to rebut them. Indeed, here again, without putting forward any objective and substantiated legal argument in support of its allegations, the Claimant reiterates its bare assumption that the Amending Directive has for sole purpose to harm the Nord Stream 2 project, by arguing that it is allegedly the only pipeline affected.[27] The Claimant has failed to demonstrate this, and in the absence of any substantiated rebuttal, the European Union simply maintains the arguments put forward in its Counter-Memorial.

91. In its attempt to deny any other purpose than targeting Nord Stream 2, the Claimant pretends that there was no problem whatsoever of lack of clarity or lack of level playing field in the legal situation prior to the Amending Directive. The Claimant argues that the Gas Directive applied only to the EU's onshore territories, and not its territorial waters, without providing any explanation or basis for this counter-intuitive assumption. The Amending Directive, according to the Claimant, simply moved the border connection point from the coastal terminal to the legal border of the territorial sea.[28] The Claimant's description of the Amending Directive's impact is misleading and incorrect. As explained by the European Union, the applicability of the Gas Directive to interconnectors between the European Union and third countries was not sufficiently clear before the adoption of the Amending Directive. While there were differences of views about the exact scope of application of EU rules before their clarification through the Amending Directive, the Claimant should certainly have understood that EU law applies in EU territory. The Amending Directive does not merely "shift the point of application" of the Gas Directive to the border of the territorial sea. It instead makes clear that such rules are applicable to interconnectors with third-countries, something which, due to the existing wording ("between Member States[29]"), was not clear in some regulatory situations, e.g. whether Article 36 exemptions were available for interconnectors with third countries. Crucially, the Amending Directive does not extend the scope in many respects (including with regard to the possibility, for example, of applying for an exemption pursuant to Article 36 but also of negotiating an intergovernmental agreement, based on a clear competence of the EU institutions and given the clear applicability of EU law).

[27] See, for example, Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 218 i 218 vi.
[28] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 218 ii.
[29] Article 1(1)of the Amending Directive, modifying Article 2(17) of the Gas Directive.

Such legal clarifications are legitimate. They are in the interest of the affected market participants and current practice in EU legislation.☐

92. The Claimant argues that, for onshore pipelines, there was no change as "[f]or onshore pipelines, the border connection point always coincided with the legal border, i.e. before and after the Amending Directive." For offshore pipelines it shows pictures and drawings of the coastal landing station.[30]

93. First, these Claimant's factual assertions are incorrect. For example, the Kondratki station, in the Yamal-Europe pipeline, which is on Polish territory, is about 1.6 km away from the Belarussian border.[31] As such, the border connection point and the territorial/legal border do not coincide in that case.

94. Second, the Claimant's factual allegations are in any event beside the point. The legal uncertainty regarding the application of the EU's internal gas market rules to third-party import pipelines did not flow from the exact location of a "border connection point". Rather, it flowed from the fact that according to Article 2(17) of the original Gas Directive, the term 'interconnector' was defined as "a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States", thus excluding transmission lines crossing an external border of the European Union (whether on land or on sea) for the sole purpose of connecting the transmission system of a Member State with that of a third country.

95. This uncertainty was an issue for offshore import pipelines such as the Mediterranean pipelines or Nord Stream 1, but also for onshore import pipelines such as Yamal, i.e. the part of it that only connects the Polish and the Belarusian systems. The Polish section of the Yamal pipeline (owned and operated by EuRoPol GAZ s.a.) has only two physical connection points with Poland's domestic gas transmission system (operated by Gaz-System s.a.), at Włocławek (situated in more or less the geographical centre of the country) and Lwówek (situated in the western part of Poland between the German border and Poznań).[32] However, the already mentioned Kondratki station, referred to by the Claimant as "border connection point", is a mere metering station along the Yamal Europe pipeline with no further connection to the Polish gas transmission network.

96. Hence, the stretch of the Polish section of Yamal east of the Włocławek connection point up to the Belarusian border – about half the length of that whole

[30] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 218 ii., pp. 23-25.
[31] **Exhibit R-190**, Map of the Yamal-Europe pipeline on Polish territory.
[32] **Exhibit R-214,** GAZ System, 'Transit Gas Pipeline System' https://en.gaz-system.pl/customer-zone/transit-yamal-pipeline/.

section and a much longer structure than the 54 km part of Nord Stream 2 between the landing terminal at Lubmin and the border of Germany's territorial sea – did not fall under the definition of "interconnector" under EU law before the Amending Directive came into force. Accordingly, there may have been doubts as regards which provisions of the Gas Directive applied. It was precisely this kind of legal uncertainty flowing from specific provisions of the original Gas Directive that the Amending Directive sought to remedy. It surely was entirely reasonable for the European Union to seek to ensure that its regulatory regime applied consistently across the entirety of EU territory.

97. Apart from being misleading and unsubstantiated, the Claimant's argument in this regard is rather contradictory. If the Amending Directive was incapable of attaining its objectives because the change it makes was too limited to have any real impact, one may only wonder how the Claimant can then argue at the same time that it causes a "dramatic change" to its own situation.

98. It is interesting to note in this context that the Claimant concedes[33] that adding a new physical connection to an offshore pipeline could be a potential benefit of applying the rules of the Gas Directive to such pipeline, even though it considers this (without explanation) as "extremely unlikely".

2.5 The Expert Report of Professor Maduro correctly presents the true legal situation

99. In paragraphs 219 to 223 of its Reply, the Claimant criticises the Expert Report of Professor Maduro in very general terms. Here again, the Claimant bases its criticisms on the incorrect assumption that the Amending Directive simply shifts the point of application of EU regulatory control from the limits of the EU terrestrial jurisdiction to the border of the territorial sea, and that the Amending Directive cannot be deemed to have clarified the legal situation, as that situation allegedly was already entirely clear.[34] These arguments are without merit and have already been rebutted above.

100. The Claimant also quotes[35] statements by Professor Maduro explaining that, without the Amending Directive, portions of gas transmission lines between EU Member States and third countries would not be fully subject to the EU gas regulatory framework. The Claimant argues that such statements are incorrect

[33] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 218 iv.
[34] See notably paras. 222 and 223 of Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021
[35] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 219.

given that, even before the Amending Directive, there could not be unregulated import pipelines on the EU side of a border connection point.

101. Here again, the Claimant, whether intentionally or not, confuses two completely different things. The European Union has never claimed that there was a need to clarify the applicability of the Gas Directive to pipelines on the EU side of a terrestrial border connection point. The situation clarified by the Amending Directive was the one of interconnectors with third countries, which are transmission lines before they are connected with the domestic gas transmission system of a Member State and not on the EU side of a border connection point. Once connected with a domestic transmission system on the EU territory, the EU legal framework did indeed clearly apply. Given this, Professor Maduro's assertion is absolutely correct.

2.6 The Claimant's allegation that Nord Stream 2 could not be a threat to security of supply is irrelevant

102. The Claimant argues that Nord Stream 2 could not be a threat to security of supply and puts forward various factual allegations, in particular with regards to the situation of gas supply in Poland.[36]

103. The Claimant's allegations are fundamentally irrelevant in the framework of the present case. What is at stake before the Tribunal in the present case is not whether Nord Stream 2 might or might not be beneficial or detrimental to the security of supply of the European Union or Poland. Such an assessment of the effects of a specific pipeline on security of supply requires a detailed assessment, usually with the consultation of all interested States and parties potentially affected by an interconnector. The EU legal framework foresees such an assessment in the framework of decisions such as a certification, a derogation or an exemption decision.

104. The Tribunal in the present case is not called upon to answer such questions but rather to consider whether the Amending Directive, which clarifies the applicability of the EU regulatory framework to all pipelines on the EU territory, pursues legitimate objectives, including to ensure security of supply by creating a framework to protect against risks of security of supply.

[36] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 224 to 229.

105. Regardless, for the sake of completeness, the European Union will respond to the Claimant's factual allegations underlying its assertion that Nord Stream 2 cannot possibly be a threat to security of supply of the European Union or its Member States.

106. First, the Claimant alleges that, with recently built additional pipeline capacity such as the Baltic Pipe, Poland is now completely independent from supplies from Russia.

107. Baltic Pipe[37] has a design capacity of 10 billion cubic metres/year (bcm). Poland's demand is about 20 bcm and expected to increase significantly in the next years also due to Poland's decision to switch from coal to natural gas to ensure electrical power generation. A 60% increase in natural gas consumption in Poland is expected between 2024 and 2030, corresponding to a total demand of ca. 32 bcm by 2030.[38] Even assuming that Poland had sufficient natural gas import capacity to avoid dependency on Russia, it would still need to be able to procure 32 bcm of gas of non-Russian origin, which is unlikely. Overall, even if Poland is following a strategy of diversification and has made good progress, Baltic Pipe will not make Poland completely independent from Russian gas supplies given Russia's dominant position for natural gas supplies to Europe.

108. Second, the Claimant refers to the United States' and Germany's Joint Statement of 21 July 2021, in which the two agreed "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". In the Claimant's view, this Statement eliminates any possible threat that Nord Stream 2 could pose to Ukrainian energy security.

109. However, the referenced Joint Declaration merely constitutes a political commitment by the United States and Germany to increase capacity for reverse flow into Ukraine at some point in the future. Currently, capacities to supply Ukraine from the European Union through reverse flow are limited. Should Russia suspend the flow of gas via Ukraine to the European Union, gas supplies to Ukraine will be unable to rely on virtual reverse flows, since achieving this would require Russian gas destined for Europe physically to remain in Ukraine based on commercial transactions. In case of a reduction or suspension of flows as a result of reliance on Nord Stream 2, physical flows from the European Union on to Ukraine would only be possible on a guaranteed basis via Slovakia (27 million

[37] **Exhibit R-191**, Map figuring the Baltic Pipe.
[38] **Exhibit R-210,** Reuters, 'RPT-Poland expects gas demand to rise 60 % as it reduces coal' https://www.reuters.com/article/poland-gas-demand-idUSL1N2LT1FV.

cubic metres/day [mcm/d]).[39] Peak demand in Ukraine is about 210 mcm/d, while domestic gas production is at a level of 55 mcm/d, leaving 128 mcm/d to be covered from storage withdrawals and imports from the EU. Storage facilities are expected to contribute to another 90 mcm/d in February and March but require storage of sufficient quantities of gas to ensure that enough gas was stored before winter. This leaves a gap of 38 mcm/d, which is higher than the 27 mcm/d capacity which is permanently available.[40]

110. Last, the Claimant concedes that Nord Stream 2 could affect the transit fees currently received by pipeline operators in Ukraine and EU Member States such as Poland and Slovakia, once Russian gas is transported to Western Europe via Nord Stream 2, rather than via onshore pipelines passing through these countries. It nonetheless claims that this only affects the commercial and financial interests of the operators in question but is not a matter of security of supply.

111. This argument, too, fails. Should use of the infrastructure of transit countries fall away, together with corresponding revenues, there is a risk that such infrastructure could be decommissioned. In such circumstances, there could be a negative impact on security of supply given the loss of infrastructure options potentially required to ensure supply of the EU Market. For this reason, Article 5 of Regulation (EU) 2017/1938 on security of gas supply requires to fulfil the so-called N-1 status as defined in Annex II of that Regulation, which means that in case of infrastructure failing, there is always a possibility to have a fall-back option. If the fall-back option is decommissioned in light of the failure of its supporting economic model, then the absence of transit revenues becomes a relevant consideration vis-à-vis security of supply.

2.7 The possibility to apply for derogations does not prevent the achievement of the objectives of the Amending Directive

112. The Claimant argues that the fact that five of the six offshore import pipelines affected by the Amending Directive (except Nord Stream 2) received a derogation under Article 49a demonstrates that the objectives of the Amending Directive put

[39] There is additional 15 mcm/d in Slovakia that is temporarily offered on firm basis and 8 mcm/d capacity from Hungary to Ukraine also based on a temporary pilot project both until end of March 2022. **Exhibit R-216.**
[40] The demand of Moldova of 15 mcm/d is not included, but Moldova is also supplied via Ukraine, which increases the capacity gap further, **Exhibit R - 217**, Moldovagaz, 'The Gas Sector of Moldova – National and Regional Security Issues', slide 3.

forward by the EU cannot be achieved[41]. It argues that in such circumstances Nord Stream 2 alone is affected by the Amending Directive, confirming that the true objective of the Amending Directive was simply to harm the Claimant.

113. When arguing that Nord Stream 2 is the only offshore import pipeline affected by this Amended Directive, the Claimant misrepresents reality. While it is true that five pre-existing pipelines have received an Article 49a derogation, such derogations were delivered in accordance with the requirements imposed by the Amending Directive and are temporary. Moreover, the Claimant could have applied for an exemption for Nord Stream 2 pursuant to Article 36 of the Gas Directive. If granted by the German National Regulatory Authority, such exemption could have similar effects as an Article 49a derogation (see Section 4 below).

114. Furthermore, the Gas Directive will also apply to any future import pipelines, as well as to the interconnectors with the United Kingdom, should these not be covered by the Trade and Cooperation Agreement between the European Union and that country at any future point in time, as well as to the five existing Mediterranean pipelines once they cease to be covered by derogations.

115. By clarifying the legal regime for import pipelines the Amending Directive has created a level playing field for gas infrastructure both between Member States and Member States and third countries and therefore fulfilled its objectives.

3 THE AMENDING DIRECTIVE DOES NOT INVOLVE A "DRAMATIC REGULATORY CHANGE"

3.1 Introduction

116. The Claimant asserts that the EU amended Gas Directive in such a way as to bring about a dramatic regulatory change that undermined the basis of NSP2AG's investment. The claim is premised on the hypothesis that when NSP2AG's adopted its Financial Investment Decision regarding Nord Stream 2 on [redacted] (the "Investment Decision"), a duly diligent investor could have safely assumed that the requirements of unbundling, tariff regulation and third party access (the "Regulatory Requirements") would not apply to offshore import pipelines in Member States' territorial sea, but only as from the coastal terminal where such pipelines reached landfall in a Member State.

117. In making this argument, NSP2AG has abandoned its original claim that it made its investment on the understanding that the Gas Directive as it applied before the

[41] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 230 and 231,

Amending Directive was enacted (the "original Gas Directive") would not apply *at all* to Nord Stream 2.[42] Rather, the Claimant now argues that the Amending Directive unexpectedly extended the scope of the Gas Directive from the coastal terminal to the legal border of the territorial sea.[43]

118. The Claimant's new allegation is as much without merit as the previous one. When the Claimant took its Investment Decision, there were numerous indications confirming that the original Gas Directive imposed the Regulatory Requirements to pipelines such as Nord Stream 2 over the entirety of Member States' territory, including territorial waters. Furthermore, it was obvious at that time that the Pipeline could have been affected in its entirety by remedies imposed on the Claimant by virtue of EU competition law, which would have resulted in requirements comparable to those following from the Gas Directive. Accordingly, in the eyes of a duly diligent investor, the Amending Directive did not result in an unforeseeable regulatory change, and even less so in a dramatic or radical one. Rather, it enhanced legal certainty to the benefit of all economic operators.

119. Before addressing the above points in greater detail, it is essential to rectify a misconception on which parts of the Claimant's submissions are based. It is immaterial and does not need to be explored for the purpose of the present proceedings whether the Regulatory Requirements would actually have applied to Nord Stream 2 before the Amending Directive was adopted.[44] The EU accepts that there was a degree of uncertainty regarding the extent to which the original Gas Directive applied to offshore pipelines, which eventually prompted the EU legislature to adopt the Amending Directive.[45] Similarly, the EU does not claim that the European Commission would have been certain to impose remedies comparable to the Regulatory Requirements against Nord Stream 2 on the basis of EU competition law given also the Commission's discretion when enforcing EU competition law against potential infringers.[46]

120. Rather, what matters is whether at the time of the Investment Decision, a duly diligent investor could plausibly fail to note that the Regulatory Requirements either already applied or stood likely to be rendered applicable to pipelines such as

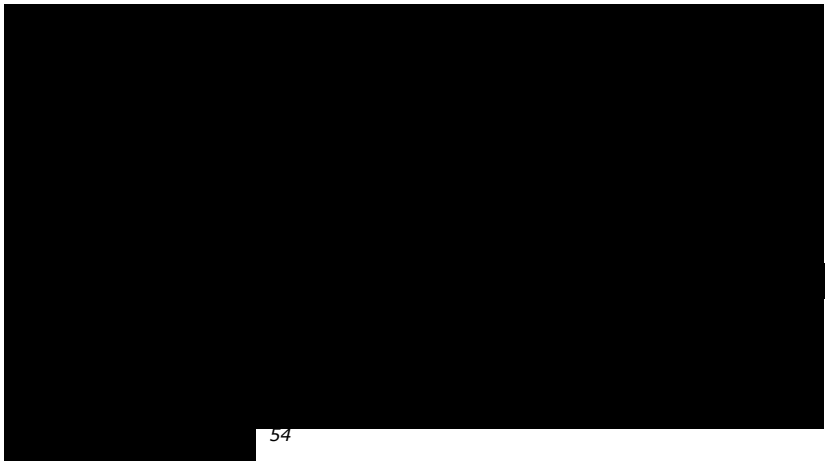
[42] This view was defended in the Memorial, as expressed most prominently in the heading above para. 157 and in para. 157.
[43] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 56, 57 and, explicitly, para. 88 (i); [redacted]
[44] Arguably, it is anyhow impossible to ascertain whether a piece of legislation that has been amended in the meantime would have applied to a pipeline that had not been built before the amendment.
[45] See European Union Counter-Memorial on the Merits, 3 May 2021, Section 2.5.6.
[46] Under settled case law, the European Commission is entitled to prioritise enforcement in accordance with the Union interest that intervention against potentially anticompetitive behaviour presents. See **Exhibit RLA-302**, *Polskie Górnictwo Naftowe i Gazownictwo v. Commission*, Case T-616/18, EU:T:2022:43, Judgment, 2 February, para 476 and the case law cited.

Nord Stream 2.[47] The Claimant itself accepts that its claim is bound to fail if relevant circumstances "should not have caused the investor to assume that the original Gas Directive applied to Nord Stream 2"[48] and depicts as the relevant question whether a duly diligent investor "could not reasonably have expected" that the Regulatory Requirements would apply to Nord Stream 2.[49] Assessing the risk of these Requirements being applied to its investment was, in the Claimant's own words, "the hallmark of a diligent investor".[50]

121. It should be common ground that in view of the importance of the investment at stake, the bar for the sufficiency of such indications should not be overly high. Mere uncertainties as to whether the Gas Directive or EU competition law might eventually impose the Regulatory Requirements on Nord Stream 2 would have prompted a duly diligent investor to seek clarifications from EU authorities before engaging in a [redacted]euro investment. This holds all the more true where the investor itself feared that these Regulatory Requirements could have a "catastrophic impact" on its investment".[51] It is common practice to approach the European Commission on regulatory questions in case of legal uncertainty, and the Commission provides informal and formal legal guidance on its interpretation of EU energy law at request of stakeholders on a regular basis both bilaterally[52] and in the context of specialised fora.[53] Whilst the European Commission could only have provided its own interpretation of the Gas Directive, which would have been without prejudice to the discretion accorded to Member States' authorities when transposing or applying individual provisions of the Directive, such guidance would have avoided the alleged "misunderstanding" invoked by the Claimant according to which the EU's general regulatory framework would remain inapplicable to the offshore parts of the Nord Stream 2 pipeline.

In its Expert Report of 22 October 2021 Peter Roberts describes [redacted]

[47] As regards the rigorous due diligence required from investors invoking legitimate expectations, See European Union Counter-Memorial on the Merits, 3 May 2021, paras. 516-522 and below, Section 7.1.4.3.
[48] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, heading above para 83.
[49] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para 20.
[50] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 521.
[51] In Memorial paras. 307 et seq., the Claimant takes the view that the applicability of the Amending Directive will have a "catastrophic impact" on NS2PAG's investment as it would fundamentally undermine the basis on which it made its investment.
[52] This may be illustrated by the European Commission's reply to questions on the interpretation of Article 19 (9) of Commission Regulation (EU) 2017/459 raised by stakeholders, **Exhibit R-209**.
[53] For instance, the European Gas Regulatory Forum, also known as the Madrid Forum, was set up to discuss opportunities and challenges related to the internal EU gas market and to its integration with other energy sectors. The participants are national regulatory authorities, Member States, the European Commission, transmission system operators, electricity traders, consumers, network users, and power exchanges. It is a forum in which stakeholders as the Claimant regularly seek information on the regulatory context from the European Commission. More detailed information on the Madrid Forum and its meetings since 2007 is available at https://www.ceer.eu/eer_workshop/stakeholder_fora/madrid_fora/.



[54]

122. As it will be shown below, contemporaneous documents drawn up by the Claimant's owner Gazprom confirm that the Claimant was indeed well aware of the risk that the Regulatory Requirements would apply to Nord Stream 2. Despite this, the Claimant decided not to turn to the EU authorities to seek to better inform itself about this eventuality. Rather, the Claimant chose to confront the EU authorities with the *fait accompli* of a largely terminated pipeline, in hope that the scale of its investment and the threat of arbitration proceedings would deter the Regulator from enforcing its regulatory regime of general application against the Claimant. This is not the kind of behaviour the ECT was intended to promote or to protect, nor by the same token does it give rise to any valid claim under the ECT.

123. In the remainder of this Section, the EU will demonstrate that:

(i) At the time of the Investment Decision, a duly diligent investor would have been aware of the possibility that the Gas Directive would apply or could be rendered applicable to Nord Stream 2 in its entirety;

(ii) At the time of the Investment Decision, a duly diligent investor would have been aware of the possibility that requirements comparable to the Regulatory Requirements would apply to Nord Stream 2 by virtue of EU Competition Law; and

(iii) A prospectus issued by NSP2AG's parent company Gazprom in , which warned securities investors of the Regulatory Requirements applying to Nord Stream 2, confirms that the Claimant was well aware of these risks at the time of its Investment Decision.

[54] Expert Report of Peter Roberts, 22 October 2021, para 13.

3.2 There were sufficient indications that the Gas Directive would apply or be rendered applicable to pipelines such as Nord Stream 2 also offshore

124. Contrary to the allegations set out in its last Memorial, when the Claimant took its Investment Decision, the fact that the original Gas Directive could apply or stood likely to be rendered applicable to Nord Stream 2 over the entirety of Member States' territory was clear on the face of (i) the express provisions of the original Gas Directive and EU Member States' territorial jurisdiction under international law; (ii) statements by Commission representatives regarding Nord Stream and the comparable offshore South Stream project; and (iii) EU decisions and opinions regarding comparable pipelines.

3.2.1 Signalling from the original Gas Directive and from Member States' territorial jurisdiction

125. In its Counter-Memorial the Respondent explained that both the original Gas Directive itself, notably in its provisions on the Directive's aims and scope, and Member States' territorial jurisdiction, which comprise their territorial waters, pointed to the application of the Directive to pipelines such as Nord Stream 2 in their entirety.[55]

126. The most reliable source for interpreting the scope of a legal act are the aims and provisions of the legal act itself. Any duly diligent investor in the position of the Claimant would have paid close attention to whether the original Gas Directive itself suggested it might apply to Nord Stream 2 before making a [redacted] euro investment. Similarly, no duly diligent investor would simply have assumed that the original Gas Directive would not apply to pipelines in Member States' territorial waters, when basic rules of international law indicated the contrary.[56] In the case of remaining uncertainties, any duly diligent investor would also have expected the EU legislature eventually to clarify that basic EU rules of general application seeking a legitimate public policy outcome should apply to offshore pipelines in Member States' territorial waters.

127. The Reply to the Counter-Memorial provided the Claimant with yet another opportunity to show that it duly considered these indicia at the time of the Investment Decision and to submit contemporaneous evidence confirming an in-depth legal assessment of potential risks. It failed to do so. The Claimant's failure suggests that it either turned a blind eye to the regulatory environment for its Nord Stream 2 investment, or deliberately proceeded in the hope that the EU

[55] See European Union Counter-Memorial on the Merits, 3 May 2021, paras. 131 to 139.
[56] See European Union Counter-Memorial on the Merits, 3 May 2021, para. 139.

would bow to the pressure of the *fait accompli* posed by a largely completed [redacted] euro pipeline and the associated blackmail of being [redacted] if the Claimant were not exempted from basic rules of general application in the EU market.

128. The Claimant seeks to distract from its failure to conduct its own in-depth legal assessment at the time of the investment by referring to selected preparatory opinions expressed internally by representatives of individual Council or Commission departments, [redacted] after the Investment Decision was taken.[57] The Claimant picks and choose from these opinions to arrive to the conclusion that, with hindsight, these views confirm its own legal position as "obviously correct" and beyond "serious doubt".[58] On the basis of these documents, the Claimant speculates that legal arguments pointing to the applicability of the original Gas Directive would "presumably" have been debated and eventually been dismissed.[59]

129. As to the two internal opinions on the applicability of the original Gas Directive to the offshore sections of pipelines, the Claimant fails to identify a single document in which either the Commission or the Council endorsed such views. Rather, the opinions invoked by the Claimant convey the unofficial and informal personal views of their respective authors. Similarly, the Court has not yet stated whether it agrees with the Polish government or Advocate General Bobek in their respective submissions regarding the applicability of the original Gas Directive to Nord Stream 2. Indeed, the Court might eventually leave this question unanswered.[60]

130. In any event, the internal views taken by some EU officials in 2017 and 2018 that the Gas Directive would need to be amended in order to apply to Nord Stream 2 cannot detract from NSP2AG's duty to conduct a proper assessment on the basis of the elements at its disposal in [redacted]

[57] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 72. The Claimant relies on two opinions be the Commission and Council Legal Service and an opinion by Advocate General Bobek, drawn up between 2017 and 2021.
[58] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 72.
[59] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 72.
[60] The positions defended before the Court by the Polish government on the one hand and by Advocate General Bobek on the other are outlined in para 100 of **Exhibit CLA-176** (Advocate General Bobek's opinion in Case C-348/20 P, Nord Stream 2 AG v European Parliament and Council of the European Union, 6 October 2021). The Court is expected to hand down its ruling in Case C-348/20 P still in 2022.

[redacted]

131. However, even assuming that an investor had given credence to such informal and purely internal opinions at the time the Investment Decision was taken (*quod non*), their assessment would not have supported the Claimant's position. They would either have resulted in the conclusion that the Gas Directive already applied to the offshore parts of import pipelines entering EU territory,[62] or given rise to the expectation that there was a legal lacuna soon to be closed.[63] On these grounds, a duly diligent investor would have expected that its investment stood a good chance of soon becoming exposed to the Regulatory Requirements.

3.2.2 Indications from contemporaneous Commission statements

132. The EU in its Counter-Memorial referred to four contemporaneous statements (the "Statements"), which, contrary to the opinions and witness statements invoked by the Claimant,[64] were publicly accessible <u>when the Investment Decision was taken</u>. In each of them, European Commission representatives publicly took the position that the original Gas Directive applied to Nord Stream 2 in its entirety.[65] Any duly diligent investor would have paid close attention to such Statements when assessing the legal risks associated with its proposed Nord Stream 2 [redacted]euro investment. In its Reply to the Counter-Memorial, the Claimant attempts to downplay the relevance of these Statements for the present proceeding.[66] As set out in what follows for each of the Statements in turn, none of the Claimant's arguments have any merit.

133. On 14 August 2012, the European Commission asserted publicly that the Gas Directive generally applied to gas pipelines originating from a third country and entering the territory of a Member State (the "August 2012 Commission Statement").[67]

134. In this regard the Claimant first alleges that the August 2012 Commission Statement merely indicated that the original Gas Directive would apply to pipeline

[redacted]

[62] The Council Legal Service might not have seen the need to eliminate a potential legal void because it considered that the original Gas Directive applied to import pipelines over the entirety of Member States' territory, including offshore. See Exhibit C-101, para. 17.
[63] See **Exhibit C-90** to the Claimant's Memorial, 3 July 2020, p. 1.
[64] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 69-70.
[65] Counter-Memorial, Section 2.2.3.
[66] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93 (i).(iv).
[67] See **Exhibit R-20** https://www.asktheeu.org/fr/request/168/response/558/attach/html/3/Annex%20reply%20GHP%20Shmatko%203rd%20package%202.pdf.html question 3, page 2: *"Gas pipelines originating from a Third country and entering the territory of a Member State are subject to the rules of the Gas Directive on the territory of this Member State, unless the legal framework is amended by a valid public law agreement (see below)"*.

sections as from the entry point on land and not in Member States' territorial waters.[68] This position finds no support in the wording of that Statement. To the contrary, nothing in the August 2012 Commission Statement suggests that it relates to onshore pipeline sections only. Rather, the Statement expressly provides that the original Gas Directive "applies on the territory of all Member States" and to "pipelines originating from a Third country and entering the territory of a Member States", without drawing a distinction between Member States' land and sea territory. According to the Claimant's own account, 54 km of the Nord Stream 2 pipeline are on German territory, more than 53km of which is in German territorial waters.[69]

135. Second, the Claimant infers from the answer to question 7 of the August 2012 Statement that an exemption pursuant to Article 36 of the original Gas Directive would have been unavailable to Nord Stream, asserting that this would show that the Gas Directive did not apply to Nord Stream.[70] In reality, the part of the question invoked by the Claimant does not concern Nord Stream but "a pipeline coming from Russia (not an EU Member State), crossing the territory of Bulgaria and extending to Serbia (not an EU Member State)" i.e. South Stream.[71] Furthermore, the answer does not allow for the conclusion that an Article 36 exemption would have been unavailable (for South Stream) but highlighted that "this issue is legally complex and must be further assessed on the basis of the concrete facts of any case".

136. In December 2013, the European Commission Director for energy markets Mr Borchardt stated publicly that the Gas Directive and its requirements of unbundling, tariff regulation and third party access applied to trans-boundary pipeline projects such as those originating in Russia and making landfall on EU territory ("Mr Borchardt's 2013 Statements").[72] "). In his statement, which was prominently published in EU media[73] Mr Borchardt warned investors as follows: "*What the Commission would hardly accept is that you put to us a pipeline that is built, that's in the landscape, and then handing over the baby to us and say – now it's up to you, Commission, to find a solution how can we operate it.*"

[68] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93(i).
[69] See para. 83 of the Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021.
[70] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93(i).
[71] According to the Claimant's own account, that pipeline is not comparable to Nord Stream 2. See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 80 in conjunction with para. 80 point i.
[72] *See* **Exhibit R-21,** South Stream bilateral deals breach EU law, Commission says https://www.euractiv.com/section/competition/news/south-stream-bilateral-deals-breach-eu-law-commission-says/.
[73] *See* **Exhibit R-21**, South Stream bilateral deals breach EU law, Commission says https://www.euractiv.com/section/competition/news/south-stream-bilateral-deals-breach-eu-law-commission-says/.

137. The Claimant assumes that Mr Borchardt's 2013 Statements "will have been perceived" or "were most likely intended" to refer to the South Stream sections on the EU side of the border connection point (i.e. onshore). In support of this assumption the Claimant submits that the Statements refer to six EU Member States whilst South Stream made landfall only in one of them and address the possibility of an exemption under Article 36 of the amended Gas Directive, which the Claimant argues was not available for the offshore sections of South Stream terminating on the Bulgarian coast.[74]

138. Nothing in Mr Borchardt's 2013 Statements suggests that they were intended to exclude offshore parts of pipeline projects originating in Russia and making landfall on EU territory. To the contrary, the Statements explicitly and repeatedly referred to Bulgaria, whose territorial waters were directly concerned by the South Stream project. The strong reaction of the Russian deputy minister for energy Anatoly Yankovski[75] would be difficult to explain if he had interpreted Mr Borchardt's 2013 Statements as relating only to pipeline segments as from the Bulgarian coastal terminal.[76] Rather, concerns as to the applicability of the original Gas Directive to South Stream in its entirety were a reason for the cancellation of the project in 2014 and its substitution for an alternative project, the Turkish Stream pipeline.[77]

139. Furthermore, Mr Borchardt's 2013 Statements also address the question whether offshore pipelines such as Nord or South Stream could benefit from an exemption pursuant to Article 36 of the original Gas Directive. The Claimant's assertion that such an exemption would not have been available are refuted by Mr Borchardt's findings that such exemptions were "*not ruled out*" although it would "*not be an easy task*" to obtain them. Again, there is nothing in these findings that would suggest that they did not relate both to the onshore and to the offshore sections of the pipelines alike. On the Claimant's own admission, the applicability of the

[74] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93(ii).
[75] According to press reports, Mr Yankovksi delivered a prepared speech shortly after Mr Borchardt's 2013 Statements stating that Russia would not accept that EU rules should apply to transboundary projects such as pipelines. *See*, for instance, South Stream bilateral deals breach EU law, Commission says https://www.euractiv.com/section/competition/news/south-stream-bilateral-deals-breach-eu-law-commission-says/ (**Exhibit R-21**).
[76] According to the Claimant's account, such an applicability as of the coastal terminal of an EU Member State was the EU's steady practice regarding other pipelines; see Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 87, 88.

Article 36 exemption is a "strong indication" as to the applicability of the original Gas Directive to a pipeline.[78]

140. On 31 January 2014, a Member of the European Parliament raised the question whether the Nord Stream pipeline was exempted from the original Gas Directive. The European Commission replied publicly that no such exemption had been granted or requested for Nord Stream (the "March 2014 Commission Reply"), in this way confirming that Nord Stream fell within the scope of application of the original Gas Directive.[79] The March 2014 Commission Reply is of particular interest to the risk assessment of a duly diligent investor given that the Investment Decision regarding Nord Stream 2 allegedly was taken in [redacted].[80]

141. The Claimant's allegation that the March 2014 Commission Reply is irrelevant to Nord Stream 2 as it concerned Nord Stream 1, or, to the extent the Reply focused on Article 36 exemptions, "primarily concerned" South Stream,[81] is contradicted by its own submissions. The Claimant points out that "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".[82] The Claimant (and all the more so a duly diligent investor) would thus have expected that the Commission would make no difference between Nord Stream 1 and 2 when applying the original Gas Directive.

142. The Claimant's attempt to ascribe the relevant parts of the March 2014 Commission Reply to South Stream is even more specious. The Commission answered the parliamentary question "Is any exemption from EC law provided for the Nord Stream pipeline?" with "No exemption has been granted or requested for the Nord Stream pipeline project."[83] Only a deliberate misreading of the March 2014 Commission Reply can turn the Commission's express reference to "Nord Stream" into a reference to "South Stream".

143. On 4 May 2014, Energy Commissioner Oettinger, who was the Commissioner directly responsible for the enforcement of the Gas Directive, issued statements (the "May 2014 Oettinger Statements") recalling that the South Stream pipeline

[78] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93(i).
[79] Parliamentary Question, E-001009/2014, 31st January 2014 and Commission reply given on 31 March 2014. (**Exhibit R-22**), referred to in Counter-Memorial, para. 143.
[80] All replies of Members of European Parliament are publicly available on the website of the European Parliament at https://www.europarl.europa.eu/plenary/en/parliamentary-questions.html.
[81] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93(iii).
[82] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 67.
[83] Parliamentary Question, E-001009/2014, 31st January 2014 and Commission reply given on 31 March 2014. (**Exhibit R-22**), emphasis added.

had to meet the EU energy law requirements flowing *inter alia* from the Gas Directive, including the Restricted Requirements in the form of access requirements to third parties and the obligation to split gas production from operating the infrastructure.[84]

144. The Claimant itself describes South Stream as an "offshore pipeline"[85] and acknowledges that the South Stream project included "a subsea pipeline from Russia under the Black sea making landfall on the Bulgarian coast".[86] Given the similarities between the South Stream and NS2 pipelines, any duly diligent investor would have assumed that the Gas Directive would apply to pipelines such as Nord Stream 2.

145. The Claimant's assertion that the May 2014 Oettinger Statements solely concerned the Austrian section of the South Stream project, which is onshore,[87] finds no support in those Statements. Rather, they concern the Project as a whole, as was related in the press as follows: "He [Commissioner Oettinger] noted, however, the project had to meet EU requirements for environmental protection, tendering, competition and energy law, especially on giving access to third parties and splitting gas production from operating the infrastructure."[88] Commissioner Oettinger also stated: "the pipeline is not a problem for me" but that "I don't yet have the basis for a final opinion",[89] thus leaving no doubt about the situation of legal uncertainty that the investor faced regarding South Stream as a whole.

146. In the light of the above, the Claimant's arguments put forward to play down the importance of the contemporaneous EU statements relating to Nord Stream and South Stream[90] and predating its Investment Decision stand refuted. Each of these Statements would in itself have been a warning sign to a duly diligent investor that the original Gas Directive would be likely to apply to pipelines such as Nord Stream 2 both onshore and offshore. Regarded together, these Statements could not have been ignored even by the most inexperienced investor, let alone by a seasoned multinational investor like the Claimant. Only

[84] *See* **Exhibit R-24,** https://www.reuters.com/article/ukraine-crisis-pipeline-eu-idUSL6N0NU60U20140508.
[85] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93 point i.
[86] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 81 point i.
[87] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93(iv).
[88] *See* **Exhibit R-24** https://www.reuters.com/article/ukraine-crisis-pipeline-eu-idUSL6N0NU60U20140508, emphasis added.
[89] *See* **Exhibit R-24** https://www.reuters.com/article/ukraine-crisis-pipeline-eu-idUSL6N0NU60U20140508, emphasis added.
[90] In this context, it is worthwhile recalling that the Claimant, as the owner of Nord Stream 2 was also the developer and (co-)owner of South Stream. See, for instance, the information on South Stream on the official ENI website **Exhibit R-215** https://www.eni.com/en_RU/eni-russia/partners-projects/gazprom/southstream/southstream.shtml.

extreme recklessness or the bad faith intention of pre-empting the regulator's choices through the *fait accompli* of an implemented pipeline project can explain why the Claimant disregarded these Statements and did not contact the EU authorities to seek clarification on the extent to which even the original Gas Directive applied to Nord Stream 2.

3.2.3 The official statements postdating the investment decision

147. In support of the alleged reasonableness of its expectations, the Claimant seeks to rely on documents the EU disclosed in the context of the present arbitration proceedings, which allegedly indicate that the original Gas Directive did not apply to pipelines such as Nord Stream 2.[91]

148. Unfortunately for the Claimant, the statements in question were made in [redacted] after the Claimant made its Investment Decision regarding Nord Stream 2.

149. As no investor can foresee the future, the risk assessment as to the applicability of the original Gas Directive to Nord Stream 2 had to be conducted on the basis of information at the Claimant's disposal at the time of the Investment Decision. The Claimant itself accepts that it could not have relied on later indications.[92] [redacted] the point in time when the Claimant took its Financial Investment Decision, is thus the relevant date for determining those elements that a duly diligent investor could be expected to factor in when assessing the possibility that the Regulatory Requirements would apply to Nord Stream 2. This is consistent with the notion that expectations are to be assessed at the time the investment is made.[93]

150. Accordingly, statements made between [redacted] should be disregarded *ratione temporis*.

151. In any event, the letters to the Energy Ministers of Denmark and Sweden, Germany and Poland referred to by the Claimant[94] do not allow for the conclusion that the original Gas Directive would not apply to offshore pipelines such as Nord Stream 2. At best, they draw a picture of legal uncertainty and of a state of regulatory flux on which no duly diligent investor would have built legitimate expectations.

[91] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 69-70.
[92] This is most explicit in Reply Memorial, para. 91: "It is certainly correct that the Claimant did not rely on these statements from [redacted] and later when taking its investment decision prior to these dates".
[93] See, ex multis, **Exhibit RLA-308**, *Georg Gavrilovic and Gavrilovic D.O.O v. Republic of Croatia* (ICSID case NO ARB/12/39, Award of 26 July 2018), para 990.
[94] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 69(i).

152. In the letter to Germany, Vice-President Šefčovič and Energy Commissioner Arias Cañete stated that the "[original] Gas Directive [did] not explicitly set out a comprehensive framework for offshore pipelines" and that "Union rules [could not] be made directly binding within the jurisdiction of third countries".[95] As Member States' territorial waters do not come within the jurisdiction of third countries,[96]the above statements suggest that the original Gas Directive in fact *did* apply to offshore pipelines in Member States' territorial waters – precisely the issue confirmed by the Amending Directive - whilst not covering pipelines sections falling within the jurisdiction of third countries.

153. The same Statement confirms the situation of legal uncertainty that the Amending Directive was intended to address: "In order to ensure legal certainty, a specific legal regime should be established." Similar statements are contained in the letters to Poland.[97] This confirms *a contrario* that there were uncertainties about the legal regime as of [redacted], and that a diligent investor engaging in a massive international project would at very least have enquired about the issue with the relevant authority, i.e. the EU. The Claimant did not – either because it was extremely reckless or because it was wilfully blind to the answer.

154. Similarly, in the letters to the Energy Ministers of Denmark and Sweden, Vice-President Šefčovič and Energy Commissioner Arias Cañete stated that the offshore sections of a pipeline "cannot be built or operated exclusively under the law of a third country or in a legal void".[98] This statement suggests that pipeline segments that lie within a Member State's territorial water would need to be subjected to a regulatory framework, conveying the impression of legal uncertainty surrounding this point. The same impression is conveyed by the fact that the Commission was not in a position to confirm, in reply to the request by a Member of European Parliament,[99] that the original Gas Directive did *not* apply to offshore import pipelines such as Nord Stream 2.

155. Finally, the comments made by the Netherlands in relation to the proposal for the Amending Directive in the Council[100] are views expressed by an individual Member State of the EU and can thus not be imputed to the latter. Other EU Member States took the opposite view and insisted on the applicability of the

[95] See **Exhibit C-214**.
[96] See European Union Counter-Memorial on the Merits, 3 May 2021, para. 139.
[97] **Exhibit C-215**.
[98] **Exhibit C-213,** emphasis added.
[99] **Exhibit C-218**.
[100] **Exhibit C-220.**

original Gas Directive to Nord Stream 2.[101] In any event and contrary to the depictions of the Claimant, the Netherlands did not specifically warn against a change in the treatment of offshore pipelines. Rather, its comments pertained to onshore and offshore pipelines alike.[102]

156. However, even if the above Statements had already been made at the time of the Investment Decision *(quod non)*, they would not have refuted indications from the original Gas Directive itself and official statements that the Gas Directive already applied to pipelines such as Nord Stream 2 in their entirety. Rather, they would have conveyed a legal situation in a state of evolution, and shown the willingness on the part of the Regulator to expressly subject pipelines to the Regulatory Requirements in the near future to address any ambiguity or perceived gap in the existing regime. No duly diligent investor would have relied on statements evoking differences of view about the application of the existing regime, and calling for the "filling of gaps", and on that basis and without further verification simply assumed away the regulatory risks for the specific deal structure it was proposing for a [redacted] euro investment. Rather, in a situation of transition where duly diligent investors regard changes in the legislative regime as likely, no expectation that relevant laws or regulations will remain unchanged or inapplicable can be considered legitimate or reasonable.[103] Investment tribunals have highlighted that a prudent and experienced international investor can be expected to take account of likely changes in the investment context when formulating its expectations.[104]

3.2.4 Indications from contemporaneous EU decisions

157. The EU's Counter-Memorial refers to European Commission opinions and decisions that were adopted and published before the Investment Decision was taken and which indicated that the original Gas Directive applied to pipelines importing gas from third countries to the European Union.[105]

158. The Claimant argues in response that these opinions and decisions are irrelevant as they all concern pipelines that allegedly cannot be compared with Nord Stream

[101] See for instance the position the Polish government defended before the Court, which is outlined in para 100 of **Exhibit CLA-176** (Advocate General Bobek's opinion in Case C-348/20 P, Nord Stream 2 AG v European Parliament and Council of the European Union, 6 October 2021).
[102] See **Exhibit C-220** under the heading "A predictable investment climate". The word "offshore" appears nowhere in the Dutch statement.
[103] See UNCTAD publication, "Fair and Equitable Treatment" (2012), (**Exhibit R-106**) p. 72 and Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 335, **Exhibit RLA-329.**
[104] See also **Exhibit RLA-30**, *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para 324.
[105] Counter-Memorial, para. 145.

2.[106] The Claimant in this regard accuses the Respondent of "intentionally" confusing the Tribunal by mentioning "a large number of less relevant pipelines".[107]

159. To the contrary, it is the Claimant's strained distinction between "relevant" and "less relevant pipelines" that is an attempt at obfuscation, because it is not rooted in the aims and scope of the original Gas Directive.

160. First, neither the purpose nor the wording of the original Gas Directive suggested that it was intended to apply merely to onshore pipelines on the entirety of Member States' territory, whilst applying to offshore pipelines only to the exclusion of Member States' territorial waters (indeed, merely to state this confirms that such an assumption would be counter-intuitive). Rather, the provisions on temporary derogations of the original Gas Directive indicated its applicability to pipelines "transporting gas from third countries" into the European Union.[108] Similarly, the aims of the original Gas Directive indicated in its recitals and operative provisions confirmed that gas import pipelines from third countries into the European Union needed to be covered by the original Gas Directive also in Member Sates' territorial sea to achieve a comprehensive and effective legal framework for gas transmission activities in the European Union as well as a level-playing field for all suppliers.[109]

161. Second, the Claimant does not contest that the territorial sea is an integral part of the territory of a State, in which a State's jurisdiction is fully applicable in accordance with basic principles of international law.[110] Accordingly, the claim that the EU allegedly consciously restricted the scope of the original Gas Directive to pipelines within the EU[111] turns against the Claimant. Pipelines in Member States' territorial waters are within the EU.[112]

162. Third, the Tribunal will note that the Claimant itself abandons its own categorisation of "less" and "more relevant" pipelines where these categories do not suit its claims.

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[106] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, Section III.3.
[107] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 78. A similar accusation is levelled against the EU in para. 54 of the Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021.
[108] See, for instance the statement in recital (35) of the original Gas Directive addressed in para. 135 of the Counter-Memorial.
[109] See European Union Counter-Memorial on the Merits, 3 May 2021, paras. 132-137 with references to and explanations of Recitals (22), (35), (37) as well as Articles 13(1)(a) and 34 of the original Gas Directive.
[110] See European Union Counter-Memorial on the Merits, 3 May 2021, para. 139. In this regard, the Claimant solely questions the number of km of the Nord Stream 2 pipeline that are in German territorial waters (53 km according to the Claimant). See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 83.
[111] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 78.
[112] See European Union Counter-Memorial on the Merits, 3 May 2021 para. 139.

163. For instance, the Claimant itself describes the South Stream project as an "offshore pipeline"[113] with "a subsea pipeline from Russia under the Black sea making landfall on the Bulgarian coast",[114] and thus as presenting striking similarities with Nord Stream 2, which is a subsea pipeline from Russia under the Baltic sea making landfall on the German coast. Nevertheless, South Stream does not figure in the Claimant's list of "offshore import pipelines".[115]

164. Where its suits its case, the Claimant indeed argues that South Stream is "fundamentally different" from Nord Stream 2.[116] Where it does not, the Claimant has second thoughts about how different these pipelines are. For instance, the Claimant invokes a Commission statement relating to South Stream[117] in support of its assertion that an exemption pursuant to Article 36 of the original Gas Directive would not have been available to Nord Stream. [118]

165. Similarly, the Claimant describes Nord Stream 1 on the one hand as "essentially identical in terms of its route and entry point into EU territory"[119] and argues on the other that official statements as to the applicability of the amended Gas Directive to Nord Stream 1 provide no indication whatsoever that the Directive would apply to Nord Stream 2.[120]

166. Finally, the Claimant fails to identify a single decision or opinion in which the Commission or any other EU institution took the view that the original Gas Directive did not apply to pipelines such as Nord Stream 2. Rather, the Claimant solely relies on the perceived "practical reality of the non-application of the Gas Directive to Nord Stream 1".[121] In other words: the fact that the original Gas Directive was not enforced against Nord Stream 1 in the past is adduced as sole evidence for its non-applicability.

167. Any temporary lack of enforcement cannot be taken as proof that a rule does not exist or apply. Such lack of enforcement may generally have other causes, such as a Regulator's high workload, the existence of other, more pressing regulatory tasks or the absence of legal clarity as to the applicable rules.

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[113] According to the Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93, South Stream and Nord Stream 1 are "both offshore pipelines".
[114] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 81 point i.
[115] According to the Claimant, there are only five offshore import pipelines that are listed in para. 76 of the Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021.
[116] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 80 and para. 80(i).
[117] See **Exhibit R-20**, answer to question 7, in which the Commission refers to "a pipeline coming from Russia (not an EU Member State), crossing the territory of Bulgaria and extending to Serbia (not an EU Member State)" i.e. South Stream.
[118] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93(i).
[119] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 67.
[120] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93(iii).
[121] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 91.

168. Furthermore, regarding the original Gas Directive, there are three more specific reasons that explain why this piece of legislation was not applied to Nord Stream 1 at an earlier stage.

169. First, there was a suboptimal degree of legal clarity as to the scope of application of the Gas Directive, which was acknowledged in the EU's submissions;[122]

170. Second, the economic importance of Nord Stream 1 in isolation was not such as to require urgent regulatory intervention. The picture is different when looking at the Nord Stream 1 and 2 in conjunction.[123]

171. Third, Member States' regulatory authorities are in charge of ensuring compliance with certification duties and these national regulators are independent from Member States' governments.[124] As a result, the EU was not in a position to give direct instructions regarding the application of the Gas Directive to Nord Stream 1. Rather, in order to ensure that its views regarding the correct interpretation of the Gas Directive are heard by Member States' regulatory authorities, the European Commission would have had to initiate infringement proceedings against the respective Member States[125] in the course of which a breach of EU law by Member States' regulatory authorities would have had to be established. Bringing infringement proceedings may be a time-consuming process,[126] which the EU Court of Justice leaves at the discretion of the European Commission.[127] Regarding the Gas Directive, it is easily understandable that the European Commission focussed on submitting a legislative proposal for the clarification of the applicable rules rather than initiating lengthy proceedings aimed at establishing their possible breach by Member States' regulatory authorities.

3.3 EU Competition Law could have resulted in the Regulatory Requirements being enforced against the Claimant

172. In the Counter-Memorial, the Respondent recalled that at the time of the Investment Decision, requirements comparable to unbundling, third party access and tariff regulation ("Comparable Requirements") could have been imposed on

[122] See, for instance, Counter-Memorial, Section 2.5.6.
[123] As regards the economic weight of both pipelines operated by the same "undertaking" within the meaning of EU Competition Law, see below, Section 3.3.
[124] Article 35(4)(a) and (5)(a) of Directive 2009/72 and Article 39(4)(a) and (5)(a) of Directive 2009/73 specify that NRAs shall exercise their powers independently of any public entity or political body. See also **Exhibit RLA-313,** *Commission v Germany*, Case C-718/18, EU:C:2021:662, Judgment, 14 November 2013, para. 107
[125] See **Exhibit RLA-17,** Article 258 Treaty on the Functioning of the European Union
[126] In May 2014 the average duration of an infringement case was 27.7 months, to which the time lag in compliance with EU law following a court judgment needs to be added. See **Exhibit R-207,** Commission reporting on infringement proceedings for the period 11/2013 - 05/2014, https://ec.europa.eu/internal_market/scoreboard/_archives/2014/07/performance_by_governance_tool/infringements/index_en.htm.
[127] See **Exhibit RLA-315**, *LPN v Commission*, Joined Cases C-514/11 P and C-605/11, EU:C:2013:738, Judgment, 14 November 2013, para 61.

offshore pipelines operated by dominant undertakings by virtue of EU competition law, and in particular pursuant to Article 102 of the Treaty on the Functioning of the European Union ("TFEU").[128] The Commission's enforcement practice and the EU Courts' case law strongly suggested that Nord Stream 2 could be subjected to such Requirements independently from the Gas Directive. Accordingly, the Claimant should have taken the prospect of such rules being applicable to it into account when deciding upon the structuring of and prospects for its planned project.

173. In response to such evidence, the Claimant cavalierly asserts that Competition Law is irrelevant for this arbitration, arguing that its claims have been founded on the enactment of the Amending Directive rather than on the applicability of EU Competition Law.[129] This completely sidesteps the EU's point that these Competition rules were an intrinsic part of the regulatory framework at the time the Claimant took its Investment Decision, achieved a result equivalent to the Amending Directive, and the Claimant nonetheless chose to ignore their potential impact when arranging its affairs.

174. NS2PAG's case is premised on an alleged "dramatic" regulatory change resulting from the Regulatory Requirements being rendered applicable to Nord Stream 2 after the Investment Decision was taken.[130] However, no significant regulatory change occurred given that Comparable Requirements may already have applied to Nord Stream 2 in any event by virtue of existing EU competition rules. NS2PAG also has no grounds for alleging any "catastrophic impact" that the Amending Directive allegedly had on its investment[131] given that Comparable Requirements could in any event have been imposed on Nord Stream 2 independently from the Gas Directive.

175. Faced with this reality, to the extent the Claimant engages with EU competition law at all, it implausibly claims that (i) EU competition law did not apply to Nord Stream 2, as allegedly illustrated by the lack of enforcement and the enactment of the Amending Directive; (ii) Nord Stream 2 does not confer a dominant position to NS2PAG; and (iii) the operation of Nord Stream 2 could not have resulted in an abusive refusal to supply within the meaning of Article 102 TFEU. None of these allegations have any merit.[132]

[128] Counter-Memorial, Section 2.2.4.
[129] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 95.
[130] See already Memorial, paras. 307 et seq. and paras. 381 et seq.
[131] Memorial para. 307.
[132] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras 94-98.

176. The claim that EU competition law was never enforced against Nord Stream 2[133] or other infrastructure comparable to that Pipeline[134] is not only factually incorrect,[135] but also misguided, given that temporary non-enforcement of rules generally in no way indicates their non-existence or suggests they never will be applied. This holds all the more true for EU competition law, where the Commission has discretion whether and when to intervene against breaches and can prioritise in accordance with the European Union's interest in bringing those infringements to an end that are more flagrant, less resource-intensive to investigate or of greater importance for the European Union legal order.[136] In any event, it is hardly surprising that EU competition law has not yet been enforced against Nord Stream 2, since that Pipeline has not started operating. The fact remains that the legislative framework permitting the EU to safeguard against abuse of dominant position was fully in place in 2015 and accordingly would have been part of the assessment of any reasonably diligent investor.

177. It is not "counter-intuitive", as the Claimant alleges, that the EU legislature sought to update and clarify the application of its Gas Directive at a time when the investigation against Gazprom had already illustrated that the Union could also make use of its competition powers. In this regard, the Claimant misstates the aims pursued by the Gas Directive, which go beyond solving "competition issues".[137] The Gas Directive aims to achieve a competitive, secure and environmentally sustainable market in natural gas in the European Union.[138] Furthermore, Article 102 TFEU can generally be enforced against undertakings only once anticompetitive conduct has been established, whilst the regulatory framework created by the Gas Directive allows for intervention before infringing conduct occurs. It is unsurprising and trite to note that State entities often put in place overlapping and complementary legal regimes to address related but specific policy issues and goals.

178. Moreover, NS2PAG's claim that Article 102 TFEU has never been enforced against third country import gas pipeline operators comparable to the Claimant is also factually incorrect, as set out in what follows.

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[133] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 95.
[134] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 96(i).
[135] Regarding the competition proceedings related to Gazprom's import pipeline contracts, see See **Exhibit R-208,** Summary of Commission Decision of 24 May 2018 in Case AT.39816 — Upstream gas supplies in Central and Eastern Europe EU Official Journal 2018/C 258/07.
[136] See already **Exhibit RLA-84,** *Béguelin Import v G.L. Import Export,* Case 22/71, EU:C:1971:113, Judgment, 25 November 1971, para 11**;** See most recently **Exhibit RLA-314**, *Agria Polska v Commission,* Case C-373/17P, EU:C:2018:756, Judgment, 20 September 2018, para 61.
[137] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021 para. 95, in which the Claimant assumes that the Gas Directive had been amended "to address competition issues".
[138] See, for instance, Article 3(1) of the Amended Gas Directive.

i) The Claimant's assertion is belied from the outset by the Commission's "long-running and wide-ranging Article 102 TFEU investigation from August 2012 until May 2018" against Gazprom, which the Claimant itself refers to.[139] The proceeding against NS2PAG's owner was ongoing when the Claimant took its Investment Decision. It served as a reminder of the European Commission's determination to enforce EU Competition Law also against dominant pipeline operators like the Claimant and its 100 percent owner, Gazprom. The Article 102 TFEU investigation was closed only after Gazprom offered far reaching commitments to meet the Commission's overall objective of the free flow of gas at competitive prices across the European Union, which *inter alia* addressed the Commission's pricing concern and ensured that gas prices did not become again unfair in Central and Eastern Europe.[140] It is hard to think of a more glaring example of how the rules the Claimant now claims emerged unexpectedly were to the contrary fully engaged, against the Claimant's own 100 per cent owner, at precisely the time the Claimant finalised its investment decision in Nord Stream 2.

ii) It is only after having rendered binding Gazprom's far reaching commitments that the Commission lawfully decided to reject PGNiG's complaint on 17 April 2019 on priority grounds.[141] The fact that this rejection decision does not specifically address the Nord Stream 1 and 2 pipelines does not confirm that these pipelines were outside of the scope of EU competition law. Rather, PGNiG's complaint did not focus on EU competition law infringements that could have resulted from the operation of these pipelines.[142] Furthermore, the Commission investigation focussed on gas supplies to "Central and Eastern Europe"[143] rather than pipelines supplying gas to Germany.

iii) Contrary to the Claimant's assertions,[144] the competition law investigations referred to in the Counter-Memorial do concern import pipelines, strongly suggesting that EU competition law would equally have been engaged vis-à-vis- NS2. There is no reason why onshore pipelines should be treated differently from offshore import pipelines under EU competition law. Since EU competition law may apply to all practices liable of affecting the EU internal market,[145] its scope of application

[139] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 96 (ii).
[140] See **Exhibit R-208,** Summary of Commission Decision of 24 May 2018 in Case AT.39816 — Upstream gas supplies in Central and Eastern Europe EU Official Journal 2018/C 258/07.
[141] The lawfulness of doing so has recently been established by the EU General Court. See **Exhibit RLA-302,** *Polskie Górnictwo Naftowe i Gazownictwo v Commission*, Case T-616/18, EU:T:2022:43, Judgment, 2 February 2022 in, and in particular paras 473-479**.**
[142] PGNiG took the view that these pipeline projects would not be a direct breach of competition rules but rather elements facilitating other competition law infringements. See **Exhibit CLA-183**, European Commission Decision on Case AT.40497 Polish Gas Prices, 17 April 2019, para 56.
[143] See **Exhibit CLA-183**, European Commission Decision on Case AT.40497 Polish Gas Prices, 17 April 2019, paras 5 and 30-34.
[144] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 96(i).
[145] See European Union Counter-Memorial on the Merits, 3 May 2021, para. 151.

undoubtedly covers offshore sections of import pipelines.[146] This is confirmed by recent case law on the effects that practices relating to such import pipelines may have on EU markets[147] and further evidenced by the fact that the Gazprom procedure also concerned South Stream, which the Claimant itself categorises as an offshore pipeline.[148] Gazprom stood accused of leveraging its position of a dominant gas supplier in Bulgaria to browbeat the Bulgarian gas incumbent, Bulgarian Energy Holding, into participating in the Gazprom driven South Stream project.[149] To allay the Commission's competitive concerns in this regard, Gazprom committed to allow its Bulgarian partners to leave the South Stream project without incurring liabilities, notably damages claims.[150]

179. The remainder of the Claimant's submissions on this issue betray a misunderstanding of the legal concepts and principles applicable under Article 102 TFEU, namely the concept of "undertaking", the assessment of "dominance" and the conditions for abusive "refusal of supply". This will be shown in the following on the basis of the settled case law of the EU Court of Justice, on which any duly diligent investor would have based its assessment as to the correct interpretation of EU competition law.

180. EU competition law is addressed to "**undertakings"** i.e. entities engaged in an economic activity and consisting of a unitary organization of personal, tangible and intangible elements, and pursuing a specific economic aim on a long-term basis.[151] The "undertaking" designates an economic unit even if in law that unit consists of several legal persons. Formal separation of two companies, resulting from their having distinct legal identity, therefore is not determinative. The test under EU Competition Law is instead whether or not there is unity in their conduct on the market. Where a parent company exercises decisive influence over its subsidiary,

[146] EU competition law applies to conduct which, while not adopted within the EU, may have anticompetitive effects liable to have an impact on the EU market, which is the case for offshore pipelines importing gas into the EU internal market; see **Exhibit RLA-85,** *Intel Corporation v Commission*, Case C-413/14P, EU:C:2017:632, Judgment, 6 September 2017, para 45**;** See also **Exhibit RLA-87,** *Gencor v Commision,* Case T-102/96, ECLI:EU:T:1999:65, Judgment, 25 March 1999, paras 90-108.
[147] See **Exhibit RLA – 316,** *Commission v Germany*, Case C-718/18, ECLI:EU:C:2021:662, Judgment, 2 September 2021, paras. 29-44, and in particular para. 37.
[148] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 93.
[149] See **Exhibit R – 208,** Commission Decision of 24 May 2018 in Case T.39816 – Upstream gas supplies in Central and Eastern Europe, paras. 80 and 84-87.
[150] **Exhibit R – 208** Commission Decision of 24 May 2018 in Case T.39816 – Upstream gas supplies in Central and Eastern Europe, paras. 104 and 158.
[151] **Exhibit RLA – 317,** *Analisi G. Caracciolo,* Case C-142/20, EU:C:2021:368, Judgment, 6 May 2021, para 55. See also **Exhibit RLA – 317,** *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission,* Case C-288/11P, EU:C:2012:821, Judgment, 19 December 2012, para 50 and the case-law cited.

both are part of the same undertaking. There is a presumption that a parent company exercises decisive control over its solely-owned subsidiary.[152]

181. PJSC Gazprom2 and its wholly-owned subsidiary Gazprom export LLC3 ("Gazprom") are therefore one and the same "undertaking" for purposes of EU Competition Law, together with NS2PAG, which is wholly owned by Gazprom.[153] Since Gazprom is also the majority shareholder of Nord Stream AG, which operates Nord Stream 1, both Pipelines are in the hands of the same undertaking, which in addition controls gas supplies from Russia to Europe by dint of its legal export monopoly.[154] According to EU Competition Law as interpreted by the EU Courts, the Claimant and the infrastructure it owns are assets owned by the same "undertaking", namely the Gazprom Group.

182. The Claimant's description of Gazprom's commercial conduct as "the action of a Government acting in the exercise of the powers of a public authority"[155] that could not be attributed to the Claimant to the extent it concerned Gazprom's Russian export monopoly[156] is based on an interpretation of the concept of undertaking that finds no support in the settled case law of the EU Courts. The mere fact that an undertaking benefits from a legal export monopoly does not exempt it from EU competition law.[157] Even a public entity may be regarded as an undertaking to the extent it exercises an economic activity which can be separated from the exercise of its public powers.[158] The applicability of Article 102 TFEU to Gazprom is illustrated by the recent Gazprom competition proceedings and other EU antitrust cases concerning Gazprom's anti-competitive supply practices and abuses of its dominant position in the last 15 years.[159] Besides, if the Claimant were to submit that it is merely an emanation of the Russian Government with governmental functions,

[152] See **Exhibit RLA – 318,** *Sumal,* Case C-882/19, EU:C:2021:800, Judgment, 6 October 2021, paras 41-44. See also Meeßen in Kellerbauer/Klamert/Tomkin, the EU Treaties and the Charter of Fundamental Rights, Oxford University Press 2019, Commentary on Article 101 TFEU, paras. 7-29, with further references to settled case law.
[153] See **Exhibit R – 208,** Commission Decision of 24 May 2018 in Case AT.39816 — Upstream gas supplies in Central and Eastern Europe, para. 1 and 5-8 accessible at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf
[154] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 97 iv.
[155] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 97 point iv.
[156] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 97 point v.
[157] It is only where activities, by their nature, their aim and the rules to which they are subject, are connected with the exercise of powers which are typically those of a public authority that EU Competition Law does not apply. See **Exhibit RLA – 319,** *SAT Fluggesellschaft mbH contre Eurocontrol,* Case C-364/92, EU:C:1994:7, Judgment, 19 January 1994, para. 30.
[158] See to this effect **Exhibit RLA-326**, *Compass-Datenbank*, Case C-138/11, EU:C:2012:449, Judgment, 12 July 2012, para 38 and the case law cited.
[159] See **Exhibit RLA-266,** case AT.37811 - Territorial Restrictions 1) Algerian gas export contracts 2) Expansion of TAG pipeline summarised in press release IP/03/1345, https://ec.europa.eu/commission/presscorner/detail/en/IP_03_1345); **Exhibit RLA-267,** case AT.38085 Territorial restrictions - PO/Territorial restrictions - Austria summarised in press release (IP/05/195), https://ec.europa.eu/commission/presscorner/detail/en/IP_05_195,**;** see also **Exhibit RLA-268,** *Nyssens/ Cultrera/Schnichels*, The territorial restrictions case in the gas sector: a state of play, Competition Policy Newsletter 2003, https://ec.europa.eu/competition/publications/cpn/2004_1_48.pdf;

which does not exercise an economic activity, NS2PAG would in effect be admitting it is not an "investor" with standing to invoke Article 26 of the Energy Charter Treaty.[160]

183. The Claimant's unsubstantiated denial of its **dominant position** on the relevant market does not engage with the facts and arguments put forward in the Counter-Memorial[161] and should therefore be dismissed on that basis alone. Without prejudice to this conclusion, the EU makes the following comments in response to the Claimant's latest unfounded allegations.

184. While the Claimant presents a bare denial of its dominant position, what is relevant for the application of Article 102 TFEU in a network industry such as the gas industry is the existence of a dominant position in the form of a natural infrastructure monopoly. As part of the Gazprom Group (which is the relevant "undertaking" under EU Competition Law),[162] the infrastructure owned by the claimant clearly forms part of a natural monopoly enjoyed by the Gazprom group for infrastructure importing gas from Russia to the EU.[163] In addition, in its antitrust investigation against Gazprom mentioned by the Claimant, the Commission arrived at the preliminary assessment that Gazprom held a dominant position in each of the relevant upstream wholesale gas supply markets in Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary and Bulgaria:

> The Commission's preliminary assessment is that Gazprom holds a dominant position on each of the relevant markets in CEE, namely in Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary and Bulgaria. This preliminary assessment is reached on the basis of Gazprom's high and stable market shares on each of the relevant markets. For the years 2004-2013, Gazprom's estimated market shares are as follows: Bulgaria (80-100%); the Czech Republic (75-100%); Estonia (80-100%); Hungary (50-70%); Latvia (70-100%); Lithuania (100%); Poland (40-65%); Slovakia (70-100%). Other competitors may not have the strength and may not be numerous enough to effectively constrain Gazprom's dominant position. On all the markets concerned Gazprom may have a

[160] According to Article 1(6) ECT an "Investment refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party". Pursuant to Article 1(5) ECT an "Economic Activity in the Energy Sector means an economic activity¬ concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises."

[161] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 98, where the Claimant merely states that a dominant position must not be presumed without engaging with the facts and arguments in Counter-Memorial, para.156.

[162] See **Exhibit R – 208,** Commission Decision of 24 May 2018 in Case AT.39816 — Upstream gas supplies in Central and Eastern Europe, para. 1 and 5-8 accessible at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf,.

[163] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 97 point v.

> pivotal role which means that, without its supplies in the short to mid-term, customers may not be able to cover their demand for gas. Not least because of its large gas reserves, Gazprom may also be considered an unavoidable trading partner for large parts of the national consumption of CEE countries.
>
> The Commission's preliminary assessment is that there are barriers to entry that protect Gazprom's alleged dominant position across CEE. These alleged barriers to entry stem to some extent from the available gas connecting infrastructure that could give alternative gas suppliers real access to the market. Furthermore, the Commission's preliminary view is that Gazprom's own behaviour may also create barriers to entry. Gazprom's long-term contract, coupled with the take-or-pay obligation, may also further cement its dominant position. The Commission considers on a preliminary basis that the take-or-pay obligation, which often covers […] of the country's gas consumption, may mean that other suppliers have no opportunity to enter the market during the contract term.[164]

185. Market data for Germany also points to the existence of a dominant position. According to the German Federal Statistical Office (Statistisches Bundesamt), consumption of natural gas in Germany in 2020 was 86.5 bcm.[165] According to Gazprom Export, it supplied in 2020 to customers in Germany 45.84 bcm of natural gas,[166] which corresponds to a 53% share of overall gas consumption. Other sources estimate an even higher share of Russian (i.e., Gazprom, as per its legal export monopoly) gas supplied to Germany in 2020 (65.2%).[167] According to long-standing case-law, a market share of 50% already creates a strong presumption of the existence of a dominant position.[168]

186. It follows that a duly diligent investor in the position of the Claimant should have been aware at the time of its Investment Decision of the strong indications that the Gazprom group, of which it forms a part, would have been in a dominant position of a relevant gas supply and/or transport market and, hence, subject to the special obligations arising for dominant operators from Article 102 TFEU.

187. The starting point for assessing whether a dominant undertaking breaches Article 102 TFEU through **abusive behaviour** is the dominant undertaking's special responsibility, pursuant to which the latter is precluded from applying not only those

[164] **Exhibit R – 208,** Commission Decision of 24 May 2018 in Case AT.39816 – Upstream gas supplies in Central and Eastern Europe, paras 34-35.
[165] **Exhibit R – 211,** https://www.statista.com/statistics/703657/natural-gas-consumption-germany/.
[166] **Exhibit R – 212,** http://www.gazpromexport.ru/en/partners/germany/.
[167] See **Exhibit R – 213**, National Public Radio, "Explaining why natural gas plays such a big role in the Russia-Ukraine crisis", 9 February 2022, available at https://www.npr.org/2022/02/09/1079338002/russia-ukraine-europe-gas-nordstream2-energy?t=1645216997932&t=1645217659363.
[168] **Exhibit RLA-320,** *Akzo Chemie v European Commission*, Case C-62/86, EU:C:1991:286, Judgment, 3 July 1991 para 60.

practices that directly cause harm to consumers but also practices departing from competition on the merits that may cause consumers harm through their impact on competition.[169] Article 7(1) of Regulation 1/2003 explicitly provides for the possibility to impose further structural remedies by way of a decision ordering the undertaking to bring such abuses to an end.

