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)

RESPONDENT'S SUPPLEMENTARY COUNTER-MEMORIAL ON JURISDICTION AND MERITS

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4 July 2024

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1. INTRODUCTION AND SUMMARY

1. This Supplementary Counter-Memorial on Merits and Jurisdiction (the "**Supplementary Counter-Memorial**") is submitted pursuant to the Tribunal's Procedural Order No. 12. As requested by the Tribunal in that order, this Supplementary Counter-Memorial briefs the Tribunal "on relevant factual developments which occurred since the beginning of the stay of the proceedings"[1], which had been ordered by the Tribunal on 7 March 2022, at the Claimant's request.[2]

2. This Supplementary Counter-Memorial provides the response of the European Union ("**EU**") to the Claimant's Supplementary Memorial on Jurisdiction and Merits ("**Supplementary Memorial**"), of 27 February 2024.

3. This Supplementary Counter-Memorial builds upon previous submissions made by the European Union to the Tribunal, including the EU's Memorial on Jurisdiction of 15 September 2020 ("**Memorial on Jurisdiction**"); the EU's Counter-Memorial on the Merits, of 3 May 2021 ("**Counter-Memorial on the Merits**"); the EU's Rejoinder on the Merits and Reply on jurisdiction of 22 February 2022 ("**Rejoinder**"); and the EU's letters to the Tribunal of 3 October 2022 and of 16 December 2022.

4. As explained by the European Union in its previous submissions, the Gas Directive is the centrepiece of the EU's generally applicable regulatory regime for gas. That regime pursues legitimate policy objectives in the field of energy, as prescribed by Article 194 of the Treaty on the Functioning of the European Union (the "**TFEU**"). The Amending Directive clarifies that the EU internal market rules for gas established by the Gas Directive apply to all interconnectors, including interconnectors between the European Union and third countries, so as to ensure the full benefits of a competitive and well-functioning internal gas market, as well as to enhance security of supply. The Amending Directive underwent a proper legislative process and did not involve any "dramatic and radical regulatory change". Nor did the Amending Directive "specifically target", or otherwise discriminate against the Nord Stream 2 ("**NS 2**") pipeline project. The "catastrophic impact" alleged by the Claimant is not attributable to the Amending Directive, but instead to the Claimant's own actions or inactions (including those of the Gazprom group ("**Gazprom**") and the Russian Federation ("**Russia**"),

[1] Procedural Order No 12, para. 26.
[2] Procedural Order No. 7.

which control the Claimant) or to other circumstances for which the European Union cannot be held responsible.

5. The Claimant is adamant that the Tribunal should rule on this dispute as if time had stopped in 2019, when the Amending Directive was adopted, and disregard any subsequent developments, including those brought about deliberately by the Claimant and its controller Russia/Gazprom. The Claimant is understandably anxious about the Tribunal looking at developments beyond 2019. Indeed, subsequent developments have confirmed beyond doubt that the Amending Directive is an indispensable regulatory measure for achieving legitimate policy objectives of utmost importance. Moreover, through their own deliberate contribution to such subsequent developments, the Claimant and its controller Russia/Gazprom have thoroughly and irreversibly undermined the Claimant's business prospects. Any alleged damage sustained by the Claimant is, therefore, self-inflicted.

6. On 24 February 2022 Russia launched a full-scale invasion of Ukraine in flagrant violation of its obligations under international law. This had immediate consequences for the Claimant and for its investment in the Nord Stream 2 pipeline, including notably that: i) the United States ("**US**") imposed sanctions on the Claimant; ii) the Government of the Federal Republic of Germany ("**Germany**") announced that it would re-assess the impact of NS 2 on security of supply in the EU energy market, as part of the pipeline's pending certification process; and iii) the Claimant had to file for bankruptcy and eventually for a "composition moratorium" in accordance with Swiss bankruptcy laws.

7. Preparations for the full-scale invasion of Ukraine had begun well before February 2022. Already as of the Summer of 2021, Russia/Gazprom began to curtail its supplies of gas to most EU Member States, dramatically reducing EU reserves. Following the launch of Russia's full-scale invasion, Russia/Gazprom imposed further restrictions in retaliation for the European Union's support to Ukraine. By September 2022, Russia/Gazprom had halted completely and definitively the supply of gas to the European Union through the Nord Stream 1 ("**NS 1**") pipeline, while making clear that supplies would not be resumed, as long as the European Union and its Member States continued to support Ukraine.

8. Russia's unlawful war of aggression against Ukraine, and the attendant weaponization of gas deliveries, have brought about fundamental and lasting changes in the EU market and infrastructure for natural gas and, as a result, in the Claimant's business prospects. In view of ending their dependency on a manifestly unreliable supplier, the European Union and its Member States have

taken drastic and effective measures to phase out imports from Russia by 2027 at the latest. Moreover, by weaponizing its gas deliveries, Russia/Gazprom has breached its contractual obligations vis-à-vis EU economic operators and shaken to the core their trust in Russia/Gazprom's reliability. EU customers have terminated their commercial relations with Russia/Gazprom and entered into long-term contracts with other gas suppliers. Key parts of the infrastructure required for receiving and distributing gas shipped through the NS 2 pipeline have been irreversibly devoted to other purposes. The further deterioration of relations between the European Union and its Member States and Russia rules out a market for Russian natural gas in the foreseeable future. For all those reasons, Nord Stream 2 has lost its economic *raison d'être* for good.

9. In its Supplementary Memorial the Claimant seeks to dismiss the relevance to these proceedings of Russia's full-scale invasion of Ukraine, and of the above-described events and consequences triggered by that invasion. Indeed, the Claimant does not even refer to Russia's full-scale invasion of Ukraine. Instead, it alludes euphemistically to unspecified "geopolitical developments", as if this could erase Russia's manifest responsibility for those "geopolitical developments".

10. On the other hand, the Claimant unduly magnifies the relevance for these proceedings of the Judgment of the Court of Justice of the European Union ("**ECJ**"), of 12 July 2022, in the Case C-348/20 P, and of the Advocate General's Opinion in the same case. Indeed, a large part of the Claimant's Supplementary Memorial consists of lengthy, but highly selective, quotations of the ECJ's Judgement and of the Advocate General's opinion, and incorrect interpretations of such quotations.

11. As will be shown in this Supplementary Counter-Memorial, the Claimant's framing of the issues is wrong on both counts. Russia's full-scale invasion of Ukraine, and the accompanying measures taken by Russia/Gazprom to prepare and assist that invasion, as well as the legitimate responses thereto by the European Union and other countries, including in particular the US sanctions, have a direct and decisive bearing on the core legal issues before the Tribunal.

12. In particular, Russia/Gazprom's weaponization of its deliveries of gas to the European Union has confirmed beyond doubt that the Claimant's control over the Nord Stream 2 pipeline poses a significant threat to the EU's security of supply, as well as to competition within the European Union. This, in turn, confirms that the EU co-legislators' decision to clarify that the Gas Directive applies to all inter-connectors, including the Nord Stream 2 pipeline, was fully justified. In the light of that threat, any differences in treatment between the Nord Stream 2 pipeline

and other gas pipelines which do not pose a comparable threat cannot be considered as discriminatory under any relevant ECT standards. Even if such differences of treatment could be regarded as discriminatory (*quod non*), they would be justified pursuant to Article 24.3 of the ECT, as a measure which the European Union considers necessary to protect its "public order", as well as its "essential security interests".

13. Beyond this, the Claimant's heavy reliance on the ECJ's Judgment (and, *a fortiori*, on the purely advisory opinion of the Advocate General) is entirely misplaced. As the European Union will explain, that judgment deals exclusively with the procedural issue of the admissibility of the application brought by the Claimant before the EU's General Court against the Amending Directive. It is without relevance to the Claimant's allegation of a "dramatic and unexpected regulatory change"; and it does not support the Claimant's allegations of discriminatory treatment.

14. In what follows, the European Union sets out, by way of introduction, a brief summary of the main arguments that will be developed in this submission in response to the Claimant's Supplementary Memorial.

15. Together with this Supplementary Counter-Memorial, the European Union submits an expert opinion by Ms. Serena Hesmondgalgh and Mr. Carlos Lapuerta, of the Brattle Group, regarding the impact of NS 2 on competition and security of supply in the EU energy market (the "**Brattle Report**").

1.1. Factual developments since February 2022

16. The European Union will begin by addressing the main factual developments which have taken place since February 2022. First, the European Union will clarify the status of the certification procedure applied for by the Claimant for NS 2 and show that the suspension of that procedure is due to the Claimant's own inaction. Next, the European Union will rebut the Claimant's attempts to minimize the impact of the acts of sabotage of September 2022[3], of the US sanctions[4] and of the composition/bankruptcy proceedings to which the Claimant remains subject[5]. Lastly, the European Union will provide a comprehensive rebuttal of the Claimant's

[3] Claimant's Supplementary memorial, section III.
[4] Claimant's Supplementary memorial, section IV.
[5] Claimant's Supplementary memorial, section V.

allegations that a "future market for the import of natural gas from Russia to the EU is possible[6]" and that "gas transport by the Claimant is not utopia"[7].

1.1.1. Current status of the certification procedure

17. The Claimant alleges that the certification procedure for NS 2 has been "stopped" by the German authorities and suggests that such "stoppage" is unjustified and arbitrary. That allegation is incorrect and misleading (section 2.1). In fact, the certification procedure remains formally open and no decision has been taken yet by Germany's National Regulatory Authority ("**NRA**"), the Bundesnetzagentur ("**BNetzA**"). The certification procedure was suspended on 21 November 2021 by the BNetzA and remains suspended to date. That suspension, however, is due to the Claimant's own inaction. Indeed, the Claimant has failed, since February 2022, to take any further step to meet the legal requirement that the application for certification must be filed by a legal entity established within the European Union. Beyond this, on 22 February 2022, Germany's Federal Ministry for Economic Affairs and Climate Action withdrew its original Security of Supply Assessment of 26 October 2021 in view of reevaluating the situation. That reevaluation is fully warranted in light of the events that culminated in Russia's full-scale invasion of Ukraine. No new Security of Supply Assessment has yet been issued, given that the certification procedure remains suspended due to the Claimant's own inaction.

1.1.2. Impact of the acts of sabotage of September 2022

18. The impact of the explosions of 26 September 2022 makes it very uncertain whether the NS 2 pipeline will be operational within the foreseeable future. The Claimant's assertions to the contrary are based exclusively on the views of [redacted], a long-standing senior employee of the Claimant, and are not supported by any independent evidence. [redacted] refers to unspecified "surveys" and "assessments" allegedly made by the Claimant, which have not been exhibited to the Tribunal. According to independent sources, the explosions were unprecedented in scale and the damage is likely to be very severe. Moreover, the reparation of the pipelines will be crippled by US sanctions and permit requirements (section 2.2).

[6] Claimant's Supplementary Memorial, section IV.5.
[7] Claimant's Supplementary Memorial, section IV.6.

1.1.3. Status and impact of the US sanctions

19. The Claimant has acknowledged the impact of the US sanctions on the operation of the NS 2 pipeline, but it seeks to minimize that impact. The US sanctions do more than establish certain obstacles that the Claimant could surmount in practice. As will be further explained in this submission, the available evidence illustrates the crippling effects of the US primary sanctions on the Claimant (section 2.3.1). Similarly, the Claimant has provided no basis for the Tribunal to conclude that all the goods, services, and technology needed for NS 2's operations can be obtained from providers that remain willing to transact with the Claimant despite the substantial risk of US secondary sanctions and the commitment at the highest level of the US government to prevent the pipeline from becoming operational (section 2.3.2).

1.1.4. Status of the Claimant under Swiss Bankruptcy law

20. Unlike the Claimant, the European Union will not engage in pointless speculation at this stage regarding the possible outcome of the ongoing composition/bankruptcy proceedings. The European Union reserves the right to object to the continuation of the present arbitration once the final outcome of the ongoing composition/bankruptcy proceedings becomes clearer (section 2.4).

1.1.5. Current and future market for imports of natural gas from Russia

21. The Claimant expresses hopes that future natural gas imports from Russia to the European Union are no utopia. Such hopes are refuted by recent and long-term developments, which illustrate that a market for the additional transport capacity provided by Nord Stream 2 can be ruled out. This is due to the decision by Russia/Gazprom to weaponize its gas supplies in the run up of its war of aggression against Ukraine (section 2.5.1), which disrupted commercial relations with EU economic operators. The latter no longer seek gas but damages from Russia owned gas suppliers (section 2.5.2). The European Union is now well on track to phase out Russian gas by 2027 (section 2.5.3), which has resulted in repurposing key parts of the infrastructure required for receiving and distributing gas shipped through Nord Stream 2 (section 2.5.4). The further deterioration of relations between the European Union and Russia renders these developments irreversible in the foreseeable future, all the more so as decarbonising the EU's

economy will continuously decrease the need for additional Russian gas in the years to come (section 2.5.5).

1.2. Subsequent developments have not "confirmed" the "catastrophic impact" of the Amending Directive alleged by the Claimant

22. Contrary to the Claimant's assertions, the alleged "catastrophic impact" of the Amending Directive has not been "confirmed" by subsequent developments. As will be recalled below, the Amending Directive does not, as such, prevent the operation of the NS 2 pipeline by the Claimant (section 3.2). Rather, the non-operation of the NS 2 pipeline is the consequence of the Claimant's own actions and omissions and of other circumstances that are not attributable to the European Union. The certification procedure was suspended due to the Claimant's own inaction (section 3.3), whereas the decision of the German authorities to reassess the pipeline's impact on security of supply was a justified response to Russia's full-scale invasion of Ukraine (section 3.4). That the alleged damage is not attributable to the European Union is confirmed by the fact that the foreign investors in the NS 1 pipeline have written off entirely their investments, despite the fact that the NS 1 pipeline is not subject to certification under the Gas Directive (section 3.5). Lastly, the Second Swiss Economics Report, just like the First Swiss Economic Report, is deeply flawed and unreliable (section 3.6).

1.3. The Judgment of the European Court of Justice does not support the Claimant's case

1.3.1. The Judgment of the Court of Justice contains statements limited to admissibility

23. The Claimant relies heavily on the ECJ's Judgment of 22 July 2022. It nevertheless draws conclusions from this judgment that are not supported by it, as if this arbitration case would now be settled in its favour. The Claimant errs and fails to present the judgment for what it is: a decision on admissibility of the action before the General Court, rather than a decision on the substance or merits (section 4.1.1).

24. The Claimant also relies on a number of statements by the Advocate General that the ECJ failed to cite, still less to endorse, and that are therefore moot. As such, the Claimant's attempt to elevate various statements of the Advocate General, made in the context of a submission on admissibility, to a finding of the Court on an issue of substance, is fundamentally misleading (section 4.1.2).

1.3.2. The Judgment is without relevance to the claim of dramatic regulatory change

25. The ECJ's Judgment does not contain a ruling on the merits, which would set out binding interpretations of the Amending Directive, but merely addresses the admissibility of an action brought against that Directive. However, even if the interpretations of the Amending Directive set out in the judgment were to prevail when the EU Courts decide on the merits of the case (which is uncertain), these interpretations could not be invoked in support of the Claimant's claim that a dramatic and unexpected regulatory change undermined the basis of NSP2AG's investment (section 4.2).

1.3.3. The Judgment does not support the claim of discriminatory treatment

26. The Claimant's primary allegation is that the Amending Directive allegedly specifically targeted NS 2, in that it was the only pipeline that could benefit neither from an exemption, not from a derogation. It argues the Court has "endorsed" this conclusion.

27. However, as the European Union has already demonstrated in previous memorials and will demonstrate here again, the manner in which the Gas Directive was amended never had the intent of eliminating the possibility for a non-completed project, like Nord Stream 2, to apply for an Article 36 exemption. The intention when proposing the amendment was to establish a system whereby, on the one hand, *existing* pipelines completed before 23 May 2019 could apply for an Article 49a derogation. On the other hand, *new* pipelines (namely those not yet completed) can apply for an Article 36 exemption, in line with the earlier decisional practice of the Commission under the Directive (Section 4.3.1).

28. Even if it were the case that Nord Stream 2 was the only pipeline unable to apply either for a derogation or for an exemption (*quod non*), this difference in treatment would not amount to discrimination contrary to protections set out in the ECT. The Claimant's conceptual "leap" from differential treatment to discrimination is baseless. Importantly, the Court of Justice itself made no finding that any difference of treatment was discriminatory. The European Union will demonstrate the alleged difference in treatment is in any event not discriminatory because it is based on objective reasons related to the fact that Nord Stream 2 was neither an existing nor a projected pipeline (Section 4.3.2).

29. Regardless of the issue of access to either the exemption or derogation regimes, the European Union will demonstrate that, in the end, there is no less favourable

treatment in practice. The Claimant has failed to demonstrate that it had any reasonable possibility of qualifying either for a derogation or for an exemption. To the contrary, neither outcome could reasonably have been expected. The European Union will explain, based on firm evidence, including the Brattle expert report, that this is because the Nord Stream 2 pipeline is very different from other pipelines that have been granted derogations or exemptions, for the simple reason that it poses much greater risks to security of supply and competition. This has been confirmed beyond doubt by recent developments (Section 4.3.3).

1.3.4. Subsidiarily, even if the Tribunal were to find a breach of the non-discrimination standards, it would be justified under the general exception in Article 24.3 of the ECT

30. In any event, the European Union considers and demonstrates that, even if the Tribunal would – despite the objective differences between the Nord Stream 2 pipeline, on the one hand, and other pipelines, on the other hand – find that the Amending Directive breaches the non-discrimination standards in the ECT, the Amending Directive is still justified under the general exception for "public order" measures in Article 24.3 c) of the ECT. Further, the Amending Directive is also necessary for the protection of the European Union's essential security interests, in the sense of Article 24.3 a) ii) of the ECT (Section 4.4).

1.4. The Tribunal lacks jurisdiction

31. 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. The present proceedings concern an example "par excellence" where parallel proceedings take place, risking conflicting outcomes and enabling the Claimant "two bites at the apple".

32. The European Union has demonstrated that the disputes before the Court of Justice of the European Union and the present Tribunal are substantially the same. The application for annulment before the Court of Justice of the European Union and the present arbitration proceedings indeed have the same fundamental basis. Substantially identical obligations are argued before in arbitration proceedings and in proceedings before the ECJ, and in the result the fork-in-the-road limitations under the ECT are triggered and apply. The Claimant's extensive reliance in its Supplementary Submission on the holdings of the ECJ in connection

with the Claimant's pre-existing challenge stands as a tacit admission that the present and that other proceeding address the same dispute in substance.

33. The European Union also demonstrates that the present case can be distinguished from the SCC Case No V2019/126 – *Mercuria Energy Group Limited (Cyprus) v The Republic of Poland* that the Claimant cites in support of its own argument.

34. For all these reasons, the Tribunal should declare the present case inadmissible (section 6).

1.5. The Tribunal cannot afford a restitutionary remedy

35. Contrary to the Claimant's assertions, the Tribunal has no power to order an interim or permanent injunction that would prevent the European Union from applying a generally applicable legislative measure (the Gas Directive) to the Claimant and its asset (section 7). Granting such relief would amount to an extraordinary and unprecedented incursion into the European Union's sovereign right to regulate within the scope of its powers to promote public welfare objectives. The Claimant has offered nothing in the Supplementary Memorial to rebut the EU's arguments against the imposition of a final injunctive relief as a "primary remedy" in investor-State cases, either under general international law or under Article 26(8) of the ECT. To the contrary, the injunction sought by the Claimant is wholly inappropriate and unprecedented in investor-State practice and must be rejected.

36. Rather than engage with the European Union's submissions to this effect, the Claimant has simply made cryptic reference to the judgment of the International Court of Justice ("**ICJ**") in the case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* as "further support of the Tribunal's power to award the requested remedy". The Claimant's assertion fails, as this judgment provides no support for the Tribunal's power to award the relief the Claimant seeks in this case. The referenced ICJ case is materially different from the present case in critical respects: the ICJ decision was taken in the State-to-State rather than in the investor-State context; it addressed the consequences of decisions by sovereign courts in particular cases, rather than the proposed suspension of a State regulation of general application to a private entity; Germany never requested compensation for the non-pecuniary harm caused to it by Italy's violations of sovereign immunities; and the dispute was ultimately resolved through monetary compensation by the respondent State on the basis of a separate, pre-existing treaty. The analogy the Claimant proposes and its

reliance on the ICJ case is therefore strained and misleading. Indeed, its argument confirms *a contrario* that the Claimant has failed to find any apposite authority supporting its unprecedented request for a permanent injunctive suspension of legislative measures of general application vis-à-vis private investors.

2. FACTUAL DEVELOPMENTS SINCE FEBRUARY 2022

2.1. Status of the certification procedure

2.1.1. Introduction

37. The Claimant alleges that, by imposing the unbundling requirements, the Amending Directive has prevented the Claimant from operating the German section of the NS 2 pipeline[8]. In reality, on 11 June 2021, the Claimant filed a request with the German authorities for its certification as an Independent Transmission Operator ("**ITO**")[9]. The Claimant's request amounted to a belated but unequivocal recognition that the unbundling requirements of the Amending Directive, as transposed and implemented by Germany, did not, as such, pose an absolute bar to the operation of the NS 2 pipeline.

38. In its Supplementary Memorial, the Claimant further asserts that the certification procedure "was stopped in February 2022 for an indefinite period of time"[10]. The Claimant implies that this "stoppage" was attributable to the German authorities, and suggests that it was unjustified and arbitrary.

39. As will be explained below, the Claimant's allegations are incorrect and misleading. The certification procedure was suspended by the BNetzA as of 21 November 2021 and remains suspended because of the Claimant's own deliberate inaction. More specifically, the procedure was and remains suspended because the Claimant failed to take the necessary steps to meet the legal requirement that requests for certification as an ITO must be made by an entity established within the European Union.

[8] *See e*.g. Claimant's Supplementary Memorial on Jurisdiction and Merits, para. 200
[9] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 265.
[10] Claimant's Supplementary Memorial on Jurisdiction and Merits, para. 195.

2.1.2. Background

40. By way of background, the European Union will recall first the main provisions governing the certification procedure, both under the Gas Directive and under German Law.

41. Before an undertaking is approved and designated as transmission system operator, it must be "certified" according to the procedures laid down in Articles 10 and 11 of the Gas Directive.

42. Those procedures provide that the decisions on certification must be taken by the competent NRA of each EU Member State.

43. Where certification is requested by a transmission system owner or a transmission system operator which is controlled by a person or persons from a third country or third countries, the NRA must refuse certification unless it has been demonstrated that:

    i. the entity concerned complies with the unbundling requirements of Article 9; and
    ii. granting certification will not put at risk the security of energy supply of the Member State and the [Union][11].

44. The NRA must adopt a draft decision on certification within four months from the filing of a request (provided that the request is complete)[12]. The draft decision must then be notified to the European Commission, which may issue an opinion within two months (although this can be extended to four months in some circumstances)[13]. The European Commission's opinion must be taken into utmost account by the NRA. The NRA must then take its decision within two months from the expiry of the time-period for the issuance of the European Commission's opinion[14].

45. The Gas Directive was transposed into German law by the Gesetz zur Neuregelung energiewirtschaftsrechtlicher Vorschriften, of 26 July 2011, which amended the Energiewirtschaftsgesetz („**EnWG**") of 7 July 2005[15]. In turn, the Amending Directive was transposed by an Act of 5 December 2019 further amending the EnWG[16].

[11] Gas Directive, Article 11(3).
[12] *Ibid*.
[13] Gas Directive, Article 11(4) and (6).
[14] Gas Directive, Article 11 (8).
[15] **Exhibit RLA – 60**.
[16] **Exhibit CLA - 47**.

46. The EnWG transposes the three unbundling models provided for in the Gas Directive (i.e. Ownership Unbundling or "**OU**"; Independent System Operator or "**ISO**", and Independent Transmission System Operator or "**ITO**")[17] and allows each operator to choose one of those three models, provided it meets the relevant legal requirements in each case.

47. The Bundesnetzagentur ("**BNetzA**") is the German NRA responsible for applying the EnWG. The Bundesnetzagentur is responsible *i.a.* for the certification of TSOs in accordance with sections 4a and 4b of the EnWG, which transpose Articles 10 and 11 of the Gas Directive.

48. It is for the BNetzA to assess whether the applicant complies with the applicable unbundling requirements of the EnWG in each case. On the other hand, the assessment of risks to security of supply is not conducted by the BNetzA, but instead by the Federal Ministry for Economic Affairs and Climate Action. The Ministry's assessment ("Bewertung") on security of supply issued is binding on the BNetzA when issuing its decision on certification[18].

2.1.3. Development of the certification procedure of NSP2AG

49. Pursuant to the above regime, on 11 June 2021, NSP2AG applied to the BNetzA for certification as an ITO[19]. Upon review of the filing the BNetzA found that the application was incomplete, as relevant documents and information were missing, and duly notified NSP2AG.

50. On 8 September 2021, the BNetzA announced that NSP2AG "has now submitted all necessary documents for inspection by the authority"[20]. However, on 21 November 2021, the BNetzA moved to suspend the certification procedure. According to the BNetzA, the suspension

> was caused by a change in legal form at Nord Stream 2 AG. The company has decided to found a subsidiary that is to become the owner and operator of the German part of the Nord Stream 2 pipeline. The new subsidiary now has to fulfil the unbundling requirements of an independent transmission operator as set out in sections 10 to 10e of the German Energy Industry Act (EnWG) and submit documentation, evidence, etc to the ruling chamber accordingly.[21]

[17] *See* EU's Counter-Memorial on the Merits of 3 May 2021, para. 84 ff.
[18] **Exhibit RLA - 60**, section 4b (2) of the EnWG.
[19] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 265.
[20] **Exhibit R – 291**, Bundesnetzagentur, press release, 21 November 2021, "Nord Stream 2 AG's application for certification in accordance with sections 4(a), 4(b) and 10 et seq" EnWG https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK7-GZ/2021/BK7-21-0056/BK7-21-0056_Antrag.html?nn=659906
[21] *Ibid*.

51. The BNetzA further announced that the procedure

> will therefore remain suspended until the main assets and human resources have been transferred to the subsidiary and the ruling chamber has been able to check whether the documentation resubmitted by the subsidiary, as the new applicant, is complete.[22]

52. The BNetzA's move and related announcements were consistent both with the express requirements of the EnWG and with the BNetza's generally applicable procedures.

53. It was not until 26 January 2022 that the Claimant announced that NSP2AG had incorporated a German subsidiary (Gas for Europe GmbH)[23] as a first step towards meeting the conditions for resuming the certification procedure that the BNetzA had specified on 21 November 2021. Yet, the Claimant took no further action to meet those conditions following Russia's full-scale invasion of Ukraine on 24 February 2022. In particular, the Claimant failed to transfer the pipeline assets to Gas for Europe GmbH. Gas for Europe GmbH was inactive during the remainder of 2022 and was eventually wound up by the Claimant, with effects from 1 January 2023[24].

54. Prior to the suspension of the certification procedure by BNetzA on 21 November 2021, Germany's Federal Ministry for Economic Affairs and Climate Action had already issued, on 26 October 2021, a Security of Supply Assessment regarding NSP2AG's certification.

55. On 21 February 2022, President Putin announced Russia's diplomatic recognition of the Russian-controlled territories of Ukraine as independent states: the so-called "Donetsk People's Republic" and "Luhansk People's Republic". The following day, the Federal Ministry for Economic Affairs and Climate Action sent a letter to the BNetzA communicating the withdrawal of the Security of Supply Assessment of 26 October 2021.[25] This withdrawal was motivated as follows by the Ministry:

> The reason for this move is the situation on the German and European gas market this winter, and the deterioration of the

[22] *Ibid*.
[23] **Exhibit R-151**, website of Gas for Europe GmbH, https://www.g4e.de/en/news/
[24] **Exhibit R – 292**, Reuters, 20 January 2023, "Nord Stream 2 German subsidiary wound up -report" https://www.reuters.com/business/energy/nord-stream-2-german-subsidiary-wound-up-t-online-reports-2023-01-20/
[25] **Exhibit R - 293**, Germany's Ministry for Economic Affairs and Climate Action, press release, 22 February 2022, "Minister Habeck comments on the situation in eastern Ukraine and the discontinuation of the certification procedure for Nord Stream 2" https://www.bmwk.de/Redaktion/EN/Pressemitteilungen/2022/02/20220222-minister-habeck-comments-on-the-situation-in-eastern-ukraine-and-the-discontinuation-of-the-certification-procedure-for-nord-stream-2.html

> geostrategic situation. In particular, in view of Russia's escalation in Ukraine and its breach of international law by its recognising of the two "people's republics", it is quite possible that this will impact on the security of supply of the Federal Republic of Germany and the European Union, which is to be assessed in the context of the certification of the transport system operator. A re-evaluation is therefore necessary.[26]

56. On 24 February 2022, Russia launched its full-scale invasion of Ukraine[27].

57. Given that the certification procedure remains suspended due to the Claimant's own inaction, the Federal Ministry for Economic Affairs and Climate Action has not yet issued a new Security of Supply Assessment.