188. In the present case, the actual existence of a breach of Article 102 TFEU is no relevant question. Rather, what matters is whether at the time of the Investment Decision taken by the Claimant, a duly diligent investor would have factored in the possibility that requirements comparable to the Regulatory Requirements might be imposed on Nord Stream 2 by virtue of EU Competition Law.[170]

189. The Claimant argues that the European Commission could not have imposed Comparable Requirements on NS2PAG due to the high hurdles applying to an abusive "refusal to supply" under Article 102 TFEU. In this context, the Claimant relies on an opinion of Advocate General Saugmandsgaard Øe in support of the assertion that remedies such as third party access could only be required under EU Competition law where a dominant undertaking's infrastructure can be qualified as an essential facility.[171]

190. The Claimant's argument is incorrect and misses the point that the gas import infrastructure owned by the "undertaking" of which the Claimant forms part (including Nord Stream 1 and 2) may itself constitute an essential facility. The Gazprom group is a vertically integrated gas supplier and network operator, enjoying both a natural monopoly as owner of all gas import infrastructure from Russia into the EU, and a legal monopoly for the export of Russian gas. This is also highlighted in the Article 49a derogation decision by BNetzA quoted by the Claimant: as Gazprom enjoys a legal export monopoly, no competition on NordStream 1 is possible. While it is true that EU competition law (with the notable exception of Article 106 TFEU) is concerned with the conduct of undertakings offering goods or services on a market, rather than the conduct of governments, the fact that as a result of government action such an undertaking enjoys a monopoly for the offering of certain goods or services is relevant for considering whether an undertaking such

[169] Settled case law. See ex multis **Exhibit RLA-321,** Intel v Commission, Case C-413/14P, EU:C:2017:632, Judgment, 6 September 2017, para. 135; **Exhibit RLA-322***, Post Danmark*, Case C-209/10, EU:C:2012:172, Judgment, 27 March 2012, paragraph 20;. See also most recently **Exhibit RLA-323**, *Google v Commission*, Case T-612/17, EU:T:2021:763, Judgment, 10 November 2021, paras. 150-153.
[170] See Section 3.1 Introduction in this Rejoinder.
[171] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 97(i) referring to **Exhibit CLA-184** para. 60.

as Gazprom has a dominant position and thus is subject to the obligations following from Article 102 TFEU.[172]

191. Furthermore, the Claimant conveniently omits to mention that that Opinion and the ensuing ruling of the Court of Justice in Slovak Telecom drew a difference between cases in which a dominant undertaking refuses to give access to an input that it exclusively uses for its own business, and those where the dominant undertaking grants access to such input under unfair or anticompetitive terms. The former case involves restrictions of the dominant undertaking's freedom to contract, which justifies the higher legal standard of requiring the input to be an essential facility. By contrast, in the latter case, an abuse under Article 102 TFEU does not depend on whether the infrastructure or input is indispensable to other market participants.[173]

192. Accordingly, even if one took the view that Nord Stream 2 is not an essential facility for competitors (*quod non*), it is still likely that a competition authority may find that the third party access requirement could be imposed on the Claimant pursuant to Article 102 TFEU to ensure that the latter provides gas through its pipeline without engaging in practices that depart from competition on the basis of better price, quality or choice ("competition on the merits") and are liable to foreclose competitors.

193. In any event, remedies in the form of tariff regulation do not depend on an abusive refusal to supply but may also be imposed to safeguard against prices that are excessive in relation to the economic value of the service provided.[174]

194. Similarly, unbundling remedies do not depend on an abusive refusal to supply, either.[175] In terms of unbundling as a remedy in competition cases, an example publicly known when the Investment Decision was taken was the Commission commitment decision in case AT.39402 RWE in which the Commission held that: *"a mere behavioural remedy would not have removed the underlying incentives of RWE to engage in the alleged anti-competitive conduct, as ensured by the proposed structural remedy. Indeed, there is strong evidence that RWE's restrictive capacity management policy and its margin squeeze strategy were used to protect its own gas supply business. These forms of behaviour derive in this case and taking into account*

[172] See **Exhibit RLA-322,** *Post Danmark*, Case C-209/10, EU:C:2012:172, Judgment, 27 March 2012, para. 23; **Exhibit RLA-324,** *Slovak Telekom, a.s. v European Commission*, Case T-851/14, EU:T:2018:929, Judgment, 13 December 2018, paras 153-154**.**

[173] See **Exhibit CLA-186,** *Slovak Telekom v Commission*, Case C-165/19 P, EU:C:2021:239, Judgment, 25 March 2021, paras. 38-60 and **Exhibit CLA-184,** *Slovak Telekom v Commission*, Case C-165/19 P, EU:C:2020:678, Opinion of Advocate General Saugmandsgaard Øe, 9 September 2020, paras. 61-117.

[174] See, to that effect, **Exhibit RLA-327,** *AKKA*, Case C-177/16, EU:C:2017:689, Judgment, 14 September 2017, para. 35; **Exhibit RLA-328,** *Kanal 5 and TV 4*, Case C-52/07, EU:C:2008:703, Judgment, 11 December 2008, para. 28 and the case-law cited.

[175] See, most recently, Commission decision C(2018) 4761 final of 18 July 2018 in Case AT.40099, Google Android, sections 11 and 18.2.1., **Exhibit RLA –332**.

the elements which form the basis of the Preliminary Assessment from an inherent conflict of interest within RWE as a vertically integrated gas company which controls both transmission and supply of gas. Absent a structural remedy, the incentives to further engage in such behaviour would not have been removed as effectively, resulting in a risk of a lasting or repeated infringement."[176]

195. Finally, the Claimant seeks to infer compliance of Nord Stream 2 with Article 102 TFEU from the alleged positive effects that Nord Stream 2 may have on prices in Europe.[177]

196. However, even if such positive effects existed (and not proof to this effect has been adduced), they would exclude abusive behaviour under Article 102 TFEU only under exceptional conditions, which have nothing in common with the conditions under which exemptions under Article 36 of Directive 2009/73/EC are granted.[178]

197. According to the EU Courts' settled case law, for positive effects to render otherwise abusive behaviour compliant with Article 102 TFEU, the following conditions need to be met cumulatively: (i) the exclusionary effect arising from a practice must be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer; (ii) the exclusionary effect of that practice must bear a relation to advantages for the market and consumers; (iii) it must not go beyond what is necessary in order to attain those advantages. The dominant undertaking bears the burden of proof for the above.[179] It is highly unlikely that a competition authority would find these conditions to be met regarding Nord Stream 2 and the Claimant has not even argued they would. In particular, it is implausible that the potential anticompetitive effects would be required for Nord Stream 2 to have positive effects on prices in Europe. On the contrary, imposing Comparable Requirements to Nord Stream 2 with a view to avoiding such anticompetitive effects could be expected to enhance price benefits for customers.

[176] Commission Decision of 18 March 2009 in Case COMP/39.402 relating to a proceeding under Article 82 of the EC Treaty [now Article 102 TFEU]– RWE Gas Foreclosure, para 50, **Exhibit RLA-330.**
[177] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 97 point v.
[178] Accordingly, the exemption decision of the "Gazelle" interconnector referred to in Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 97 point vi. and fn. 141, which in addition concerned a pipeline segment which has nothing in common with Nord Stream 2, does not allow for any conclusions as to how Article 102 TFEU could be enforced against Nord Stream 2.
[179] See **Exhibit RLA-325,** *British Airways v Commission*, Case C-95/04 P, EU:C:2007:166, Judgment, 15 March 2007, para 86; **Exhibit RLA-322,** *Post Danmark*, Case C-209/10, EU:C:2012:172, Judgment, 27 March 2012, para 41.

198. In the light of the above, a duly diligent investor had to factor in that Nord Stream 2 would be exposed to Comparable Requirements under Article 102 TFEU.[180]

3.4 The Claimant was aware that the Regulatory Requirements could apply to pipelines such as Nord Stream 2

199. Faced with a claim for legitimate expectations, an arbitration tribunal needs to assess whether the investor should have been aware of the regulatory risk that eventually materialised to the disadvantage of its investment. In the present case the Tribunal will find this task easy to accomplish. Contrary to the Claimant's submissions in the Reply to the Counter-Memorial,[181] contemporaneous evidence leaves no doubt that the Claimant was well aware of the prospect that the Regulatory Requirements would apply to Nord Stream 2 at precisely the time that it took its Investment Decision.

200. On [redacted], [redacted] after the Investment Decision, NSP2AG's sole shareholder Gazprom issued a prospectus in which it informed securities investors of the regulatory risks to which the original Gas Directive would expose Nord Stream 2 (the "Gazprom [redacted] Prospectus"). In doing so, Gazprom complied with the relevant legislation requiring security issues to inform security investors inter alia of "risks which are specific to the situation of the issuer and/or the securities and which are material for taking investment decisions".[182]

201. In this context, Gazprom expressly warned that the original Gas Directive could result in the Regulatory Requirements being imposed against Nord Stream 2:

> "The Third Gas Directive's precise effect on our operations is yet to be determined. If, pursuant to the Third Gas Directive, an EU state chooses to implement the most restrictive measures on participation of energy producers in ownership and management of the transportation networks, it may limit the activities in which we are permitted to engage which may force us to dispose of our gas transportation assets in Europe. These restrictions could affect our competitive position and our ongoing or contemplated projects, and, consequently, our results of operations. […] In addition, the implementation of the Third

[180] See **Exhibit RLA-93**, *Microsoft v Commision*, Case T-201/04, ECLI:EU:T:2007:289, Judgment, 17 September 2007, paras 332-334**; Exhibit RLA-73,** *Bronner*, Case C-7/97, ECLI:EU:C:1998:569, Judgment, 26 November 1998, para 40**; Exhibit RLA-74,** *RTE et ITP v Commission*, Joined Cases C-241/91 P and C-242/91 P, EU:C:1995:98, Judgment, 6 April 1995, para 56.

[181] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 507-526.

[182] See **Exhibit RLA – 331,** Articles 2 and 25 of Regulation 809/2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, published in EU Official Journal of 30.4.2004, L 149/1.

> Gas Directive could negatively affect the timing and prospects of our gas transportation projects in Europe. In particular, inconsistencies between the provisions of the Third Gas Directive and the terms of bilateral intergovernmental agreements entered into by and between the Russian Federation and the countries that participated in implementing the South Stream pipeline project became one of the reasons for the cancellation of the project in 2014 and its substitution for an alternative project, the Turkish Stream pipeline. The liberalization of the gas market in Europe may also result in a declining role for long-term contracts, which could, in turn, adversely affect the stability of our revenues. Further, in the absence of a special permission granted in accordance with the EU laws, it may not be possible for us to own and control gas transportation assets in Europe. Our ability to implement gas transportation projects in Europe may also be affected by the provisions of the Third Gas Directive, which could have a material adverse effect on our operating results in Europe.[183]

202. In other words: the Claimant was absolutely aware and its 100 percent owner publicly admitted that the original Gas Directive could result in the Regulatory Requirements being imposed against its Nord Stream 2 pipeline and warned against the ensuing far-reaching economic consequences ("material adverse effects") that would occur in such circumstances. Gazprom also emphasised that these consequences were far from being hypothetical. It informed securities investors that the applicability of the original Gas Directive had already been instrumental in prompting it to abandon the South Stream project, thereby implying that the application of EU regulatory controls through the original Gas Directive could also prompt it to cancel Nord Stream 2 (which apparently, it would only contemplate building if it could be operated as an unregulated monopoly enterprise).

[redacted]

204. Such unequivocal evidence that the Claimant knew of the risk that the Regulatory Requirements would apply to Nord Stream 2 at the time of the Investment

[redacted]

Decision belies the Claimant's submission in reply to the Counter-Memorial that it had "performed regular and continuous assessments of all risk concerning the project" purportedly yielding the opposite result.[185] It speaks of the dishonesty of the Claimant's assertions that the legal opinions from external counsels it says were drawn up at the time of the Investment Decision and that allegedly confirmed the inapplicability of the Regulatory Requirements to Nord Stream 2[186] still have not been submitted for scrutiny by the Tribunal, despite the EU's requests in this regard in the document production phase in this arbitration. Rather than producing such allegedly existing opinions, the Claimant relies on intentionally vague post ex facto statements according to which it was considered "unlikely" at the time of the investment that the Regulatory Requirements would apply to Nord Stream 2.[187] Needless to say, such statements in no way establish the Claimant's wilful blindness at the time of the Investment Decision as either reasonable or justified. Moreover, even if the Claimant had decided to submit the unproduced legal opinions to the Tribunal's scrutiny (which it has not), the existence of self-serving opinions produced to justify a decision at the time again is not conclusive of the alleged reasonableness of the Claimant's expectations.

205. Furthermore, faced with the Gazprom [redacted] Prospectus, one may wonder why the Clamant decided to go ahead with its investment only to file an arbitration case [redacted] later complaining that allegedly "unforeseeable" regulatory risks in the form of the Regulatory Requirements had had a catastrophic impact on its investment. The answer may lie in the hopes the Claimant may have harboured that the EU institutions would not dare imposing these Requirements against a powerful investor like Gazprom, all the more so against the backdrop of the threat of arbitration proceedings. The ECT was not meant to reward investors for bullying public authorities, with a view to escaping the application to such investors of legitimate public policy rules of general application.

[185] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 521.
[186] See, for instance, Second witness statement of [redacted] paras. 21, 24-25.
[187] See First witness statement of [redacted], paras. 93 and 98; Second witness statement of [redacted], para. 33. In its Expert Report of 22 October 2021, paras. 24 and 26 Peter Roberts states that [redacted].

4 THERE WAS NO "DELIBERATE EXCLUSION" OF THE NS2 PIPELINE PROJECT FROM THE DEROGATION REGIME NOR ANY SPECIFIC TARGETING

4.1 Introduction

206. In Section IV of its Reply Memorial, the Claimant alleges that the Amending Directive targets and deliberately discriminates Nord Stream 2, seeking to rebut the European Union's explanations that this is not the case by claiming that this intention is "obvious".[188] The European Union notes that every argument the Claimant makes with respect to the alleged targeting of NSP2AG or discrimination of NSP2AG starts from the assumption that the Amending Directive could have no other intention than to obstruct Nord Stream 2. The Claimant thereby refuses to look at the full legal framework established through the Gas Directive, as amended, in an objective and coherent way.

207. The Claimant also pretends that it was legitimately entitled to assume that its pipeline could operate in the European Union in a regulatory vacuum. The Amending Directive has clarified the legal framework for gas transmission in the European Union, making clear that all pipelines transmitting natural gas in the European Union are under the EU gas legal framework, with possibilities for derogations and exemptions, as appropriate. Even if the construction of the Nord Stream 2 pipeline may be one of the elements that are part of the context of clarifying the legal framework of the Gas Directive, this does not mean that the legislative framework is "targeted" at NSP2AG, or would be discriminatory. The EU legal framework consists of rules and flexibilities and one cannot assess the impact of this framework on a particular project without considering this complete framework.

208. The Claimant would like the Tribunal to focus on the Claimant's narrow view of the legal framework, ignoring the different options that exist under that framework. Yet, in an apparent belief that it could operate a major pipeline in the territory of the European Union outside any legal framework, the Claimant focuses only on the Article 49a derogation – assuming it would obtain this without any conditions – intentionally denying the availability of other flexibilities under the gas directive. The European Union submits that it cannot be held responsible for NSP2AG's own choices, in particular NSP2AG's decision not to apply for an Article 36 exemption. Such exemption is fit for purpose and can be as favourable as an Article 49a derogation. The European Union also insists that

[188] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 124.

an objective assessment of the legal framework is required that does not start from assumptions.

209. In what follows, the European Union will explain, first (Section 4.2), that the Commission could not prejudice the decision by the German authorities regarding NSP2AG's application for an Article 49a derogation. Contrary to what the Claimant argues,[189] the application of the "completed" criterion in Article 49a to the facts of the NS2 pipeline was a matter for Germany. Second (Section 4.3), the European Union will demonstrate again that the Amending Directive is not discriminatory, neither in intention nor in effect, addressing the Claimant's suggestions to the contrary.[190] The Amending Directive does not have the aim to obstruct NSP2AG. It is a measure of general application and pursues perfectly legitimate policy objectives, clarifying the applicable legal framework. Third (Section 4.4), the European Union will rebut the Claimant's argument that the flexibility offered in Article 36 is not comparable to that under Article 49a.[191] The European Union will explain, for each point raised by the Claimant, the parallelism with Article 36. Both Article 36 and Article 49a form part of a coherent system of obligations and flexibilities under the Gas Directive. It was the Claimant's own deliberate choice not to apply for an Article 36 exemption or any other flexibility and bet everything on obtaining an unconditional Article 49a derogation.

4.2 The German authority has applied the "completed" criterion to the facts of the NSP2AG project

210. The Claimant first disputes that, in the context of Article 49a of the Amending Directive, Member States have discretion when assessing whether or not an infrastructure was "completed" before 23 May 2019.[192] The Claimant takes issue with the European Union's explanation that it could not prejudice the assessment by the German authority whether the NSP2AG pipeline project would be an infrastructure "completed before 23 May 2019".

211. What the Claimant in fact suggests, is that the Commission, in its pleadings before this Tribunal, should have pre-determined the assessment that the German authority has to make when examining the application by NSP2AG to obtain an Article 49a derogation. However, the European Union has consistently maintained[193] that the procedure under Article 49a defines that the Member State

[189] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, Section IV.1.
[190] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, Section IV.2.
[191] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, Section IV.3.
[192] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 125.
[193] See European Union Counter-Memorial on the Merits, 3 May 2021, paras. 192, 394-414.

where the first connection point of the transmission line between a Member State and a third country is located has the competence to decide to grant a derogation from certain obligations under the Gas Directive.

212. The Commission is no decision-maker in this procedure. The Commission therefore stressed that the competent authority of the Member State (in this case the German authority) had to decide whether the application of the "completed before 23 May 2019" criterion to the situation of NS2 pipeline meant it was eligible for a derogation. It was not for the Commission to apply this criterion to the concrete factual situation of NSP2AG. If the Commission were to do so, it would upset the balance of competences established by the Amending Directive: Member State authorities make the decision and apply the law to the facts. This is normal under a Directive, where Member States need to implement the Directive and apply it to particular cases. What is more, the Claimant's appeal against the decision by the German authority before the German Court means that the decision-making process in Germany has not reached its final point.

213. The Claimant points out that the Commission, as guardian of the Treaties, has a role of "policing Member States' compliance with EU law".[194] It is of course correct that the Commission may, if the circumstances merit this, bring an action against a Member State for wrong application of EU law. The Court of Justice of the European Union would then decide whether this is indeed the case. However, contrary to what the Claimant suggests,[195] as long as the interpretation and application of EU law by the Member State is not established, it would be entirely premature and inappropriate for the Commission to take any such action.

214. The Claimant's criticism that it is inconsistent that, on the one hand, the European Union would be able to interpret Article 36 while, on the other hand, would be unable to adopt a view on Article 49a is misplaced.[196] What the Claimant essentially wanted was that the Commission intervenes in a running procedure before a national competent authority that was processing a request for an Article 49a derogation. Irrespectively of whether an intervention against an alleged "wrong" decision of the independent German Regulator would be legally warranted, this would be inappropriate and legally questionable, since the procedure established in the Amending Directive gave the Member State authorities the role to decide on an application for an Article 49a derogation.

[194] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 132 (iii).
[195] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 133(iii).
[196] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 132.

4.3 The Amending Directive is not discriminatory, neither in intention nor in effect

215. The Claimant argues that the Amending Directive is discriminatory, based on its alleged intention and its practical effect.[197] The Claimant errs. There is no intention expressed in the legislation to "target" the NS2 pipeline project and neither does the structure of the Gas Directive support such argument. Moreover, the Amending Directive is not discriminatory in effect either. The Claimant cannot demonstrate that the Gas Directive, as amended, is such that the NS2 pipeline is the "only transmission infrastructure on which the Amending Directive has a practical impact".[198]

4.3.1 There is no aim in the legislation to obstruct the Nord Stream 2 Project

216. The Claimant argues that the Tribunal must find that the Amending Directive is "aimed at the obstruction of the Nord Stream 2 Project", or otherwise it would be "ignor[ing] the facts".[199] With "facts", the Claimant means selected documents that contain statements made about the Nord Stream 2 pipeline project.[200] These are personal statements of individuals in the margins of the legislative process.

217. To the contrary, it is an objective fact that the Amending Directive does not express the intention to "stop" or "obstruct" the NS2 pipeline project. It is legislation of general application whose application in any particular case will depend on a range of variables that is not predetermined by the legislation itself.[201] As explained in Section 2 above, the Amending Directive has the objective of clarifying the application of the legal framework of the Gas Directive, making express the European Union's policy position that the Gas Directive's rules apply to transmission pipelines connecting the European Union with third countries. This is a matter of public record. Indeed, it is clearly stated in recital (3) of the Amending Directive:

> This Directive seeks 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. 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. This will establish consistency of the legal framework within the Union while avoiding distortion of competition in the internal

[197] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 136.
[198] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 163.
[199] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 137.
[200] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 138-139.
[201] See Prof. Maduro's Second Expert Responsive Report, paras. 59-72.

> 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.

218. The Amending Directive thus sought to clarify a situation that was uncertain,[202] in order to ensure that the rules applicable to gas transmission lines connecting two or more Member States would also be applicable within the territory of the Union to gas transmission lines to and from third countries (as is the case for all other transmission pipelines in the Union territory). The Amending Directive clarified that a consistent legal framework existed, enhancing transparency and legal certainty. It should be entirely uncontroversial for a public authority such as the European Union to ensure consistent application of a basic framework for the operation of major infrastructure with a substantial impact on the EU internal market, to all areas within the EU territory, including the territorial sea of the EU Member States.[203]

219. The isolated statements that the Claimant keeps on citing[204] and that make up the majority of its argument do not undermine this. Indeed, this may explain the Claimant's multiple, repetitive letters on document production. Apparently, the Claimant is disappointed that the evidence that it believed would support its theories and allegations simply does not exist.

220. The Claimant argues that the references to the Nord Stream 2 pipeline project in the margins of the legislative process leading to the Amending Directive would show that the legislative process was "aimed at the obstruction of the Nord Stream 2 Project".[205] The Claimant suggests that the European Union would deny the factual context of the Amending Directive.

221. However, that a particular factual situation is part of the context in which a measure is adopted does not mean that the "intent" of the measure is to target a particular project. Contrary to what the Claimant suggests, the European Union does <u>not</u> put forward a "purely abstract approach"[206] in the assessment under the ECT.

[202] See also the statement by Dr. Borchard, cited by the Claimant in para. 138(i)(a) of the Reply ("this 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". (See **Exhibit C-92**, p. 3 (emphasis added).)
[203] See also European Union Counter-Memorial on the Merits of 3 May 2021, paras. 92-128.
[204] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 138-139.
[205] Claimant's Reply Memorial & Counter-memorial on Jurisdiction, 25 October 2021, para. 137.
[206] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 143.

222. The context of the Amending Directive was the legal uncertainty that existed with regard to legal framework applicable to transmission pipelines connecting third countries to the European Union. For most onshore gas interconnectors with third countries, the rules of the Gas Directive were already being applied in practice on the European Union side of the respective interconnection points with the domestic gas transmission system of the Member State in question,[207] which, as shown by the example of the Polish section of the Yamal pipeline (see Section 2.4 above), may be geographically far away from both the international border and a physical border connection point (such as a metering station). As explained, the uncertainty as to the application of the European Union's internal gas market rules to third-party import pipelines was due to the fact that according to Article 2(17) of the original Gas Directive, the term 'interconnector' was defined as *"a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States",* thus excluding transmission lines crossing an external border of the European Union (whether on land or on sea) for the sole purpose of connecting the transmission system of a Member State with that of a third country. This uncertainty was an issue for offshore import pipelines such as the Mediterranean pipelines or Nord Stream 1 but also for onshore import pipelines such as Yamal, i.e. the part of it that only connects the Polish and the Belarusian systems. That current and future pipelines transmitting gas in the European Union – be they within the European Union only, or connecting the European Union with third countries, onshore or offshore – should not operate in a legal vacuum is clear and should be undisputed.

223. The NS2 pipeline project – a project of vast scale and potential impact on the internal market that was in the making – was part of a legitimate impetus to the European Union to clarify the legal framework for transmission pipelines ensuring a consistent legal framework, enhancing transparency and legal certainty. But it did not target that project. The Amending Directive made clear that the usual rules of EU law would apply in the territory of the European Union, pursuing the legitimate objectives of avoiding distortion of competition in the internal energy market in the Union and negative impacts on the security of supply. These objectives are pursued through the Gas Directive, for all existing and future pipelines. There is no intent in the legislation to apply the Gas Directive in a particular manner to one or the other specific pipeline.

[207] European Union Counter-Memorial on the Merits of 3 May 2021, para. 95.

224. The European Union has successfully responded to arguments alleging an "anti-Gazprom bias" in its legislation in the past, notably in a prior WTO dispute concerning the European Union's Gas Directive. In the WTO Dispute DS476 – *EU – Third energy package*, the panel, after carefully examining the Russian Federation's arguments and evidence, unreservedly rejected Russia's allegation that the objective of the Gas Directive's unbundling measure, including its use of different unbundling models, was to reduce reliance on or to discriminate against Russian pipeline transport services or service suppliers.[208] This finding built on the approach adopted early on by the Appellate Body, when it recognized that panels could not "sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent".[209] Rather, what matters is the "design, structure, and expected operation"[210] of the measure. There is no reason why this would not apply to investment arbitration under the ECT. The European Union maintains that an objective examination of the design, structure and expected operation of the Gas Directive, as amended, must lead to the conclusion that the Gas Directive is not targeting NSP2AG.

225. Assessing a measure under international law indeed requires an objective examination of the legal framework at issue and cannot use as its starting-point any assumptions as to the alleged intent of that framework. In the present case, the NS2 pipeline project is of course part of the context in which the Gas Directive applies and was amended, as would be any pipeline project of such dimension and with such potential implications for the internal market for energy in the European Union. New gas pipelines of the dimension of Nord Stream 2 are major investments the planning and completion of which takes many years. Therefore, it is in no way unusual that at the time the Amending Directive was proposed, debated and adopted, Nord Stream 2 was the only offshore import pipeline under construction that at that specific point in time fell to be considered under the new rules. Otherwise the European Union would be prevented from adopting general legislation merely because of the fact that at a particular moment in time there is only one project concerned. In other words, it would have to wait and let the uncertainty continue until there are more projects. That cannot be the case. This does not preclude or eliminate the fact that the

[208] **Exhibit RLA-76**, Panel Report, *European Union and its Member States – Certain measures relating to the energy sector*, WT/DS476/R, 10 August 2018, footnote 883.
[209] **Exhibit RLA-258**, Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 27.
[210] **Exhibit RLA-297**, Appellate Body, *EC – Seal Products*, para. 5.95 and footnote 1019 .

framework was intended to, and will, apply to all potential pipeline projects going forward. In short, it is a framework of general application.

226. Given this, it cannot be concluded that the Gas Directive, as amended, has the intent to "target" NSP2AG or to "obstruct[] … the Nord Stream 2 Project".[211] The practical context in which an amendment is made does not make generally-applicable rules "targeted" at the situation that was part of that context. To the contrary, as the European Union has explained before, an examination of the full legal framework established by the Gas Directive – with its obligations and flexibilities – leads to the conclusion that the Amending Directive does not target or discriminate against NSP2AG nor does it have that effect. How NSP2AG complies with the legal framework and whether it makes use of the appropriate flexibilities under the Gas Directive of course depends on NSP2AG's own choices and behaviour.

4.3.2 The Claimant's focus on derogations for certain offshore pipelines ignores that other third country pipelines are subject to the Gas Directive

227. The Claimant describes five offshore pipelines and the decisions that the competent national regulatory authorities of the Member States have reached with respect to the application for an Article 49a derogation.[212] The Claimant believes it can conclude from this that "as predicted by the Claimant, the impact of the Amending Directive falls fully and exclusively upon Nord Stream 2".[213] The Claimant's conclusion is false and is based on a distorted representation of the facts.

228. First, there are notable differences between NSP2AG's pipeline project and the referenced offshore pipelines. As explained in Section 2, above, the NS2 pipeline is a pipeline that largely duplicates the capacity of Nord Stream 1. It significantly enhances the capacity for direct gas imports from Russia to Germany, potentially avoiding transit through Ukraine and Poland, thereby possibly increasing Gazprom's market power (which already has an export monopoly in the Russian Federation). This undertaking therefore raises significant potential competition concerns. Moreover, the NS2 pipeline is a new pipeline for which the consequences of its operation cannot be assessed with hindsight. Therefore the appropriate context for determining flexibilities are the Article 36 exemption, Article 9(6) measure or an IGA. In contrast, the other pipelines have operated for years if not decades, so their impact on competition and security of supply can be

[211] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 137.
[212] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 145-151.
[213] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 152.

easily established. None of the upstream gas suppliers from Morocco, Algeria and Libya has a market position vis-à-vis the European Union or any of its Member States indicating any risk for competition in the internal gas market, let alone close to Gazprom's market power. This also explains why the statement of reasons of the derogation decisions for these pipelines are rather short. With regard to Nord Stream 1, although it is also controlled by Gazprom, the impact of its operation on competition in the internal gas market and security of supply can also be established from the experience of its 10 years of operation and is subject to a fully reasoned decision by BNetzA.

229. Second, as the European Union has already explained in paragraphs 303-311 of its Counter-Memorial on the Merits, other import pipelines are subject to the gas directive without a derogation. For instance, EuRoPol GAZ s.a. was certified as transmission system operator of the Polish section of the Yamal pipeline by a decision of the Polish national regulatory authority of 17 November 2010 (i.e., long before the Amending Directive came into force) and this certification has applied in practice to the whole of the Polish section of the Yamal pipeline, including the stretch between the eastern-most connection point between Yamal and the domestic Polish transmission system and the Polish-Belarusian border (about half the overall length of the Polish Yamal section, see Section 2.4 above). The Amending Directive clarified the legal basis for this.

230. Third, even if NSP2AG could apply for a derogation – something on which the European Union takes no position, given that the German procedure needs to run its course – it has no "right" to a derogation, let alone to an unconditional one, contrary to what the Claimant is effectively presuming as part of its discrimination claim. Previous derogations are not a precedent because they concern very different pipelines. The NS 2 pipeline project is a new pipeline and an enormous one, which a priori may conceivably raise particular Security of Supply and competition concerns, issues that are to be assessed by Germany. At the present stage, given that such decisions have not yet been taken, NSP2AG's claims about the alleged impact of decisions on its undertaking are at the very least speculative and premature.

231. Fourth, the Article 49a derogation procedure has not yet reached its conclusion. Moreover, NSP2AG has not yet applied for an Article 36 exemption, compounding the uncertainty about the extent to which it will have to comply with the Gas Directive and under what conditions. Indeed, the Claimant could seek and benefits from other flexibilities as well, in particular under Article 9(6) of the Gas Directive (separation of control between public bodies), provided the conditions

are met (i.e., the Russian state as NSP2AG's ultimate owner is willing to meet these conditions). To the European Union's knowledge, no such application has been made.

4.3.3 The "completed" criterion is entirely appropriate

232. The Claimant argues that the use of the "completed" criterion violates the ECT[214] since it would be "chosen deliberately to target Nord Stream 2".[215]

233. This is incorrect. As explained by the European Union, the Amending Directive addresses any uncertainty that may have existed with regard to the specific EU rules applicable to gas transmission lines to and from third countries before the entry into force of the Amending Directive. Pipelines that are "completed before 23 May 2019", i.e. before the entry into force of the Amending Directive, can apply for an authorisation to derogate from certain obligations under the Gas Directive. The time limitation for access to a derogation reflects the intention of the European Parliament and the Council to ensure that the clarification of the rules through the Amending Directive applies effectively to all pipelines at a given point in time. By providing a time-limited derogation which may be subject to conditions, Member States are enabled to progressively adapt the regulatory framework on these pipelines, moving it closer to full application of the principles where appropriate.[216]

234. The Amending Directive had to set a time limit for gas transmission lines to request a derogation, precisely to reconcile the need for enabling transition for completed pipelines with the overall need to clarify that the Gas Directive applies to all pipelines functioning in the EU territory, regardless of their origin. The "completed" criterion is objective and appropriate since it enables an accurate assessment whether it is met. Indeed, in contrast to the criteria that the Claimant claims the co-legislators should have used, this criterion is clear and factually precise. The European Union has explained that the "final investment decision" criterion proposed by the Claimant is factually imprecise and national authorities would find it difficult to determine at what point in time the final decision is ultimately made.[217]

235. The "completed" criterion is also used to determine the eligibility for an exemption from certain obligations under Article 36 of the Gas Directive. As

[214] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 156.
[215] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 158.
[216] European Union Counter-Memorial on the Merits of 3 May 2021, paras. 267-268.
[217] European Union Counter-Memorial on the Merits of 3 May 2021, para. 274.

explained, under Article 36 of the Gas Directive, "major new gas infrastructure" may, upon request, be exempted, for a defined period of time, from certain provisions under the Gas Directive. "New infrastructure" is defined in Article 2(33) of the Directive as "an infrastructure not completed by 4 August 2003". Pipeline infrastructure projects that are thus not "completed by 4 August 2003" are eligible to apply for an Article 36 exemption.

236. The "completed" criterion is also used in Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union.[218] This Regulation has established a mechanism which enables Member States to cooperate and assist each other where a foreign direct investment in one Member State could affect security or public order in other Member States. In that situation, Member States can provide comments to the Member State in which such investment is planned or has been completed, irrespective of whether that Member State has a screening mechanism in place or such an investment is undergoing screening. Where the Commission considers that a foreign direct investment planned or completed in a Member State which is not undergoing screening in that Member State is likely to affect security or public order in more than one Member State, or has relevant information in relation to that foreign direct investment, it may issue an opinion. Member States may provide comments and the Commission may provide an opinion "no later than 15 months after the foreign direct investment has been completed".[219] The cooperation mechanism should not apply to "foreign direct investments completed before 10 April 2019".[220] Hence, because of its precision, also in this context a "completed" criterion is applied. The investment screening mechanism thus applies an approach that is consistent with the Amending Directive.

237. The Claimant repeats its reference to the NEL certification opinion, where, in the Claimant's view, the Commission allegedly 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".[221] However, in that opinion, the Commission did not establish any new criterion. The question at stake was whether the NEL pipeline could qualify for the alternative unbundling models. The Commission considered that this was not the case because the

[218] **Exhibit R-95**, Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, *OJ L* 79I, 21.3.2019, p. 1–14.
[219] *Ibid.*, Article 7(8).
[220] *Ibid.*, Article 7(10).
[221] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 160(i).

condition set out in Article 9(8) of the Gas Directive was not fulfilled: on 3 September 2009, the transmission system NEL did not belong to a vertically integrated undertaking. Indeed, the Commission noted that on 3 September 2009, the transmission system concerned, the NEL pipeline, did not exist yet and no final investment decision had been taken. Construction of the NEL started in March 2011 and the pipeline was foreseen to become fully operational in November 2013.[222]

238. All these elements pointed out that the NEL pipeline was a new pipeline that could not apply for the alternative unbundling models. However, this Commission opinion did not introduce the "final investment decision" as a criterion. It merely listed several factual elements, also including the fact that the NEL pipeline "will become fully operational in November 2013". The only criterion was that in the Gas Directive: on 3 September 2009, the transmission system must belong to a vertically integrated undertaking.

239. The Claimant also repeats its reference to Article 22(5) of the Electricity Regulation 2019/943.[223] The Claimant argues that the exception to the limits on making public payments to electricity generators by way of capacity mechanisms with high carbon emissions uses the signing of contracts as eligibility criterion rather than the completion of infrastructure.[224] Article 22 of the Electricity Regulation imposes limits on public payments for capacity mechanisms, amongst others on the basis of the carbon emissions. The Member States had to comply with these rules by 4 July 2019 "without prejudice to commitments or contracts concluded by 31 December 2019".

240. The fact that this legislation does not rely on a "completed" criterion is irrelevant. As already explained,[225] the use of "contracts concluded by 31 December 2019" is entirely appropriate in this context. Article 2(22) of the Electricity Regulation defines 'capacity mechanism' as "a temporary measure to ensure the achievement of the necessary level of resource adequacy by remunerating resources for their availability, excluding measures relating to ancillary services or congestion management". These measures are based on contracts between public authorities and generators. The existence of an agreement between the relevant public authority and the operators concerned thus determines the eligibility for payments in exchange for a clearly defined service. Such a service

[222] **Exhibit C-34**, European Commission Opinion, "Certification of the Operators
[223] **Exhibit CLA-156**, Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast), OJ L 158/54, 14 June 2019.
[224] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 160(ii).
[225] European Union Counter-Memorial on the Merits of 3 May 2021, para. 275.

can be provided by new or existing installations. The eligibility criterion used is thus adapted to the situation at hand. Moreover, its use in this context does not undermine the appropriateness of the "completed" criterion for an Article 49a derogation. As the European Union has explained, that criterion is clear and factually precise and therefore well-adapted to application by Member State authorities charged with deciding whether a transmission pipeline can benefit from a derogation.

241. Finally, the Claimant refers again to EU state aid law in the energy sector, arguing that the Commission uses in that context the "start of works" as criterion and that the same criterion should be used here.[226] The Commission's Guidelines on State aid for environmental protection and energy 2014-2020 provide conditions for the granting of state aid. These Guidelines specify that installations that began works before 1 January 2017 and had received a confirmation of the aid by the Member State before such date can be granted aid on the basis of the scheme in force at the time of confirmation.[227]

242. Again, the criterion used in that context is adapted to the circumstances: the start of works before 1 January 2017 and the related confirmation of the aid by the Member State before that date. The Member States will thus in that context already have taken a clear position with regard to the aid under the applicable rules at that time (before 1 January 2017). Again, this does not undermine the appropriateness of the "completed" criterion for an Article 49a derogation: when deciding whether a gas transmission pipeline can benefit from a derogation, Member States must have a clear and factually precise criterion. The completion of the pipeline is such criterion. The "start of works" is not such criterion. As explained,[228] pipeline construction could be a long and interrupted process. The start of works does not necessarily mean that a pipeline will come into being and does not say anything about the circumstances in the market when the pipeline will be completed and that may influence the conditions that a Member State authority may want to attach to the derogation. Contrary to what the Claimant suggests, the "concern" attached to the "start of works" criterion is thus not about the "length" of derogations but about its precision and usefulness in the context of an Article 49a derogation.

[226] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 160(iii).
[227] **Exhibit C-123**, European Commission Communication, "Guidelines on State aid for environmental protection and energy 2014-2020", OJ C200/1, footnote 66.
[228] European Union Counter-Memorial on the Merits of 3 May 2021, para. 276.

243. In summary, the alternative criteria proposed by the Claimant do not undermine the appropriateness of the criterion used for an Article 49a derogation in the Amending Directive. As demonstrated above, the European Union adopts a range of different criteria in its legislative practice, each of which is adapted to the particular circumstances of the law in question. The goal is to ensure that the criteria adopted are precise and appropriate. That is what occurred in the case of the Amending Directive in selecting a firm cut-off date for availability of the Article 49a derogation, based upon completion of a gas transmission line as of that date.

4.3.4 Article 49a does not "intentionally impose[] obstacles for Nord Stream 2"

244. The Claimant argues that Nord Stream 2 "is the only transmission infrastructure on which the Amending Directive will have a meaningful impact"[229] and that this "was intentional".[230]

245. To the contrary, the European Union has demonstrated based upon the text and context of the Amending Directive that the latter does not "target" Nord Stream 2. The Amending Directive addresses any uncertainty that may have existed with regard to the specific EU rules applicable to gas transmission lines to and from third countries before the entry into force of the Amending Directive. It is not NSP2AG-specific. Rather, it clarifies that all gas transmission lines in the European Union, be they intra-EU or supplying gas to and from third countries, are within the scope of the Gas Directive. It is perfectly legitimate for the European Union to seek to ensure consistent application of a basic framework for the operation of major infrastructure with a substantial impact on the internal market, to all areas within the territory of the EU Member States, including in the territorial sea. That a particular factual situation is part of the context in which a measure is adopted does not mean that the "intent" of the measure is to "target" a particular project.

246. Moreover, the Amending Directive not only clarifies the legal basis for application of the Gas Directive to NSP2AG, but also to a range of other existing pipelines. As the European Union demonstrated in its previous submissions,[231] the Amending Directive also clarifies the legal basis for application of Gas Directive rules to other existing and future onshore and offshore interconnectors with third countries (i.e., to the transmission line between the connection point with the

[229] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 163.
[230] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 164.
[231] European Union Counter-Memorial on the Merits of 3 May 2021, paras. 304-309.

domestic gas transmission system of the EU Member State in question and the international border with the third country, be it onshore or offshore): notably interconnectors between EU Member States and Contracting parties of the Energy Community; the Yamal pipeline between Belarus and Poland and the three interconnectors between Ukraine and Romania; interconnectors between Russia and the EU Member States Finland, Estonia and Latvia and between Turkey and EU Member States Bulgaria and Greece; interconnectors between the United Kingdom and the European Union. With respect to the latter, while it is true that they currently are governed by the more specific provisions of the TCA, it was by no means certain at the time of adoption of the Amending Directive that this would be the case (i.e., that the European Union and the United Kingdom would agree on a TCA in the first place and that the TCA concluded between them would include rules governing gas interconnectors). The European Union also notes that if the Russian Federation – the ultimate controlling shareholder of NSP2AG – was willing to enter into an agreement with it regarding the applicable regulatory framework of Nord Stream 2, this framework would take precedence over the Amending Directive for that pipeline as well. Moreover, the Gas Directive also applies to future interconnectors with third countries. In short, the Amending Directive is not NSP2AG-specific but rather is of general application.

247. In any event, if the Amending Directive is considered in the broader context of the Gas Directive, in particular alongside Article 36 of that Directive, it is again obvious that the "completed" criterion in the Amending Directive does not "target" NSP2AG. Indeed, other flexibilities are available in a coherent system. It is not because the Claimant's particular circumstances mean a particular range of flexibility options is open to it under the rules, that NSP2AG is "targeted". Rather, this is the consequence of the deliberate choice of the Claimant and its shareholders Gazprom and the Russian Federation to make no attempt to avail themselves of the full range of flexibilities available under the regime, including requesting an exemption under Article 36 of the Gas Directive or complying with requirements whereby two entities owned by the same State may be considered as "ownership unbundled". One has to consider the entire system established under the Gas Directive with its obligations and flexibilities considered as a whole, and the specific decisions the Claimant itself and its controlling entities have taken faced with such options, to determine the ultimate "impact" of the measure on NSP2AG.

4.4 An Article 36 exemption is a suitable flexibility, comparable to an Article 49a derogation

248. Faced with the reality that it does indeed have access to an exemption regime under the Amending Directive as adopted, the Claimant asserts that "an Article 36 exemption is not an alternative to an Article 49a derogation" and adds that an Article 36 exemption "certainly is not suitable for a pipeline in the situation of Nord Stream 2".[232]

249. The European Union disagrees. By categorically refusing to apply for an Article 36 exemption (or indeed to consider relying on other flexibilities available under the Gas Directive) and betting everything on obtaining an unconditional Article 49a derogation, the Claimant has itself generated the circumstances for which it now seeks to hold the European Union responsible. The Claimant's dog-in-the-manger approach to the Amending Directive provides no foundation for any legitimate claim against the European Union under the ECT or at all.

4.4.1 Article 49a and Article 36 form part of a coherent system of obligations and flexibilities under the Gas Directive

250. The Claimant first argues in defence of its position that Article 36 exemptions and Article 49a derogations are "intrinsically different as they address very different situations".[233]

251. It is correct that Article 36 exemptions and Article 49a derogations address different situations: they each have their own rationale and scope of application. But they together are part of a coherent regime for applying Gas Directive disciplines for all gas interconnectors, both between EU Member States and between EU Member States and third countries, where conditions so warrant. There is no "gap" between those two sources of potential regulatory flexibility.

252. Article 49a derogations are available for all "gas transmission lines between a Member State and a third country completed before 23 May 2019". Article 36 exemptions are available for "major new gas infrastructure, i.e. interconnectors, LNG and storage facilities". "New infrastructure" is defined as "an infrastructure not completed by 4 August 2003".[234] The definition of Article 2(17) of "interconnector" as amended by the Amending Directive reads: "a transmission line which crosses or spans a border between Member States for the purpose of connecting the national transmission system of those Member States or a transmission line between a Member State and a third country up to the territory

[232] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 171.
[233] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 172.
[234] Article 2(33) of the Gas Directive.

of the Member States or the territorial sea of that Member State". Hence, a third country interconnector that cannot apply for an Article 49a derogation – because it is an interconnector that was not "completed before 23 May 2019" – can apply for an Article 36 exemption as "major new gas infrastructure".

253. The Claimant alleges that, while an Article 49a derogation is "to protect the interests of investors and owners of pipelines completed before the entry into force of the Amending Directive",[235] an Article 36 exemption is "completely unrelated to the protection of investors from a change in law" and instead seeks to incentivise investment in major new infrastructure.[236]

254. The Claimant's characterisation of the regime does nothing to undermine the coherence of the system established by Article 49a and Article 36. The two indeed apply to different situations, without leaving any "gap" between them. A third country interconnector that would not qualify for an Article 49a derogation can apply for an Article 36 exemption. A situation like that of NSP2AG would be eligible for applying for an Article 36 exemption. It is an interconnector that was "not completed by August 2003". The Claimant itself considers (otherwise it would not have brought this dispute challenging the application of the Gas Directive rules) that the investment would not have taken place without the exemption. This assessment would need to be made upon a concrete application. In the circumstances, it is striking that the Claimant itself has chosen not to apply for an Article 36 exemption.

255. The Claimant argues that the European Union creates 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"[237] and disagrees with this, saying it is a misrepresentation.[238]

256. In the first place, this does not fully reflect the European Union's position: the European Union considers that also other flexibilities under the Gas Directive must be considered to examine the impact of the Amending Directive. Regardless, the European Union indeed strongly disagrees with an analysis that merely considers the scope of Article 49a. That a flexibility under a specific provision may not be available to certain pipelines, according to an objective criterion such as completion by a certain date, does not equate to

[235] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 174.
[236] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 173.
[237] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 176.
[238] Claimant's Reply Memorial & Counter-memorial on Jurisdiction, 25 October 2021, para. 177.

"discrimination" contrary to the ECT. It is a basic principle of international law that in assessing the legality of actions of a State in light of its international obligations, such actions must be considered as a whole, and not in isolation from each other. An objective assessment of the European Union's decision to clarify the scope of rules of general application in respect of the sale of a key energy commodity cannot limit itself to an examination of one individual provision of the Gas Directive in isolation from the other flexibilities that exist to determine the impact of a measure on a particular interconnector.

257. The Claimant also posits that Article 36 is a "systemic part of the regulatory regime created by the Gas Directive", while Article 49a "is merely a transitional provision".[239] Again, this is not relevant for determining the eligibility of NSP2AG for flexibilities under the Gas Directive. What matters is not the "transitional" nature of the flexibility provided by Article 49a but that the Gas Directive provides flexibility even for infrastructure not falling under that transitional provision, inter alia through Article 36. The Claimant itself explains the similarities between Article 36 and 49a, noting that Article 36 "allows the relaxation of these [Gas Directive's] requirements for certain types of major infrastructure"[240] and Article 49a "is intended to reduce the impact of a regulatory regime".[241] That Article 49a is a "transitional provision" with "no ongoing role"[242], as the Claimant states, is of course explained by the fact that Article 49a derogations are meant for pipelines completed by 23 May 2019, while Article 36 exemptions are for major new gas infrastructure.

258. Contrary to what the Claimant suggests,[243] the European Union did not argue that "not completed by 23 May 2019" would be "the cut-off date that the Gas Directive uses for Article 36". The European Union simply explained that pipelines that are not completed by 23 May 2019 may not apply for an Article 49a derogation, but that such pipelines may instead apply for an Article 36 exemption. The temporal scope criterion for Article 36 exemptions is indeed all "major new infrastructure", i.e. "an infrastructure not completed by 4 August 2003".[244] Interconnectors that are not yet completed on 23 May 2019, including that of the Claimant, may fall into this category.

[239] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 177.
[240] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 177 (i).
[241] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 177 (ii).
[242] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 177.
[243] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 179.
[244] Article 2(33) of the Gas Directive.

259. The Claimant also argues that the cut-off date for Article 36 (not competed by 4 August 2003) cannot be the only element that determines the scope of Article 36 and that in order to benefit from an exemption under that Article, infrastructure also has to be "new". This states the obvious but does of course not mean that the Claimant was not able to fulfil the requirements for an Article 36 exemption; the competent national authority would have to determine what the condition of the infrastructure being "new" entails in the case of an investment already under way but not yet completed at the time the Amending Directive came into force on 23 May 2019.

260. In the Claimant's view, "Medgaz, Greenstream and Nord Stream 1" allegedly did not "need" an Article 49a derogation because these pipelines were "not completed by 4 August 2003" and could apply for an Article 36 exemption.[245] The Claimant's argument is irrelevant to the assessment of whether NSP2AG itself may apply for flexibilities that reduce the impact of the regulatory regime under the Gas Directive. The European Union's position is that NSP2AG can, in order to "reduce the impact" of the Gas Directive, apply for an Article 36 exemption, just like interconnectors already completed by 23 May 2019 can apply for an Article 49a derogation to "reduce the impact". The language in Article 36 to the effect that, when deciding whether to grant an Article 36 exemption, the national authority will assess whether the level of risk attached to the investment is such that the investment would not take place unless an exemption was granted,[246] precisely shows why an Article 36 exemption procedure would be the logical option for NSP2AG: the Claimant argues that its investment project would not be viable without a relaxation of the rules under the Gas Directive. Contrary to what the Claimant argues, there is thus a "distinction between the[] five pipelines [Medgaz, Greenstream, Nord Stream 1, Transmed and MEG] and Nord Stream 2".[247] The five mentioned pipelines had already operated for some time during which there was uncertainty as to whether they were subject to the Gas Directive. Hence, they had more reasons to invoke legitimate expectations than the Claimant, who took its investment decisions at a time when the discussion about the applicable legal regime for offshore import pipelines was already well engaged.

[245] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 180.
[246] Article 36(1)(b) of the Gas Directive.
[247] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 181.

261. In sum, contrary to the Claimant's allegations, there is indeed a "logical link"[248] between Article 49a and Article 36. In addition to other flexibilities in the Gas Directive, they form part of a coherent system of obligations and flexibilities under the Directive. Pipelines that are completed by 23 May 2019 may apply for an Article 49a derogation, whereas major new infrastructure may apply for an Article 36 exemption. The availability of the latter exemption is fatal to the Claimant's plea that it has been the subject of "discrimination", simply because of the place where it falls within an overall legislative and regulatory scheme of general application, and put in place for obviously sound and legitimate public policy reasons.

4.4.2 An Article 36 exemption can be as favourable as an Article 49a derogation

262. Recognizing in effect that the Article 36 exemption regime is indeed available to it, the Claimant goes on to question whether such an exemption can be as favourable as an Article 49a derogation, "particularly so in the case of the Claimant".[249] In doing so, the Claimant wrongly presents Article 49a derogations as if they necessarily are unconditional and would in all events be granted. The Claimant also presumes the outcome of an application for an Article 36 exemption, despite that no assessment under Article 36 has been made in its case by the competent national authorities, as a consequence of NSP2AG's own decision not to apply for an Article 36 exemption.

263. As a preliminary matter, the European Union fails to understand why an exemption under Article 36 could only be a viable option for the Claimant if it is "as favourable" as an Article 49a derogation. The only criterion relevant for the Claimant in the context of the current arbitration should be whether an exemption would help to avoid the supposedly "catastrophic" impact of the Amending Directive on its business. Furthermore, given the objective basis for the cut-off date for derogations under Article 49a (as described in Section 4.3.3 above), the Claimant cannot seriously base its pretention that the Amending Directive had "targeted" it merely by stating that it could only apply for an exemption which supposedly would be slightly "less favourable" than a derogation for which it does not qualify.

264. In any event, an Article 36 exemption holds out the prospect of being just as favourable as an Article 49a derogation. The essence of Article 36 exemptions

[248] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 182.
[249] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 183.

and of Article 49a derogations is the same: they provide temporary flexibilities with regard to the obligations that apply under the Gas Directive, so as to facilitate the economic conditions for investments, while at the same time safeguarding the functioning of the internal market for gas and competition in this market and guaranteeing the security of supply in the EU gas market.[250]

265. The Claimant first suggests that Article 49a derogations are renewable and therefore have the ability of being extended indefinitely, while Article 36 exemptions are not.[251] However, Article 49a (1), second subparagraph provides explicitly that "the derogation shall be limited in time up to 20 years based on objective justification". There is thus a maximum time limit of 20 years for such a derogation. Thereafter, it is only renewable "if justified". In any event, authorities have the discretion to make the original derogation subject to conditions which overall contribute to ensuring that a derogation will not be detrimental to competition on or to the effective functioning of the internal market in natural gas, or to security of supply in the Union.[252]

266. Article 36 exemptions are similarly established only for a defined period of time.[253] When deciding to grant an exemption, national authorities must, as in the case of a proposed derogation, give consideration, "on a case-by-case basis, to the need to impose conditions regarding the duration of the exemption".[254] When deciding on those conditions, account shall, in particular, be taken of the additional capacity to be built or the modification of existing capacity, the time horizon of the project and national circumstances. The decision must explain the reasons for the time period.[255] In any event, when determining the period for which an exemption is granted, the regulatory authority will take into account the time needed to recoup the investment. Thus, even if NSP2AG were only eligible to be granted an exemption for a definite period of time, such an exemption would take the cost recovery of the new infrastructure into account.[256] Past

[250] European Union Counter-Memorial on the Merits of 3 May 2021, para. 290.
[251] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 183(i)(a).
[252] Article 49a (1) of the Amending Directive.
[253] Article 36 (1) of the Gas Directive.
[254] Article 36 (6), second subparagraph of the Gas Directive.
[255] Article 36 (8) (c), second subparagraph of the Gas Directive.
See **Exhibit R-65**, Commission staff working document on Article 22 of Directive 2003/55/EC concerning common rules for the internal market in natural gas and Article 7 of Regulation (EC) No 1228/2003 on conditions for access to the network for cross-border exchanges in electricity SEC (2009) 62 final. As regards the duration of an exemption, the Guidelines specify that, the following should be taken into consideration:

a. throughput contracts for terminals, duration of underlying transportation contracts for pipelines and cables, or upstream and downstream supply contracts, or both;

exemption practice shows that exemptions are often granted for more than 20 years[257] and can be renewed.

267. The Claimant also argues[258] that, unlike Article 36 exemptions, Article 49a derogations allow for derogation from the certification requirement in Articles 10 and 11 of the Gas Directive, in particular with regard to the assessment of the risk to security of energy supply that is made for transmission system operators and owners that are controlled by a person or persons from a third country.[259] However, it is false to pretend that no security of supply assessment would be made by national authorities when deciding whether or not to grant a derogation under Article 49a. Article 49a (1) in fact explicitly provides that the derogation must not be "detrimental to competition on or the effective functioning of the internal market in natural gas, **or to security of supply in the Union**".[260] Pipelines applying for either a derogation or an exemption cannot escape such assessment. Indeed, the derogation decision by the German authorities with regard to Nord Stream 1[261] include security of supply assessments. In any event, the Claimant has not brought a claim that the provisions of Article 11 of the Gas Directive would themselves violate the ECT.

268. Further, the Claimant argues it is "practically impossible" for Nord Stream 2 to obtain an Article 36 exemption that is as favourable as an Article 49a derogation.[262] The Claimant considers that the involvement of the European Commission in the Article 36 procedure means that its application for an Article 36 exemption will be refused. In this regard, the Claimant refers to excerpts from a Commission press release from June 2017 and a Commission response to a parliamentary question from September 2018 that express concerns with regard to the contribution of the NS2 pipeline to the Energy Union objectives of energy security and diversification of suppliers.[263]

269. The European Union strongly rejects the Claimant's speculation that the Commission would for reasons of political opposition against the Nord Stream 2

b. the level of risk, notably, the duration of the exemption does not have to correspond to the full length of the amortisation period. The exemption duration should be equal to or less than the expected period for cost recovery of the new infrastructure.

[257] **Exhibit R – 197**, Table with Duration of Exemptions for Gas Pipeline Infrastructure.
[258] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 183(i)(b).
[259] Article 11(3)(b) of the Gas Directive.
[260] Emphasis added.
[261] **Exhibit CLA-204**, Bundesnetzagentur Decision concerning an application for derogation from regulation by Nord Stream AG, BK7-19-108, 20 May 2020, in particular Sections 2.5.1 and 2.6.1.
[262] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 183(ii).
[263] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 183(ii)(a), footnotes 270 and 271, referring to **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 and **Exhibit C-91**, European Commission Response to parliamentary question E-004084/2018, 24 September 2018.

project apply any other than the legal criteria set out in Article 36 when giving its opinion on a possible national decision granting an exemption to this project. In fact, while the Commission has indeed stated that it did not believe Nord Stream 2 would contribute to the Energy Union objectives, it has also always made clear that it would not legally oppose the project provided it complies with the same rules as all other gas infrastructure projects in the European Union.[264] The proposal of the Amending Directive was precisely meant to create a level playing field for offshore just as for onshore import pipelines, by ensuring on the one hand that they, too, are subject to the general rules of unbundling, tariff regulation and third-party access, while on the other hand clarifying (through including import pipelines from third countries in the definition of "interconnector") that they are likewise eligible for exemptions under Article 36.

270. That being said, it is hardly surprising that a project of the magnitude and likely impact of NSP2AG should give rise to close attention and potential concerns from the perspective of Energy Union objectives of fair competition, energy security and diversification of supply. As explained, competition and security of supply assessments figure in the procedures for both Article 36 exemptions and Article 49a derogations. It is precisely to remedy such concerns that conditions may be attached to exemptions and to derogations, if indeed they are granted at all, which is not guaranteed. How these concerns are assessed and addressed in any particular case will depend on the facts at hand and provided for in the procedure before the authorities. This does not mean that NSP2AG would necessarily be outright refused an Article 36 exemption, while being guaranteed an "unconditional" Article 49a derogation from the competent national authority. In reality, a similar security of supply assessment has to be done under Article 49a as under Article 36.

271. The involvement per se of the Commission is also no basis for suggesting the Article 36 regime is necessarily less favourable than that available under Article 49a: in fact, while the Commission can render a decision in the context of an Article 36 exemption procedure, the Commission is also notified by Member States of derogation decisions under Article 49a[265] and can potentially bring an infringement case against a Member State for failure to comply with EU law as a result of decisions taken pursuant to the implementing legislation relating to the latter article.

[264] See **Exhibit R-147**, Speech by Vice-President Maroš Šefčovič on "Nord Stream II – Energy Union at the crossroads", 6 April 2016.
[265] Article 49a (3) of the Amending Directive.

272. In any event, the fact that the procedure under Article 36 envisages input by the Commission is perfectly justified. For completed pipelines, the impact of these on the functioning of the internal market, competition and security of supply is easier to assess. After all, these pipelines are already in operation and their functioning can be observed in the market. Member States can thus quickly assess the facts to come to a decision on the availability of an Article 49a derogation and on which conditions to be attached to such decision, and the Commission is notified of this. A quick assessment is of essence in case of completed pipelines that already are operational. Otherwise, there is a risk of disrupting unnecessarily the supply through those pipelines, thereby undermining security of supply and competition. For new infrastructure, such assessment is forward-looking and seeks to predict the future impact. That explains the particular features of the Article 36 procedure. However, it cannot be assumed that the outcome and conditions under the Article 36 exemption procedure would necessarily be less favourable than under the Article 49a derogation procedure.

273. The Claimant also repeats its reference to the certification procedure under Article 11 of the Gas Directive that would apply in case of an Article 36 exemption, arguing that this security of supply assessment under Article 11 is still required in case of an Article 36 exemption.[266] Yet, as already explained, the risks to security of supply are also assessed under Article 49a. It is incorrect to pretend that these concerns play no role and are not assessed under that derogation procedure. There is no reason why these concerns would lead to a negative outcome under the Article 36 procedure in combination with the Article 11 procedure, while they would still result in a positive outcome under the Article 49a derogation procedure. Moreover, under both procedures these concerns may be addressed by means of conditions. As explained, even if the Claimant could apply for a derogation, it has no right to a derogation, let alone an unconditional derogation.

274. In sum, the Claimant seeks to find distinctions between Article 36 and Article 49a that have, in the end, no practical relevance, certainly not to such an extent that they would justify the Claimant seeking an Article 49a derogation while refusing to apply for an Article 36 exemption. The European Union further summarises this in the following table, which corrects the Claimant's own erroneous and selective comparative table.[267]

[266] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 183(ii)(b).
[267] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 184.

	Article 36 exemption	**Article 49a derogation**
Type of infrastructure	"major new infrastructure": i.e. interconnectors, LNG and storage facilities not completed by 4 August 2003. This includes new infrastructure that is not yet completed on 23 May 2019 (the date of entry into force of the Amending Directive).	Gas transmission lines between a Member State and a third country – both onshore and offshore – completed before 23 May 2019.
Key conditions	The Member State may provide an exemption provided that: a) the investment must improve security of supply and boost competition in the gas market; b) the investment could not go ahead without the exemption due to the level of risk; c) the infrastructure must be owned by a legally separate firm from the TSO in whose system it will operate; d) users of the infrastructure must pay for access; e) the exemption does not harm the functioning of the EU's internal gas market or the transmission system to which the infrastructure is linked. Forward-looking assessment seeking to predict future impacts.	Member State may decide to grant a derogation for objective reasons such as: a) to enable the recovery of the investment made or b) for reasons of security of supply, provided that the derogation would not be detrimental c) to competition on or the effective functioning of the internal market in natural gas, or d) to security of supply in the Union Assessment of the impact of completed pipelines that are already operating in the EU internal market
Temporal scope	For a defined period of time, which is based on a case-by-case assessment of the need to impose conditions regarding the duration of the exemption. That period of time is often longer than 20 years. The duration must be justified and shall take into account the additional capacity to be built or the modification of	Limited in time up to 20 years based on objective justification. Only renewable if justified and decision may be subject to conditions.

	existing capacity, the time horizon of the project and national circumstances.	
Decision making	Member State regulatory authorities decide. Within a period of two months from the day following the receipt of a notification, the Commission may take a decision requiring the regulatory authority to amend or withdraw the decision to grant an exemption.	Member State authorities decide. Commission is notified of the decision and Commission may make use of its powers as guardian of the Treaties (notably infringement procedure).
Scope	Articles 9, 32, 33 and 34 and Article 41(6), (8) and (10): Ownership unbundling Third party access Tariff regulation	Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10): Ownership unbundling Third party access Tariff regulation Certification – yet, the risks of the pipeline project for the security of gas supply in the European Union are still assessed as one of the conditions for granting a derogation.

4.4.3 The OPAL Decision demonstrates that the start of works does not prevent an application for an Article 36 exemption

275. The Claimant notes that one condition of an Article 36 exemption is that the "investment would not take place unless an exemption was granted". In the Claimant's view, this allegedly means that Article 36 concerns pipeline projects that are still in the "*planning phase"*[268] and that the "final investment decision" would represent the "point of no return".[269]

276. The Claimant in so arguing imposes conditions in Article 36 that are nowhere set out in the text of that provision.[270] To the contrary, exemption practice under Article 36 confirms that the grant of any request for exemption must be assessed on a case-by-case basis, to determine whether the conditions for an Article 36 exemption are in any given case fulfilled. The OPAL exemption decision, obtained by the owner of Nord Stream 2, Gazprom, notably confirms that making

[268] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 186.
[269] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 187.
[270] See also Professor Maduro's Second Expert Responsive Report, paras. 44-55.

"significant financial commitments"[271] – such as purchasing pipes for the construction[272] – does not disqualify a project's eligibility for an exemption.

277. What is more, this OPAL decision stressed also that the "question whether the investment decision depends on the exemption being granted is a mens rea element, which must be present at the time the decision is made and demonstrated by the party applying for exemption" and that it did not matter that, eventually, "an investor who has been denied an exemption decides to invest anyway".[273]

278. In this light, it can be noted that the Claimant has argued that the application of the Gas Directive would be "catastrophic" for its investment[274] since it allegedly assumed that the pipeline would operate without the general public policy disciplines of the Gas Directive being applicable in its own case. The Claimant thereby itself suggests that the investment would not have taken place (in its current form or at all) unless the application of the Gas Directive were relaxed through an exemption. The Claimant's contention describes precisely the condition in Article 36(1)(b), namely that "the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted".

279. Despite this, the European Union notes that the Claimant itself has apparently decided not to apply for an Article 36 exemption and instead to assume either that rules of general application would not apply in its case, or that if they applied it would necessarily have access to and would be granted an Article 49a derogation. Hence, the Claimant's view that "an Article 36 exemption would no longer be available" because Nord Stream "is already completed"[275] is nothing more than that, the Claimant's untested view, flowing from the Claimant's own decisions. This does not confirm in any way that the legal framework in the Gas Directive, as amended by the Amending Directive, is discriminatory.

280. In such an Article 36 exemption procedure, the specific situation of NSP2AG would have to be taken into account when assessing whether or not the investment would have been undertaken absent an exemption, and in any event whether the exemption should be granted and under what conditions, in light of potential concerns about abuse of dominant position and security of supply. While

[271] **Exhibit R-67**, Bundesnetzagentur Exemption Decision with respect to OPAL, 25 February 2009, p. 62.
[272] See **Exhibit R-201**, Concord Power Presentation: Slide 7 – Level of Risk – Investments already made by Wingas.
[273] **Exhibit R-67**, Bundesnetzagentur Exemption Decision with respect to OPAL, 25 February 2009, p. 64.
[274] See Section VII of the Claimant's Memorial, 3 July 2020.
[275] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 194.

NSP2AG may not have taken the investment decision under the assumption it would be granted an exemption, it arguably did so under the (incorrect and unfounded) assumption that it could operate its massive pipeline in a legal limbo – or in the alternative necessarily would obtain an unconditional Article 49a derogation, which for all practical purposes comes down to the same. Therefore, from the Claimant's point of view it can be concluded that, had NSP2AG considered the investment would be subject to the Gas Directive, it would not have undertaken it unless an exemption was granted.

5 THE AMENDING DIRECTIVE UNDERWENT A PROPER LEGISLATIVE PROCESS

5.1 Introduction

281. The Claimant asserts that the legislative process for the adoption of the Amending Directive was hasty and followed an improper legislative procedure.[276]

282. These allegations are unfounded. The Amending Directive was adopted in accordance with the rules and procedures applicable to acts of its type and, during the 18 months that intervened between the formal presentation of the proposal and its adoption, there was ample opportunity for an in-depth discussion by stakeholders and political actors.[277]

283. The Claimant contends that the EU "failed to carry out the consultation, ex-post evaluation and impact assessment which are normally expected in relation to a substantive legislative initiative".[278] However, the Claimant misunderstands the EU legislative process and wilfully misrepresents the circumstances in which such consultations, evaluations or assessments are required or "normally expected". Moreover, in arguing that formal consultation, ex-post evaluation and impact assessment are "normally" expected, the Claimant implicitly admits that these are not mandatory steps of the legislative process. The limited scope of the Amending Directive is readily apparent when compared to the far-reaching provisions of the Gas Directive which were already in force and whose application was merely clarified.

5.2 An impact assessment was not required

284. The Better Regulation Toolbox of 2017 provides for guidelines concerning when it is recommended to carry out an impact assessment. It lists the types of

[276] Claimant's Memorial, 3 July 2020, Section VI.10 and Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, *passim* Section IV.4. and paras. 418-419, 430ii, 466, 470, 550iii, and 603ii.
[277] The European Union refers to Section 2.5 of its Counter-Memorial on the Merits, 3 May 2021, The Amending Directive Underwent a Proper Legislative Process.
[278] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 195.

initiatives for which the Commission *should evaluate the need of an impact assessment*.[279] The 'revision of existing legal acts' is part of this list: it was therefore recommended that the Commission *evaluate* the need for an impact assessment.

285. In full compliance with the Better Regulation Toolbox 2017,[280] the Commission indeed evaluated the need to carry out an impact assessment and included such evaluation in the Explanatory Memorandum[281] and in the Staff Working Document[282] accompanying the Proposal.[283] The Commission concluded that there was no need for an impact assessment.

286. The Better Regulation Toolbox 2017 also provides that:

> [A]n IA should be carried out only when it is useful. An assessment of whether an IA is needed should therefore be done on a case-by-case basis […][284]

287. Nowhere is the impact assessment indicated as a mandatory step: it is instead recommended to carry it out "only when it is useful".[285]

288. The Better Regulation Toolbox 2017 also provides that an impact assessment is not necessary "when there is little or no choice available for the Commission".[286]

289. In the present case, the *raison d'être* of the Amending Directive was to fill a legal vacuum[287] and clarify a point left ambiguous by the Gas Directive.

290. As a comparison, an impact assessment and a public consultation had been conducted in the preparation of the proposal for the Gas Directive, with the aim "to assess policy options related to the completion of the internal gas and electricity market."[288]

291. In the Gas Directive, the public consultation received 339 replies to questionnaires by organisations having their roots in 19 countries. In addition, 73 replies by organisations not connected to a particular country were received. Interviews were conducted with 56 additional stakeholders, mainly companies

[279] **Exhibit R-97**, page 49.
[280] **Exhibit R-97**, page 49.
[281] **Exhibit C-88**, Explanatory Memorandum.
[282] **Exhibit R-64**, Commission Staff Working Document of 8 November 2017, Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas {COM(2017) 660 final}.
[283] See Section 2.5.4 An impact assessment was not required, European Union Counter-Memorial on the Merits, 3 May 2021.
[284] **Exhibit R-97**, Better Regulation Toolbox 2017, p. 48.
[285] **Exhibit R-97**, Better Regulation Toolbox 2017, p. 48.
[286] **Exhibit R-97**, Better Regulation Toolbox 2017, p. 48.
[287] See Section 4.3.1 There is no aim in the legislation to obstruct the Nord Stream 2 Project, in this Rejoinder.
[288] **Exhibit R-148**, Proposal 2007/0196 (COD) leading to the adoption of the Gas Directive.

which could be affected by the unbundling of their assets or the application of increased transparency requirements.[289]

292. The circumstances were far different in the Proposal that led to the adoption of the Amending Directive. In this case, the purpose of the amendment was to clarify one aspect of the Gas Directive, bringing the notion of interconnector in line with EU competition law, international law, as well as the Commission practice on the applicability of EU law to pipelines to and from third countries as reflected in several IGAs.[290] An impact assessment and a public consultation would have been redundant, unnecessary, and futile.[291]

293. An impact assessment was not needed, considering the limited scope of the Proposal and the technical nature of the amendments. The Proposal for the Amending Directive, which aimed at clarifying an existing legal act, did not require the carrying out of an impact assessment, and the Explanatory Memorandum explained the reasons why this was not necessary.[292] The Proposal reiterated the same principles already established in the 2012 IGA Decision[293] and the 2017 IGA Decision,[294] recalled the Commission's approach as regards the applicability of EU law to pipelines to and from third countries as reflected in several IGAs,[295] provided for requirements comparable to those already imposed by EU competition law,[296] and applied rules of international law regarding State's jurisdiction over territorial waters.[297]

294. In its Counter-Memorial, the European Union provided data showing the absence of an impact assessment in 86% of amending directives and amending regulations adopted from 1 January 2019 to 18 February 2021.[298] In fact, out of

[289] **Exhibit R-148**, Proposal 2007/0196 (COD) leading to the adoption of the Gas Directive.
[290] European Union Counter-Memorial on the Merits, 3 May 2021, para. 348.
[291] See Section 2.5.3. The Explanatory Memorandum illustrates the rationale of the Amending Directive, in the European Union Counter-Memorial on the Merits, 3 May 2021.
[292] See Section 2.5.4. An impact assessment was not required, in the European Union Counter-Memorial on the Merits, 3 May 2021.
[293] **Exhibit R-101**, Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13–17 (the 2012 IGA Decision). The 2012 IGA Decision was repealed by the 2017 IGA Decision.
[294] **Exhibit R-102**, Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9 (the 2017 IGA Decision). The 2017 IGA Decision repealed the 2012 IGA Decision.
[295] European Union Counter-Memorial on the Merits, 3 May 2021, para. 348
[296] See Section 3.3 EU Competition law could have resulted in the Regulatory Requirements being enforced against the Claimant, in this Rejoinder.
[297] See Section 3.2.1 Signalling from the original Gas Directive and from Member States' territorial jurisdiction, in this Rejoinder.
[298] **Exhibit R-99**, Adoption procedures.