2.1.4. Current status of the certification procedure of NSP2AG

58. In light of the foregoing, the current situation of the ITO certification procedure applied for by the Claimant may be summed up as follows:

i. the certification procedure remains formally open. No decision has yet been taken by the BNetzA on whether or not to accord ITO certification, as requested by the Claimant;

ii. the certification procedure was suspended on 21 November 2021 by the BNetzA and remains suspended to date. The suspension is due to the Claimant's own inaction, given its failure, since February 2022, to take any further steps required to meet the conditions for resuming the certification procedure specified by the BNetzA on 21 November 2021;

iii. on 22 February 2022, the Federal Ministry for Economic Affairs and Climate Action withdrew its original Security of Supply Assessment of 26 October 2021 in order to reevaluate the situation in light of events that culminated in Russia's full-scale invasion of Ukraine. No new Security of Supply Assessment has yet been issued, given that the certification procedure remains suspended due to the Claimant's own inaction;

iv. as of 1 January 2023, the Claimant wound up Gas for Europe GmbH, the legal entity established previously by the Claimant as a first step to fulfil the requirements for ITO certification.

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[26] *Ibid.*
[27] **Exhibit R- 294**, BBC, 24 February 2022, "Ukraine conflict: Russian forces attack from three sides" https://www.bbc.com/news/world-europe-60503037

2.2. Impact of the acts of sabotage of September 2022 on the operability of the NS pipelines

59. On 26 September 2022, a series of massive underwater explosions and consequent gas leaks occurred on the Nord Stream 1 and Nord Stream 2 pipelines. The leaks were located in international waters, but within the exclusive economic zones of Denmark and Sweden[28]. The investigations conducted by the Swedish and Danish authorities ruled out the possibility of an accident and concluded that the explosions were a deliberate act of sabotage. The perpetrators remain unidentified[29].

60. Contrary to the Claimant's allegations, the impact of the acts of sabotage of 26 September 2022 makes it very uncertain whether the NS 2 pipeline will be operable within the foreseeable future.

61. In its Supplementary Memorial, the Claimant alleges that "one line of the NS 2 pipeline remains operable … and the other line … is reparable"[30] and that "the Claimant therefore has an unchanged and continued interest in the outcome of these arbitration proceedings"[31].

62. More specifically, the Claimant alleges that, as regards Line B, "Claimant could start operation [redacted] [32]. The Claimant concedes that Line A has been severely damaged and that approximately 130 kilometres of that line have been flooded[33]. Nevertheless, the Claimant contends that Line A could be "repaired and start operation [redacted] [34]. The Claimant estimates the total cost of repairing both lines [redacted][5].

63. The Claimant's assertions are wholly unsupported by independent evidence. The Claimant bases all its assertions exclusively on the expressed views of [redacted] a longstanding senior employee of NSP2AG with an obvious personal interest in the outcome of this dispute. [redacted] fails to cite any independent source of evidence in support of any of his assertions. Instead, [redacted] makes

[28] **Exhibit R – 235**, Financial Times, 29 September, "What we know about the damage to Baltic Sea gas pipelines", https://www.ft.com/content/294e441d-7b24-4144-a51f-75bdf70d723c
[29] **Exhibit R- 295**, BBC, 26 February 2024, "Nord Stream: Denmark closes investigation into pipeline blast" https://www.bbc.com/news/world-europe-68401870
[30] Claimant's Supplementary Memorial on Jurisdiction and Merits, 27 February 2024, title of section III.
[31] *Ibid.*, para.40.
[32] *Ibid.*, para. 40
[33] *Ibid.*, para.30
[34] *Ibid.*, para. 40.
[35] *Ibid.*, para. 39.
[36] [redacted]

some vague allusions to "a survey … performed by NSP2 in Q1 2023 to assess the damage"[37] and to a series of unspecified "assessments" conducted by NSP2AG itself on the basis of that "survey". Neither the alleged "survey", nor any of the subsequent internal "assessments" allegedly made by NSP2AG on the basis of that "survey", has been disclosed either to the Tribunal or to the European Union.

64. According to independent sources, the explosions of 26 September 2024 were unprecedented in scale and the resulting damage was likely to be very severe[38]. The German authorities have stated that the ruptures in the pipes may not be reparable, due to the corrosion resulting from salt water[39].

65. Additional confirmation that at least line B may not be reparable is provided by the fact that all the shareholders of Nord Stream AG, the Swiss company which owns the pipeline Nord Stream 1 (with the sole exception of Gazprom), have written off entirely their investments in Nord Stream AG by citing *i.a.* the damages to the Nord Stream 1 pipeline caused by the acts of sabotage of September 2022 (see below section 3.5).

66. Even if it were technically feasible to repair the NS 2 pipeline at an affordable cost, and within a reasonable period of time (neither of which proposition has been demonstrated through objective and tested evidence), restoration of the pipeline to operation condition would, in any event, face significant obstacles in light of the US sanctions (see below section 2.3), permit requirements[40] and irreversible changes to the landing infrastructure (see below section 2.5.4). In addition, reparations of the NS 2 pipeline would be hampered by the difficulty to obtain appropriate insurance coverage[41].

2.3. Status and impact of the US sanctions

67. The European Union has described in detail the impact of the US sanctions on the operation of the NS 2 pipeline in its letters of 3 October 2022 (paras. 10-19) and of 16 December 2022 (section 3.1.1, para. 89 ff.)

68. The Claimant, in response, argues that US sanctions and other sanctions regimes "may complicate" the Claimant's activities but "do not make them impossible."[42] As the Claimant's argument progresses further, however, it is clear that the Claimant is focused only on legal impossibility: when stated with precision, the

[37] [redacted]
[38] EU's letter dated 16 December 2022, para. 136 and evidence cited therein.
[39] EU's letter dated 16 December 2022, para. 136 and evidence cited therein.
[40] EU's letter dated 16 December 2022, para. 137 and evidence cited therein.
[41] EU's letter dated 16 December 2022, para. 138 and evidence cited therein.
[42] Claimant's Supplementary Memorial, para. 42.

Claimant's argument is that US sanctions or other applicable sanctions would not make it "legally impossible" for the Claimant to operate the intact pipeline, and that the repair and operation of the damaged pipeline would not be "legally prohibited" by sanctions.[43]

69. As the European Union has already noted before this Tribunal, these arguments are a strawman: the European Union has never argued that the US sanctions (primary or secondary) legally prohibit the Claimant from operating the NS 2 pipeline[44]. The European Union's position is that the Claimant is effectively unable to operate the NS 2 pipeline because of the US sanctions. The Claimant's unduly narrow focus on legal impossibility implicitly asks the Tribunal to ignore the significant evidence that the sanctions foreclose the Claimant's ability to operate the NS 2 pipeline as a practical matter.

70. To the extent the Claimant acknowledges the practical impact of the US sanctions, the Claimant seeks to minimize that impact. The Claimant's most recent understatement in this regard is the assertion that the US sanctions "have of course created certain difficulties."[45] But as explained herein, the sanctions do more than establish certain obstacles that the Claimant might surmount. The US primary sanctions have had an immediate and paralyzing effect on the Claimant. It is hardly speculation to suggest that, while those sanctions remain in place, the future will be no different from the present.

71. The Claimant has notably offered no evidence to suggest that it can obtain all the goods, services, and technology necessary for NS 2's operations without directly or indirectly involving US suppliers; without the use of the US financial system; and without the use of the non-US financial institutions that refuse to do business with Specially Designated Nationals ("**SDN**"). Instead, the available evidence points in exactly the opposite direction: it illustrates the crippling effects of the US primary sanctions on the Claimant (section 2.3.1). Similarly, the Claimant has provided no basis for the Tribunal to conclude that all the goods, services, and technology needed for NS 2's operations can be obtained from providers that remain willing to transact with the Claimant despite the substantial risk of US secondary sanctions and the commitment at the highest level of the US government to prevent the pipeline from going forward (section 2.3.2). The Claimant's conclusory argument that sanctions do not prevent the Claimant from

[43] *Ibid*. para. 43.
[44] *See* EU's letter of 16 December 2022, para. 94.
[45] Claimant's Supplementary Memorial, para. 41.

going into commercial gas transport operations are therefore to be rejected as unfounded.

2.3.1. Primary Sanctions

72. The Claimant's Supplementary Memorial emphasizes at length that the US primary sanctions on the Claimant impose legal obligations only with respect to US persons or transactions with a nexus to the United States.[46] It follows, according to the Claimant, that the NS 2 pipeline could start gas transport without triggering any consequences under the US primary sanctions, because the Claimant's activities supposedly have no US nexus.[47] The Claimant therefore argues it is "simply not correct" to assert that US primary sanctions would affect the Claimant.[48]

73. This argument fails for two reasons: it ignores the effects that the US primary sanctions have already had on the Claimant, and it appears to assume that only a direct nexus to the United States would be relevant under US primary sanctions.

74. Regarding the effects of the US primary sanctions, there is ample evidence – as the European Union has already explained to the Tribunal – that the US primary sanctions had an immediate and paralyzing effect on the Claimant.[49] For example, according to the Swiss authorities, the Claimant faced "massive payments difficulties" following its SDN designation that "made its ongoing operations impossible."[50] The Claimant conceded that its bank accounts were promptly blocked after the SDN designation, making the Claimant "unable to make any payments or access finance."[51] The Claimant has not adduced any evidence that these payments difficulties would somehow disappear should the Claimant attempt to repair and operate the NS 2 pipeline. The cited difficulties directly stemmed from the Claimant's designation as an SDN; that designation remains in effect; and it is likely to remain in effect for the foreseeable future.[52]

75. Moreover, by the Claimant's own admission, the Claimant's provider of telecommunications services discontinued its services to the Claimant "in response to the US listing Claimant as an SDN."[53] The Claimant has not adduced any evidence that it has identified a new provider willing to provide

[46] Claimant's Supplementary Memorial, paras. 50-55.
[47] *Ibid.* para. 55.
[48] *Ibid.* para. 55.
[49] *See* EU's letter of 16 December 2022, paras. 119-126.
[50] *Ibid.* para. 122 and sources cited therein.
[51] Claimant's email of 1 March 2022.
[52] *See* EU's letter of 16 December 2022, para. 132; EU's letter of 3 October 2022, paras. 16-19.
[53] Claimant's Supplementary Memorial, para. 203(ii) (emphasis added).

telecommunications services; instead, despite the passage of two years since the Claimant was designated as an SDN, a witness supporting the Claimant has estimated (without explaining the basis for his estimate) that it would take approximately nine months to contract a new telecommunications service provider and re-establish required connections.[54] In the meantime, the Main Control Center and Backup Control Center for the NS 2 pipeline remain inoperative, and certain safety functions have been transferred from the Main Control Center to Pig Trap Areas in Russia and Germany.[55]

76. Regarding the supposed lack of a US nexus to the Claimant's activities, it is notable that the Claimant has adduced no evidence that its current activities lack a US nexus. Even if the Claimant's conclusory assertion were true in this regard, the Claimant overlooks that an indirect nexus to the US would be equally relevant – and equally problematic – under US primary sanctions. For example, if the Claimant were to obtain any goods, services, or technology from a non-US supplier who procured such items from the United States, the non-US supplier would be violating US primary sanctions. The Office of Foreign Assets Control ("**OFAC**") has brought numerous enforcement actions against non-US companies that caused an export of goods or services to a US sanctions target.[56]

77. Furthermore, as the European Union has noted and the Claimant has acknowledged, US primary sanctions effectively prohibit the Claimant from conducting any transactions in US dollars.[57] Transactions in many non-US currencies are also likely to be unfeasible for the Claimant, because many non-US banks dealing primarily in those currencies decline to engage in transactions with SDNs for various reasons, including secondary sanctions risks and reputational concerns. For evidence of this, the Tribunal needs to look no further than the fact that the Claimant's accounts at non-US banks were frozen after the US designated the Claimant as an SDN.[58]

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[54] [redacted]

[55] *Ibid.* para. 2.4.

[56] *See, e.g.,* **Exhibit RLA-353**, OFAC Enforcement Release, "EFG International AG Settles with OFAC for $3,740,442 for Apparent Violations of Multiple Sanctions Programs" (14 March 2024), available at https://ofac.treasury.gov/media/932766/download?inline (settlement for causing export of services to, inter alia, an SDN designated under OFAC's Russia sanctions); **Exhibit RLA-354**, OFAC Enforcement Release, "Alfa Laval Middle East Ltd. Settles Potential Civil Liability for Apparent Violations of the Iranian Transactions and Sanctions Regulations" (19 July 2021), available at https://ofac.treasury.gov/media/911521/download?inline (settlement for causing indirect export of goods from the US to Iran); **Exhibit RLA-355**, OFAC Enforcement Release, "Nordgas S.r.l. Settles Potential Civil Liability for Apparent Violations of the Iranian Transactions and Sanctions Regulations" (26 March 2021), available at https://ofac.treasury.gov/media/56931/download?inline (settlement for causing indirect export of goods from the US to Iran).

[57] EU's letter of 16 December 2022, para. 112; Claimant's Supplementary Memorial, para. 54.

[58] Claimant's email to the Tribunal of 1 March 2022, where the Claimant stated that:

78. The Claimant has made no effort to show that it could repair and operate the NS 2 pipeline without transacting in US dollars; with limited access to non-US financial services; and without even indirect access to US goods, services, or technology. For an infrastructure project of NS 2's technical and commercial complexity, any suggestion that the Claimant could do so strains credulity past the breaking point. It is notable that prior to 2021, the major US energy company [redacted] was providing services to the Claimant; in February 2021, the US Department of State announced that [redacted] was among eighteen US and non-US companies that were engaged in good faith efforts to wind down their operations in support of NS 2.[59] At that time, the Claimant had not yet even been designated as an SDN. Now that the Claimant is an SDN, US sanctions are a legal bar preventing [redacted] (and every other US company) from providing any goods, services, or technology to NS 2. If a non-US company were to replace [redacted], US primary sanctions would bar that company from procuring any goods, services, or technology from the US for the NS 2 project.

79. The Claimant's insistence that the US sanctions have a limited impact on its operations is misleading and disingenuous. It is contradicted by expert research commissioned by the Claimant's group for its own use and withheld from this Tribunal. Indeed, according to press reports, an independent research report commissioned by Gazprom's management and written at the end of 2023 came to the conclusion that "sanctions have cut Russia's energy industry off from crucial technology such as turbines that help move gas though pipelines, as well as spare parts and expertise to repair them".[60]

"The designation of Nord Stream 2 AG as a US Specially Designated National (SDN) on 23 February 2022 and recent geopolitical developments have led to an inability on the part of the Claimant to pursue the arbitration at this time. In particular, [redacted]".

[59] **Exhibit R- 301**, Timothy Gardner, "Baker Hughes, AXA Group, 16 Others Quit Nord Stream 2 Pipeline – U.S.," *Reuters* (24 February 2021), available at https://www.reuters.com/article/idUSKBN2AO280/ ; *see also* US Department of State, "Certification of Good Faith Wind Down Efforts" (19 February 2021), available at https://www.scribd.com/document/495285362/Certification-of-Good-Faith-Wind-Down-Efforts.

[60] **Exhibit R – 320**, Financial Times, 5 June 2024, "Gazprom badly hurt by Ukraine war, says company-commissioned report", https://www.ft.com/content/21f8f63f-80d6-455f-abf8-fce269d70319
("Gazprom would struggle to ramp up its own export capacity, the report added, if Russia could not end its dependence on western-designed turbines, which are used for tasks such as electricity generation and compression as well as moving gas. Russia's energy ministry has said it expects companies to be able to repair US-made turbines by next year. But Russian manufacturers have yet to reproduce crucial parts of turbine production, the report says, with as much as 75 per cent of the components needed coming from western countries. Moscow could be forced to mothball or shut down power stations across the country if it cannot produce an alternative domestically, the report warns. A programme to build gas turbines domestically would cost at least Rbs100bn and take at least five years, the report estimated, adding that Gazprom would struggle to finance its investment programme without a significant rise in revenues.")

2.3.2. Secondary Sanctions

80. Turning to the impact of US secondary sanctions, the Claimant observes that such sanctions did not prevent the completion of the NS 2 pipeline in 2021, and leaps to the conclusion that those sanctions would not prevent the Claimant from starting operations of the pipeline in the future.[61] In so doing, the Claimant ignores the obvious differences between 2021 and the present as regards US sanctions policy toward Russia and the NS 2 pipeline.

81. For example, the President of the United States made a clear commitment in early February 2022 – prior to Russia's further invasion of Ukraine later that month – that in the event of such an invasion, "there will be no longer Nord Stream 2. We will put an end to it."[62] When pressed on how the US would prevent the pipeline from becoming operational, President Biden stated "I promise you we will be able to do it."[63] The clear implication of the President's statement is that the US will be more aggressive in the use of secondary sanctions against Nord Stream 2 in light of Russia's ongoing illegal war of aggression against Ukraine.

82. Furthermore, the strong US opposition to NS 2 is bipartisan – not merely the policy of the current Democratic Party-led administration. When the Biden administration initially declined to impose sanctions on Nord Stream 2 in 2021, the Republican Party members of the US Senate Foreign Relations Committee and the US House of Representatives Foreign Affairs Committee were strongly critical of that decision, and stated that they view Nord Stream 2 as a "Russian malign influence project."[64] Similarly, when the Claimant was designated as an SDN in February 2022, the ranking Republican member of the Senate Foreign Relations Committee (Senator Jim Risch) stated, "Today's actions on Nord Stream 2 are long overdue, but I cannot overstate how critical they are to showing Putin that violating a nation's sovereignty has consequences. I have worked with my colleagues on a bipartisan basis for years toward this result, and it is good to see President Biden do the right thing."[65]

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[61] Claimant's Supplementary Memorial, para. 44.
[62] **Exhibit R- 302**, Reuters, "If Russia Invades Ukraine, There Will Be No Nord Stream 2, Biden Says" (8 February 2022), available at https://www.reuters.com/business/energy/if-russia-invades-ukraine-there-will-be-no-nord-stream-2-biden-says-2022-02-07/.
[63] *Id.*
[64] **Exhibit R- 303**, US Senate Foreign Relations Committee and US House Foreign Affairs Committee Republicans, "The Biden Administration's Failed Policy to Stop the Nord Stream 2 Pipeline" (18 August 2021), available at https://www.foreign.senate.gov/imo/media/doc/ns2_myth_v.factsheet.pdf.
[65] **Exhibit R- 304**, US Senate Foreign Relations Committee, "Risch on Administration's Decision to Sanction Nord Stream 2" (23 February 2022), available at https://www.foreign.senate.gov/press/rep/release/risch-on-administrations-decision-to-sanction-nord-stream-2.

83. The Tribunal should reject the Claimant's attempt to draw a false equivalency between the secondary sanctions environment leading up to 2021 and the very different environment that has existed since early 2022, and will exist for the foreseeable future, as a result of Russia's illegal war of aggression against Ukraine.

84. The Claimant attempts to dismiss the risk of secondary sanctions as mere speculation.[66] But as the European Union has previously explained to the Tribunal, the US secondary sanctions consist of two components: a legal authority defining the activities that can trigger secondary sanctions, and the imposition of US sanctions on the persons found to have engaged in the sanctionable activities.[67] The very existence of the former is designed to have a deterrent effect on those who might otherwise engage in the sanctionable activity.[68]

85. There is no question that the legal authorities needed for the US government to impose secondary sanctions in response to many activities regarding the NS 2 pipeline are already in place – this is not a matter of speculation. These authorities include the Protecting Europe's Energy Security Act of 2019, as amended ("PEESA")[69] and the Countering America's Adversaries Through Sanctions Act of 2017.[70] Notably, both of these authorities were enacted into law during the administration of former US President Trump.

86. Nor is it a matter of speculation that the existence of those legal authorities has already been sufficient to deter a significant number of non-US entities from engaging in transactions in support of NS 2, even before Russia's further invasion of Ukraine in February 2022. In September 2020, for example, the International Group of P&I Clubs – reportedly the world's largest group of shipping insurers – announced that its members would not insure vessels involved in the NS 2 project due to the threat of US sanctions.[71] And in February 2021, as noted above, the US State Department announced that eighteen companies including [redacted], [redacted] and [redacted] were engaged in good faith efforts to wind down their operations in support of NS 2 following the enactment of PEESA.[72]

[66] Claimant's Supplementary Memorial, paras. 65-66.
[67] *See* EU's letter of 16 December 2022, para. 100.
[68] *See id.* para. 115.
[69] Pub. L. 116-92, §§ 7501 *et seq*. (20 December 2019), as amended by Pub. L. 116-283, § 1242 (1 January 2021), codified at 22 U.S.C. § 9526 note.
[70] Pub. L. 115-44, § 232 (2 August 2017), codified at 22 U.S.C. § 9526.
[71] **Exhibit R- 307**, Reuters, "Top Shipping Insurance Group Will Not Cover Ships Linked to Nord Stream 2" (23 September 2020), available at https://www.reuters.com/article/idUSKCN26E1EL/ .
[72] **Exhibit R- 301**, Timothy Gardner, "Baker Hughes, AXA Group, 16 Others Quit Nord Stream 2 Pipeline – U.S.," Reuters (24 February 2021), available at https://www.reuters.com/article/idUSKBN2AO280/.

87. Moreover, the US has already used its PEESA authority to impose sanctions on entities involved in the NS 2 project on multiple occasions.[73] The idea that the United States will continue to follow through on the threat to impose secondary sanctions to prevent the NS 2 pipeline from becoming operational is not mere speculation: it is a well-founded prediction based upon the past practice of the United States and upon a clear commitment from the highest level of the US government, backed by a bipartisan consensus.

2.4. Status of the Claimant under Swiss bankruptcy law

88. As the Tribunal is aware, the Claimant is currently undergoing "composition proceedings" under the Swiss Debt Enforcement and Bankruptcy Law ("**DEBL**"). These proceedings may lead to a "composition agreement" or, failing that, to the opening of bankruptcy proceedings.

89. According to the Claimant[74], those proceedings were allegedly triggered by the decision of Germany's Federal Ministry for Economic Affairs and Climate Action, of 22 February 2022, to withdraw its Security of Supply Assessment of 26 October 2021.

90. The Claimant further alleges, in passing, that "Claimant would not have had to undergo composition moratorium proceedings, had the Amending Directive not prevented Claimant from starting operations"[75]. This unsupported assertion is incorrect. As will be explained below, the Amending Directive does not, as such, prevent the operation of the NS 2 pipeline (see section 3.2); the suspension of the certification procedure is entirely attributable to the Claimant's own inaction (see section 3.3); and the withdrawal of the Security of Supply Assessment by Germany's Federal Ministry for Economic Affairs and Climate Action, which post-dates that suspension, was a justified response to events provoked by Russia, of which the Claimant is an organ (see section 3.4).

91. The Claimant was granted a provisional composition moratorium in two four-month periods, from 10 May 2022 to 10 September 2022, and then from 10 September 2022 to 10 January 2023[76]. Thereafter, the Claimant was granted a

[73] *See, e.g.,* **Exhibit RLA-357**, OFAC, "PEESA Designations" (21 May 2021), available at https://ofac.treasury.gov/recent- actions/20210521; **Exhibit RLA-358**, OFAC, "PEESA Designations" (20 August 2021), available at https://ofac.treasury.gov/recent-actions/20210820; **Exhibit RLA-359**, OFAC, "PEESA Designations (23 November 2021), available at https://ofac.treasury.gov/recent-actions/20211123; Exhibit RLA- 360, OFAC, "PEESA Designations" (23 February 2022), available at https://ofac.treasury.gov/recent-actions/20220223_33.
[74] Claimant's Supplementary Memorial on Jurisdiction and Merits, 27 February 2024, para. 195.
[75] *Ibid.*, para.93.
[76] *Ibid.*, para. 90 i.

definitive composition moratorium in six-month periods from 10 January 2023 to 10 July 2023 and from 10 July 2023 to 10 January 2024[77].

92. In its Supplementary Memorial[78], the Claimant informs the Tribunal that an extension of the definitive composition moratorium was granted from 10 January 2024 to 10 July 2024. The Claimant speculates that "another extension *can, and is expected to be granted* until 10 January 2025, as the definitive composition moratorium can last for a maximum of 24 months.[79]" The Claimant provides no justification for this expectation.

93. According to the Claimant, as a matter of Swiss bankruptcy law, three legal outcomes can result at the end of a composition moratorium: (i) an ordinary composition agreement; (ii) a composition agreement with assignment of Claimant's assets; and (iii) initiation of bankruptcy proceedings[80]. The Claimant speculates that "as things stand, all three scenarios are entirely *possible and realistic*, i.e. a composition agreement as well as Claimant ending up in bankruptcy proceedings"[81]. Again, no justification is provided by the Claimant for this assertion.

94. The Claimant further speculates that "it *is very likely* that the moratorium proceedings will continue beyond the conclusion of the current phase of this arbitration."[82]

95. The scope of the current phase of the arbitration is limited to ascertaining whether the European Union has breached any of the ECT obligations invoked by the Claimant. The outcome of the ongoing composition/bankruptcy proceedings has no direct bearing on that question. Rather, the outcome of the ongoing composition/bankruptcy proceedings is relevant only for assessing whether the continuation of the present arbitration proceedings remains possible and necessary.

96. Unlike the Claimant, the European Union does not wish to speculate at this stage about the possible outcome of the ongoing composition/bankruptcy proceedings. The European Union reserves its right to object to the continuation of the present arbitration proceedings once the outcome of the ongoing composition/bankruptcy proceedings becomes clearer.

[77] *Ibid.*, para. 90 ii.
[78] *Ibid.*, para. 91.
[79] *Ibid.* Italics added.
[80] *Ibid.*, para.92.
[81] *Ibid.* para. 92. Italics added.
[82] *Ibid.*, para. 89.

2.5. No future market for the additional Nord Stream 2 gas transport capacity

97. The Claimant acknowledges that a prerequisite for the transport of natural gas through its Nord Stream 2 pipeline is "that there will be a market for natural gas and corresponding pipeline gas transport from Russia to the EU in the future"[83]. The Claimant submits that such a future market cannot be ruled out, arguing that despite a continuous decline, the EU continues being supplied with natural gas imports from Russia. Whilst the Claimant accepts that the EU is currently "attempting to bring import of natural gas from Russia to the EU to an end", it argues that steps undertaken in that regard "may very well change as the geopolitical developments unfold"[84].

98. In response, the European Union below confirms that there is no future market for the additional Nord Stream 2 natural gas transport capacity given that (i) Russia as well as their organs Claimant and Gazprom have decided to weaponise their gas supplies for political motives; (ii) commercial relations with EU customers have been irreparably damaged; (iii) the EU is on track to terminate imports of natural gas from Russia by 2027; (iv) key parts of the infrastructure required for exploiting the Nord Stream 2 pipeline have been devoted to other purposes; and (v) the deterioration of relations between the EU and Russia excludes the return to viable commercial relations in the foreseeable future.

2.5.1. Russia has weaponised natural gas supplies to punish the European Union

99. As set out in greater detail in the Brattle Report,[85] Russia's actions and communications illustrate that its organs Gazprom and the Claimant have weaponised gas supplies for political motives, in particular to punish EU Member States for their support of Ukraine.[86] So long as EU Member States do not abandon support for Ukraine, no gas will flow through the Nord Stream 2 pipeline even if it were fully functional and certified.