65 amending legislative acts adopted during this period, an impact assessment was performed in only nine of them, amounting to 13,8% of the total.[299]

295. The data submitted makes a distinction between the identified amending legislative acts for which an impact assessment was conducted (9 out of 65, representing 13,8% of the total) and those for which an impact assessment was not conducted (86% of the total).[300]

296. The reason why the data presented covers the period 1 January 2019-18 February 2021 is to ensure that such data is both representative and recent. On the one hand, the period chosen in Exhibit R-99 is slightly longer than two years. On the other hand, it is also a period close to the date when the European Union submitted its Counter-Memorial, i.e. on 3 May 2021.

297. In an attempt to minimize the data, the Claimant asserts that 35 out of 65 EU Amending Directives or Amending Regulations adopted without an impact assessment are related to COVID and Brexit and "have not been subject to an impact assessment due to the urgency of the measure or the exceptional circumstances".[301]

298. The Claimant apparently fails to note that, in fact, 30 out of 65 EU legislative files covered by that data, amounting to the 46% of the total, do not concern either Brexit or COVID. It follows that the non-Brexit and non-COVID related amending legislative acts that were preceded by an impact assessment were 9/30, amounting to a proportion of 30%. Therefore, even taking into account only the non-Brexit and non-COVID related amending legislative acts, the proportion of those amending legislative acts that did not require an impact assessment was 21/30, amounting to 70%, which confirms once again that the practice does not systematically entail carrying out an impact assessment.

299. At the same time, the European Union presents additional data, showing amending directives and amending regulations adopted through the ordinary legislative procedure between 1 January 2017 and 31 December 2021.[302] This timeframe of five years overall offers a broader perspective over the amending legislative acts and allows to identify a practice in place for more than two years before the adoption of the Amending Directive (whose signature took place on 17 April 2019) and more than two years thereafter.

[299] European Union Counter-Memorial on the Merits, 3 May 2021, para. 345.
[300] **Exhibit R-99**, Adoption procedures.
[301] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 204.
[302] **Exhibit R–192,** Amending directives and amending regulations COD 2017 2021.

300. Within this timeframe, 135 out of 205 Commission proposals were not preceded by an impact assessment, amounting to a majority of two-thirds (65,85%). Only 70 out of 205 Commission proposals were preceded by an impact assessment, representing a proportion of one third (34,15)%. This is in line with the data in Exhibit R-99.

301. This additional data confirms that the adoption by the Commission of the Proposal for the Amending Directive was in line with the practice followed in respect of other Commission proposals for amending legislative acts that followed the ordinary legislative procedure and were adopted between 1 January 2017 and 31 December 2021.

5.3 An ex-post evaluation was not needed

302. Secondly, the Claimant contends that an ex-post evaluation is 'normally' expected in relation to a substantive legislative initiative.[303] Again, the Claimant misunderstands or misrepresents the role of ex-post evaluations in the EU legislative process.

303. The mandatory steps of the EU ordinary legislative procedure, applying to the adoption of acts such as the Amending Directive, are those described in Article 294 TFEU[304] and in other institutional provisions of the TFEU.

304. An ex-post evaluation is only necessary when the overall performance of the existing piece of legislation is assessed and a comprehensive review of that legislation is envisaged. Instead, for targeted revisions, an ex-post evaluation is not always needed. In the present case, since the purpose of the Amending Directive was not to assess the fitness of the Gas Directive, but rather to clarify that the Gas Directive also applies to gas transmission lines between a Member State and a third country, the Commission concluded in the Explanatory Memorandum that an ex-post evaluation of the Gas Directive was not necessary.[305]

5.4 Stakeholders were involved in the legislative process

305. The Claimant argues that a formal public consultation is 'normally' expected in relation to a substantive legislative initiative.[306]

[303] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 195 and 200.
[304] **Exhibit RLA-253**, Article 294 TFEU.
[305] See Section 2.5.5 A separate ex-post evaluation was not needed in the European Union Counter-Memorial, 3 May 2021, paras. 350-353 and para. 357.
[306] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 195.

306. However, a formal public consultation is not systematically required. The absence of a formal public consultation when this is not considered necessary is in line with the practice for the proposals for amending directives and amending regulations that underwent an ordinary legislative procedure before being adopted between 1 January 2017 and 31 December 2021.[307]

307. In this period, 165 out of 205 Commission proposals were not preceded by a public consultation, amounting to 80,5% of the total. Only 40 out of 205 Commission proposals were preceded by a public consultation, representing a 19,5% of the total.

308. In the legislative procedure leading to the adoption of the Amending Directive, a public consultation was not needed, given they limited scope of the proposed act.

309. Stakeholders were nevertheless actively involved in two different ways: (i) through the collection of public feedback from 6 December 2017 until 31 January 2018,[308] and (ii) through participation in a public hearing, which took place on 21 February 2018 in the European Parliament.[309]

310. Concerning (i), the involvement of stakeholders in the legislative process that led to the adoption of the Amending Directive was ensured through the collection of feedback.[310] The collection of feedback after the publication of the Proposal for the Amending Directive, instead of a public consultation before the Proposal was published, reflects EU law-making practice, which simplifies the legislative process when the content of the acts has a limited scope, while ensuring that all stakeholders can express their views. Since 2019, out of the 124 legislative proposals adopted by the European Commission, only 14, amounting to 11,3% of the total, were subject to a formal public consultation.[311]

311. The Better Regulation Toolbox of 2017 provides that: "Citizens and stakeholders can provide feedback […] on legislative proposals",[312] specifying that the feedback can indeed be welcomed *after* the legislative proposal has been issued.

312. Public feedback was in fact provided from 6 December 2017 until 31 January 2018, and 37 responses from NGOs, companies, trade associations, public

[307] **Exhibit R-192**, Amending directives and amending regulations COD 2017 2021.
[308] **Exhibit R-103**, Commission proposal for a Directive amending Directive 2009/73/EC, Feedback period 06 December 2017 - 31 January 2018, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1237-Commissionproposal-for-a-Directive-amending-Directive-2009-73-EC, accessed on 23 January 2022.
[309] **Exhibit R-127,** ITRE Public hearing.
[310] See European Union Counter-Memorial, 3 May 2021, Section 2.5.5. "A separate ex-post evaluation was not needed", paras. 354-359.
[311] **Exhibit R-104**.
[312] **Exhibit R-97**, Better Regulation Toolbox 2017.

entities, chambers of commerce, and anonymous contributors were received during that period.[313] The reactions were published on the "[h]ave your say" webpage of the European Commission, a platform that gathers the feedback of citizens and businesses on new EU policies and existing laws.

313. On 20 February 2018, pursuant to the Better Regulation Toolbox of 2017,[314] the 37 feedback responses received were summarised and sent to the European Parliament[315] and the Council.[316]

314. Concerning (ii), although the European Parliament is under no specific obligation to conduct consultations with stakeholders,[317] it nevertheless held a public hearing on 21 February 2018, at which external stakeholders had the opportunity to express their views.[318] In the public hearing, after the introductory remarks on the proposed amendment of the Gas Directive by Dr Borchardt, several distinguished commentators were invited to present their views and discuss the implications of the amendment for the EU Internal Energy Market and Energy Security: Lapo Pistelli, ENI Executive Vice President, Saulius Bilys, CEO of AB Amber Grid (Lithuanian TSO), Prof Andreas Goldthau, Professor in International Relations at Royal Holloway University of London and Director of the Centre of International Public Policy, and Dr Alan Riley, Senior Associate Fellow of Energy Strategy and Energy Security in the European Union at The Institute for Statecraft, London. After those presentations, a session on Questions and Answers allowed the public to ask questions and make further comments.[319]

5.5 [redacted] assertions are groundless

[redacted]

[313] **Exhibit R-103**.
[314] **Exhibit R-97**, Better Regulation Toolbox 2017, pages 439-440.
[315] **Exhibit R-193,** Outcome of the public consultation on the Commission proposal Mr Buzek.
[316] **Exhibit R-194,** Outcome of the public consultation on the Commission proposal Mr Tzantchev.
[317] **Exhibit RLA-251,** Case C-104/97 P, *Atlanta and Others v European Community*, judgment of 14 October 1999, paragraph 38, ECLI:EU:C:1999:498
[318] **Exhibit R-127**, ITRE Committee Public Hearing, 21 February 2018.
[319] **Exhibit R-127**, ITRE Committee Public Hearing, 21 February 2018.
[redacted]

[redacted]

5.5.1 The Amending Directive is an act of general and abstract application

319. [redacted]

As discussed in Section 4.3 in this Rejoinder, the Amending Directive is not discriminatory[327] and there was no specific targeting of Nord Stream 2, since the Amending Directive is a legislative act of general and abstract application. It

[redacted]

[327] See Section 4.3 (The Amending Directive is not discriminatory, neither in intention nor in effect) in this Rejoinder.

applies to all pipelines falling under its scope and is not limited to the ones under construction when the Amending Directive entered into force on 23 May 2019.

320. An example of a possible application of the Amending Directive besides Nord Stream 2 is represented by the situation of offshore interconnectors between the European Union and the United Kingdom. At present, the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (Trade and Cooperation Agreement)[328] signed on 24 December 2020, provides for a specific legal regime for these interconnectors. However, had the European Union and the United Kingdom not included these provisions in the Trade and Cooperation Agreement, or had they not concluded the Trade and Cooperation Agreement, the Amending Directive would have applied to offshore interconnectors between the European Union and the United Kingdom.

321. In fact, a 'no-deal Brexit' is one of the options envisaged by Article 50 (3) of the TEU.[329] In accordance with that provision, the European Union Treaties would cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the withdrawing Member State's notification to the European Council of its intention to leave the European Union.

322. Therefore, absent the Trade and Cooperation Agreement, the Amending Directive would have applied to offshore interconnectors between the European Union and the United Kingdom. Since it could by no means be taken for granted that the European Union and the United Kingdom would find an agreement regarding the legal regime for their mutual gas interconnectors, this example clearly shows the general relevance of the Amending Directive beyond the single case of Nord Stream 2 and, hence, that [redacted]

323. Moreover, the Amending Directive, as any other legislative act of the European Union, is in force, together with the Gas Directive that it amends, until a further legislative act will intervene to abrogate them or modify their provisions. It follows that, until then, the legal regime of the Gas Directive, as amended by the

[328] **Exhibit RLA-250**, 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.
[329] **Exhibit RLA-252**, Article 50 TUE.

Amending Directive, will apply to any other offshore pipelines to and from third countries to be built besides Nord Stream 2.

324. The Claimant bases its 'targeting' allegations on the erroneous assumption that no other offshore pipeline connecting the European Union and third countries can be built in the future. Instead, any future offshore pipeline connecting the European Union and third countries will be subject to the provisions of the Gas Directive, as amended by the Amending Directive, for the period that they remain in force.[330]

5.5.2 The procedure in the European Parliament was regular and proper

5.5.2.1 The procedure for the examination of legislative proposals was fully respected

325. The Claimant, [redacted]., argues that there were 'significant irregularities' in the procedure followed by the European Parliament[331] until the decision to give a mandate to the ITRE Committee to enter into interinstitutional negotiations on 19 April 2018.

326. The Claimant's contentions are false. The procedure in the European Parliament was regular and proper, following the steps required by the applicable rules.

327. It is useful to recall the chronology of steps that were followed.[332]

8 November 2017	The Proposal is published.[333]
17 November 2017	ITRE Committee Coordinators decide that the EPP Group has the prerogative to appoint the rapporteur.
17 November 2017	EPP appoints Dr Buzek as Rapporteur.[334]
17 November 2017	The other six political groups appoint one shadow rapporteur each.[335]
28 November 2017	The ITRE Committee discusses the Proposal.[336]
29 November 2017	The Proposal is formally announced in the EP Plenary.[337]

[330] See Section 4 (There was no "deliberate exclusion" of the NS2 pipeline project from the derogation regime nor any specific targeting) in this Rejoinder.
[331] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 197.
[332] **Exhibit R-132**, Timeline of procedure in the European Parliament.
[333] **Exhibit R-130**, Procedure file 2019 0294 COD, page 1.
[334] **Exhibit R-130**, Procedure file 2019 0294 COD, page 1.
[335] **Exhibit R-130**, Procedure file 2019 0294 COD, page 1.
[336] **Exhibit R-77,** EP, Report on the Proposal, page 22; **Exhibit R-139**, Draft Agenda of ITRE Committee Meeting 28 11 2017; **Exhibit R-146**, Minutes of ITRE Committee meeting 28 11 2017.
[337] **Exhibit R-77,** EP, Report on the Proposal, page 22.

7 December 2017	Dr Buzek submits the Draft Report with amendments 1-7 to the ITRE Committee for discussion.[338]
11 January 2018	The ITRE Committee meets and discusses the Draft Report.[339]
16 January 2018	Deadline for tabling amendments in the ITRE Committee.[340]
26 January 2018	The ITRE Committee publishes the tabled amendments 8-142.[341]
21 February 2018	The ITRE Committee holds a public hearing.[342]
22 February 2018	The ITRE Committee discusses the Draft Report and the tabled amendments.[343]
14 March 2018	The ITRE Committee publishes the 14 compromise amendments.[344]
21 March 2018	The ITRE Committee votes on the Draft Report and adopts it with 22 amendments.[345]
21 March 2018	The ITRE Committee decides to enter into interinstitutional negotiations.[346]
11 April 2018	The ITRE Committee Report with 22 amendments is tabled for the EP Plenary.[347]
16 April 2018	The ITRE Committee's decision dated 21 March 2018 to enter into interinstitutional negotiations is announced in the EP Plenary.[348]
19 April 2018	The EP Plenary gives a mandate to the ITRE Committee to enter into interinstitutional negotiations.[349]

[338] **Exhibit R-137**, Draft Report Dr Buzek 07.12.2017.
[339] **Exhibit R-77**; EP, Report on the Proposal, page 22; **Exhibit R-140**, Draft Agenda of ITRE Committee meeting 11 01 2018; **Exhibit R-142**, Minutes of ITRE Committee meeting 11 01 2018.
[340] **Exhibit R-141**, Draft Agenda of ITRE Committee meeting 22 02 2018, page 5.
[341] **Exhibit R-136**, Tabled amendments 8-142.
[342] **Exhibit R-127**, ITRE Public hearing.
[343] **Exhibit R-77**, EP, Report on the Proposal, page 22; **Exhibit R-141**, Draft Agenda of ITRE Committee meeting 22 02 2018; **Exhibit R-144**, Minutes of ITRE Committee meeting 22 02 2018.
[344] **Exhibit R-125,** Compromise amendments.
[345] **Exhibit R-130**, Procedure file 2019 0294 COD, page 2; **Exhibit R-143**, Draft Agenda ITRE Committee meeting 21 03 2018; **Exhibit R-145,** Minutes of ITRE Committee meeting 21 03 2018.
[346] **Exhibit R-130**, Procedure file 2019 0294 COD, page 2.
[347] **Exhibit R-130**, Procedure file 2019 0294 COD, page 2.
[348] **Exhibit R-130**, Procedure file 2019 0294 COD, page 2.

4 April 2019	The EP Plenary votes on the agreed text in first reading.[350]

328. The steps followed in the European Parliament indicate that the parliamentary procedure followed the applicable rules and that there was nothing unusual about it.

5.5.2.2 The work in the ITRE Committee followed an ordinary procedure

329. [redacted]

330. The allegations of [redacted], as integrated in the Claimant's Reply, are not supported by the facts. It is true that the Rules of Procedure of the European Parliament allow for the acceleration of the legislative procedures (Rule 47a, 'Acceleration of legislative procedures'), that the Rules also make provision for simplified procedures (Rule 50, 'Simplified procedure') or urgent procedures (Rule 154, 'Urgent procedure').[352] However, these procedures were not applied in the case of the Proposal for the Amending Directive, and the ordinary procedure was followed instead.

5.5.2.3 The appointment of the rapporteur complied with the applicable rules and practice

331. [redacted] allegations are again not supported by the facts. The ordinary procedure for the appointment of the rapporteur was followed instead.

332. For the purpose of demonstrating that [redacted] allegations are unfounded, the European Union will provide the relevant background on the organisation and procedures in the European Parliament.

[349] **Exhibit R-133**, Minutes - Decision to enter into interinstitutional negotiations.
[350] **Exhibit R-203**, Adoption of EP Position in first reading 2017-0294 COD 04-04-2019; **Exhibit R-126**, Legislative Observatory, Results of vote in Parliament, Statistics - 2017/0294(COD), A8-0143/2018, 4 April 2019, also available at: https://oeil.secure.europarl.europa.eu/oeil/popups/sda.do?id=31001&l=en, accessed on 23 January 2022. The date indicated in Exhibit R-126 is 19 April 2018 due to a clerical error of the European Parliament documentary services. The final vote in the European Parliament took place on 4 April 2019.
[351] First Witness Statement of [redacted], 23 October 2021, para. 20.
[352] **Exhibit R-135**, Rule 47a and Rule 50, Rules of Procedure of the European Parliament, January 2017.
[353] First Witness Statement of [redacted], 23 October 2021, para. 21.

333. In order to carry out the preparatory work for the Parliament's Plenary, MEPs sit in a number of specialised standing parliamentary committees. There are 20 parliamentary committees. A committee consists of between 25 and 88 MEPs, and has a chair, a bureau and a secretariat.

334. The MEPs sit in political groups: they are not organised by nationality, but by political affiliation. There are currently seven political groups in the European Parliament. Political groups are represented in each parliamentary committee through 'committee coordinators'.

335. Rule 205 of the Rules of Procedure of the European Parliament of January 2017, which were in force at the time the Amending Directive was negotiated, establishes the procedure for the designation and the operation of committee coordinators.

336. Pursuant to Rule 205(1) of the Rules of Procedure of the European Parliament, each political group may designate one of their members in each committee to be a coordinator. As currently there are seven political groups in the European Parliament, each committee has seven committee coordinators, representing the seven political groups.

337. According to Rule 205(2) of the Rules of Procedure of the European Parliament, the Chair of the committee may convene a meeting of the committee coordinators to make decision concerning the appointment of rapporteurs.[354] The committee coordinators do not appoint the rapporteur directly: instead, they decide which political group has the prerogative to appoint the rapporteur within its own members.

338. The committee coordinators may decide by consensus or by a majority that clearly represents a large majority of the committee, having regard to the respective strengths of the various political groups.

339. Once the committee coordinators have decided which political group has the prerogative to appoint the rapporteur, pursuant to Rule 205(2), fifth sentence, of the Rules of Procedure of the European Parliament, the Chair of the committee announces such decision in a meeting of the full committee. In this meeting, any member of the committee may contest such decision. If there is no contestation, such decision shall be deemed to have been adopted.[355] In the present case,

[354] **Exhibit R-135**, Rule 205(2), Rules of Procedure of the European Parliament, January 2017.
[355] **Exhibit R-135**, Rule 205(2), fifth sentence, Rules of Procedure of the European Parliament, January 2017.

there was no contestation of Dr Buzek's appointment in the following ITRE Committee meeting.[356]

340. In the appointment of rapporteurs, a variation of a 'points system' is used.[357] Each political group receives a number of points proportionate to its size.[358] Each subject is also attributed a number of points. It follows that political groups with a larger number of MEPs have a higher number of points, which grants them a larger power in the choice of files where they wish one of their Members to be appointed as rapporteur, and that an MEP belonging to a large political group has a higher possibility to be appointed as rapporteur.

341. Within the framework of the European Parliament's work on the Proposal for the Amending Directive, the ITRE Committee Coordinators decided to grant the European People's Party Group (EPP Group), which is the largest political group,[359] the prerogative to appoint the rapporteur within its own members, thereby fully complying with the applicable rules.[360]

342. On 17 November 2017, i.e. nine days after the Proposal was published on 8 November 2017, the EPP Group appointed Dr Buzek,[361] the Chair of the ITRE Committee, as rapporteur.

343. Pursuant to Rule 47(3) of the Rules of Procedure of the European Parliament, "the committee responsible may, at any time, decide to appoint a rapporteur to follow the preparatory phase of a proposal"[362] (emphasis added). It follows that the timing of the decision of the committee coordinators on granting the EPP Group the prerogative to appoint the rapporteur, and the timing of the decision of the EPP Group to appoint Dr Buzek as rapporteur, both made nine days after the publication of the Proposal, but before the formal announcement of the Proposal in the monthly European Parliament Plenary,[363] which was held on 29 November 2017,[364] are fully compliant with the Rules of Procedure of the European Parliament.

344. The Claimant's argument [redacted] finds no ground at all and must fail.

[356] **Exhibit R-146**, Minutes of ITRE Committee meeting 28 11 2017.
[357] Also called 'd'Hondt method', *v. infra*.
[358] **Exhibit R-122**, European Parliament, Briefing, Understanding the d'Hondt method, 2019.
[359] The EPP counted 219 MEPs out of a total of 749 MEPs in the year 2018, amounting to 29,24%.
[360] See also Section 5.5.3 ("The appointment of the rapporteur complied with the applicable rules").
[361] **Exhibit R-130**, Procedure file 2017/0294(COD).
[362] **Exhibit R-135,** Rule 47(3), Rules of Procedure of the European Parliament, January 2017.
[363] **Exhibit R-131**, European Parliament Organisation and Operation, page 2.
[364] **Exhibit R-130**, Procedure file 2017/0294(COD).

345. [redacted]

346. It should be noted that Dr Buzek is an engineer and has an extensive experience in the energy field. Notably, Dr Buzek studied in the mechanical and energy engineering department at the Silesian University of Technology in Gliwice, Poland, graduating in 1963. He is the President of the European Energy Forum, where he joined as Vice-President in 2004.[366] Dr Buzek's background and expertise in the energy sector support his appointment as rapporteur in the Amending Directive file.

347. Within the political group, the appointment as rapporteur is often related to the particular expertise of the MEP. It follows that the appointment as rapporteur of an MEP with a specific background and expertise in the field of energy is hardly surprising and is certainly not an irregularity.

348. Moreover, a Table by the European Parliament provides data concerning instances where the Chair of a Parliamentary Committee acted as a rapporteur in a file treated by the European Parliament following the different procedures provided for in the TFEU: legislative procedures (ordinary and special) and budgetary procedures.[367] This Table indicates that the Chair of a Parliamentary Committee acted as a rapporteur in 77 legislative files dealt with during the 8th and 9th legislatures, showing that this practice is not at all uncommon. In addition, there are numerous other instances relating to other types of procedures where the Chairs act as rapporteurs.

349. In any event, the fact that the rapporteur is also a Committee Chair does not confer to him/her any special status on the procedure, nor does the rapporteur have any special or enhanced prerogatives due to his/her quality of Committee Chair. Nowhere do the Rules of Procedure of the European Parliament grant any special status or any prerogatives in this regard to the Committee Chair who acts as rapporteur.[368]

[redacted]

[366] **Exhibit R-121**, European Parliament, Jerzy Buzek, Biography of the President of the European Parliament, available at: https://www.europarl.europa.eu/former_ep_presidents/president-buzek/en/the_president/biography.html (accessed on 22 January 2022).
[367] **Exhibit R-199**, Data Rapporteur Chair EP 8th and 9th legislative terms.
[368] **Exhibit R-135**, Rules of Procedure EP 2017.

5.5.2.4 The appointment of the shadow rapporteurs complied with the applicable rules and practice

350. [redacted]

351. Shadow rapporteurs are normally appointed by each political group after the appointment of the rapporteur, albeit without a pre-determined procedure. In fact, the Rules of Procedure of the European Parliament do not provide for a specific moment for the designation of shadow rapporteurs. In fact, Rule 205a simply provides that "The political groups may designate a shadow rapporteur for each report to follow the progress of the relevant report and find compromises within the committee on behalf of the group. Their names shall be communicated to the committee Chair".[370] Therefore, it is not excluded that shadow rapporteurs may be designated at an early point in time.

352. In this case, the shadow rapporteurs were in fact designated by the political groups,[371] in full compliance with Article 205a of the Rules of Procedure of the European Parliament. The Rules of Procedure do not identify a specific moment for the appointment of shadow rapporteurs, and in any event, the shadow rapporteurs are chosen by political groups based on policy priorities of the political groups, expertise, and availability of the MEPs. In the present case, the shadow rapporteurs were appointed after the appointment of the Rapporteur on 17 November 2017.[372]

353. [redacted]

5.5.2.5 The timetable in the Parliament was not unusual

354. [redacted]

355. It should be noted that the approaching end of the 8th Parliamentary term (2014-2019) had an impact on how the European Parliament planned and organised its legislative work in 2018. 2018 was indeed the year preceding the end of the legislative term, and was characterised by a particularly high workload as the co-

[redacted]

[370] **Exhibit R-135**, Rules of Procedure of the European Parliament, January 2017.
[371] Dan Nica (S&D, Romania), Zdzisław Krasnodębski (ECR, Poland), Morten Helveg Petersen (ALDE, Denmark), Neoklis Sylikiotis (GUE/NGL, Cyprus, Mr Darevor (ALDE).
[372] **Exhibit R-130**, Procedure file 2017/0294(COD)
[373] First Witness Statement of [redacted], 23 October 2021, para. 23.

legislators tried to finalise as many files as possible in order to avoid delays related to the change of legislature.

356. In fact, it emerges from EU official statistics that in 2019, the legislative acts adopted according to the ordinary legislative procedure were a total of 126 (75 basic legislative acts and 51 amending legislative acts).[374]

357. Instead, in 2018, the legislative acts adopted according to the ordinary legislative procedure were a total of 73 (29 basic legislative acts and 44 amending legislative acts).[375]

358. The EU official statistics show a 72,6% increase in the number of legislative acts adopted in 2019 according to the ordinary legislative procedure – and where work was carried out mostly in 2018 – compared to the number of legislative acts adopted in 2018.

359. Even if at the time the file was handled by the ITRE Committee (December 2017-April 2018) this workload had not yet reached peak levels, the European Parliament as a whole was nevertheless aware of the upcoming increase in legislative work at the material time. Accordingly, any attempts to treat a certain legislative proposal as expeditiously as possible must also be seen in this context.

360. [redacted]

361. In fact, more than five months elapsed from the submission of the Proposal on 8 November 2017 until the European Parliament Plenary gave a mandate to the ITRE Committee to enter into interinstitutional negotiations on 19 April 2018. Such a period is not unusually short compared to other legislative procedures handled by the European Parliament and does not speak to a special or hasty treatment of the file.[378]

362. Moreover, a Table by the European Parliament further indicates that there was nothing unusual in the duration of the parliamentary procedure for the adoption

[374] **Exhibit R – 123**, EurLex, Legal acts – statistics, 2019, page 1, also available at: https://eur-lex.europa.eu/statistics/2019/legislative-acts-statistics.html, accessed on 22 January 2022.
[375] **Exhibit R-124**, EurLex, Legal acts – statistics, 2018, page 1, also available at: https://eur-lex.europa.eu/statistics/2018/legislative-acts-statistics.html, accessed on 22 January 2022.
[redacted]
[378] **Exhibit R-138**, page 13.

of the Amending Directive.[379] Even if we do not consider the time from the publication of the Proposal to the formal announcement of the Proposal in the European Parliament Plenary, the procedure in the European Parliament for the adoption of the Amending Directive was not particularly short compared to other 99 legislative procedures in the Parliament dealt with during the 8th and 9th legislatures.[380]

363. This is shown by the following considerations: (i) the average duration of a parliamentary procedure for the 8th and 9th legislatures is 122,66 days, whereas the duration of the parliamentary procedure for the adoption of the Amending Directive lasted 112 days. The duration of 112 days amounts to only 10 days less compared to the average of 122,66 days, corresponding to a small ratio of 8,15%; (ii) there are 41 parliamentary procedures, out of 100, lasting less or equal to 112 days; (iii) out of the 41 files whose duration of the parliamentary procedure was 112 days or less, 34 (amounting to 82,9%) are non-COVID and non-Brexit related; and (iv) the duration of 112 days cannot be considered as an "unusual speed" as the Claimant incorrectly alleges,[381] when comparing it to the 40 shorter parliamentary procedures, including the parliamentary procedure for examination of the Common Fisheries Policy [2017/0190(COD)], which took only 14 days.[382]

364. Moreover, as acknowledged by the Claimant,[383] the period for the European Parliament's vote on the amendments and the confirmation of the ITRE Committee's decision to enter into interinstitutional negotiations is part of the 18-month negotiations period between the European Parliament and the Council. This period is calculated from the transmission of the Commission Proposal to the European Parliament and the Council on 8 November 2017[384] to the adoption of the text endorsed by the European Parliament and the Council of the EU on 17 April 2019, which is fully in line with the average duration of negotiations[385] for the adoption of legislative acts at first reading in the Parliamentary term 2014-2019.[386]

[379] **Exhibit R-198**, COD Data January 2022.
[380] **Exhibit R-198**, COD Data January 2022.
[381] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 197.
[382] **Exhibit R-198,** COD Data January 2022.
[383] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 198.
[384] **Exhibit R-73**.
[385] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 39, 313, and 321.
[386] **Exhibit R-94**, and **Exhibit R-138** page 13.

365. The file was discussed at no less than four ITRE Committee meetings (on 28 November 2017, 11 January 2018, 22 February 2018, and 21 March 2018)[387] and MEPs in the ITRE Committee tabled 142 amendments.[388] [redacted] Fourteen compromise amendments were approved by the ITRE Committee.[390]

366. The European Parliament's position concerning the file enjoyed broad political support, and obtained almost full support from [redacted] political group, the EPP. On 21 March 2018, the full ITRE Committee voted on the amendments and adopted the Report with 41 votes in favour, 13 against and 9 abstentions.[391]

367. On 19 April 2018, the European Parliament Plenary confirmed the ITRE Committee's decision to enter into interinstitutional negotiations.[392]

368. Likewise, on 4 April 2019, following the interinstitutional negotiatons (also known as trilogues), the European Parliament Plenary voted on the agreed text with a large majority of 465 votes in favour, 95 against, and 68 abstentions.[393] [redacted]

369. [redacted]

370. The European Union notes that the Claimant has not alleged any irregularities in the rest of the legislative process, i.e. from 19 April 2018 until the signature of the agreed text by the European Parliament and the Council on 17 April 2019.

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[387] **Exhibit R-77**, Report on the Proposal, page 22.
[388] **Exhibit R-136,** Tabled amendments 8-142, and **Exhibit R-137**, Draft Report.
[redacted]
[390] **Exhibit R-125**, Compromise Amendments on the Proposal for a directive (COM(2017)0660 – C8-0394/2017 – 2017/0294(COD)), 14 March 2018, also available at: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/ITRE/AMC/2018/03-21/5-compromise-amendments-natural-gas-directive-buzek-EN.pdf, accessed on 22 January 2022.
[391] **Exhibit R-145**, Minutes of ITRE Committee meeting 21 03 2018; **Exhibit R-77** European Parliament, Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (COM(2017)0660 – C8-0394/2017 – 2017/0294(COD)), 11 April 2018, also available at: https://www.europarl.europa.eu/RegData/seance_pleniere/textes_deposes/rapports/2018/0143/P8_A(2018)0143_EN.pdf, accessed on 23 January 2022.
[392] **Exhibit R-133.**
[393] **Exhibit R-203**, Adoption of EP Position in first reading 2017-0294 COD 04-04-2019; **Exhibit R-126**, Legislative Observatory, Results of vote in Parliament, Statistics - 2017/0294(COD), A8-0143/2018, 4 April 2019, also available at: https://oeil.secure.europarl.europa.eu/oeil/popups/sda.do?id=31001&l=en, accessed on 23 January 2022. The date indicated in Exhibit R-126 is 19 April 2018 due to a clerical error of the European Parliament documentary services. The final vote in the European Parliament took place on 4 April 2019.

5.6 The Amending Directive was adopted through democratic decision-making

371. The Claimant maintains that some MEPs and Member States such as Austria, Germany, the Czech Republic, Hungary, Cyprus, the Netherlands and Belgium criticised certain substantial and procedural aspects of the Proposal for the Amending Directive.[394]

372. The European Union notes that in democratic decision-making, negotiations are a structural part of the legislative process, which implies that political positions are not static and may instead shift.

373. In the present case, this is demonstrated by the final vote in the European Parliament Plenary on 4 April 2019 on the agreed text with the Council with 465 votes in favour, 95 against, and 68 abstentions;[395] and by the voting results in the Council, where the European Parliament's position was adopted at first reading with 27 votes in favour and one abstention (Hungary).[396]

374. It follows that the discordant opinions invoked by the Claimant are, as well as negotiations, inherent to a democratic decision-making process, where decisions are taken by the majority.

5.7 The Explanatory Memorandum is the result of an analysis by the European Commission

375. The European Union explained in its Counter-Memorial that: "The Proposal for the Amending Directive, which was published on 8 November 2017, was accompanied by an Explanatory Memorandum which was the result of a study carried out by the European Commission."[397]

376. The Claimant argues that the term "study" refers to a separate document, alleges that the "study" is responsive to document production request No. 12, claims that the European Union failed to produce it,[398] and at the same time that it does not exist.[399]

377. For the avoidance of any doubt, the term 'study' as used by the European Union in the cited passage refers to activity undertaken in preparation of the Explanatory Memorandum. The Oxford Advanced Learner's Dictionary defines the

[394] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 202 and *passim*.
[395] **Exhibit R-203**, Adoption of EP Position in first reading 2017-0294 COD 04-04-2019; **Exhibit R-126**, Legislative Observatory, Results of vote in Parliament, Statistics - 2017/0294(COD), A8-0143/2018, 4 April 2019, also available at: https://oeil.secure.europarl.europa.eu/oeil/popups/sda.do?id=31001&l=en, accessed on 23 January 2022. The date indicated in **Exhibit R-126** is 19 April 2018 due to a clerical error of the European Parliament documentary services. The final vote in the European Parliament took place on 4 April 2019.
[396] **Exhibit R-129**, Voting results in the Council, 16 April 2019.
[397] European Union Counter-Memorial, 3 May 2021, para. 324.
[398] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 9.iii.
[399] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 199.

noun 'study' as "the activity of learning or gaining knowledge, either from books or by examining things in the world".[400]

378. The Explanatory Memorandum is the document resulting from such activity. It follows that the Claimant plainly misunderstands the European Union's comment. In short, the 'study' referred to is embodied in the Proposal, which the Claimant already possesses.

5.8 Conclusion

379. It follows from the foregoing that the Amending Directive underwent a proper legislative process. It was adopted in accordance with the relevant rules and procedures, and its 18 month-long negotiations granted stakeholders the chance to intervene and present their views, and gave political actors an ample opportunity to discuss the Proposal and finally vote. It is inherent to the democratic decision-making process that the discordant views are heard and, ultimately, the decisions are taken by the majority of elected representatives of the people.

6 THE AMENDING DIRECTIVE WILL NOT HAVE THE ALLEGED "IMPACT" ON THE CLAIMANT'S INVESTMENT IN THE NORTH STREAM 2 PIPELINE

6.1 Introduction

380. In its Memorial of 3 July 2020 the Claimant alleged that the Amending Directive would have a "catastrophic" impact on its investment[401]. In contrast, in its Reply the Claimant suggests that it can meet its burden of proof simply by showing that the Amending Directive will have some "impact" on its investment, and that the "extent" of that "impact" is "at most relevant to the remedy sought by the Claimant".[402]

381. The European Union takes issue with that proposition. NSP2AG's claims, including notably its claim of breach of Article 13 of the ECT, and its various claims pursuant to Article 10(1) of the ECT based on the alleged lack of proportionality of the Amending Directive, require more than merely showing some "impact". Unless the Claimant can prove a sufficiently serious "impact" on its investment,

[400] **Exhibit R-128**, Oxford Advanced Learners' Dictionary, 'Study', also available at: https://www.oxfordlearnersdictionaries.com/definition/american_english/study_1, accessed on 23 January 2022.
[401] Claimant's Memorial, 3 July 2020, Section VII.
[402] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 234.

having regard to the relevant legal standard for each claim, those claims must be rejected as legally unfounded.

382. As will be shown in this Section, despite the factual developments since the Claimant's Memorial of 3 July 2020 cited by the Claimant[403], the "impact" of the Amending Directive on NSP2AG's investment in the NS2 pipeline remains highly uncertain. Therefore, the Claimant's allegations with regard to that "impact" remain speculative and premature.

383. The "impact" of the Amending Directive on NSP2AG's investment continues to depend on measures that the German authorities may or may not adopt within the margin of discretion accorded to them by the Amending Directive, as well as on choices to be made by NSP2AG itself within the framework of those measures (Section 6.2).

384. The Claimant could have avoided the alleged "impact" by exercising due diligence (Section 6.3.1). Moreover, the Claimant (and its controlling shareholders Gazprom and the Russian Federation) have failed to take action reasonably within their power in order to avert or mitigate the alleged impact, notably by requesting an exemption based on Article 36 of the Gas Directive (Section 6.3.2), by re-organising itself in accordance with Article 9(6) of the Gas Directive (Section 6.3.3), by abolishing or relaxing the export monopoly granted to Gazprom Export (Section 6.3.4), and/or by negotiating an IGA with the European Union (Section 6.3.5).

385. The Claimant also has failed to substantiate its allegation[404] that it has already suffered any financial losses attributable to the European Union resulting either from its current inability to operate the NS2 pipeline [redacted] (Section 6.4).

386. For the purposes of assessing the Claimant's own contribution to the alleged "impact", the impacts resulting from actions or omissions of other entities belonging to the Gazprom group, of from the Claimant's ultimate owner and controller (the Russian Federation) must be attributed to the Claimant (Section 6.4). In turn, the "impact" resulting from the sanctions imposed or threatened by the United States with regard to the NS 2 project cannot be attributed to the European Union (Section 6.5).

[403] *See* Second Witness Statement of [redacted], 25 October 2021, paras. 87-114.
[404] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 311-316.

6.2 The "impact" of the Amending Directive, as transposed and implemented by Germany, on NSP2AG's investment remains highly uncertain

387. As explained in the EU's Counter-Memorial[405], the actual impact of the Amending Directive on the Claimant's investment will flow from measures that the German authorities may or may not adopt within the wide margin of discretion accorded to them by the Amending Directive, as well as from choices to be made by the Claimant itself within the framework of those measures.

388. In its Reply, the Claimant has been forced to acknowledge that the impact of the Amending Directive on its investment remains "highly uncertain" at this stage[406]. That alone provides uncontroverted basis for deeming its claims in this matter to be entirely premature.

389. To recall, the Claimant has challenged before the German courts the decision of the German NRA refusing the derogation pursuant to Article 49a of the Gas Directive requested by the Claimant. That challenge is still pending[407]. Assuming that the Claimant's challenge were to be definitively rejected, the impact of the Amending Directive will depend, in the first place, on whether the German NRA grants the application filed by the Claimant for the certification of a German subsidiary of NSP2AG as an ITO[408].

390. The Claimant's application for ITO certification contradicts the allegations of "impact" previously made by the Claimant in its Memorial, where the possibility to operate the NS 2 pipeline as an ITO had not even been considered by the Claimant[409].

391. The fact that the Claimant has now decided to apply for ITO certification involves a belated recognition that, despite the remaining uncertainties which are inherent to any certification process under the Gas Directive, the Claimant is not precluded *per se* from complying with the unbundling requirements of the Amending Directive, as transposed and implemented by Germany.

392. [redacted]

[405] European Union Counter-Memorial on the Merits, 3 May 2021, Section 2.3.3.
[406] *See* e.g. Second Witness Statement of [redacted], 25 October 2021, para. 45. *See* also Second Witness Statement of [redacted], 25 October 2021, para. 60.
[407] *See* Second Witness Statement of [redacted], 25 October 2021, paras. 48-51.
[408] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 265.
[409] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 219-220.
[410] [redacted]

[redacted]

394. [redacted]

395. The Claimant speculates that the German NRA may refuse the requested ITO certification[415]. The Claimant also speculates that the German authorities may impose conditions relating to tariffs or TPA which will render unprofitable the operation of the NS 2 pipeline[416].

396. The European Union cannot take position on the ongoing discussions between the Claimant and the German authorities to which the Claimant refers[417]. The European Union notes that the Claimant has not exhibited before the Tribunal its application to the German NRA for ITO certification or, indeed, any other document or record of its discussions with the German authorities. Rather, the Claimant's allegations are, as so often in this dispute, based exclusively on bare assertions by [redacted]. No such documents or records are otherwise available to the European Union.

397. In any event, it would be inappropriate for the European Union to take position, at this stage, on the ongoing discussions between the Claimant and the German authorities. The European Union will be required, through the European

[redacted]

[415] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 265-267; and Second Witness Statement of [redacted], 25 October 2021, paras. 73-75.
[416] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 263; and Second Witness Statement of [redacted], 25 October 2021, paras. 59-63 and 71.
[417] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 262-263; and Second Witness Statement of [redacted], 25 October 2021, para. 69.

Commission, to give its opinion on the draft decision to be notified by the German NRA in accordance with the Gas Directive[418]. No such draft decision has been notified yet to the European Union by the German authorities. Until then, the assessment of the requested certification remains the exclusive competence of the German authorities. It would be incompatible with the constitutional allocation of powers between the European Union and its Member States if the European Union, through the European Commission, were to interfere in any way with the ongoing assessment by the German authorities.

398. The European Union notes, nevertheless, that the Claimant is very careful not to exclude that the requested ITO certification will be granted by the German NRA and, more generally, that, to borrow the Claimant's recurring terms, a "regulatory solution can be found".

399. [redacted]

400. [redacted]

401. [redacted]

[418] *See* Article 11(6) of the Gas Directive.
[419] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, Section VI.4.

[redacted]

[redacted]

402. [redacted]

[redacted]

405. The current lack of regulatory certainty will not, however, last indefinitely. In the course of 2022 the German authorities will have to take decisions regarding the ITO certification requested by the Claimant and the applicable tariff and TPA

[redacted]

requirements, in accordance with the procedural requirements and deadlines prescribed by the Gas Directive[426].

406. Furthermore, the current uncertainty is, to a large extent, the result of the Claimant's own lack of diligence. The Claimant could have requested a TSO certification as soon as the Amending Directive was transposed by Germany.

407. Furthermore, the Claimant could have sought to avert or limit the alleged impact of the Amending Directive, including in particular by requesting an exemption pursuant to Article 36 of the Gas Directive, also as soon as the Amending Directive was transposed by Germany.

408. Even before the Amending Directive was transposed, the Claimant could have contacted informally the German authorities with a view to preparing its applications for certification and exemption.

409. The Claimant did nothing of the sort. For more than two years after the adoption of the Amending Directive the Claimant remained in outright denial. The Claimant limited itself to requesting a derogation under Article 49a of the Gas Directive, even though the Claimant has argued strenuously before this Tribunal that the NS 2 pipeline cannot qualify to apply for such derogation.

410. Beyond that, the Claimant's sole initiative was to launch a barrage of legal actions before the EU and German courts, as well as before this Tribunal, aimed at excluding entirely the application of the Amending Directive to the NS 2 pipeline. To date the Claimant continues to pursue those actions with dogged obstinacy, despite repeated judicial setbacks.

411. It was not until 11 June of 2021 that the Claimant finally brought itself to request an ITO certification[427], a possibility which it had previously dismissed. Nevertheless, in yet another display of lack of diligence, the application filed by the Claimant was defective and could not be considered complete by the German NRA until 8 September 2021[428]. Furthermore, the Claimant negligently disregarded the obvious legal requirement that, pursuant to the provisions of German Law transposing Article 17(3) of the Gas Directive, a Swiss company, such as NS2PAG, cannot be certified as an ITO. Rather, the operator must be a legal entity established in the European Union. As a result, on 16 November 2021 the German NRA had to suspend the certification process "until the main assets

[426] Article 11 of the Gas Directive.
[427] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 265.
[428] **Exhibit R-149**, website of the Bundesnetzagentur, https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK7-GZ/2021/BK7-21-0056/BK7-21-0056_Antrag.html;jsessionid=A90AD8790499560C96CBB36B99ACF254?nn=265794

and human resources have been transferred to the subsidiary and the Bundesnetzagentur is able to check whether the documentation resubmitted by the subsidiary, as the new applicant, is complete"[429]. It was not until 26 January 2022 that the Claimant announced that NSP2AG had incorporated a German subsidiary (Gas for Europe GmbH)[430]. Nevertheless, the certification procedure will remain suspended until the transfer of the main assets and human resources to the subsidiary has been completed and the German NRA will be in a position to check the documents for completeness.[431]

412. The Claimant contends that the situation is "further complicated" [432] because of the risk of U.S. sanctions. [redacted]. In any event, the European Union reiterates that the risk of U.S. sanctions, and the ensuing adverse impact alleged by the Claimant, is not attributable to the European Union, but to a third country (see below Section 6.6).

6.3 The Claimant has failed to take action in order to prevent or mitigate the alleged impact

413. The European Union cannot be held responsible for any adverse impact on the Claimant's investment which the Claimant could have reasonably prevented by taking action within its power, or within that of its ultimate owner and controller.

414. As already explained in the EU's Memorial, there are multiple ways in which the Claimant (or its ultimate owner and controller) could have sought to prevent, and indeed can still seek to prevent, or at least substantially mitigate, the adverse impact of the Amending Directive alleged by the Claimant.

415. In the first place, the Claimant could have prevented the alleged impact by exercising due diligence when making its investment decision [redacted] (Section 6.3.1). Second, the

[429] **Exhibit R-150**, Press release of the Bundesnetzagentur, 16 November 2021, "Certification procedure for Nord Stream 2 suspended" https://www.bundesnetzagentur.de/SharedDocs/Pressemitteilungen/EN/2021/20211116_NOS2.html
[430] **Exhibit R-151**, website of Gas for Europe GmbH, https://www.g4e.de/en/news/
[431] **Exhibit R-189**, Reuters, 26 January 2022, "Nord Stream 2 registers German subsidiary, certification still suspended", https://www.reuters.com/business/energy/nord-stream-2-registers-german-subsidiary-certification-still-suspended-2022-01-26/
[432] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 281.

Claimant could have requested, and may still request, an exemption from the unbundling, TPA and tariff requirements in accordance with Article 36 of the Gas Directive, as transposed and implemented by Germany (Section 6.3.2). As an alternative, the Claimant could re-organise itself in accordance with Article 9(6) of the Gas Directive (Section 6.3.3). Third, the Russian Government, which ultimately owns and controls the Claimant, could negotiate an IGA with the European Union (Section 6.3.5) and/or allow exports of gas from Russia by undertakings other than the Gazprom group, so as to facilitate the full use of the NS 2 pipeline (Section 6.3.4).

6.3.1 NSP2AG failed to exercise due diligence when making its investment decision and [redacted]

416. As shown by the European Union, the Amending Directive did not involve a "dramatic and radical regulatory change" (see Section 3 above). There were clear indications before the Claimant adopted its financial investment decision in [redacted] that the requirements of unbundling, tariff regulation and TPA already applied to pipelines such as the NS2 pipeline by virtue of the Gas Directive, or at the very least that those pipelines could be made subject to such requirements. [redacted] Instead, the Claimant wilfully and entirely disregarded such risk.

6.3.2 The Claimant has not requested an Article 36 exemption

417. The adverse impact alleged by the Claimant would flow from the application with regard to the NS 2 pipeline of the unbundling, TPA and tariff regulation obligations provided for in the Amending Directive.

418. Under Article 36 of the Gas Directive, the NRAs of an EU Member State may, upon request, exempt major new gas infrastructures from the unbundling, TPA and tariff regulation obligations. Qualifying infrastructures include gas transmission lines between an EU Member State and a third country, such as the NS2 pipeline (see Section 4.4.2 above).

419. If the Claimant had requested from the German authorities an Article 36 exemption from the requirements on unbundling, TPA and tariff regulation in respect of the NS2 pipeline, and the German authorities had granted such exemption, NSP2AG would not have been required to comply with these requirements. While the German authorities could have subjected the granting of

that exemption to certain conditions, the ensuing impact on NSP2AG could still be far less adverse than alleged by the Claimant (see Section 4.4.2 above).

420. To date, however, the Claimant has failed to take any steps in order to request an exemption from the German NRA pursuant to the provisions of German law implementing Article 36 of the Gas Directive.

421. By way of excuse for its inaction, the Claimant contends that the NS2 pipeline does not qualify for an Article 36 exemption. As explained in Section 4.4.2, however, that contention is baseless.

422. The Claimant's refusal to request an Article 36 exemption is all the more incomprehensible in view of the Claimant's obstinacy in pursuing a derogation based on Article 49a of the Gas Directive[434], while insisting that the NS 2 cannot possibly qualify for such a derogation.

423. The clear implication is that the Claimant is unwilling to settle for anything short of the complete and unconditional disapplication of the Amending Directive to the NS 2 pipeline. In its obsessive pursuit of that objective the Claimant is, apparently, ready to forego the potential benefits of applying for an Article 36 exemption.

424. The Claimant cannot legitimately complain about the alleged impact of the Amending Directive on NSP2AG's investment, while at the same time refraining from availing itself of the possibility to request an Article 36 exemption. If the Claimant chooses not to avail itself of that possibility, the alleged impact would be self-inflicted and not attributable to the European Union.

6.3.3 The Claimant has not sought to avail itself of Article 9(6) of the Gas Directive

425. The EU co-legislators are not allowed to discriminate between state-owned enterprises and privately owned ones[435]. For that reason, Article 9(6) of the Gas Directive provides that the requirement to ensure OU is deemed satisfied where an EU Member State, or another public body (including a public body of a third country), chooses to confer to two separate public bodies the exercise of control over a transmission system or a TSO, on the one hand, and over an undertaking performing any of the functions of production or supply, on the other hand.

426. In practice, Article 9(6) of the Gas Directive implies that if an EU Member State or a third country controls both a gas producer and a TSO, it is not required to

[434] *See* Second Witness Statement of [redacted], 25 October 2021, paras. 48-51.
[435] **Exhibit R-152**, Article 345 TFEU.

ensure complete separation of ownership between them (i.e. relinquishing ownership of one of them) in order to comply with the OU model. Rather, the EU Member State or third country concerned may choose to confer control over the gas producer and the TSO to two separate public entities, such as, for example, two different ministries, in such a way that the TSO has an independent power of decision in relation to the gas producer.

427. Many EU Member States have chosen to re-structure their control over state-owned enterprises in accordance with Article 9(6) of the Gas Directive[436].

428. Both the Claimant and Gazprom are controlled by the Russian Government (see below Section 6.5), which is a "public body" within the meaning of Article 9(6) of the Gas Directive. Therefore, it appears possible, in principle, that Russia's control over both Gazprom and the NS2 pipeline could be reorganised in accordance with that provision.

429. The Claimant's Reply[437] confirms implicitly that this possibility has not even been considered by the Claimant, let alone discussed with the German authorities.

430. The Claimant implies that Article 9(6) does not apply to public bodies of third countries, without, however, advancing any argument or evidence in support of that assumption[438]. The Claimant is wrong: the Russian Government raised the same objection in the WTO Dispute DS 476 - *European Union and its Member States – Certain Measures relating to the Energy Sector*. Russia's objection was thoroughly dismissed by the Panel in that dispute, which concluded that Article 9(6) equally covers public bodies of other countries, including the Russian Government[439].

431. The legal concept of "separation within the state" underlying Article 9(6) of the Gas Directive has been developed under the EU Merger Regulation and, according to recital 10 of the Gas Directive, is to be applied in line with that Regulation. The European Commission has applied the relevant criteria in several decisions under

[436] *See* e.g. the Commission opinions concerning the certification as TSOs of the following state owned enterprises:
- Gaz-System (Poland) (**Exhibit RLA-254**): https://ec.europa.eu/energy/sites/ener/files/documents/2014_100_pl_en.pdf
- Energienet (Denmark) (**Exhibit RLA-255**): https://ec.europa.eu/energy/sites/ener/files/documents/2012_006_dk_en.pdf
- Gas Transport Services (Netherlands) (**Exhibit RLA-256**): https://ec.europa.eu/energy/sites/ener/files/documents/2013_069_nl_en.pdf
- Transgaz (Romania) (**Exhibit RLA-257**): https://ec.europa.eu/energy/sites/ener/files/documents/2013_088_ro_en.pdf

[437] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 324 and 325 ii.
[438] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 325.
[439] **Exhibit RLA-76**, WTO Panel report, DS 476, *European Union and its Member States – Certain Measures relating to the Energy Sector*, paras. 7.789- .823.

the EU Merger Regulation not only with respect to state-owned enterprises (SOEs) controlled by EU Member States but also with respect to third-country SOEs[440].

432. The Claimant further speculates that the European Union would not "accept" that the conditions of Article 9(6) of the Gas Directive are met, given the EU's position that NSP2AG is not independent from Russia[441]. But this misses the point. Obviously, the European Union is not suggesting that the Russian Government complies currently with Article 9(6) in respect of NSP2AG. Rather the EU's submission is that it appears legally possible, in principle, that the Russian Government could re-organise its control over the Gazprom group, including NSP2AG, in such a way as to comply with all the requirements of Article 9(6), just as the Governments of many EU Member States have done in respect of other state-owned enterprises controlled by them. The Claimant advances no reason why the Russian Government would be incapable of such a re-organisation. Instead, the Claimant seeks to justify its inaction by positing that the European Union would, under no circumstances, "accept" [442] such a re-organisation, even if all legal requirements were fulfilled. The Claimant thus implies that the European Union will deliberately fail to abide by its own laws in order to deprive the Claimant of its rights. This is a very serious accusation for which the Claimant provides no evidence and which is furthermore rebutted by the practice described above. The Claimant cannot base its allegations of adverse impact, and the legal claims based on those allegations, on its own unsupported speculation that the European Union will act in bad faith.

433. Lastly, the Claimant contends that NS2PAG is just a "Swiss company"[443], which has no control over the actions of the Russian Government. This argument is specious and disingenuous. NSP2AG is part of the Gazprom group, which is ultimately owned and controlled by the Russian Government. NSP2AG and the Russian Government cannot be considered as separate and distinct entities for the purposes of assessing NSP2AG's own contribution to the alleged adverse impact. As explained below in Section 6.5, any actions and omissions of the Russian Government in connection with the NS 2 pipeline must be attributed to the Claimant.

[440] *See*, for instance, **Exhibit RLA-259**, case COMP/M.6082 – China National Bluestar/Elkem, decision of 31 March 2011; **Exhibit RLA-260**, case COMP/M.7850 – EDF/CGN/NNB Group of Companies, decision of 10 March 2016 and **Exhibit RLA-261**, case COMP/M.7962 – ChemChina/Syngenta, decision of 5 April 2017.
[441] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 325.
[442] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 325.
[443] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 324.

6.3.4 The Russian Government could prevent the alleged adverse impact of the TPA requirements by allowing exports of gas from Russia by other undertakings

434. According to the Claimant, the alleged adverse impact will flow, to a very large extent, from the application of TPA requirements to the NS 2 pipeline[444]. More precisely, according to the Claimant, the TPA requirements will make it impossible for Gazprom Export to book the entire capacity of the NS 2 pipeline, as initially planned. In turn, this will make it impossible for NSP2AG to achieve a 100 per cent usage of the NS 2 pipeline, with the ensuing loss of revenue for NSP2AG[445].

435. As already explained by the European Union[446], the alleged adverse impact of the TPA requirements could be prevented if the Russian Government abolished or relaxed the legal monopoly currently granted to Gazprom Export over all exports of natural gas from Russia, so as to allow independent gas suppliers to use part of the capacity of the NS 2 pipeline.

436. As further noted by the European Union[447], it is Russia's sovereign prerogative to grant an export monopoly to Gazprom Export within the limits of its own jurisdiction. However, by the same token, Russia cannot seek to impose that monopoly within the EU's territory. The European Union cannot be held responsible for any impact on NSP2AG that may result from NSP2AG's inability to comply with EU law within the EU territory as a result of that export monopoly. If Russia, which controls both NSP2AG and Gazprom, wishes to sell gas within the European Union, it is for Russia to adapt Gazprom's operations to the EU laws that apply to all operators within the EU territory, and not the other way around.

437. The Claimant does not event attempt to contest the obvious fact that abolishing or relaxing the export monopoly would make it much easier for the Claimant to exploit profitably the NS2 pipeline, notwithstanding the TPA requirements. Instead, the Claimant limits itself to arguing that abolishing the export monopoly [redacted]

[444] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 289, 302, and 304-306; Second Witness Statement of [redacted], 25 October 2021, paras. 61-63, 78, 137 c, 137 d, 137 e.
[445] *Ibid*.
[446] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 239-240.
[447] European Union Counter-Memorial on the Merits, 3 May 2021, para. 171.
[448] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 325 i.
[redacted]

[redacted]

438. Understandably, the Gazprom group would prefer that the European Union changes its laws, rather than losing its export monopoly. But the elimination or limitation of that export monopoly is by no means unrealistic or, to borrow the Claimant's words, "fanciful"[452]. The Russian Government already permits the supply of gas in LNG form by independent suppliers, such as PAO Novatek[453], and is actively considering the possibility of allowing Rosneft to export natural gas[454].

439. The Claimant further contends, again, that the Claimant is just a "Swiss company" with no control over the actions and omissions of the Russian Government[455]. As noted above, however, NSP2AG and the Russian Government cannot be regarded as separate and distinct entities for the purposes of assessing NSP2AG's own contribution to the alleged adverse impact. As explained in Section 6.5, any actions and omissions of the Russian Government in connection with the NS 2 pipeline must be attributed to the Claimant.

6.3.5 The Claimant has opposed the negotiation of an IGA between the European Union and Russia

440. As the European Union has explained[456], the alleged adverse impact on NSP2AG's investment resulting from the regulatory overlap described in the previous Section could be best addressed through the conclusion of an IGA between the European Union and Russia on the operation of the NS2 pipeline, as formally recommended by the European Commission[457]. Such an IGA would be in line with well-established practice concerning similar import pipelines[458].

441. The envisaged IGA would provide for a single regulatory regime for the entire pipeline agreed between the European Union and Russia. Such a regime would not seek to replicate all the requirements of the Gas Directive. Rather, to

[redacted]

[452] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 238 iii.
[453] **Exhibit R-37**, website of PAO Novatek.
[454] **Exhibit R-153**, Reuters, 7 December 2021, "Russia's Putin puts Rosneft one step closer to gas exports to Europe", https://www.reuters.com/markets/commodities/russias-putin-requests-proposals-rosneft-gas-exports-europe-2021-12-07/
[455] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 324.
[456] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 209-214.
[457] **Exhibit C- 88.**
[458] European Union Counter-Memorial on the Merits, 3 May 2021, para. 210.

accommodate Russia's interests, it would "establish an appropriate regulatory regime for the operation of the pipeline, which introduces the key principles of EU energy law and moderates the expected negative market impacts"[459].

442. Despite the obvious benefits of such an IGA for NSP2AG and the Gazprom group, as compared to the current situation, the Claimant, which can be assumed to express the views of the Russian Government on this matter, has systematically objected to its negotiation[460]. The Claimant's and Russia's persistent hostility to the proposed IGA evidences, once again, their unwillingness to settle for anything short of the complete and unconditional disapplication of the EU's generally applicable regulatory regime to the NS 2 pipeline.

443. Remarkably, the Claimant does not even seek to contest that an IGA negotiated with Russia could mitigate the alleged adverse impact on the NS2 pipeline. Instead, the Claimant limits itself to rehearsing the unconvincing excuse that NSP2AG is a "Swiss company", which does not control the actions and omissions of the Russian Government[461]. To repeat, however, NSP2AG and the Russian Government cannot be considered as separate and distinct entities for the purposes of assessing NSP2AG's own contribution to the alleged adverse impact. As explained in Section 6.5, any actions and omissions of the Russian Government in connection with the NS 2 pipeline must be attributed to the Claimant.

6.4 The Claimant has not proven that it has already suffered losses attributable to the European Union

444. The Claimant alleges that it "has already suffered losses as a result of the Amending Directive"[462]. For the reasons explained below, that allegation is baseless.

6.4.1 The Claimant has failed to prove that it has already suffered losses attributable to the European Union resulting from the current inability to operate the NS2 pipeline

445. The Claimant contends that, because of the Amending Directive, the Claimant is "unable to operate [the NS 2 pipeline] and to generate revenue, despite

[459] **Exhibit C- 88**, Explanatory memorandum, p. 4.
[460] *See* **Exhibit C- 88**, NSP2AG's "Company Response to the European Commission Initiative for Negotiations Between the EU and Russia on an Intergovernmental Agreement", available at https://www.nordstream2.com/ru/dlia-pressy/novosti-i-meropriiatiia/company-response-to-the-european-commissioninitiative-for-negotiations-between-the-eu-and-russia-on-an-intergovernmental-agreement-55/
[461] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 324.
[462] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, Section VI.6

physically being in a position to do so, because of [the uncertainty as to the precise regulatory treatment of Nord Stream 2]"[463].

446. [redacted] The repeated and long delays in the construction of the pipeline were due to factors not attributable to the European Union, including in particular the sanctions imposed or threatened by the United States[466].

447. Furthermore, the Claimant's current inability to operate the pipeline pending the completion of the TSO certification process is the result of the Claimant's own lack of diligence. As explained above, the Claimant could have requested a TSO certification as soon as the Amending Directive was transposed by Germany and made sure that it complied with the clear and unambiguous legal requirements for making such request (in particular by setting up a subsidiary in a EU Member State). Furthermore, the Claimant could have sought to avert or limit the alleged impact of the Amending Directive, including in particular by requesting an exemption pursuant to Article 36 of the Gas Directive, also as soon as the Amending Directive was transposed by Germany. Instead, and for more than two years since the adoption of the Amending Directive, the Claimant limited itself to pursuing a derogation under Article 49a of the Gas Directive, even though the Claimant insists now that the NS2 pipeline cannot possibly qualify to apply for such a derogation. Had the Claimant taken appropriate and timely action, the "uncertainty as to the precise regulatory treatment of Nord Stream 2"[467] could have been dispelled long ago and the NS 2 pipeline could be fully operational by now.

6.4.2 [redacted]

[463] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 312.
[464] First Witness Statement of [redacted], 2 July 2020, para. 63.
[465] Second Witness Statement of [redacted], 25 October 2021, para. 46.
[466] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 172-177.
[467] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 312.
[468] [redacted]

[redacted]

452. [redacted]

[redacted]

469 [redacted]

456.

478

[redacted]

461. [redacted]

[redacted]

6.5 The impact resulting from actions or omission of entities belonging to the same group as the Claimant, or of the Claimant's ultimate owner and controller, must be attributed to the Claimant

462. As explained above, there are several ways in which the Claimant could have sought to prevent, and indeed can still seek to prevent, or at least substantially mitigate, the adverse impact of the Amending Directive alleged by the Claimant. Some of them involve actions of the Russian Government. In particular, the European Union has identified the following actions: i) the Russian Government could re-organise its control over the Claimant in accordance with Article 9(6) of the Gas Directive (Section 6.3.3); ii) the Russian Government could negotiate an IGA with the European Union (Section 6.3.5); and/or iii) the Russian Government could allow exports of gas from Russia by undertakings other than the Gazprom group, so as to facilitate the full use of the NS 2 pipeline (Section 6.3.4).

463. The Claimant has sought to dismiss these alternatives as "fanciful"[485] by arguing that the Claimant is just a "Swiss company", with no control over the actions and omissions of the Russian Government[486].

464. [redacted]

465. It is simply not credible for the Claimant to pretend that NSP2AG is just a "Swiss company" and that any actions or omissions of Gazprom, or of the Russian Government, cannot be imputed to it. The Claimant is *de facto* indissociable from both Gazprom (and other subsidiaries of Gazprom such as [redacted] Gazprom Export) and the Russian Government.

466. It is well established in international investment law that a State is responsible for the actions and omissions of a formally distinct legal entity, such as a state-owned enterprise, where such entity acts *de facto* as an organ of that State[488]. By the same token, a Claimant which acts *de facto* as an organ of a State cannot seek relief based upon the failure of that State (or of other *de facto* organs of that State) to mitigate the alleged impact of the challenged measures.

[485] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 238 iii.
[486] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 324.
[redacted]
[488] *See* **Exhibit RLA-161,** *Nykomb Synergetics Technology Holding AB, Stockholm v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, p. 31,[4.2]; **Exhibit RLA-262,** *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/09/02, Award, 31 October 2012, [405 a) and b)]; **Exhibit RLA-37,** *Flemingo DutyFree Shop Private Limited v the Republic of Poland*, UNCITRAL, Award, 12 August 2016, [426]; and **Exhibit RLA-263,** *Muhammet Çap & Bankrupt Sehil Inşaat Endustri Ve Ticaret Ltd. Sti v Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, [745].

467. In assessing whether a separate legal entity is *de facto* an organ of a State, previous investment tribunals have taken into account circumstances such as: the State's degree of ownership and/or control, whether direct or indirect[489]; the State's power to appoint and remove directors[490]; the degree of State supervision of the entity[491]; the fact that the entity has been granted special prerogatives by the State[492]; or the extent to which the purpose of the entity is to carry out functions of a governmental nature[493].

468. Having regard to those factors, it is beyond doubt that Gazprom and its subsidiaries (including the Claimant) act *de facto* as an organ of the Russian Government.

469. The Claimant does not contest that, through Gazprom [redacted], the Russian Government ultimately controls NSP2AG. Indeed, NSP2AG is wholly owned [redacted] Gazprom[495]. In turn, Gazprom is majority owned and controlled by the Russian Federation[496]. [redacted] Gazprom Export is a fully owned subsidiary of Gazprom[497].

470. Gazprom is the successor of the Ministry of Gas Industry of the former USSR. In 1989 the Ministry of Gas Industry was renamed as the State Gas Concern Gazprom and became the Soviet Union's first state run corporate enterprise.

471. State Gas Concern Gazprom became a joint-stock company pursuant to the Presidential Decree No. 1333, of 5 November 1992[498], and the Resolution of the Council of Ministers No. 138, of 17 February 1993[499].

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[489] **Exhibit RLA-161**, *Nykomb Synergetics Technology Holding AB, Stockholm v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, p. 31,[4.2]; **Exhibit RLA-262,** *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/09/02, Award, 31 October 2012, [405 a) and b)]; and **Exhibit RLA-37,** *Flemingo Duty Free Shop Private Limited v the Republic of Poland*, UNCITRAL, Award, 12 August 2016, [426].

[490] **Exhibit RLA-262,** *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/09/02, Award, 31 October 2012, [405 b].

[491] **Exhibit RLA-161,** *Nykomb Synergetics Technology Holding AB, Stockholm v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, p. 31,[4.2].

[492] **Exhibit RLA-161,** *Nykomb Synergetics Technology Holding AB, Stockholm v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003, p. 31,[4.2].

[493] **Exhibit RLA-263,** *Muhammet Çap & Bankrupt Sehil Inşaat Endustri Ve Ticaret Ltd. Sti v Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, [745].

[494] Expert Report of Peter Roberts, 22 October 2021, para. 12. [redacted]

[495] Expert Report of Peter Roberts, 22 October 2021, para. 12. [redacted]

[496] **Exhibit R-155**, Gazprom's website, Shares, https://www.gazprom.com/investors/stock/

[497] **Exhibit R-156**, Gazprom Export's website, Our Activity, http://www.gazpromexport.ru/en/about/activity/

[498] **Exhibit R-157**, Presidential Decree No. 1333, of 5 November 1992, http://www.kremlin.ru/acts/bank/2349 An English translation of the relevant provisions is provided as **Exhibit R-158**.

[499] **Exhibit R-159**, Resolution of the Council of Ministers No. 138, of 17 February 1993 https://docs.cntd.ru/document/9004045 . An English translation of the relevant provisions is provided as **Exhibit R-160**.

472. In accordance with the Presidential Decree No. 1333 of 5 November 1992, Gazprom is tasked to perform the following activities:

- providing reliable gas supply to Russian consumers;
- controlling Russia's Unified Gas Supply System (UGSS);
- supplying gas outside the country under interstate and intergovernmental agreements;
- pursuing an integrated science, technology and investment policy with regard to UGSS upgrading and development;
- building and financing high pressure gas pipeline branches for rural gasification purposes;
- providing other producers with access to the national gas transmission system.

473. According to its Articles of Association, as approved by the Resolution of the Council of Ministers No. 138, of 17 February 1993, Gazprom carries out certain functions of governmental nature, including the following[500]:

> [Gazprom] shall ensure constant supervisory control over the Unified Gas Supply System facility operations, as well as operations of the gas supply facilities connected to the System in their connection points, centralized technological and supervisory control over connected facilities, no matter who owns them. [Gazprom] shall give binding gas supply and gas consumption instructions to gas suppliers and consumers, according to the applicable laws and regulations in this field.
>
> [Gazprom] shall participate in operations of the interested governmental authorities for drafting subsoil use and gas industry laws, shall develop and submit the related projects for approval in the established manner.
>
> As concerns the gas, gas condensate and liquefied gas production, processing, transportation and storage facilities as well as the use of gas as motor fuel for vehicles, [Gazprom] shall:
>
> – participate in elaboration of construction standards and rules approved in the established manner;
>
> – participate in development and submit for approval in the established manner the federal and industry technological design standards as well as the industry construction standards; and

[500] **Exhibit R-161**, Articles of Association of Public Joint Stock Company Gazprom, Article 4.7 – 4.11.

> – participate in development and submit for approval in the established manner the safe operation rules for the above facilities.
>
> [Gazprom's] representatives shall, by resolution of the appropriate governmental authorities, be entitled to take part in negotiations on entering into multi-national and intergovernmental agreements for the Company's gas and condensate (oil) supplies.

474. Gazprom Export has a legal monopoly over exports of natural gas pursuant to the Federal Law on Exports of Gas No. 117-FZ, of 18 July 2006.[501] On its website Gazprom Export stresses that, in conducting its business operations, Gazprom Export ensures "compliance with Russia's National Interests"[502].

475. The Russian Federation, as the majority shareholder of Gazprom, has the right to appoint a large majority of the members of the Board of Directors.

476. Currently the Board of Directors of Gazprom is chaired by Mr. V. Zubkov, a former Prime Minister and Deputy Prime Minister of the Russian Federation, who is "Russia's Special Presidential Representative for Cooperation with the Gas Exporting Countries Forum"[503].

477. Other current members of Gazprom's Board of Directors include: Mr. A. Novak, Deputy Prime Minister of the Russian Federation; Mr. D. Manturov, Minister of Industry and Trade of the Russian Federation; and Mr. N. Shulginov, Minister of Energy of the Russian Federation[504].

478. Mr. Alexei Miller, the current Deputy Chairman of the Board of Directors and Chairman of the Management Committee of Gazprom, is a former Deputy Energy Minister of the Russian Federation[505]. From 1991 to 1996, Mr. Alexei Miller served on the Committee for External Relations of the Saint Petersburg Mayor's Office under Mr. Vladimir Putin, current President of the Russian Federation.

479. Gazprom has officially acknowledged that "through its shareholding, representation on Gazprom's Board of Directors and role as the main regulator,

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[501] **Exhibit R-162**, Federal Law on Exports of Gas No. 117-FZ, of 18 July 2006, *https://legalacts.ru/doc/federalnyi-zakon-ot-18072006-n-117-fz-ob/* . An English translation of the relevant provisions is provided as **Exhibit R-163**.
[502] **Exhibit R-164**, Gazprom Export's website, Our Activity, http://www.gazpromexport.ru/en/about/activity/
[503] **Exhibit R-165**, Gazprom's website, Board of Directors, https://www.gazprom.com/about/management/directors/
[504] **Exhibit R-165**, Gazprom's website, Board of Directors, https://www.gazprom.com/about/management/directors/
[505] **Exhibit R-165**, Gazprom's website, Board of Directors, https://www.gazprom.com/about/management/directors/

the Government has a strong influence over our operations."[506] More precisely, according to Gazprom,

> As our controlling shareholder, the Russian Federation is able to determine our strategy, make policy decisions in relation to the main areas of our business (including investments, borrowings, risk management and asset allocation), and supervise the implementation of such decisions.[507]

480. Further, Gazprom has recognised that "the Government has previously required Russian companies, including us, to take certain actions, such as the undertaking of projects and the supply of goods and services to customers that may not be in the best interests of such companies or their investors" [508].