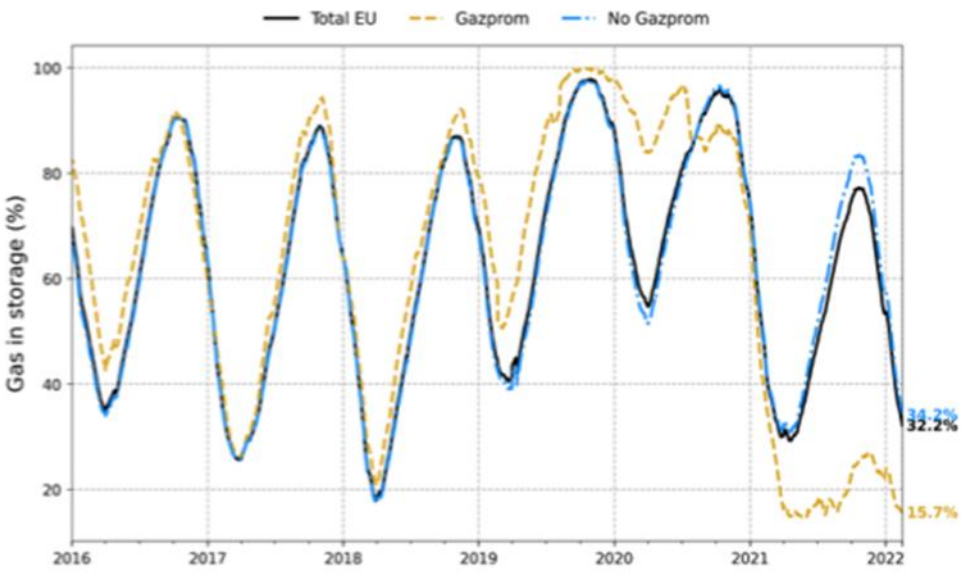
100. Already as of 2021, in the run-up to Russia's full-scale military invasion of Ukraine, Gazprom failed to supply and fill up its EU based storage facilities, in contrast to its practice in all previous years. This affected the EU's preparedness for the winter

[83] Claimant's Supplementary Memorial on Jurisdiction and Merits, 27 February 2024, para. 67.
[84] Claimant's Supplementary Memorial on Jurisdiction and Merits, 27 February 2024, paras. 79-80.
[85] See Brattle Report, Section VI.A.
[86] **Exhibit R – 325,** Russia first published a list of so called 'unfriendly countries' in May 2021. The list has since been expanded and covers all 27 EU Member States. See Russian News Agency TASS, report of 7 March 2022, 'Russian government approves list of unfriendly countries and territories' accessible at: https://tass.com/politics/1418197,

2021-2022 and rendered the EU vulnerable to supply disruptions and more dependent on Russian gas imports in winter 2021/2022, when Russia invaded Ukraine.

101. Unfilled storage facilities were a key factor in the unprecedented price levels gas prices reached in summer 2022 (up to €350/GWh, as opposed to a long-term average of around €30). They contributed to general inflation and an economic crisis in the whole EU, affected the EU's preparedness for the winter 2021-2022 and rendered the EU vulnerable to supply disruptions and more dependent on Russian gas imports in winter 2021/2022, when Russia invaded Ukraine.[87] At that time, dependence on Russian supplies was compounded by the Union's insufficient LNG import capacities.

102. The deviation from Gazprom's previous storage filling policy confirms that Gazprom deliberately sought to induce shortages of supply. Gazprom-owned storages within the EU have historically followed the EU average filling levels. As illustrated by the following chart, this markedly changed with the injection season 2021.



Gas in storage (%) in Gazprom Storages vs non-Gazprom storages pre-invasion (Source: European Commission, Joint Research Centre, based on GIE AGSI+ Transparency platform).

103. The International Energy Agency ("**IEA**") has since provided evidence that the 2021 volume reductions were not the result of physical constraints. Notably, the

[87] See **Exhibit R – 326,** "EU economy still grappling with long tail of 2022 energy shock" , Euractiv report of Jan 16, 2024, accessible at EU economy still grappling with long tail of 2022 energy shock – Euractiv.

IEA concluded in October 2021 that Russia could have raised supplies by 15%[88] and in January 2022 that Russian supplies could have been raised at least by one third.[89] What is more, official statements made by the Russian government left no doubt that gas flows were reduced for political motives.[90]

104. Following Russia's unprovoked war of aggression against Ukraine, on 23 March 2022, Russian President Vladimir Putin issued a decree ordering all countries considered "unfriendly" (i.e., opposed to Russia's illegal and unprovoked full-scale invasion of Ukraine) to make payments for gas deliveries exclusively in roubles.[91] Such demands were in breach of contractual agreements with EU operators, which provided for payments in other currencies. In response to the refusals to pay in roubles, Gazprom unilaterally (i) suspended gas supply to Poland and Bulgaria on 27 April 2022;[92] (ii) cut flows via the YAMAL pipeline for transit to and via Poland on 12 May 2022;[93] (iii) cut gas supplies to Shell Deutschland GmbH, Denmark's Ørsted and the Netherlands' GasTerra on 31 May 2022;[94] and (iv) suspended gas deliveries to Finland on 21 May 2022.[95]

105. The political motivations for Russian supply cuts were further illustrated by Russia's decision of 13 May 2022 to suspend electricity supplies to Finland in retaliation for the country's application to join NATO.[96]

106. In June 2022, Gazprom further reduced gas supplies to EU Member States under the pretext of a series of alleged technical issues, as follows:

- On 15 June 2022, Gazprom announced it would reduce flows via Nord Stream 1 to 60% of capacity due to issues with spare parts for one of the compressors.[97] The spare parts could not return from maintenance allegedly due

[88] **Exhibit R – 374**, Sheppard, D. and Seddon, M., "IEA chief says Russia has substantial scope to boost Europe's gas supplies", Financial Times, dated 10 October 2021, pp. 1-2.,
[89] **Exhibit R – 375**, Financial Times, "IEA chief accuses Russia of worsening Europe's gas crisis", 12 January 2022.
[90] See Brattle report, paras 105-106.
[91] **Exhibit R – 327,** Russian President Vladimir Putin issued a decree ordering all countries considered "unfriendly": https://www.reuters.com/business/energy/putin-says-russia-will-start-selling-gas-unfriendly-countries-roubles-2022-03-23/
[92] See Brattle report, para 112.
[93] See Brattle report, paras 99, 112.
[94] **Exhibit R – 330,** 'Natural gas imports from Russia under Gasum's supply contract will be halted on Saturday 21 May at 07:00', Gasum: https://www.gasum.com/en/news-and-customer-stories/news-and-press-releases/2022/natural-gas-imports-from-russia-under-gasums-supply-contract-will-be-halted-on-saturday-21-may-at-07.00/.
[95] See Brattle report, para 112.
[96] **Exhibit R – 331,** 'Russia cuts power exports to Finland over failed payments', Reuters, 16 May 2022: https://www.reuters.com/markets/europe/russia-cuts-power-exports-finland-over-failed-payments-2022-05-16/
[97] **Exhibit R – 332,** 'Russia steps up energy wars with gas cuts to Europe's top buyers', Bloomberg News, 15 June 2022: https://www.bloomberg.com/news/articles/2022-06-15/gazprom-halts-gas-compressor-squeezing-exports-to-europe

to sanctions against Russia.[98]

- Equally on 15 June 2022, Gazprom cut gas supplies to Italy's state-controlled Eni and Austrian energy company OMV.[99] The reduction amounted to about 15% of total flows from Russia to Italy,[100] while France's TSO GRTgaz informed that it was not receiving gas through its interconnection with Germany since 15 June 2022, likely due to the decreased flows from Nord Stream 1.[101]

- On 15 June 2022, Austria informed about reductions in supply by Gazprom.[102]

- On 16 June 2022, Gazprom cut back on its supplies to Czechia as the reduction in flows via Nord Stream 1 was now impacting the route via Czechia (EUGAL pipeline).[103]

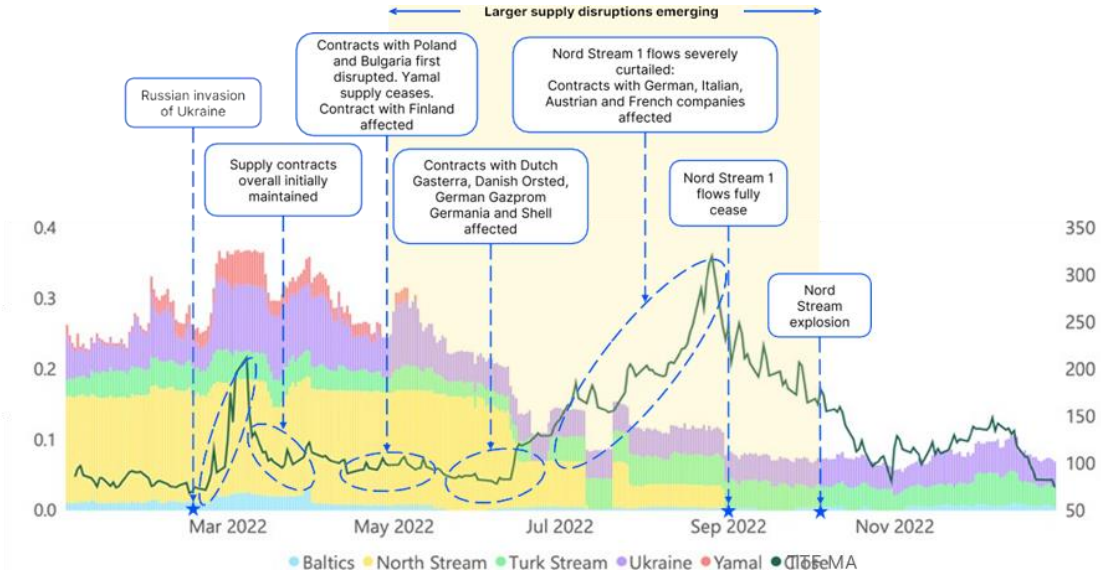
107. As of July 2022, Russia's unwillingness to supply gas through the Nord Stream 1 pipeline became even more obvious. It alleged maintenance of the Nord Stream 1 pipeline scheduled from 11 to 21 July to completely stop natural gas flows and caused a loss of ca. 1.37 bcm over the "maintenance" period. The real reasons for reducing gas flows were political.[104] Russian claims that a turbine could not be returned from maintenance in Canada due to Western sanctions were debunked when it was established that the turbine in question had actually been returned to Germany in a timely manner and stood ready for reuse in Nord Stream 1.[105]

[98] **Exhibit R – 333,** 'Russian gas flows Europe fall further amid diplomatic tussle', Reuters, 16 June 2022: https://www.reuters.com/markets/europe/russian-gas-flows-europe-fall-further-amid-diplomatic-tussle-2022-06-16/
[99] **Exhibit R – 333,** 'Russian gas flows Europe fall further amid diplomatic tussle', Reuters, 16 June 2022: https://www.reuters.com/markets/europe/russian-gas-flows-europe-fall-further-amid-diplomatic-tussle-2022-06-16/
[100] **Exhibit R – 369,** Bloomberg, **'**Gazprom Cuts Gas Flows to Italy by About 15%, Eni Says':https://www.bloomberg.com/news/articles/2022-06-15/gazprom-cuts-gas-flows-to-italy-by-about-15-eni-says
[101] **Exhibit R – 334,** 'Russia again cuts natural gas exports to European countries', AP, 17 June 2022: https://apnews.com/article/russia-ukraine-france-italy-european-union-39f69052043b910e6880086da9528bf3
[102] **Exhibit R – 334,** 'Russia again cuts natural gas exports to European countries', AP, 17 June 2022: https://apnews.com/article/russia-ukraine-france-italy-european-union-39f69052043b910e6880086da9528bf3
[103] **Exhibit R – 333** 'Russian gas flows to Europe fall, hindering bid to refill stores', 16 June 2022, Reuters: https://www.reuters.com/markets/europe/russian-gas-flows-europe-fall-further-amid-diplomatic-tussle-2022-06-16/.
[104] See Brattle report, para 117.
[105] **Exhibit R – 336** Press statement by the German Federal Government of 3 August 2022, available at https://www.bundesregierung.de/breg-de/schwerpunkte/krieg-in-der-ukraine/energiesicherung-turbine-2068778.

108. Gas flows through Nord Stream 1 were reduced further to 20%[106] and finally completely halted by the end of August 2022.[107] This time the Russian government confirmed that stopping gas supplies was due to political reasons. On 5 September 2022, it stated that it would not resume flows until the "collective West" lifted sanctions on Russia for its invasion of Ukraine.[108]

109. Accordingly, when both lines of the Nord Stream 1 pipeline were destroyed by acts of sabotage on 26 September 2022, Russia had in any event already effectively decided to stop supplying gas supplies through that pipeline.

110. The following chart illustrates the reduction of Russian gas exports to Western Europe between January 2022 and August 2023.



111. The unwillingness on the part of the Russia/Gazprom to resume normal gas supplies to Europe is further corroborated by the fact that, as explained above, Claimant abandoned required actions to meet the conditions specified by the German NRA for resuming the ITO certification procedure (see section 2.1). Its German subsidiary Gas for Europe GmbH set up for the purpose of meeting those

[106] **Exhibit R – 337,** 'Russia to cut gas through Nord stream 1 to 20% of capacity', AP News, 25 July 2022: https://apnews.com/article/russia-ukraine-germany-government-and-politics-1acacc374cd6d9bc860de00a73b8abee
[107] See **Exhibit R – 338,** Entsog Transparency platform: https://transparency.entsog.eu/#/points/data?from=2022-07-27&indicators=Physical%20Flow%2CFirm%20Technical&points=ru-tso-0002itp-00120exit%2Cde-tso-0001itp-00665entry%2Cde-tso-0017itp-00247entry%2Cde-tso-0020itp-00454entry%2Cde-tso-0001itp-00251entry%2Cde-tso-0015itp-00250entry%2Cde-tso-0001itp-00247entry%2Cde-tso-0005itp-00491entry%2Cde-tso-0016itp-00251entry%2Cde-tso-0018itp-00297entry&to=2022-09-21
[108] **Exhibit R – 373**, Seddon M., Sheppard D., and Foy H., Russia switches off Europe's main gas pipeline until sanctions are lifted, Financial Times, dated 5 May 2022.

conditions first remained wholly inactive and was later wound up in January 2023.[109]

2.5.2. Commercial relations between EU economic operators and Russia owned suppliers have been irreversibly damaged

112. Russia's weaponization of energy supplies to Europe has initially been successful. From 2021 to date, the EU lost over 100 billion cubic meters of annual supply from Russia, more than one fourth of EU gas consumption. This fuelled inflation in the European Union and fostered economic crises in its Member States. However, Russia's decision to cut gas deliveries for political reasons has also resulted in the breach of contractual obligations vis-à-vis EU economic operators[110] and shaken to the core the trust placed in the reliability of Russia owned suppliers. As EU economic operators were forced to procure replacement energy at short notice at a substantially higher cost, they have turned to arbitration tribunals to seek damages from their former suppliers for the unjustified halt in the supply of natural gas.

113. In response, rather than honouring the arbitration agreements they have signed with their EU customers, Russia-owned suppliers have relied on Russian courts to order EU customers to terminate arbitration against Russia-owned companies.[111] So far, at Gazprom's urging, the Russian courts have issued 12 anti-arbitration injunctions seeking to block the international arbitration proceedings initiated by the Ukranian Naftogaz, the Polish EuRoPol GaZ, the German Uniper and Metha, the Czech Net4Gas and CEZ, the Austrian OMV Exploration and Production as well as OMV Gas Marketing and Trading, the Dutch BBL, the Slovak ZSE Energy and the Swiss DXT Commodities. Proceedings in which Gazprom seeks anti-arbitration injunctions against the Czech CEZ, and Swiss Axpo Solutions AG and Slovak Východoslovenská energetika a.s. are pending.[112] Such rulings deny EU economic operators access to impartial adjudication in respect of their dealings with Russian gas suppliers, as a further deterrent against resuming commercial relations with Russia-owned suppliers in the future.

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[109] See **Exhibit R – 339** Reuters report 'Nord Stream 2 German subsidiary wound up - report' of 20 January 2023.
[110] See, in more detail, Brattle report, paras 115 et seq.
[111] Article 248.1 of Russia's Arbitration Procedure Code allows Russian courts to disregard foreign arbitration agreements and foreign exclusive forum clauses and to exercise exclusive jurisdiction over disputes arising out of the imposition of sanctions on Russian individuals or entities.
[112] See **Exhibit R – 341,** Hristina Todorovic, IA Reporter of June 19, 2024 accessible at Gazprom Round-Up: Russian courts issue new anti-arbitration injunctions and confirm previous ruling on cassation, Gazprom Exports asks for additional court measures, and other arbitration-related updates involving the Russian state-owned gas company, Investment Arbitration Reporter (iareporter.com) with further references.

114. In an effort to portray itself as a separate entity from Russian-owned gas suppliers that have breached their contractual obligations vis-à-vis EU suppliers, the Claimant asserts it is a mere capacity provider, which "is not the shipper and is not party to gas supply contracts"[113]. In legal and economic reality, there is no distinction between the Claimant and Russian owned gas suppliers. As part of the Gazprom Group, the Claimant's NS 2 infrastructure forms part of a natural monopoly the Gazprom group enjoys over the infrastructure importing natural gas from Russia to the EU.[114] As shown by the European Union, it is beyond doubt that Gazprom and its subsidiaries (including the Claimant) act *de facto* as an organ of the Russian Government (See EU's Rejoinder section 6.5). Therefore, any relevant actions or omissions of the Russian Government relating to the NS 2 pipeline must be attributed to the Claimant. Accordingly, the Claimant is as much affected by the total loss of trust in the reliability of Russia owned gas suppliers as is Gazprom.

115. The fact that disruptions of commercial relations have eliminated any profitability prospects for Russian pipeline gas is further confirmed by the assessment of Nord Stream 2 investors themselves. In the first half of 2022, five companies providing 50% of the loan financing the Nord Stream 2 pipeline announced that they would write off their exposure and have since reported this amount as a loss. The loans provided by Wintershall Dea, Uniper, Engie, Shell and OMV amounted to approximately EUR 1 billion each and have all been written off[115]. This decision cannot be explained away as a response to the fact that the certification procedure for NS 2 remains suspended (see section 2.1). Indeed, as set out below in section 3.5, all non-Russian investors in the NS 1 pipeline have also written off their investments, despite that this earlier-built pipeline was not subject to certification under the Gas Directive.

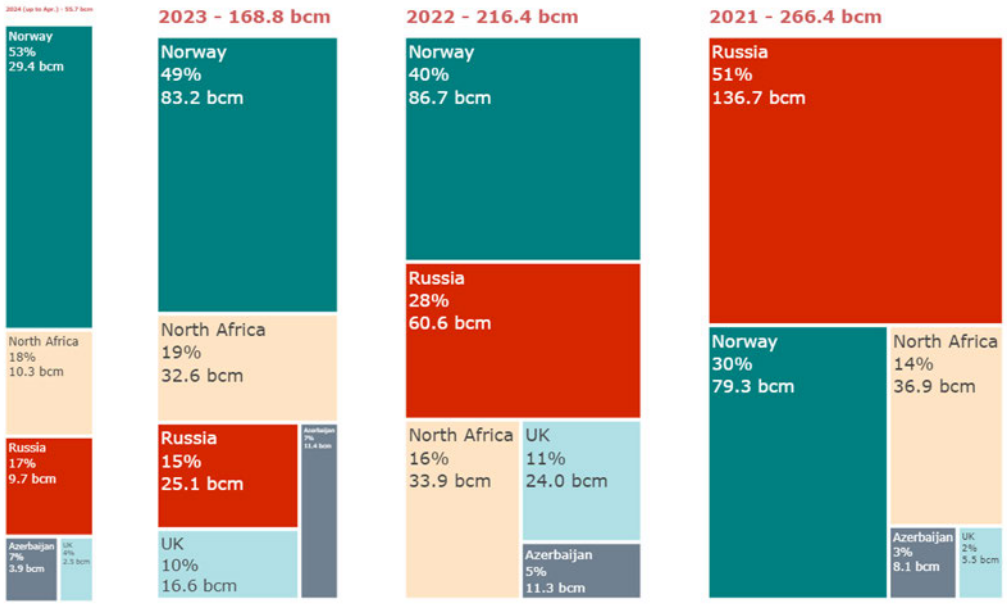
[113] Claimant's Supplementary Memorial on Jurisdiction and Merits, 27 February 2024, para. 84.
[114] See Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 97 point v.
[115] See **Exhibit R – 342,** Press release by Wintershall Dea, 2 March 2022: https://wintershalldea.com/sites/default/files/media/files/PI_22_06_Wintershall%20Dea%20writes%20off%20financing%20of%20Nord%20Stream%202_en.pdf; **Exhibit R – 343,** Reuters, 8 March 2022: Germany's Uniper joins peers in writing down loan to Nord Stream 2 | Reuters; **Exhibit R – 344,** Reuters, 21 April 2022: Engie to book entire $1 bln credit loss from halted Nord Stream 2 pipeline | Reuters; **Exhibit R – 345,** Interfax, 5 May 2022: Shell writes off $3.9 bln in losses from Russia exit; $1.6 bln from Sakhalin-2, $1.1 bln from Nord Stream 2 (interfax.com); and **Exhibit R – 346,** Energy Connects, 8 April 2022: OMV to take $2.17 billion hit due to Russia exit (energyconnects.com).

2.5.3. The EU is on track to phase out imports of Russian natural gas by 2027

116. On 18 May 2022, in reaction to Russia's war of aggression, the European Commission presented a plan rapidly to reduce dependence on Russian fossil fuels, fast forward the green transition and phase out Russian imports by 2027 ("REPowerEU").[116] What the Claimant tries to play down as mere "political declarations"[117] was followed by drastic and effective measures.

117. Before Russia's invasion of Ukraine, the EU imported more than 50% of its gas pipeline supply from Russia (137 bcm in 2021). Since 2022, pipeline import from Russia has drastically dropped (-82%), down to 25 bcm in 2023.[118] Russia now accounts for less than 20% of EU pipeline imports. Even according to Gazprom's own optimistic estimation for the coming decade, its exports to Europe will amount to no more than under a third of its prewar EU export levels.[119]

Figure 6: Net imports of pipeline gas in the EU (bcm)



(Source: European Commission, DG Energy, based on data from ENTSO-G and London Stock Exchange Group)

[116] See **Exhibit R – 318,** the Commission Communication COM/2022/230 final of 18 May 2022 on a 'REPowerEU Plan', accessible at https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3131,
[117] Claimant's Supplementary Memorandum, para 80.
[118] See **Exhibit R – 347,** the data from the ENTSO-G Transparency Platform: https://transparency.entsog.eu/#/map
[119] See **Exhibit R – 320,** Financial Times of 5 June 2024, 'Gazprom badly hurt by Ukraine war, says company-commissioned report', accessible at: https://www.ft.com/content/21f8f63f-80d6-455f-abf8-fce269d70319

Russia's pipeline supply of gas to the EU has been replaced by more pipeline supply from other sources, particularly Norway and the UK (see Chart above) as well as by a substantial increase in LNG import (+78% already between 2021 and 2022).

118. The EU increased LNG imports from most of its suppliers, in particular from the United States, whose supply to the EU raised by almost +200% (from 19 bcm in 2021 to 56 bcm in 2023). The share of the United States in the EU LNG import increased to 46% (2023) from 28% pre-crisis (2021). The share of LNG in total EU imports increased to 42% from 20% pre-crisis. [120] In order to enable the EU to import more LNG, new infrastructure was built within a short time frame,[121] which now stands ready to replace pipeline gas imports. Facilitated by Germany's LNG Acceleration Act, which speeds up the approval process for new LNG import infrastructure, numerous additional LNG terminals are about to be built in Northern Germany.[122]

119. Furthermore, the rapid decrease in the EU's consumption of Russian pipeline gas has also been driven by the accelerated deployment of renewable energies, which have helped displace gas-fired power plants from the electricity generation mix. In 2022, 56 GW of wind and solar capacity have been installed in sites across the EU (respectively 16 and 40 GW), representing an increase of 16% compared to 2021 installed capacity. In 2023, 73 GW (17 GW for wind and 56 GW for solar) of additional renewable capacity was deployed, increasing further installed capacity by 18%. Thanks to this, the renewables share in the EU electricity mix increased from 37% in 2021 to 43% in 2023.[123] Renewable energy capacity addition will structurally reduce gas demand in the future. Under the recently revised Renewable Energy Directive,[124] the EU has set a binding target for the share of

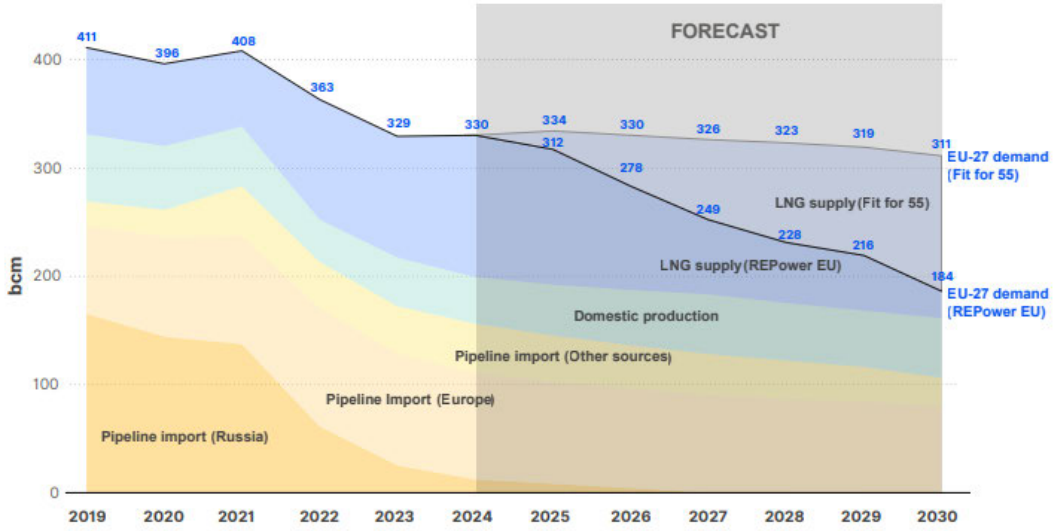
[120] *Source: Commission's calculation based on ENTSO-G and London Stock Exchange Group data*
[121] **Exhibit R – 349,** ACER: Analysis of the European LNG market developments, 2024 Market Monitoring Report, 19 April 2024, p. 55
[122] **Exhibit R – 377**, 'Regulatory Exemption for TES Terminal in Wilhelmshaven', Energate Messenger, 26 March 2024: Regulatory exemption for TES terminal in Wilhelmshaven | energate messenger english edition (energate-messenger.com); **Exhibit R – 378,** 'Regas margets capacities for "German Baltic Sea"', Energate Messenger, 3 June 2024: Regas markets capacities for "German Baltic Sea" | energate messenger english edition (energate-messenger.com); **Exhibit R – 379**, 'Deutsche ReGas: FSRU leaves Lubmin to start Mukran job', LNGPrime, 6 May 2024: Deutsche ReGas: FSRU leaves Lubmin to start Mukran job - LNG Prime; **Exhibit R - 380**, 'GLNG to begin with preparatory work for onshore Brunsbuttel LNG Terminal', *Platts European Gas Daily,* Volume 29, Issue 36, 20 February 2024 and 'Germany's HEH takes final investment decision for onshore Stade LNG terminal': https://plattsconnect.spglobal.com/web/index1.html#platts/insightsArticle?articleID=3c941d45-049c-4f0a-9f94-c58a1172a59b&insightsType=News
[123] See **Exhibit R – 348,** data from the ENTSO-E Transparency Platform, https://transparency.entsoe.eu/,
[124] **Exhibit RLA – 375**, Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L 328, 21.12.2018, p. 82, as amended in particular by Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L, 2023/2413, 31.10.2023.

energy from renewable sources in primary energy consumption – across all sectors – of 42.5% by 2030 and reaching this target will obviously require a further substantial increase of the share of renewables in electricity generation.

120. Finally, a considerable reduction in EU gas consumption (-18% in the period August 2022 to April 2024 (compared to the average of the previous 5 years) equivalent to more than 130 bcm of gas saving)[125] helped render Russian pipeline gas redundant.

121. The fact that the EU is well on track to phase out Russian gas imports by 2027 has been confirmed in the recent LNG Market Monitoring Report of the EU Agency for the Cooperation of Energy Regulators (ACER), which takes account of developments until April 2024.[126] The Report also shows how other sources of gas supply have replaced Russian Pipeline imports.[127]

Figure 13: EU gas supply and demand outlook and assessed LNG supply needs relative to Fit For 55 and REPowerEU scenarios by 2030 (bcm)



Source: ACER based on data from ICIS, Platts, and REPowerEU.
Note: The demand evolution from 2024 to 2030 reflects a linear decrease in alignment with the target set for 2030. The potential gas demand reduction described in REPowerEU linked to the 20 Mt goal for green hydrogen by 2030 is not factored in the assessed scenario.