481. In practice, the Russian Government exercises its control over Gazprom, and over its subsidiaries, including the Claimant, in a very direct and overtly intrusive manner.

482. Russia's President does not hesitate to issue personally public orders to Gazprom with regard to matters pertaining to Gazprom's business activities, which are then dutifully executed by Gazprom's management. Such instructions are aimed at advancing Russia's "National Interests", including in particular Russia's foreign policy objectives, rather than Gazprom's commercial interests.

483. By way of example, at a recent televised meeting on 27 October 2021, President Putin ordered publicly Mr. Alexei Miller, to resume, within a matter of days, the deliveries of natural gas to Gazprom's UGS facilities in Europe[509].

484. The following excerpt of the transcript of that televised meeting leaves no doubt about the complete subservience of Gazprom to the political instructions of the Russian Government:

> ***V.P.*** *Alexey Borisovich, I ask you, after you finish pumping gas into underground gas storage facilities in Russia on November 8, start smooth and planned work to increase the gas volume of your UGS facilities in Europe, Austria and Germany. This will make it possible to reliably and rhythmically fulfill your contractual obligations, in order to*

[506] [redacted]

[509] **Exhibit R-167**, Transcript of televised meeting of 27 October 2021 between V. Putin and A. Miller The video of the meeting is provided as **Exhibit R-168**, http://kremlin.ru/events/president/news/67016

> *supply European partners with gas in the autumn-winter period. And, it will certainly create a more favorable situation on the energy market in Europe as a whole.*
>
> ***A.M.*** *We will do so as soon as we finish pumping gas into UGS facilities in the Russian Federation, we will start pumping our Gazprom gas into UGS facilities in Europe, and as you noted, this will increase the reliability and stability of gas supplies in the autumn-winter period, in the coming winter.*
>
> ***V.P.*** *Okay, do it, then report back to me how this work is going.*
>
> ***A.M.*** *Naturally.*[510]

485. President Putin's instruction to Gazprom followed widespread public complaints, according to which the Russian Government had previously directed Gazprom to withhold its deliveries of gas to its European USG facilities, with the purpose of causing an acute price hike and coerce Germany and the European Union to grant the certification of the NS 2 pipeline requested by the Claimant[511]. President Putin denied those accusations, while stressing his complete certainty that certification of the NS 2 pipeline will lead to a reduction of prices in the European Union[512].

486. There is ample evidence that the Russian Government uses Gazprom as an instrument to advance its foreign policy objectives[513]. The Russian Government intervenes directly in the negotiation of supply agreements between Gazprom and other countries which are dependent on Gazprom's supplies and, where considered politically expedient, dictates to Gazprom the terms of those agreements, according to the foreign policy objectives pursued by the Russian

[510] **Exhibit R-167**, Transcript of televised meeting of 27 October 2021 between V. Putin and A. Miller The video of the meeting is provided as **Exhibit R-168**.

[511] **Exhibit R-169**, The Centre for Eastern Studies, "Russia and the gas crisis in Europe", 3 November 2021, https://www.osw.waw.pl/en/publikacje/analyses/2021-11-03/russia-and-gas-crisis-europe ;
Exhibit R-170, Financial Times, 9 December 2021, "Why Nord Stream 2 is at heart of US warnings to Putin over Ukraine", https://www.ft.com/content/650963c2-3e45-4ad0-bc87-0f0b59851a5a;
Exhibit R-171, Financial Times, 12 January 2022, "IEA chief accuses Russia of worsening Europe's gas crisis ("*Fatih Birol said on Wednesday that the IEA […] believed Russia was holding back at least a third of the gas it could feasibly send to Europe, while draining Russian-controlled storage facilities on the continent to bolster the impression of tight supplies. "We believe there are strong elements of tightness in the European gas market due to Russia's behaviour," Birol said. "I would note that today's low Russian gas flows to Europe coincide with heightened geopolitical tensions over Ukraine." Birol added, "Russia could increase deliveries to Europe by at least one-third — this is the key message."*), available at https://www.ft.com/content/668a846e-d589-4810-a390-6d7ff281054a?shareType=nongift

[512] **Exhibit R-172**, President of Russia, 13 October 2021, "Russian Energy Week International Forum plenary session" ("*The German regulator must take the corresponding decision, but has not done so yet. Of course, if we could increase deliveries through this route, this would substantially ease tension on the European energy market. I am 100 percent sure about this. Of course, this would affect prices on the European gas market. This is obvious. However, we cannot do this so far because of the administrative barriers.*") http://en.kremlin.ru/events/president/news/66916; **Exhibit R-173**, Financial Times, "Putin says Russia could deliver 10% more gas if Nord Stream 2 approved", 21 October 2021, available at https://www.ft.com/content/e5f74353-73e5-4273-ae13-cc3d0985e606
Exhibit R-174, Reuters, 29 December 2021, "Putin says Nord Stream 2 link ready to calm gas prices, https://www.reuters.com/markets/commodities/putin-declares-nord-stream-2-ready-gas-exports-2021-12-29/

[513] **Exhibit R-175**, Gabriel Collins, "Russia's use of the 'Energy Weapon' in Europe," (Houston: Baker Institute for Public Policy, Rice University, July 17, 2020), available at https://www.bakerinstitute.org/research/russias-use-energy-weapon-europe/

Government, rather than the commercial interests of Gazprom. For example, it has been reported that Gazprom has recently concluded supply agreements with Serbia[514], Moldova[515] and Hungary[516] on very favourable terms for those three countries, following the personal intervention of Russia's President. As recently as at a joint press conference in Moscow on 1 February 2022 with Hungary's Prime Minister Viktor Orbán, Russian President V. Putin "signaled that he was ready to increase gas supplies to Hungary from 4.5 to 5.5 billion cubic meters per year". [517]

487. There is also ample evidence that, in particular, the Russian Government regards the NS 2 pipeline as a matter of overriding national interest and has frequently and forcefully intervened in order to ensure the success of the project[518].

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[514] **Exhibit R-176**, Lenta, 26 November 2021, "Serbia called the gas price agreed with Russia the lowest in Europe", https://lenta.ru/news/2021/11/26/nizko/; **Exhibit R-177**, Balkan Insight, 24 November 2021, "Serbia expects a "friendly price" for Russian gas when the country's current supply deal expires on December 31", available at https://balkaninsight.com/2021/11/24/serbia-russia-gas-deal-seen-certain-but-at-what-price/

[515] **Exhibit R-178**, 28 October 2021, Radio Free Europe, "The Kremlin Is Threatening To Turn Off Moldova's Gas. Pro-Russia Separatists Are Blamed For Running Up The Energy Bill", available at https://www.rferl.org/a/moldova-gas-russia-transdniester/31533284.html; **Exhibit R-179**, Tass, 29 October 2021, "Gazprom is open to further talks that will lead to mutually acceptable solutions with Moldova on gas supplies, Kremlin spokesman Dmitry Peskov announced", https://tass.com/economy/1355647; **Exhibit R-180**, Tass, 22 November 2021, "Gazprom may stop gas supplies to Moldova in 48 hours due to non-payment — company" (Gazprom's spokesman Sergey Kupriyanov said: "*Taking into account Moldova's very difficult economic and financial situation and being guided by the desire to keep Moldova's ability to pay off its debt obligations to Gazprom, as well as the position of the Russian President, the Moldovan side has repeatedly turned to for assistance, Gazprom decided to sign the contract practically on the terms of the Moldovan side […].* Underlining added), available at https://tass.com/economy/1364785

[516] **Exhibit R-181**, Intellinews, "East Europe fares better than West in gas crisis thanks to pricing terms", 30 November 2021 *("Hungary inked a new and very controversial deal with Gazprom in September that diverted gas that used to flow through Ukraine and rerouted it via the newly launched TurkStream pipeline, cutting Ukraine out of the loop. […] Hungary obviously got a better deal with lower prices from its new deal, but the details are an extremely closely guarded secret. Hungarian authorities insisted that the new deal, which will last up to 15 years, will result in a lower price than the one calculated in the old agreement that expired that month".*), available at https://intellinews.com/long-read-east-europe-fares-better-than-west-in-gas-crisis-thanks-to-pricing-terms-228445/

[517] See **Exhibit R-204**, Radio Free Europe/Radio Liberty, "Orban Requests Increase In Russian Gas Imports" *("During Meeting With Putin Orban spoke at a joint news conference with Putin, who signaled that he was ready increase gas supplies to Hungary from 4.5 billion to 5.5 billion cubic meters per year. Details were not provided, but Orban added that Hungary would be insulated from future energy price spikes in Europe under its long-term contract with Russia.*"), available at: https://www.rferl.org/a/hungary-orban-putin-russia-gas/31681502.html.

[518] *See* e.g. **Exhibit R-182**, Reuters, "Putin says will fight for Nord Stream 2 pipeline project", 18 May 18 2018 available at: **https://uk.reuters.com/article/us-russia-germany-putin-merkel-nordstrea/putin-says-will-fight-for-nord-stream-2-pipeline-project-idUSKCN1IJ1SW ; Exhibit R-183**, Reuters, "Lavrov: Nord Stream 2 will be completed despite difficulties", 19 May 2020**,** available at: **https://www.reuters.com/article/us-russia-gas-nord-stream-2-idUSKBN22V240** ; **Exhibit R-184**, Financial Times, 22 December 2019, "US envoy defends Nord Stream 2 sanctions as 'pro-European" ("*Russian foreign minister Sergei Lavrov on Sunday warned that Russia would respond to the measures with steps that would not also harm the Russian economy […] Lavrov on Sunday vowed that the pipeline — and a similar project to pipe gas to Turkey also affected by the sanctions — would be launched regardless of the US decision."*), available at: https://www.ft.com/content/21535ebe-23dc-11ea-9a4f-963f0ec7e134 ;
Exhibit R-185, Reuters, "Putin says Nord Stream 2 link ready to calm gas prices" , 29 December 2021, available at https://www.reuters.com/markets/commodities/putin-declares-nord-stream-2-ready-gas-exports-2021-12-29/ ; **Exhibit R-186**, Financial Times, "Putin says Russia could deliver 10% more gas if Nord Stream 2 approved", 21 October 2021, available at https://www.ft.com/content/e5f74353-73e5-4273-ae13-cc3d0985e606 ; **Exhibit R-187**, Deutsche Welle, "Russia says Nord Stream 2 loaded with gas, no alternatives needed", available at: https://www.dw.com/en/russia-says-nord-stream-2-loaded-with-gas-no-alternatives-needed/a-60284377 ; **Exhibit R-188**, Reuters, "Russia says failure to certify Nord Stream 2 is not an option –

488. Given the degree of subordination of Gazprom to the Russian Government, it is inconceivable that the Gazprom group could have taken the initiative to build the NS 2 pipeline without being instructed to do so by the Russian Government. It is likewise inconceivable that the Claimant could have decided to institute the current proceedings against the European Union without the Russian Government's prompting. The Russian Government will be the main beneficiary of any remedies that might be ordered by this Tribunal against the European Union. It would be manifestly unfair if the Russian Government were to benefit in such way from "impacts" which are attributable to the Russian Government's own acts and omissions.

489. For the above reasons, it is beyond doubt that Gazprom and its subsidiaries (including the Claimant) act *de facto* as an organ of the Russian Government. Therefore, any relevant actions or omissions of the Russian Government relating to the NS 2 pipeline must be attributed to the Claimant for the purpose of assessing the Claimant's own contribution to the "impacts" alleged by the Claimant.

6.6 The impact resulting from the U.S. sanctions is not attributable to the European Union

490. The Claimant argues that, but for the Amending Directive, [redacted] According to the Claimant, complicating factors and challenges that such negotiations may face, which include, as the Claimant acknowledges, U.S. sanctions "have no bearing on the EU's liability for illegitimately putting NSP2AG in that position in the first place".[520]

491. However, under international law, [redacted] as a result of the U.S. sanctions cannot be attributed to the European Union.

492. Article 31 of the 2001 ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) identifies causation as a critical condition

RBC", 29 December 2021, available at https://www.reuters.com/markets/commodities/russia-says-failure-certify-nord-stream-2-is-not-an-option-rbc-2021-12-29/ [redacted]

[520] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 285.

precedent to the obligation of a State to repair any injury caused by any of its internationally wrongful acts:

> Article 31. Reparation
>
> 1. The responsible State is under an obligation to make full reparation for the injury **caused by** the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, **caused by** the internationally wrongful act of a State. (Emphasis added.)

493. In the commentary to Article 31, the ILC underlines the need for a causal link between the internationally wrongful act and the injury for which full reparation must be made[521]. As stated by the ILC in its Commentary: "Article 31(2) is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act"(our emphasis).

494. The ILC in its Commentary mentions that the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise may be described as the wrongful act being a "proximate cause" of losses. The ILC points to an additional requirement beyond causation for the obligation to repair injury to arise, namely: that of directness, foreseeability or proximity, in order to exclude injury that is too remote or consequential to be the subject of reparation.

495. The International Court of Justice (**ICJ**) recently articulated and applied principles on compensation and causation that are consistent with those set forth by the ILC in its Commentary in its rendered Judgment on the question of reparations in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo [DRC] v. Uganda)*.[522] The European Union draws the

[521] **Exhibit RLA-62,** International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected. Available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.
See in particular paras. 9-10 of the commentary to Article 31.

[522] **Exhibit RLA-306**, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 9 February 2022, General List No. 116. It is understood that the facts of this case, in which the ICJ fixed the amounts for the compensation due by Uganda to the DRC, are distinguishable from the dispute with Nord Stream 2, as the case before the ICJ related to the unlawful use of force by one State in the territory of another State, as well as the occupation by one State of part of another State's territory. *See e.g. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 9 February 2022, General List No. 116, para. 65. Nevertheless, the principles that the ICJ articulated and applied are directly relevant to the issues of attribution, causation and compensation that the Claimant's allegations raise.

Tribunal's attention in particular to the following statements by the ICJ in this recent Judgment, which align with the ICJ's previous jurisprudence:

> *93. The Court may award compensation only when an injury is caused by the internationally wrongful act of a State. As a general rule, it falls to the party seeking compensation to prove the existence of a causal nexus between the internationally wrongful act and the injury suffered. In accordance with the jurisprudence of the Court, compensation can be awarded only if there is "a sufficiently direct and certain causal nexus between the wrongful act ... and the injury suffered by the Applicant, consisting of all damage of any type, material or moral" …*
>
> *94. … For some other injuries, the link between the internationally wrongful act and the alleged injury may be insufficiently direct and certain to call for reparation. It may be that the damage is attributable to several concurrent causes …*
>
> *382. The Court considers that it is not sufficient, as the DRC claims, to show "an uninterrupted chain of events linking the damage to Uganda's wrongful conduct". Rather, the Court is required to determine "whether there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant" … Compensation can thus only be awarded for losses that are not too remote from [the internationally wrongful conduct] …*

496. Two specific conditions thus arise from Article 31 and the ILC's Commentary, as well as from the ICJ's jurisprudence: (i) the internationally wrongful act must be a sufficiently direct or proximate cause of the alleged injury (*i.e.*, the loss suffered must be a natural consequence of the wrongful act – this is also referred to as "factual causation"); and (ii) foreseeability, *i.e.*, the State must have reasonably foreseen that its internationally wrongful act would cause the claimed damages (thus avoiding linking overly remote damages to an internationally wrongful act – also known as "legal causation").

497. As noted by Professor Bjorklund:

> *'Causation' serves several purposes in investment arbitration. One role it plays is in establishing liability – harm resulting from unlawful conduct is attributable to the State if it is caused by State action, or by State inaction if the State had a duty to act. Conduct attributable to some actor other than the State does not give rise to State responsibility. A second role it plays is in establishing the amount of compensation due. There must be a causal link between the unlawful act and the injury, including monetary damages, that ensues.* [523] (Footnotes omitted.)

[523] **Exhibit RLA-265,** Andrea K. Bjorklund, "Causation, Morality, and Quantum" (2009) 32 Suffolk Transnat'l L Rev 435, 435-436.

498. In *Biwater Gauff v. Tanzania*, the tribunal considered that "[t]he key issue in this case is the factual link between the wrongful acts and the damage in question" and found that none of the respondent's treaty violations "in fact caused the loss and damage in question".[524]

499. In *S.D. Myers v. Canada*, the tribunal decided that compensation was payable only in respect of harm that was proved to have a "sufficient causal link" with a specific treaty breach, and that the claimant had to prove that its economic losses had arisen from a treaty breach and not from other causes. The *S.D. Myers* tribunal further stated that "the harm must not be too remote" and that "the treaty breach must be the proximate cause of the harm".[525]

500. The "sufficient causal link" approach was subsequently adopted by a number of other tribunals, including among others: *El Paso Energy v. Argentina*;[526] *Duke Energy Electroquil v. Ecuador*;[527] *Biwater Gauff v. Tanzania*;[528] and *Crystallex v. Venezuela*.[529]

501. Many of NSP2AG's claims, including notably its claim of breach of Article 13 of the ECT, and its various claims pursuant to Article 10(1) of the ECT based on the alleged lack of proportionality of the Amending Directive, require that the Claimant proves that the alleged "impact" on the investment is attributable to the European Union. Unless such "impact" is established and can be attributed to the European Union, there can be no breach of the ECT by the European Union. The above considerations concerning the requisite link of causality are equally pertinent in order to decide that issue.

502. The European Union submits that U.S. sanctions break the chain of causation (if there was any to be found, which is denied) between the Amending Directive and the "impact" alleged by the Claimant in relation to the NS2 pipeline project, as a constituent element of its claims of breach of the ECT.

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[524] **Exhibit CLA-96**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 783-785 and fn 369, 786, 792-797.

[525] **Exhibit RLA-264,** *S.D. Myers v. Canada* (UNCITRAL; [First] Partial Award, 13 November 2000, at para. 316; Second Partial Award, 21 October 2002, paras. 140, 311). The *S.D. Myers* tribunal ultimately found that there was causation and held Canada liable to compensate the claimant for its losses.

[526] **Exhibit RLA-137,** *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2001, paras. 682-687, 752 (the tribunal found that Argentina's measures had caused the losses).

[527] **Exhibit RLA-148,** *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, paras. 468, 491 (the tribunal found that Ecuador's measures had caused the claimants' losses).

[528] **Exhibit CLA-96**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 779 (as previously discussed, the tribunal found no causation and Tanzania was not held liable for the claimant's losses).

[529] **Exhibit RLA-176,** *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 860, 862 (the tribunal found that Venezuela's measures had caused the claimant's losses).

[redacted]

504. [redacted]

[redacted]

[redacted]

[redacted]

508. [redacted]

[redacted]

[redacted]

511. In addition, the alleged impact of the U.S. sanctions was not reasonably foreseeable[538] by the EU legislators at the time where the Amending Directive was enacted. [redacted] Subsequent U.S. legislation on sanctions was enacted after the adoption of the Amending Directive and could not have been reasonably foreseen by the EU legislators. Indeed, had it been reasonable foreseeable by the EU legislators, it should have been reasonably foreseen as well by the Claimant [redacted]. Therefore, the Claimant could have refrained from making the investment [redacted] or at least covered adequately such risk.

[redacted]

[538] **Exhibit RLA-62**, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* Commentary, para. 10.

[redacted]

7 THE EUROPEAN UNION HAS NOT BREACHED ITS OBLIGATIONS UNDER THE ECT

7.1 There is no breach of the fair and equitable treatment standard under Article 10(1) ECT

512. The Claimant's allegations of breach of obligations under the fair and equitable treatment ("FET") standard contained in Article 10(1) of the ECT are unsustainable, in light of the legal content of the standards alleged and the facts at issue in this dispute. As made clear by the EU in its Counter-Memorial, the EU fully complied with its obligations under the standards set out in Article 10(1) of the ECT: it ensured due process and justice and did not breach legitimate expectations; it acted proportionately, transparently, and in good faith; and there was no impairment by unreasonable or discriminatory measures. The Claimant's attempt to rebut these arguments in its Reply is unconvincing, as addressed in the following subsections.

7.1.1 The European Union ensured due process and did not deny justice

513. In its Memorial, the Claimant argued that the European Union failed to afford the Claimant due process and denied it justice. In making this argument, the Claimant asserts that these standards are "together" a key element of the FET standard, which may be breached when a decision-maker bases a decision on "inappropriate or irrelevant considerations."[540]

514. In its Counter-Memorial, the EU recalled that – although the notion of due process is often associated with a denial of justice – these standards are nonetheless separate. As a result, the EU discussed the two standards separately, noting the high standard required for both.[541] In particular, the EU noted, due process of law is associated with a procedural violation by a host State in connection with either judicial or administrative decision-making, circumstances that do not arise here, where the adoption of a Directive is at issue.[542]

515. In its Reply, the Claimant now asserts that the obligation to accord due process is broader than a denial of administrative or judicial justice,[543] and denies treating the standards "together". The Claimant's arguments remain unavailing. First, the Claimant's attempts to reinvent both its claims and the standards it now says should apply are wholly inconsistent with its earlier claims, which merely underscores its inability to support a claim of a breach of due process or of denial

[540] Claimant's Memorial, 3 July 2020, para. 388.
[541] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 426-433 ("Legal standard of due process") and paras. 434-443 ("Legal standard of denial of justice").
[542] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 430-432.
[543] Claimant's Memorial, 3 July 2020, para. 392(i).

of justice on the present facts. Second, the Claimant continues to overstate the content of the legal standard of due process under Article 10(1) of the ECT, and to understate the high threshold required to demonstrate a breach of legislative process in particular. In sum, the Claimant continues to mischaracterise both the content of the standard and the threshold for breach of the obligations Article 10(1) truly upholds.

7.1.1.1 The Claimant has been inconsistent in its assertion of the relevant standard to be applied

516. In its Memorial, the Claimant conflated the standards of "due process" and "denial of justice", arguing that "[t]he application of a fair procedure and compliance with the basic principles of due process of law are together a key element of the FET standard."[544] The Claimant made these arguments under the heading "Failure to afford NSP2AG due process and denial of justice."[545] In its Counter-Memorial, the EU noted that the Claimant had conflated these standards, separating its discussion of due process and denial of justice to make clear the high – but separate – standards required in respect of each.[546]

517. Now, in its Reply, the Claimant has conspicuously pivoted towards arguing that the EU allegedly failed to accord "due process and *proper procedure*" (i.e. *not* "denial of justice").[547] In making this shift, the Claimant resiles from the arguments it originally made in its Memorial, stating that "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."[548] In decisively stepping away from its original allegations, the Claimant appears to hope that a focus on "due process" and "proper procedure" (a standard which appears to be of the Claimant's own making, as somehow distinct from that of due process) will distract the Tribunal from applying the high standards required to demonstrate a breach of FET. As discussed in the following section, these efforts must fail; the Claimant continues to substantially overstate both the content of the due process standard and the ease with which the standard may be breached. Its attempts to now distinguish its claims from the standards required for a denial of justice are unavailing.

[544] Claimant's Memorial, 3 July 2020, para. 388.
[545] Claimant's Memorial, 3 July 2020, paras. 388-393.
[546] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 426-433 ("Legal standard of due process") and paras. 434-443 ("Legal standard of denial of justice").
[547] Claimant's Memorial, 3 July 2020, para. 392(i).
[548] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, p. 151 (heading states "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").

7.1.1.2 The Claimant continues to overstate the content of the legal standard required to demonstrate a breach of due process

518. The Claimant first argues that the obligation to provide due process is a "broad concept" that "cannot be reduced to the EU's binary presentation of administrative procedures or judicial procedures."[549] Instead, the Claimant asserts, a "lack of due process is a separate element of the FET standard and is broader than simply denial of administrative or judicial justice."[550] The Claimant is prompted to assert this standard, precisely because it knows that its claims fail under the legal standards for either due process or for denial of justice.

519. As the EU demonstrated in its Counter-Memorial, the concept of due process as considered by tribunals in relation to FET has been linked to the protection of fundamental procedural rights in the administrative or judicial decision-making context, such as reasonable notice, a fair hearing, unbiased and impartial adjudicators, procedural fairness in application of administrative procedures, and procedural violations in regulatory decisions.[551] As the EU pointed out, the facts of the current matter concern neither an administrative nor a judicial review process, but rather the Claimant's allegations relating to the process for adoption of the Amending Directive (essentially and undoubtedly, a legislative process). As such, reliance on cases considering the procedural conduct of tribunals (either judicial or administrative) is inapposite. Moreover, to the EU's knowledge, only one case (*Belenergia v. Italy*) has addressed a claim that a failure to observe "legislative process" could amount to a breach of the FET standard.[552] In rejecting this claim, the *Belenergia* tribunal expressly found that "the standard for a finding of procedural impropriety is a high one under the FET."[553]

520. In attempting to overcome this fundamental problem with its case, the Claimant essentially makes two arguments. First, the Claimant attempts to dismiss as "irrelevant" the EU's survey of cases demonstrating the administrative or judicial context of the "due process" standard. Second, the Claimant attempts to break free of the EU's allegedly "binary" characterization of due process as administrative or judicial justice by creating its own test of "proper process". Neither of these tactics withstand scrutiny. In fact, a review of the cases and

[549] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 404.
[550] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, p. 150 (heading).
[551] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 429-432.
[552] **Exhibit RLA-168**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, para. 607.
[553] **Exhibit RLA-168**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, para. 609.

arguments the Claimant cites in support of its new arguments simply reinforce the correctness of the EU's position.

521. First, the Claimant cherry-picks from the EU's review of arbitral decisions considering the notion of due process, and the types of measures that tribunals in such cases held to amount to a breach of due process. For example, the Claimant asserts that the findings of the tribunals in *Metalclad v. Mexico*, *Genin v. Estonia*, and *International Thunderbird v. Mexico* are irrelevant because the paragraphs cited referred to the tribunals' decision on the facts and "d[id] not offer any standard against which an allegation of lack of due process can be judged",[554] arguing that the EU's reliance on these cases therefore is misleading."[555]

522. This is incorrect. Examination of the referenced cases confirms that there was nothing either irrelevant or misleading about them. These cases all dealt with the concept of administrative due process (arguably, as noted above, an even higher standard than the one that should be applied to a legislative process).[556] They set out the standards used to assess such claims. The cases in question consistently found that the bar for breach of "due process" under FET, even in the administrative decision setting, is high. For example:

- In *Metalclad v. Mexico*, at issue was the fairness of a process of municipal decision-making regarding the issuance of a permit. The municipality issued the denial of the permit at a meeting of the town council, after 13 months, and the claimant received no notice of this meeting, no invitation, and no opportunity to appear.[557] The tribunal concluded that the denial of the permit at issue "coupled with the procedural and substantive deficiencies of the denial" supported its finding of a breach of the fair and equitable treatment standard.[558] The standard for breach here obviously was high: the investor had deliberately been denied the ability to make representations in respect of an administrative decision specifically concerning it. Despite these circumstances, the Claimant was unsuccessful in its claim, reflecting the high threshold for breach of "due process" even in the context of administrative decision-making.

[554] *See*, *e.g.*, Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 403(iii).
[555] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 403.
[556] **Exhibit RLA-168**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, para. 609.
[557] **Exhibit CLA-126**, *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 91; European Union Counter-Memorial on the Merits, 3 May 2021, para. 430.
[558] **Exhibit CLA-126**, *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 97.

- In *Genin v. Estonia*, at issue was the revocation of the claimant's banking licence by the respondent, through the administrative processes provided by law.[559] In considering the claim, the tribunal specifically listed certain procedures subject to criticism by the investor, including the absence of any formal notice to the claimant that its license would be revoked, the authority's failure to invite the claimant to attend meetings relating to the amendments at issue, and the fact that the administrative decision was not subject to challenge.[560] Despite this, the tribunal held that the authority's administration of its functions "[did] not amount to a denial of due process".[561]
- In *International Thunderbird v. Mexico*, the tribunal considered the claimant's allegation that Mexico had failed "to provide due process, constituting an administrative denial of justice".[562] The *Thunderbird* tribunal rejected this claim, noting that the claimant was given a full opportunity to be heard and to present evidence.[563] As a result, the tribunal found that circumstances did not attain the minimum level of gravity required to show an administrative due process violation.[564]

523. Clearly, the types of "procedural and substantive" issues addressed by the tribunals in these disputes formed part of the standard against which an alleged breach of "due process" should be assessed, and were accordingly among the examples the EU provided in its Counter-Memorial.[565] These findings provide a clear and consistent confirmation of the high standard required to find a violation of due process, even in an administrative decision-making context. *A fortiori*, the standard for breach of due process in the context of a legislative process, notably relating to the adoption of a law of general and abstract application, should be even higher.

[559] In this dispute, the Bank of Estonia (Estonia's central bank) was afforded administrative function under the Bank of Estonia Act, including the right to issue and cancel banking licences. *See* **Exhibit RLA-103**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 62.
[560] **Exhibit RLA-103**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 364.
[561] **Exhibit RLA-103**, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 364.
[562] **Exhibit RLA-104**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 186.
[563] **Exhibit RLA-104**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, paras. 197-198.
[564] **Exhibit RLA-104**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 200.
[565] European Union Counter-Memorial on the Merits, 3 May 2021, para. 431.

524. These findings are also consistent with other cases cited by the EU, including *ADC v. Hungary* and *Petrobart v. Kyrgyz Republic*.[566] The Claimant also takes umbrage with the EU's reference to these cases, on the basis that they considered due process in the expropriation and in the "effective means" context.[567] Despite this criticism, the Claimant does not demonstrate or indeed even allege that the due process standards are (or should be) materially lower in the context of a legislative process.

525. Indeed, the legal authorities the Claimant itself refers to in its Reply support the high threshold required to establish a breach of due process under the FET standard, even in the administrative or judicial decision-making context.[568] For example, the Claimant relies on *Apotex v. United States* to assert that the standard of due process is a "flexible" one, citing the tribunal's finding in that case at paragraph 9.48 that "whatever process may be due depends on the particular context or circumstances of the claim." This sentence follows paragraph 9.47, which states:

> Despite their varying approaches regarding this element of due process, Professor Dumberry concludes in his well-known work that all of these past NAFTA tribunals "have emphasized that a high threshold of severity and gravity is required in order to conclude that the host state has breached any of the elements contained within the FET standard under Article 1105." The Tribunal agrees with this scholarly conclusion. It does not support the Claimants' case.[569]

526. Thus, while particular circumstances of a claim will always be relevant to determining a breach, the Claimant's own preferred legal authority is clear on the

[566] **Exhibit RLA-101**, *ADC Affiliate Limited and ADC & ADMC Management Limited Claimants v. The Republic of Hungary*, Award, 2 October 2006, para. 435; Exhibit RLA-102, *Petrobart v. Kyrgyz Republic (II)*, SCC, Award, 29 March 2005, para. 133.
[567] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 403(i) and 403(ii).
[568] The Claimant cites the tribunal's findings in *Rusoro v. Venezuela* for its proposition that "a deliberate and 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." *See* Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 405. However, this sweeping conclusion is not found in the *Rusoro* decision; in fact, the tribunal simply stated at a general level that the fair and equitable treatment standard encompasses the principles of due process, but went on to find that the claimants had failed to prove a breach under the fair and equitable treatment standard because the claimant had not demonstrated any legitimate expectations with respect to the legislation. That is, the tribunal in *Rusoro v. Venezuela* did not even directly address the standard required by due process. *See* **Exhibit CLA-216**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para 524 (whether the State has "respected the principles of due process … when adopting the offending measures"). The Claimant's reliance on that case is therefore irrelevant, and the EU does not consider it necessary to provide any further response.
[569] **Exhibit CLA-217**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 9.47 (emphasis added, internal citation omitted).

fundamental point that the standard against which those circumstances must be considered is "a high threshold of severity and gravity."[570]

527. In another case the Claimant relies upon, *AES v. Hungary*, the conclusion of the tribunal was the same. The *AES* tribunal rejected the claimant's allegation that the respondent had failed to accord due process, stating that:

> not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The 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) – to use the words of the *Tecmed* Tribunal – that the standard can be said to have been infringed.[571]

528. Once again, the legal authority upon which the Claimant itself relies simply supports the EU's point that the standard for finding a breach of due process, even in the judicial or administrative decision-making context, is high, and must amount to "manifestly unfair or unreasonable" procedural misconduct.[572] In the context of parliamentary adoption of legislation, this high threshold has never been found to have been violated: this is presumably because tribunals recognise that appropriate deference should be afforded to the processes followed by the democratically elected legislative bodies of a sovereign State.

529. Finally, in its Memorial, the Claimant asserted that the tribunal in *Tecmed v. Mexico* "held that there may be a lack of due process when a decision-maker bases a decision on inappropriate or irrelevant considerations."[573] The EU in response pointed out that the tribunal in that case did not mention due process or denial of justice, nor set out a test that a tribunal should apply.[574] In its Reply, the Claimant has therefore tied itself in knots trying to distinguish its reliance on this case, claiming that "[w]hether the tribunal expressly included within its description the words 'due process' is irrelevant."[575] This is a far cry from the initial "standard" the Claimant declared, and even more so of the *Tecmed* tribunal's finding (repeated by the *Apotex* tribunal) that a breach of the fair and equitable treatment standard requires conduct that "shocks, or at least surprises,

[570] **Exhibit CLA-217**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 9.47.
[571] **Exhibit CLA-108**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.40 (emphasis added, internal citation omitted).
[572] **Exhibit CLA-108**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.40.
[573] Claimant's Memorial, 3 July 2020, para. 388, citing **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154.
[574] European Union Counter-Memorial on the Merits, 3 May 2021, para. 442.
[575] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 411.

a sense of juridical propriety" as a general matter. In any event, it remains the case that the *Tecmed* tribunal was discussing administrative decision-making rather than seeking to set a standard for due process in the context of a parliamentary procedure.

530. Thus, no matter whether the Tribunal looks at the legal authorities cited by the Claimant or those cited by the EU, the result is the same: in order to breach the obligation to accord due process, "a high threshold of severity and gravity is required",[576] that "shocks, or at least surprises, a sense of juridical propriety",[577] and not every breach of procedure amounts to a breach of the right to due process under international law.[578] Moreover, this comes in the context of administrative or judicial decision-making; no tribunal has ever sought to second-guess the decisions reached by a duly elected parliamentary assembly on the basis of alleged lack of "due process", under the FET standard or otherwise.

531. Nor has anything in the various steps of the legislative process followed by the EU or any of its constitutive organs (notably the European Parliament) come close to violating a standard of "due legislative process", even if such a thing had been elaborated by investment treaty tribunals, which it has not. To the contrary, the process for adoption of the Amending Directive followed the ordinary legislative procedure as outlined in Article 294 of the TFEU and met all the requirements applicable to a legislative act of its nature and scope.

7.1.1.3 The European Union has ensured due process

532. The Claimant contends that the European Union has breached the obligation to ensure due process in four ways: (i) through an alleged improper legislative process;[579] (ii) because the stated objectives of the Amending Directive could not have been achieved;[580] (iii) because the Amending Directive allegedly targeted Nord Stream 2;[581] and (iv) through an alleged lack of transparency.[582] These allegations are all unfounded and must be rejected.

533. Concerning (i), the European Union has explained that the fact that the Proposal for the Amending Directive was not preceded by a formal public consultation, ex-

[576] **Exhibit CLA-217**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 9.47.
[577] **Exhibit CLA-108**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.40; **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154.
[578] **Exhibit CLA-108**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.40.
[579] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 418.
[580] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 415-416.
[581] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 417 and 419.
[582] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 420.

post evaluation or impact assessment does not breach any mandatory rules, due to the nature and limited scope of the proposed act, whose objective was to clarify one aspect of previously enacted legislation governing the EU's gas market.[583]

534. As regards the examination of the Proposal by the European Parliament, the European Union has also explained that it followed a standard and regular procedure,[584] including with respect to the appointment of the rapporteur and of the shadow rapporteurs.[585]

535. Indeed, the relevant procedural decisions of the ITRE Committee that the Claimant complains about were taken by the committee coordinators from all political groups, in accordance with the Rules of Procedure of the European Parliament for the 8th parliamentary term,[586] as explained in detail in Section 5.5.2 above.[587]

536. As acknowledged in the First Witness Statement of [redacted] submitted by the Claimant, the Proposal and the draft report prepared by the rapporteur (Dr Buzek) were debated in several meetings of the ITRE Committee and a public hearing took place on 21 February 2018.[588] Individual MEPs who opposed the Proposal, [redacted] had ample opportunity to express their views before the final report was adopted by the ITRE Committee on 21 March 2018.[589]

537. There was therefore nothing irregular or improper, even less egregious, about the legislative process leading to the adoption of the Amending Directive. The only thing remarkable in that process was the vehemence of the opposition mounted by a minority of MEPs. Their efforts were however ultimately unsuccessful, as a large majority (465 out of 751 MEPs) voted in favour of the agreed text on 4 April 2019.[590]

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[583] See Section 5.2 (An impact assessment was not required) in this Rejoinder, Section 5.3 (An ex-post evaluation was not needed) in this Rejoinder, and 5.4 Stakeholders were involved in the legislative process in this Rejoinder; as well as Section 2.5.4 (An impact assessment was not required,) Section 2.5.5 (A separate ex-post evaluation was not needed,) and Section 2.5.3 (The Explanatory Memorandum illustrates the rationale of the Amending Directive) in the European Union Counter-Memorial on the Merits, 3 May 2021.
[584] See Section 5.5.2 (The procedure in the European Parliament was regular and proper) in this Rejoinder.
[585] See Section 5.5.2.3 (The appointment of the rapporteur complied with the applicable rules) in this Rejoinder; and Section 5.5.2.4 (The appointment of the shadow rapporteurs complied with the applicable rules) in this Rejoinder.
[586] **Exhibit R-135**, Rules of Procedure of the European Parliament, January 2017.
[587] See Section 5.5.2. (The procedure in the European Parliament was regular and proper) in this Rejoinder.
[588] First Witness Statement of [redacted], 23 October 2021, paras. 28, 30 and 31.
[589] First Witness Statement of [redacted], 23 October 2021, para. 33.
[590] **Exhibit R-203**, Adoption of EP Position in first reading 2017-0294 COD 04-04-2019; **Exhibit R-126**, Legislative Observatory, Results of vote in Parliament, Statistics - 2017/0294(COD), A8-0143/2018, 4 April 2019, also available at: https://oeil.secure.europarl.europa.eu/oeil/popups/sda.do?id=31001&l=en, accessed on 23 January 2022. The date indicated in Exhibit R-126 is 19 April 2018 due to a clerical error of the European Parliament documentary services. The final vote in the European Parliament took place on 4 April 2019.

538. With regard to (ii), the Claimant argues that "extending" the Gas Directive regulatory regime to the territorial sea section only of offshore import pipelines cannot achieve the stated objectives of the Amending Directive.[591]

539. As provided in Recital 3 of the Amending Directive, its objectives are 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"; "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"; "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"; "enhance transparency and provide legal certainty to market participants, in particular investors in gas infrastructure and system users, as regards the applicable legal regime."[592]

540. The First Expert Report of Professor Maduro explains in detail that the objectives of the Amending Directive are achievable[593] and the European Union Counter-Memorial also provides a comprehensive description of the objectives pursued by the Amending Directive.[594]

541. The clarification concerning the application of the regulatory regime to the territorial sea section of offshore import pipelines can achieve the objectives of the Amending Directive because it removes the uncertainty as to the application of the Gas Directive to the whole territory, including the territorial sea, under the jurisdiction of the Member States of the European Union. Thus, it contributes decisively to the completion of the internal market in natural gas.

542. Concerning (iii), the Claimant argues that Dr Borchardt's presentation during the 11 October 2017 meeting of the ITRE Committee revealed that the Amending Directive "was not of general and abstract application and was a substitute for being able to 'veto' the [Nord Stream 2] pipeline".[595]

543. The Claimant distorts Dr Borchardt's statements without considering their full context.

544. The message conveyed by Dr Borchardt covers the following main points:

[591] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 415-416.
[592] **Exhibit CL-3**, Amending Directive, Recital 3.
[593] See First Expert Report of Professor Maduro, 3 May 2021.
[594] See Section 2.1. (The Amending Directive Pursues Legitimate And Achievable Policy Objectives) in the European Union Counter-Memorial on the Merits, 3 May 2021.
[595] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 417.

- "it is of utmost importance for the Commission that this pipeline is operated within a clear regulatory framework";[596]
- "rendering the Third Energy Package applicable will help us so we have an orderly manner how to operate these pipelines";[597]
- "[w]e will have third party access, we will have more competition, we will have transparency, we will have non-discriminatory tariffs";[598] and
- "the Commission has decided, and has the intention, to end the legal uncertainty […] and will present without delay, most probably already next month, a legislative proposal on common rules for gas pipelines entering the EU gas market."[599]
- "once this legislative proposal is adopted, then we have an undisputable legal framework - and this framework would also apply to Nord Stream 2."[600]

545. It follows that Dr Borchardt wished to prevent the operation of Nord Stream *without a clear regulatory framework*: nowhere did he affirm the need to '*stop*' the Nord Stream 2 project.

546. The Claimant erroneously maintains that the exclusion of Nord Stream 2 from the Derogation Regime was intentional and the Amending Directive was rushed to pass before construction of Nord Stream 2 was complete.[601]

547. As the European Union has already explained in paragraphs 303-311 of its Counter-Memorial on the Merits, other onshore import pipelines are subject to the Gas Directive without having obtained a derogation.[602]

548. As detailed in Section 4.3.3 of this Rejoinder, the criterion used for an Article 49a derogation in the Amending Directive is precise and appropriate. In the case of the Amending Directive, a firm cut-off date was selected for the Article 49a derogation, based upon completion of a gas transmission line as of that date.[603]

549. Moreover, in particular alongside Article 36 of the Gas Directive, it is clear that the "completed" criterion in the Amending Directive does not "target" NS2. Indeed, other flexibilities are available in a coherent system. It was a deliberate choice of the Claimant and its shareholders Gazprom and the Russian Federation

[596] **Exhibit C-92**, Transcript of presentation by Mr Borchardt at ITRE meeting, 11 Oct 2017, page 2.
[597] **Exhibit C-92**, Transcript of presentation by Mr Borchardt at ITRE meeting, 11 Oct 2017, page 8.
[598] **Exhibit C-92**, Transcript of presentation by Mr Borchardt at ITRE meeting, 11 Oct 2017, page 8.
[599] **Exhibit C-92**, Transcript of presentation by Mr Borchardt at ITRE meeting, 11 Oct 2017, page 3.
[600] **Exhibit C-92**, Transcript of presentation by Mr Borchardt at ITRE meeting, 11 Oct 2017, page 3.
[601] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 419.
[602] See Section 4.3.2. (The Claimant's focus on derogations for certain offshore pipelines ignores that other third country pipelines are subject to the Gas Directive) in this Rejoinder.
[603] See Section 4.3.3. (The "completed" criterion is entirely appropriate) in this Rejoinder.

to make no attempt to avail themselves of other flexibilities available under the regulatory regime, for instance by requesting an exemption under Article 36 of the Gas Directive.[604]

550. As the European Union established in Section 4 above, there was no "deliberate exclusion" of the NS2 pipeline project from the derogation regime nor any specific targeting.[605]

551. Concerning (iv), the European Union notes that the Claimant makes no new arguments in its Reply. The European Union highlights that it has acted transparently in its exchanges with NS2PAG.

552. In short, it is misplaced to allege that the EU "lacked transparency" when the EU in fact simply explained the division of competences between itself and Member States, pursuant to which the European Union could not simply step in and assert how the Amending Directive should be implemented, in disregard of Member States' own competences. The European Union refers in this regard to Section 2.6 of the Counter-Memorial 'The European Union informed NSP2AG about the division of competences between the European Union and its Member States'.

7.1.1.4 Conclusion

553. The claims of denial of justice and breach of the obligation to afford due process under Article 10(1) of the ECT should be rejected. The Claimant has walked away from its denial of justice claims, and continues to overstate the content of the standard to be applied to the assessment of due process violations involving the democratic legislative process of the EU. The process followed for the adoption of the Amending Directive was proper, in accordance with the applicable rules and practice and affirming the principles of democratic decision-making. The objectives of the Amending Directive are fully achievable, there was no targeting of Nord Stream 2, and the European Union acted in full transparency in its exchanges with NS2PAG. Nor do any of the Claimant's other allegations relating to the obligation to afford due process have any merit.

[604] See Section 4.3.4. (Article 49a does not "intentionally impose[] obstacles for Nord Stream 2") in this Rejoinder.
[605] See Section 4 (There was no "deliberate exclusion" of the NS2 pipeline project from the derogation regime nor any specific targeting) in this Rejoinder.

7.1.2 The European Union has acted in good faith

554. In its Memorial, the Claimant argued that the concept of good faith is at the "heart" of the FET standard, and that bad faith is not a requirement for a violation of Article 10(1) of the ECT.[606]

555. In its Counter-Memorial, the EU clarified that Article 10(1) of the ECT does not impose a separate obligation to act in good faith, but rather that good faith is a fundamental principle of international law, informing the interpretation and application of the various requirements imposed by the FET obligation.[607] In any event, the EU noted, the Claimant had failed to meet its burden to demonstrate that the EU had acted in bad faith.[608]

556. In its Reply, the Claimant rejects these arguments, and continues to insist that good faith is a stand-alone obligation under the FET standard, asserting that the EU cannot rely on a presumption that it acted in good faith.[609]

557. The Claimant's arguments should be rejected by the Tribunal. First, it is clear that good faith is not a stand-alone obligation under Article 10(1) of the ECT, but rather is a general requirement of international law informing the interpretation of the FET standard. Second, absent a showing of bad faith, there is a presumption that the EU acted in good faith. Third, this presumption is borne out by the evidence which demonstrates that the EU has acted in good faith. The Claimant has thus failed to discharge its burden under these standards, and its claim must be dismissed.

7.1.2.1 Good faith is not a stand-alone obligation under Article 10(1) of the ECT

558. The parties agree that a treaty must be interpreted and performed in good faith, as a principle of international law.[610] Where the parties differ, however, is whether the notion of good faith is a stand-alone obligation under Article 10(1) of the ECT.

559. The Claimant has cited a number of cases which it asserts demonstrates that "good faith is a central aspect of the FET standard."[611] However, a closer inspection of many of these cases demonstrates two fundamental points: first, that good faith is a notion that *underpins* the interpretation of the FET standard,

[606] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 416.
[607] European Union Counter-Memorial on the Merits, 3 May 2021, para. 478.
[608] European Union Counter-Memorial on the Merits, 3 May 2021, para. 482.
[609] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 423, 428-428.
[610] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 478-479; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 423.
[611] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 423.

but is not an autonomous stand-alone obligation; and second, that – inevitably – tribunals' consideration of allegations of breach of the FET standard turn on an investigation of whether or not the State has indeed acted in *bad faith*.

a) Good faith as a general requirement of international law

560. As agreed by both parties, good faith performance forms the essence of any international law obligation, including the obligation of fair and equitable treatment.[612] However, while it may be a "guiding principle", good faith is not in and of itself an autonomous, stand-alone obligation under the FET standard.[613] For example, in *SunReserve v. Spain*, the tribunal explained that:

> The Tribunal does not consider the requirement of good faith or *bona fide* conduct to constitute a separate obligation under Article 10(1) ECT. Instead, the Tribunal is persuaded by Respondent's view that good faith is a fundamental concept that permeates across the FET obligation in general, and all independent facets thereof.[614]

561. While the Claimant asserts that a "significant body of case law" supports the proposition that good faith is a stand-alone obligation, closer inspection of such cases confirms that the tribunals in question made general statements about good faith forming part of the FET standard, but did not discuss good faith as a stand-alone obligation.[615] Otherwise, tribunals considered a requirement to act in good faith in relation to separate, stand-alone provisions. For example:

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[612] European Union Counter-Memorial on the Merits, 3 May 2021, para. 478; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 423.

[613] *See*, *e.g.*, **Exhibit RLA-285**, Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105, (Kluwer Law International 2013), p. 223 (citing Roland Kläger, Fair and Equitable Treatment in International Investment Law (Cambridge U. Press, 2011) at 131; Alexandra Diehl, The Core Standard of International Investment Protection: Fair and Equitable Treatment (Wolters Kluwer, 2012) at 358; I. Laird, Betrayal, Shock and Outrage - Recent Developments in NAFTA Article 1105, in NAFTA Investment Law and Arbitration: The Early Years 58 (T. Weiler ed., Transnational Publ. 2004) at 272). *See also* **Exhibit RLA-284**, Ioana Tudor, The Fair and Equitable Treatment Standard in International Foreign Investment Law, 23 (Oxford U. Press, 2008), p. 174 (In the context of BITs, the question is whether a bilateral disposition, that provides for the FET obligation to be performed in respect of good faith, adds anything substantial to the content of the FET obligation. This does not seem to be the case. The arbitral tribunal in the *ADF* case concluded that there is no additional substantive content brought by the good faith principle: 'An assertion of breach of a customary law duty of good faith adds only negligible assistance in the task of determining or giving content to a standard of fair and equitable treatment.'"); **Exhibit RLA-286**, *Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, (20 December 1988), ICJ Rep. 1988, paras. 105, 106 (where the ICJ also came to the conclusion that the principle of good faith is "not in itself a source of obligation where none would otherwise exist".

[614] **Exhibit RLA-123**, *SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic*, SCC Case No. V2016/32, Final Award, 25 March 2020, para. 737. *See also* **Exhibit RLA-151**, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paras. 835-836.

[615] *See*, *e.g.*, **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 153-154 (where the tribunal considered allegations of breach of the FET standard "*in light of* the good faith principle established by international law", recognizing that FET is "an expression and part of the bona fide principle recognized in international law." (emphasis added); **Exhibit CLA-89**, *Eureko v. Poland*, ad hoc Arbitration Rules, Partial Award, 19 August 2005, para. 235; **Exhibit RLA-153**, *Total SA v. The Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para 111 ("legally, the fair and equitable treatment standard is derived from the

- In *Novenergia v. Spain*, the citations relied upon by the Claimant refer to the application of Article 21(1) of the ECT (obligations relating to "taxation measures"), and whether good faith is relevant to discrimination with respect to those measures.[616]
- In *Plama v. Bulgaria*[617] and *Indian Metals v. Indonesia*,[618] the notion of good faith was considered only when determining whether the FET standard included protection of the legitimate and reasonable expectations of the parties.
- In *Al-Bahloul v. Tajikistan*, reference to good faith was made in relation to consideration of the standard of due process and denial of justice.[619]
- In *Philip Morris v. Uruguay*, the tribunal considered good faith in the context of its discussion of asserted obligations of transparency,[620] and of proportionality.[621]

562. Thus, the simple fact that a tribunal may have mentioned the principle of good faith in connection with the FET obligation does not mean that it is a stand-alone obligation which gives rise to a distinct heading of claim against a respondent State. All it means is that, as the parties agree, good faith is a general principle of international law that underlies the interpretation and performance of all treaty obligations.

b) Absent showings of bad faith, there is a presumption of good faith

563. The Claimant further disputes that there is a presumption that a government has acted in good faith, absent a showing of "bad faith" on the part of a respondent State. Instead, the Claimant argues, "[w]hat matters is whether the EU has failed to act in good faith"[622] as a positive obligation.[623]

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requirement of good faith w.hich is undoubtedly a general principle of law under Article 38(1) of the Statute of the International Court of Justice.").

[616] **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, 15 February 2018, para. 520. The Claimant in its Reply referred to paras. 500 and 504, which fall under the same heading of "Does the Taxation Carve-out in Article 21 of the ECT Apply to Law 15/2012 (Preliminary Objection B)?".

[617] **Exhibit CLA-105**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 175-176 (the tribunal was discussed legitimate expectations, and noted that "[t]hese expectations would equally include 'the observation by the host State of such well-established fundamental standards as good faith, due process, and non-discrimination.").

[618] **Exhibit CLA-218**, *Indian Metals & Ferro Alloys Limited v. The Government of the Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, para. 252.

[619] **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, para. 221.

[620] **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. 399.

[621] **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. 409.

[622] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 425.

564. The Claimant has been unable to articulate the content of this alleged legal standard. The Claimant's difficulty in articulating this standard flows from the presumption of good faith with respect to governmental conduct, and the corresponding need for a Claimant alleging "bad faith" to factually establish its contention.[624] In *Novenergia v. Spain*, for example, the tribunal noted that:

> The starting point, or the assumption, should always be that the taxation measure was in fact adopted in good faith. The consequence of this assumption is that the Claimant bears the burden of proving to the Tribunal that Law 15/2012 was not enacted for the purpose of raising general revenue for the state, but for a different purpose, i.e. that the measure therefore was enacted *mala fide*."[625]

565. Likewise, as the tribunal in *SunReserve v. Spain* noted "[i]n any event, the Tribunal considers it important to emphasise that in order for bad faith or *mala fide* conduct to be established, the burden on the investor is high."[626]

566. As discussed in the following part, there is no evidence of bad faith on the part of the EU, and thus the European Union is presumed to have acted in good faith.

7.1.2.2 The European Union has acted in good faith

567. The Claimant puts forward false allegations concerning the European Union's good faith with regard to: (i) the clarity of the legal regime applicable to offshore pipelines prior to the adoption of the Amending Directive;[627] (ii) the regularity of the legislative process;[628] (iii) the general and abstract nature of the Amending Directive;[629] (iv) the transparency of the exchanges between the European Commission and NS2PAG in 2019;[630] and (v) the alleged targeting of Nord Stream 2.[631]

568. The European Union will now analyse and rebut in turn each of these allegations in detail.

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[623] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 428.
[624] **Exhibit RLA-181**, *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011 [Spanish], paras. 95, 125.
[625] **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, 15 February 2018, para. 521 (citing *Renta 4 S.V.S.A., Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. Russian Federation*, SCC Case No. 24/2007, Award, 20 July 2012, para. 181). The EU notes that this discussion does not refer to the FET standard, but rather the application of Article 21(1) of the ECT, as raised by the Claimant in its Reply. The EU uses this legal authority by way of general example only.
[626] **Exhibit RLA-123**, *SunReserve Luxco Holdings S.À.R.L, SunReserve Luxco Holdings II S.À.R.L and SunReserve Luxco Holdings III S.À.R.L v. Italian Republic*, SCC Case No. V2016/32, Final Award, 25 March 2020, paras. 739-740.
[627] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 430.i.
[628] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 430.ii.
[629] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 392.ii.
[630] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 430.iii.
[631] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 430.iv and 431.

569. With regard to (i), the Claimant argues that "it was clear prior to the adoption of the Amending Directive that the Third Energy Package did not apply to offshore pipelines".[632] This allegation is untrue. As discussed in this Rejoinder, there were various indications that the Gas Directive would apply to offshore pipelines.[633] However, a degree of uncertainty remained, which required clarification through a limited legislative amendment. The European Union has acted in good faith by providing such clarification.

570. Concerning (ii), in asserting that "[t]he absence of required processes was a matter of concern to the EU's own institutions, as well as some of its Member States",[634] the Claimant is attempting to mislead the Tribunal, suggesting that there was a strong opposition to the adoption of the Amending Directive. If this were true, the Amending Directive would not have received the necessary votes. Instead, the Claimant is relying on statements by a minority of MEPs and Member States. Such exchange of views is an inherent part of a democratic legislative process,[635] which was concluded with the adoption of the Amending Directive with a large majority both in the European Parliament, with 465 votes in favour out of 751,[636] and in the Council, with 27 Member States voting in favour and one abstaining (Hungary).[637]

571. Moreover, as detailed in Section 5.5.2. above,[638] the procedure in the European Parliament was regular and proper.

572. With regard to (iii), the Claimant maintains that: "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".[639] The Claimant appears to have forgotten the Expert Report filed by the European Union.

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[632] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 430.i.
[633] See Section 3.2 (There were sufficient indications that the Gas Directive would apply or be rendered applicable to pipelines such as Nord Stream 2 also offshore); and Section 3.3 (EU Competition law could have resulted in the Regulatory Requirements being enforced against the Claimant), in this Rejoinder.
[634] Claimant's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, 25 October 2021, para. 430.ii.
[635] See Section 5.6 (The Amending Directive was adopted through democratic decision-making) in this Rejoinder.
[636] **Exhibit R-203**, Adoption of EP Position in first reading 2017-0294 COD 04-04-2019; **Exhibit R-126**, Legislative Observatory, Results of vote in Parliament, Statistics - 2017/0294(COD), A8-0143/2018, 4 April 2019, also available at: https://oeil.secure.europarl.europa.eu/oeil/popups/sda.do?id=31001&l=en, accessed on 23 January 2022. The date indicated in Exhibit R-126 is 19 April 2018 due to a clerical error of the European Parliament documentary services. The final vote in the European Parliament took place on 4 April 2019.
[637] **Exhibit R-129**, Voting results in the Council.
[638] See Section 5.5.2. (The procedure in the European Parliament was regular and proper) in this Rejoinder.
[639] Claimant's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, 25 October 2021, para. 392.ii.

573. The Claimant purposefully ignores the First Expert Report of Professor Maduro, where he explained that the Amending Directive "is drafted in such a way as to be of general and abstract application".[640]

574. Professor Maduro added that: "The legal provisions changed in the Gas Directive by the Amending Directive are addressed not to a specific case, but to a category of cases presented in a general and abstract manner."[641]

575. It follows that the European Union has provided exhaustive and authoritative evidence of the *fact* that the Amending Directive, like any other directive of the European Union, is of a general and abstract nature.[642]

576. Discussing point (iv), the Claimant argues that the European Union's alleged lack of good faith is shown by the "superficiality" of the European Union's communications with NSP2AG "prior to the commencement of this arbitration".[643] This assertion does not accord with the relevant facts.

577. The European Union has actively engaged with NS2PAG, by replying, on 13 May 2019 and on 26 July 2019[644] to the Claimant's letters, and by holding a meeting with NS2PAG on 25 June 2019, in which various services of the Commission participated.[645] The European Union notes that the Claimant itself acknowledges that the 25 June 2019 meeting took place, with the opportunity for NS2PAG to hold a dialogue with the Commission.[646] By replying to NS2PAG and by organising and holding a meeting with NS2PAG, the European Union acted in good faith in its exchanges with NS2PAG, which were far from superficial.

578. Whereas the Claimant complains about the superficiality of the European Union's communications with NS2PAG, it fails to acknowledge the true nature of the Claimant's repeated requests for what it called "clarification".[647] In fact, the Claimant attempted to exert pressure on the European Commission to issue an interpretation that the Commission was not competent to provide. First, as

[640] First Expert Report of Professor Maduro, 3 May 2021, Section 8. The Amending Directive does not target Nord Stream 2 – The general and abstract character of the provisions of the Amending Directive, para. 255.
[641] First Expert Report of Professor Maduro, 3 May 2021, Section 8. The Amending Directive does not target Nord Stream 2 – The general and abstract character of the provisions of the Amending Directive, para. 271.
[642] See Section 2.4.2. (The Amending Directive is of a general and abstract nature) in the European Union Counter-Memorial on the Merits, 3 May 2021, para. 264.
[643] Claimant's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, 25 October 2021, para. 430.iii.
[644] **Exhibit C-9**, Letter from the Commission to NSP2AG 26 July 2019.
[645] **Exhibit C-11**, Letter from the Commission to NSP2AG 13 May 2019.
[646] Claimant's Memorial, 3 July 2020, para. 381(v)(b).
[647] **Exhibit C-5**, Letter from the Claimant to the European Commission on 12 April 2019; **Exhibit C-8**, Letter from NSP2AG to the Commission 8 July 2019; **Exhibit C-10**, Letter from NSP2AG to the Commission 6 August 2019; **Exhibit C-11**, Letter from the Commission to NSP2AG 13 May 2019 including the invitation to the meeting between the Claimant and the Commission on 25 June 2019, and **Exhibit C-6**, Note from the Claimant's counsel to the Commission on 14 June 2019.

clarified by the European Commission, it was Germany's competence to assess the applicability of the Article 49a derogation to the NS2 pipeline. Second, only the Court of Justice of the European Union is competent[648] to authoritatively interpret EU law.[649]

579. The Claimant contends that the European Union's alleged lack of good faith "is underlined by its continued refusal to clarify the scope of its own legislation and the meaning of '*completed before 23 May 2019*'".[650] This argument does not stand.

580. The European Union cannot itself take a decision that is within the competence of a Member State's NRA, in accordance with the national legislation implementing the Amending Directive. Instead, in the meeting between the European Commission and NS2PAG on 25 June 2019,[651] and in the Commission's letter dated 26 July 2019,[652] the European Union correctly and in good faith explained to the Claimant that the German Bundesnetzagentur was competent to take such a decision.[653]

581. Coming to (v), the Claimant contends that "the timing of the Amending Directive also demonstrates the EU's lack of good faith".[654] The Claimant's allegations are misplaced and fail to consider that the legal vacuum addressed by the Amending Directive did not become immediately apparent in the aftermath of the adoption of the Gas Directive. When the uncertainty concerning the applicability of the Gas Directive to pipelines originating in third countries became apparent,[655] the European Commission promptly began exploring the policy instruments at its disposal to clarify the matter. This included EU initiatives to negotiate IGAs with third countries. Moreover, the IGA Decision 2012[656] and the IGA Decision 2017[657]

[648] **Exhibit RLA-69**, Article 267 of the TFEU.
[649] See Section 2.6. (The European Union informed NSP2AG about the division of competences between the European Union and its Member States) in the European Union Counter-Memorial on the Merits, 3 May 2021.
[650] Claimant's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, 25 October 2021, para. 430.iii.
[651] **Exhibit C-11**, Letter from the Commission to NSP2AG 13 May 19.
[652] **Exhibit C-9**, Letter from the Commission to NSP2AG 26 July 19.
[653] See Section 2.6. (The European Union informed NSP2AG about the division of competences between the European Union and its Member States) in the European Union Counter-Memorial on the Merits, 3 May 2021.
[654] Claimant's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, 25 October 2021, para. 430.iv.
[655] See Section 2.3. The arguments and considerations that the Claimant considers as "entirely unaddressed" by the European Union are irrelevant and unfounded, in this Rejoinder.
[656] **Exhibit R-101**, Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13–17 (the '2012 IGA Decision'). The 2012 IGA Decision was repealed by the 2017 IGA Decision.
[657] **Exhibit R-102**, Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9 (the 2017 IGA Decision). The 2017 IGA Decision repealed the 2012 IGA Decision.

require that the energy imported into the European Union be fully governed by EU law. The European Commission therefore considered that the Gas Directive should apply to pipelines to and from third countries.[658] As an alternative to concluding a variety of IGAs, the Commission published the Proposal for the Amending Directive on 8 November 2017.

582. The Claimant alleges that "the Amending Directive was drafted in such a way that it would apply only to Nord Stream 2",[659] and that this provides the context for the alleged lack of good faith. The Claimant's contentions are not supported by the facts.

583. As detailed in Section 2.4 and Section 4.3 of this Rejoinder, other onshore import pipelines are subject to the Gas Directive without having obtained a derogation. Among them, EuRoPol GAZ s.a. was certified as transmission system operator of the Polish section of the Yamal pipeline by a decision of the Polish national regulatory authority of 17 November 2010.[660]

584. The Claimant contends that "[t]he EU has provided no credible explanation for the cut-off date of 23 May 2019 for the purposes of obtaining an Article 49a derogation".[661] The Claimant's contention is baseless. The European Union chose the date of 23 May 2019 as it was the date of entry into force of the Amending Directive and because it was an objective date which provided certainty as to the application of the legal framework.[662]

585. To conclude, contrary to the Claimant's allegations, the European Union acted in good faith by providing the required clarification with regard to the regime applicable to offshore pipelines to and from third countries. It adopted the Amending Directive pursuant to a democratic decision-making process. The European Union has provided full evidence of the fact that the Amending Directive, like any other directive, is an act of general and abstract nature, which will apply to gas transmission lines going forward. The European Union's good faith is further confirmed by the fact that other pipelines from third countries have been made subject to the Gas Directive without having obtained an Article 49a derogation. Finally, the date of 23 May 2019 was an objective date which provided legal certainty.

[658] See para. 366 and Section 2.5.6. (The Amending Directive provided legal certainty) in the European Union Counter-Memorial on the Merits, 3 May 2021.
[659] Claimant's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, 25 October 2021, para. 431.
[660] See Section 4.3. (The Amending Directive is not discriminatory, neither in intention nor in effect), in this Rejoinder.
[661] Claimant's Reply Memorial on the Merits and Counter-Memorial on Jurisdiction, 25 October 2021, para. 431.
[662] See Section 4.3.3. (The "completed" criterion is entirely appropriate) in this Rejoinder.

7.1.2.3 Conclusion

586. The Claimant has failed to demonstrate that "good faith" is a stand-alone obligation under Article 10(1) of the ECT, and has also failed to discharge its burden to demonstrate that the EU has acted in bad faith. In these circumstances, the Claimant's claims with respect to good faith should be rejected in their entirety.

587. In any event, the EU's decision to clarify the application of rules of general application with regard to the exercise of core regulatory functions within its own territory can hardly be deemed an example of "bad faith". To the contrary, by so doing the EU was exercising its core competences, in particular to ensure adequate regulation of gas transmission lines affecting the internal market in natural gas.

7.1.3 The European Union has acted proportionately

588. In its Memorial, the Claimant asserted – without articulating an applicable legal standard – that the EU had breached Article 10(1) of the ECT by acting in a "wholly disproportionate way".[663]

589. In its Counter-Memorial, the EU noted that Article 10(1) of the ECT makes no express reference to an obligation of "proportionality" and that legal authorities have recognised that proportionality is not a separate element of FET. In any event, the EU recalled that States have a wide margin of appreciation in enacting regulatory measures.[664] Moreover, the EU outlined in detail why the Claimant's allegations were unsupported by the facts in issue.

590. In its Reply, the Claimant maintains that the obligation to act proportionately is a self-standing element of the FET standard, introducing a number of cases that, it claims, support its view.[665] In addition, the Claimant asserts that the EU's margin of appreciation is "not unfettered" and maintains that the EU acted disproportionately in adopting the Amending Directive.[666]

591. However, the Claimant has been unable to rebut the EU's demonstration that proportionality, to the extent that it is considered at all, has been addressed by tribunals not as a stand-alone obligation but together with other aspects of FET. Moreover, the Claimant continues to overstate the considerations relevant to assessing proportionality and to misrepresent the essentially deferential approach

[663] Claimant's Memorial, 3 July 2020, para. 419.
[664] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 498-499.
[665] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 439.
[666] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 441-459.

tribunals have adopted with regard to its application, especially in respect of legislative measures. The fact remains that tribunals generally have (rightly) been cautious about appearing to second-guess the policy decisions of sovereigns, instead granting them a broad margin of appreciation, and finding measures "disproportionate" only where there is a manifest disconnect between the stated policy objectives of the State and the measures actually adopted. None of these circumstances are present here.

7.1.3.1 The Claimant continues to overstate the legal standard applicable to proportionality under Article 10(1) of the ECT

592. The Claimant continues to overstate the legal standard applicable to arguments of proportionality, alleging that an "obligation to act proportionately is a key, separate and self-standing element of the FET standard."[667]

593. In support of its allegations, the Claimant asserts that the legal authorities relied upon by the EU in its Counter-Memorial are "cited selectively".[668] For example, the Claimant claims that *OperaFund Eco-Invest v. Spain* is not relevant, because the tribunal exercised judicial economy with respect to parts of its FET analysis. That is untrue: the tribunal to the contrary clearly stated that it had "doubts as to whether proportionality should be accepted as a separate element of FET".[669] The fact that the tribunal did not ultimately rule on these issues does not detract from its earlier concerns, nor does it make the EU's reliance on this case inapposite.

594. The Claimant also critiques the EU's reliance on *Electrabel v. Hungary*, asserting that "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 the EU's assertion that the requirement that the host State act proportionately is not a separate element of the FET standard."[670] Even if this were true (*quod non*), many of the Claimant's own legal authorities only discuss the concept of proportionality *together with* other elements of the FET standard. For example, several tribunals discussed issues of proportionality expressly in the context of alleged legitimate expectations,[671] while others couched their considerations in terms of

[667] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 392(iii).
[668] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 438(i).
[669] European Union Counter-Memorial on the Merits, 3 May 2021, para. 497.
[670] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 438(ii).
[671] **Exhibit CLA-224**, *The AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, paras. 401-411; **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, 15 February 2018, paras. 656-657; **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. 519.

"reasonableness" and principles of non-discrimination.[672] In other cases cited by the Claimant, the tribunal mentioned disproportionate treatment as falling within the scope of consideration of the FET standard, but did not go on to discuss whether it was a stand-alone obligation, or make any assessment of claims of proportionality under FET.[673]

595. Therefore, even on the Claimant's own legal authorities, there is a consistent consideration that proportionality is inherently linked with other elements of the FET standard, rather than being addressed as a separate element.[674] Clearly, then, the Claimant's allegations that proportionality is a "free-standing" obligation are unsupported as a matter of law. In the absence of a violation of a stand-alone obligation of the FET standard, the Tribunal is not permitted to engage in a detached analysis of whether it considers that the EU's measure is proportionate to the policy objectives it pursues, let alone to the interests of one investor as the Claimant seems to suggest.[675]

596. The deferential approach required by tribunals in this respect is further supported by the States' wide margin of appreciation, as described below.

7.1.3.2 The EU enjoys a wide margin of appreciation in enacting economic regulations in the interests of its citizens

597. Regardless of the legal characterization of proportionality in relation to the FET standard, States enjoy a wide margin of appreciation when balancing regulatory interests and investors' interests.[676] In its Reply, the Claimant seeks to deflect the key importance of this principle, dismissing the State's margin of appreciation

[672] **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, 31 August 2020, paras. 411 and 414.
[673] *See*, *e.g.*, **Exhibit RLA-192**, *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V2014/168, Final Award, 29 April 2020, para 543; **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, 9 March 2020, para. 573; **Exhibit CLA-57**, *MTD Equity Sdn.Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 109; **Exhibit CLA-223**, *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, para. 336.
[674] For example, even some cases cited by the Claimant in support of the proposition that "a host State's failure to act proportionately may amount to a breach of the FET standard on its own", the tribunals' consideration was bound in other standards. In **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, 30 December 2019, the Claimant cited a conclusion of the tribunal, to a section entitled "Conclusions as to the Claimants' case on legitimate expectations; disproportionality". *See id*., Part VI.D.2(f) (incorporating para. 600, as referred to by the Claimant).
[675] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 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. All other offshore pipelines to which the Amending Directive applies have obtained derogations.").
[676] European Union Counter-Memorial on the Merits, 3 May 2021, para. 498.

by claiming that the EU has failed to "explain how this would negate its liability under the ECT."[677]

598. Contrary to the Claimant's allegations, the EU has never asserted that the wide margin of appreciation afforded to States on regulatory matters "negates" its obligations under the ECT, nor that a State's margin of appreciation should be "limitless or unfettered".[678] The EU's position is instead that considerations of "proportionality" need to take account of the wide margin of discretion granted to sovereigns to adopt policies in the public interest, and that tribunals should not purport to second-guess legitimate policy decisions of States in the name of "proportionality". Simply put, the standard does not allow for a broad second-guessing of whether the EU has adopted the "correct" policy, but rather sanctions conduct only when the measure at issue is so manifestly disproportionate to its intended policy objectives that it leads necessarily to the conclusion it was adopted for an improper motive.