122. Remaining Russian pipeline gas supplies into the EU are expected to further decrease when the transit and supply agreement between Gazprom and Ukraine, which underpins the flows of gas into the EU through Ukraine, expires by the end

[125] Despite lower wholesale gas prices since the end of 2023, gas consumption has continued to be consistently lower than pre-crisis, indicating a structurally lower gas demand in the EU. Source: Eurostat.
[126] **Exhibit R – 349,** ACER: Analysis of the European LNG market developments, 2024 Market Monitoring Report, 19 April 2024, p. 21
[127] The same is demonstrated by the Brattle expert report. See Figure 18: Main Russian gas exports, 2017 to present, at para 99.

of 2024. According to specialised market intelligence sources such as OIES, it is highly unlikely that this agreement will be renewed.[128]

123. Claimant submits that it will be for each Member State to decide whether to phase out Russian gas imports as energy supply is a national competence under Article 194 of the TFEU[129]. This is incorrect. Pursuant to Article 4(2)(i), in conjunction with Article 2(2), of the TFEU, energy is a shared competence where Member States are no longer allowed to act once the Union has exercised its competence. Furthermore, the EU has already banned imports of Russian oil and coal without encountering legal challenges.[130]

124. In any event, there is unanimous support among the EU Member States to phase out gas supplies from Russia, which is also reflected by EU Member States' unanimous support to impose unprecedented sanctions on Russia. Most recently, on 24 June 2024, EU Member States adopted within the EU Council a comprehensive 14th package of sanctions against Russia. In this context, the EU also forbade reloading services of Russian LNG in EU territory for the purpose of transshipment operations to third countries.[131]

125. In addition, concrete legislative measures to stop Russian gas imports have been adopted at EU level. On 8 December 2023, the European Parliament and the Council reached a political agreement on a recast of Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks. The new Regulation, which aims at an overhaul of the EU's market rules for gas, including renewable and low-carbon gas and hydrogen, includes a specific clause allowing EU Member States under certain conditions to limit up-front bidding for capacity for pipeline gas or LNG imports from Russia and Belarus in order to accommodate security of supply concerns.[132] The new Regulation was formally approved by the

[128] See **Exhibit R – 350,** Oxford Institute for Energy Studies, report of July 2003, p. 24, accessible at Insight-131-Do-future-Russian-gas-pipeline-exports-to-Europe-matter-anymore.pdf (oxfordenergy.org),
[129] Claimant's Supplementary Memorial on Jurisdiction and Merits, 27 February 2024, para. 83.
[130] **Exhibit R – 366,** An overview of EU sanctions in the field of energy, see https://eu-solidarity-ukraine.ec.europa.eu/eu-sanctions-against-russia-following-invasion-ukraine/sanctions-energy_en#:~:text=Targeting%20Russian%20oil%20revenues,exports%20go%20to%20the%20EU
[131] **Exhibit R – 351,** Council of the EU, Press release of 24 June 2024, "Russia's war of aggression against Ukraine: comprehensive EU's 14th package of sanctions cracks down on circumvention and adopts energy measures", accessible at: Russia's war of aggression against Ukraine: comprehensive EU's 14th package of sanctions cracks down on circumvention and adopts energy measures - Consilium (europa.eu).
[132] **Exhibit RLA – 373,** Articles 6(7) and 8(7) of the draft Regulation as adopted by the European Parliament available at: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0282_EN.html)

European Parliament on 11 April 2024[133] and by the Council on 21 May 2024.[134] It will enter into force after publication in the EU's Official Journal, which is scheduled for July 2024.

2.5.4. Key parts of the infrastructure required for receiving and distributing gas shipped through the Nord Stream 2 pipeline have been irreversibly devoted to other purposes.

126. In a trend that will result in further lasting changes on the market, the phasing out of Russian gas imports has affected the downstream infrastructure required for exploiting the Nord Stream 2 Pipeline. This trend will result in even more structural and irreversible changes away from Russian pipeline gas. Even if Nord Stream 2 could be repaired, which remains very uncertain (see above section 2.2), there would no longer be any infrastructure at the Claimant's disposal to transport the gas arriving through Nord Stream 2 to potential customers. This is due to the repurposing of the Nord Stream downstream infrastructure to transport LNG gas on the one hand and to transport hydrogen on the other.

127. In Germany there are two main pipelines that allowed for gas coming in via Nord Stream 1 and 2 to be transported south-ward, namely the "European Gas Pipeline Link" (EUGAL) and the "Ostsee-Pipeline-Anbindungsleitung" (OPAL). Both start at Lubmin and run through Germany to Czechia. Another pipeline – the "Nordeuropäische Erdgasleitung" (NEL) – allowed for the incoming gas to be transported west-ward. These pipelines are all interconnected [135]

128. Whilst OPAL started operations in 2011 to transport gas arriving through Nord Stream 1, EUGAL became operational in 2020 and was designed to become the onshore extension of the Nord Stream 2 pipeline. Large parts of the EUGAL line run parallel to OPAL. The NEL pipeline started its commercial operations on 1 November 2013 and runs from Lubmin westward to Rehden.

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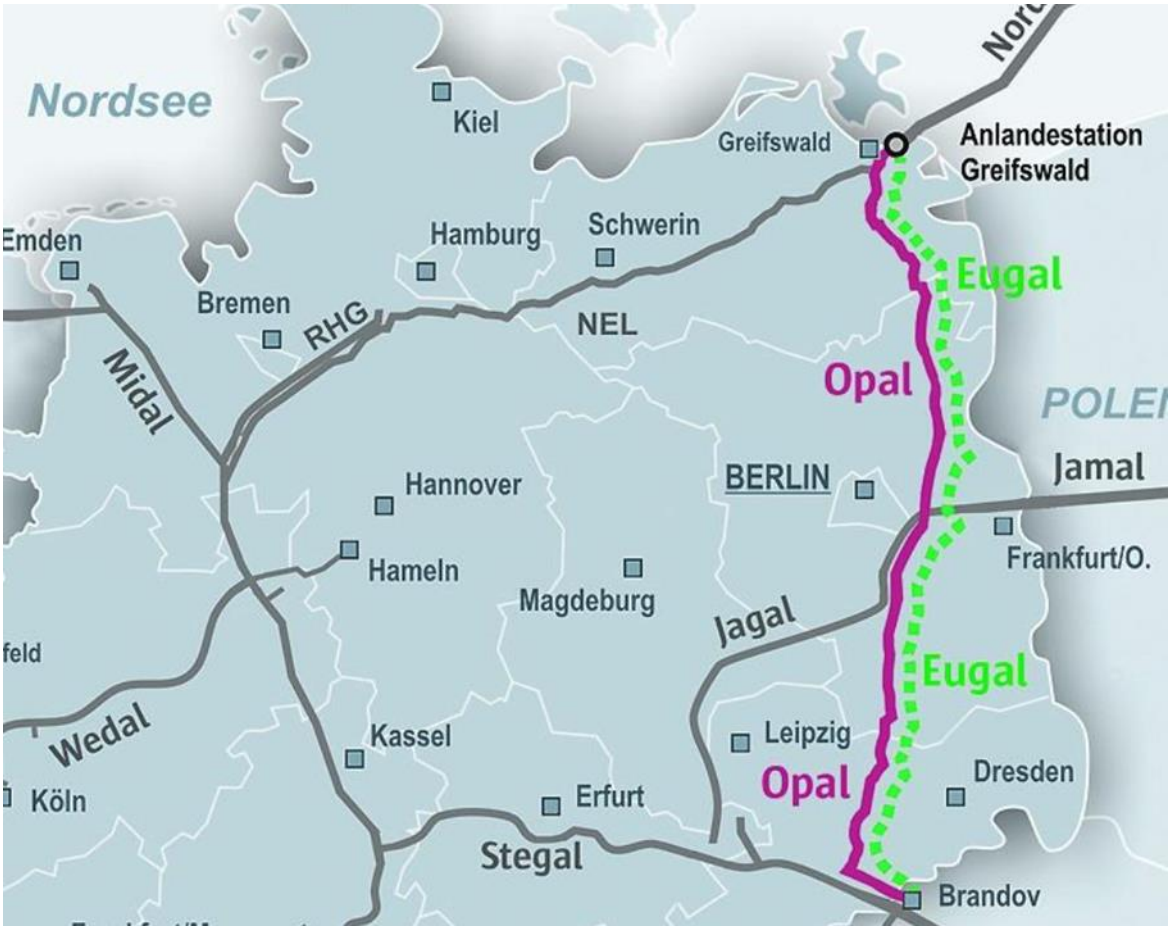
[133] **Exhibit R – 352,** European Parliament press release, 11 April 2024, available at: https://www.europarl.europa.eu/news/en/press-room/20240408IPR20317/meps-approve-reforms-for-a-more-sustainable-and-resilient-eu-gas-market#:~:text=On%20Thursday%2C%20MEPs%20adopted%20plans,of%20renewable%20gases%20and%20hydrogen

[134] **Exhibit R – 353,** Council press release, 21 May 2024, available at: https://www.consilium.europa.eu/en/press/press-releases/2024/05/21/fit-for-55-council-signs-off-on-gas-and-hydrogen-market-package/#:~:text=The%20hydrogen%20and%20decarbonised%20gas,Commission%20on%2015%20December%202021

[135] See **Exhibit R – 335**, Gascade, 'Receiving and Distributing', German natural gas network: https://www.gascade.de/en/our-network/receiving-station

Image: Nord Stream and downstream pipelines OPAL, EUGAL, NEL



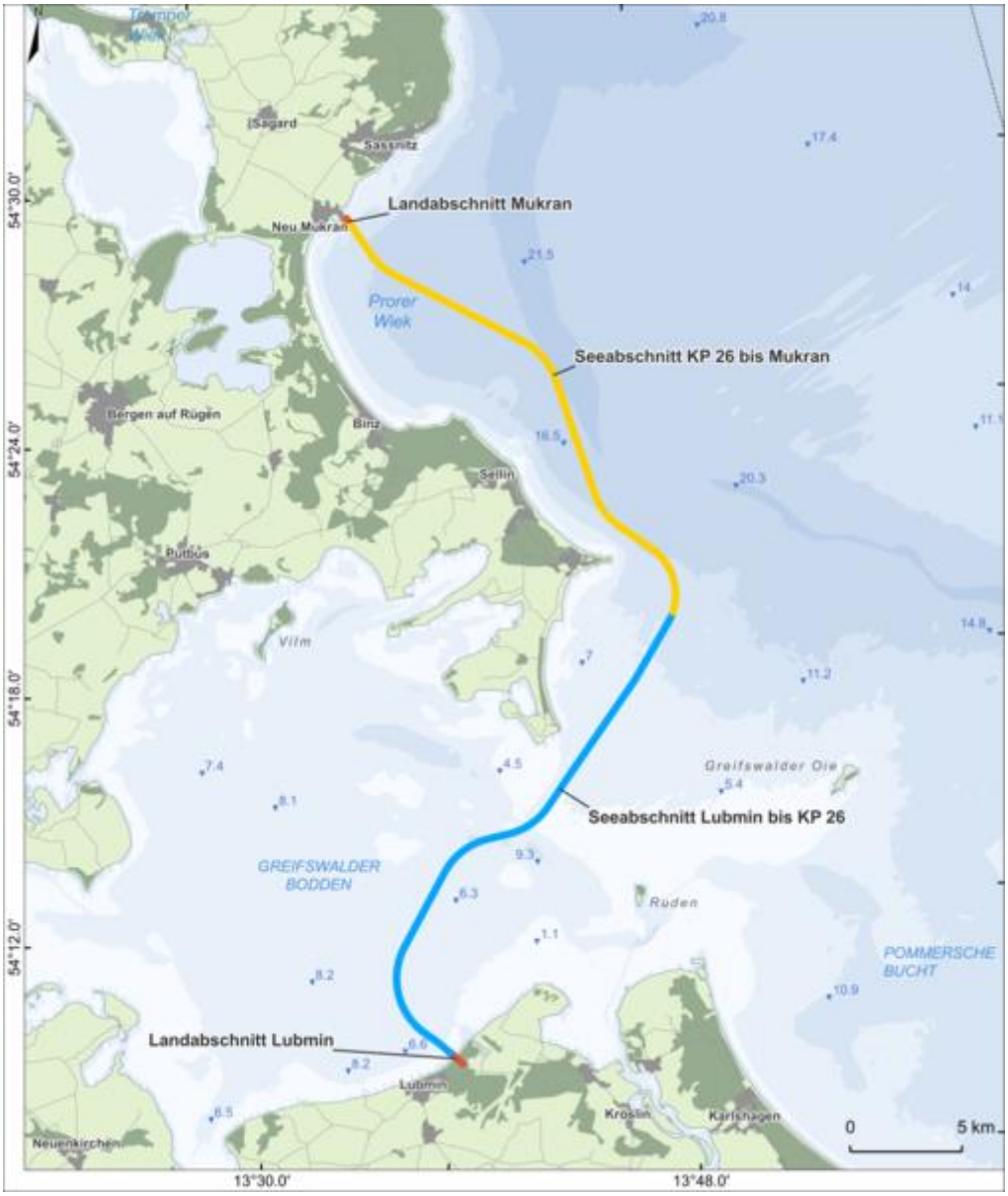
129. As no more gas was flowing through Nord Stream 1 and 2, the German investor Deutsche Regas has secured an operating permit under German laws for the Deutsche Ostsee LNG import terminal. The Deutsche Ostsee LNG terminal started operations at the port of Lubmin in January 2023. From July 2024 the terminal was moved and expected to take up operations at Mukran on the island of Rügen.[136] With an eventual expected import capacity of 13.5 bcm,[137] it makes use of the downstream infrastructure formerly used by Nord Stream 1 or earmarked for Nord Stream 2 (notably NEL, OPAL and EUGAL).[138]

130. As a result, the former Nord Stream 2 landing station in Greifswald for EUGAL is now being used as landing terminal for the Deutsche Ostsee LNG terminal. The landing terminal has a capacity of about 70 GW and was conceived to accommodate the gas coming from Nord Stream 2. As part of the overall effort to build the necessary infrastructure to replace Russian pipeline gas with LNG (see section 2.5.3 above), the landing station was adapted and set up to accommodate

[136] **Exhibit R – 371**, Regas markets capacities for "German Baltic Sea" | energate messenger english edition (energate-messenger.com), 6 June 2024.
[137] **Exhibit R – 354,** Deutsche ReGas: FSRU leaves Lubmin to start Mukran job - LNG Prime, 6 May 2024.
[138] **Exhibit R – 354,** Deutsche ReGas: FSRU leaves Lubmin to start Mukran job - LNG Prime, 6 May 2024.

16 to 20 GW from the Deutsche Ostsee LNG terminal. This means that it will no longer be able to accommodate the totality of gas flows, should Nord Stream 2 become operational again.

Landing station in Lubmin initially destined for Nord Stream 2 (source: google maps)



Source: https://www.gascade.de/netzinformationen/unser-leitungsnetz/oal

131. After receiving all required authorisations, GASCADE completed the construction of the approximately 50-kilometre-long "Ostsee Anbindungsleitung" (OAL) in January 2024. The above map shows how the Deutsche Ostsee LNG terminal is connected to the former Nord Stream 2 landing station at Lubin via the new OAL pipeline, especially constructed for that purpose. Gas can flow via the Mukran landing terminal through EUGAL, OPAL and NEL into the European gas transmission network.139

[139] **Exhibit R – 367,** Gascade, Netzinformation und Anbindungsleitung: https://www.gascade.de/netzinformationen/unser-leitungsnetz/oal#:~:text=GASCADE%20hat%20den%20Bau%20der,deutschen%20Fernleitungsnetz%20in%20Lubmin%20verbinden

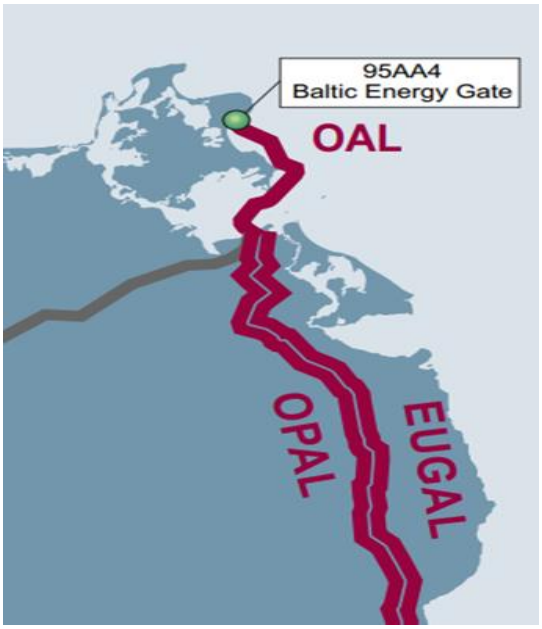
132. Furthermore, the operator of the OPAL pipeline, GASCADE, has engaged in the Flow – Making Hydrogen Happen project.[140] Starting from 2025, it will repurpose the OPAL gas pipeline into a hydrogen pipeline.[141] GASCADE will propose to the German regulatory authority BNetzA that the OPAL pipeline becomes part of the so-called hydrogen core network (Wasserstoffkernnetz) planned by the German Federal Government.[142] It is estimated that the repurposing of the OPAL pipeline from gas to hydrogen will cost EUR 525 million.[143] In 2030 it is also envisaged to repurpose 22.4 km of the EUGAL pipeline close to the Czech border for hydrogen use.[144]

133. In view of the above, the Nord Stream south-bound capacity (EUGAL and OPAL) is now used by suppliers delivering gas LNG from the Deutsche Ostsee LNG terminal. In addition, the OPAL pipeline is about to be repurposed, which will in itself reduce the south-bound capacity by 35 bcm.[145] The downstream pipeline network will thus no longer be capable of accommodating substantial amounts of Russian gas entering Germany via Nord Stream.

134. It should also be noted that the entry point that existed to accommodate Russian gas has been moved north, to accommodate gas from the Deutsche Ostsee LNG terminal and is now called Baltic Energy Gate. Hence, at the place where the Nord Stream 2 pipeline lands on German soil, there is 'de-facto' no entry point to the German pipeline network anymore, as illustrated by the two graphs below. This makes it impossible to transport gas through the Nord Stream 2 pipeline.

135. Graph: Entry point Baltic Energy Gate and landing point of Nord Stream 1 and 2[146]

[140] **Exhibit R – 355,** GASCADE Gastransport, OAL
[141] **Exhibit R – 376**, 'Gascade wants to ensure confidence in the hydrogen core grid', *Energate Messenger*, 20 March, 2024: Gascade wants to ensure confidence in the hydrogen core grid | energate messenger english edition (energate-messenger.com)
[142] **Exhibit R – 356,** Press release of 12 April 2024: „Gesetz zur Wasserstoff-Netzentwicklungsplanung und zur Kernnetz-Finanzierung im Deutschen Bundestag beschlossen" (https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2024/04/20240412-gesetz-zur-wasserstoff-netzentwicklungsplanung.html)
[143] **Exhibit R – 356,** Press release of 12 April 2024: „Gesetz zur Wasserstoff-Netzentwicklungsplanung und zur Kernnetz-Finanzierung im Deutschen Bundestag beschlossen" (https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2024/04/20240412-gesetz-zur-wasserstoff-netzentwicklungsplanung.html),
[144] **Exhibit R – 357,** FNB Gas, Pressematerial, Entwurf für das Wasserstoff - Kernnetz 2030: https://fnb-gas.de/pressematerialien/wasserstoffnetz_entwurf-wasserstoff-kernnetz-2030/,
[145] **Exhibit R – 358,** Gascade: The Baltic Sea Pipeline Link: https://www.gascade.de/en/our-network/our-pipelines/opal
[146] **Exhibit R – 359,** GASCADE Gastransport: Netzinformationen: https://www.gascade.de/fileadmin/downloads/GASCADE_Gasfernleitungsnetz_Ein-Ausspeisepunkte_2405.pdf



136. LNG Infrastructure investments such as those outlined above are usually accompanied by long-term contracts, both for capacity and gas volumes. The

recent LNG Market Monitoring Report published by ACER[147] indicates such developments, projecting a possible over-contracting of LNG going forward and predicting a phase-out of Russian gas. For instance, German chemicals giant BASF has turned to LNG as an alternative to Russian pipeline gas in the past year, signing a long-term contract with US exporter Cheniere in August 2023 to purchase up to around 800,000 mt/year of LNG over a period spanning 2026-2043.[148]

137. Even if more significant quantities of Russian gas became available again on the EU market (*quod non*), suppliers would be prevented from purchasing it due to alternative contractual arrangements entered into in interim that tie up available onward transportation capacity.

138. Furthermore, Germany's 10-year gas network development plan (TYNDP), which is drafted jointly by the country's transmission system operators and approved by the regulator (BNetzA), has recently been overhauled on the basis of the assumption that no Russian gas will be imported by Germany during the period 2022 to 2032, which the updated plan covers.[149] The TYNDP forms the basis for future investments in gas infrastructure, and the need for a specific investment indicated in the TYNDP is taken into account by the competent authorities responsible for granting planning, environmental or other permits necessary to build new infrastructure. On the basis of the current TYNDP, it will thus be extremely challenging for the Claimant to obtain the necessary permits should it wish to re-build the infrastructure necessary at the landing point of Nord Stream 2 at Lubmin to transport gas to Germany.

2.5.5. The further deterioration of relations between EU Member States and Russia rule out a market for Russian gas in the EU

139. The Tribunal is no doubt aware of the ongoing Russian war of aggression against Ukraine, which Claimant treats under the euphemism "geopolitical developments", and the suffering caused by it. More than two years into this war, relations between the EU and Russia are continuously deteriorating. This is witnessed by an unprecedented level of sanctions the EU imposed on Russia, the

[147] **Exhibit R – 349,** ACER: Analysis of the European LNG market developments, 2024 Market Monitoring Report, 19 April 2024, p. 36
[148] **Exhibit R – 372**, 'German gas price premium expected to continue despite new FSRUs',S&P Global, 27 October 2023: https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/natural-gas/102723-feature-german-gas-price-premium-expected-to-continue-despite-new-fsrus.
[149] **Exhibit R – 360,** FNB Gas, Netzentwicklungsplan Gas 2022-2032, available at https://fnb-gas.de/wp-content/uploads/2024/03/2024_03_20_NEP-2022_Gas_FINAL_DE.pdf.

mutual threat of seizing each other's assets[150] and, most recently, indications that Russia is plotting covert bombings, arson attacks and damage to infrastructure across the European continent.[151]

140. At this current juncture, there are no indications whatsoever that relations between EU and Russia "may very well change" for the better. Rather, it is unimaginable that the EU and its Member States will resume normal relations with the Russia until it abandons claims of sovereignty over lands and waters that are occupied parts of Ukraine, until the perpetrators of Russian war crimes have been held accountable and until compensation for the damage Russia caused in Ukraine has been paid.[152] None of this will happen under Russia's President Putin, against whom the International Criminal Court has issued an arrest warrant for war crimes[153] and whom EU Member States are obliged to arrest and surrender to that Court for trial.[154] President Putin has just secured a 5th term in office until 2030 and is widely expected to remain in full control of Russia also beyond that date.

141. Against this backdrop, Claimant cannot claim that "a crystal ball with which to predict the future"[155] would be required to foresee that hostile relations will exclude a market for gas imports from Russia to the EU for a long time. Whilst nobody can predict long-term geopolitical developments with certainty, speculations that gas may flow again in the distant future are no basis for the Claimant's case brought before this Tribunal. Speculations as to an eventual resumption of Russian gas pipeline imports collide with the changed technical, legal and economic reality, which makes it impossible for the Claimant to resume its business model. Even if the EU were to reverse its current phasing-out of Russian in the short or medium term (a highly improbable scenario), the EU's

[150] **Exhibit R – 370**, The Freeze and Seize Task Force convened by the Commission has coordinated the freezing of more than EUR 27 billion of private assets and the immobilisation of more than EUR 200 billion of private assets and the immobilisation of more than EUR 200 billion of Russian sovereign assets." The EU has blocked more than €200 Billion in Russian Central Bank Assets and currently plans to use at least revenues resulting from it to pay for reconstruction of Ukraine: https://www.bloomberg.com/news/articles/2023-05-25/eu-has-blocked-200-billion-in-russian-central-bank-assets. Russia, in turn, is taking steps towards the nationalisation of certain Western companies. See **Exhibit R – 361,** Financial Times, 'Russia moves to seize "naughty" Western companies', 15 June 2023: https://www.ft.com/content/cd627211-68f6-4dfa-8a04-3344deee2e85

[151] **Exhibit R – 368**, Most recently, European intelligence agencies have warned their governments that Russia is plotting covert bombings, arson attacks and damage to infrastructure across the continent. See FT of 5 May 2024, "Russia plotting sabotage across Europe, intelligence agencies warn" accessible at https://www.ft.com/content/c88509f9-c9bd-46f4-8a5c-9b2bdd3c3dd3?emailId=069b61cb-5090-4f47-8586-8db3261b2169&segmentId=22011ee7-896a-8c4c-22a0-7603348b7f22

[152] See, for instance, **Exhibit R – 362,** Commission President von der Leyen's statement 22/7307 of 30 November 2022 on Russian accountability and the use of Russian frozen assets, accessible at: President's statement on Russian accountability and (europa.eu)

[153] **Exhibit R – 363,** On 17 March 2023, the International Criminal Court issued arrest warrants against Vladimir Vladimirovich Putin. See the ICC press statement, accessible at https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and

[154] All EU Member States are party to the Rome Statute of the ICC.

[155] Claimant's Supplementary Memorial on Jurisdiction and Merits, 27 February 2024, para. 87.

decision to decarbonise its economy even more rapidly in view of the war[156], the changes to the infrastructure originally earmarked for Nord Stream 2 (see above, section 2.5.4) and the complete disruption of commercial relations with European customers (see above, section 2.5) would in any event make it impossible for NS 2 to resume its pipeline business within that time frame, even in the highly unlikely event of a radical change of the EU's policy towards Russia.

142. Finally, even if the EU surprisingly decided to import some Russian gas (*quod non*), given the EU's ongoing pivot towards renewables there would be insufficient EU demand for the additional amount of gas capable of being transported through Nord Stream 2 (55 bcm/year) and much less for the combined capacity of the Nord Stream 1 and Nord Stream 2 pipelines (110 bcm/year).

143. In other words: Nord Stream 2 has lost its economic raison d'être for good.

3. SUBSEQUENT DEVELOPMENTS DO NOT "CONFIRM" THAT THE AMENDING DIRECTIVE HAS THE ALLEGED "CATASTROPHIC IMPACT" ON THE CLAIMANT'S INVESTMENT

3.1. Introduction

144. The Claimant contends that its previous submissions in relation to the alleged "catastrophic impact" of the Amending Directive on the Claimant's investment have been "confirmed"[157] by subsequent developments.

145. More specifically, the Claimant alleges that: (i) the Amending Directive has [redacted]; (ii) the certification procedure was "stopped in February 2022" and there is no longer "any prospect for the Pipeline to be certified in the foreseeable future"[159]; and (iii) the "factual and legal developments since February 2022 have

[156] **Exhibit R – 365,** The EU's pledge to be climate-neutral by 2050, already decided in 2019, is a legally binding target resulting from the European Climate Law. As the EU currently imports only about 40% of its total gas consumption, it is likely no longer to depend on any gas imports already much earlier. On 30 May 2024, Italy, Germany and Austria have signed an agreement to cooperate on the development of a network to transport hydrogen from the southern Mediterranean to northern Europe, which is supposed to be operational by 2030. See Reuters press release of 30 May 2024, accessible at: https://www.reuters.com/sustainability/climate-energy/italy-germany-austria-sign-cooperation-deal-southern-hydrogen-link-2024-05-30
Between August 2022 and September 2023, gas consumption in the EU went down by 18%. In 2022, 60 GW of wind and solar energy capacity were added, resulting in gas saving of about 10 bcm. An additional 70 GW of renewable energy capacity is estimated for 2023, resulting in further gas savings of about 10 bcm.
[157] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, heading of Section VII.
[158] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, para. 200.
[159] *Ibid.*, para. 195.

only to a limited extent altered the […] impact of the Amending Directive on the Claimant"[160].

146. In support of these allegations, the Claimant refers to a second report by Swiss Economics SE AG (SE 2024), which purports to estimate the amount of the alleged damage suffered by the Claimant, as a result of the non-operation of the NS 2 pipeline until 22 February 2024 (date of the Claimant's submission), as well as the additional monthly damage from March 2024. Those estimates are based on a comparison of a hypothetical "But-For Scenario", in which the Amending Directive does not apply to the NS 2 pipeline and the Claimant can therefore operate the NS 2 pipeline without complying with any regulatory requirements, with a "Factual Scenario", where the Claimant is unable to operate the NS 2 Pipeline.

147. The European Union has shown in previous submissions that the Claimant has failed to establish that the Amending Directive will have the "catastrophic impact" which it alleges. The European Union refers, in particular, to its Counter-Memorial on the Merits of 3 May 2021 (section 2.3, para. 157 ff.) and its Rejoinder on the Merits, of 22 February 2022 (section 6, para. 380 ff.).

148. Contrary to the Claimant's assertions, the alleged "catastrophic impact" of the Amending Directive has not been "confirmed" by subsequent developments. As will be explained below, the Amending Directive does not, as such, prevent the operation of the NS 2 pipeline (section 3.2). Rather, the non-operation of the NS 2 pipeline is a consequence of the Claimant's own actions and omissions and of other circumstances that are not attributable to the European Union. The certification procedure was suspended due to the Claimant's own inaction (sections 3.3), whereas the withdrawal of the security of supply assessment by the German authorities was a justified response to Russia's full-scale invasion of Ukraine (section 3.4). That the alleged damage is not attributable to the European Union is confirmed by the fact that the non-Russian investors in the NS 1 pipeline have written off entirely their investments, despite the fact the NS 1 pipeline is not subject to certification under the Gas Directive (section 3.5). Lastly, the Second Swiss Economics Report, just like the First Swiss Economic Report, is deeply flawed (section 3.6).

[160] *Ibid.*, para. 196

3.2. The Amending Directive does not, as such, prevent the operation of the NS 2 Pipeline

149. The Claimant asserts that the Amending Directive [redacted]

150. These assertions are wholly unsupported and have been thoroughly rebutted by the European Union in previous submissions to the Tribunal. The Claimant fails to address those EU submissions.

151. As explained by the European Union, the Claimant has failed to prove that NSP2AG cannot comply with the applicable requirements of the Amending Directive, as transposed and implemented by Germany, and, therefore, that the NS 2 pipeline cannot be operated in accordance with those requirements (see Section 2.3.4 of the EU's Counter-Memorial on the Merits of 3 May 2021).

152. In particular, the Claimant has failed to prove that NSP2AG cannot comply with the applicable unbundling requirements (see Section 2.3.4.1 of the EU's Counter-Memorial on the Merits of 3 May 2021).

153. Contrary to the Claimant's assertions, the GTA is not an impediment. As further explained by the European Union, the Claimant has failed to prove that the GTA cannot be amended as necessary, so as to permit the operation of the NS 2 pipeline in accordance with the Amending Directive, as transposed and implemented by Germany (see Section 2.3.4.3 of the EU's Counter-Memorial on the Merits of 3 May 2021).

154. It is recalled, in particular, that GPI and Gazprom Export are not third parties to this dispute. Just like NSP2AG, both GPI and Gazprom Export are controlled by Gazprom. All of them are part of the same corporate group, which is ultimately controlled by the Russian Federation; and all of them constitute effectively a single economic and decisional unit. The failure by GPI, Gazprom Export or Gazprom to agree with the Claimant on any necessary modifications to the existing contractual arrangements would, therefore, be entirely attributable to the Claimant (see Section 6.5 of the EU's Rejoinder on the Merits, of 22 February 2022).

[161] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, para. 200.
[162] *Ibid*.

155. The Claimant's assertion that it is prevented from complying with the unbundling requirements is further contradicted by the fact that, on 11 June 2021 the Claimant requested from the German authorities an ITO certification (see above section 2.1.3). This request involves a belated but unequivocal recognition by the Claimant that NSP2AG is not precluded *per se* from complying with the unbundling requirements of the Amending Directive, as transposed and implemented by Germany.

156. In any event, as shown by the European Union, the Claimant could have avoided, or at least substantially mitigated, the alleged "catastrophic impact" resulting from the application of the unbundling requirements of the Amending Directive, as transposed and implemented by Germany, by exercising due diligence when negotiating the GTA and other contractual arrangements, and/or by pursuing one or more of the alternative options identified by the European Union (see Section 6.3 of the EU's Rejoinder on the Merits, of 22 February 2022).

3.3. The suspension of the certification procedure is attributable to the Claimant's own inaction

157. The Claimant alleges that the certification procedure "was stopped in February 2022 for an indefinite period of time"[163]. The Claimant appears to suggest that this "stoppage" was attributable to the German authorities and lacking any proper justification.

158. The Claimant's allegations are incomplete and misleading.

159. As explained in section 2.1 above, the certification procedure was not "stopped" in February 2022. Instead, the certification procedure had already been suspended by the BNetzA on 21 November 2021.

160. The suspension of the certification procedure was required by the applicable provisions of German law and should have been reasonably anticipated by any diligent operator. The BNetzA suspended the certification procedure because the Claimant did not fulfil one of the basic legal conditions for applying for ITO certification: a Swiss entity, such as the Claimant, cannot apply for ITO certification. Only an entity established within the European Union can do so[164]. In view of the objections raised by the BNetzA, the Claimant announced that it would apply for ITO certification on behalf of a subsidiary of NSP2AG, to be

[163] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, para. 195.
[164] Cf. section 10(2), 2nd sentence, of the EnWG, which provides that the ITO must be established in one of the legal forms provided for by the laws of EU Member States as listed in Article 1 of the Gas Directive.

incorporated in Germany[165]. Following this announcement, the BNetzA indicated that the procedure "will therefore remain suspended until the main assets and human resources have been transferred to the subsidiary and the ruling chamber has been able to check whether the documentation resubmitted by the subsidiary, as the new applicant, is complete.[166]"

161. As of the date of this submission, the certification procedure remains suspended due to the persistent inaction of the Claimant. As mentioned earlier (section 2.1.3), it was not until 26 January 2022 that the Claimant announced that NSP2AG had incorporated a German subsidiary (Gas for Europe GmbH)[167]. Nevertheless, since Russia's full-scale invasion of Ukraine in February 2022, the Claimant has taken no further step to meet the conditions specified by the BNetzAa for resuming the certification procedure. Gas for Europe GmbH was inactive during the rest of 2022 and was eventually wound up by the Claimant with effects from 1 January 2023[168].

162. In sum, the alleged "stoppage" of the certification procedure is simply the necessary legal consequence of the Claimant's own deliberate inaction in this regard. It is fully within the Claimant's power to comply with the legal conditions recalled by the BNetzA on 21 November 2021 and, thereby, to allow the resumption of the certification procedure. Any alleged damage flowing from the current suspension of the certification procedure cannot, therefore, be attributed to the European Union. Rather, such damage (which is denied) is self-inflicted and not subject to compensation by the European Union under the ECT.

3.4. The withdrawal of the SoS Assessment was a justified response to events provoked by Russia, of which the Claimant is an organ

163. As further explained in section 2.1.3, on 22 February 2022, Germany's Federal Ministry for Economic Affairs and Climate Action withdrew its Security of Supply Assessment of 26 October 2021, in order to re-evaluate the situation in light of Russia's full scale invasion of Ukraine[169]. Contrary to the Claimant's assertions,

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[165] **Exhibit R – 291**, Bundesnetzagentur, press release, 21 November 2021, "Nord Stream 2 AG's application for certification in accordance with sections 4(a), 4(b) and 10 et seq" EnWG https://www.bundesnetzagentur.de/DE/Beschlusskammern/1_GZ/BK7-GZ/2021/BK7-21-0056/BK7-21-0056_Antrag.html?nn=659906

[166] *Ibid*.

[167] **Exhibit R - 151**, website of Gas for Europe GmbH, https://www.g4e.de/en/news/

[168] **Exhibit R – 292**, Reuters, 20 January 2023, "Nord Stream 2 German subsidiary wound up -report" https://www.reuters.com/business/energy/nord-stream-2-german-subsidiary-wound-up-t-online-reports-2023-01-20/

[169] **Exhibit R - 293**, Germany's Ministry for Economic Affairs and Climate Action, press release, 22 February 2022, "Minister Habeck comments on the situation in eastern Ukraine and the discontinuation of the certification procedure for Nord Stream 2"

however, this withdrawal did not "stop"[170] the certification procedure. The certification procedure had already been suspended by the BNetzA on 21 November 2021, and its resumption depended upon the Claimant itself completing the requirement of establishment within the European Union, a process the Claimant abandoned.

164. Germany's Federal Ministry for Economic Affairs and Climate Action decided to withdraw its original Security of Supply Assessment in response to Russia's recognition, on 21 February 2022, of the Russian-controlled territories of Ukraine as independent states: the self-styled "Donetsk People's Republic" and "Luhansk People's Republic"[171]. Three days later, Russia launched a full-scale invasion of Ukraine[172].

165. Germany's Federal Ministry for Economic Affairs explained that:

> the assessment (Security of Supply Assessment) to be submitted under Section 4b (3) of the Energy Industry Act (EnWG) is to be based on an analysis of the factual and legal basis and can/must be updated if the factual basis changes in any substantial way[173].

166. It is beyond dispute that Russia's launch of an illegal war of aggression against Ukraine, together with the weaponization of gas supplies to the European Union, both prior and after the full-scale invasion of Ukraine, warranted the German authorities to thoroughly re-evaluate the risks the control by the Claimant of the NS 2 pipeline posed to security of supply (see below section 4.3.3.2).

167. In its Supplemental Memorial, the Claimant very carefully avoids any mention of Russia's aggression. Instead, the Claimant alludes euphemistically to unspecified "geopolitical developments"[174]. By doing so, the Claimant seeks to obfuscate the obvious fact that those "geopolitical developments" were brought about by Russia's own decision to launch an illegal full-scale invasion of Ukraine. As the

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https://www.bmwk.de/Redaktion/EN/Pressemitteilungen/2022/02/20220222-minister-habeck-comments-on-the-situation-in-eastern-ukraine-and-the-discontinuation-of-the-certification-procedure-for-nord-stream-2.html

[170] Cf. Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, para. 195.

[171] **Exhibit R - 293,** Germany's Ministry for Economic Affairs and Climate Action, press release, 22 February 2022, "Minister Habeck comments on the situation in eastern Ukraine and the discontinuation of the certification procedure for Nord Stream 2" https://www.bmwk.de/Redaktion/EN/Pressemitteilungen/2022/02/20220222-minister-habeck-comments-on-the-situation-in-eastern-ukraine-and-the-discontinuation-of-the-certification-procedure-for-nord-stream-2.html

[172] **Exhibit R - 294**, BBC, 24 February 2022, "Ukraine conflict: Russian forces attack from three sides"https://www.bbc.com/news/world-europe-60503037

[173] **Exhibit R - 293**, Germany's Ministry for Economic Affairs and Climate Action, press release, 22 February 2022, "Minister Habeck comments on the situation in eastern Ukraine and the discontinuation of the certification procedure for Nord Stream 2" https://www.bmwk.de/Redaktion/EN/Pressemitteilungen/2022/02/20220222-minister-habeck-comments-on-the-situation-in-eastern-ukraine-and-the-discontinuation-of-the-certification-procedure-for-nord-stream-2.html

[174] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, paras. 12 and 80.

European Union has demonstrated, Gazprom and its subsidiaries (including the Claimant) act *de facto* as an organ of the Russian Federation (Section 6.3 of the EU's Rejoinder on the Merits, of 22 February 2022). Therefore, Germany's decision to reassess security of supply issues was prompted by the Claimant's own unlawful actions.

168. For the above reasons, any alleged damage arising from the withdrawal of the Security of Supply Assessment cannot be attributed to the European Union. Rather, any such damage (which is denied) was entirely self-inflicted and not subject to compensation by the European Union under the ECT.

3.5. That the alleged damage is not attributable to the Amending Directive is confirmed by the decision of all non-Russian investors in Nord Stream 1 to write off their investments following the invasion of Ukraine

169. The Nord Stream 1 pipeline is owned by the Swiss entity Nord Stream AG. In turn, the shareholders of Nord Stream AG are: Gazprom (51 %); the German company Wintershall DEA AG (15.5 %); PEG Ifrastruktur AG, a subsidiary of the German company E.ON (15.5 %); the Dutch company N.V. Nederlandse Gasunie (9 %); and the French group ENGIE (9 %)[175].

170. Nord Stream AG applied and received from the German NRA a derogation for the pipeline NS 1 pursuant to Article 49a of the Gas Directive and, therefore, is not subject to certification. Despite this, since February 2022, all the non-Russian shareholders of Nord Stream AG have deemed it necessary to completely write off their investments in Nord Stream AG (and therefore in the NS 1 pipeline) in view of Russia's full-scale invasion of Ukraine and related events, including the acts of sabotage of September 2022, none of which events are attributable to the European Union.

171. Illustrating the reasoning underpinning these write offs, Gasunie's Annual Report for 2023 states as follows:

> The context of our shareholding in Nord Stream has changed significantly due to the continued Russian aggression since the beginning of 2022, and certainly due to the serious damage to the pipelines as a result of the explosions that occurred on 26 September 2022, which has resulted in the pipelines not being operational since. At the end of 2023, we considered several scenarios regarding the future of the Nord Stream pipeline and assessed the financial implications of each. Based on our latest risk assessment, including our expectations regarding any future dividends to be received, we decided to keep the value of our

[175] **Exhibit R – 296**, website of Nord Stream AG, "Our Shareholders", https://www.nord-stream.com/about-us/our-shareholders/

interests in Nord Stream at year end 2023 at € zero (year end 2022: € zero)[176].

172. The fact that the investors in the Nord Stream 1 pipeline have decided to write off their investments following the full-scale invasion of Ukraine evidences that the alleged damage suffered by the Claimant cannot be attributed to the lack of certification of the NS 2 pipeline, but rather to the full-scale invasion of Ukraine and related events, for which the European Union cannot be held responsible.

3.6. The Second Swiss Economics report is deeply flawed

173. The Second Swiss Economics report (SE 2024) is fundamentally flawed because it is based on unreliable factual assumptions fed by the Claimant to Swiss Economics and fails to take into account the Claimant's own contribution to the alleged damage.

3.6.1. The "But-For Scenario" is unrealistic

174. The "But-For Scenario" relied upon by Swiss Economics, following instructions from the Claimant, is based on unrealistic assumptions.

175. First, the "But-For Scenario" assumes that the Gas Directive (or any other similar regulatory requirements, either at EU level or at national level) would not apply to the German section of the NS 2 pipeline during its lifetime.

176. However, as explained by the European Union, the Claimant could have entertained no legitimate expectation that the section of the NS 2 pipeline within the EU territory would be wholly unregulated from the start of its operations and during its entire lifetime. There were clear indications prior to the adoption by the Claimant of its final investment decision in 2015 that the requirements of unbundling, tariff regulation and TPA already applied to pipelines such as the NS 2 pipeline by virtue of the Gas Directive, or at the very least that those pipelines would be made subject to such requirements (see below section 4.2 and prior EU submissions cited therein).

177. Second, the "But-For Scenario" assumes that Gazprom/Russia would have been willing to supply gas through the NS 2 pipeline. However, as explained in section 2.5.1, already as of the summer of 2021, Russia/Gazprom began curtailing supplies of gas to most EU Member States in preparation of Russia's full-scale

[176] **Exhibit R – 297**, Gasunie, Annual Report for 2023, p. 140; See also**, Exhibit R- 298**, Engie 2023 Annual Report, p. 96; **Exhibit R- 299**, E.ON 2022 Annual Report, 77; and **Exhibit R- 300**, Wintershall Dea Annual Report 2022, p. 52, p. 90, p. 139, p. 144.

invasion of Ukraine. Following that invasion, Russia/Gazprom imposed further restrictions as retaliation for the EU's support of Ukraine. By September 2022, Russia/Gazprom had halted completely and definitively the supply of gas through the NS 1 pipeline, while making clear that supplies would not be resumed, as long as the European Union and its Member States continued to apply sanctions to Russia in response to Russia's invasion of Ukraine[177]. In such circumstances, there is no reason to assume that Russia/Gazprom would have been willing to supply any gas through the NS 2 pipeline, even if the Gas Directive had not applied to that pipeline. Instead, it is far more reasonable to assume that Russia/Gazprom would have halted supplies through the NS 2 pipeline in order to put additional pressure on the European Union and its Member States. Through the present dispute, the Claimant is effectively asking the European Union to "compensate" Gazprom/Russia for the impossibility to supply gas through the NS 2 pipeline, despite that Gazprom/Russia would, in any event, have refused to supply gas though that pipeline in order to harm the European Union and its Member States.

178. Third, the "But-For" scenario further assumes that there is demand in the European Union for all the gas that, in theory, might be shipped through the NS 2 pipeline. Yet, as explained in Section 2.5, as a result of Russia's and Gazprom's own actions, there is no prospect of a future market in the European Union for natural gas transported though Nord Stream 2.

3.6.2. The "Factual Scenario" is attributable to the Claimant's own actions

179. The "Factual Scenario" is described by Swiss Economics as a situation where "no gas is transported and tariff revenues can be collected".[178]

180. It is not in dispute that this is, indeed, the current situation. However, the non-operation of the NS 2 pipeline is not attributable to the European Union. Rather, it is a consequence of the Claimant's own actions and omissions and of other circumstances which are not attributable to the European Union (including notably the US sanctions and the sabotage of the NS 2 pipeline).

181. As recalled above (section 3.2), the Claimant has failed to prove that NSP2AG cannot comply with the applicable requirements of the Amending Directive, as transposed and implemented by Germany, and, therefore, that the NS 2 pipeline cannot be operated in accordance with those requirements. While the certification procedure has remained suspended since 21 November 2021, that suspension is

[177] **Exhibit R-230** and **Exhibit R-231**.
[178] Second Swiss Economics Report, pp. 9-10.

due to the Claimant's own inaction. Also, while the SoS Assessment was withdrawn on 23 February 2022, in view of its re-evaluation, that withdrawal was a justified response to events provoked by Russia, of which the Claimant is an organ.

3.6.3. The Second Swiss Economics Report underestimates the impact of the US sanctions and the acts of sabotage of September 2022

182. The Claimant has conceded that, in the "But-For Scenario", the Claimant's revenues would have been "reduced" by two "developments" which are clearly not attributable to the European Union, namely the US sanctions and the acts of sabotage of the pipeline of September 2022. However, the Claimant alleges that those "developments" have had only a "limited" impact[179]. Following the Claimant's instructions, Swiss Economics has made some limited adjustments to the "But-For Scenario" in order to reflect the allegedly limited impact of those events[180].

183. As explained above, the impacts of the US sanctions (section 2.3) and the acts of sabotage of September 2022 (section 2.2) are far from "limited" and call into question the operability of the NS 2 pipeline within the foreseeable future. The limited adjustments made by Swiss Economics fundamentally underestimate those impacts and are clearly inadequate.

3.6.4. The Annex to the Second Swiss Economics Report fails to address the deficiencies of the First Report identified by the European Union

184. The Annex to the EU's Rejoinder on the Merits, of 22 February 2022 (EU Annex 2022), identified a number of instances where the First Swiss Economics Report (SE 2021) fails to substantiate, or even disclose, the assumptions used in its modelling, as well as instances where the model relies on erroneous assumptions or methodology. The Second Swiss Economics Report (SE 2024) includes a section entitled "Assessment of the EU's Rejoinder and Annex", which purports to respond to the EU's critique of SE 2021. The Annex to this submission (EU Annex 2024)

[179] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, para. 196.
[180] SE 2024, pp. 24-25.

sets out a detailed rebuttal of that "assessment" and identifies further deficiencies in SE 2024.

4. THE JUDGMENT OF THE EUROPEAN COURT OF JUSTICE DOES NOT SUPPORT THE CLAIMANT'S CASE

4.1. The judgment of the European Court of Justice contained statements limited to admissibility

4.1.1. The Court of Justice's judgment of 12 July 2022 is a decision on admissibility, not a decision on the substance or merits

185. In support of its claim of alleged discrimination and "targeting" of its investment, the Claimant relies heavily on the Court of Justice's judgment of 12 July 2022.[181] Indeed, the Claimant devotes 23 pages of its 79 pages Supplementary Submission to this, mainly copy-pasting paragraphs from the ECJ judgment and related advisory opinion of the Advocate General.

186. The Claimant draws conclusions from this judgment that are unsupported by it, alleging that its claim is now for all intents and purposes settled in its favour. The Claimant is wrong to do so, failing to present the judgment for what it is: a decision solely concerning the admissibility of its action before the General Court, rather than a decision on the substance or merits.

187. The judgment of 12 July 2022 was an appeal against an order of the General Court of 20 May 2020, dismissing the Claimant's application for annulment as inadmissible for lack of direct concern.[182] On 12 August 2020, the Claimant appealed against the Order of the General Court. On 12 July 2022, the Court of Justice rendered its judgment in Case C-348/20 P and ruled that the action for annulment brought by Nord Stream 2 AG against the contested Directive was

> admissible, to the extent that it is directed against the provisions of Articles 36 and 49a of 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, as amended and inserted, respectively, by Directive 2019/692.[183]

[181] **Exhibit CLA-323**, Judgment of the European Court of Justice of 12 July 2022, *Nord Stream 2 AG v. European Parliament and Council*, Case C-348/20 P.
[182] **Exhibit RLA-361**, Order of the General Court of 20 May 2020, *Nord Stream 2 AG v. European Parliament and Council,* Case T-526/19.
[183] See paragraph 3 of the operative part of the Judgment of 12 July 2022.

188. The Court of Justice referred the case back to the General Court of the European Union for a decision on the merits concerning the action for annulment. That proceeding is currently pending.[184]

189. In these circumstances, neither the General Court nor the Court of Justice have yet pronounced themselves on the merits of the Claimant's allegation under EU law. There is in particular no finding of illegality under EU law or at all concerning the Amending Directive.

190. The only question at stake before the Court of Justice was whether the application for annulment was admissible given that it sought to challenge the Amending Directive that – being a directive and not a regulation – requires transposition by Member States. At issue was the proper interpretation of the fourth paragraph of Article 263 of the Treaty on the Functioning of the European Union:[185]

> Any natural or legal person may, under the conditions laid down in the first and second paragraphs [of Article 263], institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

191. In order for its substantive complaint to be admissible, the Claimant was therefore obliged to demonstrate that the Amending Directive is "of direct and individual concern to them".

192. The General Court for its part had decided that the Claimant "is not directly concerned by the provisions of the contested directive",[186] rendering the application inadmissible. The General Court in so deciding underlined that it was only through the intermediary of the national measures transposing the contested directive that the Member States - this instance the Federal Republic of Germany - would adopt or had adopted that operators such as the applicant will be or are subject, under the conditions agreed on by those Member States, to obligations under Directive 2009/73 as amended by the contested directive.[187] The General Court found that the Federal Republic of Germany had not adopted such transposing measures as at the time of the application and held that Member States had a margin of discretion in implementing the provisions of that directive.[188] The General Court also noted that it is for the Member States to adopt national measures enabling the operators concerned to ask to benefit from derogations under Article 49a, determining precisely the conditions for obtaining

[184] A hearing was held in the General Court in Luxembourg on 11 April 2024.
[185] **Exhibit RLA-362**, Article 263 TFEU.
[186] **Exhibit RLA-361**, Order of the General Court of 20 May 2020, *Nord Stream 2 AG v. European Parliament and Council,* Case T-526/19, para. 116.
[187] Ibid., para. 110.
[188] Ibid., para. 111.

the derogations in the light of the general criteria laid down by Article 49a of Directive 2009/73.[189]

193. On appeal, the Court of Justice recalled that

> the conditions that a natural or legal person must be directly concerned by the measure being challenged requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of that person and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules.[190]

194. Its determination therefore concerned a highly technical and general procedural issue under EU law, rather than any ruling on the specific merits of this present case under EU law or *a fortiori* under the ECT.

195. The Court of Justice disagreed with the General Court's reasoning because,

> in order to reach the conclusion that the directive at issue did not directly affect the applicant's legal situation the General Court principally relied on the fact that a directive cannot, in itself, create obligations for an individual or be the direct and immediate source of such obligations, in the absence of transposing measures.[191]

196. The Court of Justice thus disagreed with the General Court's reliance on the nature of the Amending Directive to reach the conclusion that the application was inadmissible. The Court of Justice stressed that

> any act, whether regulator or another type of act, may, in principle, directly concern an individual and thus directly affect its legal situation irrespective of whether it entails implementing measures, including, in the case of a directive, transposing measures.[192]

197. The Court of Justice found that the Amending Directive

> has the consequence of subjecting the operation of that interconnector [of the Complainant] to the rules laid down in that directive, thus rendering applicable to the appellant the specific obligations that it lays down on that matter.[193]

198. The Court considered that the Member State

> has no discretion, as regards those transposing measures, capable of preventing those obligations from being imposed on the appellant.

199. It thus concluded that

[189] Ibid., para. 115.
[190] **Exhibit CLA-323**, Judgment of the European Court of Justice of 12 July 2022, *Nord Stream 2 AG v. European Parliament and Council*, Case C-348/20 P, para. 43.
[191] Ibid., para. 65.
[192] Ibid., para. 74.
[193] Ibid., para. 75.

> [i]n the absence of such discretion, those transposing measures do not call into question the direct nature of the link between the directive at issue and the imposition of those obligations.[194]

200. This leads the Court of Justice to the conclusion that the General Court erred in law in holding that the directive at issue did not directly affect the situation of the appellant.[195]

201. The Court of Justice thus only provided interpretations of the Amending Directive insofar as relevant for the admissibility of the Claimant's action for annulment. It issued no ruling at all on the substantive issue that now remains to be decided in that ongoing procedure, i.e. whether the impact of the Amending Directive on the Claimant is unlawful as a matter of EU law.

4.1.2. The Claimant mischaracterizes statements in the advisory opinion of the Advocate General, which are, moreover, not confirmed by the Court of Justice

202. The Claimant also relies on a number of statements by the Advocate General made in the course of the appeal on admissibility that the Court of Justice failed to cite, still less to endorse, and that are therefore moot. The Claimant's attempt to elevate various statements of the Advocate General in the context of a submission on admissibility, to a finding of the Court on an issue of substance, is fundamentally misleading.

203. An Advocate General Opinion is an advisory opinion (a "reasoned submission"[196]). It is not binding on the Court of Justice and may be completely or partially disregarded by the Court of Justice.[197]

204. The Claimant in the present proceedings alleges that the Amending Directive deliberately "targeted" the Claimant. Seeking support for its contention, it refers to the statement by the Advocate General that

> EU institutions [were] aware that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the very intention of subjecting the appellant to that new regime.[198]

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[194] Ibid., para. 76.
[195] Ibid., para. 77.
[196] See **Exhibit RLA-363**, Article 252, second paragraph, TFEU.
[197] **Exhibit R-308**, K. Lenaerts, K. Gutman and J. Nowak, *EU Procedural Law* (second edition), Oxford 2023, para. 2.17.
[198] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, paras. 171 and 172, referring to **Exhibit CLA-176** ,the AG Opinion in Case C-348/20 P, paras. 197-200.

205. The Claimant's reliance on the Advocate General is misplaced and fails to advance its case. The Advocate General's statement does not support the Claimant's discrimination claim: it merely states that the Claimant is subject to the new regime, as are other pipelines, such as Yamal-Europe, and also future pipelines, and opined that EU institutions intended the Claimant to be subject to that regime.

206. Accordingly, the Advocate General's comment does not point to any form of discrimination or intention to "stop" the Nord Stream 2 project. The project is subject to the rules in the Gas Directive, including its flexibilities (including, e.g. Article 9(6) regarding ownership unbundling within the state), like other pipelines.

207. What is more, significantly, the Court of Justice did not confirm this position. No such statement can be found in the Court's judgment. There is thus no definitive interpretation of EU law that would support the Claimant's argument.

208. After quoting the Advocate General Opinion, the Claimant again claims that the "sole objective of the Amending Directive" was to "complicate or prevent Claimant's project and to ensure that other pipelines would not be affected in the process", which was achieved by enacting Article 49a.[199] Yet, as just explained, no such statements were made by either the Advocate General or the Court of Justice. And the Claimant has not produced any other evidence in support of such statements, either.

209. Also the Claimant's reliance on the Court judgment and the Advocate General Opinion to respond to the Expert Report of Prof. Maduro is entirely misplaced. The Claimant's only argument in response is that the Amending Directive had as "sole objective" to prevent the Claimant's project.[200] This is not the case and, importantly, has not been endorsed by the Court of Justice (whatever the Advocate General opinion may have stated).

210. Hence, in summary, the only question that was at issue in the judgment of 12 July 2022 was whether the application for annulment was admissible. More precisely, the Court examined whether the Claimant was directly concerned by the Amending Directive, despite the challenged act being a directive. There was no analysis of the substance of the claims of the Claimant. There was no hearing either where the details of the Amending Directive and its interpretation could have been discussed in greater detail. Therefore, any statements beyond the admissibility of the application must be read with this context in mind. They were only relevant for the decision on admissibility. Most importantly, the Court has

[199] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, para. 174.
[200] See Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, paras. 178, 179, referring each time to Section VI.8 of the Submission and the conclusion in para. 174, just cited.

not concluded that there was any targeting, let alone unjustifiable discriminatory treatment, of the Claimant by the Amending Directive. Contrary to the Claimant's allegation, the referenced judgment thus fails to support the Claimant's case in substance.

4.2. The Judgment is without relevance to the claim of a dramatic and unexpected regulatory change

211. The Judgment does not contain a ruling on the merits, which would set out binding interpretations of the Amending Directive, but merely addresses the admissibility of an action brought against that Directive. However, even if some of the interpretations of the Amending Directive set out in the Judgment were to prevail when the EU Courts decide on the merits of the case (which is uncertain), these interpretations could not be invoked in support of the Claimant's claim that a dramatic and unexpected regulatory change undermined the basis of NSP2AG's investment.