599. Despite the Claimant's further allegations that the EU has cited selectively cases with respect to the margin of appreciation to be applied, once again many of the Claimant's own legal authorities make clear that a cautious approach, assessing an investor's claim of unfair treatment in light of the undoubted right of the State to regulate in the public interest, is integral to a tribunal's assessment of the FET standard under the ECT. Every exercise of State regulatory power will have impacts, but that does not mean that these impacts rise to the level of a breach of an international obligation. Nor should the particular desiderata of a specific investor be weighed on equal terms against the collective public interest, which the State through its measure is seeking to serve.

600. Accordingly, a wide margin of discretion is typically afforded, that is deferential to the balancing exercise the State itself must undertake when considering any particular policy or measure. For example, in *Novernergia v. Spain*, the tribunal referred to the *Electrabel* tribunal's finding that "[p]rovided that there is an appropriate correlation between the policy sought by the State and the measure, the decision by a State may be reasonable under the ECT's FET standard even if others can disagree with that decision. A State can thus be mistaken without being unreasonable."[679]

[677] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 441.
[678] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 441.
[679] **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. 656-657; **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, 30 November 2018, para. 657

601. Consistent with the above, the burden of demonstrating that a regulatory measure of general applicability is disproportionate is high. As the tribunal in *RREEF Infrastructure v. Spain* noted:

> [T]here can be no doubt that States enjoy a margin of appreciation in public international law and the exercise of such a power of appreciation must be more particularly recognized when States apply the ECT, whose common purpose is "to promote the development of an efficient energy market throughout Europe" in view of creating "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." Such common goal may be reached by different ways, depending on the circumstances as appreciated by each State.
>
> [. . . .]
>
> Just because an investor may have an expectation of immutability of the conditions of an investment does not necessarily mean that such an expectation is objectively legitimate in any given circumstance. In order to appreciate the legitimacy (or illegitimacy) of the Claimants' expectations in the present case, it must be kept in mind that it is generally recognized that States are in charge of the general interest and, as such, enjoy a margin of appreciation in the field of economic regulations. As a result, the threshold of proof as to the legitimacy of any expectation is high and only measures taken in clear violation of the FET will be declared unlawful and entail the responsibility of the State.[680]

602. Likewise, the tribunal in *CEF Energia v. Italy* was clear that "[t]he host State is not required to elevate the interests of the investor above all other considerations, and the application of the FET standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in the light of the high measure of deference which international law generally extends to the right of national authorities to regulate matters within their own borders."[681]

603. Thus, the EU has a wide margin of appreciation to enact economic regulations in the interests of EU citizens. It is not required to elevate unconditionally the

(emphasis in original). *See also* **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, 31 August 2020, para 411; **Exhibit RLA-128**, *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, para. 582 (which the Claimant criticized as being "selective").

[680] **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, 30 November 2018, paras. 242, 262.

[681] **Exhibit CLA-233**, *CEF Energia B.V. v. The Italian Republic*, SCC Case No. V(2015/158), Award, 16 January 2019, para. 185 (citing *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, para. 360).

interests of the Claimant above all other considerations in every circumstance or at all.[682] A tribunal's consideration of the State's balancing exercise does not amount to an "open-ended mandate to second-guess government decision-making",[683] nor a *de novo* review of whether that decision was well-founded.[684] As a result, the Claimant's assertions that the EU's margin of appreciation must be bound by what NSP2AG considers "proportionate" solely to its interests is unsupported as a matter of law.

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

604. The Claimant argues that the EU has acted disproportionately based on the effects and the objectives of the Amending Directive. The Claimant contends that: (i) the Amending Directive caused a dramatic regulatory change;[685] (ii) the practical effects of the Amending Directive on Nord Stream 2 outweigh the public benefits;[686] (iii) the objectives of the Amending Directive are specious and its aims cannot be achieved;[687] (iv) other offshore pipelines to which the Amending Directive applies have obtained derogations;[688] and (v) the Amending Directive would be proportionate only if all planned pipelines were granted the derogation under Article 49a.[689]

605. The Claimant's allegations are misplaced: the EU has acted proportionately in adopting the Amending Directive.

7.1.3.3.1 The Amending Directive did not cause any dramatic regulatory change

606. Concerning (i), the Amending Directive did not cause any dramatic regulatory change.

[682] **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, 15 February 2018, paras. 656-657. *See also* **Exhibit RLA-130**, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, para. 413.
[683] *See* **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, 30 December 2019, para. 553; **Exhibit CLA-72**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 261. Note that the Claimants reference to this case was with respect to national treatment, not the FET standard. *See* Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, n. 648.
[684] **Exhibit RLA-128**, *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, para. 583.
[685] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 450.
[686] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 451.
[687] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 452.
[688] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 453.
[689] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 455-459.

607. NSP2AG no longer pursues its claim that it made its investment on the understanding that the Gas Directive, as it applied before the Amending Directive was enacted, would not apply at all to Nord Stream 2.[690] This is explained in detail in Section 3 of this Rejoinder.[691] The Claimant now argues that the Amending Directive unexpectedly extended the scope of the Gas Directive *from the coastal terminal to the legal border of the territorial sea*.[692] This claim is preposterous.

608. At the time of the Investment Decision, a duly diligent investor could plausibly expect that the Regulatory Requirements would either already apply or later be rendered applicable to pipelines such as Nord Stream 2 on the entirety of Member States' territory, including offshore, also by virtue of EU Competition Law.

609. Accordingly, in the eyes of a duly diligent investor, the Amending Directive did not result in an unforeseeable regulatory change, and even less so in a dramatic or radical one. Rather, it enhanced legal certainty to the benefit of all economic operators.

610. The Prospectus, drawn up by the Claimant's owner Gazprom in [redacted],[693] which warned securities investors of the Regulatory Requirements applying to Nord Stream 2, proves that the Claimant was well aware of these risks at the time of its Investment Decision.[694] [redacted]

7.1.3.3.2 The public benefits of the Amending Directive outweigh any practical effects on Nord Stream 2

611. Concerning (ii), the public benefits of the Amending Directive outweigh any practical effects on Nord Stream 2.

(ii)(a) General benefits of the Amending Directive

[690] This view was defended in the Memorial, as expressed in the heading above para. 157 and in para. 157.
[691] See Section 3, (The Claimant has failed to prove that the Amending Directive involves a "dramatic regulatory change").
[692] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 56, 57 and, explicitly, para. 88 (i); [redacted]
[693] [redacted]
[694] See Section 3.4 (The Claimant was aware that the Regulatory Requirements could apply to pipelines such as Nord Stream 2) in this Rejoinder.
[695] [redacted]

612. The EU natural gas market rules serve the main purpose of organising *fair competition* in a system in which gas pipelines constitute a natural monopoly.[696] Clear rules on transmission grids notably aim at preventing dominant suppliers from distorting competition in the EU natural gas market by abusing their monopoly position in gas sales to the EU.[697]

613. 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, to the benefit of all market operators in the EU territory regardless of their point of origin. By establishing a level playing field for economic operators, the Amending Directive also benefits consumers, who will enjoy competitive prices.[698]

614. Ensuring fair competition in gas provision services is particularly important, as gas pipelines are an essential facility for other market players,[699] and as natural gas consumption is rather price *inelastic*, meaning that changes in price have a relatively small effect on the quantity demanded by consumers.[700]

615. For any given national gas market in an EU Member State, these Regulatory Requirements create a level playing field by putting suppliers using pipelines from other EU Member States and those using pipelines from third countries on equal footing. Therefore, the Amending Directive ensures that EU gas market rules respect the principle of equal treatment which requires that comparable situations must not be treated differently.[701]

(ii)(b) Specific benefits of the Amending Directive

616. The Gas Directive includes specific requirements to ensure that competition is fair, to the benefit of other market operators and consumers.[702] They are:

[696] The European Union refers to its Counter-Memorial on the Merits, 3 May 2021, Section 2.1.2. (General benefits of the Amending Directive).
[697] See Section 2.1.2. (General benefits of the Amending Directive), European Union Counter-Memorial on the Merits, 3 May 2021.
[698] See Section 2.1.3 (Specific benefits of the Amending Directive) in the European Union Counter-Memorial on the Merits, 3 May 2021.
[699] **Exhibit RLA-269**, Ricardo Cardoso et al., The Commission's GDF and E.ON Gas decisions concerning long-term capacity bookings. Use of own infrastructure as possible abuse under Article 102 TFEU, Competition Policy Newsletter, Vol. 3, 2010, pages 8-11: "An essential facility is a network or other type of infrastructure to which access is indispensable to compete on a given market. Although undertakings normally have the right to choose their trading partners freely, it is a well-established concept under EU law that holders of an 'essential facility' can be required under competition law in certain circumstances to grant access to this facility. […] The Commission took the view that the gas transmission networks […] could be classed as an essential facility since access to them was objectively necessary to carry on business in the gas supply markets within the respective grid areas", citing **Exhibit RLA-73** Case C-7/97 Oscar Bronner
[700] **Exhibit RLA-270**, Edgar Browning, Microeconomic theory and applications, HarperCollins, 1992, pages 94–95.
[701] See, e.g., Judgment of the ECJ, in P and S, C-579/13, EU:C:2015:369, para. 41. (**Exhibit RLA-78**).
[702] The European Union refers to its Counter-Memorial on the Merits, 3 May 2021, Section 2.1.3. (Specific benefits of the Amending Directive).

obligation to grant third party access, limitation to set tariffs and conditions for the connection to the pipeline by other operators, obligation to adequately maintain the gas transmission system and to reduce methane leakage, obligation to not favour a vertically integrated undertaking over its competitors;[703] obligation to inform the market participants sufficiently in advance, in a transparent manner,[704] on a non-discriminatory basis[705] regarding planned maintenance periods, available capacity, and planned flows; the application of congestion management rules[706] providing network users the possibility to effectively gain access to the exit capacity from the interconnector;[707] tariff regulation;[708] and unbundling.[709]

617. The Gas Directive ensures that the conditions for a fair competition in the internal market in natural gas are fulfilled. It achieves this general benefit together with specific benefits laid out to ensure that aspects that are particular to the gas market are covered. The benefits resulting from a functioning internal market spread to other market operators and consumers by ensuring fair competition, prevention of abuses of dominant position, and security of supply[710] of an essential good to the EU inhabitants.

618. It follows that the Amending Directive, which clarified that these principles also apply to import pipelines originating in third countries, extends the reach of the specific benefits of the Gas Directive and ensures fair competition in the gas market of the European Union (with a potential customers pool of 447.7 million inhabitants). The specific benefits of the Amending Directive are thus significant, of great magnitude, and affect not only other market operators and consumers, but also the security of supply of this essential good in the whole EU.

619. The public benefits of the Amending Directive, both general and specific as described above, far prevail over the alleged impact the Amending Directive may have on NS2PAG.

620. Indeed, the Claimant's allegations concerning any impact on NSP2AG's investment are nothing more than speculative and unproven. Any "impact" of the

[703] Article 13 of the Gas Directive.
[704] Article 16(3) of the Gas Directive.
[705] Article 16(1) of the Gas Directive.
[706] Chapter 2 of Annex 1 of the Gas Regulation
[707] 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).
[708] E.g., Article 41(6) of the Gas Directive and Article 13 of the Gas Regulation.
[709] Article 9 of the Gas Directive.
[710] See Section 4.3 (The Amending Directive is not discriminatory, neither in intention nor in effect) in this Rejoinder.

Amending Directive on NSP2AG's investment continues to depend on measures that the German authorities may or may not adopt within the margin of discretion accorded to them by the Amending Directive, as well as on choices to be made by NSP2AG itself within the framework of those measures.[711]

621. The Claimant could have avoided the alleged impact by exercising due diligence.[712] Moreover, the Claimant has failed to take action reasonably within its power in order to avert or mitigate the alleged impact, such as requesting an exemption based on Article 36 of the Gas Directive,[713] re-organising itself in accordance with Article 9(6) of the Gas Directive,[714] exerting pressure on the Russian government to abolish the export monopoly granted to Gazprom Export,[715] and/or not opposing negotiations of an IGA between Russia and the European Union.[716]

622. The Claimant has failed to prove that it has already suffered any losses attributable to the European Union resulting either from its current inability to operate the NS2 pipeline [redacted].[717]

623. To conclude, it is clear that the benefits of the Amending Directive of ensuring fair competition in the gas market of the European Union (with a potential customers pool of 447.7 million inhabitants) and the security of supply of this essential good outweigh any speculative and unproven impact on NSP2AG's investment.[718]

7.1.3.3.3 The objectives of the Amending Directive are legitimate, suitable, and achievable

624. With regard to (iii), the Claimant alleges that the objectives of the Amending Directive are specious and unachievable.[719] These allegations are groundless. The

[711] See Section 6.2. (The "impact" of the Amending Directive, as transposed and implemented by Germany, on NSP2AG's investment remains highly uncertain), in this Rejoinder.
[712] See Section 3.5.1. (The EU did not breach legitimate expectations); Section 6.3 (The Claimant has failed to take action in order to prevent or mitigate the alleged impact); and Section 7.1.4 (The European Union did not breach legitimate expectations), in this Rejoinder.
[713] See Section 6.3.2. (The Claimant has not requested an Article 36 exemption) in this Rejoinder.
[714] See Section 6.3.3. (The Claimant has not sought to avail itself of Article 9(6) of the Gas Directive), in this Rejoinder.
[715] See Section 6.3.4. (The Russian Government could prevent the alleged adverse impact of the TPA requirements by allowing exports of gas from Russia by other undertakings), in this Rejoinder
[716] See Section 6.3.5. (The Claimant has opposed the negotiation of an IGA between the European Union and Russia), in this Rejoinder.
[redacted]
[718] The European Union refers to the Counter-Memorial on the Merits, 3 May 2021, Section 2.3. See also Section 6. (The Amending Directive Will Not Have The Alleged "Impact" On The Claimant's Investment In The North Stream 2 Pipeline), in this Rejoinder.
[719] Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, 25 October 2021, para. 452.

Amending Directive was adopted pursuant to public interest and it pursues legitimate, suitable, and achievable objectives.[720]

625. The European Union will now address each of these points in detail.

626. First, it was in the European Union's power to take the measure, pursuant to the public interest. Gas infrastructure whose sole purpose is to transport gas into the EU is subject to economic regulation by the European Union because the availability of this essential facility necessarily has a material impact on the functioning of the internal market.

627. The mere fact that the European Union and its Member States regulate economic undertakings within their territory, through the Amending Directive, is on no account a "disproportionate" exercise of State power. To the contrary, it is a textbook application of that power and the core of what public authorities rightly should do in order to protect and uphold the general public interest in fair competition and security of supply.

628. Concerning the legitimacy of the measure, the European Union pursued, in the general public interest, the legitimate aim of providing clarity as to the application of the Gas Directive regulatory framework to pipelines to and from third countries.[721] The European Union was competent to adopt the measure pursuant to the powers conferred upon it by Article 194 of the TFEU for the pursuit of an EU policy on energy. There was hence a valid policy justification for the measure as well as a solid legal basis.

629. The objectives of the Amending Directive are not specious. Instead, concerning the suitability of the measure, i.e. whether the measure adopted by the State is appropriate or rationally-related to the stated policy objective and whether it is able to achieve its objectives,[722] the Amending Directive is both appropriate and rationally-related to the stated policy objectives.[723] As discussed by Professor Maduro and detailed in Section 2 of this Rejoinder, the Amending Directive can

[720] See Section 2.1.1.3, The objectives of the Amending Directive, in the European Union's Counter-Memorial on the Merits, 3 May 2021. See also Section 2, The amending Directive pursues legitimate and achievable policy objectives, in this Rejoinder.
[721] See Section 2.1, The Amending Directive Pursues Legitimate and Achievable Policy Objectives, in the European Union Counter-Memorial on the Merits, 3 May 2021. See also Section 2, The amending Directive pursues legitimate and achievable policy objectives, in this Rejoinder.
[722] **Exhibit RLA-271**, *Valeri Belokon v. Kyrgyz Republic*, Award, 24 October 2014, paras. 232, 243.
[723] See Section 2, The amending Directive pursues legitimate and achievable policy objectives, in this Rejoinder.

achieve its policy objectives on competition, security of supply of energy in the EU, as well as legal certainty.[724]

630. To conclude, the Amending Directive was adopted pursuant to public interest and it pursues legitimate, suitable, and achievable objectives as stated in the measure itself.[725]

7.1.3.3.4 Nord Stream 2 can apply for an Article 36 exemption

631. With regard to (iv), the Claimant maintains that "all other offshore pipelines to which the Amending Directive applies have obtained derogations".[726] The Claimant's allegation is misplaced. On the one hand, Nord Stream 2 can apply for an Article 36 exemption[727] and, on the other, there are other onshore pipelines, to which the Gas Directive applies, according to the clarification provided by the Amending Directive in 2019, that were not granted an Article 49a derogation.[728]

632. As detailed in Section 2.4 and Section 4.3.2 of this Rejoinder[729] as well as in paras. 303-311 of the Counter-Memorial,[730] other import pipelines are subject to the Gas Directive without a derogation. For instance, EuRoPol GAZ s.a. was certified as transmission system operator of the Polish section of the Yamal pipeline by a decision of the Polish national regulatory authority of 17 November 2010 (i.e., long before the Amending Directive came into force). This certification has applied in practice to the whole of the Polish section of the Yamal pipeline, including the stretch between the eastern-most connection point between Yamal and the domestic Polish transmission system and the Polish-Belarusian border (about half the overall length of the Polish Yamal section).[731] The Amending Directive clarified the legal basis for this.

[724] See Professor Maduro's First Expert Report, 3 May 2021, Section 4. (The Amending Directive goals – legal basis and amending legislation); Section 5. (The Amending Directive contributes to ensure the functioning of the internal market – competition in particular); Section 6. (The Amending Directive contributes to the security of supply of energy in the EU); and Section 7. (The Amending Directive contributes to enhance transparency and legal certainty).
[725] See Section 2.1.1.3 (The objectives of the Amending Directive) in the European Union Counter-Memorial on the Merits, 3 May 2021. See also Section 2 (The amending Directive pursues legitimate and achievable policy objectives) in this Rejoinder.
[726] Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, 25 October 2021, para. 453.
[727] See Section 4.4 (An Article 36 exemption is a suitable flexibility, comparable to an Article 49a derogation), in this Rejoinder.
[728] See Section 4.3.2 (The Claimant's focus on derogations for certain offshore pipelines ignores that other third country pipelines are subject to the Gas Directive), in this Rejoinder.
[729] See Section 2.4 (The Claimant has failed to provide any compelling response to the EU's rebuttal) and Section 4.3.2 (The Claimant's focus on derogations for certain offshore pipelines ignores that other third country pipelines are subject to the Gas Directive), in this Rejoinder.
[730] See Section 2.4.5. (The Amending Directive does not have as "practical effect" that only the NS2 pipeline will be affected), in the European Union Counter-Memorial on the Merits, 3 May 2021, in particular paras. 303-311.
[731] See Section 2.4 (The Claimant has failed to provide any compelling response to the EU's rebuttal) in this Rejoinder.

633. The Gas Directive applies to all interconnectors with third countries mentioned above and no Article 49a derogation has been granted in any of the cited cases. It follows that the Claimant's allegation is baseless.

7.1.3.3.5 The Amending Directive includes an appropriate derogation mechanism

634. Concerning (v), the Claimant asserts that the Amending Directive would be proportionate only if all planned pipelines were granted the derogation under Article 49a.[732] The Claimant's assertion is groundless.

635. It appears that NS2PAG is claiming the power to write EU legislation and substitute itself to the co-legislators in the democratic process of legislation making, by defining the criteria based on which the NRAs should grant derogations.

636. The Claimant does not take account of the fact that the derogation provided for in Article 49a of the Amending Directive is based on a temporal criterion.[733] Pipelines that are "completed before 23 May 2019", i.e. before the entry into force of the Amending Directive, can apply for an authorisation to derogate from certain obligations under the Gas Directive for a period of 20 years, renewable only if justified. The time limitation for access to a derogation reflects the intention of the European Parliament and the Council to ensure that the rules of the Gas Directive apply effectively to all pipelines at a given point in time.[734]

637. As detailed in Section 4.3.3 above, the "completed" criterion is objective, appropriate, clear and factually precise since it enables an accurate assessment whether it is met. Moreover, only eligible offshore pipelines could receive an Article 49a derogation.[735] It serves to establish a clear time limitation, so that Amending Directive applies effectively to all pipelines *at a given point in time*.

638. To provide *legal certainty* as to the application of the Gas Directive regulatory framework to pipelines to and from third counties was the purpose of the Amending Directive. Had the co-legislators decided that all planned pipelines, at any stage of construction, were to receive an Article 49a derogation, as the Claimant suggests, that regulatory framework may not apply to such pipelines for an undetermined and undeterminable number of years, thereby defeating the purpose of the Amending Directive.

[732] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 455-459.
[733] See Section 4.3.3 (The "completed" criterion is entirely appropriate), in this Rejoinder.
[734] See European Union Counter-Memorial on the Merits of 3 May 2021, paras. 267-268.
[735] See Section 4.3.3 (The "completed" criterion is entirely appropriate), in this Rejoinder.

639. For example there are a number of planned and proposed pipelines, such as EastMed,[736] Southern Gas Corridor,[737] and the Trans-Anatolian Natural Gas Pipeline Project (TANAP),[738] whose date of completion is currently undetermined.

640. It is therefore legally incorrect to set an undetermined and undeterminable date of application if the purpose of the act is to clarify the normative framework. It follows that the European Union righty defined a precise end-date for a pipeline to be eligible for an Article 49a derogation issued by the competent NRA. The Claimant's suggestion that every planned pipeline should be eligible for an Article 49a derogation would defeat the clarification purpose of the Amending Directive.

7.1.3.4 Conclusion

641. The Claimant has been unable to rebut the EU's demonstration that proportionality, to the extent relevant at all, is not a stand-alone obligation to be considered in isolation of other aspects of FET. Furthermore, regardless of the legal characterization of the concept of proportionality, the Claimant continues to improperly dismiss the importance of the EU's wide margin of appreciation in adopting policies in the public interest.

642. Moreover, (i) the Amending Directive did not cause any dramatic regulatory change; (ii) the public benefits of the Amending Directive outweigh any practical effects on Nord Stream 2; (iii) the objectives of the Amending Directive are legitimate and achievable; (iv) Nord Stream 2 can apply for an Article 36 exemption; and (v) the Amending Directive includes an appropriate derogation mechanism.

643. As a result, the Claimant's allegations of a breach of proportionality under Article 10(1) of the ECT must be dismissed.

7.1.4 The European Union did not breach legitimate expectations

644. In its Memorial, the Claimant asserted that it had a "legitimate expectation with respect to the stability of the legal framework in which it decided to invest", and claimed that these expectations were breached by the EU's legislative amendments.[739] This claim is premised on the existence of dramatic and

[736] **Exhibit RLA-95**, Intergovernmental Agreement between the Republic of Cyprus, and the State of Israel, and the Hellenic Republic, and the Italian Republic concerning a pipeline system to transport Eastern Mediterranean Natural Gas to the European Markets.
[737] **Exhibit R-195**, Southern Gas Corridor
[738] **Exhibit R-196**, Trans-Anatolian Natural Gas Pipeline Project (TANAP).
[739] Claimant's Memorial, 3 July 2020, paras. 426-427.

regulatory change frustrating the Claimant's investment.[740] As has been recalled above, there was no such regulatory change, let alone a dramatic or radical one.[741] The Claimant's claim of alleged breach of legitimate expectations can therefore be dismissed for this reason alone.

645. In the alternative, the remainder of this Section explains that the additional arguments put forward in the Reply to the Counter-Memorial in support of the claim of legitimate expectations are legally flawed because (i) the protection of legitimate expectations is merely one element of the FET-standard applicable under the ECT; (ii) legitimate expectations require a specific investment-inducing regulatory framework, in the absence of which they do not guarantee a stable legal and business environment; (iii) NSP2AG's expectations were not reasonable, legitimate and justifiable; and (iv) the Claimant did not rely on the expectations it allegedly had at the time of the Investment. Each of the above points suffices individually to reject the claim of legitimate expectations.

7.1.4.1 Legitimate expectations under the FET standard under Article 10(1) of the ECT

646. The EU in its Memorial explained that the commitment on the part of ECT Contracting Parties to accord to investments of Investors of other Contracting Parties FET fails to accord the far-reaching right the Claimant asserts to the protection of alleged legitimate expectations and to regulatory stability.[742]

647. However, contrary to the Claimant's misstatement of its case,[743] the EU has not suggested that legitimate expectations are irrelevant to the FET analysis in all cases. What the EU to the contrary asserted is that the protection of investors' legitimate expectations is but one element of the FET standard, and needs to be interpreted against that backdrop.[744]

648. Most tribunals have considered legitimate expectations a "relevant factor"[745] in the context of FET rather than a standalone source of legal obligations.[746] An

[740] *See* Claimant's Memorial, 3 July 2020, paras. 423-428.
[741] See Section 3 (The Amending Directive does not involve a "dramatic regulatory change") in this Rejoinder.
[742] See European Union Counter-Memorial on the Merits, 3 May 2021, paras. 508-509.
[743] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para 475 i).
[744] See European Union Counter-Memorial on the Merits, 3 May 2021, paras. 508-509.
[745] See, *e.g.*, **Exhibit RLA-287**, *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, para. 317 (citing *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016, para. 371); **Exhibit CLA-102**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 486.
See, *e.g.*, **Exhibit RLA-287**, *Eurus Energy Holdings Corporation v. Kingdom of Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability, 17 March 2021, para. 317 (citing *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016, para. 371); **Exhibit CLA-102**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 486.
[746] See European Union Counter-Memorial on the Merits, 3 May 2021, para. 509.

alleged breach of legitimate expectations can therefore not constitute the core element of an FET claim under this provision, but rather something to be taken into account when considering whether other core aspects of FET have been violated. Alleged legitimate expectations therefore "might be the relevant analytical tool in some cases, but […] not the primary tool".[747] This applies all the more so to the FET standard anchored in Article 10(1) of the ECT given that legitimate expectations do not appear in the text of the Treaty at all.

649. Therefore, the EU maintains its position set out in the Counter-Memorial, that a breach of an investor's expectations (even if such expectations otherwise met the criteria for "legitimacy", an issue addressed below), does not in and of itself suffice to demonstrate that a host State fell short of the FET standard. Rather, it would at best be something the Tribunal should take into account, in considering whether a core element of the FET standard (such as protection against denial of justice, or against manifest arbitrariness) has been breached.

7.1.4.2 Legitimate expectations require an investment-inducing regulatory framework

650. The Claimant insists that investors' legitimate expectations are protected under the FET standard of the ECT despite the absence of an investment-inducing regulatory framework.[748] Before proving the Claimant wrong, the Respondent wishes to highlight the importance of this requirement for the Claimant's case. In the present proceedings, it is uncontested that no specific-investment inducing framework existed in the EU and the EU made no commitments whatsoever as to the inapplicability of the requirements of unbundling, tariff regulation and third party access to pipelines such as Nord Stream 2. On the contrary, the regulatory framework as well as official EU statements, decisions and opinions gave ample indications that these Regulatory Requirements were either already applicable to Nord Stream 2 when the Investment Decision was taken or would be rendered fully applicable to such pipelines in the near future.[749]

7.1.4.2.1 The Claimant's criticism of the authorities relied on by the Respondent

651. Contrary to the Claimant's misstatement,[750] the authorities relied on by the EU in support of the requirement of an investment inducing framework were not

[747] See **Exhibit, RLA-312**, most recently and with further evidence, Cairn v. India, PCA, Final Award, 21 December 2020, para.1723
[748] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 484-497.
[749] See Section 3.3 (EU Competition Law could have resulted in the Regulatory Requirements being enforced against the Claimant) and Section 3.4 (The Claimant was aware that the Regulatory Requirements could apply to pipelines such as Nord Stream 2) in this Rejoinder.
[750] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 485.

confined to the arbitral award in *Masdar Solar & Wind Cooperatief v Kingdom of Spain* and recent investment agreements concluded by the EU.

652. In reality, the Respondent relied on three further arbitration awards which illustrate that legitimate expectations require an investment inducing framework, namely:[751]

- *9REN Holding v. Spain*, which "accepted as correct" that legitimate expectations may arise from "rules not specifically addressed to a particular investor but which are put in place with *a specific aim to induce foreign investments and on which the foreign investor relied on making his investment*."[752]
- *El Paso v. Argentina*, which considered that a regulation could be a violation of the FET standard if it "violates a specific commitment towards the investor", and that there are two types of commitments that could be considered "specific" for that purpose: "those specific to their addressee and those specific regarding their object and purpose."[753]
- *Glamis Gold v. United States*, which concluded that a breach of the FET standard may be exhibited by "the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations."[754]

653. In addition, the EU referred to a publication of the United Nations Conference on Trade and Development from 2012, which promotes correct understanding of the concept of FET in international investment agreements and which is itself based on a thorough assessment of a large number of arbitral awards. The publication concludes that "*[l]egitimate expectations may arise only from a State's specific representations or commitments made to the investor, on which the latter has relied*".[755]

[751] See European Union Counter-Memorial on the Merits, 3 May 2021, fn. 456 and 458.
[752] See European Union Counter-Memorial on the Merits, 3 May 2021, fn 456 referring to *9REN Holding S.a.r.l v. Kingdom of Spain*, Award 31 May 2019, ICSID Case No. ARB/15/15, para. 294 (**Exhibit RLA-136**), emphasis added.
[753] See European Union Counter-Memorial on the Merits, 3 May 2021, fn 456 referring to *El Paso Energy International Company v. The Argentine Republic*, Award 31 October 2011, ICSID Case No. ARB/03/15, para. 375. (**Exhibit RLA-137**).
[754] See European Union Counter-Memorial on the Merits, 3 May 2021, fn 458 referring to *Glamis Gold, Ltd. v. The United States of America*, Award 8 June 2009, UNCITRAL, para. 627. (**Exhibit RLA-139**), emphasis in original.
[755] See European Union Counter-Memorial on the Merits, 3 May 2021, fn 456 referring to the UNCTAD publication, "Fair and Equitable Treatment" (2012), (**Exhibit R-106**) pp. 68-69.

654. The Claimant does not contest that the above arbitral awards and the UNCTAD publication support the finding that a specific investment inducing regulatory framework is required for investors' expectations to be protected.

655. By contrast, NSP2AG argues that *Masdar Solar & Wind Cooperatief v Kingdom of Spain* stands against the proposition that legitimate expectations cannot be based on a general legal framework.[756]

656. The Claimant's reliance on the *Masdar* decision is unavailing, because the circumstances of that decision were entirely distinct from those before the present Tribunal. In *Masdar Solar & Wind Cooperatief U.A v Spain*, the tribunal found that Spain had "*actively encouraged investments*" through various regulatory regimes[757] and relied on the existence of a specific commitment made by the State in order to establish a breach of the FET standard.[758] *Inter alia*, the *Masdar* tribunal held that it "*would be difficult to conceive of a more specific commitment than a Resolution issued by Spain addressed specifically to each of the Operating Companies*"[759] and concluded that the Claimant had legitimate expectations "*[b]ecause of these specific commitments*".[760] Given that these specific commitments were instrumental for the Tribunal to arrive to the conclusion that legitimate expectations existed, *Masdar Solar & Wind Cooperatief U.A v Spain* provides no support to the Claimant's arguments here. Contrary to the circumstances addressed by the Masdar tribunal, the Claimant in making its investment was faced with a regulatory environment that already applied significant disciplines (notably, unbundling, third-party access and tariff regulation) on major pipeline undertakings. Moreover, EU Competition Law rules in place expressly guarded against abuses of dominant position. The only question was whether or not such rules would apply across the EU territory, including in its territorial sea – and for reasons the EU has set out above, a prudent investor would have understood this to be both rational and likely.[761]

[756] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para 484
[757] See **Exhibit RLA-135** Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018, para 496.
[758] See **Exhibit RLA-135** Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras 519-521
[759] See **Exhibit RLA-135** Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018, para 520.
[760] See **Exhibit RLA-135** Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018, para 521.
[761] See also Section 3.2 (There were sufficient indications that the Gas Directive would apply or be rendered applicable to pipelines such as Nord Stream 2 also offshore) and Section 3.3 (EU Competition Law could have resulted in the Regulatory Requirements being enforced against the Claimant) in this Rejoinder.

657. NS2PAG is also incorrect in denying the relevance of recent investment agreements,[762] which elucidate the concept of legitimate expectations in the context of the FET standard. Whilst these agreements are not identical to the ECT, they illustrate that States do not adhere to the overly broad interpretation of that concept advocated by the Claimant.

658. A review of recently rendered cases further demonstrates that the trend in decision-making has been to require some specific objective representation by the State directed towards the investor upon which the investor reasonably relied and that the State subsequently repudiated.763 The trend towards universal adoption of this standard reflects a common sense recognition on the part of tribunals that mere "expectations" on the part of investors cannot amount to a legally enforceable obligation, particularly where the investor's expectation is subjective and self-serving (as in the present case). Accordingly, the list of arbitral awards requiring an investment inducing regulatory context could be further extended. Many awards even go beyond this requirement and protect legitimate expectations only where the host State has made specific commitments or representations that the investor relied upon at the time of its investment.[764] These include:

- in *PSEG Global v. Turkey*, the tribunal held that "legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed."[765]
- in *JSW Solar vs Czech Republic*, the tribunal held that "legitimate expectations can only arise if the investor relies on the representations made by the State at the time of its investment. […] In the absence of a commitment by the Respondent that the Tax Incentives would not be altered, the Claimants should expect that the laws in force at the time of its investment would change. The expectations which the Claimants might have had cannot be deemed legitimate and, therefore, cannot benefit from the protection of the Treaty. As the claimants recognize: "an

[762] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 485(i).
[763] See, e.g., **Exhibit RLA-288**, *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on Jurisdiction, Liability and Directions on Quantum, 13 September 2021, paras. 570-574; **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, 9 March 2020, paras. 581-591; **Exhibit CLA-219**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, paras. 515-517; **Exhibit CLA-247**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020 [Redacted], para. 539.
[764] See also **Exhibit RLA-303**, Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen, JSW Solar (zwei) GmbH & Co. KG v. The Czech Republic ("Wirtgen") PCA Case No. 2014-03, Award, paras 436-437; **Exhibit RLA-120**, Charanne B.V., Construction Investments S.A.R.L. v Spain, SCC Arbitration No.: 062/2012, Award, para 490
[765] **Exhibit RLA-307**, PSEG Global, Inc., North American Coal Corp., & Konya Ingin Electrik Üretim ve Ticaret Ltd. Sirketi v. Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007, para 241.

investor can[not] legitimately expect that the laws at the time of investment will not be changed."[766]

- In *Cairn v. India*, the tribunal defined legitimate expectations as follows: "This principle stands for the proposition that the State should respect its specific commitments in reliance on which the investor has made its investment."[767]
- In *CEF Energia v. Italy*, the tribunal relied on a series of propositions developed by the *Antaris* tribunal, including that "[a] claimant must establish that (a) clear and explicit (or implicit) representations were made by or attributable to the state in order to induce the investment, (b) such representations were reasonably relied upon by the Claimants, and (c) these representations were subsequently repudiated by the state."[768]

659. In *RWE Innogy v. Spain*, the tribunal found that "this is not a case where specific commitments were made to an investor such as to found legitimate expectations."[769]

7.1.4.2.2 The authorities relied on by the Claimant

660. The Claimant argues that 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 an investment inducing framework.[770]

661. A thorough reading of these cases shows that none of them supports the Claimant's position.

662. This is most apparent in the case of the tribunal decision in *Total SA v Argentine Republic,* of which the Claimant quotes paragraph 333 out of context.[771] It suffices to read paragraph 333 in conjunction with the preceding paragraph of the decision to refute the Claimant. In paragraph 332, the tribunal describes its assessment as being based on the fact that *"[t]he security that a regime established by law offered to investors [was] severely undermined"*. In other words, the tribunal held that the breach of legitimate expectations resulted from

[766] **Exhibit RLA-303,** Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen, JSW Solar (zwei) GmbH & Co. KG v. The Czech Republic ("Wirtgen") PCA Case No. 2014-03, Award, paras 436-437.
[767] See **Exhibit RLA-312,** Cairn v. India, PCA, Final Award, 21 December 2020, para.1761.
[768] **Exhibit CLA-233**, *CEF Energia B.V. v. The Italian Republic*, SCC Case No. V(2015/158), Award, 16 January 2019, para 185.
[769] **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, 30 December 2019, para. 550.
[770] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para 486.
[771] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 487 and footnote 718. The passage "expectations based on such principles are reasonable and hence legitimate even in the absence of specific promised by the government" is in addition highlighted.

unreasonable changes of a legal regime that had specifically offered security (regarding price setting) to investors.[772]

663. What is more, in Total SA v Argentine Republic the investor itself submitted that its expectations were legitimate and deserved protection only "in as far as (i) stability [of the legal regime] has been "promised "(to the foreign investor), and (ii) the foreign investor has "relied" upon such promises in making its investment".[773] After the investor Total asserted such different promises of varying specificity,[774] the tribunal identified as its task "to determine whether the legislation, regulation and provisions invoked by Total constitute a set of promises and commitments towards Total whose unilateral modifications entail a breach of the legitimate expectations of Total and, as a consequence, are in breach of the fair and equitable treatment standard".[775]

664. Furthermore, the tribunal in Total SA v Argentine Republic held even more specifically that "when relying on the concept of legitimate expectations, arbitral tribunals have often stressed that "specific commitments" limit the right of the host State to adapt the legal framework to changing circumstances. Representations made by the host State are enforceable and justify the investor's reliance only when they are made specifically to the particular investor."[776]

665. The tribunal's ruling on legitimate expectations in *Charanne v Spain* was similarly based on its finding there were "*specific commitments adopted by Spain directed at the Claimants*".[777] Even then, the *Charanne* tribunal rejected the proposition that a regulatory framework could give rise to legitimate expectations, even "*where it was directed to a limited group of investors*". [778] It held that "*[t]o convert a regulatory standard into a specific commitment of the state, by the limited character of the persons who may be affected, would constitute an*

[772] See **Exhibit RLA-153,** Total S.A. v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para 327, emphasis added.
[773] See **Exhibit RLA-153,** Total S.A. v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para 91.
[774] See **Exhibit RLA-153,** Total S.A. v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, paras 91-95.
[775] See **Exhibit RLA-153,** Total S.A. v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para 99, emphasis added.
[776] See **Exhibit RLA-153,** Total S.A. v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, paras 119 and 309(e), emphasis added. In support, the tribunal referred inter alia to International Thunderbird Gaming Corporation v. Mexico, para. 147, CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17
July 2003, para. 27
[777] See **Exhibit RLA-120** Charanne B.V., Construction Investments S.A.R.L. v Spain, SCC Arbitration No.: 062/2012, Award, para 490.
[778] See **Exhibit RLA-120** Charanne B.V., Construction Investments S.A.R.L. v Spain, SCC Arbitration No.: 062/2012, Award, para 491.

excessive limitation on power of states to regulate the economy in accordance with the public interest"[779].

666. On that basis, the tribunal concluded that "in the absence of a specific commitment, an investor cannot have a legitimate expectation that existing rules will not be modified".[780] It also refuted the claim that the protection of legitimate expectations generally encompasses an investor's right to regulatory stability as follows: "*in the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest*".[781]

667. The Claimant's reliance on PSEG Global v. Turkey[782] is equally self-defeating, given that the tribunal in that case explicitly held that "legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed."[783] The tribunal's finding that the fair and equitable treatment standard had nevertheless been breached was based on evident negligence on the part of the administration in the handling of the negotiations with the claimants and other inconsistent use or even abuse of authority.[784] In short, the underlying facts are wholly unrelated to Claimant's allegations in the present case.

668. The Claimant misquotes para 309 of *Saluka Investments BV v Czech Republic* as suggesting that the protection of legitimate expectations generally follows from the state having assumed the obligation of FET.[785] In reality that para reads as follows: "The "fair and equitable treatment" standard in Article 3.1 of the Treaty is an autonomous Treaty standard and must be interpreted, in light of the object and purpose of the Treaty, so as to avoid conduct of the Czech Republic that clearly provides disincentives to foreign investors. 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

[779] See **Exhibit RLA-120** Charanne B.V., Construction Investments S.A.R.L. v Spain, SCC Arbitration No.: 062/2012, Award, para 493.
[780] See **Exhibit RLA-120** Charanne B.V., Construction Investments S.A.R.L. v Spain, SCC Arbitration No.: 062/2012, Award, para 499.
[781] See **Exhibit RLA-120** Charanne B.V., Construction Investments S.A.R.L. v Spain, SCC Arbitration No.: 062/2012, Award, para 510.
[782] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 489.
[783] See **Exhibit RLA-307** PSEG Global, Inc., North American Coal Corp., & Konya Ingin Electrik Üretim ve Ticaret Ltd. Sirketi v. Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007, para 241.
[784] See **Exhibit RLA-307** PSEG Global, Inc., North American Coal Corp., & Konya Ingin Electrik Üretim ve Ticaret Ltd. Sirketi v. Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras 247-251.
[785] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 488.

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." [786]

669. It follows that (i) the findings in *Saluka* are explicitly based on the specific objective and purpose of the investment protection treaty at stake;[787] (ii) even on that basis, the tribunal considers that only discriminatory (i.e. based on unjustifiable distinctions) and unreasonable (i.e. unrelated to some rational policy) treatment of investors is in breach of legitimate expectations. Finally, even the tribunal in Saluka relies on case law according to which "*[in applying [the "fair and equitable treatment"] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant*".[788] In other words, the decision again assumes that for so-called "legitimate expectations" to arise, there must at very least be specific representations by the State upon which the Investor relied in order to make its investment, and that were repudiated. That is manifestly not the case in the present situation, where to the contrary it was repeatedly signalled that the Gas Directive *would* apply to the Claimant's pipeline venture.[789]

670. The lack of case law authorities in support of the Claimant's position is further illustrated by the Claimant's attempt to depict the opinion of the Austrian academic Christoph Schreuer as the tribunal's position in *El Paso v Argentina*.[790] In reality, the tribunal in that award explicitly required a specific investment-inducing commitment, finding "*that FET is linked to the objective reasonable legitimate expectations of the investors and that these have to be evaluated considering all circumstances. As a consequence, the legitimate expectations of a foreign investor can only be examined by having due regard to the general*

[786] See **Exhibit RLA-150** Saluka Investments BV v. Czech Republic (UNCITRAL, Partial Award of 17 March 2006), **Exhibit CLA 64**, para 309, emphasis added.
[787] See **Exhibit RLA-150** Saluka Investments BV v. Czech Republic (UNCITRAL, Partial Award of 17 March 2006), Exhibit CLA 64, para 280.
[788] See **Exhibit RLA-150** Saluka Investments BV v. Czech Republic (UNCITRAL, Partial Award of 17 March 2006), Exhibit **CLA 64**, para 302, relying on Waste Management, 30 April 2004, para. 98.
[789] See Section 3.2 (There were sufficient indications that the Gas Directive would apply or be rendered applicable to pipelines such as Nord Stream 2 also offshore) of this Rejoinder.
[790] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para 490 and fn. 721. The Claimant erroneously refers to para 329 of the Award in El Paso Energy International Company v. The Argentine Republic (ICSID case No. ARB/03/15, Award of 31 October 2011). In reality, the reference to the publication by Christoph Schreuer that the Claimant relies upon is contained in fn. 329 to the heading before para 365. In that fn. the Tribunal leaves no doubt that it does not identify with Mr Schreuer's views as follows: ("See Christoph Schreuer, for whom …" (emphasis added).

proposition that the State should not unreasonably modify the legal framework or modify it ***in contradiction with a specific commitment not to do so****, as will be shown below*."[791]

671. The award in *Gavrilovic v. Croatia* is equally unhelpful to the Claimant, as is confirmed by the following finding of the tribunal in that matter: "As set out above, legitimate expectations depend on specific assurances or representations made by the State to the investor, which are relied upon by the investor at the time of making the investment".[792]

672. The Claimant argues that the tribunal in *Impregilo SpA v. Argentine Republic*[793] equates legitimate expectations to the protection from allegedly unreasonable modifications of the legal framework, even in the absence of specific commitments.[794] However, the Claimant fails to mention that the tribunal limited that protection in the case at hand to protection from the flagrant misuse of public power such as a behaviour deliberately aimed at damaging the investor.[795] Furthermore, in *Impreglio*, the tribunal was not addressing as here the adoption of a regulation of general application aimed at clarifying the scope of coverage of legitimate and appropriate rules of public policy as well as rules intended to avoid abuse of dominant position.

673. Faced with jurisprudence that consistently requires at very least a specific investment inducing framework for legitimate expectations to be protected (and more typically, specific undertakings by the State to the investor), NS2PAG resorts to the convoluted claim that the Amending Directive *itself* creates such a framework, arguing that its Recital (4) points to the protection of legitimate expectations of investors affected, with the undue exception of the Claimant.[796]

674. The Claimant's argument in reliance on the Amending Directive is nonsensical bootstrapping that ignores chronology and common sense. The issue considered here is whether the EU acted in any way that generated allegedly legitimate expectations on the part of the Claimant that induced it to invest, by [redacted] In this regard, citing legislation adopted two years later lacks any basic

[791] See **Exhibit RLA-137** El Paso Energy International Company v. The Argentine Republic (ICSID case No. ARB/03/15, Award of 31 October 2011), para 364, emphasis in original.
[792] See **Exhibit RLA-308,** Georg Gavrilovic and Gavrilovic D.O.O v. Republic of Croatia (ICSID case NO ARB/12/39, Award of 26 July 2018), para 984.
[793] See **Exhibit RLA-309,** Impregilo SpA v. Argentine Republic (ICSID case No ARB/07/17, Award of 21 June 2011), para
[794] In the Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, the Claimant quotes from *Impregilo SpA v. Argentine Republic* (ICSID case No ARB/07/17, Award of 21 June 2011), para 291.
[795] See **Exhibit RLA-309,** Impregilo SpA v. Argentine Republic (ICSID case No ARB/07/17, Award of 21 June 2011), paras 297, 299.
[796] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 505.

flavour of reasonableness or logic.[797] In any event, the Amending Directive contains no references whatsoever to the protection of investors' legitimate expectations. The existence of transitory rules in a piece of legislation does not constitute proof that such protection is intended. This holds all the more true where amendments are based on the absence of "specific" rules,[798] the reference to the latter pointing to the existence of more "general" rules that already applied to the investment in question.

7.1.4.2.3 No right to a stable legal and business environment

675. The Claimant argues that the protection of legitimate expectations also include investors' right to a stable legal and business environment, which is allegedly not to be equated to a "regulatory freeze". As to the latter, the Claimant accuses the EU of misrepresenting its views.[799]

676. To the contrary, the Claimant's conception of so-called "legitimate expectations" would indeed amount to a regulatory freeze: according to the Claimant, the State would *de facto* be precluded from making any amendments affecting an investor's interests. In the eyes of the Claimant, States would be precluded not only from major ("fundamental") changes to their regulatory framework but in addition be required to justify also less important amendments by reference to police objectives that are deemed rational and pursued proportionately.[800] Even if such hurdles were passed, the Claimant submits that proposed amendments would in addition need to "take into account the legitimate expectations of investors".[801] This additional requirement, which renders the Claimant's definition of legitimate expectations circular, would preclude States from pursuing even "overriding legitimate public interests", unless those public interests can be shown to prevail over the investor's interests in the individual case.[802]

677. These far reaching restrictions of State's right to regulate in the public interest are not rooted in the case law discussed above. As will be shown below, they do not result, either, from the arbitral awards in the cases of *Plama v Bulgaria,*

[797] As regards the relevant point in time for the risk assessment as to the applicability of the original Gas Directive to Nord Stream 2 see also Section 3.2.3(The official statements postdating the investment decision), in this Rejoinder.
[798] See Recital (4) of the Amending Directive (emphasis added): "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".
[799] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 498-501.
[800] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021 paras. 486, 488, and 500-501.
[801] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 501, emphasis added.
[802] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 531-532.

Stadtwerke München v. Spain and *Micula v. Romania*, to which the Claimant refers in its Reply to the Counter-Memorial.[803]

678. In *Plama v. Bulgaria*, the arbitral tribunal stated that whilst the FET standard was viewed by some to include "*to a certain extent*" the "*provision of a stable legal framework*", it noted that this interpretation of the standard was "*controversial*".[804] Even based on "the *interpretation most favorable to the [c]laimant"*[805] the tribunal's ruling plainly contradicts NS2PAG's interpretation of legitimate expectations, in that it requires specific commitments to the benefit of investors:

> *"It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects."*[806]

679. Similarly, the tribunal in *Stadtwerke München v. Spain* generally requires a specific investment-inducing regulatory framework for legitimate expectations to be protected:

> "*Thus 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 and cause disappointed investors to seek compensation by invoking investment treaties, like the ECT, in which States have promised investors "fair and equitable treatment*."[807]

[803] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 498 and 502.
[804] See **Exhibit RLA-145** Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24 (Award of 27 August 2008), para 175.
[805] See **Exhibit RLA-145** Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24 (Award of 27 August 2008), para 175. The tribunal assumed the most investor-friendly reading of legitimate expectations for the purpose of the award, because even on this basis, it arrived to the conclusion that the claimant was not entitled to any of the substantive protections afforded by the ECT; see Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24 (Award of 27 August 2008), para 325.
[806] See **Exhibit RLA-145** Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24 (Award of 27 August 2008), para 177, quoting from CMS Gas Transmission Company v. The Argentine Republic, Award of 12 May
2005, ICSID Case No. ARiOl/8, para. 277, emphasis added.
[807] See **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, emphasis added.

680. The Stadtwerke München tribunal also held that a specific investment inducing regulatory framework requires at least that "a prudent and experienced investor could have reasonably formed a legitimate and justifiable expectation of the immutability of [the host State's] legislation."[808]

681. Similarly, in determining whether the Claimants had legitimate expectations, the tribunal in *Micula v. Romania* relied on a specific State program expressly directed to attract investors. Whilst emphasising that a State was generally "*free to amend its laws and regulations absent an assurance to the contrary*" the tribunal held that "*Romania's conduct had included an element of inducement that required Romania to stand by its statements and its conduct*"[809] concluding that "*it cannot be fair and equitable for a state to offer advantages to investors with the purpose of attracting investment in an otherwise unattractive region*" if the investor is then unexpectedly deprived of the advantages announced.[810]

682. Indeed, the *Micula* tribunal goes on to confirm that "[w]hen the alleged legitimate expectation is one of regulatory stability, the reasonableness of the expectation must take into account the underlying presumption that, absent an assurance to the contrary, a state cannot be expected to freeze its laws and regulations." In other words, and as the tribunal noted, "[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged… Accordingly, for a state to violate the fair and equitable treatment standard by changing the regulatory framework, the investor must have received a legitimate assurance that the relevant laws and regulations would not be changed in his or her respect."[811] The Claimant of course wholly omitted this aspect of the *Micula* decision in its own submissions.

683. In his separate opinion in *Micula v Romania,* Professor Georges Abi-Saab's set the bar for an investment inducing regulatory context even higher, holding that "*[t]he conduct or representation of the government has to bear the makings of an identifiable legal commitment towards the specific investor, before we can*

[808] See **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 264.
[809] See **Exhibit RLA-151** Ioan Micula, Viorel Micula and others v. Romania (I), ICSID Case No. ARB/05/20, Award, 13 December 2011, para 686.
[810] See **Exhibit RLA-151** Ioan Micula, Viorel Micula and others v. Romania (I), ICSID Case No. ARB/05/20, Award, 13 December 2011, para 687.
[811] **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, 11 December 2013, para. 673 (citing **Exhibit CLA-64**, *Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 305.

speak of a breach (or frustration) of legitimate expectations, calling for a remedy or compensation".[812]

684. In other words, the case law, including the authorities invoked by the Claimant, points to the existence of legitimate expectations of a stable legal environment only if a prudent and experienced investor could have legitimately and justifiably interpreted the host State's legislation as carrying the assurance that it would not be amended to the investor's disadvantage. By contrast, general legislation applicable to a plurality of persons or a category of persons do not create legitimate expectations that there will be no change in the law, as can be further illustrated with range of ECT tribunals opining on the same issue. For example:

- In *CEF Energia v. Italy*, citing the findings of the *Antaris* tribunal, the tribunal noted that "[p]rovisions of general legislation applicable to a plurality of persons or a category of persons, do not create legitimate expectations that there will be no change in the law … An expectation may be engendered by changes to general legislation, but, at least in the absence of a stabilization clause, they are not prevented by the fair and equitable treatment standard if they do not exceed the exercise of the host State's normal regulatory power in the pursuance of a public interest."[813]

- In *Stadtwerke München v. Spain*, the tribunal confirmed that "[t]he FET standard in the ECT does not, however, protect the investor from any and all changes that a government can introduce into its legislation. As concluded in the previous section, it does not protect it against the changes introduced to safeguard the public interest to address a change of circumstances, nor does it protect the investor who unreasonably and unjustifiably expects that the host government will introduce no amendments to the legislation governing the investment."[814]

685. Other cases considering the issue of expectations of regulatory stability have similarly emphasized that such expectations cannot as a general matter (*i.e.* absent a specific undertaking by the State to this effect) be deemed "reasonable"; to the contrary, the expectation should be that regulation will

[812] See **Exhibit RLA-311,** Ioan Micula, Viorel Micula and others v. Romania (I), ICSID Case No. ARB/05/20, Separate Opinion of Georges Abi-Saab, 5 December 2011, para 3.
[813] **Exhibit CLA-233**, *CEF Energia B.V. v. The Italian Republic*, SCC Case No. V(2015/158), Award, 16 January 2019, para. 185. The tribunal also that "[t]he requirements of legitimate expectations and legal stability as manifestations of the FET standard, do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances." See *id*.
[814] **Exhibit RLA-144**, *Stadtwerke Munchen GmbH and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, para. 264.

continue to evolve, potentially to the detriment of an investor's preferred business model:

- In *Charanne v. Spain*, the tribunal cited the findings in *El Paso v. Argentina*, that "if the often repeated formula to the effect that "the stability of the legal and business framework is an essential element of fair and equitable treatment" were true, legislation could never be changed: the mere enunciation of that proposition shows its irrelevance. Such a standard of behaviour, if strictly applied, is not realistic, nor is it the BITs' purpose that States guarantee that the economic and legal conditions in which investments take place will remain unaltered ad infinitum." [...] "In other words, the Tribunal cannot follow the line of cases in which fair and equitable treatment was viewed as implying the stability of the legal and business framework. Economic and legal life is by nature evolutionary."[815]

- In *Belenergia v. Italy*, the tribunal stated that "the FET obligation does not prevent host States' regulatory autonomy. In *Saluka v. Czech Republic*, the tribunal held that '[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged" and that whether expectations are justified and reasonable takes into account "the host State's legitimate right subsequently to regulate domestic matters in the public interest.' This means that legitimate regulatory activity in the public interest does not amount to an FET breach even if it adversely affects investments."[816]

- In *Cavalum v. Spain*, the tribunal considered that "[t]he starting point is that a State is generally free to amend its laws and regulations. In *Foresight v. Spain*, the tribunal referred with approval to the reference in *Philip Morris Brands v. Uruguay* to 'the State's rights to exercise sovereign authority to legislate.' That is part of a State's margin of appreciation in public international law." The *Cavalum* tribunal further noted that "economic, social, environmental and legal circumstances and problems are by their nature evolutionary, dynamic and bound to constant change, and it is indispensable for successful public infrastructure and public

[815] **Exhibit CLA-102**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 502.
[816] **Exhibit RLA-168**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, para. 572 (citing **Exhibit CLA-64**, *Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 305.

services to be adaptable to change in evolving circumstances."[817] As a result, the FET standard "preserves the regulatory authority of the host state to make and change its laws and regulations to adapt to changing needs, including fiscal needs, subject to respect for specific commitments made."[818]

686. Faced with abundant case law contradicting its position, the Claimant cannot rely on *Saluka* in support of its interpretation of legitimate expectations, either. Even if that ruling supported the proposition that investors are entitled to a stable legal environment (*quod non*), such stable framework would protect investors only against abusive measures that amount to manifest violations of investors' rights.[819] Similarly, in *Novenergia II*, the tribunal verified whether "*subsequent legislation by the [r]espondent radically altered the essential characteristics of the legislation in a manner that violates the FET standard*."[820] Even if the Tribunal gave credence to such isolated rulings (*quod non*), they would still not support the Claimant's assertion that FET precludes States from changing their rules even to pursue legitimate public interests, unless the latter have been weighed against investor's interests in the individual case.[821]

7.1.4.3 NSP2AG's expectations were not legitimate, reasonable and justifiable

687. Even if NSP2AG could have harboured expectations that the regulatory framework applicable to Nord Stream 2 would not change despite the absence of an investment inducing framework (*quod non*), the Claimant would still need to establish that its expectations were legitimate, reasonable and justifiable.[822] The Claimant does not contest that these requirements need to be met additionally for a claim of legitimate expectations to succeed.

688. In assessing whether alleged expectations were "reasonable, legitimate and justified" tribunals have been clear that this is subject to a high threshold, particularly in light of the States' margin of appreciation, the baseline assumption being that – failing any undertakings to the contrary – the regulatory

[817] **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, 31 August 2020, para. 424.
[818] **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, 31 August 2020, para. 424.
[819] See **Exhibit RLA-150** Saluka Investments BV v. Czech Republic (UNCITRAL, Partial Award of 17 March 2006), **Exhibit CLA 64**, para 307.
[820] See **Exhibit RLA-147** Novenergia II - Energy & Environment (SCA) v. Spain, SCC Arbitration (2015/063), para. 656.
[821] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 531-532.
[822] See European Union Counter-Memorial on the Merits, 3 May 2021, para. 515.

environment in any State will continue to evolve.[823] As the tribunal noted in *RREEF v. Spain*, due to these factors, "the threshold of proof as to the legitimacy of any expectation is high and only measures taken in clear violation of the FET will be declared unlawful and entail the responsibility of the State."[824]

689. Tribunals have considered that the question of whether an investor's expectation is "legitimate" is an objective one. As the tribunal noted in *Charanne v. Spain*:

> The mere subjective belief that the investor could have had at the time of making the investment does not suffice. Similarly, the application of this principle depends on whether the expectation has been reasonable or not in the specific case.[825]

690. In *Saluka v. Czech Republic*, the tribunal explained that the legitimate expectations doctrine does not just protect the subjective expectations of an investor; they "must rise to the level of legitimacy and reasonableness in the light of circumstances".[826] Notably, these circumstances can include the "political, socioeconomic, cultural and historical conditions prevailing in the host State at the time of the investment.[827] In addition, a tribunal may consider the investor's conduct, including whether or not it has properly exercised due diligence.[828]

691. Considering the above case law requirements, the Claimant's expectations were not legitimate.

692. NSP2AG's claim that it did not expect EU rules on unbundling, tariff regulation and third party access (the "Regulatory Requirements") to apply to its Nord Stream 2 investment is belied by contemporaneous evidence.

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[823] See, *e.g.*, **Exhibit CLA-233**, *CEF Energia B.V. v. The Italian Republic*, SCC Case No. V(2015/158), Award, 16 January 2019, para 185; **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, 31 August 2020, para. 424 ("the State's sovereign right to regulate has been affirmed in many awards, and the State is entitled to a "high measure of deference" (citing **Exhibit CLA-64**, *Saluka Investments B.V. v. the Czech* Republic, UNCITRAL, Partial Award, 17 March 2006, para. 305; **Exhibit RLA-153**, *Total SA v. The Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para. 115).

[824] **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, 30 November 2018), para. 262.

[825] **Exhibit CLA-102**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 495. See *also FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award, 8 March 2021, paras. 541, 544.

[826] **Exhibit CLA-64**, *Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 304.

[827] **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, 31 August 2020, para. 424; **Exhibit RLA-168**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, para. 571 (emphasis added).

[828] **Exhibit CLA-251**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL Arbitration, Award, 12 November 2010, para. 287; **Exhibit CLA-102**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 505; **Exhibit RLA-289**, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Final Award, 17 July 2016, para. 781.

693. In the Gazprom [redacted] Prospectus,[829] NSP2AG's parent company informed securities investors that "the implementation of the Third Gas Directive could negatively affect the timing and prospects of our gas transportation projects in Europe".[830] Gazprom explicitly recognised that "*the requirements relating to vertical disintegration apply not only to European undertakings but also to foreign vertically integrated undertakings operating in the EU, including the Group*" and warns security investors that "*if, pursuant to the Third Gas Directive, an EU state chooses to implement the most restrictive measures on participation of energy producers in ownership and management of the transportation networks, it may limit the activities in which we are permitted to engage which may force us to dispose of our gas transportation assets in Europe.*"[831]

694. The Gazprom [redacted] Prospectus thus proves that the Claimant factored in that the Regulatory Requirements would apply to its Nord Stream 2 investment. Alleged "expectations" that are flatly contradicted by the Claimant's own contemporaneous admissions (or by those of its 100% parent, of which the Claimant cannot credibly claim ignorance) are manifestly illegitimate.

695. In any event, even if the view were taken that the Gazprom [redacted] Prospectus did not constitute conclusive evidence showing that the Claimant expected that the Regulatory Requirements would apply or be rendered applicable to Nord Stream 2 (*quod non*), its claim of alleged "legitimate expectations" should still be rejected as unreasonable. As tribunals have found, expectations are reasonable only if based on a "*rigorous due diligence process*" conducted by the investor before taking the investment decision.[832]

696. To conduct such a rigorous due diligence process, the Claimant would necessarily have needed to assess and factor into its decision-making the prospect that the Regulatory Requirements could apply to its Nord Stream 2 pipeline, all the more so given that the Claimant itself took the view that their applicability could have a

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[829] That Prospectus is already discussed in detail in Section 3.4 (Indications from contemporaneous EU decisions) in this Rejoinder.

[830] [redacted] n the same Prospectus, Gazprom stated: "Our ability to implement gas transportation projects in Europe may also be affected by the provisions of the Gas Directive, which could have a material adverse effect on our operating results in Europe." [redacted] In the same Prospectus, Gazprom stated: "Our ability to implement gas transportation projects in Europe may also be affected by the provisions of the Gas Directive, which could have a material adverse effect on our operating results in Europe."

[831] Ibid. emphasis added.

[832] **Exhibit RLA-144**, Stadtwerke München and others v. Spain, ICSID Case No. ARB/15/1, Award, 2 December 2019, para 264; **Exhibit RLA-120**, Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, Award, (Spanish), para 505; **Exhibit RLA-305**, STEAG GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Principles of Quantum, 8 October 2020 (in Spanish), para 527.

"catastrophic impact" on its investment".[833] The Claimant accepts that reasonable expectations could only exist where relevant circumstances "should not have caused the investor to assume that the original Gas Directive applied to Nord Stream 2".[834] Assessing the risk of these Regulatory Requirements being applied to its investment was, in the Claimant's own words, "the hallmark of a diligent investor".[835]

697. In order to know the outcome that a due diligence process would have yielded in [redacted] when the Investment Decision was taken, the Tribunal need to look no further than the Gazprom [redacted] Prospectus, in which the Claimant's parent company explicitly warns investors of the Regulatory Requirements being applied to Nord Stream 2.[836] The conclusions reached in the Prospectus are further borne out by the numerous indications available at that time of the Investment illustrating that the Regulatory Requirements or Comparable Requirements would either already apply to pipelines such as Nord Stream 2 on the entirety of Member States' territory (including offshore) or be rendered applicable in the near future, namely: (i) the express provisions of the original Gas Directive and EU Member States' territorial jurisdiction under international law; (ii) statements by Commission representatives regarding Nord Stream and the comparable offshore South Stream project; (iii) EU decisions and opinions regarding comparable pipelines; and (iv) the Commission's enforcement practice and the EU Courts' case law strongly suggesting that Nord Stream 2 could be subjected to Comparable Requirements by virtue of EU competition law.[837] [redacted]

698. In multiple instances, NSP2AG claims that it conducted due diligence at the time of the investment decision.[839] It speaks volumes that the Claimant has failed to

[833] In Memorial paras. 307 et seq., the Claimant takes the view that the applicability of the Amending Directive will have a "catastrophic impact" on NS2PAG's investment as it would fundamentally undermine the basis on which it made its investment.
[834] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, heading above para. 83.
[835] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 521.
[836] [redacted] See Section 3.4 (The Claimant was aware that the Regulatory Requirements could apply to pipelines such as Nord Stream 2), in this Rejoinder.
[837] See Section 3.2 (There were sufficient indications that the Gas Directive would apply or be rendered applicable to pipelines such as Nord Stream 2 also offshore) and Section 3.3 (EU Competition Law could have resulted in the Regulatory Requirements being enforced against the Claimant) in this Rejoinder.
[redacted]
[839] See, for instance, Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 521.

provide *any* contemporaneous documentary evidence in support of such claims. Even ex-post-facto statements regarding due diligence submitted by the Claimant and its Witnesses remain deliberately vague and unsupported by evidence.[840] The Claimant's failure to provide meaningful evidence in this regard is of particular relevance, as arbitral tribunals typically analyse documentary evidence of legal advice in order to establish if investors indeed conducted real due diligence at the time of the investment, as part of analysing whether so-called expectations are in any sense either legitimate or reasonable.[841]

699. [redacted][843] Accordingly, the Claimant's assertion is wholly unsupported in evidence, in the absence of which the EU invites the Tribunal to draw an adverse inference that either no due diligence was in fact conducted, or it was conducted and the Claimant was reckless to the (disfavourable) conclusions reached. The same holds true for the Claimant's unproven submission that it "performed regular and continuous assessments of all risk concerning the project and, in particular, the risk of TEP being extended to apply to Nord Stream 2".[844]

700. [redacted] self-serving[845] Witness Statements asserting alleged due diligence but providing no written evidence either of a request or of the conclusions reached fare no better than the Claimant's own unsubstantiated assertions. In any event, any such "evidence", had it been produced (it has not) would have to be the subject of an independent test of reasonableness. The mere fact of having requested and obtained a self-serving opinion (which in any event has not been produced) would not in itself render an alleged expectation either legitimate or reasonable. Of course, the Claimant has not allowed that to be tested, by failing to produce any evidence of legal due diligence, at all.

[840] See, in particular Claimant Reply Memorial, paras 520 and 521.
[841] See for example **Exhibit RLA-310,** Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01, Award, 8 May 2018, para 432.
[redacted]
[844] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 521.
[redacted]

701. [redacted]

[redacted]

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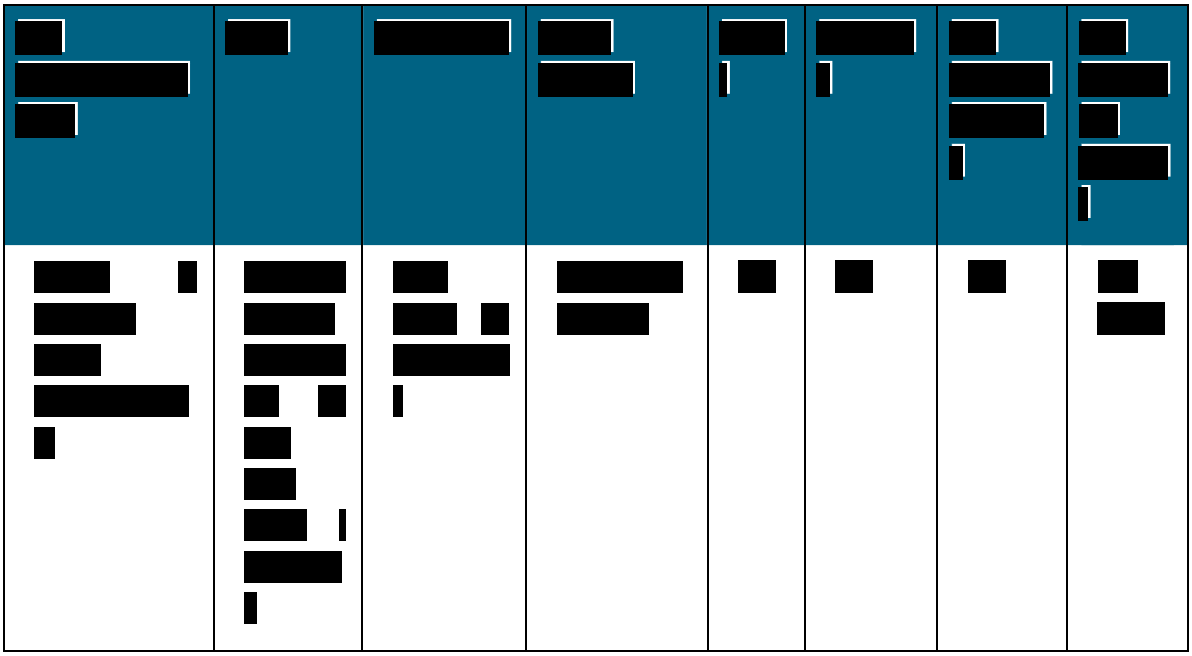

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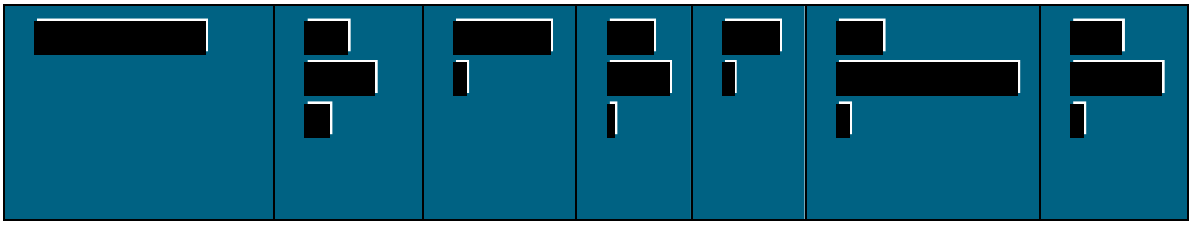

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709. [redacted]

[redacted]

[redacted]

710. The Claimant's failure to adduce any evidence to this effect cannot be remedied by the Claimant's allegedly "independent" expert Peter Roberts, [redacted] Given that the burden of proof regarding the reasonable nature of its alleged expectations lies with the Claimant,[878] the absence of any conclusive evidence adduced by an investor should in the EU's respectful submission lead this Tribunal to assume that Claimant failed to conduct any due diligence at the time of the investment, a fatal conclusion with regard to this heading of claim.

7.1.4.4 NSP2AG did not rely on its alleged expectations when making the investment

711. Even if the Claimant's expectations had been reasonable and legitimate (*quod non*), the Claimant would still need to prove that it actually relied on them when making the investment in [redacted] Whilst the Claimant appears to agree with this requirement,[880] it does not adduce any convincing evidence in support of the reliance on the alleged legitimate expectations.

[877] Expert Report of Peter Roberts, 22 October 2021, para 24, emphasis added.
[878] Watkins Holdings S.à.r.l. and others v. Kingdom of Spain, Award 21 January 2020, ICSID Case No. ARB/15/44, (**Exhibit RLA-138**) para. 516; Electrabel S.A. v Republic of Hungary, Award 25 November 2015, ICSID Case No. ARB/07/19, para. 154. (**Exhibit RLA-127**)
[879] See European Union Counter-Memorial on the Merits, 3 May 2021, para.515.
[880] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras 510 and 527.