212. The Claimant's claim as to a dramatic and unexpected regulatory change is premised on the hypothesis that when NSP2AG's adopted its Financial Investment Decision regarding Nord Stream 2 on 4 September 2015 (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. (Rejoinder on the Merits, of 22 February 2022, paragraph 116).

213. In this regard, the decisive question 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 Nord Stream 2. In this regard, a ruling that an EU Court rendered in July 2022 (ie. seven years later) is of obvious irrelevance. The interpretations made therein could not possibly have been taken into account in an investment decision taken in September 2015. Rather, at that time, the investor had to take account of numerous indications, including official statements, pointing to the applicability of the Regulatory Requirements to Nord Stream 2 already before the Amending Directive entered into force (Rejoinder on the Merits, of 22 February 2022, paragraphs 120-171). Even if uncertainty remained whether the original Gas Directive presented a loophole which resulted in its inapplicability to Nord Stream 2, these indications made it abundantly clear to investors that EU

authorities would step up regulatory activity to ensure that this ambiguity would be addressed and resolved as soon as possible in favour of extending the scope of the exiting EU energy market rules to NS 2. The Defendant also produced evidence that NSP2AG's parent company Gazprom was well aware in October 2015 that the Regulatory Requirements could apply to pipelines such as Nord Stream 2 (Rejoinder on the Merits, of 22 February 2022 paragraphs 199-205). This evidence stands unrefuted.

4.3. The Judgment does not support the claim of discriminatory treatment

214. Relying on selected excerpts from the Court Judgment on admissibility, the Claimant argues that the Nord Stream 2 pipeline is the "**only pipeline** which is neither eligible for an exemption pursuant to Article 36 of the Amending Directive, nor for a derogation pursuant to Article 49a of the Amending Directive".[201]

215. The European Union has already before explained that this allegation is incorrect. Exemptions and derogations are not automatic. They can only be granted if the objective criteria set by the Directive are met. This includes an assessment, by the national authority, of the impact of the project on competition and on security of supply. When a project would be detrimental to competition or to security of supply in the Union, the exemption or derogation will be rejected, or at least be subject to stringent conditions.

216. As the European Union will explain hereafter, the Claimant inappropriately assumes that, if it had access to an Article 36 exemption or an Article 49a derogation, it would obtain this, without any conditions. This is a baseless assumption. What is more, pipelines are large infrastructure networks that are not built every day. In the future, interconnectors with third countries may be built that will in any case not benefit from a derogation and, even if they apply for an exemption, may not necessarily obtain such exemption since the applicable conditions, including a security of supply assessment, must be met.

217. The European Union has also explained that the Nord Stream 2 pipeline is not the only interconnector with third countries that does not benefit from an Article 49a derogation. In paragraphs 303-311 of the Counter-Memorial on the Merits as well as paragraph 246 of the EU Rejoinder of 22 February 2022, the European Union has listed four groups of pipelines between EU Member States and third countries

[201] Claimant's Supplementary Memorial on Jurisdiction and Merits of 27 February 2024, para. 154 (original emphasis).

that are "completed" and that are subject to the Gas Directive without benefiting from an Article 49a derogation.

218. 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 easternmost connection point between Yamal and the domestic Polish transmission system (and, hence, the Polish entry-exit system) and the Polish-Belarusian border (about half the overall length of the Polish Yamal section).[202] The Amending Directive clarified the legal basis for this.

219. Finally, one should also bear in mind that the Amending Directive is meant to regulate all future situations and that massive investments in pipeline infrastructure of the scale of Nord Stream 2 are not being made every day.

220. The European Union will, hereafter, demonstrate further that the cited judgment does not support the Claimant's discrimination claim.

4.3.1. The co-legislators had no deliberate intent to exclude Nord Stream 2 from Article 36 of the Gas Directive

221. The Claimant's primary point is that the Amending Directive allegedly specifically targeted NS 2, in that it was the only pipeline that could benefit neither from an exemption, not from a derogation. It argues the Court has "endorsed" this conclusion.

222. However, the manner in which the Gas Directive was amended never had the intent of eliminating the possibility for a non-completed project, like that of Nord Stream 2, to apply for an Article 36 exemption. The intention when proposing the amendment was to establish a system whereby, on the one hand, *existing* pipelines completed before 23 May 2019 could apply for an Article 49a derogation. On the other hand, *new* pipelines (namely those not yet completed) can apply for

[202] 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). The Kondratki station at the border between Belarus and Poland is a mere metering station along the Yamal Europe pipeline with no further connection to the Polish gas transmission network. See **Exhibit R-309**, Gaz System, 'Transit Gas Pipeline System': https://www.gaz-system.pl/en/transmission-system/transmission-infrastructure/transit-gas-pipeline-system.html

an Article 36 exemption, in line with the earlier decisional practice of the Commission under the Directive.

223. Indeed, at the time of adopting the contested Directive, the co-legislators considered that Article 36 exemptions were also available to new infrastructure. This was already clear in the Commission's proposal for an amendment to the Gas Directive:[203]

> The current proposal specifies the exact scope of application of the Gas Directive and consequently the Gas Regulation 3 to pipelines to and from third countries up to the border of EU jurisdiction. This includes the respective provisions on third-party access, tariff regulation, ownership unbundling and transparency. It **will enable new pipelines** to and from third countries to apply for **an exemption pursuant to Article 36 Gas Directive**. It **also** includes the possibility for Member States to grant **derogations for existing import infrastructure already in operation**. In order to ensure a **coherent legal framework** for pipelines passing through more than one Member State, it is necessary to establish which Member State should decide on such a derogation.

224. This was a justified consideration, given that an Article 36 exemption had been granted to the "OPAL" pipeline already in 2009. The Commission agreed to an exemption[204] in the OPAL case at a moment where all tubes for the pipeline had already been bought and where the construction had already started. In addition, concerning more directly the situation of the Applicant in the case at issue, various papers and articles in the legal doctrine[205] which refer to the interpretation of the contested measure as adopted, also analysed the possibility of the Applicant seeking an exemption under Article 36 as a viable option.

225. The Court of Justice in its appeal judgment on admissibility found that Nord Stream 2 would be excluded from an exemption under Article 36 because

> the investments for the Nord Stream 2 gas pipeline had already been decided at the date of adoption of the directive at issue.[206]

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[203] **Exhibit R-64**, 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, para. 5 (emphasis added).

[204] **Exhibit R-67**, Bundesnetzagentur Exemption Decision with respect to OPAL, 25 February 2009, pp. 62 and 64. See also **Exhibit R-201**, Concord Power Presentation: Slide 7 – Level of Risk – Investments already made by Wingas and see EU Rejoinder on the merits and reply memorial on jurisdiction of 22 February 2022, paras. 275-280.

[205] **Exhibit R-310,** The Gas Directive Amendment and Nord Stream 2 (https://www.ceeol.com/search/gray-literature-detail?id=848572); **Exhibit R-311,** Nord Stream 2: A Political Economic Crime Novel and Its EU Legal Consequences (2020, European Energy and Environmental Law Review), where both articles examine the possibility of seeking an exemption under Article 36 as one of the ways in which Nord Stream 2 can comply with the Gas Directive.

[206] See **Exhibit CLA-323**, Judgment of the European Court of Justice of 12 July 2022, *Nord Stream 2 AG v. European Parliament and Council*, Case C-348/20 P, para. 104.

226. However, the Court of Justice's statement was only made in the context of an assessment on admissibility and for that purpose only. Moreover, there was no hearing where the legal interpretation of Article 36 could be discussed and the position of the co-legislators heard. The Court of Justice did not extensively consider this issue beyond its bare statement, and its conclusion relied solely on a reference to the Advocate General's Opinion[207] relating to Article 36. As such, this is far from being a "decided issue" before the Court from a substantive point of view.

227. It is not – and has never been – the European Union's understanding that Nord Stream 2 could not apply for an Article 36 exemption based on the timing of the investment. Article 36 does not use "final investment decision" as criterion but refers to the "level of risk"[208]. This is not the same as a cut-off criterion based on the timing of the investment. The Claimant's assertion that such a formal criterion applies *finds no basis in EU legislation*. The Claimant's suggestion this criterion governs access to Article 36 is thus simply wrong as a matter of EU law. The Advocate General himself seems to have wrongly understood this, as reflected in points 74 and 75 of his Opinion, referred to (without any further discussion or analysis) in paragraph 104 of the Judgment in Case C-348/20 P.

228. The Claimant's assertion is further belied if one considers the *decisional practice* of the European Commission. EU practice concerning exemption decisions clearly shows that Member States enjoy a wide margin of discretion concerning the analysis of the "risk" criterion: in particular in the case of large pipeline projects or projects that are urgent for security of supply and significant investment risks were acknowledged in phases where the projects entered already into their implementation. In its Memorial on the Merits of 3 May 2021[209] and its Rejoinder[210], the European Union pointed to a Commission decision concerning OPAL, where Article 36 was applied to projects that had clearly already passed the stage of the final investment decision.[211] A more recent decision in the same sense is the decision relating to the LNG Terminal of Deutsche ReGas in Lubmin.[212] In the latter case, the Commission agreed to an exemption despite that the floating LNG terminal (FSRU) was already on its route to its final destination in

[207] **Exhibit CLA-176**, of the AG Opinion in Case C-348/20 P, paragraphs 74 and 75.
[208] Article 36 provides that the "level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted".
[209] EU Counter-memorial on the merits of 3 May 2021, para. 294.
[210] EU Rejoinder on the merits and reply memorial on jurisdiction of 22 February 2022, paras. 275-280.
[211] **Exhibit R-66**, Commission Decision of 12 June 2009 on the exemption of the German Bundesnetzagentur for the OPAL pipeline, available at https://energy.ec.europa.eu/system/files/2015-01/2009_opal_decision_de_0.pdf.
[212] **Exhibit R-312**, Commission Decision of 20.12.2022 on the exemption of Deutsche ReGas GmbH & Co. KGaA LNG Terminal in Lubmin (Germany), available at 2022_deutsche_regas_decision_en.pdf (europa.eu).

the harbour of Lubmin (and hence the project was close to starting operations). In both cases, Article 36 exemptions were granted at a time when the investment decision was already taken and the infrastructures were close to being built or even to start operation.

229. In sum, Articles 36 and 49a form part of a coherent and complete 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 infrastructures may apply for an Article 36 exemption. There is no 'gap' for certain pipelines and no differential treatment for Nord Stream 2, who itself took the decision and responsibility not to apply for an Article 36 exemption. This remains the European Union's position and it awaits the judgment of the General Court on the merits. Regardless, it remains the case that the Amending Directive as adopted was intended to provide this option to the Claimant. Nothing prevented the Claimant from applying for an Article 36 exemption, and the treatment of that request would have been within the decision-making power of the relevant German authority.

4.3.2. Even if Nord Stream 2 is the only pipeline which cannot apply for a derogation or an exemption, this difference in treatment is not discriminatory because it is based on objective reasons related to the fact that Nord Stream 2 was neither an existing nor a projected pipeline

230. Even if it were the case that Nord Stream 2 was the only pipeline unable to apply either for a derogation or for an exemption (*quod non*), this difference in treatment would not amount to discrimination contrary to protections set out in the ECT. The Claimant's conceptual "leap" from differential treatment to discrimination[213] is baseless. Importantly, the Court of Justice itself made no finding that any difference of treatment was discriminatory.

231. In the first place, there is a difference between the ability to apply and actually being granted either an exemption or a derogation. The latter is not automatic. The Claimant's allegation of "discrimination" is premised on the notion that, had it had access to either Article 36 or 49a, it would necessarily have obtained an exemption or a derogation without any conditions and would thereby have "escaped" the application of the Gas Directive. To the contrary, exemptions and derogations are not automatic. They can only be granted if the objective criteria

[213] See Claimant's Supplementary Submission of 27 February 2024, para. 159.

set by the Directive are met. This includes an assessment, by the national authority, of the impact of the project on competition and on security of supply. When a project is deemed detrimental to competition or to security of supply in the Union, the exemption or derogation will be rejected, or at least be subject to stringent conditions.

232. The Amending Directive applies an objective criterion to determine the eligibility for an Article 49a derogation that applies to objectively different situations. Article 49a derogations are available, subject to specific conditions assessed by the National Regulatory Authorities, to transmission lines between Member States and third countries that had been completed before 23 May 2019.

233. Pipelines completed before 23 May 2019, on the one hand, and non-completed pipelines (including Nord Stream 2), on the other hand, are indeed in objectively different situations. The date of 23 May 2019 corresponded to the date of coming into force of the Amending Directive. Completed pipelines entering the EU energy market from third countries (such as, for instance, Nord Stream 1) had already been operating as at that date for a significant amount of time.[214] For completed pipelines, the impact of these on the functioning of the internal market, on competition and on security of supply is easier to assess for the simple reason that their functioning can be observed in the market.

234. Member States were thus in a position to quickly assess all relevant facts concerning the application of Article 49a and come to a decision on the Article 49a derogation and related design conditions, with due notification to the Commission.

235. A quick assessment is of essence in the case of completed pipelines, since they are already operational. Otherwise, there would be a risk of disrupting unnecessarily the existing supply through those pipelines, thereby undermining security of supply and competition.

236. Regardless, while the operator of a completed pipeline had the right to apply for a derogation under Article 49a, it remained that the granting of that derogation was not guaranteed. The conditions of Article 49a still have to be fulfilled and, in any event, a derogation would only be temporary. Hence, even "completed pipelines" may be subject to the obligations of the Gas Directive without derogations.[215]

[214] See also European Union Rejoinder on the merits and reply memorial on jurisdiction of 22 February 2022, para. 272.

[215] The European Union notes that there are indeed several onshore and offshore interconnectors with third countries that are subject to the Gas Directive and that do not benefit from an Article 49a derogation. A first group of such interconnectors are those between EU Member States and Contracting Parties of the Energy

237. In contrast, for new pipelines – not yet completed on 23 May 2019 – National Regulatory Authorities cannot already observe their operation in the market and thus their impact on competition and security of supply in practice. Such pipelines were instead given the option of relying on the flexibilities that are already available under the Gas Directive, including the choice between the three unbundling models, as well as Article 9(6) of the Gas Directive (separation between public bodies[216]) and Article 36 exemptions. Under any of these provisions, NRAs assess the compliance with the applicable requirements when adopting their certification decision. This assessment entails evaluating the expected effects of the operation of the transmission line - an undertaking necessarily more challenging than for completed pipelines. Completed pipelines are thus in an objectively different situation from the Complainant's pipeline for purposes of the Amending Directive.

238. Beyond these considerations, the distinction between completed and non-completed pipelines on the basis of the "completed" criterion, has an objective justification.

239. The "completed on 23 May 2019" criterion is an objective criterion that ensures legal certainty. The Amending Directive had to set a time limit for undertakings to request a derogation, precisely to reconcile the need for enabling transition for completed pipelines with the overall need to clarify that the Gas Directive applies to all pipelines functioning in the EU territory, regardless of their origin. The choice of the "completed" criterion is appropriate and legitimate since it enables an accurate assessment whether it is met. Indeed, this criterion is clear and factually precise. By contrast, the "final investment decision" criterion that the Complainant prefers is factually imprecise and, given that, National Regulatory Authorities would find it difficult to determine at what point in time the final decision is ultimately made.[217]

Community, notably the import pipelines from Ukraine towards Poland, Slovakia and Hungary, as well as the interconnectors between Hungary and Serbia and Serbia and Bulgaria. A second group of interconnectors includes the Yamal pipeline between Belarus and Poland and the three interconnectors between Ukraine and Romania. A third group of interconnectors includes those between Russia and EU Member States (Finland, Estonia, Latvia) and between Turkey and EU Member States (Bulgaria, Greece) and a fourth group includes the interconnectors between Germany and Italy on one side and Switzerland on the other. These have always been operated on the basis of EU law principles and this practice received a stable legal basis following the amendment of the Gas Directive.

[216] Article 9(6) of the Gas Directive provides that the requirement to ensure ownership unbundling is deemed to be satisfied where a Member State, or another public body (including a third country), chooses to confer to two separate public bodies the exercise of control over a transmission system or a transmission system operator, on the one hand, and over an undertaking performing any of the functions of production or supply, on the other.

[217] See European Union Rejoinder of 22 February 2022, paras. 232-243 and European Union Counter-Memorial on the Merits of 3 May 2021, paras. 267-268 and 273.

240. Given its objectivity, reliance on the "completed" criterion in the Amending Directive followed substantial EU precedent. Notably, it is also used to determine the eligibility for an exemption from certain obligations under Article 36 of the Gas Directive. As 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.

241. Hence, when the legislator adopts a legal framework with a possible derogation, it must set a cut-off date, reconciling 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. In doing so, the legislator linked this cut-off date to the entry into force of the Amending Directive, in an appropriate manner.

242. As already explained, even if the Arbitral Tribunal were to consider that "completed pipelines" and the Nord Stream 2 project would be in comparable situations, and despite the objective nature of the cut-off criterion, the difficulty of assessing the impact of such not-yet-completed project on competition and on security of supply on the EU market, as compared to completed projects, justifies the differential treatment.

243. In case of pipelines between a Member State and third countries that were not completed on 23 May 2019, like the Nord Stream 2 project, the rules under the Gas Directive involve also a forward-looking assessment of the impact of a project. All such pipelines require certification under Articles 10 and 11 of the Gas Directive and involve an assessment by the NRA of the risk to security of supply of the Member State and the Union. This certification procedure also requires an opinion by the Commission. The relatively faster assessment by the NRAs under Article 49a is inappropriate and unsuitable in the case of new, not-yet-operating, pipelines.

244. Finally, while the Nord Stream 2 pipeline bears closer similarities to new pipelines whose functioning could not yet be witnessed and that benefit from access to an Article 36 exemption than to existing pipelines, the Nord Stream 2 pipeline is also different even from such projected pipelines. The Nord Stream 2 pipeline was already an advanced project, hence different from pipelines eligible for exemptions, according to the judgment by the European Court of Justice. This provides a further rational regulatory basis for distinguishing even between the

Nord Stream 2 pipeline and other potential new pipelines. Nonetheless, the Commission stresses again that this distinction between NS 2 and other projected pipelines was not the intention of the legislator when it adopted the Amending Directive. The intention was that all such not-yet-completed pipelines could apply for an Article 36 exemption.

4.3.3. In any event, the assumption by Nord Stream 2 that it would obtain a derogation or an exemption is groundless given its characteristics and, therefore, there is no less favourable treatment of Nord Stream 2

245. Regardless of the issue of access either to the exemption or to the derogation regimes, in the end there is no less favourable treatment in practice.

246. The Claimant's complaint of discrimination is premised on the notion that, had it been able to apply for an exemption or a derogation under either Article 36 or 49a, it would have obtained, quasi automatically, one or the other without any conditions and would thereby have "escaped" the application of the Gas Directive. However, neither exemptions nor derogations are automatic. They can only be granted if the objective criteria set by the Directive are met. This includes an assessment, by the national authority, of the impact of the project on competition and on security of supply.

247. The Claimant has failed to demonstrate that it had any reasonable possibility of qualifying either for a derogation or for an exemption. To the contrary, neither outcome could reasonably have been expected. This is because the Nord Stream 2 pipeline is very different from other pipelines that have been granted derogations or exemptions, for the simple reason that it poses much greater risks to competition and security of supply. This has been confirmed beyond doubt by recent developments.

4.3.3.1. The Amending Directive pursues the legitimate double objective of guaranteeing Security of Supply and competition in the European Union

248. The application of the Amending Directive to Nord Stream 2 makes perfect policy sense. Recitals (3) and (15) of the Amending Directive indicate specifically that it is intended to ensure that the rules applicable to gas transmission lines connecting two or more Member States are also applicable, within the Union, to all gas transmission lines to and from third countries. This establishes consistency of the

legal framework within the Union while avoiding distortion of competition and negative impacts on the security of supply. The double objectives of both avoiding distortion of competition and ensuring security of supply are thus set out from the beginning in this Directive. These are fundamental policies of the Union.

249. The Amending Directive makes clear that operators of pipelines on EU territory, as gas transmission system operators, must comply with the whole comprehensive set of EU competition and security of supply rules. These include safeguards for fair competition in the EU energy market by ensuring that third countries' transmission lines such as Nord Stream 2 cannot legally dismiss access requests by other gas suppliers to protect the affiliated gas supply activities of a supplier such as Gazprom. Moreover, the obligation to ensure objective, non-discriminatory and transparent conduct of business by the transmission system operators[218] also safeguards against any abuse of dominant position by the pipeline owner distorting gas provision in the internal market, to the detriment of security of supply in the Union. This has been an issue in the recent past when Gazprom failed to share important information on gas flows or on the duration and planning of maintenance works. A striking example of this behaviour is the step-by-step interruption, reduction and eventual complete halt of gas flows through the Nord Stream 1 pipeline between June and August 2022 as described in detail in Section 2.5 above, due to alleged technical issues or maintenance works.

250. Further, the Amending Directive ensures security of supply by clarifying the legal basis under EU law for assessing the impact of third country interconnectors on security of supply in the Union. Such pipelines need to be certified by national regulatory authorities who can refuse certification on this ground.

251. As the European Union will explain hereafter, such security of supply risks are real: transmission system operators like Nord Stream 2, and transmission system owners, like Gazprom, play a critical role vis-a-vis the Union's security of supply. They may undermine that security by failing to comply with the legal obligations imposed upon them by EU energy legislation. They may also fail to act in accordance with their own commercial interest, contrary to the assumption on which the market-based mechanisms in that legislation are premised. Foreign governments have the means to require or effectively induce the transmission system operators and transmission system owners controlled by them to undermine security of supply policies. All these elements need to be assessed

[218] Article 13(3) and 41 Gas Directive.

when national authorities decide whether to grant certification, or when granting an exemption or a derogation.

4.3.3.2. The Nord Stream 2 pipeline poses significant risks to Security of Supply in the European Union

4.3.3.2.1. Security of supply in the European Union

252. Energy is one of the most basic necessities of modern societies. Ensuring energy supplies is regarded as a fundamental policy objective in most countries. The secure supply of energy is of vital importance not only to a country's economy, but also to the operation of its institutions and essential public services and even to the survival of its inhabitants.[219]

253. The International Energy Agency has defined energy security[220] as "the uninterrupted availability of energy sources at an affordable price".[221] Similarly, UNECE has defined security of supply as

> the availability of usable energy supplies, at the point of final consumption, at economic price levels and in sufficient quantities and timeliness, so that, given due regard to encouraging energy efficiency, the economic and social development of a country is not materially constrained.[222]

254. The importance accorded in the European Union to security of supply is, in particular, reflected in Article 194 of the Treaty on the Functioning of the European Union, a provision with constitutional rank, which states that:

> In the context of the establishment and functioning of the internal market and with regard or the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:
>
> a) ensure the functioning of the energy market;
>
> b) ensure security of energy supply in the Union;
>
> c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
>
> d) promote the interconnection of energy networks

[219] The WTO Panel report in the case DS 476, European Union – Energy Sector, found that security of gas supply was a matter of public order for the European Union, which could justify derogating from other provisions of the WTO GATS, pursuant to Article XIV(a) of the GATS. See **Exhibit RLA-76,** WTO Panel Report, *EU - Energy Sector*, para. 7.1156.
[220] The terms security of energy supply and energy security are often used as synonymous, as in the IEA's definition. In some cases, the terms "energy security" are used in a broader sense which also encompasses other concerns, such as "security of demand".
[221] **Exhibit R-313,** IEA, *Energy supply security 2014*, p. 13.
[222] **Exhibit R-314,** UNECE, *Emerging Global Energy Security risks*, 2007, p 8.

255. As required by Article 194 TFEU, the objective of ensuring security of energy supply in the European Union informs all the legislation enacted by the European Union in the energy sector, including the Amending Directive.

256. Natural gas plays an essential role in the energy balance of many countries, including the European Union, making gas security a key element in energy security.[223] Diversifying supply import sources is also part of security of supply, as is the switch away from relying on fossil fuel-based energy and towards renewable energy sources.

257. Disruptions of gas supplies may be due to various factors, including infrastructure breakdown, natural disasters, social unrest, political action or terrorism. Major disruptions of gas supply are by no means a hypothetical or infrequent event. According to the International Energy Agency,

> Recent significant gas crises occurred in the United States (2005 and 2008), the United Kingdom, Italy and Ukraine (2006); Turkey, Greece and Australia (2008). At the beginning of 2009, Europe suffered its worst gas supply disruption to date, with Russian supplies transiting Ukraine interrupted for almost three weeks; in total some 7 billion cubic metres (bcm) of supply was lost, including 2 bcm of supply for Ukraine. Coming at a time of very high demand because of cold weather, this crisis had a far greater impact than even the hurricane-induced shortages in the United States in 2005 and 2008. Some Eastern European countries with heavy reliance on Russian gas and only limited storage capabilities were especially badly affected, with major industrial closures and real hardship in the domestic sector.[224]

258. The practical need to adopt measures to ensure security of supply was reflected in the Communication on a European Energy Security Strategy released by the Commission on 25 May 2014[225], which included "eight key pillars". The first pillar consisted of the adoption of "immediate actions aimed at increasing the EU's capacity to overcome a major disruption during the winter 2014/2015". These measures are based on the analysis of the so-called 'stress-tests' conducted by the EU Member States and other European countries. Those tests had shown that a prolonged disruption of gas supplies (such as a complete halt of Russian gas imports to the European Union or a disruption of Russian gas imports through the

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

[224] **Exhibit R-313**, IEA, *Energy supply security 2014*, p. 54.

[225] **Exhibit R-315,** Communication from the Commission to the European Parliament and the Council, "European Energy Security Strategy", 28 May 2014, COM (2014)330 final.

Ukrainian transit route) would have a substantial impact on the European Union, and in particular on the Eastern EU Member States.[226]

259. The other seven pillars identified in the Communication on a European Energy Security Strategy address long term challenges to SoS and are the following[227]:

- strengthening emergency/solidarity mechanisms including coordination of risk assessments and contingency plans; and protecting strategic infrastructure;
- moderating energy demand;
- building a well-functioning and fully integrated internal market;
- increasing energy production in the European Union;
- further developing energy technologies;
- diversifying external supplies and related infrastructure; and
- improving coordination of national energy policies and speaking with one voice in external energy policy.

260. The serious gas supply disruptions experienced by some EU Member States in 2006 and 2009 demonstrated the need to strengthen and coordinate the emergency mechanisms at the EU level (the first long term pillar mentioned in the Communication on a European Energy Security Strategy) and led to the adoption of Regulation (EU) No 994/2010[228], a dedicated instrument providing for various measures to safeguard security of gas supply, which was later replaced by Regulation (EU) Regulation (EU) 2017/1938,[229] which currently contains the framework of the EU's security of gas supply rules.

261. In 2022, as discussed in detail in Section 2.5 above, Europe experienced very significant gas supply disruptions and a consequent energy crisis due to gas supply disruptions by the Russian state-owned gas supplier Gazprom – which is also the sole shareholder of the Claimant, Nord Stream 2. According to the International Energy Agency:

[226] **Exhibit R-316**, Communication from the Commission to the European Parliament and the Council of 16 October 2014 on the short term resilience of the European gas system, "Preparedness for a possible disruption of supplies from the East during the fall and winter of 2014/2015", COM (2014) 654 final.
[227] **Exhibit R-315,** Communication from the Commission to the European Parliament and the Council, "European Energy Security Strategy", 28 May 2014, COM (2014)330 final, at p. 3.
[228] **Exhibit RLA-364,** Regulation (EU) No 994/2010 of the European Parliament and of the Council of 10 October 2010, concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, L 295/1 of 12.11.2010.
[229] **Exhibit RLA- 367**, Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 (Text with EEA relevance)

> Russia has sharply reduced its piped natural gas supplies to the European Union since its unprovoked invasion of Ukraine. Flows via the YAMAL-Europe pipeline system were completely cut in May 2022 and deliveries via the Nord Stream pipeline were gradually reduced were fully shut by the beginning of September 2022. Pipeline deliveries completely stopped to Estonia, Finland, Latvia and Lithuania and were significantly reduced via Ukraine. In October 2022, Russian pipeline deliveries were 80% lower compared to their last year's levels. On 10 May, Ukraine's gas transmission systems operator declared force majeure at a key compressor station, following illegal actions and unauthorised gas offtakes by occupying forces. According to Ukraine's Gas TSO, flows could be temporarily rerouted, although Gazprom refused to accommodate this option. Transit gas volumes via Ukraine to the European Union have dropped by 60% since then. Domestic gas supplies in Ukraine have been disrupted in several regions due to pipeline damage caused by military operations.[230]

262. The International Energy Agency thus attributed the significant reduction of gas flows to Europe in 2022 to the politically-motivated actions of the Russian government, in particular via Gazprom.

263. The weaponisation of the gas supply and the Russian Federation's manipulation of the markets through intentional disruptions of gas flows have led to skyrocketing energy prices in the Union in 2022 and 2023 (see Section 2.5.1 above). Risks to security of supply are thus far from theoretical. Excessive reliance on one pipeline transport supplier exacerbates such risk. It is perfectly legitimate for any public authority to ensure that such concerns can be addressed as part of a legal framework.

264. In response to the hardships and global energy market disruption caused by Russia's invasion of Ukraine, the European Commission adopted a Communication on a REPowerEU Plan to phase out Russian fossil fuel imports.

265. As discussed already in Section 2.5.3, above, launched in May 2022, REPowerEU is meant to help the EU to (i) save energy, (ii) diversify energy supplies; and (iii) produce clean energy.[231] This Plan complements the efforts made through the Gas Directive to have a well-functioning internal market for natural gas in the European Union that ensures competition and security of supply.

[230] See **Exhibit R-317**, International Energy Agency, Frequently Asked Question on Energy Security, 16 November 2022, available at Frequently Asked Questions on Energy Security – Analysis - IEA.
[231] **Exhibit R-318**, Communication from the Commission, REPower EU Plan, COM (2022) 230 final, 18 May 2022.

266. By submitting all pipelines on EU territory to the security of supply rules for Transmission System Operators, the Amending Directive significantly increased the protection of EU citizens enjoy against security of supply risks.

267. A comprehensive overview of the main provisions to enhance security of supply is provided in Annex II. From this comprehensive list, a number of key provisions can be highlighted, demonstrating their importance and effectiveness to ensuring security of supply.

268. First of all, a number of provisions relate to the *specific risks resulting from the operation of a pipeline by a third country owner*. Indeed, to anticipate risks to security of supply, the Gas Directive contains, in several provisions, the obligation for National Regulatory Authorities to assess the impact on security of supply of a pipeline.

269. In particular, Article 10 of the Gas Directive requires that, before an undertaking is approved and designated as transmission system operator, it shall be certified by National Regulatory Authorities in accordance with the provisions in that Article. The Commission must be notified of this certification.

270. Article 11 (entitled "Certification in relation to third countries") lays down special requirements and procedures which apply when either the TSO or the transmission system owner is controlled by a person or persons from a third country or third countries[232].

271. Article 11(3) of the Gas Directive sets out the substantive requirements for the certification of TSOs within the scope of Article 11. It provides that the certification is to be refused in two instances: when the entity concerned does not comply with the relevant unbundling requirements of Article 9[233]; and, when it has not been demonstrated

> […] to the regulatory authority or to another competent authority designated by the Member State that granting certification will not put at risk the security of energy supply of the Member State and the Community.[234]

272. Furthermore, when a TSO applies for an <u>exemption</u> under Article 36 or a derogation under Article 49a, the NRA must assess what the impact would be on security of supply in the European Union.[235] Under Article 36 of the Gas Directive, major new gas infrastructure may, upon request, be exempted, for a defined

[232] It is recalled that under the ISO model the TSO must be independent of the transmission system owner (Article 14 of Directive 2009/73/EC). In the ownership unbundling and ITO models, the TSO is the system owner.
[233] Article 11(3) a) of Directive 2009/73/EC.
[234] Article 11(3) b) of Directive 2009/73/EC.
[235] See also European Union Rejoinder on the merits and reply memorial on jurisdiction of 22 February 2022, paras. 289-297.

period of time, from certain provisions in the Gas Directive. Article 36 sets a number of conditions, the first of which is that

> […] the investment must enhance competition in gas supply and enhance security of supply.

273. Hence, a security of supply assessment is made under Article 36 of the Gas Directive. If the exemption does not enhance security of supply (e.g. because it increases the risk of gas supply disruptions), one condition for granting an exemption is already not fulfilled.

274. Security of supply is also assessed under Article 49a. Article 49a (1) 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.

275. If the derogation is detrimental to security of supply in the Union (*e.g.* because it increases the risk of gas supply disruptions), one condition for granting a derogation is already not fulfilled.

276. Second, there are a number of measures intended to *minimise supply risks resulting from interruptions*. Indeed, an obligation is imposed on Transmission System Operators to inform upfront about any maintenance work or other supply interruption. Uncertainty about the likelihood, duration and reasons of such interruptions can have significant effects on the gas market, as demonstrated by the factual events discussed above Section 2.5.1, and below Section 4.3.3.2.2.

277. Specific transparency obligations imposed on TSOs seek to ward off such lack of transparency, in particular by Articles 18 and 20 of the Gas Regulation 715/2009.[236] These provisions make it obligatory to make market and security of supply relevant information immediately available in order to avoid price manipulation, security of supply problems and foreclosure of competitors. In addition, Title 1.9 of the Guideline on Capacity Management Procedures (in annex to the Gas Regulation) requires the publication of all maintenance periods and corresponding operational information in advance, as well as info on expected duration and effect of maintenance.

[236] **Exhibit RLA-365**, (Consolidated version of) 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.

278. Also Articles 4, 7 and 8 of Regulation 1227/2011 (REMIT)[237] make it obligatory to make information available (in advance and after the events) on key market data (such as planned outages).

279. All of these provisions (security of supply assessments and transparency obligations) proved prescient of the circumstances which materialized with Russia's invasion of Ukraine, and which already had been anticipated by many within the European Union, i.e. the potential weaponization of gas supplies by Russia and dangers of over-dependence of the EU on Russian energy.

280. The European Union indeed considers that the Nord Stream 2 project poses significant risks to security of supply in the European Union. Therefore, as detailed hereafter, the Claimant has not demonstrated – and cannot demonstrate – that an exemption (or derogation) would ever have been granted to the project. Even if the project had not been eligible to apply for an exemption (and, as explained above, the intention of the European Union always was that it should be eligible to apply), the project would not have obtained such exemption as it did not satisfy the relevant criteria. The Claimant is thus not no differently situated than that it would otherwise have been, irrespective of its ability to apply either for an exemption or for a derogation. As explained in the next section, this is because of its particular characteristics that pose a significant threat to security of supply in the European Union.

4.3.3.2.2. The Nord Stream 2 project poses significant risk to security of supply

281. Based upon a range of objective evidence and expert consideration of the issue, it is beyond doubt that the Nord Stream 2 pipeline, if permitted to operate outside of the rules set down by the Energy Directive, would pose a serious threat to security of energy supply in the EU. The European Union submits in this regard the Expert Report by Serena Hesmondhalgh and Carlos Lapuerta (the "Brattle Report") and summarizes the relevant conclusions set out in that report in what follows.

282. The first point is that – as the European Union has explained in detail before in previous submissions – NS 2 should be considered a *de facto* organ and instrument of the Russian Government via Gazprom, NS 2's sole owner. The European Union recalls that, as explained in Section 6.5 of the EU Rejoinder on

[237] **Exhibit RLA-366,** (Consolidated version of) Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (Text with EEA relevance).

the merits and again in Section 3.4 of this Supplementary Memorial, that the Claimant is *de facto* indissociable from both Gazprom (and other subsidiaries of Gazprom such as GIP and Gazprom Export) and the Russian Government. It is beyond doubt that Gazprom and its subsidiaries (including the Claimant) act *de facto* as an organ of the Russian Government.[238] As already explained, there is ample evidence that the Russian Government uses Gazprom as an instrument to advance its foreign policy objectives.[239] 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.[240] The Claimant is thus not like any other private company, but is owned by a company – Gazprom – and linked with a State – the Russian Federation – that have demonstrated to be willing to use their economic power for politically-motivated intentions.

283. Indeed, as already explained in Section 3.2.1 above, there is a long series of examples, some already dating back years before the Amending Directive was adopted,[241] where the Russian government, through Gazprom, has interrupted gas flows to the European Union for reasons that are political. This already illustrates convincingly the risk to security of supply that the Gazprom-owned Nord Stream 2 project poses for the European Union.

284. The Brattle Report explains the risks to security of supply in the European Union of the Nord Stream 2 project in further detail. It explains why the Nord Stream 2 project would not have met the security of supply criteria for exemptions or derogations.[242]

285. The Brattle Report explains that, in May 2019, the existing transit routes from Russia to Europe (in particular the Ukrainian Gas Transport System) already offered ample capacity for the needs that existed at that time, as well as for foreseeable future needs. Nord Stream 2 therefore was not necessary to facilitate

[238] EU Rejoinder on the Merits of 22 February 2022, paras. 467-468.
[239] EU Rejoinder on the Merits of 22 February 2022, para. 486.
[240] EU Rejoinder on the Merits of 22 February 2022, para. 487.
[241] See paragraph 257**Error! Reference source not found.**, above and see **Exhibit R-313**, IEA, *Energy supply security 2014*, p. 54. Following a dispute between the Ukrainian oil and gas company Naftogaz Ukrainy and Gazprom, Gazprom cut off its deliveries of gas to Ukraine on 1 January 2006. The situation deescalated after 4 January 2006, as a preliminary agreement was found. In these four days, Austria, France, Germany, Hungary, Italy and Poland reported a reduction of gas pressure in their own pipelines of as much as 30%. (See **Exhibit R-381**, Jon Henley, "Is Europe's gas supply threatened by the Ukraine crisis?" in *The Guardian*, 03.03.2014. Available at: https://www.theguardian.com/world/2014/mar/03/europes-gas-supply-ukraine-crisis-russsia-pipelin). The gas crisis of 2009 began as a result of a similar dispute between Ukraine and Gazprom over the gas prices and supplies for that year. On 2 January 2009, Poland, Romania, Bulgaria and Hungary reported a reduction of gas pressure in their own pipelines. From 7 to 20 January 2009, Gazprom stopped its gas delivery to Ukraine, affecting the supplies to the European Union transiting through the country (See **Exhibit R-382**, "Russia vows to end gas shortage" in *BBC* News, 02.01.2006. Available at: http://news.bbc.co.uk/2/hi/europe/4574630.stm.).
[242] Brattle Report, Section V.

Russian gas exports in 2018, which was at that time the year with the highest Russian exports to Europe.[243] According to the Brattle analysis, Nord Stream 2's added capacity was also unnecessary to support either Gazprom's forecasted increases in European demand, or those predicted by the International Energy Agency or the European Network of Transition System Operators for Gas. To the contrary, Nord Stream 2's additional capacity merely increased the risk of diversion of supply away from diversified pipelines running through Ukraine, leading to their redundancy and an overall reduction and concentration of supply routes into the EU, which runs completely contrary to security of supply requirements.[244]

286. The Brattle Report goes on to conclude that Nord Stream 2 was likely to lead to a significant reduction in import capacity, through the stranding of the Ukrainian import route, thereby reducing security of supply by decreasing or eliminating overall spare import capacity. Given Gazprom's monopoly on all gas exports via pipeline to Europe and refusal to allow Central Asian producers to directly transit their gas through Russia, the Ukrainian Gas Transport Network had no prospect of acquiring any customers other than Gazprom itself. Nord Stream 2 had sufficient capacity to permit Gazprom fully to bypass the Ukrainian network, effectively pushing the latter into redundancy.[245] Far from increasing security of supply, the Nord Stream 2 pipeline would result in elevated security of supply risks, even during routine maintenance.[246] Moreover, replacing the transit route via Ukraine by Nord Stream 2 would also significantly reduce use of the more than 30 bcm of gas storage capacity located in Ukraine (mainly near its Western border).[247] This would again have an adverse security of supply impact on the European Union countries currently making use of this storage capacity.

287. Unregulated use of the Nord Stream 2 pipeline therefore posed a substantial risk to the overall diversity of gas supply routes to and gas sources for the EU. The Nord Stream 2 pipeline would overall annul the diversity of gas supply routes to the European Union as well as the diversity of gas supply sources. In contrast to the Nord Stream 2 pipeline, the Ukrainian gas transit route involves several independent pipelines with different entry and exit points. As explained in the Brattle Report, more routes and entry and exit points decreases the risk of supply disruptions due to routine maintenance, faults or congestion.[248] The Brattle Report

[243] Brattle Report, Section V.A.1.
[244] Brattle Report, Section V.A.2.
[245] Brattle Report, Section V.B, referring also to Section IV.A.
[246] See Brattle Report, Section V.B, para. 83.
[247] Brattle Report, Section V.B.
[248] Brattle Report, Section V.C.

thus also disputes that Nord Stream 2 would have facilitated the integration of the EU market. The Ukrainian network had sufficient capacity to meet the existing and projected demand. Moreover, the ability of that network to deliver gas to several countries rather than just to the German coast provides more support for an integrated EU market than Nord Stream 2 could have delivered.[249]

288. The Ukrainian network also enabled gas to be transported from three different gas fields, whereas the gas entering Europe via Nord Stream came from a single gas producing field. Brattle considers it unlikely that, if the Ukrainian Gas Transport System were abandoned, the significant amounts of gas currently produced from the existing three fields and transported through the Ukrainian route could be transported instead through alternative routes.[250] Again, this outcome would reduce rather than enhance Europe's Security of Supply.

289. As Brattle notes, the coming online of Nord Stream 2 made it equally less likely that gas from Central Asian gas producers in Turkmenistan and Kazakhstan would be transported to Europe. Apart from the fact that Gazprom currently impedes such independent sales, transport via Nord Stream 1 and 2, after abandonment of the Ukrainian route, would be more expensive and would likely make such exports uneconomic.[251] This again would harm security of supply in the European Union.

290. Unregulated operation of Nord Stream 2 would also have a particular impact on security of supply in central-European countries and Italy. For most of those countries, delivering gas through Nord Stream 2 would involve transiting through more countries and a longer transportation distance, when compared to transport through Ukraine.[252] In addition, eliminating transit flows through Ukraine would effectively have removed those gas entry points from Poland, Romania, and Slovakia to Ukraine, all of which support virtual and physical reverse flows. As Brattle explains, these reverse flows contribute to the efficiency of the gas market. Virtual reverse flows int Ukraine from Poland, Romania, and Slovakia would no longer be possible were transit flows to cease.[253]

291. All these elements, based on evidence that was available when the Amending Directive was adopted in 2019, demonstrate that the Nord Stream 2 pipeline project raised and continues to raise security of supply risks.

[249] Brattle Report, Section V.C.
[250] Brattle Report, Section V.C.
[251] Brattle Report, Section V.C.
[252] Brattle Report, Section V.C.
[253] Brattle Report, Section V.C.

292. As Brattle notes, recent developments[254] have simply confirmed that Nord Stream 2 pipeline indeed constitutes a genuine risk to security of supply in the European Union. Gazprom's recent actions demonstrate that it acts as an instrument to advance Russia's foreign policy objectives and abuses its dominant position to further Russia's political ends.

293. Notably, in 2021, despite the recovery of gas demand after the COVID-19 pandemic, Gazprom did not increase deliveries to Europe. Rather, it restricted short-term sales of Russian gas and left the gas storage that it controlled in Europe at historically low levels. In the autumn of 2021, it also dramatically reduced its capacity booking for the Yamal pipeline.[255] The lead to dramatic increases in gas prices in Europe.[256] These restrictions were highly profitable for Gazprom, and at the same time dramatically reduced EU gas storage levels on the very eve of Russia's illegal invasion of Ukraine, in an effort to make EU Member States more compliant to Russian aggression.[257] The Brattle Report demonstrates that the restrictions did not flow from any physical impediments in the Gazprom-owed pipeline system. To the contrary, top Russian officials confirmed through their statements that the restrictions were not due to technical constraints, but were used to put pressure on Europe, and in particular on Germany to certify the Nord Stream 2 pipeline.[258]

294. As already discussed in Section 2.5 above, the abuse of the power of the owner of Nord Stream 2, Gazprom, in order to promote Russia's political objectives continued in 2022. In the months before Russia's invasion of Ukraine, Gazprom continued supplying relatively little gas to Europe, with extremely high European gas prices as a consequence.[259] When European countries imposed sanctions on Russia in March 2022, Russia required gas companies from a number of countries, including all EU member states, to pay for their gas in roubles. When European importers refused to comply, Gazprom halted deliveries to them. In June 2022, Gazprom stopped supplying companies in Bulgaria, Denmark, Finland, the Netherlands and Poland.[260] Gazprom also halted all deliveries through the Yamal pipeline, citing the sanctions as reason.[261] Gazprom thus abuses its control over the gas transport network for political objectives.

[254] Brattle Report, section VI.
[255] Brattle Report, Section VI.A.
[256] Brattle Report, Section VI.A.
[257] Brattle Report, Section VI.A.
[258] Brattle Report, Section VI.A.
[259] Brattle Report, Section VI.A.
[260] Brattle Report, Section VI.A.
[261] Brattle Report, Section VI.A.

295. Motivated by the same objectives, Gazprom has also refused to use alternative transport routes. When Gazprom started reducing gas flows through the Nord Stream pipeline in June 2022 – alleging that the Canadian sanctions prevented the return of vital equipment to operate the Siemens compressors on the pipeline – it refused to use the Ukrainian route, despite that such capacity was available.[262]

296. Even after the period of scheduled maintenance of the Nord Stream pipeline in late July 2022, Gazprom further reduced supplies via Nord Stream 1, citing new and unrelated compressor problems. European as prices increased again. On 2 September 2022, Gazprom announced an indefinite shutdown of Nord Stream 1 based on alleged issues with all eight of the compressors at the Portovaya compressor station near St. Petersburg, and despite the fact that [redacted] indicated that there were enough additional turbines available for Nord Stream to operate. [263] It is no coincidence that the shutdown was announced just hours after Europe had announced stricter sanctions against Russia.[264]

297. That Gazprom's gas deliveries (and their interruption) are used to put pressure on the European Union for political reasons is not even hidden by the Russian government. The Brattle report mentions that, on 5 September 2022, the Kremlin indicated that it would not resume flows until the "collective West" lifted sanction on Russia for its invasion of Ukraine.[265]

298. The consequence of all these actions distorting security of supply was that gas prices in Europe were driven to unparalleled heights in 2022. Moreover, this also disrupted the efficient functioning of the internal EU gas market.

299. In sum, all these recent facts and events confirm that the Nord Stream 2 pipeline poses a significant risk to the security of supply in the European Union. It would thus never have met the conditions of a derogation or an exemption.

[262] Brattle Report, Section VI.A.
[263] Brattle Report, Section VI.A.
[264] Brattle Report, Section VI.A.
[265] Brattle Report, Section VI.A. See also Section 2.5, above.

4.3.3.3. The Nord Stream 2 project poses significant risks to competition in the European Union

4.3.3.3.1. Competition in the European Union

300. The maintenance and fostering of competition in the energy sector is a fundamental interest of EU society and is reflected in the European Union's laws and policies.

301. Competition in the European Union's internal market is one of the main objectives of the European Union, as is reflected in Article 3(3) of the Treaty Establishing the European Union. This provision reads, in relevant part:

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a *highly competitive social market economy*, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.[266]

302. This objective is further elaborated in the rules on competition contained in Chapter 1 of Title VII of the Treaty on the Functioning of the European Union ("TFEU"). This Chapter contains rules against cartels and other anticompetitive agreements (Article 101) and abuse of a dominant position by one or more undertakings (Article 102). Examples of the latter include directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions on suppliers or consumers;[267] or applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.[268]

303. These rules on competition are further elaborated in EU Regulations. In particular, the prohibition of abuse of a dominant position is enforced by the European Commission according to the rules laid down in Council Regulation 1/2003.[269]

[266] **Exhibit RLA-70,** Article 3(3), first subparagraph of the Treaty on European Union (Emphasis added).
[267] **Exhibit RLA-1**, Article 102(a) of the Treaty on the Functioning of the European Union.
[268] **Exhibit RLA-1,** Article 102(c) of the Treaty on the Functioning of the European Union.
[269] **Exhibit RLA-94,** Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty Official Journal L 1, 04.01.2003, p.1-25.

304. Moreover, the competition concerns arising from the control over essential facilities such as networks are widely acknowledged by the decisional practice of the Commission[270] and the case law of the Court of Justice.[271]

305. Enabling competition in the markets for gas and electricity is an integral part of European energy policy which is directed at achieving the three closely related objectives of: (i) a competitive and efficient energy sector, (ii) security of supply and (iii) sustainability.[272] All European consumers, i.e. households, commercial users and industrial users, heavily depend on the secure and reliable provision of energy at competitive prices.

306. Well-functioning energy markets that ensure secure energy supplies at competitive prices are key for achieving growth and consumer welfare in the European Union.[273] Competitive markets provide the necessary signals for investment, which leads to supply security in the most cost-efficient manner. Similarly, a competitive internal market allows energy companies to operate in a market of a larger dimension, which improves their ability to contribute to security of supply. At the same time, market forces oblige operators to use the most cost-effective methods of production, which in the appropriate regulatory environment can benefit sustainability. By improving conditions for market entry, consumers are able to choose between different providers and contract schemes. Competitive, cost-reflective prices help encourage energy efficiency.

307. The European Union's policy with regard to energy markets and energy consumers stresses that an integrated EU energy market is the most cost-effective way to ensure secure and affordable energy supplies to EU citizens. Through common energy market rules and cross-border infrastructure, energy can be produced in one country and delivered to consumers in another. This keeps prices in check by creating competition and giving consumers choices when it comes to their energy supplier.[274]

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[270] *See* **Exhibit R-2,** Commission Decision of 18 March 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/39.402 – RWE Gas Foreclosure), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39402/39402_576_1.pdf; and **Exhibit R-4,** Commission Decision of 4 May 2010 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.317 – E.ON Gas), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39317/39317_1942_3.pdf.

[271] **Exhibit RLA-74,** Court of Justice of the European Union, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* (*Magill*), ECLI:EU:C:1995:98, paras. 48-57; **Exhibit RLA-75,** Court of Justice of the European union, Joined cases 6/73 and 7-73 *Commercial solvents v. Commission*, ECLI:EU:C:1974:18, para 25.

[272] Recital (1) of Directive 2009/73/EC.

[273] **Exhibit R-319,** Communication from the Commission, Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report), COM (2006) 851, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2006:0851:FIN, para. 1.

[274] *See* European Commission, DG Energy, Markets and consumers: Integrated energy markets for European households and businesses, http://ec.europa.eu/energy/en/topics/markets-and-consumers.

308. For all these reasons, in addition to a security of supply assessment, when a TSO applies for an exemption under Article 36 or for a derogation under Article 49a, the national regulatory authority must also assess its likely impact on competition in the European Union.[275] 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 in the Gas Directive. Article 36 sets a number of conditions, the first of which is that

> […] the investment must enhance competition in gas supply and enhance security of supply.

309. Emphasizing the point, the fifth condition requires that the exemption

> […] must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected.

310. Hence, Article 36 of the Gas Directive mandates an assessment of impact on competition in the internal market of the European Union. If the exemption would be detrimental to competition, one condition for granting an exemption already has not been fulfilled.

311. Prompted by the same policy rationale, the potential impact on competition of an undertaking must also be assessed under Article 49a. Article 49a (1) 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

312. If the derogation would be detrimental to competition in internal market in natural gas in the Union, it has failed a key condition in favour of granting such a derogation.

313. Apart from these conditions in Articles 36 and 49a, the clarification by the Amending Directive that the Gas Directive, and its related rules, apply also to third country operators ensures that EU law measures apply to mitigate competition risks. The European Union refers again to Annex II with an overview of the relevant provisions.

314. Article 32 of the Gas Directive establishes a right to access the pipeline for third-party suppliers. As already explained, the Gas Directive ensures that Nord Stream 2 cannot legally dismiss such requests to protect the affiliated gas supply activities, at least not with regard to the section of the pipeline within the EU jurisdiction. The right to third-party access comprises two elements: first, the

[275] See also European Union Rejoinder on the merits and reply memorial on jurisdiction of 22 February 2022, paras. 289-297.

physical connection to the gas grid and, second, the right to use the grid by obtaining access to the necessary transmission capacities pursuant to fair terms.

315. Further to the right of access, the application of core third party access requirements under the Directive also implies the application of a wide range of rules detailing various aspects of fair contractual network access. This includes rules on TSO obligations and transparency in the Gas Directive, rules on congestion management procedures, capacity allocation methods, non-discriminatory tariff setting and transparency in Articles 14, 16 and 18 as well as Annex I of the Gas Regulation (EC) No 715/2009, and Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management[276] adopted under the Gas Regulation.

316. With regard to unbundling (Article 9 of the Gas Directive), under the Amending Directive the Applicant must ensure that the section of the Nord Stream 2 pipeline situated on German territory and in German territorial waters complies with one of the unbundling models available under the Gas Directive and the German legislation transposing the Gas Directive. This includes the possibility of complying with ownership unbundling of State-controlled entities by ensuring a separation of effective control within the State. It is for the Applicant and its controlling shareholders to set up a governance structure for the Nord Stream 2 pipeline that ensures compliance with these requirements within the EU's jurisdiction. To this end, demonstrating its ability to comply, the Applicant had indeed filed a request for certification of the operator of the pipeline to the German NRA and proceeded to actively engage in the certification procedure with the NRA, at least until the beginning of Russia's invasion of Ukraine in February 2022.

317. In the next sub-section, the European Union will demonstrate that the Nord Stream 2 pipeline project indeed poses significant risks to competition.

4.3.3.3.2. The Nord Stream 2 project poses significant risks to competition

318. The Brattle Expert Report confirms that the owner of Nord Stream 2, Gazprom, had a dominant position when the Amending Directive was adopted and that the Nord Stream 2 pipeline threatened to increase Gazprom's dominance. It also confirms that Gazprom has not hesitated to abuse its dominant position. Therefore, leaving the Nord Stream 2 pipeline in an unregulated state, not subject

[276] **Exhibit RLA-376**, (Consolidated version of) Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management.

to EU energy market disciplines, would be detrimental to competition and to the effective functioning of the EU's internal market in natural gas.

319. The Brattle Report demonstrates that Gazprom had (as of 2019) a dominant position in the German and Northern European gas markets.[277] Brattle notes that Gazprom has in practice abused its dominant position by pursuing a strategy of partitioning gas markets along national borders in Europe. This abusive conduct has encompassed unfair and discriminatory pricing and other related unlawful conduct such as tying and bundling.[278] The Brattle Report also explains how Gazprom and its subsidiaries control the multiple pipeline routes that exist for delivering Russian gas to European markets. One notable example is Gazprom's strategy to minimise transit across Ukraine, with the aim of eventually reducing these flows to zero.[279] In addition to its control of the export capacity from Russia to Europe, Gazprom also has the exclusive right to export gas from the Russian Federation. If Gazprom chose to restrict sales to Europe, no independent gas producer could supply its gas as a substitute. This further reinforces its control over gas exports into the EU.[280] Moreover, Gazprom's control of the Russian system to Europe also allows Gazprom to prevent Central Asian gas exports from transiting gas through Russia for direct export to customers in Europe, and this is despite the existence of spare transit capacity.[281] Finally, the Brattle Report indicates that Gazprom historically has controlled part of gas storage facilities in Austria, Germany, the Netherlands, and the Czech Republic.[282]

320. The Brattle Report goes on to highlight the lack of economic justification for the construction of the Nord Stream 2 pipeline, other than to extend Gazprom's dominance. The Brattle Report explains that the Nord Stream 2 pipeline did not respond to any existing or reasonable anticipated need for new pipeline capacity. In fact, the project, creating excess capacity, would tend to deter new investments (and thus potential competitors) from entering the market. Nord Stream 2 if free from all regulatory requirements (notably unbundling, tariff regulation and third party access) stood likely to give Gazprom the ability to deter competition by potential LNG producers, whereby Gazprom would reduce prices to recover no more than the short-run operating costs of Nord Stream 2.[283]

[277] Brattle Report, Section IV.A.
[278] Brattle Report, Section IV.A.
[279] Brattle Report, Section IV.A.
[280] Brattle Report, Section IV.A.
[281] Brattle Report, Section IV.A.
[282] Brattle Report, Section IV.A.
[283] Brattle Report, Section IV.B.

321. In addition, as already explained in Section 4.3.3.2.2, apart from a strategy to strengthen Gazprom's dominance, the Nord Stream 2 project is based on political incentives, in particular the intent to bypass the Ukrainian transit system. The Brattle Report explains that, in that case as well, the lack of an independent business justification for Nord Stream 2 would highlight concerns over adverse economic impacts on competition and consumers.[284] Submitting the Nord Stream 2 project to the rules of the Gas Directive, including the requirement to implement cost-reflective tariffs, is an entirely reasonable approach to prevent such impacts.

322. In fact, as the Brattle report explains,[285] recent examples of where Gazprom imposed gas curtailments for political reasons, were only possible and effective because Gazprom has a dominant position that it can abuse. Further proof of the same is the extortionate profits Gazprom extracted from its limited sales to the EU: despite the gas restrictions, Gazprom declared record profits of USD 41,75 billion for the first half of 2022, just as 2021 was a record year.