712. [redacted]

713. [redacted]

714. [redacted]

7.1.5 The European Union has acted transparently

715. In its Memorial, the Claimant argued that "the obligation to create transparent conditions" is "related" to the FET standard under Article 10(1) of the ECT,[883] and that a breach of the "requirement" of transparency is alone "sufficient to give rise to a violation of the FET standard".[884]

716. In its Counter-Memorial, the EU recalled that transparency is not an element of the FET standard under the ECT, and that – in any event – the threshold for a breach of a transparency obligation, even assuming that obligation existed, would be very high.[885]

[redacted]

[883] Claimant's Memorial, 3 July 2020, para. 429.
[884] Claimant's Memorial, 3 July 2020, para. 431.
[885] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 531-532.

717. In its Reply, the Claimant maintains its position that transparency is an independent obligation, and argues that the EU has misstated the threshold of the requirement under Article 10(1) to act transparently.[886]

718. The Claimant's arguments are ineffective, in light of the legal standard applicable to transparency allegations under the FET standard and the factual circumstances at issue in these proceedings. As outlined in the following Sections, the threshold to demonstrate a lack of transparency as an element of the FET standard is high. Moreover, the Claimant has not met its burden to demonstrate that the EU has breached this standard.

7.1.5.1 The threshold to demonstrate a lack of transparency is high

719. The Claimant asserts that the EU's position that "transparency is not an element of the FET standard under the ECT" is "incorrect" and "contradicted by [] many investment tribunals".[887]

720. The EU does not dispute that transparency forms a component of Article 10(1) of the ECT, which provides in relevant part that:

> Each Contracting Part shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.

721. However, and as recognized by numerous ECT tribunals (including those cited by the Claimant), an allegation of lack of transparency under Article 10(1) of the ECT would not, alone, constitute an autonomous breach of the FET standard.[888] In fact, to the EU's knowledge, a mere lack of transparency on its own has never been found to be a breach of the FET standard.

722. Those tribunals who have considered a lack of transparency as forming an element of a breach of FET have, however, made clear that a "complete lack of

[886] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 462, 464-468.
[887] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 392(iv), 462.
[888] **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, 30 November 2018, para. 415 ("the Arbitral Tribunal does not consider that lack of transparency would constitute an autonomous breach of the FET standard embodied in Article 10(1) ECT."). *See also* **Exhibit RLA-193,** *Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Kingdom of Spain*, SCC Case No. V2015/150, Final Award, 14 November 2018, para. 361 (citing **Exhibit CLA-103**, *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. V2015/063, Final Award, 15 February 2018, para. 568; **Exhibit CLA-102**, *Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain*, SCC Case No. 062/2012, Award, 21 January 2016, para. 477; **Exhibit RLA-289**, *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153, Final Award, 17 July 2016, paras. 764-766; **Exhibit CLA-105**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 173).

transparency" is required in order to demonstrate such a breach.[889] However, the Claimant disputes that the threshold to demonstrate that a host State failed to act transparently is high, baldly stating without any support that "EU's argument is false from a legal perspective."[890]

723. Instead, the Claimant seems to have invented for itself a standard by which it would be able to force the EU, in the name of "transparency", to confirm how the Member States of the EU should exercise their margin of discretion to interpret and apply an EU Directive. This overstates by a substantial margin even the most aggressive interpretations of transparency, which indeed have regularly been rejected by tribunals. As an example, in *Eskosol v. Italy*, the claimants argued – along similar lines to the Claimant in this dispute – that "investors should be able to know clearly in advance 'all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made … [with] no room for doubt or uncertainty.'"[891] The *Eskosol* tribunal clearly rejected such an argument, stating:

> These are sweeping propositions, and the Tribunal is unable to accept them in such broad terms, which would provide no room for good faith regulatory flexibility or recalibration even where a State strives to be forthcoming about its reasons for change, both through public dialogue and through clarity in its laws.[892]

724. Thus, in the context of State regulation, the obligation of transparency is essentially for a State to make known the legal framework applicable to an investment, as that framework evolves over time.[893] The obligation of transparency does not extend to forcing a State or Regional Economic Organisation such as the EU to violate its own constitutional order by stepping in to impose an interpretation on a legal instrument, such as a Directive, the interpretation and application of which depends upon another order of government (here, the EU Member States).

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[889] **Exhibit RLA-155**, *RWE Innogy v. Spain*, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, para. 660.
[890] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 465.
[891] **Exhibit RLA-130**, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, para. 416.
[892] **Exhibit RLA-130**, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020, para. 416. *See also* **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, 30 December 2019, para. 660.
[893] *See*, *e.g.*, **Exhibit CLA-227**, *I.C.W. Europe Investments Limited (United Kingdom) v. The Government of the Czech Republic*, PCA Case No. 2014-22, Award, 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, 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, 15 May 2019, paras. 539-540; **Exhibit CLA-230**, *WA Investments-Europa Nova Limited (Cyprus) v. The Government of the Czech Republic*, PCA Case No. 2014-19, Award, 15 May 2019, paras. 625-626.

7.1.5.2 The European Union acted transparently

725. The Claimant maintains that the European Union has not acted transparently through three conducts, belonging to the following groups: (i) through an alleged 'improper legislative process';[894] (ii) through the presentation of the alleged 'spurious objectives' of the Amending Directive;[895] and (iii) through the European Commission's statement on the lack of EU competence to provide a definition of 'completed' before 23 May 2019' under Article 49a of the Amending Directive when the Claimant requested it.[896] The Claimant's arguments must fail.

726. The European Union will address each of the Claimant's arguments in the following paragraphs.

727. Concerning (i), the Claimant asserts that the EU did not follow "its normal legislative process".

728. As explained in the Counter-Memorial,[897] as well as in this Rejoinder,[898] the Amending Directive underwent a proper legislative process, where all the applicable rules were respected, all the relevant actors were involved, and the usual timetables were followed.

729. An impact assessment was not needed, due to the limited scope of the Proposal, and the fact that the Proposal was aimed at clarifying a point left ambiguous by the Gas Directive. The Proposal was reiterating the same principles already established in the 2012 IGA Decision[899] and the 2017 IGA Decision[900] (the IGA Decisions). The Explanatory Memorandum explained that there was no need for an impact assessment because there would be no unforeseen impact, based on the EU approach on the applicability of EU law to pipelines to and from third countries as reflected in several IGAs. An impact assessment would have been redundant.

[894] Claimant's Reply Memorial on the Merits & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 469-470.
[895] Claimant's Reply Memorial on the Merits & Counter-Memorial on Jurisdiction, 25 October 2021, para. 471.
[896] Claimant's Reply Memorial on the Merits & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 472-473.
[897] European Union Counter-Memorial on the Merits, 3 May 2021, Section 2.5. (The Amending Directive underwent a proper legislative process).
[898] See Section 5. (The Amending Directive underwent a proper legislative process).
[899] **Exhibit R-101**, Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy, OJ L 299, 27.10.2012, pp. 13–17 (the 2012 IGA Decision). The 2012 IGA Decision was repealed by the 2017 IGA Decision.
[900] **Exhibit R-102**, Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy, and repealing Decision No 994/2012/EU, OJ L 99, 12.4.2017, pp. 1–9 (the 2017 IGA Decision). The 2017 IGA Decision repealed the 2012 IGA Decision.

730. The Claimant argues that the welcoming of public feedback for a period of eight weeks after the publication of the Proposal meant that the public feedback could not have had any impact on shaping the Proposal.[901] The Claimant's allegations do not hold.

731. The Better Regulation Toolbox of 2017 provides that: "Citizens and stakeholders can provide feedback […] on legislative proposals",[902] specifying that the feedback can indeed be welcomed *after* the legislative proposal has been issued.

732. Public feedback could in fact be provided from 6 December 2017 until 31 January 2018, and 37 responses from NGOs, companies, trade associations, public entities, chambers of commerce, and anonymous contributors were received during that period.[903] The reactions were published on the "[h]ave your say" webpage of the European Commission, a platform that gathers the feedback of citizens and businesses on new EU policies and existing laws.

733. Pursuant to the Better Regulation Toolbox of 2017,[904] the 37 feedback responses received were then summarised and sent on 20 February 2018 to the European Parliament[905] and the Council.[906] This step shows that the guidance included in the Better Regulation Toolbox was followed and the European Parliament and the Council were provided with the input received from the stakeholders at an early stage of the legislative process. Therefore, the procedure recommended by the Better Regulation Toolbox was followed, and the co-legislators had the opportunity to take into consideration the responses received from the stakeholders in the feedback period.[907]

734. Concerning (ii), the Claimant contends that the objectives of the Amending Directive are 'spurious' and that this breaches the requirement of transparency.[908]

735. This allegation must fail. As explained in Section 2 of this Rejoinder, as well as in Section 2.1 of the Counter-Memorial, the objectives of the Amending Directive are legitimate, suitable and achievable.[909]

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[901] Claimant's Reply Memorial on the Merits & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 469-470.
[902] **Exhibit R-97**, Better Regulation Toolbox 2017.
[903] **Exhibit R-103**.
[904] **Exhibit R-97**, Better Regulation Toolbox 2017, pages 439-440.
[905] **Exhibit R-193** Outcome of the public consultation on the Commission proposal Mr Buzek.
[906] **Exhibit R-194** Outcome of the public consultation on the Commission proposal Mr Tzantchev.
[907] See Section 5.4 (Stakeholders were involved in the legislative process) in this Rejoinder.
[908] Claimant's Reply Memorial on the Merits & Counter-Memorial on Jurisdiction, 25 October 2021, para. 471.
[909] See Section 2 (The amending Directive pursues legitimate and achievable policy objectives) in this Rejoinder, as well as Section 2.1 (The Amending Directive pursues legitimate and achievable policy objectives) in the European Union Counter-Memorial on the Merits, 3 May 2021.

736. With regard to (iii), the Claimant argues that the 'refusal' of the European Commission to endorse the interpretation of 'completed' that the Claimant requested amounts to a breach of transparency.[910] The Claimant contends that the European Union has purposely avoided to interpret the concept of 'completed before', both as a strategy in the present arbitration and because the Commission's interpretation of the concept of 'completed' could be relied upon NS2PAG in the German proceedings.

737. The Claimant's arguments are nonsensical for two main reasons.

738. First, as explained in Section 2.6 of the Respondent's Counter-Memorial on the Merits, on 12 April 2019 the Claimant asked the Commission to confirm that the NS2 pipeline would be treated as "completed" for the purposes of Article 49a of the Amending Directive.[911] On 13 May 2019, the European Commission responded that it was not possible to confirm to it whether or not Nord Stream 2 would be eligible for a derogation under Article 49a of the Amending Directive, as it was not within the European Commission's competence to determine how the relevant EU Member State would transpose the Amending Directive, nor how the competent NRA might decide to apply the derogation regime as transposed by the relevant EU Member State.[912]

739. Second, if the European Commission had given the Claimant an interpretation of the concept of 'completed' under Article 49a of the Amending Directive, it would have overstepped the division of competences between the EU and its Member States. The Claimant was in effect asking the European Commission to illegitimately prejudge the exercise of an EU Member State's competence under the Amending Directive by providing "advance views" on how that discretion should be exercised. Moreover, had the European Commission confirmed that the Nord Stream 2 pipeline could not be considered as 'completed' under Article 49a based on the poor advancement of the works (only 48% of the pipeline was built on 23 May 2019),[913] it is unclear how this would have supported the Claimant in its application for an Article 49a derogation before the Bundesnetzagentur.

[910] Claimant's Reply Memorial on the Merits & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 472-473.
[911] **Exhibit C-5**.
[912] **Exhibit C-11**. See Section 2.6 (The European Union informed NSP2AG about the division of competences between the European Union and its Member States), European Union Counter-Memorial on the Merits, 3 May 2021.
[913] **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's derogation application, 15 May 2020.

7.1.5.3 Conclusions

740. The Claimant has failed to meet the high threshold required to demonstrate a lack of transparent conditions under Article 10(1) of the ECT, and to establish that the EU did not act in a transparent manner. Consequently, the Claimant's claim must fail.

741. Even if the Tribunal were to endorse the Claimant's misstated interpretation of Article 10(1) of the ECT, it would still find that the EU has acted transparently in the three conducts indicated by the Claimant as examples supporting its claim.

742. (i) The Amending Directive underwent a proper legislative process, where all the applicable rules were respected, all the relevant actors were involved, and the usual timetables were followed. In particular, the impact assessment would have been redundant given the limited scope of the Proposal and existing IGA practice. Stakeholders were involved in providing feedback for a period of eight weeks. The 37 responses received from the stakeholders were not only published on the platform 'Have your Say': summaries of these responses were also separately sent to the European Parliament and the Council so that they could be considered during the negotiations held by the co-legislators.[914]

743. (ii) The policy objectives of the Amending Directive are legitimate, suitable and achievable.[915]

744. (iii) The European Union ensured full transparency in its exchanges with NSP2AG. NSP2AG sought to obtain a confirmation from the European Commission that the NS2 pipeline was considered as "completed". The European Commission recalled that the Amending Directive was going to be transposed by Germany, and directed NSP2AG to the German authorities competent to decide on the interpretation of the notion of "completed", in accordance with the criteria and procedures set out in the provisions transposing the Amending Directive into German law.

745. It follows that the allegations made by the Claimant concerning the failure to act transparently are entirely unfounded.

[914] **Exhibit R-193** Outcome of the public consultation on the Commission proposal Mr Buzek; **Exhibit R-194** Outcome of the public consultation on the Commission proposal Mr Tzantchev.
[915] See Section 2 (The amending Directive pursues legitimate and achievable policy objectives) in this Rejoinder. See also Section 2.1 (The Amending Directive pursues legitimate and achievable policy objective) in the European Union Counter-Memorial on the Merits, 3 May 2021.

7.2 There is no impairment by unreasonable or discriminatory measures under Article 10(1) ECT

746. In its Memorial, the Claimant argued that the imposition of the Amending Directive by the European Union violates Article 10(1) of the ECT, which states that "no Contracting Party shall in any way impair by unreasonable or discriminatory measures [the] management, maintenance, use, enjoyment or disposal". The Claimant acknowledged that this obligation "raises various aspects which are also relevant in the context of arbitrary or discriminatory treatment under the FET standard",[916] and proceeded to cross reference law and facts in relation to both claims.

747. In its Counter-Memorial, the European Union responded to the Claimant's articulation of its case, noting that the Claimant had conflated the two standards and agreeing that arbitral tribunals had treated them as overlapping.[917] In light of the fact that the Claimant had collapsed its arguments by relying on the same facts and law, the European Union noted that it would also address the alleged breaches together as part of its discussion on the impairment standard in Article 10(1).[918]

748. In its Reply, the Claimant now asserts that – in taking this approach – the European Union has "failed to properly address the Claimant's case" with respect to the alleged non-discrimination standard of FET.[919] Furthermore, while the Claimant appears to agree with the European Union's characterization of the standard applicable to a non-impairment obligation under Article 10(1) of the ECT,[920] it continues to assert that the threshold to establish a breach of that standard is lower than that articulated by the European Union.

749. The Claimant's claims must be rejected. First, the European Union has not failed to properly address the Claimant's case on FET, particularly in circumstances where both parties have expressly noted that the law and facts overlap under Article 10(1). Second, the Claimant has been unable to demonstrate any unreasonable or discriminatory measures taken by the European Union. Third, the Claimant has not suffered the requisite "impairment" required to give rise to a breach of Article 10(1).

[916] Claimant's Memorial, 3 July 2020, para. 435.
[917] European Union Counter-Memorial on the Merits, 3 May 2021, para. 473.
[918] European Union Counter-Memorial on the Merits, 3 May 2021, para. 476.
[919] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 537.
[920] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 546.

7.2.1 The European Union has not failed to properly address the Claimant's case

750. The Claimant asserts that the European Union "has failed to properly address the Claimant's case" with respect to the alleged non-discrimination standard of FET, falsely asserting that the European Union only addressed the obligation of non-impairment by unreasonable or discriminatory measures.[921] In reality, the European Union addressed the alleged non-discrimination standard of FET in Section 3.1.2 of the Counter-Memorial, noting that because the Claimant had relied on the "same alleged facts in relation to either alleged breach",[922] the European Union would address the FET standard and the non-impairment standard "jointly" in Section 3.1.7.[923] Thus, the Claimant's critique is misplaced, in that the European Union organised its comments in this way in *direct response* to the Claimant's own Memorial, which itself cross-referred case law and facts and conflated these standards.

751. Indeed, the Claimant itself continues to acknowledge in its Reply that "[i]n assessing whether conduct is arbitrary, unreasonable or discriminatory, tribunals have tended to apply the same legal tests."[924] Thus, and even on the Claimant's own stated case, the distinction between these principles is largely academic. Regardless, the Claimant's claims with respect to discrimination under Article 10(1) fail, no matter which standard applies.

752. The European Union in its Counter-Memorial properly stated the requirements for a breach of Article 10(1) based on the plain language of the provision, as considered by tribunals. As the European Union demonstrated, in order to establish a violation of the clause to protect investors from "unreasonable and discriminatory" measures, the Claimant must demonstrate: (1) the existence of a measure; (2) that the measure possesses the specified negative quality required by the ECT (*i.e.* it must be arbitrary, discriminatory or unreasonable); and (3) such a measure must significantly impair or negatively affect a protected investment.[925] As demonstrated in the following parts, the Claimant has failed to fulfil the second or third requirement, and thus its claim must fail.

[921] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 537. *See also* European Union Counter-Memorial on the Merits, 3 May 2021, Section 3.1.2 and para. 548.
[922] European Union Counter-Memorial on the Merits, 3 May 2021, para. 475.
[923] European Union Counter-Memorial on the Merits, 3 May 2021, para. 476.
[924] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 538(v).
[925] *See* European Union Counter-Memorial on the Merits, 3 May 2021, para. 550, n. 504.

7.2.2 The Claimant has not demonstrated unreasonable or discriminatory measures

7.2.2.1 The Claimant has not demonstrated the existence of unreasonable or arbitrary measures

753. The parties appear to largely agree on the standard required to demonstrate the existence of an unreasonable or arbitrary measure,[926] including the criteria identified by Professor Schreuer in *EDF v. Romania*:[927]

a) a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b) a measure that is not based on legal standards but on discretion, prejudice or personal preference;

c) a measure taken for reasons that are different from those put forward by the decision maker; and

d) a measure taken in wilful disregard of due process and proper procedure.[928]

754. However, the parties differ as to the threshold required to demonstrate a violation of Article 10(1), including whether it is sufficient that a measure be related to a rational governmental policy in considering whether that measure is unreasonable or arbitrary.

755. As to the threshold required, the Claimant criticizes the European Union for concluding based upon the criteria elucidated by Professor Schreuer in *EDF v. Romania* that "the required threshold to establish a violation of this provision is high."[929] This is despite the Claimant expressly accepting Professor Schreuer's criteria as relevant to the assessment of claims under Article 10(1), rendering its objection contradictory.[930] Unsurprisingly, the Claimant fails to cite any precedent espousing a low threshold for what constitutes "unreasonable or arbitrary" behaviour. Indeed, applying the VCLT Article 31(1) interpretative framework,

[926] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 546.
[927] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 548 ("[T]he Claimant accepts that these criteria are indicative of a measure which is arbitrary or reasonable, such as to potentially violate the non-impairment obligation in Article 10(1) of the ECT (assuming impairment can be shown).").
[928] European Union Counter-Memorial on the Merits, 3 May 2021, para. 559 (citing Legal Opinion of Prof. Schreuer, cited in **Exhibit RLA-160**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 303).
[929] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 549. *See* European Union Counter-Memorial on the Merits, 3 May 2021, para. 560.
[930] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 548 ("[T]he Claimant accepts that these criteria are indicative of a measure which is arbitrary or reasonable, such as to potentially violate the non-impairment obligation in Article 10(1) of the ECT (assuming impairment can be shown).").

"arbitrary and unreasonable" amounts to an inherently high threshold.[931] As the tribunal noted in *Cargill v. Mexico* with respect to determining whether a measure is arbitrary, the investor must show that the state conduct "move[s] beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive"."[932]

756. Similarly, the ordinary meaning of "reasonable" is "related to a rational policy", again making the Claimant's arguments against this standard fail. As outlined in the European Union's Counter-Memorial, the criteria of "reasonableness" is not an "open-ended mandate to second-guess the host State's policies" and thus, a rational relationship to the alleged objective of a measure should be sufficient basis on which a tribunal could find that it is "not arbitrary".[933] The Claimant vainly asserts that the European Union's position is "contradicted by the principles cited by the European Union in the preceding paragraphs",[934] but fails to elaborate on the alternative standard it feels is required, or to cite any valid authority to that effect.

757. For example, the Claimant excerpts a quote from *Micula v. Romania*, arguing that in order to be "rational" a policy must necessarily reflect "due regard for the consequences imposed on investors".[935] In fact, the *Micula* tribunal to the contrary held that the determination of whether a State's conduct is reasonable requires the analysis of two factors only: whether there exists a rational policy and whether the act was reasonable in relation to that policy.[936] This was precisely the European Union's position: a tribunal does not have *carte blanche* to review a State's policy or to second-guess governmental decision making. Instead, a tribunal may consider whether there is a rational relationship to the alleged objective of a measure. This understanding of the criteria of "rationality" is amply recognised by tribunals, who have specifically noted that:

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[931] As noted by several commentators, "[t]he threshold for establishing arbitrary state action appears to be relatively high". *See* **Exhibit RLA-290**, Borzu Sabahi, Noah Rubins, et al., Investor-State Arbitration (Second Edition), 2nd edition Oxford University Press 2019), pp. 631-689, para. 19.35 (citing Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment, Chapter 6 (minimum standard of treatment) (Kluwer 2009), pp. 302-303).

[932] **Exhibit RLA-291**, *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 293.

[933] European Union Counter-Memorial on the Merits, 3 May 2021, para. 558.

[934] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 547.

[935] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 546.

[936] **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, 11 December 2013, para. 525 (citing **Exhibit CLA-108**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010).

> The Tribunal's function is not to judge the reasonableness or effectiveness of such measures as a matter of political economy, nor whether other measures were available to achieve the goal. Instead, the Tribunal must interpret and apply Article 10(1) of the ECT.[937]

758. In interpreting and applying Article 10(1) of the ECT in these proceedings, the Claimant has failed to meet the standards required, on any reading.

759. As explained in paragraphs 574-586 of the European Union's Counter-Memorial on the Merits as well as in Sections 2 and 4.3.1 above, the Amending Directive is an entirely rational measure. It sought to clarify a situation that was uncertain, in order to ensure that the rules applicable to gas transmission lines connecting two or more Member States are also applicable within the territory of the Union to gas transmission lines to and from third countries, just like it is the case for all other transmission pipelines in the Union territory. It clarified that a consistent legal framework existed, enhancing transparency and legal certainty. It is perfectly rational and legitimate to seek to ensure consistent application of a basic framework for the operation of major infrastructure with a substantial impact on the internal market, to all areas within the EU territory, including the territorial sea of the EU Member States.[938]

760. Nor are the goals of the Gas Directive themselves in any way arbitrary or unreasonable, since they effectively seek to ensure well-interconnected and competitive EU gas markets to the benefit of consumers and market players. The obligations in the Gas Directive contribute to the security of gas supply and allow for all potential sources of gas supply to reach consumers. By clarifying that the obligations of the Gas Directive apply also to interconnectors with third countries, the Amending Directive serves to achieve this rational policy.[939]

7.2.2.2 The Claimant has not demonstrated the existence of discriminatory measures

761. In its Memorial, the Claimant took the position that "the prohibition on discrimination in Article 10(1) does not refer to any comparative element", and thus the mere fact of "singling out and targeting" the Claimant was sufficient to give rise to a breach of Article 10(1) of the ECT.[940]

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[937] **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, 14 September 2020, para. 704.
[938] See also European Union Counter-Memorial on the Merits of 3 May 2021, paras. 92-128, 574-576 and Sections 2 and 4.3.1 above.
[939] European Union Counter-Memorial on the Merits of 3 May 2021, paras. 577-582.
[940] Claimant's Memorial, 3 July 2020, para. 441.

762. In its Counter-Memorial, the European Union corrected this understanding and set forth the three conditions that must be established in order to demonstrate the existence of discrimination:

a) the investor who is allegedly discriminated against must be in a comparable situation, or like circumstance, to other investors that are allegedly treated more favourably (similarity of comparators);

b) the investor's treatment is less favourable than the treatment of investors in like circumstances (less favourable treatment); and

c) there is no reasonable justification for the differential treatment.[941]

763. Now, in its Reply, the Claimant does not appear to dispute these requirements, but rather disagrees as to how those elements should be applied in the circumstances of this dispute.

a) The Claimant has failed to demonstrate that there exist comparators who are treated more favourably

764. As the European Union outlined in its Counter-Memorial, the first and second elements of the standard to demonstrate discrimination require the identification of a relevant comparator, and demonstration that the investor has been treated less favourably than that comparator. The Claimant has failed to fulfil these requirements.

765. As the European Union recalled in its Counter-Memorial, the identification of an appropriate comparator requires comparison of the foreign investor to another investor/investment in all relevant aspects.[942] The European Union then identified a range of criteria that tribunals have considered in making this assessment, including whether the investors are in the same business or sector, whether there exists a competitive relationship between the situations, and whether the specific characteristics of projects are comparable, in light of the specific legal and factual context at issue.[943] While the Claimant now agrees that the determination of a relevant comparator must depend on the circumstances at issue,[944] the Claimant has failed to engage with this criteria in any meaningful way. Instead, the Claimant continues to assert a broad basis to argue that offshore import pipelines

[941] European Union Counter-Memorial on the Merits, 3 May 2021, para. 567.
[942] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 561-568.
[943] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 567-568, 590, 592.
[944] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 558. The Claimant disputes the general proposition that discrimination provisions are based on nationality. *See* Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 556-557. Given that the Claimant failed to address any of the Respondent's legal authorities set out in its Counter-Memorial on this issue, the EU does not consider it necessary to respond further to the Claimant's unsupported allegations. *See* European Union Counter-Memorial on the Merits, 3 May 2021, paras. 561-568.

are generally appropriate comparators in the circumstances.[945] This argument is unavailing.

766. The European Union notes that the Claimant has not explained the basis for using only offshore pipelines as a comparator. The Claimant argues that this is "simply untrue" and refers to paragraphs 406 and 407 of its Memorial.[946] However, in those paragraphs, the Claimant focuses on the alleged "effects" of the Amending Directive to support its choice of comparator, arguing that the five offshore third-country import pipelines are "similarly affected should these requirements [in the Gas Directive] apply".[947] It is inappropriate to base the comparator, in a discrimination claim, on the alleged discriminatory effect: instead, the analysis necessarily uses as a starting point whether the circumstances of the alleged (if different treatment is found) whether the distinct circumstances of the comparators gave rise to different treatment. The Claimant fails to compare the characteristics of the pipelines. It also fails to explain why the onshore third-country import pipelines would not fall within the scope of comparable pipelines. The latter pipelines compete with the NS2 pipeline and serve the same purpose of supplying third-country gas to the European Union. Also in its Reply Memorial, the Claimant repeats that the other offshore import pipelines are "the only gas pipelines impacted by the Amending Directive",[948] once again only focusing on the alleged impact to determine a comparator.

767. The European Union has explained, in Section 4.3.2 above, and in paragraphs 592-593 of the Counter-Memorial on the Merits, that the NS2 pipeline is different from the five mentioned pipelines and therefore the Claimant's attempt to confirm a "discriminatory" impact on the basis of comparison with them must fail. The NS2 pipeline is a pipeline that largely duplicates the capacity of Nord Stream 1. It significantly enhances the capacity for direct gas imports from Russia to Germany, avoiding transit through Ukraine and Poland, thereby potentially increasing Gazprom's market power. It would therefore seem to raise particular competition concerns. Moreover, the NS2 pipeline is a new pipeline for which the consequences of its operation cannot be assessed with hindsight. Therefore, the appropriate context for determining flexibilities adapted to the operation of a new pipeline are through an Article 36 exemption, an Article 9(6) measure or the conclusion of an IGA. In contrast, the other offshore pipelines have operated for

[945] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 559-568.
[946] See the Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 559-560.
[947] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 559, referring to Claimant's Memorial, 3 July 2020, para. 407.
[948] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 560. See also para. 563 "The Amending Directive does not affect 'onshore' import pipelines".

years if not decades and, therefore, their impact on competition and security of supply can be easily established. None of the gas suppliers from Morocco, Algeria or Libya has a market position vis-à-vis the European Union or any of its Member States that creates a risk for competition in the internal gas market, let alone close to Gazprom's market power. With regard to Nord Stream 1, although it is also controlled by Gazprom, the impact of its operation on competition in the internal gas market and security of supply can also be established from the experience of its 10 years of operation and is subject to a fully reasoned derogation decision by the BNetzA.

768. In response to the European Union's arguments and evidence that the NS2 pipeline project shows significant differences when compared to the five mentioned pipelines, the Claimant states that "[t]his 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".[949] The Claimant thus makes a totally circular argument and returns to its familiar, but unsupported, conspiracy theories. As explained in detail in Section 4.3 above, the Amending Directive does neither express such "targeting" intent nor does it exclusively "target" Nord Stream 2 as a matter of fact. Moreover, the Claimant again requests the Tribunal to focus its examination only on Article 49a, considering Article 36 to be a "distraction".[950] Yet, as explained in detail in Section 4.3 above, an objective assessment of the Gas Directive, as amended, must consider the full legal framework, with all obligations imposed and flexibilities offered. Article 36 forms part of that framework, together with other flexibilities, and, as demonstrated in Section 4.4 above, is not "substantially different"[951] in essence. The European Union has also explained why an Article 36 exemption procedure could be an appropriate procedure for the specific circumstances of the NS2 pipeline project. The Article 36 assessment concerns new infrastructure for which the competition, internal market impact and security of supply elements cannot be based on past operation. Indeed, the Article 36 assessment is forward-looking and seeks to predict the future impact of such new infrastructure.

769. In these circumstances, the Claimant has failed to confirm that there is any appropriate comparator that has been treated more favourably than Nord Stream 2. The Claimant has thus failed to meet the thresholds required to satisfy the first

[949] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 565.
[950] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 565-566.
[951] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 566.

two elements required to show the existence of a discriminatory measure under Article 10(1), rendering its claim groundless.

b) The Claimant has failed to demonstrate that any differential treatment, to the extent it exists, is not justified

770. With respect to the third element, the Claimant does not appear to disagree with the standard *per se* (*i.e.* that there is no reasonable justification for the differential treatment), nor does it appear to disagree with the general application of the standard, as highlighted by the European Union in its Counter-Memorial (*i.e.* that differentiations are justifiable if rational grounds are shown).[952]

771. Instead, the Claimant focuses its Reply on which party bears the burden of proving this element,[953] arguing that the European Union has not put forward a "proper case" on why the Claimant can "legitimately be distinguished" from comparators in like circumstances.[954] This formulation of the third element significantly misstates the standard, and turns the order of analysis and burden of proof on its head. It is not for the European Union to substantiate the Claimant's allegations of discriminatory treatment in order to sustain a claim under Article 10(1) of the ECT.[955]

772. In any event, the Claimant's argument is irrelevant. As an initial point, the Claimant has failed to clear the first two hurdles (a relevant comparator and less favourable treatment), and thus the Tribunal need not even get to a consideration of the third element. And even if the Claimant had satisfactorily discharged its own burden with respect to these two elements, and the European Union bore the burden of demonstrating how its measure would be justified in the face of alleged differential treatment (*quod non*), the European Union *has* demonstrated this justification as a factual matter.

773. As explained in Section 4.3.2 above, there are significant differences between the NS2 pipeline and the other five offshore pipelines the Claimant cites as alleged comparators. Given that the NS2 pipeline and the other pipelines are not in like circumstances, treating them differently does not constitute less favourable treatment of the NS2 pipeline.

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[952] *See*, *e.g.*, European Union Counter-Memorial on the Merits, 3 May 2021, paras. 570-573.
[953] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 569-575.
[954] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 576.
[955] *See*, *e.g.*, **Exhibit RLA-172**, *Cengiz Insaat Sanayi ve Ticaret A.S. v. Libya*, ICC Case No. 21537/ZF/AYZ, Award, 7 November 2018, paras. 525-526 ("To prove the existence of discrimination, it is necessary that a three-step approach be followed … The burden of proving these three elements lies with Claimant."); **Exhibit RLA-292**, *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018, para. 711 ("[T]he Claimant did not establish the presence, much less the cumulation, of any of the elements derived from the standard mentioned above, that is: (i) the existence of another person or company in like circumstances, (ii) differential treatment, and (iii) the absence of rational justification for such treatment.").

774. However, there is not even differential treatment: the Gas Directive, as amended, is of a general and abstract nature. It does not "target" NSP2AG. Rather, as explained, the applicable flexibilities under the Gas Directive were and are available to NSP2AG, in particular under Article 36. As explained in Section 4.4.1 above, just like for other pipelines, NSP2AG could "reduce the impact" of the Gas Directive.

775. Moreover, even if the NS2 pipeline project were eventually not to obtain an exemption – something that has not been established by the Claimant – the fact of not obtaining an exemption does not mean that discrimination is at stake. The outcome of an exemption decision depends on an assessment using objective criteria that pursue legitimate policy reasons. Indeed, the assessment under Article 36 (just as under Article 49a) examines the impact of the pipeline on the functioning of the Energy Union, the competition in the EU internal energy market and security of supply considerations. These are perfectly legitimate policy objectives that are examined on a case-by-case basis. As explained in paragraphs 601-604 of the Counter-Memorial on the Merits, even if the regulatory authorities ultimately concluded that it would be imprudent to grant NSP2AG flexibility, the full application of the Gas Directive would be perfectly legitimate, based on the assessment of the circumstances at hand.

C) The Claimant has not demonstrated that its investment has been impaired

776. Finally, even if the Tribunal were to find that the Claimant had sufficiently established that the Amending Directive is unreasonable or discriminatory (*quod non*), the Claimant has failed to demonstrate impairment with respect to its management, maintenance, use, enjoyment or disposal, as required by Article 10(1) of the ECT.

777. The Claimant asserts that "any" impairment is sufficient to establish a breach of the ECT,[956] and disputes the European Union's position that "significant" impairment is required. The Claimant relies on findings by the tribunal in *ESPF v. Italy* to support its contention, without clarifying that the claimants in that case had nonetheless alleged that the impairment was "significant."[957] Similarly, the Claimant refers to *CMS v. Argentina* in support of its proposition.[958] In that case, however, the tribunal noted that although "some adverse effects can be noted" with respect to use, expansion or disposal of the investment, there was

[956] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 543.
[957] **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, 14 September 2020, para. 701.
[958] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, n. 811.

nonetheless not sufficient impairment for a finding of breach.[959] Thus, something more than "any" impairment is clearly required.[960]

778. This standard has not been satisfied by the Claimant. Contrary to what the Claimant argues, as the European Union explained in Section 2.3 of the Counter-Memorial on the Merits, NSP2AG is not prevented from developing its investment project while at the same time complying with the applicable rules in the Gas Directive.

7.2.3 Conclusion

779. The Claimant has thus failed to demonstrate the elements required to establish that the European Union has taken unreasonable or discriminatory measures which impair the Claimant's investment. The European Union fully answered the case on discrimination put forward by the Claimant under Article 10(1) and demonstrated that the Claimant had not met the threshold required to demonstrate a breach of that provision. The Claimant's claim should therefore be dismissed.

7.3 <u>There is no breach of the constant protection and security standard under Article 10(1) ECT</u>

780. In its Memorial, the Claimant argued that the constant protection and security ("CPS") standard under Article 10(1) imposes an obligation on the EU to establish "a legal framework to protect investments from wrongful interference and to take reasonable measures to ensure that said framework is properly enforced."[961] The Claimant asserted that the EU had breached this standard by undermining the "promise of legal security" under Article 10(1).[962]

781. In its Counter-Memorial, the EU recalled the long history of tribunals who have interpreted CPS (constant or full protection and security) standards as affording protection of investments from physical damage by third parties.[963] The EU noted that the Claimant misstated the CPS standard in material ways, and that – in any event – the EU had satisfied its obligations under the ECT.[964]

[959] **Exhibit CLA-71**, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 292.
[960] *See* **Exhibit CLA-84**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras. 7.152-7.153.
[961] Claimant's Memorial, 3 July 2020, para. 447.
[962] Claimant's Memorial, 3 July 2020, para. 451.
[963] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 609-613.
[964] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 615-629.

782. In its Reply, the Claimant continues to submit that the CPS standard is broad in application, and is not limited to issues of physical security,[965] or to requiring effective judicial redress.[966] Instead, the Claimant maintains that the EU has breached the CPS standard through its alleged failure to maintain its legal and regulatory framework.

783. These arguments are entirely unsupported. First, it is clear that the CPS standard under Article 10(1) of the ECT has consistently been identified as an obligation to protect from physical interference (not to provide legal security), consistent with longstanding content of the equivalent "full protection and security" obligation under public international law. Second, even if the CPS standard under the ECT extended to legal security (*quod non*), the broad standard the Claimant promotes is unsupported. Third, in light of these standards, and as a factual matter, the Claimant has failed to demonstrate that the EU has breached its CPS obligations under Article 10(1) of the ECT.

7.3.1 The CPS standard is narrow in its application

7.3.1.1 The CPS standard protects investments from physical damage

784. The parties both agree that the CPS standard imposes only an obligation of due diligence on the part of a respondent State, and is not a strict liability standard.[967] Where the parties differ, however, is with regard to the scope of the CPS standard.

785. As explained by the European Union in its Counter-Memorial, the CPS standard incorporated in Article 10(1) is concerned with: (1) the obligation of respondent States to afford protection against interference from third parties; and (2) the duty to protect the investment from physical damage.[968] This reading is consistent with the longstanding public international law understanding of "full protection and security" and its equivalents as a State obligation.

786. With respect to the first element, the Claimant now asserts – without support – that "the protection afforded by the CPS standard is not limited to the protection against the actions of third parties."[969] This is incorrect. Investment tribunals have consistently made clear that where the action in issue is not attributable to

[965] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 582-599.
[966] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 600-602.
[967] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 581; European Union Counter-Memorial on the Merits, 3 May 2021, para. 612.
[968] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 609, 611.
[969] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 599.

a third party, a claim that those measures allegedly violate the CPS standard must be dismissed. For example:

- In *Mobil v. Argentina*, the tribunal noted that "all the impugned acts that allegedly violate the FPS standard are allegedly attributable to the [Government of Argentina] and not to any third party. In the present case none of the measures challenged by the Claimants were taken by a third party; they all emanated from the State itself. Consequently, the measures should only be assessed in the light of other BIT standards and cannot be examined from the angle of full protection and security."[970]

- In *Gemplus v. Mexico*, the tribunal considered that "this was never a case about a failure by the Respondent (including the Secretariat) to afford physical or other like protection to the Claimants. Moreover, the harm alleged by the Claimants is attributed to the Respondent itself and not to any third party … demonstrat[ing] that it was also never a case about a failure by the Respondent to afford, indirectly, legal protection to the Claimants or their investments under Mexican law within the Mexican legal system." The tribunal thus considered that the respondent had not breached Article 3(2) of the Argentine BIT ("full legal protection") or Article 4(3) of the France BIT ("full and complete protection and security").[971]

- In *Paushok v. Mongolia*, the tribunal noted, "in any case, that in the present instance there is no claim of a negative action taken by third parties that the State is accused of not having prevented" and therefore that "the Tribunal cannot conclude that there has been a violation of the "full legal protection" guaranteed by Article 2 of the Treaty."[972]

- In *Oxus Gold v. Uzbekistan*, the tribunal stated that "the way in which Claimant has put its claim for breach of FPS standard is not in line with the principle that such standard may only apply with regard to actions of third parties. To the extent that Claimant's claim is based on the premise that all the relevant actions and omissions by the Uzbek Parties and/or liquidators are "imputable to

[970] **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, 10 April 2013, para. 1004.
[971] **Exhibit CLA-90**, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, paras. 9-12, 9.13.
[972] **Exhibit RLA-218**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, para. 327.

Respondent", they do not qualify as actions of third parties and thus fall beyond the scope of the FPS standard."[973]

787. Here, the measure the Claimant alleges forms the basis of its claim is the adoption of a legislative measure by the EU (the Amending Directive).[974] In fact, the Claimant specifically reiterates that its CPS claim arises because "the EU has taken positive steps to harm the Claimant's investment" (*i.e*. not the actions of a third party).[975] Given the scope of its claim, the Claimant's reliance on CPS must be dismissed.

788. In any event, even if the Claimant had standing to claim a violation of the CPS obligation by virtue of action taken by the EU (*quod non*), Article 10(1) of the ECT is only concerned with the duty to protect investments from physical damage. In its Reply, the Claimant carefully avoids engaging with any of the EU's many legal authorities which support this position,[976] but instead presents a convoluted "textual" analysis. Its efforts are unavailing.

789. First, the Claimant asserts that the "ordinary meaning" of the phrase "constant protection and security" is not limited to physical security, and refers to selected cases as support for this contention.[977] It is notable, however, that the Claimant has been unable to point to a single ECT case in support of its position. Instead, the Claimant dismisses the EU's reference to *OperaFund v. Spain* (which held that "[t]he wording of the ECT's most constant protection and security clause does not suggest that it extends to legal security") because the Claimant considers that the tribunal made the "unduly narrow" statement "in passing".[978] Yet the Claimant's cursory and unsupported dismissal does not diminish the value of the considerations of the *OperaFund* tribunal, which is also echoed by other ECT tribunals. In *BayWa r.e. v. Spain*, for example, the tribunal noted that the CPS provision "obliges the State to ensure the physical protection of the investor and to protect it against physical violence and harassment", referring to similar views taken by tribunals in *Noble Ventures v. Romania*, *Tecmed v. Mexico*, *APL v. Sri Lanka*, *Wena Hotels v. Egypt*, *AMT v. Zaire*, *Eureko v. Poland*, and the *ELSI* case.[979] The *BayWa* tribunal opined that there was "no evidence that BayWa's

[973] **Exhibit RLA-173**, *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 839.
[974] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 581; European Union Counter-Memorial on the Merits, 3 May 2021, para. 613.
[975] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 581.
[976] See, e.g., European Union Counter-Memorial on the Merits, 3 May 2021, nn. 573-575.
[977] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 583-590.
[978] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 595.
[979] **Exhibit RLA-293**, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019,

investment has suffered from any physical harm or deterioration through the Disputed Measures and BayWa has not suggested otherwise."[980] In light of the clear public international law principles concerning CPS or "full protection and security" obligations, it is unsurprising that ECT tribunals have taken this position.

790. Second, the Claimant vainly attempts to draw conclusions from the textual context of the CPS standard in the ECT, to no effect.[981] The Claimant asserts that because there is a "close relationship between the FET and CPS protections in the ECT", this relationship "militates in favour of a broad reading of the CPS standard."[982] This argument is non-sensical. To adopt the broad reading of the CPS obligation advocated by the Claimant would be to conflate the CPS standard with that of the FET standard, and deprive each of their *effet utile*. As the tribunal in *Infinito Gold v. Costa Rica* recently noted:

> The Tribunal's view is that, absent treaty language indicating that legal security is covered, the FPS standard is intended to ensure physical protection and integrity of the investor and its property within the territory of the host State […] the full protection and security standard primarily seeks to protect investment from physical harm done by third parties. As noted by the *Enron* tribunal, "there might be cases where a broader interpretation could be justified, but then it becomes difficult to distinguish such situation from one resulting in the breach of fair and equitable treatment, and even from some form of expropriation." This Tribunal concurs that an overly extensive interpretation of FPS standard may result in an overlap with the other standards of investment protection, which is neither necessary nor desirable.[983]

791. A similar view was reached by the tribunal in *Indian Metals v. Indonesia*:

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paras. 529-530 (citing *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, paras. 164-167; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, paras. 175-182; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, paras. 45-86; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 84; *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, paras. 6.02 *ff*; *Eureko v. Poland*, ad hoc Arbitration Rules, Partial Award, 19 August 2005, paras. 236-237; *Elettronica Sicula S.p.A (ELSI) (US v. Italy)*, ICJ Reports 1989, paras. 104-108).

[980] **Exhibit RLA-293**, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019), para. 531. *See* similar findings in **Exhibit RLA-175**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, paras. 622-623; **Exhibit RLA-174**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v, Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 668-669; **Exhibit RLA-140**, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007, para. 326.

[981] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 591, 596-598.

[982] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 596.

[983] **Exhibit CLA-219**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, para. 623.

> [T]he standard of full protection and security requires the host state to exercise due diligence in the provision of physical protection to foreign investments. Unless the relevant treaty clause explicitly provides otherwise, the standard of full protection and security does not extend beyond physical security nor does it extend to the provision of legal security. This point has been emphasised by various tribunals and precisely elaborated by the tribunal in the *Crystallex International Corporation v. Venezuela* case:
>
> > . . . .
> >
> > The Tribunal is of the view that 'full protection and security' is a distinct treaty standard whose content is not to be equated to the minimum standard of treatment. However, the Tribunal considers that such treaty standard only extends to the duty of the host state to grant physical protection and security. Such interpretation best accords with the ordinary meaning of the terms 'protection' and 'security'.
> >
> > . . . .
> >
> > Furthermore, as rightly observed by a number of previous decisions, a more extensive reading of the 'full protection and security' standard would result in an overlap with other treaty standards, notably FET, which in the Tribunal's mind would not comport with the 'effet utile' principle of interpretation. The Tribunal is thus unconvinced that it should depart from an interpretation of the 'full protection and security' standard limited to physical security.[984]

792. Clearly, the immediate context of the CPS obligation (that is, Article 10(1) itself) supports a narrow reading of the scope of its application, rather than the opposite. The CPS standard must be distinguished from the FET standard stipulated in Article 10(1) of the ECT, as the Claimant implicitly acknowledges.[985] To conflate the two standards by taking a broad reading of the CPS obligation would deprive each of them of its *effet utile*.

793. Therefore, even if the CPS obligation were not limited to the protection against the actions of third parties (*quod non*), it only operates to protect the investment from physical harm.

[984] **Exhibit CLA-218**, *Indian Metals & Ferro Alloys Limited v. The Government of the Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, para. 267 (citing **Exhibit RLA-176** *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 632-634).
[985] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 596.

7.3.1.2 Even if the CPS standard encompassed legal security, it is still a narrower standard than that advocated by the Claimant

794. Even assuming that the CPS standard under the ECT extends to legal security (*quod non*), no tribunal has asserted as broad a scope for the standard as the Claimant here promotes. The Claimant asserts that the CPS standard is not limited to requiring effective judicial redress,[986] but that it extends to oblige the EU to "maintain through its legal and regulatory framework a secure investment environment."[987] In other words, the Claimant seeks to illegitimately "read in" to the CPS obligation, an unfounded requirement of legal standstill. This allegation is no more legitimate in relation to CPS than it was with regard to FET.

795. With respect to whether the standard is limited to requiring effective judicial redress, the Claimant criticises the EU for "misrepresenting" the findings of the *Frontier Petroleum* tribunal, stating:

> The section the EU misrepresents is clear: "where the acts of the host state's judiciary are at stake, 'full protection and security' means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor".[988]

796. However, it is unclear how the Claimant considers that the EU "selectively cites" from that case, as the emphasized portion of the quote in question by the Claimant was excerpted in precisely the same way in the European Union's Counter-Memorial.[989] In any event, a number of tribunals have reached the same findings as the *Frontier Petroleum* tribunal, finding that – if the CPS standard extends to legal security, which most tribunals deny – legal security is merely "in the sense of providing the necessary means for the investor to obtain redress."[990]

797. With respect to whether the CPS obligation extends to oblige the EU to "maintain through its legal and regulatory framework a secure investment environment", a number of ECT tribunals have been clear that it does not. As the tribunal in *AES v. Hungary* noted, the CPS obligation "certainly does not protect against a state's

[986] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 600-602.
[987] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 578(i).
[988] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 602 (emphasis added by the Claimant).
[989] European Union Counter-Memorial on the Merits, 3 May 2021, para. 621.
[990] **Exhibit RLA-294**, *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020 [Redacted]), paras. 651-653 (citing Exhibit CLA-251, *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, paras. 262, 273; **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, para. 246; **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 7.146); **Exhibit RLA-146**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 360-361.

right (as was the case here) to legislate or regulate in a manner which may negatively affect a claimant's investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals."[991]

798. It remains the case that CPS only applies to due diligence protection with regard to third party acts affecting the physical integrity of an investment. But even if that standard were to be arbitrarily extended to acts of the EU itself, concerning the legal environment of the investment (extension which the European Union rejects), the Claimant wildly overstates even that unfounded standard.

7.3.2 The European Union did not breach the CPS standard

799. The Claimant maintains that the EU has breached the CPS standard through its alleged failure to maintain its legal and regulatory framework. The CPS standard suggested by the Claimant is entirely unsupported.

800. The Claimant argues that the European Union breached the CPS standard through three different conducts: (i) through "specious objectives" having the alleged hidden purpose to target NS2PAG;[992] (ii) through a "rushed" and "improper" legislative procedure, having the derogation eligibility criterion of being "completed before" the date of entry into force of the Amending Directive in mind and aiming to finish the legislative process before NSP2AG finished construction of the Nord Stream 2 pipeline and became operational;[993] and (iii) through the causation of dramatic and radical regulatory change by enacting the Amending Directive.[994]

801. Even if the Tribunal were to find that the Claimant's allegations are relevant to the CPS standard (*quod non*), it would still find that they are unfounded. The European Union will address each of these allegations in the following paragraphs.

802. With regard to (i), the Amending Directive pursues legitimate, suitable and achievable policy objectives as detailed in Section 2 of this Rejoinder,[995] as well as in Section 2.1 of the Counter-Memorial.[996]

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[991] **Exhibit CLA-108**, *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 13.3.2. *See also* **Exhibit RLA-168**, *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, 6 August 2019, para. 621.
[992] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 603(i).
[993] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 603(ii).
[994] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 603(iii).
[995] See Section 2 (The amending Directive pursues legitimate and achievable policy objectives), in this Rejoinder.

803. It should be stressed that the objectives of the Amending Directive are built upon those of the Gas Directive.[997] Clearly, the pursuit of these objectives, in line with those listed in Article 194(1) TFEU, was not agreed with the purpose of targeting the Claimant's investment. Instead, these are long-standing objectives, constantly pursued by the European Union since 2009.

804. Concerning (ii), the Amending Directive underwent a regular and proper legislative process. As detailed in Section 5 of this Rejoinder,[998] the Amending Directive was adopted in accordance with the rules and procedures applicable to acts of its type and, during the 18 months that intervened between the publication of the Proposal and the adoption of an agreed text, there was ample opportunity for an in-depth discussion by stakeholders and political actors. As acknowledged by the Claimant,[999] formal consultation, ex-post evaluation, and impact assessments are not mandatory steps of the legislative process. In fact, the limited scope of the Amending Directive and the practice for adoption of amending legislative acts indicate that an impact assessment, an ex-post evaluation, and a formal consultation were not required in this case. Nevertheless, stakeholders were actively involved in the legislative process in two different ways: (i) through the collection of public feedback from 6 December 2017 until 31 January 2018,[1000] and (ii) through participation in a public hearing, which took place on 21 February 2018 in the European Parliament.[1001]

805. Moreover, the procedure for the examination of legislative proposals in the European Parliament was fully respected. As detailed in Section 5.5 of this Rejoinder,[1002] the work of the European Parliament, both in the ITRE Committee and in the Plenary, followed an ordinary procedure, complied with all the applicable rules, and had nothing unusual about it. The timetable observed in the Parliament until the adoption of a mandate for interinstitutional negotiations (on 19 April 2018) and the timetable followed by the co-legislators overall, until the signature of the agreed text by the European Parliament President and the Council President (on 17 April 2019) was not uncommon and reflected the length of timetables used for the adoption of similar types of acts.

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[996] See Section 2 (The amending Directive pursues legitimate and achievable policy objectives), in this Rejoinder, as well as Section 2.1 (The Amending Directive pursues legitimate and achievable policy objectives), in the European Union Counter-Memorial on the Merits, 3 May 2021.
[997] **Exhibit CL-4**, Gas Directive.
[998] See Section 5 (The Amending Directive underwent a proper legislative process), in this Rejoinder.
[999] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 195.
[1000] **Exhibit R-103**, Commission proposal for a Directive amending Directive 2009/73/EC, Feedback period 06 December 2017 - 31 January 2018, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1237-Commissionproposal-for-a-Directive-amending-Directive-2009-73-EC, accessed on 23 January 2022.
[1001] **Exhibit R-127**, ITRE Public hearing.
[1002] See Section 5.5 ([redacted] assertions are groundless) in this Rejoinder.

806. The Claimant fails to take in due account that the Amending Directive was adopted through democratic decision-making, whereby discordant opinions are heard, negotiations are carried out, and ultimately decisions are taken by the majority.[1003]

807. The Claimant argues that an "improper legislative procedure" was followed "having the derogation eligibility criterion of being 'completed before' the date of entry into force of the Amending Directive in mind and aiming to finish the legislative process before NSP2AG finished construction of the Nord Stream 2 pipeline and became operational",[1004] and that this shows a breach of the CPS standard. However, as detailed in the previous paragraphs, the legislative process was proper and not 'rushed'. The Amending Directive is an act of general and abstract nature,[1005] and any future offshore pipeline connecting the European Union and third countries will be subject to the provisions of the Gas Directive, as amended by the Amending Directive, for the period that these legislative acts remain in force.[1006]

808. With regard to (iii), the Claimant argues that the Amending Directive caused dramatic and radical regulatory change, breaching the CPS standard.

809. As detailed in Section 3 of this Rejoinder,[1007] the Claimant erroneously argues that the Amending Directive unexpectedly extended the scope of the Gas Directive from the coastal terminal to the legal border of the territorial sea.[1008]

810. However, when the Claimant took its Investment Decision, there were numerous indications that the original Gas Directive imposed the Regulatory Requirements to pipelines such as Nord Stream 2 on the entirety of Member States' territory, including to offshore pipelines within their territorial sea. Furthermore, it was evident that comparable requirements could have been imposed on NSP2AG by virtue of EU competition law. Accordingly, in the eyes of a duly diligent investor, the Amending Directive did not result in an unforeseeable regulatory change, and

[1003] See Section 5.6 (The Amending Directive was adopted through democratic decision-making) in this Rejoinder.
[1004] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 603(ii).
[1005] See Section 5.5.1 (The Amending Directive is an act of general application) in this Rejoinder.
[1006] For example, EastMed is an offshore pipeline planned to connect Israel to Cyprus to Greece. See Section 2.4.5. (The Amending Directive does not have as "practical effect" that only the NS2 pipeline will be affected), European Union Counter-Memorial on the Merits, 3 May 2021.
[1007] See Section 3, (The Claimant has failed to prove that the Amending Directive involves a "dramatic regulatory change").
[1008] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 56, 57 and, explicitly, para. 88 (i); [redacted]

even less so in a dramatic or radical one. Rather, it enhanced legal certainty to the benefit of all economic operators.[1009]

811. In fact, (i) at the time of the Investment Decision, any duly diligent investor would have been aware of the risk that the Gas Directive could apply or be rendered applicable to Nord Stream 2 in its entirety; (ii) at the time of the Investment Decision, a duly diligent investor would have been aware of the risk that requirements comparable to the Regulatory Requirements could apply to Nord Stream 2 also by virtue of EU Competition Law; and (iii) a prospectus issued by NSP2AG's parent company Gazprom [redacted],[1010] which warned securities investors of the Regulatory Requirements applying to Nord Stream 2, proves that the Claimant was well aware of these risks at the time of its Investment Decision.[1011]

812. It follows that, in the eyes of a duly diligent investor, the Amending Directive did not result in an unforeseeable regulatory change, and even less so in a dramatic or radical one.[1012]

7.3.3 Conclusion

813. It follows from the above that the legal standard to be applied to the CPS obligation in Article 10(1) is the protection of an investment from physical damage inflicted by third parties. Even if the CPS standard did encompass legal security (*quod non*), that legal security only imposes an obligation on the EU to provide for effective judicial redress and does not extend to the protection of a "secure investment environment" as the Claimant asserts. The Claimant has failed to meet these thresholds to demonstrate a breach of the CPS obligation under Article 10(1) and its claims should be rejected.

814. If the Tribunal were to find that the CPS standard encompassed also the legal environment of the investment (which the European Union rejects), it would nevertheless find that the allegations of the Claimant are baseless. In fact, the Amending Directive pursues legitimate, suitable and achievable objectives, which built upon the objectives of the Gas Directive and are in line with those listed in Article 194(1) TFEU. The Amending Directive underwent a proper legislative

[1009] Section 3, (The Claimant has failed to prove that the Amending Directive involves a "dramatic regulatory change").

[1010] [redacted]

[1011] See Section 3, (The Claimant has failed to prove that the Amending Directive involves a "dramatic regulatory change").

[1012] See Section 3, (The Claimant has failed to prove that the Amending Directive involves a "dramatic regulatory change").

process, which respected all the applicable rules, involved all the necessary actors, and followed the usual timetables. Finally, the Amending Directive did not cause any dramatic regulatory change.

7.4 There is no breach of most-favoured-nation and national treatment under Article 10(7) ECT

815. In its Memorial, the Claimant argued that the adoption of the Amending Directive constituted a breach of Article 10(7) of the ECT, because the European Union allegedly treated the Claimant less favourably in comparison to like investors and their investments.[1013]

816. In its Counter-Memorial, the European Union disputed this claim, and demonstrated the Claimant's failure to establish the elements required to show a breach of Article 10(7), being that: the Claimant must demonstrate that the European Union has provided treatment to investors of the European Union or of third countries that were in like circumstances to the Claimant; that treatment must have been "more favourable" than that provided to the Claimant; and there was no legitimate regulatory basis for that distinction in treatment.[1014]

817. In its Reply, the Claimant largely agrees with the legal standard as set out by the European Union.[1015] However, the Claimant objects to the European Union's position that the treatment in question must be based on origin, arguing that Article 10(7) does not place any limitation on what could satisfy the element of "less favourable treatment."[1016] Moreover, the Claimant disagrees as to the identification of an appropriate comparator for the factual analysis required under Article 10(7).

818. The Claimant's positions are untenable. First, the Claimant's assertion that origin is not relevant to a determination of national or MFN treatment is contrary to the very purpose of those provisions – to prevent discriminatory treatment based on origin or nationality. Second, as a factual matter, the Claimant has failed to demonstrate a breach of Article 10(7), including through its failure to identify an appropriate comparator and show that such comparator has been subject to more favourable treatment than the Claimant.

[1013] Claimant's Memorial, 3 July 2020, para. 462.
[1014] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 637-638, 640, 643.
[1015] *See* Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 608.
[1016] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 606.

7.4.1 The Claimant's assertion that origin is irrelevant is incorrect

819. With respect to the issue of origin, the Claimant objects to the European Union's position that the less favourable treatment allegedly received by NSP2AG must be based "on its origin".[1017] The Claimant asserts that this position is inconsistent with both parties' recognition that it is not necessary for the Claimant to show an intent to discriminate based on nationality.[1018] The Claimant fundamentally misunderstands the distinction between the *intent* of a respondent State to discriminate (*i.e.* purposefully target a foreign investor) and whether a measure *de jure* or *de facto* discriminates based on nationality or origin. It is the latter question that is fundamental to the purpose of national treatment and MFN clauses.[1019] As the tribunal in *Total v. Argentina* noted with respect to claims of national treatment:

> [T]he national treatment obligation does not preclude all differential treatment that could affect a protected investment but is aimed at protecting foreign investors from *de iure* or *de facto* discrimination based on nationality.[1020]

820. In *Tecmed v. Mexico*, the tribunal considered:

> The Claimant has failed to furnish convincing or sufficient evidence to prove, at least *prima facie*, that the Claimant's investment received, under similar circumstances, less favorable treatment than that afforded to nationals of the State receiving the investment or of a third State, or that said investment was subject to discriminatory treatment upon the basis of considerations relative to nationality or origin of the investment or the investor.[1021]

821. As a result, and as the European Union explained in Section 3.3 of its Counter-Memorial, the factors that must be explored in order to determine whether there has been a breach of non-discrimination provisions include whether the measure creates a disproportionate benefit for nationals over non-nationals, or appears to

[1017] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 606.
[1018] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 605-606.
[1019] **Exhibit RLA-295**, Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment, (Kluwer Law International 2009), p. 147 ("One of the main objectives of international trade and investment law is to limit state measures that discriminate based on the nationality of the foreign individual, entity, good, service or investment in question.").
[1020] **Exhibit RLA-153**, *Total SA v. The Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010, para. 211 (emphasis added).
[1021] **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 181 (emphasis added).

favour nationals over non-nationals.[1022] The Claimant has failed to demonstrate the existence of such effects.

7.4.2 The Claimant has failed to demonstrate less favourable treatment than "like" investments of investors

822. The parties are agreed as to the legal standards required to conduct an analysis under Article 10(7), being: (1) whether the investor is in a "like" circumstance as an investor of the host State or third-party State; (2) whether the investor received less favourable treatment; and (3) whether there is any legitimate regulatory explanation that can explain the difference in treatment.

823. Both parties are also agreed that in order to conduct this analysis, an appropriate comparator in "like" circumstances must be identified. Where the parties diverge, however, is with respect to the appropriate comparator in these proceedings, and whether that comparator has been treated less favourably.

824. As already explained in Section 4 above, NSP2AG is not "like" investors in the five pipelines that the Claimant mentions. There are very significant differences between the NS2 pipeline and the other five offshore pipelines. Given that the NS2 pipeline and the other pipelines are not in like circumstances, treating them differently does not constitute differential treatment.

825. Moreover, the Gas Directive, as amended, is an act of a general and abstract nature. It does not "target" NSP2AG. Rather, NSP2AG as other pipelines bringing gas into the EU market is eligible to apply for flexibilities offered by the Gas Directive, in particular under Article 36. As explained in Section 4.4.1 above, just like other pipelines, NSP2AG could "reduce the impact" of the Gas Directive.

826. It follows that even if the NS2 pipeline project were eventually not to obtain an exemption – something that has not been established by the Claimant – the fact of not obtaining an exemption does not mean that discrimination is at stake. The outcome of an exemption request depends on an assessment using objective criteria that pursue legitimate policy reasons. Indeed, the assessment under Article 36 (or Article 49a for that matter) examines the impact of the pipeline on the functioning of the Energy Union, the competition in the EU internal energy market and takes account of security of supply considerations. These are perfectly legitimate policy objectives that are examined on a case-by-case basis. As explained in paragraphs 601-604 of the Counter-Memorial on the Merits, even

[1022] European Union Counter-Memorial on the Merits, 3 May 2021, para. 640 (citing **Exhibit RLA-163**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Award, 13 November 2000, paras. 252-254).

if the regulatory authorities would ultimately conclude that it is imprudent to grant NSP2AG any flexibilities, the full application of the Gas Directive would be perfectly legitimate, based on the assessment of the all the circumstances at hand.

7.4.3 Conclusion

827. Therefore, the Claimant has failed to demonstrate a breach of Article 10(7), using the legal standards both parties agree are required. In particular, the Claimant has failed to identify an appropriate comparator and show that such comparator has been subject to more favourable treatment than the Claimant. Accordingly, the Claimant's claims under Article 10(7) should be dismissed.

7.5 There is no breach of the provisions regulating expropriation under Article 13 ECT

828. In its Memorial, the Claimant argued that the European Union is in breach of Article 13 of the ECT because its measures amount to an indirect expropriation that does not comply with the requirements of that provision.[1023]

829. In its Counter-Memorial, the European Union demonstrated that the Amending Directive, as transposed and implemented by Germany, does not constitute "indirect expropriation". Instead, the Amending Directive is a regulatory measure aimed at achieving public welfare objectives. The Claimant cannot show that the Amending Directive, as transposed and implemented by Germany, has an "equivalent effect" to expropriation, let alone the "catastrophic impact" on NSP2AG's investment in the North Stream 2 pipeline alleged by the Claimant. Furthermore, the Amending Directive 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.

830. In its Reply, the Claimant argues that the "police powers defence is not *carte blanche*" and that "in particular, the requirements set out under Article 13(1) of the ECT are cumulative".[1024] The Claimant thus contends that:

[1023] Claimant's Memorial, 3 July 2020, paras. 464-482, 484.
[1024] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 618-619.

> 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.[1025]

831. The Claimant's reading of the legal standard for indirect expropriation is blatantly incorrect, and conflates distinct questions that a tribunal must consider in assessing whether there exists indirect expropriation.

832. To determine the existence of indirect expropriation, the Tribunal needs to consider the following:[1026] first, whether there was substantial deprivation of the ability to use and dispose of the investment despite the absence of any formal transfer of title; and second, if so, whether the relevant measures constitutes a legitimate exercise of the EU's police powers. In sum, there is no indirect expropriation unless the impact of the measure rises to the level of a substantial taking of the investment, and the measure giving rise to that effect does not constitute a legitimate exercise of a State police power.

7.5.1 The Claimant cannot show that the Amending Directive has an "equivalent effect" to expropriation

833. To rise to the level of an indirect expropriation, the Claimant must first demonstrate that the impact of the measures amounts to a substantial or near total deprivation of the investment, as considered on a case-by-case, fact-based inquiry.[1027]

834. The Claimant does not appear to contest the legal standards applicable to this determination,[1028] which require an investor under the ECT to establish the "substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its

[1025] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 629.
[1026] *See* **Exhibit RLA-178**, *Methanex Corporation v. United States of America*, UNCITRAL, Award, 3 August 2005, Part IV, Ch. D, pp. 3-7; **Exhibit CLA-64**, *Saluka Investments B.V. v. the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 255-275; **Exhibit RLA-180**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [Redacted], paras. 483-504; **Exhibit RLA-296**, *WNC Factoring v. The Czech Republic*, PCA Case No. 2014-34, Award, 22 February 2017, paras. 375-396.
[1027] *See* **Exhibit RLA-304**, *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award (2 August 2010), para. 249.
[1028] The EU set out the standards required in order to demonstrate an indirect expropriation, and the Claimant provided no response to these principles in Part VIII.5 of its Reply. *See* European Union Counter-Memorial on the Merits, 3 May 2021, paras. 670-677; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 643-671 (which deals with fact-specific issues).

investment, its value or enjoyment."[1029] It follows from this standard that a measure cannot be considered as expropriatory simply because it renders the investment less profitable.[1030]

835. The Claimant in its Reply has been unable to demonstrate a substantial deprivation of its investment with an equivalent effect to expropriation. In essence, the Claimant simply alleges that the combined application to Nord Stream 2 of the core elements of the Gas Directive, i.e. tariff regulation, TPA and unbundling requirements "deprive NSP2AG of the use and enjoyment of its investment" and amount to indirect expropriation[1031].

836. As recalled below, however, the impact of the Amending Directive on NSP2AG's investment remains, at this stage, highly uncertain. Moreover, the Claimant could have prevented, and indeed can still prevent, or at least substantially mitigate, the alleged adverse impact (Section 7.5.1.1).

837. In any event, the Claimant cannot show that full compliance with all the requirements of the Amending Directive, as transposed and implemented by Germany, even if it were required from the Claimant, would amount to a substantial deprivation of its investment (Section 7.5.1.2).

7.5.1.1 The "impact" of the Amending Directive on NSP2AG's investment remains at this stage highly uncertain and could be averted or mitigated by the Claimant

838. The Claimant's claim under Article 13(1) of the ECT is built upon the speculation that [redacted] As such, it does not amount to a substantial deprivation of its investment which could be considered as having an equivalent effect to an expropriation.

839. [redacted]

[1029] **Exhibit CLA-84**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 6.62. *See also* European Union Counter-Memorial on the Merits, 3 May 2021, paras. 670-677.
[1030] **Exhibit RLA-195**, *Burlington Resources Inc. v. Republic of Ecuador (hereafter, Burlington v. Ecuador)*, ICSID Case No. ARB/08/5, Award of 14 December 2012, para. 399; **Exhibit RLA-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. 286.
[1031] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 658.

[redacted]

[redacted] The Claimant's allegations with regard to that "impact" are therefore premature and speculative.

840. The "impact" of the Amending Directive on NSP2AG's investment will flow from measures that the German authorities may or may not adopt within the margin of discretion accorded to them by the Amending Directive, as well as from choices to be made by NSP2AG itself within the framework of those measures[1035].

841. The Claimant has failed to prove that it has already suffered any losses attributable to the European Union resulting either from its current inability to operate the NS2 pipeline [redacted][1036]. The modelling conducted by Swiss Economics at the request of the Claimant is fundamentally flawed because it is entirely based on unreliable factual assumptions fed by the Claimant to Swiss Economics[1037].

842. Moreover, as further explained by the European Union, there are multiple ways in which the Claimant (or its ultimate owner and controller) could have prevented, and indeed can still seek to prevent, or at least substantially mitigate, the adverse impact of the Amending Directive alleged by the Claimant[1038].

843. In the first place, the Claimant could have prevented the alleged impact by exercising due diligence when making its investment decision [redacted][1039]. Second, the Claimant could have requested, and can still request, an exemption from the unbundling, TPA and tariff requirements in accordance with Article 36 of the Gas Directive, as transposed and implemented by Germany[1040]. As an alternative, the Claimant could re-organise itself in accordance with Article 9(6) of the Gas Directive[1041]. Third, the Government of the Russian Federation, which ultimately owns and controls the Claimant, could negotiate an IGA with the European Union[1042] and/or

[redacted]

[1035] See Section 6.2 (The "impact" of the Amending Directive, as transposed and implemented by Germany, on NSP2AG's investment remains highly uncertain), in this Rejoinder. See also Section 2.3 in the European Union Counter-Memorial on the Merits, 3 May 2021.
[1036] Section 6.4 (The Claimant has not proven that it has already suffered losses attributable to the European Union), in this Rejoinder.
[1037] Section 6.4.2 (The Claimant has not proven that it has already suffered losses attributable to the European Union resulting from its inability to obtain project financing), in this Rejoinder.
[1038] Section 6.3 (The Claimant has failed to take action in order to prevent or mitigate the alleged impact), in this Rejoinder.
[1039] Section 6.3.1.
[1040] Section 6.3.2.
[1041] Section 6.3.3.
[1042] Section 6.3.5.

allow exports of gas from Russia by undertakings other than the Gazprom group, so as to facilitate the full use of the NS 2 pipeline[1043].

844. The European Union cannot be held responsible for any adverse impact on the Claimant's investment which the Claimant could have reasonably prevented by taking action within its power, or within that of its ultimate owner and controller[1044]. Therefore, any such adverse impact on the Claimant's investment cannot be attributed to the European Union for the purposes of establishing the existence of the alleged indirect expropriation.

845. Nor can the European Union be held responsible for any adverse impact which is attributable to third countries. The European Union reiterates that the risk of U.S. sanctions, and the ensuing adverse impact alleged by the Claimant, is not attributable to the European Union, but to a third country[1045].

7.5.1.2 In any event, the Claimant cannot show that full compliance with the requirements of the Amending Directive, as transposed and implemented by Germany, would constitute indirect expropriation

846. Even if the requirements of the Amending Directive on unbundling, TPA and tariff regulation, as transposed and implemented by Germany, were to apply in full with regard to the NS2 pipeline, the Claimant cannot show that their impact on NSP2AG's investment would constitute a substantial deprivation of its investment with an effect equivalent to expropriation.