323. In sum, this evidence demonstrates that the Nord Stream 2 pipeline project would be detrimental to competition and the effective functioning of the internal market in natural gas. It would thus never have met the conditions of a derogation or an exemption.

4.4. Subsidiarily, even if the Tribunal were to find a breach of the non-discrimination standards, it would be justified under the general exception in Article 24.3 of the ECT

324. In any event, even if the Arbitral Tribunal were to find – despite the objective differences between the Nord Stream 2 pipeline, on the one hand, and other pipelines, on the other hand – that the Amending Directive breaches the non-discrimination standards in the ECT, the Amending Directive would still be justified under the general exception for "public order" measures in Article 24.3 c) of the ECT.

325. Article 24.3 of the Energy Charter Treaty provides:

> The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:
>
> (a) for the protection of its essential security interests including those
>
> […]
>
> (ii) taken in time of war, armed conflict or other emergency in international relations;
>
> […]

[284] Brattle Report, Section IV.B.
[285] Brattle Report, Section VI.A.

(c) for the maintenance of public order.

326. In the European Union's respectful submission, the Amending Directive is necessary for the maintenance of public order. As explained above, ensuring security of supply in the European Union and competition in the EU internal market are fundamental policies of the Union and a matter of public order for the European Union. To this effect, the WTO Panel in the case DS 476 already found that security of gas supply was a matter of public order for the European Union, which could justify derogating from other provisions of the WTO GATS.[286]

327. The evidence that the European Union has set out in the previous section fully supports that the Nord Stream 2 pipeline constitutes a risk to security of supply and to competition in the European Union. It thus affects a matter of public order in the European Union. Given that the Amending Directive, as demonstrated above, provides a legal basis for applying the rules of the Gas Directive to the Nord Stream 2 pipeline – which is intended to protect competition and security of supply in the European Union – the European Union considers that it is necessary for the maintenance of public order. Hence, even if the Amending Directive were to be found to be discriminatory *(quod non*), it is justified on the basis of Article 24.3 c) of the ECT.

328. Finally, even if the Tribunal would find that the significant competition and security of supply risks that the European Union has demonstrated to exist in relation to the NS 2 project do not qualify as public order objectives in Article 24.3 c) of the ECT, the Amending Directive is also necessary for the protection of the European Union's essential security interests, in the sense of Article 24.3 a) ii) of the ECT. This is demonstrated by the security of supply concerns discussed in Section 4.3.3.2, as well as the facts discussed in Section 2 above.

5. THE EU HAS NOT BREACHED ITS OBLIGATIONS UNDER THE ECT

329. In section VIII of its Supplementary Memorial, the Claimant concludes that the European Union "remains in breach of its obligations under the ECT". The Claimant does not advance any new argument or evidence in support of that conclusion. Rather, the Claimant refers to its previous submissions, including the allegations made in the preceding sections of its Supplementary Memorial.

330. More specifically, the Claimant alleges that "nothing that has transpired since the commencement of this arbitration -either from a factual or legal perspective- has

[286] See **Exhibit RLA-76,** WTO Panel Report, *EU - Energy Sector*, para. 7.1156.

changed [the] fact"[287] that, according to the Claimant, the Amending Directive breached the ECT as of the date of its adoption.

331. Like the Claimant, the European Union refers to its previous submissions, where it has amply demonstrated that the Amending Directive was not, as of the date of its adoption, in breach of any provision of the ECT. But, contrary to the Claimant's assertions, this does not mean that the factual and legal developments since the adoption of the Amending Directive are devoid of relevance to these proceedings.

332. First, as stressed repeatedly by the European Union (see e.g. the EU's Rejoinder on the Merits, section 6.2), 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 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. As further explained by the European Union in this submission, the specific impact alleged by the Claimant in its Supplementary Submission is the result of the Claimant's own failure to pursue the certification procedure as ITO (see section 3).

333. Second, subsequent factual developments have confirmed beyond doubt that the NS 2 pipeline poses a significant threat to the EU's security of supply as well as to competition within the European Union (see section 4.3.3). For that reason, differences in treatment between the NS 2 pipeline and other gas pipelines cannot be regarded as discriminatory (section 4.3). Furthermore, even if those differences were discriminatory (*quod non*), they would be justified pursuant to Article 24.3 of the ECT, as a measure which the European Union considers necessary to protect its public order and essential security interests (section 4.4).

334. While denying the relevance of the factual and legal developments that have taken place following the adoption of the Amending Directive, the Claimant seeks to bolster its case by citing extensively the ECJ's Judgment of, of 12 July 2022, in the case C-348/20 P, and the opinion of the Advocate General in the same case[288]. The Claimant's reliance on that judgment and opinion is misplaced. As the European Union has explained in detail, that judgment deals exclusively with the admissibility of the application brought by the Claimant before the General Court (section 4.1); it is without relevance to the allegation of a "dramatic and

[287] Claimant's Supplementary Memorial, para. 216.
[288] Claimant's Supplementary Memorial, paras. 217-219.

unexpected regulatory change" made by the Claimant (section 4.2); and does not support the Claimant's allegations of discriminatory treatment (section 4.3).

335. More specifically, the European Union rejects the following conclusions drawn by the Claimant from the ECJ's judgment and the Advocate General's opinion in Section VIII:

336. First, the statement by the Advocate General Bobek cited by the Claimant[289] cannot be construed as implying that the European Union acted in bad faith when adopting the Amending Directive. The Claimant has misunderstood that statement, which in any event was not taken up by the ECJ.

337. Second, as explained in detail by the European Union (section 4.3), the ECJ judgment does not "confirm"[290] the Claimant's allegation that "the Amending Directive is a lex-Nord Stream 2 targeting Claimant for separate and discriminatory treatment"[291].

338. Third, the ECJ's judgement declared that the Claimant's application against the Amending Directive was "admissible" because the Claimant was "individually" and "directly" concerned for the specific and limited purposes of Article 263 TFEU. But this is not the same as saying that all the effects alleged by the Claimant in this arbitration are attributable exclusively to the European Union[292]. While the Court concluded that the Amending Directive had changed the legal position of the Claimant, so as to make its application against that directive "admissible" for the purposes of Article 263 TFEU, it is undisputable that the Amending Directive allows each EU Member State to choose among different options when transposing the Amending Directive, and that the responsible authorities in each EU Member State have a margin of appreciation when applying the national legislation transposing the Amending Directive in each individual case. Furthermore, in the context of an appeal on admissibility, the ECJ was not required to examine, and indeed did not examine, the Claimant's own conduct and its contribution to the impacts on its investment that are alleged by the Claimant in this arbitration.

339. In conclusion, the European Union maintains that, for the reasons sets out in its previous submissions, as supplemented by this Counter-Memorial, the Amending Directive was not in breach of any of its obligations under the ECT when it was adopted and remains fully compliant with those obligations.

[289] Claimant's Supplementary Memorial, para. 220-221.
[290] Claimant's Supplementary Memorial, para. 222.
[291] Claimant's Supplementary Memorial, para. 222.
[292] Claimant's Supplementary Memorial, para. 223.

6. THE TRIBUNAL LACKS JURISDICTION

340. 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)[293], that investor may not then pursue international arbitration in respect of the same dispute.[294]

341. 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**").

342. The Claimant repeats that the claims that it presents have not been presented in any other forum, arguing that Article 26 of the ECT defines the kinds of disputes which are covered by it.[295] In its Rejoinder of 22 February 2022, the European Union explained in detail why 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.[296]

343. 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.[297] The present proceedings concern an example "par excellence" where parallel proceedings take place, risking conflicting outcomes and enabling the Claimant "two bites at the apple". This is precisely demonstrated by the Claimant's extensive reliance on the ECJ judgment as allegedly establishing a breach of the ECT.

344. The Claimant's interpretation is excessively formalistic and entirely removes the *effet utile* of the fork-in-the-road clause in Article 26(3)(b) of the ECT. 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

[293] 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".
[294] 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.
[295] Claimant's Supplementary Memorial of 27 February 2024, para. 228.
[296] European Union Rejoinder on the Merits and Reply Memorial on Jurisdiction of 22 February 2022, para. 881 and following.
[297] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 18, 23.

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).

345. As explained in European Union's Memorial on Jurisdiction and the Counter-Memorial on the Merits and Reply Memorial on Jurisdiction[298], the disputes before the Court of Justice of the European Union and the present Tribunal are substantially the same. The application for annulment before the Court of Justice of the European Union and the present arbitration proceedings indeed have the same fundamental basis.[299] Substantially identical obligations are argued in arbitration proceedings and in proceedings before the ECJ, and in the result the fork-in-the-road limitations under the ECT are triggered and apply. The Claimant's extensive reliance in its Supplementary Submission on the holdings of the ECJ in connection with the Claimant's pre-existing challenge stand as a tacit admission that the present and that other proceeding address the same dispute in substance.

346. The Claimant argues that the SCC Case No V2019/126 – *Mercuria Energy Group Limited (Cyprus) v The Republic of Poland*[300] supports its argument against applying the fork-in-the-road provision in the present case.[301] However, the two cases can readily be distinguished.

347. First, as the Claimant itself points out,[302] the *Mercuria Energy* arbitration concerned the recovery of the outstanding part of a penalty that Mercuria had not recovered in domestic proceedings. The remedy sought was thus distinct from the domestic proceedings. In the present case, the remedy is the same, based on the same standards of protection.

348. Second, in *Mercuria Energy*, the Arbitral Tribunal did not accept that the Loan Agreement was the normative source of the claims, before the domestic courts as well as the arbitral tribunal. The Arbitral tribunal considered that this would "elevat[e] the Polish administrative law claim to an international public law by transferring the public law receivable to Claimant".[303] In the present case, no such argument is made: rather, the European Union has demonstrated that

[298] Section 8.1.
[299] European Union Memorial on Jurisdiction and Request for Bifurcation, 15 September 2020, paras. 30, 45-46
[300] **Exhibit CLA-324,** *Mercuria Energy Group Limited (Cyprus) v Republic of Poland,* SCC Case No. V2019/126, Final Award, 29 December 2022.
[301] Claimant's Supplementary Submission of 27 February 2024, paras. 231-234.
[302] Claimant's Supplementary Submission of 27 February 2024, para. 231.
[303] **Exhibit CLA-324,** *Mercuria Energy Group Limited (Cyprus) v Republic of Poland,* SCC Case No. V2019/126, Final Award, 29 December 2022, para. 609.

substantially identical obligations are argued in the parallel proceedings, both originating in supra-national law.

349. Third, the Arbitral Tribunal in Mercuria Energy stressed that, in that case, it was very relevant that "the domestic proceedings in Poland form a significant basis for the claims in this arbitration that Respondent has breached its obligation under the ECT".[304] Hence, what was at issue in that dispute was the conduct of the parallel domestic proceedings. This is not the case in the present dispute. Rather, the challenged measure is the Amending Directive. Most importantly, the Claimant now explicitly underlines it had "reserved the right" to bring a claim for violation of the ECT in relation to the action for annulment before the ECJ. It is rather revealing that the Claimant states that, because the Court of Justice has held the Claimant's action for annulment admissible, "this breach likely does not need to be pursued further".[305] This abundantly demonstrates that the Claimant pursues two parallel disputes that share the same fundamental basis: it wants to have two attempts to have a hearing of the same dispute. When the Claimant feels it would lose the dispute in one forum, it claims that this "loss" should be addressed in the other, parallel forum. The present case is the perfect example why a fork-in-the-road clause is necessary and must play its useful purpose of avoiding conflicting outcomes.

350. The European Union thus maintains that, even more than ever before, it has been demonstrated that 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.

7. THE TRIBUNAL CANNOT AWARD A RESTITUTIONARY REMEDY

351. In its Supplementary Memorial, the Claimant maintains its request 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 Claimant and its asset" either in this phase of this arbitration or "in a subsequent phase".[306] The Claimant requests this as a "primary relief", failing which it seeks "an order that the EU pay compensation in an amount to be

[304] **Exhibit CLA-324,** *Mercuria Energy Group Limited (Cyprus) v Republic of Poland,* SCC Case No. V2019/126, Final Award, 29 December 2022, para. 610.
[305] Claimant's Supplementary Submission of 27 February 2024, para. 224.
[306] Claimant's Supplementary Memorial, 27 February 2024, paras. 241-242 and 248(vii) and (viii).

assessed, being the amount of NSP2AG's losses resulting from the EU's breaches of the ECT".[307]

352. The Claimant effectively seeks both an interim and a permanent injunction that would prevent the EU from applying a generally applicable legislative measure. Such relief would amount to an extraordinary and unprecedented incursion into the European Union's sovereign right to regulate within the scope of their powers to promote public welfare objectives.[308] It is wholly inappropriate and unprecedented in investor-State practice. It must therefore be rejected.

353. To recall, the EU has objected to the injunctive relief sought by the Claimant on several grounds:

> *First*, there is no basis in general international law to impose a final injunctive relief as a "primary remedy" in investor-State cases.[309] Neither general remedial principles nor the specific rules developed for State-to-State disputes establish a right to infringing upon State sovereignty by enjoining the exercise of regulatory powers in the context of investor-State cases, under the guise of ordering "restitution in kind" as opposed to damages.[310] Contrary to the Claimant's assertions,[311] the PCIJ's judgment in *Chorzów Factory* does not support the notion that restitution is the "primary remedy" for a breach of international law, much less that an investor-State tribunal may issue a final injunctive order as a remedy in a dispute between individuals and sovereign States.[312] The Claimant's repeated references to previous investor-State tribunals which have cited to *Chorzów Factory* as a general authority for the principle of full reparation in the event of internationally wrongful acts are equally of little assistance to the present case, as none of these tribunals addressed the appropriateness of a final injunction in a dispute between an investor and a State, and did not award restitution in the form sought by the Claimant in this case.[313] In its Supplementary Memorial, the Claimant has come up with no response to rebut the EU's arguments.

[307] Claimant's Supplementary Memorial, 27 February 2024, para. 248(ix). *See also* Claimant's Reply Memorial, 25 October 2021, paras. 865-867.
[308] European Union's Counter-Memorial on the Merits, 3 May 2021, para. 703.
[309] European Union's Counter-Memorial on the Merits, 3 May 2021, paras. 706-707.
[310] European Union's Counter-Memorial on the Merits, 3 May 2021, paras. 706-725.
[311] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, Part XI.2 and XI.3.
[312] European Union's Rejoinder, 22 February 2022, paras. 1019-1024.
[313] European Union's Rejoinder, 22 February 2022, para. 1025.

Second, the Claimant's repeated references to the ILC Articles on State Responsibility do not support its request for a permanent injunction against the EU in the context of investor-State arbitration.[314] As previously explained, the ILC Articles were developed in the specific State-to-State context and there is nothing in the ILC Articles to support the argument that the primacy of restitution as a remedy at the inter-State level automatically extends to the investor-State context.[315] On the contrary, the authorities relied upon by the Claimant itself confirm that the ILC Articles "do not (and cannot) support the primacy of restitution in International Investment Law".[316] In fact, the Claimant has been unable to find any persuasive authority to support its claim for an injunctive suspension of legislative measures of general application *vis-à-vis* a particular private party in the context—which is precisely the kind of remedy sought in this case.[317] In its Supplementary Memorial, the Claimant has said nothing in response to the EU's arguments on this point, either.

Third, the ordinary meaning of Article 26(8) of the ECT makes clear that it does not provide for the kind of relief requested by the Claimant in this arbitration. The reference in that provision to "monetary damages in lieu of any other remedy granted" says nothing about final injunctions, restitution or specific performance, and does not grant tribunals the blanket power to issue such remedies.[318] As explained by the EU, the mere fact that Article 26(8) of the ECT does not on its face "preclude" injunctive remedies does not mean that such remedies are available under the ECT. Such reading of Article 26(8) would be inconsistent with the fundamental principles of treaty interpretation reflected in Article 31 VCLT, which require a balanced interpretation that takes into consideration both State sovereignty and the need to protect foreign investments.[319] It also ignores the basic tenet that fundamental principles of customary law (such as a sovereign's power to regulate) cannot be held to have been "tacitly dispensed with (…) in the absence

[314] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 826. *See also* Claimant's Memorial, 3 July 2020, paras. 489-491.
[315] European Union's Rejoinder, 22 February 2022, para. 1028.
[316] European Union's Rejoinder, 22 February 2022, para. 1030, citing **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.
[317] European Union's Rejoinder, 22 February 2022, paras. 1034-1035.
[318] European Union's Rejoinder, 22 February 2022, para. 1042. *See also* European Union Counter-Memorial on the Merits, 3 May 2021, Section 4.2.1 and 4.2.2.
[319] European Union's Rejoinder, 22 February 2022, paras. 1042-1044.

of words making clear an intention to do so."[320] Again, the Claimant has offered nothing in the Supplementary Memorial to rebut these arguments.

Fourth, the Claimant has not been able to identify *any* persuasive authority under the ECT (or otherwise) to support its claims that Article 26(8) of the ECT provides the Tribunal with the power to issue final injunctive relief.[321] In its Supplementary Memorial, the Claimant has provided no arguments whatsoever in response to the EU's arguments that *Chevron v. Ecuador* does not offer an "unambiguous" precedent for the relief it seeks, given the materially different factual, legal and procedural circumstances of that case.[322]

354. Rather than engaging with the EU's arguments on these points, the Claimant only makes a cursory reference to the judgment of the ICJ in the case concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) as "further support of the Tribunal's power to award the requested remedy".[323]

355. It is far from clear why that is so. The Claimant has made no effort to explain why this case is relevant to the dispute before the Tribunal, other than a cryptic mention that the ICJ's jurisdiction was based on Article 1 of the European Convention for the Peaceful Settlement of Disputes, and that Italy "did not raise any objection concerning the jurisdiction of the ICJ."[324]

356. Be that as it may, the Claimant's reliance on this ICJ judgment does not advance its case any further. At most, it confirms that the Claimant has been entirely unable to find an apposite authority to buttress its unprecedented request for a permanent injunctive suspension of legislative measures of general application vis-à-vis private investors. Faced with this inability, the Claimant now tries in vain to make analogies with cases that have nothing to do with the factual and legal circumstances of this dispute. The analogy is strained and must be rejected.

357. In the Jurisdictional Immunities case, the ICJ found that Italy was responsible for violations of Germany's sovereign immunities under customary international law: (i) by allowing private plaintiffs to bring civil claims against Germany before Italian courts for violations of international humanitarian law perpetrated by the German

[320] European Union's Rejoinder, 22 February 2022, para. 1045.
[321] European Union's Rejoinder, 22 February 2022, paras. 1047-1048.
[322] European Union's Rejoinder, 22 February 2022, paras. 1049-1052. *See also* Claimant's Reply Memorial & Counter-Memorial on Jurisdiction, 25 October 2021, para. 846; European Union Counter-Memorial on the Merits, 3 May 2021, Section 4.2.3.
[323] Claimant's Supplementary Memorial, 27 February 2024, paras. 243-246.
[324] Claimant's Supplementary Memorial, 27 February 2024, para. 246.

Reich during the Second World War; (ii) by taking measures of enforcement against German State-owned property in Italy (the registration of a charge against Villa Vigoni); and (iii) by declaring judgments issued by Greek courts against Germany enforceable in Italy.[325] In terms of reparation, the Court upheld Germany's request for an order that Italy should take, by means of its own choosing, any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable.[326]

358. Viewed against this background, the Claimant's reliance on Jurisdictional Immunities is wholly inapposite, for the following reasons:

359. First, the two cases are materially different with respect to the nature of the disputing parties and the subject-matter of the dispute. The case brought by Germany against Italy was an inter-State proceeding relating to violations of Germany's sovereign immunities under customary law. It had nothing to do with the protection of foreign investors or private commercial interests from measures taken by the host State under an investment protection treaty. Thus, whatever findings the Court made with respect to reparation of internationally wrongful acts at the inter-State level are of little guidance to the question before this Tribunal, i.e. whether a tribunal established under the ECT can — and if so, whether it should — issue a permanent injunctive suspension of legislative measures of general application vis-à-vis a foreign investor. The EU's arguments that general remedial principles and the specific rules developed for State-to-State disputes cannot be automatically translated in the context of investor-State cases (under the guise of ordering "restitution in kind" or otherwise) apply here with equal force.[327] They also stand unrebutted.

360. Second, the two cases are materially different with respect to the nature of the impugned acts. The case before the ICJ turned on the legality of judgments and related actions taken by the Italian judiciary against Germany and German State-owned property. It did not concern the application of regulations of a general character to a specific foreign investor. Germany was not therefore asking the Court to issue a permanent injunction on Italy's sovereign powers to legislate in the public interest, much less to enjoin Italian courts from performing their functions.

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[325] **Exhibit CLA-325**, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 107, para. 15 and pp. 152-153, para. 135.
[326] *Id.*, p. 153, para. 137.
[327] European Union's Counter-Memorial on the Merits, 3 May 2021, paras. 706-725; European Union's Rejoinder, 22 February 2022, paras. 1019-1024.

361. Given that the Italian executive was unable to interfere in the independent exercise of the judiciary, the Court ordered Italy "by enacting appropriate legislation, or by resorting to other methods of its choosing" to "ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect".[328] In other words, the type of remedy granted by the ICJ was dictated by the fact that Italy was unable to interfere in the function of its courts and could not "force" them to reverse their jurisprudence and adopt the interpretation of sovereign immunities adopted by the Court. As such, the Court did not issue a general injunction against Italian courts to curtail the exercise of their judicial authority. Rather, the Court prescribed a specific obligation of result upon Italy to ensure that the Italian court decisions "cease to have effect" upon Germany's sovereign immunities, if possible by legislative or other means.

362. In contrast, the present dispute does not concern measures taken by the judiciary that could justify an injunctive relief of the type contemplated by the Claimant. The relief sought by the Claimant is entirely different from that sought by Germany, as the Claimant seeks a permanent injunction on the exercise of the European Union's powers to regulate in the public interest. Thus, even if the remedial principles applied by the ICJ in the Jurisdictional Immunities case were somehow transposable to the investor-State context (quod non), they do not support the Claimant's far-reaching request for an injunctive suspension of ordinary legislative powers.

363. Third, the Jurisdictional Immunities case is all the more inapposite because compensation was not available in the particular circumstances of that dispute. Contrary to the present case, the harm allegedly caused to Germany was not pecuniary in nature and could not therefore be made whole through compensation. In fact, Germany did not even ask the Court to award a remedy of compensation.[329] Italy's violations of Germany's jurisdictional immunities had injured Germany's non-pecuniary interest in the respect for its sovereign immunities and sovereign equality, but had not caused it any economic harm: all enforcement measures against Villa Vigoni were suspended while the case was pending before the ICJ.[330] Thus, the only remedies that could provide full reparation to Germany were declaratory relief and an order that Italian court

[328] **Exhibit CLA-325**, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, para. 139(4).
[329] *Ibid.*, paras. 15-17.
[330] *Ibid.*, para. 35.

judgments "cease to have effect".[331] Compensation was never at issue before the Court.

364. By contrast, in this case any harm allegedly suffered by the Claimant would be purely economic in nature. Naturally, an award ordering compensation could fully address any such loss. In its Supplementary Memorial, the Claimant does not even try to identify any kind of non-pecuniary damage that cannot be made whole through compensation. Rather, it concedes that its alleged losses are financially assessable and fully quantifiable.[332] The second Swiss Economics Expert Report does exactly that. Thus, even if the Tribunal were empowered to issue the requested injunction against the EU (quod non), the Supplementary Memorial confirms that any such remedy would be inappropriate, as any alleged loss can be made whole through compensation.

365. For the avoidance of doubt, the EU wholly rejects the conclusions of Swiss Economics on the quantification of alleged damages and reserves all rights to make submissions on such issues at the appropriate time, should that ever become relevant (quod non). Regardless of the unfounded nature of it claimed financial losses, on the Claimant's own concession damages (if any) are to be considered at a subsequent phase of the proceedings. In application of the test applied by arbitral tribunals and national and international courts vis-à-vis such requests, the Claimant cannot seek interim injunctive relief where it concedes that the alleged impacts of the measure may be quantified in monetary terms at a later stage.

366. Finally, the aftermath to the Jurisdictional Immunities case confirms that an order for restitution was neither effective nor appropriate as a remedy and compensation would provide the most effective way of resolving the dispute. The Government of Italy has been unable to secure compliance from its domestic courts with the ICJ ruling and has instead committed itself to indemnifying Germany for the economic losses suffered due to actions taken by its courts.

367. Subsequent to the ICJ judgment, the Italian legislature adopted Law 5/2013 which required Italian courts to declare themselves to be without jurisdiction to entertain claims brought by private claimants against Germany, to ensure compliance with

[331] *Ibid.*, para. 139(4)

[332] Claimant's Supplementary Memorial, paras. 211-213 ("As and when Claimant will ask for compensation in the next phase of the arbitration, the calculation of the exact damages amount will reflect and reconcile all relevant effects of the Amending Directive. For the purpose of illustrating the substantial damage that has already occurred in a comparably short period of time, suffice is to focus on Claimant's lost revenues and operating costs with and without the Amending Directive").

the ICJ ruling.[333] In 2014, Italy's Constitutional Court declared this provision to be unconstitutional, being incompatible with the fundamental rights of the plaintiffs enshrined in the Italian Constitution.[334] As a result, Italian courts did not dismiss the existing claims against Germany, and a large number of plaintiffs brought new proceedings against Germany before Italian courts, which led to new judgments entered against Germany, and new measures of enforcement against German-owned State property.[335]

368. In 2022, Germany instituted fresh proceedings against Italy before the ICJ, this time seeking compensation for the financially assessable injury resulting from proceedings conducted, and measures of constraint taken, in violation of Germany's sovereign immunity.[336] Shortly afterwards, Italy adopted a legislative decree No. 36 dated 30 April 2022, which extinguished the ongoing enforcement proceedings against Germany and rendered Italian court judgments unenforceable in Italy (the "Decree"). Crucially, the Decree established a fund for the compensation of damages suffered by war crimes perpetrated by the German Reich, which is intended to make such funds available to a defined category of plaintiffs.[337]

369. Notably, this Decree was issued in continuity to the agreement between the Italian Republic and the Federal Republic of Germany for the settlement of certain patrimonial, economic and financial issues concluded in Bonn on 2 June 1961.[338] According to that agreement, Italy "settled" all claims and requests of the Italian Republic, or of Italian natural or legal persons, pending at the time against Germany or against German natural or legal persons, provided that they arose from rights or reasons that arose between 1 September 1939 and 8 May 1945.[339] Italy further undertook to "indemnify the Federal Republic of Germany and German natural and legal persons from any possible action or other legal claim by persons Italian physical or legal persons" from such claims.[340] Italy has therefore assumed the financial consequences of Italian court judgments against

[333] **Exhibit RLA-356,** *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property (Germany* v. *Italy)*, Germany's Application, 29 April 2022, para. 19.
[334] *Ibid.*, paras. 19-20.
[335] *Ibid.*, paras. 19-20.
[336] *Ibid.*, para. 43(5).
[337] **Exhibit RLA – 371**, Article 43 of *Decreto-legge n. 36* dated 30 April 2022, available at <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2022-04-30;36> converted into law (with amendments) through *Legge n. 79* dated 29 June 2022, available at: https://www.gazzettaufficiale.it/eli/id/2022/06/29/22G00091/sg
[338] **Exhibit RLA – 372**, The agreement was implemented in the Italian legal order through Article 1 of *Decreto n. 1263* dated 14 April 1962, available at https://www.normattiva.it/uri-res/N2Ls?urn:nir:presidente.repubblica:decreto:1962-04-14;1263
[339] *Ibid.*, Article 2(1) (unofficial translation).
[340] *Ibid.*, Article 2(2) (unofficial translation).

Germany, pursuant to its obligation to indemnify Germany for any loss arising from private litigation for claims that arose during the Second World War.

370. Thus, the aftermath to the Jurisdictional Immunities case confirms that, even in a State-to-State context, an order for restitution can result in an impasse. In the specific circumstances of Italo-German relations, that impasse was resolved on the basis of a separate, preexisting treaty, which essentially saw Italy provide monetary compensation through an existing treaty-based assumption of obligations. The Claimant would have known this when relying on Jurisdictional Immunities in its Supplementary Memorial, but made no reference to these additional events and outcome. In any event, these circumstances simply underline that the Jurisdictional Immunities case provides no support to the Claimant's requested relief. The latter decision was in the State-to-State rather than the investor-State context; it addressed the consequences of decisions by sovereign courts in particular cases, rather than the proposed suspension of State regulation of general application; and the dispute ultimately was resolved through monetary compensation by the respondent State.

8. RELIEF SOUGHT

371. 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 accepts 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; and
6. Order such other and further relief as to the Tribunal may seem just.

372. All of which is respectfully submitted on behalf of the European Union by:

[redacted]

[redacted]

Christophe BONDY

Steptoe LLP

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