847. [redacted]

848. [redacted]

[1043] Section 6.3.4.
[1044] Section 6.5
[1045] Section 6.6.
[redacted]
[1048] [redacted]

849. In its Memorial the Claimant failed to address the ISO and ITO unbundling models.[1049] The fact that the Claimant has now decided to apply for ITO certification[1050] involves a belated recognition that, despite the remaining uncertainties, which are inherent to any certification process under the Gas Directive, the Claimant is not precluded from complying with the unbundling requirements of the Amending Directive, as transposed and implemented by Germany.

850. As for tariff regulation, the European Union has already confirmed that it does not *per se* substantially deprive NSP2AG from the ownership, use or enjoyment of the NS2 pipeline.[1051] Tariff regulation is one of the most usual tools for regulating any industry supplying essential goods or services[1052]. 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. [redacted]

851. Likewise, TPA requirements do not substantially deprive NSP2AG from the ownership, use or enjoyment of the NS2 pipeline. They merely seek to prevent NSP2AG from refusing access to the pipeline to gas suppliers other than Gazprom, an affiliated company.[1055] As explained by the European Union, the allegedly adverse impact of TPA could be avoided if the Government of the Russian Federation allowed exports of natural gas from Russia by suppliers other than Gazprom Export[1056]. [redacted]

[1049] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 219-220.
[1050] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 265.
[1051] European Union Counter-Memorial on the Merits, 3 May 2021, para. 695.
[1052] European Union Counter-Memorial on the Merits, 3 May 2021, para. 693.
[redacted]
[1055] European Union Counter-Memorial on the Merits, 3 May 2021, para. 694.
[1056] Section 6.3.4.
[redacted]

[redacted]

7.5.2 The Amending Directive falls within the scope of the EU's police powers

7.5.2.1 The police powers doctrine is a fundamental principle of international law

852. Even if the Tribunal were to find that the impact of the Amending Directive amounted to a substantial taking (*quod non*), the Amending Directive is a legitimate exercise of the EU's police powers. It is a fundamental principle of international law that regulatory activity aimed at achieving legitimate public welfare objectives is not compensable.[1059] The Claimant does not appear to dispute this principle (nor could it), instead asserting that the police powers doctrine does not operate as a "blanket exception".[1060]

853. As an initial point, the European Union has never argued that police powers is a "blanket exception", but rather that any finding of substantial deprivation must then be assessed to determine whether the measure was taken for legitimate public welfare objectives of the State. As the European Union outlined in its Counter-Memorial, this principle reflects customary international law and has been restated by many arbitral tribunals.[1061]

854. Moreover, the parties appear to agree that in considering whether a measure is the legitimate exercise of police powers, consideration of factors such as non-discrimination, proportionality, and due process are relevant.[1062]

855. The standard for making a determination that measures taken in the exercise of police powers amounts to indirect expropriation is high. The measures must be so

[redacted]

[1059] *See*, *e.g.*, **Exhibit RLA-298**, para. 712, Comment (g) of the American Law Institute's Restatement (Third) of the Foreign Relations Law; **Exhibit CLA-128**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para 202 ("The Tribunal agrees with the Respondent that, if the Revocation Decree was the legitimate exercise of its sovereign right to sanction violations of the law in its territory, it would not qualify as a compensable taking."); **Exhibit CLA-66**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 119 ("The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable."); **Exhibit RLA-137**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 238 ("Thus, Professor Ian Brownlie has stated that: 'State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably without amounting to expropriation. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.'").

[1060] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 621.

[1061] European Union Counter-Memorial on the Merits, 3 May 2021, para. 655.

[1062] European Union Counter-Memorial on the Merits, 3 May 2021, Sections 3.4.2.1 (legitimate public welfare objectives), 3.4.2.2 (non-discrimination), 3.4.2.3 (proportionality), and 3.4.2.4 (due process).

severe in light of their purpose that they appear manifestly excessive.[1063] As the tribunal in *Eco Oro v. Colombia* recently opined:

> The majority of the Tribunal therefore finds that the Challenged Measures were nondiscriminatory and designed and applied to protect a legitimate public welfare objective, namely the protection of the environment. They were adopted in good faith. The Challenged Measures were therefore a legitimate exercise by Colombia of its police powers unless they comprise a rare circumstance such that they constitute indirect expropriation…
>
> [. . . .]
>
> In undertaking this exercise, the Tribunal notes that the ordinary meaning of the word 'rare' in the context of 'a rare event' is one which seldom occurs, is unusual, uncommon, or exceptional (as detailed in the Oxford English Dictionary). Whilst the Oxford English Dictionary does not provide a definition of the word 'severe' in the context of a 'severe' measure, common uses of the word in such a context connote "something bad or undesirable", "harsh", "brutal", "serious" or "grave" and the addition of the word 'so' before 'severe' emphasises the extreme nature of the severity contemplated. Accordingly, for the Challenged Measures to comprise an actionable indirect expropriation, as opposed to a legitimate exercise of a State's police powers, there must be a very significant aggravating element or factor in the conduct of the State and not just a bureaucratic muddle or State inefficiency.[1064]

856. As the European Union outlined in its Counter-Memorial, and elaborates below in response to the Claimant's arguments, the Claimant has failed to meet this high bar. The measures are for a legitimate public purpose, are non-discriminatory, proportionate, and made in good faith in accordance with due process. It is not for the Tribunal to second guess whether an alternative measure might be "more appropriate" or "less restrictive" in the exercise of a State's police powers. As the tribunal in *Invesmart v. Czech Republic* noted:

[1063] European Union Counter-Memorial on the Merits, 3 May 2021, n. 616.
[1064] **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, 9 September 2021, paras. 642-643 (emphasis added).

> Numerous tribunals have held that when testing regulatory decisions against international law standards, the regulators' right and duty to regulate must not be subjected to undue second-guessing by international tribunals. Tribunals need not be satisfied that they would have made precisely the same decision as the regulator in order for them to uphold such decisions. The proposition first enunciated in the *Myers* case (in the context of the fair and equitable treatment standard) that international law extends a "high level of deference to the right of domestic authorities to regulate matters within their own borders" has been adopted in subsequent cases.[1065]

857. Thus, if the Tribunal determines the measures are a legitimate exercise of a State's police powers (which, as explained in the remainder of this Section, they are), then they, by definition, do not amount to an actionable indirect expropriation.

7.5.2.2 The Gas Directive and the Amending Directive are designed to pursue legitimate public welfare objectives of fundamental importance for the European Union

858. The Claimant makes a number of unsupported arguments to claim that the measures are "not intended to, and cannot, achieve 'public welfare' objectives",[1066] none of which are persuasive as a matter of law or of fact.

859. First, the Claimant asserts that the police powers doctrine "will only apply to measures adopted in pursuit of certain categories of public welfare objectives",[1067] relying on *Magyar Farming v. Hungary* to support its limited reading.[1068]However, the *Magyar Farming* tribunal stands alone in this categorization, and there is no support for the Claimant's contention in broader principles of international law, or other arbitral decisions. States are free to regulate for public purposes, which encompasses a broad range of powers, as the definition of "police power" in Black's Law Dictionary makes clear:

[1065] **Exhibit RLA-180**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009 [Redacted], para. 501, n. 356 ("The comment made by the tribunal in *S.D. Myers, Inc. v. Canada*, Partial Award, at para 261, although made in the course of discussing the fair and equitable treatment standard, is apposite to the circumstances facing the CNB at the time. The Myers dictum has been quoted with approval in a number of subsequent awards, including *Saluka v. Czech Republic*, para 284, *Waste Management, Inc. v. United Mexican States*, Final Award, para 94, and *GAMI Investments, Inc. v. United Mexican States*, Final Award, para 93.").
[1066] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, p. 222 (heading).
[1067] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 621.
[1068] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 621-622.

> The inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice. It is a fundamental power essential to government, and it cannot be surrendered by the legislature or irrevocably transferred away from government.[1069]

860. Moreover, the considerations of the *Magyar Farming* tribunal are inapposite in the circumstances of these proceedings. The Claimant highlights the tribunal's comment that Hungary was fully entitled to change its policies but was required to "respect vested rights" in doing so. In that case, the dispute arose out of property rights granted by lease for a certain term (*i.e.* the "vested rights" to which the Claimant refers), not a general regulatory framework as is the case here. The Hungarian government had awarded lease rights to the claimant for a period of ten years but – before these rights expired – the State divided the land into 16 plots and awarded them to local farmers via public tender. Clearly, these facts are distinguishable from the situation in issue – even if the EU accepted the *Magyar* tribunal's "categories" of public welfare objectives (*quod non*), the Claimant has no "vested rights" in the same manner as the claimant in that case.

861. Second, the Claimant alleges, once again, that the objectives of the Amending Directive are "specious" and "cannot be achieved".[1070]

862. The Claimant's allegations are baseless. The European Union has amply demonstrated that the requirements on unbundling, TPA and tariff regulation provided for in the Gas Directive, as modified by the Amending Directive, pursue a legitimate public welfare objective of fundamental importance for the European Union, namely to ensure the functioning of a competitive market for natural gas in the European Union, while ensuring security of supply of natural gas[1071]. It has been further demonstrated that, contrary to the Claimant's allegations, the Amending Directive, by clarifying that those requirements apply to interconnectors connecting the Member States with third countries, does make a material contribution to those objectives[1072].

[1069] **Exhibit RLA-299**, Bryan Garner, Black's Law Dictionary (10th ed., United States of America: Thomson Reuters, 2014), 1345.
[1070] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 624.
[1071] European Union Counter-Memorial on the Merits, 3 May 2021, Section 2.1. *See* also Section 2 of this Rejoinder.
[1072] *Ibid.*

7.5.2.3 The Amending Directive is not discriminatory, not disproportionate, and was enacted in accordance with due process

863. The parties appear to agree that further relevant factors in determining whether the State has exercised its police powers is: (a) whether the measures are non-discriminatory;[1073] (b) whether the measures are not disproportionate;[1074] and (c) whether the measures were adopted in accordance with due process.[1075]

864. Where the parties diverge, however, is how these factors are assessed in light of the facts at issue.

865. The legitimate welfare objectives pursued by the Gas Directive and the Amending Directive have been implemented in a non-discriminatory manner. As shown above in Sections 7.2 and 7.4, the Gas Directive does not breach any of the non-discrimination standards invoked by the Claimant under either Article 10(1) of the ECT or Article 10(7) of the ECT.

866. As further shown in Section 7.1.3., the impact of the Amending Directive on NSP2AG's investment in the North Stream 2 pipeline is not disproportionate in light of the legitimate public welfare objectives pursued by that measure.

867. Lastly, as demonstrated in Section 7.1.1, the Amending Directive was enacted with the utmost respect for procedural propriety and due process.

7.5.3 The question of whether an indirect expropriation is unlawful giving rise to compensation is moot

868. It is only if the Tribunal determines that the measures amount to a substantial deprivation of the Claimant's investment *and* fall outside of the scope of the legitimate exercise of the EU's police powers, that the Tribunal needs to consider arguments on compensation. The Claimant's assertion that the "expropriation of [its] investment has not been accompanied by any payment of compensation whatsoever, and, as such, cannot constitute expropriation permissible under Article 13 of the ECT" is only true if the first two factors have been established. As the prior Sections make clear, there is no substantial deprivation and the EU's measures fall squarely within its police powers. The Claimant's argument on

[1073] European Union Counter-Memorial on the Merits, 3 May 2021, para. 666; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 630-632.
[1074] European Union Counter-Memorial on the Merits, 3 May 2021, para. 667; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 636. Note that, with respect to the issue of proportionality, the Claimant contests the EU's position that measures in exercise of police powers may constitute indirect expropriation only when they are so severe in light of their purpose that they appear manifestly excessive. The EU has addressed this criticism in Section 7.1.3 above, and does not consider any further response warranted.
[1075] European Union Counter-Memorial on the Merits, 3 May 2021, para. 668; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 641.

compensation as giving rise to an indirect expropriation under Article 13 are therefore moot.

7.5.4 Conclusion

869. The Claimant's attempt to distort the analysis applicable to indirect expropriation should be rejected as incorrect. The Claimant has been unable to satisfactorily demonstrate that its investment has had the equivalent effect of an expropriation, because there is no substantial impairment of the Claimant's investment. Moreover, and even if there was a substantial deprivation of the Claimant's investment (*quod non*), the Claimant has been unable rebut the EU's demonstration that the measures constitute a legitimate exercise of the police powers of the State. Consequently, the Claimant's claim of unlawful expropriation under Article 13 of the ECT should be dismissed.

8 THE TRIBUNAL LACKS JURISDICTION

8.1 The Tribunal lacks jurisdiction pursuant to the ECT's fork-in-the-road provision

8.1.1 Introduction

870. In its Memorial, and in its Counter-Memorial on Jurisdiction, the Claimant asserts that Article 26(3)(b)(i) of the ECT, *i.e.* the ECT's fork-in-the-road provision, does not apply to the present dispute because the Claimant has not submitted the present dispute to the courts or administrative tribunals of the European Union.[1076]

871. To the contrary, as the European Union demonstrated in its Memorial on Jurisdiction, the Tribunal lacks jurisdiction in this matter given the lack of consent resulting from the Claimant's non-compliance with the fork-in-the-road clause in the ECT. Notably, the Claimant at the time of filing the present ECT claim had already brought court proceedings against the European Union before the Court of Justice of the European Union (**CJEU**), seeking to challenge the adoption of the Amending Directive.[1077]

872. In its Counter-Memorial on Jurisdiction, the Claimant fails to overcome this fundamental hurdle posed by the ECT's fork-in-the-road clause. For the most part, in response to the European Union's exposition, the Claimant simply repeats

[1076] *See e.g.* Claimant's Memorial, 3 July 2020, paras. 525-526; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 674.
[1077] *See e.g.* European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 3, 6, 122.

its earlier arguments and cites to those same legal authorities the European Union already has addressed in its Memorial on Jurisdiction. The Claimant attempts to superimpose on an otherwise clear and simple text a complex set of unwritten requirements that constrict the scope of application of the ECT's fork-in-the-road clause and deprive it of any *effet utile*. Accordingly, the Claimant's attempt to overcome the application of the ECT's fork-in-the-road clause must fail.

873. To the extent that the Claimant has elaborated upon its initial arguments, the European Union will address them in the remainder of this Section to demonstrate that: (1) the European Union's interpretation of the fork-in-the-road clause aligns with its ordinary meaning, object and purpose (Section 8.1.2.1); (2) the notion of "dispute" should consider whether the two disputes have the "same fundamental basis", rather than being bound by an unjustifiably formalistic test wrongly imported into the ECT (Section 8.1.2.2); (3) the Claimant's application for annulment before the Court of Justice of the European Union and the present arbitration proceedings indeed have the "same fundamental basis", triggering operation of the ECT's fork-in-the-road clause (Section 8.1.2.3); (4) the "triple identity test" that the Claimant seeks to import into the analysis of that clause would deprive it of any *effet utile* (Section 8.1.2.4); and (5) in any event, the proceedings before the CJEU and the present arbitration proceedings meet the "triple identity" test developed in the context of and for claims of *lis pendens* (Section 8.1.2.5).

8.1.2 The Claimant had already elected a different jurisdiction for its claim prior to filing its Notice of Arbitration, vitiating the European Union's consent to the present arbitral proceedings

874. In its Memorial, the Claimant argued that Article 26(3)(b)(i) of the ECT, *i.e.* the ECT's fork-in-the-road provision, does not apply to the present dispute because the Claimant has not submitted the present dispute to the courts or administrative tribunals of the European Union.[1078]

875. In its Memorial on Jurisdiction, the European Union explained that its consent to international arbitration under the ECT is conditional upon compliance with the ECT's fork-in-the-road clause. The Claimant does not dispute this assertion.

876. The European Union also pointed out that when the Claimant filed the Notice of Arbitration purportedly to initiate these arbitral proceedings on 26 September 2019, it already had initiated proceedings before the CJEU with regard to the

[1078] Claimant's Memorial, 3 July 2020, paras. 525-526.

adoption of the Amending Directive, on 25 July 2019.[1079] The Claimant was therefore precluded as of that date from bringing a parallel dispute before this Tribunal under the ECT in the absence of any consent on the part of the European Union, due to the operation of the ECT's fork-in-the-road clause.[1080] For the avoidance of any doubt, the European Union declines to provide such consent.

8.1.2.1 The European Union's interpretation of the ECT's fork-in-the-road clause is in line with its ordinary meaning, object and purpose

8.1.2.1.1 ECT Article 26(1) does not constrain the scope or application of ECT Article 26(3)(b)(i)

877. In its Memorial on Jurisdiction, the European Union explained that pursuant to Article 26(3)(b)(i), where an investor has previously submitted a dispute to the courts of one of the Contracting Parties (including of the European Union)[1081], that investor may not then pursue international arbitration in respect of the same dispute.[1082]

878. The European Union demonstrated that its interpretation of ECT Article 26(3)(b)(i) accords with the plain and ordinary meaning of the language of that clause in its context and in light of its object and purpose, in accordance with Article 31 of the Vienna Convention on the Law of Treaties (**VCLT**).[1083]

879. The Claimant argues in response that the additional elements set out in ECT Article 26(1) constrain the ordinary meaning to be assigned to the term "dispute" in ECT Article 26(3)(b)(i).[1084]

880. The European Union disagrees. First, both ECT Article 26(1) and Article 26(3)(b)(i) use the term "dispute" without qualifying its ordinary meaning.[1085] Second, ECT Articles 26(1) and 26(3)(b)(i) have distinct purposes. ECT Article 26(1) sets out jurisdictional requirements for investors seeking to bring a claim under the ECT, including that the dispute must relate to a covered investment of a covered investor in the Area of a Contracting Party, and must concern an

[1079] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 12-13.
[1080] *See e.g.* European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 3.
[1081] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 6-11, 17, 21-22, 26. The European Union is listed in para. 8 of Annex ID of the ECT titled "List of Contracting Parties Not Allowing an Investor to Resubmit the Same Dispute to International Arbitration at a Later Stage under Article 26".
[1082] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 9-10, quoting **Exhibit RLA-1**: Kaj Hobér, "Investment Arbitration and the Energy Charter Treaty", *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), p. 163.
[1083] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 9-10, 19-23.
[1084] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 686-687, 692, 705.
[1085] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 27-28.

alleged breach of an obligation of a Contracting Party under ECT Part III. These provisions serve to circumscribe the types of disputes that can be settled based on the mechanisms made available in ECT Article 26.

881. However, ECT Article 26(1) does not provide guidance to determine whether distinct court and arbitration proceedings amount to the "same dispute" for purposes of ECT Article 26(3)(b)(i), nor does it constrain the ordinary meaning to be assigned to the term "dispute" as used in that article.

882. Indeed, the fork-in-the-road clause in Article 26(3)(b)(i) of the ECT distinctly operates as a preclusive safeguard that explicitly conditions the European Union's consent upon the absence of parallel proceedings.[1086] Its aim is to ensure that the same dispute is not litigated before different fora, with a view to (1) avoiding conflicting outcomes; (2) discouraging claimants from pursuing the same dispute in multiple fora; (3) preventing claimants from using parallel proceedings as a means of exerting pressure on respondents; and (4) precluding overcompensation through potential overlapping awards of damages.[1087] The jurisdictional requirements set out in ECT Article 26(1) have nothing to do with this object and purpose. Accordingly, there are no grounds for them to be "read into" ECT Article 26(3)(b)(i) as limiting provisions.

883. More particularly, the Claimant argues that EU consent to submit a dispute to international arbitration can only be vitiated under ECT Article 26(3)(b)(i) if the dispute that has been submitted to the national courts of an EU Member State or to EU courts explicitly relies upon an alleged breach under ECT Part III.[1088] Again, the European Union disagrees. As explained in greater detail in Section 8.1.2.3 below, the same dispute can arise and/or raise allegations of breaches under more than one legal instrument concurrently. Limiting the notion of "dispute" to cases of formal identity between the underlying instruments cited, regardless of whether the parallel claims *in substance* are the same, amounts to an overly formalistic and highly limiting manner of assessing whether distinct court and arbitration proceedings in practice amount to the same dispute, and therefore to invoke the policy constraints (and related jurisdictional limitations) embodied in ECT Article 26(3)(b)(i). To take one example (seen in the present case), whether a claim of discrimination is raised under the ECT or under its exact equivalent under EU law is immaterial; for purposes of the fork-in-the-road clause, the key

[1086] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 18, 23.
[1087] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 25, 31.
[1088] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 691.

is that the claims in substance are the same. In such circumstances, the second claim should be precluded, to give effect to ECT Article 26(3)(b)(i).

8.1.2.1.2 The European Union's interpretation of ECT Article 26(3)(b)(i) gives it *effet utile*

884. The Claimant refers to broad preambular language in the ECT in an improper attempt to limit the scope and effectiveness of the ECT's fork-in-the-road clause.[1089] The Claimant erroneously suggests in this regard that the European Union misconstrued the object and purpose of the ECT.[1090] To the contrary, the European Union's consideration of "object and purpose" naturally focussed on the object and purpose of the ECT's fork-in-the-road clause itself. As explained in paragraph 882 above, the ECT's fork-in-the-road clause serves as a preclusive safeguard against multiple claims concerning the same dispute. Accordingly, ECT Article 26(3)(b)(i) aims to achieve specific objectives which cannot be overridden by the ECT's general objectives.

885. The Claimant notably cannot legitimately rely on the ECT's general purposes and objectives in order to superimpose on an otherwise clear and simple text a complex set of unwritten requirements that, as set out below, would constrict the scope of application of the ECT's fork-in-the-road clause and deprive it of any *effet utile*.[1091] Unlike the Claimant's forced approach, the European Union's interpretation of ECT Article 26(3)(b)(i) is compatible with the ECT's general provisions concerning the object and purposes of the ECT as a whole.

886. The Claimant also misrepresents the European Union's position with respect to giving *effet utile* to the ECT's fork-in-the-road clause in ECT Article 26(3)(b)(i). Contrary to the Claimant's misstatement, the European Union did not suggest that the words "'or any dispute *akin to* the dispute' be imported into the text of the ECT"'s fork-in-the-road clause.[1092]

887. Rather, the European Union has advocated for a reliance on, and adherence to, the ordinary meaning of the words as they appear in Article 26(3)(b)(i) of the ECT, in order to give that article full effect. The literal wording of ECT Article 26(3)(b)(i) is meant to address circumstances such as the present, in which the

[1089] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 699-703.
[1090] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 699.
[1091] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 699-703.
[1092] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 706-707. Indeed, the Claimant itself, in contradiction of its own allegation, relies on a passage in the transcript of the hearing on bifurcation, where the Tribunal itself (rather than the European Union) employed the expression "a dispute in substance akin", in an exchange with counsel for the European Union.

Claimant has brought essentially the *same* dispute (not one "akin to it") before this Tribunal, as before the CJEU.[1093]

888. The Claimant further incorrectly alleges that the European Union's arguments on *effet utile* are predicated on the notion "that a claim for breach of the ECT could not be brought in a domestic court or tribunal".[1094] In addition to misstating the European Union's comments on *effet utile*, the Claimant assigns exaggerated importance to the latter narrow and ultimately secondary point.[1095]

889. In its Memorial on Jurisdiction, the European Union noted that practical difficulties might make it impossible for a complaining party to cite ECT norms *in exactly the same terms* before national courts as it would in a notice of arbitration under the ECT:

> Reference in this provision to Part III [of the ECT] ("Investment Promotion and Protection") does not impose any obligation of identity of cause of action as between two pending disputes. Indeed, such a reading would violate the principle of *effet utile*, rendering null the application of Article 26(3) by imposing a requirement (nowhere stated in the article) that the party must have cited ECT norms in exactly the same terms before national courts for it to constitute the "same dispute") (a requirement in practice likely impossible to fulfil).[1096] (Emphasis added. Footnote omitted.)

890. In its Counter-Memorial, the Claimant goes to great lengths to demonstrate that the ECT can indeed be invoked before national courts of EU Member States or the Court of Justice of the European Union.[1097]

891. The European Union in this regard fundamentally disagrees with the inferences that the Claimant improperly seeks to draw from the European Union's statement to the Energy Charter Secretariat pursuant to Article 26(3)(b)(ii) of the ECT[1098] (the **EU ECT Statement**). In particular, the Claimant argues that:

> considering Paragraph 4 of the EU's Statement together with footnote (3) to Paragraph 5, it is clear that Paragraph 5 is

[1093] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 29, 47-55, 122.
[1094] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 708.
[1095] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 708, 718.
[1096] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 29.
[1097] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 709-720.
[1098] **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. The Claimant also refers to the annotation to Article 26(2)(a) of the ECT set out in **Exhibit CLA-21**, Final Act of the European Energy Charter Treaty Conference, 17 December 1994, as support for this proposition: *see* Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 721-722.

> 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.[1099] (Emphasis in the original.)

892. The Claimant uses footnote (3) to paragraph 5 of the EU ECT Statement as improper support for the proposition that "Paragraph 5 is only concerned with claims in which an applicant seeks to invoke an ECT provision in the CJEU". In making this argument, the Claimant fails to note two things. First, Paragraph 5 makes no mention of the ability of a claimant to invoke the ECT before the CJEU. Paragraph 5 instead states that "*[a]ny* 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" (our emphasis). Contrary to what the Claimant alleges, Paragraph 5 is limited to "forms of action provided by the constituent treaties of the Union".

893. Second, footnote (3) relates exclusively to "*a request for a preliminary ruling* submitted by a court or tribunal of a Member State in accordance with Article 267 of the [TFEU]" (our emphasis). Nothing in this footnote provides guidance with regard to claims by applicants: to the contrary, the footnote makes no mention of and fails to contemplate claims or applicants in any way whatsoever. Instead, footnote (3) explicitly applies to an altogether distinct scenario (*i.e.* a request for a preliminary ruling submitted by an EU Member State court or tribunal). The Claimant simply ignores the clear wording of footnote (3) to paragraph 5 of the EU ECT Statement in an attempt at framing it in its favour, even though footnote (3) does nothing to advance its interpretation of Article 26(3)(b)(i) of the ECT. Overall, the EU ECT Statement contemplates the limited possibility of an EU Member State court or tribunal submitting preliminary ruling requests regarding the ECT.

894. The mere fact that the ECT might be invoked before the Court of Justice of the European Union in certain specific circumstances does nothing to undermine the European Union's primary argument concerning *effet utile* and Article 26(3)(b)(i) of the ECT.

895. The European Union's ECT Statement therefore is of no relevance to the interpretation of the term "dispute" in Article 26(3)(b)(i) of the ECT. The Claimant's general point (that ECT norms may be cited in particular circumstances before the CJEU) fails to alter the force of the EU's specific argument: namely, that where substantially identical obligations are argued

[1099] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 720.

before in arbitration proceedings and in proceedings before the CJEU, the fork-in-the-road limitations under the ECT are triggered and apply.

896. The European Union is indeed in full agreement with the Claimant that "[t]here 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".[1100] It is for this very reason that the European Union advocates for assigning the ordinary meaning to the term "dispute" in Article 26(3)(b)(i) of the ECT. The EU's proposed approach results in a pragmatic consideration centred on the substance of the arbitral and court proceedings being compared, rather than upon a formalistic and rigid tick-the-box exercise centred on formal identity between arbitration proceedings under the ECT and proceedings before the CJEU.

897. The European Union's argument was and remains that where claims are in their substance identical (precisely because they arise out of "the same dispute"), requiring formal identity between the pleadings in both fora (notably, express reliance on exactly the same provisions of the ECT) would in effect allow the multiplication of substantially identical disputes, thereby rendering the ECT's fork-in-the-road clause without *effet utile*. The fact that the ECT may in highly limited circumstances be directly cited before the CJEU does nothing to change this conclusion.[1101]

8.1.2.2 The "same fundamental basis" test applies to the ECT's fork-in-the-road clause

898. Contrary to the Claimant's argument, considering whether two parallel claims have the "same fundamental basis" simply applies the unaltered wording of ECT Article 26(3)(b)(i), and does not require its wording "to be manipulated or ignored".[1102]

899. The Claimant argues that tribunal decisions applying the "fundamental basis" test amount simply to "an outlier", alleging that tribunals have upheld it in only three cases.[1103] To the contrary, application of the test reaches back to early principles of international arbitration: the "fundamental basis" test applied in *Pantechniki v. Albania* was first affirmed and applied by the Mexican-Venezuela Mixed Claims Commission in the *Woodruff* case of 1903.[1104] Indeed, the ICSID annulment Committee in the *Vivendi v. Argentina* dispute had previously applied this same

[1100] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 718.
[1101] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 29, 88.
[1102] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 727.
[1103] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 756-757.
[1104] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 37, citing **Exhibit RLA-10**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (28 July 2009), para. 61.

test in its annulment decision of 2002.[1105] Following these longstanding precedents, the sole arbitrator in *Pantechniki v. Albania* in applying a fork-in-the-road clause similar to ECT Article 26(3)(b)(i)[1106] declined to adopt a formalistic and mechanical test which would improperly import elements not referenced in the fork-in-the-road clause at issue (including formal identity of cause of action).[1107]

900. In its Memorial on Jurisdiction, the European Union explained that interpreting the ECT's fork-in-the-road clause (Article 26(3)(b)(i)) in accordance with the VCLT had indeed led a growing number of arbitral tribunals to decline jurisdiction where disputes before domestic courts and arbitral tribunals share the "same fundamental basis".[1108]

901. The Claimant in response continues to rely on formalistic rather than substantive arguments when attempting to dismiss the relevance of *Pantechniki v. Albania*, *H & H Enterprises v. Egypt* and *Supervision y Control v. Costa Rica*.[1109]

902. In its Memorial on Jurisdiction, The European Union explained that in assessing whether distinct proceedings share the "same fundamental basis", arbitral tribunals such as that in *Pantechniki v. Albania* looked beyond mere formal differences between legal instruments invoked in distinct proceedings (for example, treaty provisions as opposed to contractual clauses) and rejected "argument by labelling – not by analysis", in favour of considering the substantive overlap between arguments made in different fora.[1110] In this sense, such tribunals considered that "what matters is the subject matter of the dispute".[1111] Under this teleological and more substantive approach, tribunals held that "the dispute submitted before the national tribunals is the same as the

[1105] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 37, citing **Exhibit RLA-13**, *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 101.
[1106] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 40, n 28, citing Article 10(2) of the Greece-Albania BIT (**Exhibit RLA-14**).
[1107] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 37, citing **Exhibit RLA-10**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (28 July 2009), para. 61.
[1108] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 19-20.
[1109] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 773-774.
[1110] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 30, citing **Exhibit RLA-10**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (28 July 2009), para. 61.
[1111] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 30, citing **Exhibit RLA-9**, *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, paras. 367-369.

one submitted to arbitration if both of them share the fundamental cause of the claim and seek for the same effects".[1112]

903. Contrary to the Claimant's allegation that the *H & H Enterprises v. Egypt* is irrelevant to the present arbitration proceedings, the tribunal in *H & H Enterprises v. Egypt* applied a fork-in-the-road clause that was essentially the same as ECT Article 26(3)(b)(i).[1113]

904. Similarly, the tribunal in *Supervision y Control v. Costa Rica*[1114] soundly refused to import unwritten requirements into the ECT, instead giving effect to the specific language actually in Article 26(3)(b)(i)), and to its underlying policy (avoiding parallel proceedings regarding the same dispute).[1115]

8.1.2.3 The Claimant's application for annulment before the Court of Justice of the European Union and the present arbitration proceedings have the "same fundamental basis"

905. The European Union disagrees with the Claimant's attempt at replacing the "fundamental basis" test for determining the "same dispute", with one relying on the "normative source" of that dispute. The latter test improperly relies on a formalistic approach to defining the "normative source" of parallel proceedings. It is the Claimant, not the European Union that has "mis-stated" the appropriate test.[1116]

906. As recalled in the following sub-sections, in its Memorial on Jurisdiction the European Union demonstrated that the application for annulment before the CJEU and the present arbitration proceedings indeed have the same fundamental basis.[1117]

907. This finding is notwithstanding the fact that the annulment proceedings before the CJEU rely upon EU law, whereas the present arbitration proceedings rely upon the ECT. In both cases, the "fundamental cause" of the proceedings is the adoption of the Amending Directive and its alleged effects on NSP2AG. Moreover, the remedy that NSP2AG seeks, in both proceedings, is identical in substance:

[1112] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 30, 33, n 16, citing **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 310.
[1113] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 41-42 and n 29, citing Article VII(3)(a) of the US-Egypt BIT (**Exhibit RLA-15**) and **Exhibit RLA-9**, *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, paras. 367.
[1114] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 43, citing **Exhibit RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 330.
[1115] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 44.
[1116] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 773, 781.
[1117] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 30, 45-46.

i.e. to place NSP2AG in the position it would have occupied had the Amending Directive never been adopted. These facts trigger the application of Article 26(3)(b)(i) and vitiate the European Union's consent to these arbitration proceedings, thus depriving the Tribunal of any jurisdiction to hear the Claimant's claim.

8.1.2.3.1 The fundamental cause of the proceedings before the Court of Justice of the European Union and the present arbitration proceedings is the same

908. The Claimant argues that the "normative source" of the proceedings that it initiated before the Court of Justice of the European Union and the present arbitration proceedings is not the same, and that its complaints in each such proceedings are based "on a different set of rights afforded by different legal instruments".[1118] Accordingly, it argues, ECT Article 26(3)(b)(i) is not engaged.

909. In its Memorial on Jurisdiction, the European Union to the contrary demonstrated that the fundamental cause for NSP2AG bringing its case before this Tribunal and before the Court of Justice of the European Union is the same.

910. The European Union identified the "fundamental cause" of the Claimant's case before this ECT Tribunal as follows: (i) discrimination; and (ii) undermining of NSP2AG's investment in the Nord Stream 2 pipeline project.[1119]

911. The Claimant in relation to these norms has formulated allegations of *discrimination* in claims relating *inter alia* to national treatment and most-favoured nation treatment (*i.e.* unequal treatment vis-à-vis treatment received by investors of the European Union or investors of a third party).[1120] The Claimant has further formulated allegations of its investment *having being undermined* in claims under the headings of a) fundamental breaches of due process; b) arbitrariness and unreasonableness; and c) breach of legitimate expectations.[1121]

912. The European Union similarly identified the "fundamental cause" of the Claimant's case before the CJEU as follows: (i) *discrimination*; and (ii) *undermining of NSP2AG's investment* in the Nord Stream 2 pipeline project.[1122]

913. The Claimant before the CJEU has formulated allegations of *discrimination* in relation to its pleas on equal treatment.[1123] The Claimant has also put forward allegations of its *investment being undermined* in relation to its pleas concerning:

[1118] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 776.
[1119] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 49-51.
[1120] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 50.
[1121] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 51.
[1122] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 52-53.
[1123] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 54.

a) breaches of due process laid down in essential procedural requirements; b) arbitrariness and unreasonableness; and c) breach of legitimate expectations.[1124]

914. As is readily apparent, the fundamental causes for NSP2AG's cases both before this Tribunal and before the CJEU are the same. Accordingly, the Fork-in-the-Road clause in ECT Article 26(3)(b)(i) has been triggered.

8.1.2.3.2 The request for relief is also the same in both disputes

915. The Claimant's attempt at differentiating the remedy that it seeks in the CJEU proceedings and in the present arbitration proceedings, in a further attempt to avoid application of the fork-in-the-road provisions of the ECT, is equally unconvincing.[1125] In its Memorial on Jurisdiction, the European Union demonstrated that the request for relief for NSP2AG bringing its case before this Tribunal and before the CJEU is in substance the same.

916. In the present arbitration proceedings, NSP2AG in essence requests that the application of the Amending Directive be suspended and that its effects be erased vis-à-vis itself.[1126]

917. In the proceedings before the Court of Justice of the European Union, NSP2AG seeks the annulment of the Amending Directive.[1127]

918. In substance, NSP2AG is requesting the same relief from this Tribunal and from the Court of Justice of the European Union : *i.e.* a ruling that will ensure it is free to operate commercially in the internal market without being bound by any of the rules on unbundling, third-party access and tariff review, put in place under the Gas Directive to ensure against abuse of dominant position by undertakings in the internal market for natural gas, and to ensure security of supply of this key energy commodity. In both cases, the Claimant seeks to do so by voiding the provisions of the Amending Directive that confirm that these key public policy rules also apply to undertakings entering the European Union via the territorial waters of EU Member States.

919. The Claimant's argument that there is "no risk" of inconsistent outcomes between the Court of Justice proceedings and the present arbitration proceedings is

[1124] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 55, citing **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.
[1125] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 777.
[1126] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 57, citing Notice of Arbitration, paras. 3, 52 and Claimant's Memorial, 3 July 2020, paras. 30, 486, 503, 507, 511 and 527(vi).
[1127] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 58, citing **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, p. 71.

formalistic. It notably seeks to ignore that in both instances, the requested relief would directly frustrate and prevent the effective application of the Amending Directive and its related general policy objectives.[1128]

920. The only difference between the two proceedings is that before the CJEU the Claimant has the right to request annulment of the Amending Directive *erga omnes* (naturally, including itself); before the ECT Tribunal, reflecting the party-driven jurisdiction of the Tribunal, the Claimant requests effectively the same outcome, but focussed on itself alone.

921. In either case, the requested relief leads to a fundamental vitiation of a key European Union public policy tool of general application, simply to cater for the Claimant's alleged expectations regarding the potential profitability of its venture, in the absence of such legitimate public policy controls.

922. In sum, both the fundamental cause and the relief sought in the proceedings before the Court of Justice of the European Union and in the present arbitration proceedings are the same. This triggers the application of Article 26(3)(b)(i) and vitiates the European Union's consent to these arbitration proceedings, depriving the Tribunal of any jurisdiction to hear the Claimant's claim.

8.1.2.4 The "triple identity test" that the Claimant advocates renders fork-in-the-road clauses useless and deprives them of any *effet utile*

923. In its Memorial on Jurisdiction, the European Union has explained why the "triple identity test" does not apply and is unsuitable to the ECT's fork-in-the-road clause in Article 26(3)(b)(i).[1129]

924. The Claimant argues in response that applying the "triple identity" test to ECT Article 26(3)(b)(i) would not require "the unambiguous wording of Article 26 to be manipulated or ignored".[1130] The European Union disagrees. As recalled below, the Claimant's approach would instead improperly import into the clause limitations it does not contain, and that if applied would deprive the clause of *effet utile*.

925. In support of its argument, the Claimant argues that the "'triple identity' test has been applied by a majority of investment treaty tribunals called upon to interpret fork-in-the-road provisions in investment treaties".[1131] This argument *ad autoritatem* is unavailing. The European Union respectfully invites the Tribunal to

[1128] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 776.
[1129] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 16.
[1130] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 727.
[1131] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 728.

resist pressure to conform with decisions that are easily distinguishable, and therefore provide no guidance. In any event, nothing should diminish the prime importance of the clear and ordinary meaning of the terms actually used in Article 26(3)(b)(i) of the ECT, notably by substituting them for a "triple identity" test devised in a different context and that nowhere appears in the language of that ECT article.

926. As the Claimant points out, a number of arbitral tribunals considering fork-in-the-road clauses have relied on the so-called "triple identity test", requiring strict identity of parties, object and cause of action before admitting that prior pleadings in respect of the dispute in another forum deprive them of jurisdiction. In doing so, these tribunals have improperly imported the "triple identity" test from the *lis pendens* context and superimposed its requirements over the actual language of the fork-in-the-road clauses before them.[1132] As recalled below, such decisions can in any event be distinguished from the present arbitration proceedings as they were rendered in distinct factual contexts and applying differently-worded fork-in-the-road clauses.[1133]

927. As the European Union explained at length in its Memorial on Jurisdiction, the requirement of "triple identity" was not devised in relation to fork in the road clauses and instead has its origin and proper place in relation to the *lis pendens* doctrine.[1134] As the European Union has noted, the *lis pendens* doctrine and fork-in-the-road clauses operate on the basis of different considerations and criteria.

928. As the European Union noted in its Memorial on Jurisdiction, the decision at the origin of the string of decisions was rendered in *Benvenuti & Bonfant v. Congo*.[1135] Ironically, that case did not even involve the application of a fork-in-the-road clause and was instead decided solely on the basis of applying the doctrine of *lis pendens*.[1136] However, it was subsequently cited out of context.

929. Indeed, a number of tribunals subsequently wrongly drew upon the decision in *Benvenuti & Bonfant v. Congo* when faced with applying fork-in-the-road clauses.[1137]

[1132] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 16, 61-62.
[1133] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 60.
[1134] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 60-62.
[1135] **Exhibit RLA-21**, *Benvenuti & Bonfant s.r.l. v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 748, 8 August 1980, 21 I.L.M. 740 (1982).
[1136] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 64.
[1137] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 65. Such tribunals included **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; **Exhibit RLA-23**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, paras. 88-89;

930. The Claimant argues that the Respondent's "attempts to distinguish the multitude of cases that support the use of the 'triple identity' test are unconvincing".[1138]

931. Among such cases, the Claimant attempts to shore up the relevance to the present dispute of three cases involving Argentina as a respondent.[1139] In its Memorial on Jurisdiction, the European Union explained why these cases are of no assistance to this Tribunal. Faced with very similar facts and all arising under the US-Argentina BIT, the tribunals in *CMS v. Argentina*,[1140] *Azurix v. Argentina*[1141] and *Enron v. Argentina*[1142] reached similar outcomes that are entirely distinguishable from the present case, as their facts at issue differ considerably from those at issue in the present dispute.

932. First, contrary to the present dispute, there was no identity of parties between the two proceedings at issue in these Argentinian cases. The claimants in each case were shareholders of, and investors in, Argentinian companies, rather than representatives of the companies themselves. The affected Argentinian companies did not meet nationality requirements under the BIT and therefore could not pursue BIT claims of their own. As shareholders, the claimants in these three disputes exercised their independent rights to pursue a claim under the US-Argentina BIT. This is quite different from the present case, in which in both the ECT and the CJEU proceedings, the parties are identical.

933. Second, contrary to the present dispute, there was no identity either of subject matter or cause of action between the two proceedings in the Argentinian cases. In all three cases, proceedings before Argentinian courts raised substantive arguments and sought relief that failed to overlap in any way with the arguments raised and relief sought in the BIT proceedings. Moreover, the proceedings before Argentinian courts concerned the rights of the Argentinian companies under the relevant contracts, while the BIT claims concerned the rights of the claimant shareholders under the US-Argentina BIT. In the present arbitration proceedings,

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Exhibit RLA-24, *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 97; **Exhibit RLA-25**, *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, 1 July 2004, para. 57; **Exhibit RLA-18**, *Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008; **Exhibit RLA-19**, *Toto Costruzioni Generali S.P.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.

[1138] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 730.

[1139] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 730(i)-730(iii).

[1140] **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, paras. 77-82. *See* European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 66-69.

[1141] **Exhibit RLA-23**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, paras. 88-89. *See* European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 70.

[1142] **Exhibit RLA-24**, *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 97. *See* European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 71.

as described above, both the Claimant's allegations and the relief it seeks are fundamentally the same.

934. The facts of those three cases and their outcomes are therefore entirely distinguishable from those of the present dispute. The proceedings before the Court of the Justice of the European Union and the present arbitration proceedings have been initiated by the exact same party; their causes of action, objects and relief sought are essentially the same (*i.e.* removing the Amending Directive and erasing its effects). For these reasons, the Claimant's attempt at drawing an analogy between the Argentinian cases and the present dispute must fail.[1143] Nor do they provide any secure precedent for applying a rigid "triple identity" test to the present case.

935. The Claimant also vainly attempts to draw support from the decision of the tribunal in the *Occidental v. Ecuador* dispute.[1144] In its Memorial on Jurisdiction, the European Union explained why the facts of that case should be distinguished from those of the present dispute. Again, the tribunal in that case rejected the application of the fork-in-the-road clause in respect of circumstances that differ considerably from those of the present dispute.[1145]

936. In *Occidental v. Ecuador*,[1146] the tribunal notably found that the causes of action in the domestic court proceedings were separate from those before the tribunal; that the nature of the disputes in these respective proceedings was different; and that the two sets of proceedings were complementary. None of these factors are present here.

937. Importantly, the tribunal also found that the investor in the case did not have a real freedom of choice between domestic court and arbitral proceedings: the very short timeframe (20 days) to initiate proceedings under Ecuadorian law forced the investor to initiate such proceedings and should not entail the forfeiting of the right to pursue a BIT claim. No such pressure was exerted upon NSP2AG around the time it chose to institute proceedings before the Court of Justice of the European Union. The Claimant refers to having had "two months and 24 days" to file its application before the Court of Justice of the European Union.[1147] The span of 85 days to weigh whether or not to file an application is four times more time than the claimant had in *Occidental v. Ecuador* and can hardly be said to amount

[1143] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 730(i)-730(iii).
[1144] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 730(v).
[1145] *See* European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 72-74.
[1146] **Exhibit RLA-25**, *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, 1 July 2004, paras. 53, 57-58, 61.
[1147] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 730(v).

to "pressure" or "duress". No analogy can be drawn on that basis between the *Occidental v. Ecuador* case and the present dispute.

938. The Claimant sought support from the decision of the tribunal in *Occidental v. Ecuador* for the proposition 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".[1148] The Claimant in this regard erroneously suggested that the relevant statement of the tribunal in *Occidental v. Ecuador* was a "finding" of the tribunal. Instead, the relevant statement was made in *obiter dicta* and reads as follows: "[t]he characterization of the dispute by the Claimant probably would suffice alone for the Tribunal to reach a determination on jurisdiction". From there, the Claimant fails to account for the actual finding of the tribunal in *Occidental v. Ecuador* that immediately followed his *obiter dicta*:

> But the fact is that this dispute, its contractual aspects aside, involves a number of issues arising from the legislation of Ecuador, the Andean Community legal order and international law, including of course the question of rights under the Treaty. This explains the fact that the Claimant is addressing different questions to different mechanisms of dispute resolution.[1149]

939. Therefore, the tribunal in *Occidental v. Ecuador* lends no support to the Claimant's argument that domestic court proceedings based on domestic law are inevitably different from issues of investor rights under a treaty in arbitration proceedings.

940. It is also worth noting that in *Occidental v. Ecuador*, the tribunal adopted a reasoning that moved away from the "triple identity" test, shifting the focus of its analysis towards the "fundamental legal basis" of the two proceedings and to the nature of the dispute at issue in different domestic court and arbitration proceedings.[1150]

941. The Claimant also tries to establish similarities between the present dispute and the facts in *Pey Casado v. Chile*[1151] and *Toto Construzioni v. Lebanon*,[1152] where

[1148] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 730(vi), citing *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, 1 July 2004, para. 47.
[1149] **Exhibit RLA-25**, *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, 1 July 2004, para. 53. *See* European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 48.
[1150] **Exhibit RLA-25**, *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, Case No. UN 3467, Final Award, 1 July 2004, para. 53. *See* European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 74.
[1151] **Exhibit RLA-18**, *Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008.

claims in the arbitration proceedings and in the local courts or tribunals were fundamentally different, by arguing that "the ECT Proceedings and the CJEU Proceedings are fundamentally different".[1153]

942. As the European Union explained in its Memorial on Jurisdiction,[1154] the tribunals in both *Pey Casado v. Chile* and *Toto Construzioni v. Lebanon* found that even though the applicants were the same, the contractual claims and causes of action pursued in the domestic court proceedings were different to the treaty claims and the causes of action pursued in the arbitration proceedings. These facts differ from those of the court and arbitration proceedings at issue in the present dispute, which does not involve contractual claims and whose parties, causes of action, objects and relief sought are essentially the same.

943. As the European Union explained in its Memorial on Jurisdiction, tribunals in the following cases do not refer to the "triple identity" test but rather, declined to apply the relevant fork-in-the-road clause due to a lack of identity of the parties:[1155] *Olguin v. Paraguay*;[1156] *Lauder v. Czech Republic*;[1157] *LG&E Energy Corp. v. Argentina*;[1158] *BP America v. Argentina*;[1159] and *Total S.A. v. Argentina*.[1160] The findings of these tribunals can therefore be easily distinguished

[1152] **Exhibit RLA-19**, *Toto Costruzioni Generali S.P.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.
[1153] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 730(vii).
[1154] *See* European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 75,-77.
[1155] *See* European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 78.
[1156] **Exhibit RLA-26**, *Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Decision on Jurisdiction, 8 August 2000. The Claimant's comment that the tribunal in this case "implicitly found that one of the elements of the "triple identity" test was not met" is speculative at best: *see* Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, n 1093.
[1157] **Exhibit RLA-27**, *Lauder v. Czech Republic*, UNCITRAL Award, 3 September 2001. In that case, the tribunal considered "that the Respondent's recourse to the principle of *lis alibi pendens* to be of no use, since all the other court and arbitration proceedings involve different parties and different causes of action". The tribunal went on to find that "no possibility exists that any other court or arbitral tribunal can render a decision similar to or inconsistent with the award which will be issued by this [tribunal], i.e. that the [respondent] breached or did not breach the Treaty, and is or is not liable for damages towards [the claimant]" (para. 171). The tribunal further stated that "the risk of conflicting findings is even less possible since the [c]laimant withdrew his two reliefs on the imposition of conditions to the License and the enforcement of such conditions, and only maintained its relief for damages" (para. 172). Therefore, the tribunal placed considerable weight on the risk of conflicting findings between the various court and arbitral proceedings and saw the clear differences in relief sought as a deciding factor. In the present dispute, there is: (i) no difference between the main relief sought in the present arbitration proceedings and the proceedings before the Court of Justice of the European Union (i.e. removing the Amending Directive and erasing its effects); and (ii) a considerable risk of conflicting findings, notably on that very point.
[1158] **Exhibit RLA-28**, *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, 30 April 2004. In that case, the tribunal noted (at para. 75) that the claimants had submitted their investment disputes to ICSID while the Argentinian gas-distribution licensees that the claimants had invested in had themselves resorted to local tribunals.
[1159] **Exhibit RLA-29**, *BP America Prod. Co. v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, para. 157. Contrary to the Claimant's assertion, the tribunal in this case did not explicitly set out or apply the "triple identity" test: *see* Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, n 1093.
[1160] **Exhibit RLA-30**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 443. Contrary to the Claimant's assertion, the tribunal in this case did not explicitly set

from the court and arbitration proceedings at issue in the present dispute, which have both been initiated by exactly the same party against the European Union.

944. In support of its call for the "importing" of a triple identity test, the Claimant further refers to a series of additional cases in which the fork-in-the-road clause in ECT Article 26(3)(b)(i) was at issue.[1161] Again, these cases involved facts that can be easily distinguished from those of the present dispute.

945. In *Yukos v. Russia*,[1162] the impugned proceedings were instituted before the European Court of Human Rights (**ECHR**) by individuals and a corporate entity, none of whom were claimants in the arbitration proceedings under the ECT. As such, that case is fundamentally distinct from that before the present Tribunal, where the same Claimant has brought essentially the same claims against the same Respondent (the European Union) in two different fora at the same time.

946. In *Khan and Cauc v. Mongolia,*[1163] on which the Claimant also relies, the tribunal in fact expressed openness to a more supple approach to the "triple identity" test:

> The Respondents' argument that the test is too strict may have some persuasive force in cases where only one of the requirements of the triple identity test is not satisfied, while the remaining requirements, as well as other aspects of the two disputes are identical.[1164]

947. In any event, the tribunal went on to find that none of the test's three prongs were met. This differs significantly from the present case, where the facts present to the contrary confirm that all three prongs of the test are met, and that a less formalistic and more substantive approach to the application of the ECT's fork-in-the-road clause in Article 26(3)(b)(i) therefore is warranted.

948. In *Charanne BV v. Spain*,[1165] the tribunal also expressed clear openness "to a flexible interpretation of the triple identity test" as put forward in *Pantechniki v. Albania* and in *H & H Enterprises v. Egypt*.

949. In *PV Investors v. Spain*,[1166] the disputing parties *agreed* to the application of the "triple identity" test. As such, it provides no precedent for the present case,

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out or apply the "triple identity" test: *see* Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, n 1093 and para. 734, n 1096.

[1161] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 729.

[1162] **Exhibit CLA-168**, *Yukos Universal Limited (Isle Of Man) v. The Russian Federation*, PCA Case No. AA227, Interim Award on Jurisdiction and Admissibility of 30 November 2009, paras. 4, 591.

[1163] **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.

[1164] **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. 392.

[1165] **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. 404, 408.

where the European Union rejects the relevance of this test as inapposite to the case at hand. The tribunal indeed underlined in its decision that it did "not purport to make any findings on fork-in-the-road clauses in other investment treaties or on the so-called 'triple identity test' generally".

950. In *FREIF v. Spain*,[1167] whose decision was issued subsequently to the filing of the Respondent's Memorial on Jurisdiction, the tribunal acknowledged that "applying the triple identity test is not a requirement when considering a 'fork in the road' provision", citing with approval the decision of the tribunal in *H & H Enterprises v. Egypt*.

951. In sum, distinctions between these cited cases and the present dispute confirm that they provide no guidance when applying the fork-in-the-road clause under ECT Article 26(3)(b)(i) in the present case. In any event, it is not such factual distinctions alone that favour applying the "fundamental basis" test as opposed to the "triple identity" test.[1168] Rather, the justification is that applying the "fundamental basis" test comports best with the language and purpose of ECT Article 26(3)(b)(i). By contrast, the "triple identity" test appears nowhere in the clause, and its improper importation (from a completely different legal context) effectively deprives that Article of its purpose.

952. Accordingly, the European Union invites the present Tribunal to decline to follow the formalistic approach of these early tribunals, but rather to adopt the more substantive, results-driven approach now encouraged in more recent arbitral decisions reviewed above.[1169]

8.1.2.5 In any event, the proceedings before the Court of Justice of the European Union and the present arbitration proceedings meet the "triple identity" test developed in the context of claims of *lis pendens*

953. In any event, as the European Union has explained, this Tribunal should conclude that it is precluded from hearing the present dispute regardless of which test it decides to apply in considering the ECT's fork-in-the-road clause at Article 26(3)(b)(i).

[1166] **Exhibit CLA-177**, *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Preliminary Award on Jurisdiction of 13 October 2014, paras. 305, 341.
[1167] **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. 419.
[1168] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 730(v), 730(vii), 734.
[1169] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 41, citing **EXHIBIT RLA-9**, *H&H Enters. Invs., Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/09/15, Award, 6 May 2014, para. 367. European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 43, citing **EXHIBIT RLA-11**, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, para. 330.

954. This is because in its Memorial on Jurisdiction and as briefly recalled in the following sub-sections, the European Union has demonstrated that the proceedings before the Court of Justice of the European Union and the present arbitration proceedings meet the "triple identity" test developed in the context of claims of *lis pendens*.[1170]

955. In its Counter-Memorial on Jurisdiction, the Claimant considers that "none of the three elements of the 'triple identity' test is satisfied and the EU's fork-in-the-road objection fails".[1171] (Emphasis in the original.) The Claimant argues that: (i) there is "no identity of cause of action between the ECT arbitration and the CJEU Proceedings";[1172] (ii) there is "no identity of object – or *petitum* – between the ECT arbitration and the CJEU Proceedings";[1173] and (iii) there is "no identity of parties".[1174] For the reasons set out in the sub-sections that follow, the Claimant is wrong on all counts.

8.1.2.5.1 Identity of parties

956. In its Counter-Memorial on Jurisdiction, the Claimant argues that the respondent in the present arbitration proceedings is the EU, while the respondents in the proceedings before the Court of Justice of the European Union are two specific institutions of the EU: the Council of the European Union and the European Parliament, as "co-legislators in the EU framework".[1175]

957. The Claimant's suggestion that it implicitly intended to subtract from the European Union two of its most fundamental constituent parts (*i.e.* European Parliament and the Council of the European Union) when identifying the European Union as Respondent in the present arbitration proceedings is untenable. The ECT investment dispute has been brought against the European Union, which is party to the ECT. The Commission, Council and Parliament are the central institutions in the legislative work of the Union. The Amending Directive has been adopted by the Council and the Parliament on a proposal by the Commission, in line with the ordinary legislative procedure set out in Articles 289 and 294 of the TFEU. Given that the Council and the Parliament as co-legislators adopted the Amending Directive, it is logical that they are the respondents before the CJEU.

[1170] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 82-122.
[1171] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 737.
[1172] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 739.
[1173] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 743.
[1174] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 752.
[1175] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, n 1092, paras. 752, n 1118.

958. In its Memorial on Jurisdiction, the European Union explained that the parties to the case before the CJEU and to the present arbitration proceedings are identical. Switzerland-based Nord Stream 2 AG is both the applicant to the case before the CJEU and the claimant to the present arbitration proceedings.[1176] The Defendants in the case before the CJEU are the European Parliament and the Council of the European Union, the legislators of the European Union. The arbitration proceedings are also brought against the European Union and the European Commission is institutionally in charge of responding to arbitration proceedings brought against the European Union.

8.1.2.5.2 Identity of object

959. In the present arbitration proceedings, NSP2AG essentially requests that the Amending Directive be removed and that its effects be erased.[1177]

960. In the proceedings before the Court of Justice of the European Union, NSP2AG essentially seeks the annulment of the Amending Directive.[1178]

961. As the European Union explained in its Memorial on Jurisdiction,[1179] and has reviewed in Section 8.1.2.3 above, the object of the present arbitration proceedings and of the proceedings before the Court of Justice of the European Union is therefore the same.

962. The Claimant's argument that "[a]n award in favour of NSP2AG would only affect NSP2AG's legal position", while an outcome to the proceedings before the CJEU that is favourable to NSP2AG would "have *erga omnes* effect", is without any merit for present purposes.[1180] The annulment of the Amending Directive and the removal of the Amending Directive amount to the same outcome for NSP2AG.

8.1.2.5.3 Identity of cause of action

963. As explained in Section 8.1.2.3 above and in detail in its Memorial on Jurisdiction,[1181] the Claimant's case before this Tribunal, as well as its case before the CJEU, can be summed up as relating to alleged: (i) discrimination; and (ii) undermining of NSP2AG's investment in the Nord Stream 2 pipeline project.[1182] This is not, as the Claimant alleges, a mere "superficial similarity between the

[1176] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 85.
[1177] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 57, citing Notice of Arbitration, paras. 3, 52 and Claimant's Memorial, 3 July 2020, paras. 30, 486, 503, 507, 511 and 527(vi).
[1178] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 58, citing **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, p. 71.
[1179] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 86-87.
[1180] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 743.
[1181] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 88-121.
[1182] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 49-51.

manner in which NSP2AG's claims in the CJEU Proceedings, and the claims for breach of the ECT in this arbitration, are expressed". The European Union has not simply "pluck[ed] 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".[1183] Rather, consistent with the EU's substantive approach to these issues, the European Union has identified the core of the allegations in both proceedings, and demonstrated them to be the same.[1184]

964. Indeed, it is instead the Claimant that has engaged in a cursory identification of a limited number of references to the ECT in its Application for Annulment before the CJEU as (unconvincing) evidence of the alleged lack of overlap between the court proceedings and the present arbitration proceedings.[1185] Consistent with our arguments above, the mere fact of a limited reference to the ECT in the context of proceedings before the CJEU for a specific purpose does not alter the fundamental alignment of substantive allegations between the present arbitration proceedings and the proceedings before the Court of Justice of the European Union.

8.1.2.6 Conclusion

965. As set out above, the Claimant has failed to comply with Article 26(3)(b)(i) of the ECT. Consequently, the European Union has not consented to the present arbitration proceedings and the Tribunal lacks jurisdiction to hear this claim.

8.2 The Tribunal lacks jurisdiction *ratione personae*

8.2.1 Introduction

966. In its Memorial on Jurisdiction, the European Union demonstrated that the Tribunal has no jurisdiction *ratione personae* with regard to the Claimant's claims, given that: (i) the Amending Directive can impose no obligations on the Claimant; (ii) the alleged breaches of the ECT, and the alleged ensuing damages, cannot result from the Amending Directive; (iii) such hypothetical breaches and damages theoretically can only flow from potential measures of EU Member States within the margin of discretion according to them by EU law; and (iv) such

[1183] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 749.
[1184] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 749.
[1185] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 677.

measures of EU Member States cannot be attributed to the European Union under international law.[1186]

967. In its Counter-Memorial on Jurisdiction, the Claimant argues in response that the Tribunal has jurisdiction *ratione personae* and that its claims are properly attributed to the European Union, alleging that: (i) the legal effect of the Amending Directive as a matter of EU law is irrelevant to the question of the Tribunal's jurisdiction;[1187] (ii) the European Union's objection to the Tribunal's jurisdiction *ratione personae* fails to reflect the European Union's actions;[1188] (iii) the European Union's jurisdictional objections are inconsistent;[1189] (iv) the breaches of the ECT the Claimant cites are attributable to the European Union as a matter of international law;[1190] (v) its claim is solely based on impacts attributable to the European Union;[1191] (vi) the European Union's responsibility arises as a result of its overall conduct, not simply the impact of the Amending Directive;[1192] (vii) the European Union's responsibility for the impact of the Amending Directive on the Nord Stream 2 pipeline and NSP2AG is clear from the ECT;[1193] (viii) Germany was obliged to implement the Amending Directive in a way that gave rise to the violations of the ECT;[1194] and (ix) NSP2AG's position in the German Proceedings and in the present arbitration proceedings is not inconsistent.[1195]

968. In this Reply Memorial on Jurisdiction, the European Union demonstrates that the Claimant has failed to provide any compelling response to its jurisdictional objection *ratione personae*. The European Union will address these arguments in the remainder of this Section to demonstrate that: (i) the European Union's objection to the Tribunal's jurisdiction *ratione personae* is appropriate, genuine and coherent with its jurisdictional objection based on the ECT's fork-in-the-road clause (Section 8.2.2.1); (ii) the "practical effects" alleged by the Claimant may not flow from the Amending Directive, but rather, may only flow from measures (including both actions and omissions) of the EU Member States in transposing and implementing the Amending Directive (Section 8.2.2.2); (iii) EU Member States have a wide margin of discretion to implement the relevant provisions of the EU Directive challenged by the Claimant (Section 8.2.2.3); (iv) the alleged

[1186] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 4.
[1187] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 796-800.
[1188] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 801-806.
[1189] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 807-813.
[1190] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 335-351.
[1191] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 377-384.
[1192] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 352-356.
[1193] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 357-363.
[1194] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 364-373.
[1195] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 374-376.

breaches may only result from measures which cannot be attributed to the European Union (Section 8.2.2.4); and (v) the European Union is not otherwise responsible for the alleged breaches of the ECT in accordance with international law (Section 8.2.2.5).

8.2.2 The Claimant Has Failed to Provide any Compelling Response to the EU's Juridictional Objection *Ratione Personae*

8.2.2.1 The European Union's objection to the Tribunal's jurisdiction *ratione personae* is appropriate, genuine and coherent with its jurisdictional objection based on the ECT's fork-in-the-road clause

8.2.2.1.1 The European Union's objection to the Tribunal's jurisdiction *ratione personae* is appropriate

969. In its Counter-Memorial on Jurisdiction, the Claimant argues that the European Union's jurisdictional objection *ratione personae* is flawed in that "[t]he 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".[1196]

970. To the contrary, the Tribunal's analysis of its jurisdiction *ratione personae* necessarily must rely on an analysis of the underlying facts of the claim, which squarely include consideration of the margin of discretion EU Member States enjoy, *as a matter of EU law*, to implement any given EU Directive.

971. In the present case, it is the European Union's position that *as a matter of EU law*, the Amending Directive has no direct impact on the Claimant. Instead, the alleged impacts of any measures complained of by the Claimant necessarily could only flow from decisions taken by EU Member States both with regard to the implementation of the Amending Directive in their respective domestic laws, and from the actual application of such domestic laws to particular cases, including that of the Claimant.

972. Thus, the "margin of discretion" enjoyed by Member States (*as a matter of EU law*) is squarely relevant to the issue of jurisdiction *ratione personae* before the Tribunal, and indeed to the parallel issue of attribution of Member State measures to the European Union.

8.2.2.1.2 The European Union's objection to the Tribunal's jurisdiction *ratione personae* is genuine and in line with its overall conduct

973. In its Counter-Memorial on Jurisdiction, the Claimant contends that the EU "recognises" that the Claimant's claim is properly brought against the EU, in

[1196] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 797, 800.

respect of the conduct of the EU in connection with the Amending Directive, and that the European Union's jurisdiction *ratione personae* objection is "contrived" for the purposes of these proceedings. The Claimant argues that "[t]he EU's actions have been consistent with a position that it is in fact the proper respondent".[1197]

974. More specifically, the Claimant first alleges that the European Union did not inform NSP2AG that Germany would act as a respondent to the dispute within 60 days from the date of the Trigger Letter, or at all.[1198] The Claimant considers that at all times until the receipt by NSP2AG of the EU's Jurisdiction Memorial on 15 September 2020, the European Union "held itself out to be the proper respondent to this arbitration".[1199]

975. Second, the Claimant alleges that the European Union's "actions in relation to the Financial Responsibility Regulation demonstrate that it considered itself to be the proper respondent".[1200] The Claimant argues that the European Commission "accepted that it should act as the respondent in the circumstances of this arbitration" in a report of the Commission to the European Parliament and to the Council.[1201]

976. Third, the Claimant alleges that the European Union'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", and based this allegation on the composition of the EU delegation and its representations during the consultations.[1202]

977. Fourth, the Claimant attempts to infer support for its position from its allegation that there was no suggestion in the European Union's Response to the Notice of Arbitration that it intended to contest the Tribunal's jurisdiction *ratione personae*.[1203]

978. None of these arguments are availing. As to (i), the Claimant's Notice of Arbitration did not set out the Claimant's claims in a sufficiently clear fashion for the European Union to fully grasp their nature and implications. As soon as the Claimant filed its Memorial, it became clear to the European Union that it had to

[1197] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 801.
[1198] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 802(iv).
[1199] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 802(iv).
[1200] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 803.
[1201] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 803, citing **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.
[1202] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 804.
[1203] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 805.

raise an objection to the Tribunal's jurisdiction *ratione personae*. As to (ii) and (iii), the mere fact of responding to a notice of claim is obviously without prejudice to whether in the EU's view the claim is properly brought against it. Nothing in the referenced report to the European Parliament and to the Council suggested that the European Union accepted the Tribunal's jurisdiction *ratione personae* in this matter. And as to (iv), the EU has put forward notice of its objections as to jurisdiction within the times permitted under the rules applicable in the present arbitration.

8.2.2.1.3 The European Union's objection to the Tribunal's jurisdiction *ratione personae* is coherent with its jurisdictional objection based on the ECT's fork-in-the-road clause

979. The Claimant argues that the European Union's jurisdictional objections are inconsistent in two ways.[1204]

980. First, the Claimant argues that at the same time as the European Union predicates its fork-in-the-road objection on being the proper respondent to the present arbitration proceedings, the European Union also seeks to deny that it is the proper respondent in these same ECT proceedings through its jurisdictional objection *ratione personae*.[1205]

981. This argument is without substance. The European Union is within its rights to rely on the Claimant's failure to respect the fork-in-the-road clause of the ECT as an alternative and wholly dispositive objection to the Tribunal's jurisdiction in the present proceedings. This is without prejudice to the European Union's equally dispositive objection that it in any event no measure adopted by and / or attributable to it resulted in the hypothetical impacts alleged by the Claimants, thus depriving the Tribunal of jurisdiction *ratione personae*.

982. Second, the Claimant alleges that in arguing its jurisdictional objection based on the ECT's fork-in-the-road clause, the European Union 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 proceedings before the Court of Justice of the European Union (**CJEU**) for breach of EU law. By contrast, the European Union's arguments regarding its jurisdictional objection *ratione personae* allegedly "confine" the Claimant's allegations of breach of the ECT to only the "practical

[1204] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 807-813; **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; **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.
[1205] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 809.

effects" of the Amending Directive having been implemented and applied by Germany, which "neglects" the Claimant's allegations of breach of the ECT by the EU in connection with the passing of the Amending Directive.[1206]

983. Again, this objection is without any substance. Application of the fork-in-the-road clause necessarily depends on comparison of the two sets of overlapping substantive claims the Claimant itself has put forward in two parallel proceedings, in violation of the fork-in-the-road clause under the ECT. This is of course without prejudice to the European Union's demonstration that in any event, the Claimant's allegations misattribute certain effects to the European Union, which instead flow (if at all) from decisions of Member States acting in accordance with their own competences within the margin of discretion accorded to them by EU Law.

984. Indeed, it is the Claimant that by contrast has pleaded in a fundamentally inconsistent manner, by launching active proceedings against both the EU and against Germany at the same time in respect of the same alleged measures. In its Counter-Memorial on Jurisdiction, the Claimant argues that the Claimant had brought proceedings in Germany "as a matter of prudence" in order to avoid any suggestion that it had failed to take all possible steps to avoid the impact of the Amending Directive on its investment, in an attempt to mitigate the harm caused by the Amending Directive.[1207] The Claimant states that it should not be criticised for seeking to pursue every legal avenue in order to address the effects of the EU's legislation.

985. The EU's point in this regard is that the Claimant cannot in good faith argue two separate and obviously contradictory propositions as allegedly "true" at the same time, in two different fora or at all. Either the Claimant believes the measures at issue are attributable to the EU, and therefore pursues the present claim; or it believes the measures are attributable to Germany, and pursues the claims there. The Claimant's decision to fight on all fronts simultaneously notwithstanding such contradictions simply confirms that its strategy of attrition incidentally reinforces the EU's objections, stated elsewhere, regarding the abusive nature of the present proceedings.

8.2.2.2 The "practical effects" alleged by the Claimant may not flow from the Amending Directive, but rather, may only flow (if at all) from measures (including both

[1206] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 810-811.
[1207] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 374-376.

actions and omissions) of the EU Member States in transposing and implementing the Amending Directive

986. In its primary submissions, the EU noted that the alleged "practical effects" of the Amending Directive, as claimed by the Claimant, are speculative, baseless, and in any event might only flow, if at all, from measures of an EU Member State in implementing the Amending Directive within the scope of its discretion. As the EU noted, relying on *Flemingo Duty Free Shop Private Limited (India) v. Republic of Poland*[1208] and *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*[1209] the Tribunal therefore lacks jurisdiction *ratione personae* to rule on the dispute. In this regard, the EU demonstrated that the allocation of competences between the EU and its Member States is governed by the "principle of conferral"[1210] stipulated in Article 5.2 TEU[1211]. The Amending Directive clearly falls within one of the areas where competence is, in principle, "shared"[1212] between the EU and the Member States, namely "energy".[1213] EU institutions do not have the power to impose the type of legal act to be adopted in each case by a Member State. Instead, EU Member States can enjoy a wide margin of discretion to implement EU Directives. Where (as here) such margin of discretion exists, a Directive cannot itself breach the ECT. In light of this, the Claimant's allegation that "[t]he Amending Directive fundamentally undermines NSP2AG's investment in the Nord Stream 2 pipeline project (an investment made in large part in the EU), and threatens its very future as a company"[1214] can only be directed towards measures potentially adopted by any given EU Member State in the exercise of its discretion to transpose and to implement the Amending Directive.

987. In its Counter-Memorial on Jurisdiction, the Claimant contends in response that EU actions in connection with a Directive or Decision can give rise to liability of the EU, as a REIO under the ECT,[1215] for breach of its international obligations.[1216] The Claimant argues that ECT Article 1(3) implicitly addresses the

[1208] **Exhibit RLA-37**, *Flemingo Duty Free Shop Private Limited (India) v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, para. 481.
[1209] **Exhibit RLA-38**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 91.
[1210] Article 5.1 TEU (**Exhibit RLA-39**); European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 129, 133.
[1211] Article 5.2 TEU (**Exhibit RLA-40**); European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 129.
[1212] Articles 2.2 and 4 TFEU (**Exhibit RLA-43**) and (**Exhibit RLA-44**).
[1213] The Gas Directive is based on Articles 47(2), 55 and 95 ECT, all relating to the establishment of the EU internal market. The Amending Directive is based on Article 194(2) TFEU, which belongs to Title XXI of Part III (entitled "Energy"). Both the "internal market" and "energy" are areas of "shared" competence between the Union and the Member States. See Article 4.2 (a) TFEU and Article 4.2 (i) TFEU, respectively (EXHIBIT RLA-44).
[1214] Claimant's Memorial, 3 July 2020, para. 4.
[1215] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 359.
[1216] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 359-362. The Claimant in this regard relies on: ECT Article 1(3) (**Exhibit CLA-1**) (Claimant's Reply Memorial & Counter-

EU's international responsibility in cases where a Member State is *bound* to implement EU law.[1217] The Claimant further argues that where a Member State breaches the ECT by doing something *required* by EU law, international responsibility lies with the EU.[1218]

988. The Claimant's response wholly misses the point. The EU has never argued that a Tribunal could never have jurisdiction over the EU, under the ECT as a REIO, or that its liability may never be engaged by a Directive. Instead, the EU notes that the analysis of the impact of a Directive must always proceed on a case by case basis. Moreover, it is circular to argue that the analysis of jurisdiction starts with the ECT itself. In order to apply the notion of jurisdiction *ratione personae* in the ECT, the Tribunal must determine (as a question of fact) whether under EU law a margin of discretion applied in the adoption and application of a Directive, or whether a specific outcome in a particular case was required by that Directive. The latter is clearly untrue in the present case, for reasons recalled below.

989. Beyond this, the Claimant advances the argument that the EU's responsibility also arises as a result of its "overall conduct", not simply the impact of the Amending Directive.[1219] In this regard, the Claimant relies on the EU's conduct through the process of adoption of the Amending Directive, alleging *this conduct itself* amounted to a violation of the ECT.[1220] The Claimant asserts that Germany cannot be blamed as the dispute therefore precedes Germany's involvement and the implementation of the Amending Directive, notably in that:

- The Commission initiated the Proposal for the Amending Directive;[1221]

Memorial on Jurisdiction, 25 October 2021, para. 360); 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 (**Exhibit CLA-139**) (Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 362); **Exhibit CLA-212**, P.T. Stegmann, Chapter 3.2 – "International Responsibility for Breaches of EU IIPAs under Leges Speciales" (Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 360); **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 (Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 359); **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 (Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 362); **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary*, ISCID Case No. ARB/07/19, Award of 25 November 2015 (Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 360); Comprehensive and Economic Trade Agreement between the EU and Canada, Article 8.21 (**Exhibit CLA-134**) (Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 362).

[1217] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 360(iii).

[1218] **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary*, ISCID Case No. ARB/07/19, Award of 25 November 2015; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 360.

[1219] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, paras. 352-356.

[1220] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, paras. 352, 355.

[1221] Claimant's Memorial, 3 July 2020, Section VI.7; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 355.

- The Commission drafted the text of the Amending Directive, including Article 49a[1222]; and
- The EU decided, in order to accelerate the legislative progress, that no impact assessment was required and failed to engage in the normal consultation process.[1223]

990. The Claimant argues that the EU cannot pass on responsibility for these measures to Germany or to any other third party.[1224]

991. None of these further arguments have any merit. The mere fact that the EU adopted an amending framework of general application, intended to clarify *erga omnes* the scope of application of a framework for regulating the supply of services in the European Union does not thereby render the EU responsible for the exercise of Member State discretion as they decide how to implement that Directive in their respective national laws, or how to apply it in any particular case.

992. As for the drafting of Article 49a, as the EU has noted, it is typical and indeed necessary for a Directive to include transitional provisions regarding their conditions of applicability, including the timing of such applicability; and in any event, such provisions do not preclude a range of independent decisions regarding potential application of the national laws implementing such provisions.

993. Finally, the EU legislative process itself has no direct impact on any private party, and therefore cannot engage the EU's responsibility under the ECT or otherwise under international law.

8.2.2.3 The EU Member States have a wide margin of discretion to implement the relevant provisions of the EU Directives challenged by the Claimant

994. In its Counter-Memorial on Jurisdiction, the Claimant also argues as a factual matter that the EU cannot rely on Germany's role in implementing the Amending Directive, as (in the Claimant's submission) Germany was *obliged* to implement the Amending Directive by the EU in a way that gave rise to the violations of the ECT.[1225] In this regard, the Claimant[1226] points to Article 49a of the Amending

[1222] Claimant's Memorial, 3 July 2020, para 240; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 355; **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 lines to and from third countries completed or under construction before…" (emphasis in original)).
[1223] Claimant's Memorial, 3 July 2020, paras 250-251; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 355.
[1224] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 353.
[1225] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 371.
[1226] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, paras. 364-373, pp. 139-143.

Directive,[1227] Bundesnetzagentur decision on NSP2AG's derogation application,[1228] Opinion of Advocate General Bobek (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*),[1229] *Nord Stream 2 AG v. Bundesnetzagentur*,[1230] and *European Commission v. Federal Republic of Germany supported by Kingdom of Sweden.*[1231]

995. The Claimant further argues that the EU's assertion of a "wide margin of discretion" ignores the fact that Germany in effect lacked such discretion in all respects relevant to this arbitration.[1232]

996. The Claimant also argues that the phrase, "completed before 23 May 2019", in Article 49a, which is central to this argument, has an objective meaning that Germany must apply.[1233]

997. The Claimant's arguments deliberately sidestep the multiple points at which Germany and other Member States may exercise discretion in their adoption of the Amending Directive and in its application to any specific case. In this regard, the EU has pointed to the provisions of the Gas Directive and the Order of the General Court of 20 May 2020, Case T-526/19, *Nord Stream 2 AG v Parliament and Council.*[1234] As the EU has noted, the Amending Directive establishes a legal framework for the operation of gas transmission lines between a Member State and a third country. The Amending Directive allows Member States to modulate the application of key components of the Gas Directive, including through choice of unbundling models[1235], tariff setting and approval[1236], and exemptions.[1237] The Amending Directive further authorises Member States to maintain existing international agreements between a Member State and a third country relating to the operation of a transmission line between that Member State and the third

[1227] **Exhibit CLA-3**, Amending Directive, Article 49a; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 371.
[1228] **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's derogation application, 15 May 2020; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 366.
[1229] **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; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, paras. 364-366.
[1230] **Exhibit CLA-196**, Nord Stream 2 AG v. Bundesnetzagentur, Decision of the Oberlandesgericht (Higher Regional Court) Düsseldorf of 25 August 2021; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 366.
[1231] **Exhibit CLA-213**, *European Commission v. Federal Republic of Germany supported by Kingdom of Sweden*, Judgment, 2 September 2021; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 368.
[1232] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, para. 364.
[1233] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, paras. 365-368, 371.
[1234] **Exhibit RLA-3**, Order of the General Court of 20 May 2020, Case T-526/19, Nord Stream 2 AG v Parliament and Council, para. 122; European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 172.
[1235] Article 9 of the Gas Directive.
[1236] Article 41 of the Gas Directive.
[1237] Article 36 of the Gas Directive.

country, notwithstanding the EU's exclusive competences.[1238] In addition, the Amending Directive sets up a procedure for authorising Member States to amend, extend, adapt, renew or conclude an agreement on the operation of a transmission line with a third country concerning matters falling, entirely or partly, within the scope of the Gas Directive.[1239]

8.2.2.4 The alleged breaches result may only result from measures which cannot be attributed to the European Union

998. The Claimant in its initial submissions acknowledged that the Amending Directive does not discriminate *de jure* against Nord Stream 2. Rather, the Claimant based its discrimination-related claims on the allegation that "the practical effect of the Amending Directive" is that "Nord Stream is the only pipeline impacted".[1240]

999. In response, the EU noted that the Claimant seeks to substantiate this alleged "practical effect" by reference to various individual decisions of specific Member States regarding derogations requested pursuant to the national provisions transposing Article 49a of the Amending Directive: for example, German Law implementing the Gas Directive[1241], German law implementing the Amending Directive,[1242] Bundesnetzagentur decision on NSP2AG's Derogation Application,[1243] European Commission Decision in "Case M.9851",[1244] and Italian legislative decree no. 46 of 1 June 2020.[1245] As the EU noted, the Member State decisions to which the Claimant refers include the decisions taken by the German authorities with respect to Nord Stream 1 and Nord Stream 2, as well as the decisions of the Italian and the Spanish authorities with respect to other offshore pipelines.[1246]

[1238] Article 49b (1) of the Gas Directive.
[1239] Article 49b (2) to (15).
[1240] Title of section VI.11 of the Claimant's Memorial, 3 July 2020. This "practical effect" is invoked, for instance, in paras. 365, 381 ii, 390, 400, 407, 408, 411, 427, 439 iii, 444, and 462.
[1241] **Exhibit RLA-60**, German Law implementing the Gas Directive of 26 July 2011; (European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, para. 176).
[1242] **Exhibit CLA-47,** German law implementing the Amending Directive of 5 December 2019 (11 December 2019); (European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, , para. 176).
[1243] **Exhibit CLA-17**, Bundesnetzagentur decision on NSP2AG's Derogation Application, 15 May 2020, Section 2.2.3; (European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 179-180).
[1244] **Exhibit CLA-24,** European Commission Decision, "Case M.9851 – Naturgy / Sonatrach / Blackrock / Medgaz: Article 6(1)(b) Non-Opposition", 17 June 2020.
[1245] Italian legislative decree no. 46 of 1 June 2020 implementing the Amending Directive, Official Gazette of the Republic of Italy (Decreto Legislativo 1° giugno 2020, n. 46. Attuazione della direttiva (UE) 2019/692 del Parlamento europeo e del Consiglio, del 17 aprile 2019, che modifica la direttiva 2009/73/CE del Consiglio, relativa a norme comuni per il mercato interno del gas natural), General Series No. 145, 9 June 2020.
[1246] Claimant's Memorial, 3 July 2020, paras. 261-269.

1000. As confirmed by the EU General Court[1247], these decisions involve the exercise of wide discretion by the competent national authorities of the Member States in question. Moreover, measures of Germany in implementing the Amending Directive, in the exercise of its discretion, are not "attributable" to the EU within the meaning of Article 4 of the International Law Commission (ILC)'s Draft Articles on the Responsibility of International Organizations (ARIO)[1248]. Instead, they are "attributable" solely to Germany.

1001. The Claimant now alternatively responds by arguing that NSP2AG's claim is solely based on impacts "attributable" to the European Union.[1249] The Claimant in this regard alleges that the extraneous factors mentioned by the European Union including (i) the presence of U.S. sanctions and (ii) Gazprom's export monopoly in Russia, do not affect the Claimant's arguments regarding the EU's breaches of the ECT.[1250] Again, these arguments are unavailing for the reasons set out in Sections 6.5 and 6.6, respectively.

8.2.2.5 The European Union is not otherwise responsible for the alleged breaches of the ECT in accordance with international law

1002. In parallel with its arguments in favour of jurisdiction *ratione personae*, the Claimant alleges that the breaches of the ECT are attributable to the European Union as a matter of international law.[1251] The Claimant in this regard argues that the European Union is a Regional Economic Integration Organization (REIO) as defined in ECT Article 1(3) and a Party to the ECT that has assumed the same obligations as State Parties to the ECT.[1252]

1003. The Claimant further seeks to rely on ARIO Article 6 as support for the proposition that "the conduct of the European Union's organs and agents is considered to be an act of the European Union under international law."[1253]

1004. The Claimant argues that in transposing and implementing the Amending Directive, the German legislature, BNetzA and German courts can be regarded as

[1247] **Exhibit RLA-3,** Order of the General Court of 20 May 2020, Case T-526/19, Nord Stream 2 AG v Parliament and Council, para. 122.
[1248] **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. Available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf
[1249] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 377-384.
[1250] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 377.
[1251] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 335-351.
[1252] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 336-337.
[1253] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 341.

"organs" of the European Union for the purposes of ARIO Article 6 and Articles 4 and 6 of the ARSIWA.[1254]

1005. The Claimant attempts to invert the finding in *Electrabel S.A. v. Hungary*,[1255] which found that Hungary's liability under the ECT could not be triggered for an act required by EU law, to argue the converse proposition: that "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".[1256]

1006. Again, none of these arguments advance the Claimant's case. Its argument with respect to REIO is circular: as noted above, the question is not whether the European Union may be responsible in principle under the ECT as a REIO, but rather, whether in the specific context of this case, based upon the factual matrix the European Union has described, it is ultimately "responsible" for the measures directly affecting the Claimant. Based upon the specific facts of this case, the decisions of Member States in the transposition into domestic law of the Amending Directive, and in its application in any specific case (including vis-à-vis the Claimant), are not in the responsibility of the European Union, but of that Member State.

1007. The Claimant's attempted reliance upon the principles of ARIO also does nothing to further its case. As the European Union has acknowledged, ARIO provides that an international organisation may be held responsible, under certain circumstances, for conduct that is not attributable to that organisation but to a State which is a member of the international organisation.[1257] However, since the adoption of the Amending Directive constitutes neither, "aid or assistance"[1258], "coercion"[1259], "direction and control"[1260], "circumvention"[1261], nor an "internationally wrongful act"[1262], responsibility under ARIO is not engaged in this regard.

1008. The argument of alleged "agency" under ARIO is equally unavailing. Member States and their national institutions, when determining in the exercise of their discretion how to transpose and apply the Amending Directive, were not acting as

[1254] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 345-347.
[1255] **Exhibit RLA-127**, *Electrabel S.A. v. Republic of Hungary*, ISCID Case No. ARB/07/19, Award of 25 November 2015; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 360.
[1256] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 351.
[1257] Article 2.2 TFEU.
[1258] **EXHIBIT RLA-61**, Article 14 ARIO.
[1259] **EXHIBIT RLA-61**, Article 16 ARIO.
[1260] **EXHIBIT RLA-61**, Article 15 ARIO..
[1261] **EXHIBIT RLA-61**, Commentary to Article 17 ARIO, at (3).
[1262] **EXHIBIT RLA-61**, Commentary to Article 15 ARIO, at (4).

"agents" of the EU, but rather as independent actors within the exercise of their national competencies. The Amending Directive is binding upon Member States as to the result to be achieved. However, Member States enjoy wide discretion to transpose and to implement the EU Directives in ways that would not result in the breaches of the ECT alleged by the Claimants. In the circumstances, ARIO is not engaged.

1009. The same reasoning applies to the allegation various German institutions were "organs" of the EU: to the contrary, they were and are exercising their independent right of action within the margin of discretion accorded to them under both EU and domestic law.

1010. In this sense, the Amending Directive did not "legally bind" Member States to exercise their discretion in a particular manner. As such, the reasoning derived from *Electrabel* is equally inapposite.

9 THE RELIEF SOUGHT BY THE CLAIMANT IS INAPPROPRIATE

9.1 Introduction

1011. In its Memorial, and its Reply, the Claimant repeatedly requests as its "primary relief" that the Tribunal order the European Union "by means of its own choosing", to "remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive" to NSP2AG and Nord Stream 2, "thus restoring the position that would have existed but for the [EU's] breaches of the ECT."[1263]

1012. In its Counter-Memorial, the EU highlighted that the Claimant's request for relief was nothing more than a request for an interim and permanent injunction preventing the EU from applying a generally applicable legislative measure.[1264] The EU argued that this request is wholly inappropriate as a matter of international law and investment arbitration practice, and would amount to an extraordinary and unprecedented incursion into the European Union's right to regulate to promote public welfare objectives.[1265] The EU demonstrated that the Claimant's relief lacks any secure foundation in general public international law, or under the ECT. Furthermore, even if such power to grant an interim or final injunction of the kind requested did exist (*quod non*), the Claimant had manifestly failed to meet the conditions for it to be granted.[1266]

[1263] *See*, *e.g.*, Claimant's Memorial, 3 July 2020, para. 486; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 817.
[1264] European Union Counter-Memorial on the Merits, 3 May 2021, para. 702.
[1265] European Union Counter-Memorial on the Merits, 3 May 2021, para. 703.
[1266] European Union Counter-Memorial on the Merits, 3 May 2021, para. 704.

1013. In its Reply, the Claimant fails to overcome these fundamental hurdles. For the most part, the Claimant repeats its earlier arguments and cites to the same legal authorities the Respondent has already addressed in its Counter-Memorial. In particular, the Claimant continues to studiously avoid referring to its request for relief as an injunction, claiming that the EU's characterization as such is "inaccurate and irrelevant."[1267] To the contrary; the Claimant's attempts to characterize its argument as one of a "primary remedy" instead of an injunction is a vain attempt to garner more support for its argument under international law. This transparent attempt must be rejected. To the extent that the Claimant has elaborated upon its initial arguments, the EU will address them in the remainder of this Section to demonstrate: (1) issuing an injunction remains an inappropriate remedy under international law with respect to investor-State disputes (Section 9.2); (2) the Claimant has failed to demonstrate that this Tribunal has the power to grant a final injunction under the ECT and principles of investment law (Section 9.3); and (3) even if the Tribunal did hold such power (*quod non*), the Claimant has failed to sustain its claims even on its own (inaccurate) standards (Section 9.4).

1014. Finally, for the first time the Claimant also makes a request for "alternative relief" in the form of an interim injunction. However, the Claimant does not seriously try to sustain its arguments, and simply refers back to its earlier arguments with respect to a final injunction. As explained in the Counter-Memorial and in Section 9.5 below, this attempt must be rejected.

9.2 The relief sought by the Claimant is inappropriate as a matter of international law

1015. The Claimant seeks to ground its request for a final injunction in the principle of full reparation, in a manner it argues is "clearly established under international law".[1268] In support of this claim, the Claimant relies on the *Chorzów Factory* case and the ILC Articles on State Responsibility.[1269]

1016. However, as the EU demonstrated in its Counter-Memorial, and as elaborated upon below, the Claimant's reliance on these international legal authorities is misplaced. Principles of international law developed in the State-to-State context cannot be transposed *in toto* to investment arbitration proceedings between a private entity and a State. This is expressly acknowledged in both the *Chorzów*

[1267] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 817.
[1268] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, p. 285.
[1269] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, Part XI.2 and XI.3.

Factory case and the ILC Articles on State Responsibility, as outlined in detail in the remainder of this part.

9.2.1 The *Chorzów Factory* case does not provide support for the Claimant's request for a final injunctive remedy in an investor-State dispute

1017. In its Memorial, the Claimant argued that its request for a permanent injunction was supported by the "basic guiding principle of reparation, for all internationally-wrongful acts" as set out by the Permanent Court of Justice ("PCIJ") in the *Chorzów Factory* case.[1270]

1018. In the Counter-Memorial, the EU recalled that while *Chorzów Factory* sets out general remedial principles for a breach of international law, it fails to address when the specific remedy of restitution is appropriate, or the conditions of its application.[1271] Accordingly, the EU argued, merely citing the findings in *Chorzów Factory* does not provide any support for the Claimant's request in the investor-State dispute context.[1272]

1019. In its Reply, the Claimant asserts that the EU accepts that *Chorzów Factory* "sets out general remedial principles"[1273] and fails to rebut the Claimant's argument that restitution is the "primary remedy" for a breach of international law.[1274] Further, the Claimant asserts, these principles have been applied by "many" investor-State tribunals.[1275]

1020. The Claimant's arguments do nothing to further its earlier position. As the Claimant notes in its Reply, the EU agrees that *Chorzów Factory* sets out "general remedial principles for a breach of international law."[1276] Where the parties disagree, however, is the effect that these general principles have in investor-State disputes, including disputes under the ECT.

1021. First, the Claimant asserts that *Chorzów Factory* stands for the "fundamental" principle that "restitution is the primary remedy for a breach of international law".[1277] As a result, the Claimant contends that under the *Chorzów Factory* principle, "a compensatory award of damages would be appropriate only if

[1270] Claimant's Memorial, 3 July 2020, paras. 488-491.
[1271] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 708-709.
[1272] European Union Counter-Memorial on the Merits, 3 May 2021, para. 710.
[1273] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 819.
[1274] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 820.
[1275] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 820.
[1276] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 819; European Union Counter-Memorial on the Merits, 3 May 2021, para. 708.
[1277] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 820.

restitution in kind … is '*not possible*'."[1278] However, in *Chorzów Factory* the issue before the PCIJ was the amount of compensation to be paid, once negotiations between Germany and Poland on this issue had failed.[1279] Germany had withdrawn its initial claim of restitution before the PCIJ rendered the findings cited by the Claimant,[1280] and the proceedings itself were in fact terminated before the PCIJ made any substantive findings.[1281] As the EU clearly explained in its Counter-Memorial, the PCIJ therefore failed to address the appropriateness of the specific remedy of restitution in the circumstances, and any conditions of its application.[1282] The notion that *Chorzów Factory* applies directly to the Claimant's request for an injunction by way of "restitution" is thus tenuous.

1022. Second, and as the EU also pointed out in its Counter-Memorial, *Chorzów Factory* says nothing about the availability of a final injunctive order as a remedy in the context of investment treaty arbitration. The Claimant fails to address this argument, blithely stating that the EU does not rebut the "fundamental point" that "restitution is the primary remedy for a breach of international law."[1283] However, it is the Claimant that fails to understand the fundamental point of difference between State-to-State disputes, and investor-State disputes, and how that affects the appropriateness of available remedies. In *Chorzów Factory*, even Germany recognized this point, emphasising to the court that "[t]he present dispute is therefore a dispute between governments and nothing but a dispute between governments. It is very clearly differentiated from an ordinary action for damages, brought by private persons before a civil court".[1284]

1023. Moreover, the PCIJ itself was clear that the principles it espoused were relevant to the question of redressing one State's rights breached by another State:

[1278] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 821 (emphasis in original).
[1279] **Exhibit CLA-131**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, ICJ Judgment No. 13, Merits of 13 September 1928, pp. 18 ("The present judgment, however, must deal with the so-called case of the factory at Chorzów from a point of view with which the Court has not hitherto had to concern itself, namely, that of the nature-and, if necessary, the amount and method of payment-of the reparation which may be due".), 23 ("The failure of the negotiations resulted in the institution of the present proceedings.").
[1280] **Exhibit CLA-131**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, ICJ Judgment No. 13, Merits of 13 September 1928, p. 23.
[1281] **Exhibit RLA-272**, *Case Concerning the Factory at Chorzów (Indemnities)*, Order of the Court made on 25 May 1929, PCIJ Rep Series A No 19.
[1282] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 708-709.
[1283] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 820.
[1284] **Exhibit CLA-131**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, ICJ Judgment No. 13, Merits of 13 September 1928, pp. 25-26.

> The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered the damage. Rights or interests of an individual the violation of which rights causes damages are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due.[1285]

1024. Thus, the PCIJ clearly distinguished between the rights and interests of an individual and those of a State. That restitution might be a "primary remedy" in a dispute between two States does not mean that it is the primary remedy, or even an appropriate remedy, with respect to the private commercial interests of investors. The Claimant's leap from the *Chorzów Factory* principles to its claim for a final injunction is unsupported under the general principles of international law it cites.

1025. Finally, the Claimant cites two cases which it states apply the *Chorzów Factory* principles and which underpin the Claimant's request: *Greentech v. Spain* and *Masdar Solar v. Spain*.[1286] The Claimant's reliance on these legal authorities do nothing to advance its claim. In both disputes, the citations provided by the Claimant simply affirm the general principle of reparation for an internationally wrongful act.[1287] The tribunals acknowledged this principle in the context of determining *compensation* for a breach of the expropriation provision under Article 13 of the ECT (*Greentech*),[1288] and the FET standard under Article 10(1) of the ECT (*Masdar Solar*).[1289] The tribunals said nothing about the appropriateness of a final injunction in a dispute between an investor and a State, making their general statements of international law inapposite in these proceedings.

[1285] **Exhibit CLA-131**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, ICJ Judgment No. 13, Merits of 13 September 1928, p. 28.
[1286] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, n. 1184.
[1287] **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, 14 November 2018, paras. 433-438; **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 549-550.
[1288] **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, 14 November 2018, para. 438 ("In conclusion, the Tribunal, by a majority, has decided that the Claimants are in principle entitled to full compensation for Spain's violation of Article 10(1) ECT.).
[1289] **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 548 ("Article 10 of the ECT sets forth no express provisions regarding remedies or reparations for breach of the Treaty's protection. In light of Article 10's silence, it is for the Tribunal to determine the remedies for breaches of Article 10. In these circumstances, the default standard provided by customary international law is appropriately applied.").

9.2.2 The ILC Articles do not provide support for the Claimant's request for a final injunctive remedy in an investor-State dispute

1026. To further support its reliance on the general principles of international law espoused by *Chorzów Factory*, in the Memorial the Claimant asserted that the ILC Articles on State Responsibility supports its position that the Tribunal should issue a final injunction against the EU.[1290]

1027. In response, the European Union recalled that the ILC Articles were expressly developed for the State-to-State dispute context, and cannot simply be automatically applied in the distinct context of investor-State dispute settlement.[1291] To do so would extend customary international law in a dramatic and radical way, without any evidence of support for this change in State practice and *opinion juris*.[1292] The EU noted that ILC remedial principles can only be extended to the investor-State context on the basis of consistent State practice and *opinio juris*, which is entirely lacking.[1293] To the extent that investment treaty cases refer to the ILC Articles, they do so on general terms only.[1294] Finally, the EU recalled that the ILC Articles in any event incorporate important reservations regarding the availability of specific remedies.[1295]

1028. The Claimant's primary response to these arguments is the same it adopted with respect to the *Chorzów Factory* case, arguing that the EU has not rebutted the Claimant's position that "restitution is the primary remedy" for an international wrong.[1296] Once again, however, it is the Claimant who misses the fundamental point of disagreement between the parties: that while restitution may be a primary remedy under international law for *State* responsibility, this does not automatically apply to the *investor-State* context.

1029. In its Counter-Memorial, the EU made this precise point, noting that the ILC Articles expressly provide that: "This part [including Articles 34-37] is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."[1297] The EU noted that this provision prohibited a simple translation to investor-State disputes, as being outside the State-to-State context.[1298]

[1290] Claimant's Memorial, 3 July 2020, paras. 489-491.
[1291] European Union Counter-Memorial on the Merits, 3 May 2021, para. 713-719.
[1292] European Union Counter-Memorial on the Merits, 3 May 2021, para. 716.
[1293] European Union Counter-Memorial on the Merits, 3 May 2021, para. 715.
[1294] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 716-719.
[1295] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 713-714.
[1296] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 826.
[1297] European Union Counter-Memorial on the Merits, 3 May 2021, para. 713, citing **Exhibit CLA-134**, ILC Articles on State Responsibility, Article 33(2).
[1298] European Union Counter-Memorial on the Merits, 3 May 2021, para. 713.

1030. In its Reply, the Claimant asserts that "[t]his reading of Article 33(2) is unsupported, and counter-intuitive."[1299] But the Claimant's own legal authority – a commentary by Anna De Luca, upon which it heavily relies – states:

> As opposed to what is occasionally stated by investment tribunals, the ILC's Articles on State Responsibility do not (and cannot) support the primacy of restitution in International Investment Law. Neither do the Articles support the inherent authority of arbitral tribunals to award non-pecuniary remedies against host States in investment disputes with foreign investors, eventually resulting from the primacy of restitution.
>
> To use the words of the ILC, Part Two of the Articles (which includes Articles 28-39) "… does not apply to obligations of reparation to the extent that arise towards or are invoked by a person or entity other than as State."[1300]

1031. Professor Crawford – Special Rapporteur for the draft ILC Articles – was likewise clear on the application of Part Two of the ILC Articles, stating:

> [I]n contrast to Part One, … Part Two is limited to cases of inter-State responsibility and the exceptional case of responsibility to the international community as a whole. As a consequence, the provisions of Part Two are, on their own terms, not directly applicable to questions of the content of the responsibility which may arise in the context of an investment arbitration as the result of the breach of the substantive obligations contained in an investment protection instrument (whether bilateral or multilateral).[1301]

1032. Clearly, the EU's reliance on Article 33(2) is not "unsupported", as the Claimant asserts. Instead, it is reflective of the State-to-State nature and application of the ILC Articles as distinct from investment treaty arbitration, as broadly recognized by States, commentators and the ILC Articles themselves.

1033. The Claimant also asserts that the EU has not engaged in "any meaningful way" with the cases it cited in its Memorial.[1302] This is wholly untrue. The EU carefully reviewed these cases and found that every single one of them rejected restitution as a remedy, and/or referred to financial compensation as the remedy applied in practice.[1303] There is little sense reviewing in extenso cases that are patently inapposite.

[1299] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 824.
[1300] **Exhibit CLA-140**, A. De Luca. "Non-Pecuniary Remedies under the Energy Charter Treaties", Energy Charter Secretariat Knowledge Centre, 2015, paras. 25-26, and n. 27.
[1301] **Exhibit RLA-300**, James Crawford & Simon Olleson, "The Application of the Rules of State Responsibility" in Bungenberg et al, eds, International Investment Law (Baden-Baden: Nomos Verlagsgesellschaft, 2015) 411 at 417–18 (emphasis added).
[1302] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 842.
[1303] *See* European Union Counter-Memorial on the Merits, 3 May 2021, para. 717, n. 665.

1034. The Claimant's prolonged repetitive exposition of exactly the same legal authorities it cited in the Memorial does not advance its case in any way, and to the contrary simply confirms its inability to identify any persuasive authority.[1304] In focussing on whether or not general principles of international law provide for restitution, the Claimant fails to meaningfully consider how these principles apply in an investor-State context with respect to *injunctive suspension of legislative measures of general application vis-à-vis a particular private party* (*i.e.* the specific remedy now sought by the Claimant in these proceedings). The Claimant's reliance on the following cases is therefore inapposite:

- In *Petrobart Limited v. The Kyrgyz Republic*, the tribunal did not consider arguments relating to restitution, as the parties agreed that *specific performance of a contract* was not possible.[1305] Likewise, the tribunal in *Al-Bahloul v. Tajikistan* rejected the claimant's request for *specific performance to issue a licence*.[1306] That is, in both cases the tribunal was considering a specific contract or license applying to the investor, not a unilateral request for an injunction suspending application of a legal regime of general application.
- In *Kardassopoulos and Fuchs v. Georgia* and *Yukos v. Russia*, the tribunals considered that the award of *damages* was appropriate where a breach of the treaty had been proven.[1307]
- In *Nykomb v. Latvia*, the tribunal considered that restitution is only an appropriate remedy "in a situation where the Contracting State has instituted actions against the investor" (*i.e.*, not with respect to a legislative measure of general application).[1308] Accordingly, the tribunal considered *compensation* for loss to the investment to be the most appropriate remedy, not restitution.[1309]

1035. Thus, the Claimant's legal authorities only stand for the proposition that investment treaty tribunals have considered the ILC Articles in general terms,

[1304] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 826(i)-(v).
[1305] **Exhibit CLA-119**, *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No. 126/2003, Award, 29 March 2005, p 78.
[1306] **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (061/2008), Final Award, 8 June 2010, para. 618.
[1307] **Exhibit CLA-59**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, paras 532-534; **Exhibit CLA-130**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, para 1766.
[1308] **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Award, 16 December 2003, p. 39.
[1309] **Exhibit CLA-82**, *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Award, 16 December 2003, p. 39.

and do not support a finding of an injunction against legislative actions of States as a "primary" remedy.

9.2.3 Conclusion

1036. The Claimant's attempts to ground its improper request for relief in principles of international law are therefore unavailing. There is an important distinction between State-to-State disputes and disputes involving a private entity and a State. As made clear by the sources upon which the Claimant itself relies, this distinction means that it is inappropriate to transport principles of international law directly to investment arbitration disputes. The Claimant's reliance on principles of international law in support of its request must therefore be rejected.

9.3 Article 26(8) does not provide the power to award a final injunctive remedy

1037. In its Memorial, the Claimant argued that the Tribunal has the power to grant its requested relief, pursuant to Article 26(8) of the ECT, State-to-State cases, and select investment treaty cases.1310 In particular, the Claimant identified the Second Partial Award in Chevron v. Ecuador as a "significant recent example" where a tribunal considered it appropriate to grant relief of a "similar nature" as that requested by the Claimant.[1311]

1038. In its Counter-Memorial, the EU demonstrated that the ECT does not expressly provide for a final injunctive remedy either as an alternative or in priority,1312 and demonstrated that the Claimant's legal authorities did not offer any sound support for its argument.[1313] In particular, the EU demonstrated that the Claimant's heavy reliance on Chevron v. Ecuador was entirely misplaced, in light of the markedly different circumstances of that case and indeed of the relief requested, compared with the Claimant's request here.[1314]

1039. In its Reply, the Claimant continues to assert that Article 26(8) of the ECT provides the Tribunal with the power to issue a final injunction, arguing that the treaties and cases cited by the EU do not demonstrate otherwise.[1315] Moreover, rather than finding any new authorities, the Claimant presents the circular argument that Chevron v. Ecuador has "unambiguous precedential value"

[1310] Claimant's Memorial, 3 July 2020, paras. 493-502.
[1311] Claimant's Memorial, 3 July 2020, para. 499.
[1312] European Union Counter-Memorial on the Merits, 3 May 2021, Section 4.2.1.
[1313] European Union Counter-Memorial on the Merits, 3 May 2021, Section 4.2.2.
[1314] European Union Counter-Memorial on the Merits, 3 May 2021, Section 4.2.3.
[1315] *See* Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 828-843.

because it is "inevitabl[e] [that] each investment treaty case rests on its own unique set of facts."[1316]

1040. The Claimant's arguments remain unavailing. First, it is clear that Article 26(8) does not expressly provide power to the Tribunal to issue an injunctive remedy. Second, the weight of ECT jurisprudence makes clear that tribunals have never considered that Article 26(8) provides a tribunal with the power to issue an injunction against the application of sovereign's general legislative or regulatory framework vis-à-vis a private party. Finally, the Claimant's awkward reliance on the inapposite case of Chevron v. Ecuador and on select academic commentary remains unpersuasive.

9.3.1 The ordinary meaning of Article 26(8) of the ECT makes clear that it does not provide for the relief requested

1041. In its Reply, the Claimant asserts that "it is clear" that Article 26(8) provides the Tribunal with the power to order a final injunction against the Amending Directive, as requested.[1317]

1042. Despite the Claimant's best attempts to attack the EU's Counter-Memorial on this point,[1318] a plain reading of Article 26(8) of the ECT to the contrary makes clear that it fails to provide for final injunctive relief, either as an alternative or in priority. To recall, Article 26(8) provides as follows:

> The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards. (emphasis added)

1043. As is evident on the face of the provision, the ECT says *nothing* about final injunctions, restitution or specific performance, and to the contrary fails to grant tribunals the blanket power to issue such remedies. While the ordinary meaning of the ECT confirms that remedies beyond monetary compensation may be granted, it does not specify the nature of such remedies, or when the grant of such remedies may be appropriate. Faced with this obvious point, the Claimant

[1316] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 845.
[1317] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 839.
[1318] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, Section XI.4.

weakly responds that "[a]ny lack of specific reference in the ECT" means that the remedies requested by the Claimant are "not precluded".[1319]

1044. The Claimant's assertion flies in the face of the nature, scope and purpose of the VCLT, as applied to treaties negotiated by sovereign States. Article 31 of the VCLT includes an obligation to apply the provisions of a treaty "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."[1320]

1045. In conducting an analysis under the VCLT, tribunals have considered that this exercise should be a "balanced" one, "taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."[1321] Indeed, principles of international law – such as the sovereign right to regulate – should not be held to have been "tacitly dispensed with" in a treaty "in the absence of words making clear an intention to do so."[1322] In the absence of express language in the ECT providing a tribunal with power to curtail the EU's right to regulate, the Claimant's reading of Article 26(8) is a blatant overreach and amounts to "reading in" a radical remedial principle, never before applied, in the absence of any supporting language. Thus, to give reason to the Claimant, the Tribunal would need to ignore both the express terms of Article 26(8) and, by extension, the directions set out in Article 31(1) of the VCLT, which have the weight of customary international law.

1046. Moreover, the Claimant argues that in accordance with Article 31 of the VCLT, "it is clear … that there is a power to award the remedy sought" under Article 26(8), and thus no need for recourse to supplementary means of interpretation.[1323] However, the fact that the parties have already spent nearly 60 pages debating this issue would alone be sufficient to render the Claimant's proclamation

[1319] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 832.
[1320] VCLT, Article 31(1).
[1321] **Exhibit RLA-273**, *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 70. *See also* 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, 30 November 2018, para. 239; **Exhibit RLA-274**, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. Argentine Republic*, ICSID Case No. ARB/03/13 & ARB/04/8, Decision on Preliminary Objections, 27 July 2006, para. 99; Exhibit RLA-145 (CLA-105), *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 167.
[1322] **Exhibit RLA-275,** *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction, 5 January 2001, para. 73 (citing *Elettronica Sicula S.p.A (ELSI) (US v. Italy)*, ICJ Reports 1989 at 42).
[1323] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 839.

untrue.[1324] In any event, it is not sufficient that a claimant thinks that its own interpretation is "clear"; instead, the Tribunal must consider whether the terms of Article 26(8) are sufficiently clear to warrant an incursion into the EU's sovereign right to regulate through the grant of a final injunction, a remedy never before accorded in investment treaty arbitration, to our knowledge. Indeed, as the cases discussed in the following section make clear, tribunals in the same circumstance have never considered a reading of Article 26(8) in this manner to be warranted.

9.3.2 The considerations of tribunals and commentators make clear that Article 26(8) does not provide for the relief requested

1047. The Claimant continues to rely on the tribunal's decision in *Al-Bahloul v. Tajikstan*, which it states "confirmed that the ECT does not preclude" the power of the Tribunal to issue final injunctive relief.[1325] However, as the EU noted in its Counter-Memorial, the *Al-Bahloul* tribunal ultimately declined to grant the requested injunctive relief, and expressly noted that while a non-monetary remedy was possible, it was not mandatory.[1326] Moreover, the tribunal expressly cautioned that "[t]he ECT gives little guidance on the issue of damages and other forms of relief. It does not explicitly prescribe the consequences of a breach of its provisions."[1327] Thus, even the Claimant's sole ECT case on this issue does not support the Claimant's broad position that Article 26(8) of the ECT expressly provides the Tribunal with the power to issue final injunctive relief.

1048. The caution expressed by the *Al-Bahloul* tribunal is evident in other ECT tribunal decisions regarding requests to issue injunctive relief against a State's general legislation. To the best of the EU's knowledge, no claimant or tribunal has relied upon Article 26(8) of the ECT as the foundation for its consideration of a request of restitution of legal regimes.[1328] In *Eiser v. Spain*, for example, the claimant sought "restitution of the legal and regulatory regime under which they made

[1324] Claimant's Memorial, 3 July 2020, pp. 163-173; European Union Counter-Memorial on the Merits, 3 May 2021, pp. 173-204; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, pp. 285-303.
[1325] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 832.
[1326] European Union Counter-Memorial on the Merits, 3 May 2021, para. 735.
[1327] **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (061/2008), Final Award, 8 June 2010), para. 41.
[1328] *See* **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 554; **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, 30 December 2019, paras. 681-685; **Exhibit RLA-276**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, paras. 630-638; **Exhibit RLA-277**, *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, paras. 672-675.

their investments or, in the alternative, damages."[1329] The tribunal noted that it did not regard restitution "as an appropriate remedy in this situation", noting that Spain must regulate "within the international legal framework it accepted when it adhered to the ECT, including the obligation to provide compensation for any breach of its commitments under the Treaty."[1330] Clearly, the *Eiser* tribunal did not consider that Article 26(8) of the ECT created any express mandate to order restitution of a legal regime upon the request of the claimant. Other ECT tribunals have reached the same conclusion.[1331]

1049. Despite the findings of these cases (and all of those in the EU's Counter-Memorial that the Claimant did not bother to address in its Reply),[1332] the Claimant clings to the findings in *Chevron v. Ecuador* as an "unambiguous" precedent for the relief it seeks. In its Counter-Memorial, the EU provided an extensive analysis of the factual circumstances and findings of the tribunal in *Chevron v. Ecuador*,[1333] demonstrating that: (i) the circumstances of judicial corruption in that case, prompting a "work around" of domestic judicial decision-making, are significantly different from a request to suspend legislation of general application; (ii) the remedy sought in *Chevron* was issued to avoid exacerbating a dispute while judicial proceedings were ongoing; and (iii) the relief granted in *Chevron* was more akin to an anti-suit injunction, as opposed to an order suspending a State's exercise of its regulatory power.[1334]

1050. The Claimant has been unable to rebut these concerns. Instead, it simply brushes off the EU's careful analysis, stating that "[t]he factual differences" between this case and *Chevron v. Ecuador* "do not detract" from "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."[1335]

1051. The Claimant's assertion is not credible. The factual and legal circumstances in *Chevron v. Ecuador* are so significantly different to those in issue here that the

[1329] **Exhibit RLA-278**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para. 425.
[1330] **Exhibit RLA-278**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para. 425.
[1331] *See* **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 554; 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, 30 December 2019, paras. 681-685; **Exhibit RLA-276**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, paras. 630-638; **Exhibit RLA-277**, *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, paras. 672-675.
[1332] *See*, *e.g.*, European Union Counter-Memorial on the Merits, 3 May 2021, nn. 689-690.
[1333] *See* European Union Counter-Memorial on the Merits, 3 May 2021, paras. 757-780.
[1334] European Union Counter-Memorial on the Merits, 3 May 2021, Section 4.2.3.
[1335] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 846.

Chevron tribunal's findings are without application in the context of the present proceedings. To recall, in *Chevron v. Ecuador*, the tribunal found a denial of justice because the judge in a domestic proceedings had been bribed to allow the plaintiffs to "ghostwrite" the judgment in their favour. The tribunal found that the judge's conduct was "grossly improper by any moral, professional and legal standards."[1336] The tribunal acknowledged that it had no power to declare the ruling void, but instead ordered Ecuador to suspend the enforceability of the ruling, to protect the claimants' investment in third countries.[1337] It is trite to point out that these "concrete circumstances", as the *Chevron* tribunal termed them, are markedly different from those in issue here.

1052. Moreover, the remedy in *Chevron v. Ecuador*, and the remedy requested by the Claimant are wholly distinct. In *Chevron*, the order related to in effect avoiding the results of judicial decision-making in a specific case, on a finding of a gross denial of justice (a claim the Claimant has walked away from in this dispute[1338]), to ensure that the rights of the particular investor in issue were preserved pending claims of compensation.[1339] Here, the Claimant seeks a final injunctive order against a legislative measure of general application, which has a broad impact on the EU, its Member States and citizens, and other investors. The Claimant's assertion that these factual and legal differences in *Chevron* should "not detract" from the Tribunal's consideration of its request in these proceedings is facile and utterly unrealistic.

1053. Finally, the Claimant attempts to bolster support for its misreading of Article 26(8) of the ECT by reference to academic commentary.[1340] These authorities do not aid the Claimant's cause. The Claimant argued that these commentators "agree that arbitral tribunals generally have the power to grant non-pecuniary remedies."[1341] This broad statement provides no support to the actual question in issue – whether the ECT expressly provides this Tribunal with the power to issue an injunction against the application of a legal regime, as a final remedy. The fact that other tribunals, constituted under other investment agreements and arbitral rules, might "generally have the power" to grant various types of remedies provides no guidance whatsoever.

[1336] **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, 30 August 2018, para. 8.59.
[1337] *See* European Union Counter-Memorial on the Merits, 3 May 2021, para. 761.
[1338] *See* Section 7.1.1 (The European Union ensured due process and did not deny justice), in this Rejoinder.
[1339] *See* European Union Counter-Memorial on the Merits, 3 May 2021, paras. 764-769.
[1340] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 829-830, 833-834.
[1341] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 829.

1054. Moreover, in citing such academic works, the Claimant tellingly removes references to statements to be found in them, which emphasize the degree of deference that should be provided to regulatory actions of States in considering the powers of tribunals to grant various types of remedies. For example, the Claimant cites an excerpt of two paragraphs from McLachlan *et al*.,[1342] but removes the middle sentence which makes clear "[a]n order to a State to carry out a particular act would be seen as a far greater infringement of State sovereignty than an award of compensation."[1343] Likewise, in the Claimant's reference to Sinclair *et al*.,[1344] the Claimant fails to include the prior paragraph which clearly states that "[a]n order which dictates how a state should conduct itself, as compared to a pecuniary award, can be viewed as a much more significant interference with the legislative, judicial or administrative powers of the state."[1345] Even the commentators cited by the Claimant therefore recognize that – even if tribunals have the power to issue an injunctive remedy under a specific treaty – an order affecting legislative frameworks would amount to an extraordinary incursion into the right of a sovereign State to regulate for public welfare objectives. Accordingly, it has never before been granted as a remedy, and should not be granted here.

9.3.3 Conclusion

1055. The Claimant's assertion that Article 26(8) of the ECT provides the Tribunal with the power to issue a final injunction must therefore be rejected. Article 26(8) does not expressly empower the Tribunal to issue an injunctive final remedy. The weight of ECT jurisprudence makes clear that the provision fails to empower the Tribunal to issue "restitution" of an entire legal regulatory framework and its application to a particular party, with no regard to the widespread implications such an order would have across European society as a whole. The Claimant's reliance on abstract statements in academic commentary and on select cases (notably, the inapposite case of *Chevron v. Ecuador*) fails to support the remedy it here requests.

[1342] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, n. 1206.
[1343] **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.
[1344] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, n. 1209.
[1345] **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), p. 766.

9.4 In any event, the Claimant is unable to meet the test required to grant injunctive relief

1056. In its Memorial, the Claimant asserted that restitution should be the primary remedy applied by the Tribunal because: (i) damages would not be an "adequate" remedy;[1346] (ii) the requested relief is "not materially impossible";[1347] (iii) the requested relief would not "involve a burden out of all proportion to the benefit derived from granting restitution instead of compensation;[1348] and (iv) the requested remedy "would have no material impact on the respondent".[1349]

1057. In its Counter-Memorial, the EU highlighted that the Claimant has studiously avoided using the term "injunction" in order to gloss over and ignore the circumstances in which injunctive relief might potentially be granted in lieu of damages.[1350] Moreover, the EU noted that the Claimant's "test" that it set out in the Memorial was unsupported by any legal authority and did not reflect the high threshold required for grants of even interim, let alone final injunctions.[1351] In any event, the Claimant was unable to even meet the standard it had articulated on the facts.[1352]

1058. In its Reply, the Claimant now alleges that its test is "in accordance with Article 35 of the ILC Articles",[1353] specifying that restitution is required "provided and to the extent that [it] (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."[1354] The Claimant in this regard continues to deny the reality that its request amounts to an "injunction" and on this basis alleges the Tribunal need not consider the many legal authorities submitted by the EU, all of which demonstrate a consistent international and domestic practice requiring a high threshold in order to grant even an interim injunction.[1355]

1059. The Claimant's arguments remain unavailing: first, the threshold to grant an injunction against a respondent State is high; and second, even if the test advocated by the Claimant were applicable, the Claimant has failed to fulfil the standards required.

[1346] Claimant's Memorial, 3 July 2020, paras. 487(iii), 507.
[1347] Claimant's Memorial, 3 July 2020, para. 503.
[1348] Claimant's Memorial, 3 July 2020, para. 503.
[1349] Claimant's Memorial, 3 July 2020, para. 512.
[1350] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 718-784.
[1351] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 785-807.
[1352] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 808-815.
[1353] Claimant's Memorial, 3 July 2020, para. 827.
[1354] Claimant's Memorial, 3 July 2020, paras. 487-490.
[1355] Claimant's Memorial, 3 July 2020, para. 856.

9.4.1 The threshold for obtaining injunctive relief is high

1060. In its Counter-Memorial, the EU demonstrated that investor-State tribunals have been consistent in their findings that the grant of even an interim injunction is an exceptional remedy, and subject to stringent conditions.[1356] These criteria include:

> (a) urgency and necessity (the latter being interpreted as, the harm caused by the failure to grant the injunction is not of the kind that could be compensated in damages).[1357]
>
> (b) that urgent and irreparable harm to the claimants exist, and "greatly" outweighs the harm that would be caused to a respondent State (that is, that the balance of convenience favours the grant of injunctive relief).[1358]
>
> (c) that the loss must not be compensable in damages.[1359]

1061. These rigorous standards are also applied by domestic courts in the EU as well as in the United States, the United Kingdom, Canada, Australia and India.[1360] In light of these strict criteria applied to even temporary injunction orders, the EU argued that – at a minimum – such conditions must also apply to a consideration of final injunctive relief.[1361]

1062. The Claimant addresses this weight of authority in one conclusory paragraph, stating that: (1) the EU has "not suggested an alternative test for the Tribunal to adopt" (which is patently untrue); (2) that the authorities are inapposite because the Claimant does not seek an injunction as a primary remedy (which is also patently false); and (3) that a final injunction is in any event distinct from an interim injunction, which is a temporary measure required to preserve the *status quo* (thereby apparently admitting it seeks a final injunction).[1362] None of these arguments are persuasive.

1063. First, the EU clearly set out a range of alternative tests for the Tribunal to adopt when considering the Claimant's request for a final injunction, as described above.[1363] The Claimant acknowledges this in its Reply when it states that "[t]here is no need therefore to pick from one of the many tests or standards summarised by the EU."[1364] However, the mere fact that the Claimant considers

[1356] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 794-795.
[1357] European Union Counter-Memorial on the Merits, 3 May 2021, n. 732.
[1358] European Union Counter-Memorial on the Merits, 3 May 2021, n. 733.
[1359] European Union Counter-Memorial on the Merits, 3 May 2021, n. 734.
[1360] European Union Counter-Memorial on the Merits, 3 May 2021, para. 796.
[1361] European Union Counter-Memorial on the Merits, 3 May 2021, para. 798.
[1362] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 856.
[1363] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 794-798.
[1364] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 857.

widespread and universal tests to be "inapposite in the circumstances" does not mean that there is "no need" for the Tribunal to consider the weight of jurisprudence on this issue in making its determination. To the contrary, as the EU has demonstrated, these standards are directly relevant to the question of the relief being requested here, and should be afforded their full weight, leading to the conclusion that the Claimant's extraordinary request must be denied.

1064. Second, the Claimant's insistence that it is not requesting an injunction as its primary remedy is belied by the nature of its request, and the facts. The Claimant requests that the Tribunal issue an injunction against the Amending Directive, to "remove [its] application". It is impossible to conceive of this request as anything other than a permanent injunction. No amount of carefully calibrated language can transform the true nature of the Claimant's request. If any proof beyond the actual nature of the request were needed, the Claimant itself admitted as much in its Memorial, when it expressly acknowledged that "injunctive relief would be one way of describing the relief sought by NSP2AG in these proceedings."[1365]

1065. The Claimant attempts to walk away from this statement in its Reply, asserting that it "does not seek an injunction as a primary remedy".[1366] However, the Claimant then goes on to state that "in any case, a final injunction … is distinct from an interim injunction".[1367] Though not clear, it appears that the Claimant is arguing that: (1) it is not seeking an injunction; and (2) even if it was, the tests set out by the EU would not apply because those tests arise with respect to interim injunctions, and not final injunctions. This position is as confusing as it is unsupported.

1066. It makes no sense that the test for a final injunction would not be the same, or at least substantially similar, to the test for issuing an interim injunction on the same facts. Indeed, the Claimant has been unable to articulate any principles or legal authorities to demonstrate this difference.

1067. Moreover, the Claimant's attempted distinction between an interim injunction and a final injunction is rendered irrelevant by its own pleadings. As discussed in more detail in Section 9.5 below, the Claimant has now requested alternative relief by way of interim injunction "in the same terms [as the primary request for relief] pending the conclusion of the subsequent phase of this arbitration".[1368] The Claimant bases this request on Article 26(1) of the UNCITRAL Rules (1976),

[1365] Claimant's Memorial, 3 July 2020, para. 497.
[1366] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021,, para. 856(i).
[1367] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 856(ii).
[1368] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, Section XI.7.

which provides the Tribunal the power to issue interim measures.[1369] Tribunals considering applications for provisional measures under these Rules have developed tests to determine the appropriateness of the order requested, including that: such measures be necessary to avoid irreparable harm; that the balance of convenience favours the grant of the order; and that there is an imminent danger of serious prejudice.[1370]

1068. That is, the tests applicable to the Claimant's request for "alternative relief" "in the same terms" as its primary relief rely precisely on the *same tests* as those set out by the EU, and which the Claimant vainly disputes.[1371] In such circumstances, the Claimant's arguments that the legal standards presented by the EU are distinct between interim and permanent injunctions are meritless.

1069. Finally, it is telling that the Claimant has failed to address *any* of the cases cited by the EU demonstrating that the high threshold for granting injunctive relief reflects public international law's caution on restricting the exercise of State sovereignty, notably with respect to the right to regulate.[1372] As recalled in the following Section, no investment treaty tribunal has ever applied this remedy in practice, in recognition of the deference that must be afforded to State's regulatory rights.

1070. Therefore, even if this Tribunal were to find that – in theory – it has the power to grant a final injunction (*quod non*), the grant of such relief in practice is subject to a high threshold. The Claimant has been unable to establish otherwise.

9.4.2 The Claimant fails even on its own standards

1071. Even accepting the Claimant's assertion that Article 35 of the ILC Articles must be strictly applied in these circumstances (*quod non*), the Claimant would still fail to prevail on its request for a final injunction to prevent the application of the

[1369] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 861.
[1370] *See* **Exhibit RLA-218**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, para. 39; **Exhibit RLA-279**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Interim Award - Request for Interim Measures of Protection, 31 January 2004, para. 13; **Exhibit RLA-280**, *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, Order Regarding Request for Interim Measures, 11 January 2017, para. 45; **Exhibit RLA-281**, *Sergei Viktorovich Pugachev v. Russia*, UNCITRAL, Interim Award, 17 July 2017, para. 271. The same is also true under other arbitral awards, *see* **Exhibit RLA-219**, *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Procedural Order No. 2 on Application for the Grant of Provisional Measures, 24 November 2014, paras. 46, 49; **Exhibit RLA-220**, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, Arbitration SCC EA 2020/130, Emergency Award on Interim Measures, 2 August 2020, paras. 77-78.
[1371] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 794-795 (outlining conditions such as: (a) urgency and necessity; (b) that urgent and irreparable harm to the claimants exists, and "greatly" outweighs the harm that would be caused to a respondent State; and (c) that the loss must not be compensable in damages.").
[1372] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 799-807.

Amending Directive. Based on the Claimant's own test, the requested relief is: (a) not materially possible; and (b) not proportionate.

9.4.2.1 The requested relief is not materially possible

1072. The Claimant asserts that the requested relief is "appropriate as it is not materially impossible", arguing that the "EU could simply further amend the Gas Directive in order to comply with the Tribunal's award."[1373]

1073. As the EU pointed out in its Counter-Memorial, however, the Amending Directive imposes no direct legal obligation on the Claimant as a matter of EU law.[1374] The damages the Claimant alleges do not flow from the Amending Directive. Rather, they flow from measures that may or may not be adopted by Germany when transposing and implementing the Amending Directive, within the scope of the margin of discretion granted to EU Member States under the Amending Directive.[1375] In such circumstance, even if Article 26(8) provided the power to the Tribunal to grant a permanent injunction (*quod non*), Article 26(8) also makes clear that "measures of a sub-national government or authority" are subject only to monetary relief, and not injunctive relief.[1376]

1074. In its Reply, the Claimant rejects these arguments, asserting that they are "based on an erroneous premise", harking back to its claims on attribution and jurisdiction.[1377] In addition, the Claimant asserts that 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."[1378]

1075. The Claimant's arguments are unavailing. The scope and application of Article 26(8) of the ECT demonstrates that it is not possible for the Tribunal to order a final injunction in circumstances where the measure ultimately issue is one of a sub-national government or authority (as here). In addition, the Claimant's assertion it is "not materially impossible" for the EU to execute any final injunction ordered by the Tribunal is erroneous.[1379]

1076. First, the Claimant asserts that the EU's interpretation of Article 26(8) is inaccurate, and that the "very premise of Article 26(8) is that a tribunal is perfectly entitled to award other restitutionary relief."[1380] In particular, the

[1373] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 853(ii).
[1374] European Union Counter-Memorial on the Merits, 3 May 2021, Section 2.2.3.
[1375] European Union Counter-Memorial on the Merits, 3 May 2021, para. 817.
[1376] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 816-823.
[1377] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 853(iii).
[1378] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 851.
[1379] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 853.
[1380] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 851.

Claimant disputes the EU's interpretation of the terms "national" and "sub-national government or authority" in Article 26(8) to include an EU Member State. Instead, the Claimant asserts that Article 26(8) must be read together "in context" with Article 23 of the ECT, which 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.

1077. The Claimant argues that if the Tribunal were to accept that "sub-national government or authority" equated to "organs of the Member States", then this 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."[1381] This argument is confused and contradictory. Properly read together, Article 23 and Article 26(8) make clear that:

- Contracting Parties may be responsible under the ECT for regional or sub-national governments or authorities (Article 23(1)).
- If measures taken by regional or sub-national governments or authorities are considered to be a breach of the substantive protections provided in the treaty, then the ECT allows for the invocation of dispute settlement provisions (Article 23(2)).
- If a breach is established as a result of any dispute settlement proceeding, and that breach concerns a measure of a sub-national government or authority of the disputing Contracting Party, then monetary damages may be ordered (Article 26(8)).

1078. This straightforward reading is evident on the face of the provisions in question. It is also supported by the context, object and purpose of the ECT as a whole, which seeks to balance the sovereign rights of the State over energy resources (including Regional Economic Integration Organizations ("REIOs"), as specifically defined in the ECT[1382]), with "the creation of a climate favourable to the flow of

[1381] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 850(iii).
[1382] ECT, Article 1(3) (""Regional Economic Integration Organization" means 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.").

investments on the basis of market principles in this field."[1383] This carefully calibrated balance provides for dispute settlement provisions against measures taken by the Contracting Parties and regional or sub-national governments or authorities, but provides limits on the remedies applicable to such disputes. The Claimant's unsupported conclusion that Article 26(8) does not apply with respect to this dispute should be rejected.

1079. Second, the Claimant asserts that the terms of Article 26(8) do not "affect or deny" the Tribunal's power to award a final injunction.[1384] However, Article 26(8) provides that "[a]n 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 underlined portion of the provision makes clear that the Tribunal does not have any express power to order injunctive relief against the EU with respect to a measure implemented by an EU Member State, and that the possibility to pay monetary damages is required. This clearly "affects" the Tribunal's power to award the Claimant's requested remedy of a final injunction against the EU, contrary to the Claimant's unsupported claims.

1080. Third, even if the Tribunal considered the language in Article 26(8) to provide power to issue a final injunction in this dispute (*quod non*), any such power would be limited in practice because it would be impossible for the EU to comply. As the EU explained in its Counter-Memorial, if it is held responsible for the breach of an EU Member State, the EU has no mechanism to force Germany to change its measures.[1385] Instead, the EU's only recourse is by way of infringement proceedings and fines.[1386]

1081. Thus, *even if* the Tribunal has the express power to issue a final injunction against the EU for a measure taken by an EU Member State (*quod non*), it would be impossible to do so. As the tribunal in *Al-Bahloul v. Tajikistan* commented, "it is noteworthy that the ECT provision does not purport to compel the Contracting Party to implement such non-monetary relief".[1387] This is indeed noteworthy, particularly in circumstances where Contracting Parties to the ECT include REIOs

[1383] **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, 30 November 2018, para. 239.
[1384] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 851.
[1385] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 820-822.
[1386] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 820-822.
[1387] **Exhibit CLA-88**, *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (061/2008), Final Award, 8 June 2010), para. 49.

such as the EU, which do not necessarily have the legal means to compel a sub-national government or authority to implement non-pecuniary relief.

1082. In this case, and if a breach is in fact established by the Claimant (*quod non*) then the only possible remedy the Tribunal can provide to the Claimant – both as a legal and practical matter – is monetary compensation.

9.4.2.2 The requested relief is not proportionate

1083. Even if the Tribunal considered that the request was materially possible (*quod non*), this is irrelevant in circumstances where the request for an injunction against the Amending Directive (i.e. to restore the legal regime) is wholly disproportionate.

1084. The Claimant argues that its requested relief is not disproportionate, because the standard required is "grave disproportionality", which is "not the case in the current circumstances."[1388] The Claimant's argument is entirely unsupported, and is contrary to a line of ECT cases addressing this precise issue.

1085. In *Masdar Solar v. Spain*, the claimant requested – as the Claimant does here – "restitution of the legal and regulatory regime under which it made its investments."[1389] The claimant requested that the tribunal order Spain to withdraw the relevant articles of four different laws, and restore the legal regime in dispute.[1390] The tribunal rejected this request, on the basis that "doing so would unduly burden Respondent's legislative and regulatory autonomy, and would potentially benefit numerous parties not protected by the ECT (or otherwise)."[1391] The *Masdar Solar* tribunal recognised that "[s]imilarly situated tribunals have denied restitution of regulatory regimes", citing the findings of the tribunals in *LG&E v. Argentina* and *Eiser v. Spain*.[1392]

1086. In *LG&E v. Argentina*, the tribunal rejected the claimants' request to compel Argentina to reinstate the legislative framework in place prior to the dispute, declaring:

[1388] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 854.
[1389] **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 554.
[1390] **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 554-555.
[1391] **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 559.
[1392] **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 560.

> The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty. Consequently, the Tribunal arrives at the same conclusion: the need to order and quantify compensation.[1393]

1087. In *Eiser v. Spain*, the tribunal also denied restitution of the legal framework in dispute, explaining that it did "not question Respondent's sovereign right to take appropriate regulatory measures to meet public needs, potentially including revision of the RD 661/2007 regime."[1394]

1088. In reviewing these cases, the *Masdar Solar* tribunal concluded:

> The Tribunal comes unanimously to the same conclusion as the *LG&E* and *Eiser* tribunals. Ordering Respondent to reinstate its pre-breach legislative and regulatory framework would involve a disproportionate burden compared to the benefit it potentially yields to Claimant. As set out above, Article 35(b) of the ILC Articles exempts responsible States from their primary obligation to make restitution when restitution is disproportionately burdensome compared to the benefit which would be gained.
>
> In the present case, this balance favours Respondent's exercise of its legislative and regulatory autonomy to address public needs. Furthermore, implementation of an award of restitution would face obvious practical and enforcement obstacles, making its benefits to Claimant uncertain. Even if implemented, an arbitral award in such terms in favour of Claimant would materially affect Respondent's legislative authority and would benefit numerous parties not protected by the ECT (or otherwise), while imposing commensurate burdens on Respondent. Under these circumstances, the Tribunal does not regard an order for restitution as an appropriate remedy for Respondent's internationally wrongful act. That remedy may, in the present dispute, be attained by the means of pecuniary compensation. . . .[1395]

[1393] **Exhibit RLA-198**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 87 (cited in **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 560).
[1394] **Exhibit RLA-278**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, para. 425 (cited in **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 561).
[1395] **Exhibit CLA-101**, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, paras. 562-563 (emphasis added).

1089. Claims for restitution of a legal framework were also rejected in CMS Gas v. Argentina,[1396] Occidental v. Ecuador,[1397] Infrastructure Services v. Spain,[1398] RWE Innogy v. Spain,[1399] and Watkins v. Spain.[1400]

1090. The Claimant has made no attempt to address this clear line of authority. Instead, the Claimant relies on an isolated academic commentary to argue that the test to determine whether a measure is proportionate is one of "grave proportionality".[1401] Yet in that same commentary, just four paragraphs down from the passage upon with the Claimant relies, the author references findings of *LG&E v. Argentina*, recognizing that the tribunal considered that restitution of a regulatory framework "would interfere with Argentina's sovereignty", and thus rejected the claimants' request.[1402] Therefore, even if the test were "grave disproportionality" (*quod non*), tribunals have consistently considered that requests for restitution of a State's legal framework would meet that test.

9.4.3 Conclusion

1091. Therefore, even if the Tribunal considers it has the power to issue the relief requested by the Claimant (*quod non*), the Claimant has failed to demonstrate that issuing a final injunction is appropriate in the circumstances. The Claimant fails both on the high threshold required to grant interim or final injunctive relief, and on the test it advocates. In particular, the relief the Claimant requests is

[1396] **Exhibit RLA-282**, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 406.
[1397] **Exhibit RLA-283**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, para. 84 ("To impose on a sovereign State reinstatement of a foreign investor in its concession, after a nationalization or termination of a concession license or contract by the State, would constitute a reparation disproportional to its interference with the sovereignty of the State when compared to monetary compensation.").
[1398] **Exhibit RLA-276**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, 15 June 2018, para. 636 ("In the circumstances of this case, the Tribunal deems the order sought by the Claimants disproportional to its interference with the sovereignty of the State compared to monetary compensation.").
[1399] **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, 30 December 2019, para. 685 ("[R]estitution would obviously involve a burden to the Respondent out of all proportion to the benefit to the Claimants deriving from restitution instead of compensation. This case involves State regulation that is generally applicable across a very important sector in Spain i.e. the RE sector whereas, by contrast, the Claimants can very readily be afforded full reparation through compensation.").
[1400] **Exhibit RLA-277**, *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Award, 21 January 2020, para. 674 ("While the Claimants have made a summary request for restitution, the Tribunal considers that restitution is an inappropriate remedy because the Respondent has a sovereign right to take appropriate legislative and regulatory measures to meet public interests. The Tribunal notes that similar conclusions were made in *Eiser v. Spain*, *Masdar v. Spain*, and *Antin v. Spain*.").
[1401] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 85 (**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).)
[1402] **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. 21.20.

impossible, and wholly disproportionate in light of the deference to be afforded to the sovereign regulatory powers of States.

9.5 The Claimant's request for "Alternative Relief" is unsupported

1092. For the first time, the Claimant has raised a request for an "interim order in the same terms" as its request for the final injunction.[1403] The Claimant asserts this request is necessary "due to the developing factual picture", in an apparent attempt to cover its bases if "the Tribunal is minded at this stage not to grant, on a final basis, an order" that the EU remove the application of the Amending Directive.[1404]

1093. The Claimant asserts that the Tribunal has the power under the UNICTRAL Rules (1976) 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'".[1405] However, the Claimant fails to elaborate on any argument as to the standard the Tribunal should apply, or provide factual arguments to demonstrate it meets those standards. In this respect, the Claimant's request is wholly deficient.

1094. Perhaps the reason the Claimant is reticent to substantiate its request is because it recognises the fundamental tension it has introduced. The Claimant seeks to argue that it has not requested a permanent final injunction, and that the factors identified by the EU are therefore not relevant.[1406] Simultaneously, the Claimant now argues that the Tribunal should grant an interim injunction, referring in vague terms to the very factors it just insisted are not relevant.

1095. As outlined in the EU's Counter-Memorial, investor-State tribunals have been consistent in their findings that the grant of an interim injunction is an exceptional remedy, and subject to stringent conditions.[1407] In particular, provisional measures under the UNCITRAL Rules (1976) must be necessary to avoid irreparable harm, must favour the balance of convenience, and there must be an imminent danger of serious prejudice.[1408] As the tribunal in *Paushok v. Mongolia* stated:

[1403] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 861.
[1404] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 861.
[1405] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, paras. 862-864.
[1406] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 856.
[1407] European Union Counter-Memorial on the Merits, 3 May 2021, paras. 794-798.
[1408] *See* **Exhibit RLA-218**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, para. 39; **Exhibit RLA-279**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Interim Award - Request for Interim Measures of Protection, 31 January 2004, para. 13; **Exhibit RLA-280**, *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, Order Regarding Request for Interim Measures, 11 January 2017, para. 45; **Exhibit RLA-281**, *Sergei Viktorovich Pugachev v. Russia*, UNCITRAL, Interim Award, 17 July 2017, para. 271. The same is also true under other arbitral awards, *see* **Exhibit RLA-219**, *Fouad Alghanim & Sons Co. for*

> It is not contested that interim measures are extraordinary measures not to be granted lightly, as stated in a number of arbitral awards rendered under various arbitration rules. Even under the discretion granted to the Tribunal under the UNCITRAL Rules, the Tribunal still has to deem those measures urgent and necessary to avoid "irreparable" harm and not only convenient or appropriate.[1409]

1096. The *Paushok* tribunal also made clear that "it is incumbent upon Claimants to demonstrate that their request is meeting the standards internationally recognized as pre-conditions for such measures",[1410] listing those standards as: (1) *prima facie* jurisdiction; (2) *prima facie* establishment of the case; (3) urgency; (4) imminent danger of serious prejudice (necessity); and (5) proportionality.[1411] As the tribunal in *Rawat v. Mauritius* further explained:

> The accepted test for urgency is whether "action prejudicial to the rights of either party is likely to be taken before [a] final decision is given". As for irreparable harm, it is well-established that harm claimed is not irreparable if it can be compensated by monetary damages.[1412]

1097. The Claimant has not even attempted to address these factors, let alone reached the threshold required to sustain its request under the UNICTRAL Rules (1976). The Claimant's request is not urgent, necessary, or proportionate. If it were urgent, the Claimant would have made its request at the outset of these proceedings, not in its final substantive pleading. The issuance of an interim injunction is not necessary, and the Claimant will not suffer any irreparable harm, because its claims – if valid (*quod non*) – can be compensated by monetary damages. And, as outlined in Section 9.4.4.2 above, the issuance of an injunction against general State regulation is not proportionate, as recognised by a line of authorities under the ECT.

1098. Accordingly, the Claimant's request for alternative relief under Article 26(1) of the UNCITRAL Rules (1976) must be rejected.

General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/13/38, Procedural Order No. 2 on Application for the Grant of Provisional Measures, 24 November 2014, paras. 46, 49; Exhibit RLA-220, *Komaksavia Airport Invest Ltd. v. Republic of Moldova*, Arbitration SCC EA 2020/130, Emergency Award on Interim Measures, 2 August 2020, paras. 77-78.

[1409] **Exhibit RLA-218**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, para. 39.

[1410] **Exhibit RLA-218**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, para. 40.

[1411] **Exhibit RLA-218**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures, 2 September 2008, para. 45.

[1412] **Exhibit RLA-280**, *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, Order Regarding Request for Interim Measures, 11 January 2017, para. 45.

10 RELIEF SOUGHT

1099. On the basis of the foregoing, the European Union respectfully requests that the Tribunal:

1) Dismiss all the requests made by the Claimant for lack of jurisdiction;
2) In so far as the Tribunal had jurisdiction, reject the Claimant's requests for an order declaring that the European Union is in breach of any substantive obligations under the Energy Charter Treaty;
3) Decline to order the European Union to remove the application of Articles 9, 10, 11, 32, 41(6), 41(8) and 41(10) of the Gas Directive to NSP2AG and Nord Stream 2;
4) Decline to order that the European Union pay compensation to NSP2AG, in the alternative to granting the relief requested in (3);
5) Order that the Claimant pay the costs of these arbitration proceedings, including the fees and expenses of the Tribunal and costs of legal representation and applicable interest;
6) Order such other and further relief as to the Tribunal may seem just.

All of which is respectfully submitted on behalf of the European Union by:

Legal Service of the European Commission

Christophe BONDY

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