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

BETWEEN

NORD STREAM 2 AG

(Claimant)

- and -

THE EUROPEAN UNION

(Respondent)

CLAIMANT'S SUPPLEMENTARY REJOINDER ON JURISDICTION AND MERITS

The Tribunal

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2 September 2024

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I. INTRODUCTION AND FACTUAL UPDATE

1. This Supplementary Rejoinder on Jurisdiction and Merits (the **"Supplementary Rejoinder"**) is filed by the Claimant, Nord Stream 2 AG ("**Claimant**" or "**NSP2AG**"). This Supplementary Memorial is based on Claimant's previous Memorials, the latest one being the Supplementary Memorial on Jurisdiction and Merits dated 27 February 2024 (the "**Supplementary Memorial**"), and provides factual and legal responses to Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024 (the "**Supplementary Counter-Memorial**").

2. This Supplementary Rejoinder is being submitted pursuant to the procedural timetable set out in Procedural Order No. 12 dated 16 October 2023. It is accompanied by an independent expert report submitted by Dr Raymond Williams (the **"Technical Expert Report"**), an expert report submitted by Swiss Economics SE AG (the **"Third Swiss Economics Report**", including exhibits SE-1 to SE-9), an expert report submitted by Mr Perry S. Bechky (the **"US Sanctions Expert Report"**, along with exhibits PSB1 to PSB42), and 28 exhibits to Claimant's Supplementary Rejoinder.

3. Factual and legal exhibits are referred to using the same numbering as in Claimant's Notice of Arbitration dated 26 September 2019 (the "**Notice**") and Memorial dated 3 July 2020 (the "**Memorial**"), in the form C-* for factual exhibits, with additional factual exhibits starting at C-312, and in the form CLA-* for legal exhibits, with additional legal exhibits starting at CLA-326. The definitions used herein are the same as those used in the Notice and the Memorial unless otherwise defined or the context so requires.

4. This Supplementary Memorial contains 14 sections in addition to this Introduction:

   i. Section II sets out overarching aspects of this dispute and a summary of this Supplementary Rejoinder.

   ii. Section III reiterates that 17 April 2019 remains the critical date for determining breaches of the ECT.

   iii. Section IV explains that Respondent's attempts to politicize this arbitration must be disregarded.

   iv. Section V demonstrates that Respondent's mask has fallen, because for the first time in this arbitration it has clearly classified Claimant's assets as being different from all other off-shore import pipelines to the EU.

   v. Section VI demonstrates, supported by a Technical Expert Report, that Respondent's objections in relation to the technical status of Claimant's assets are baseless. So are Respondent's assertions in relation to the availability of downstream infrastructure to uptake gas transported through Claimant's pipeline.

vi. Section VII explains that Respondent's statements in relation to the status of Claimant's certification procedure in Germany are irrelevant.

vii. Section VIII further supports that Respondent's assertions in relation to the impact of US sanctions on Claimant are incorrect.

viii. Section IX demonstrates that Respondent's assertions in relation to the ECJ judgment in the case of NSP2AG are inaccurate.

ix. Section X addresses that Respondent fails to demonstrate any benefits of the application of the Amending Directive (**AD**) and EU gas regulation to the short section of Claimant's pipeline in German territorial waters.

x. Section XI explains that Respondent's assertions in relation to security of supply and competition are irrelevant and inaccurate.

xi. Section XII demonstrates that Respondent's assertions in relation to the commercial impact of the AD on Claimant are inaccurate.

xii. Section XIII maintains that future gas imports from Russia to the EU are possible and that Respondent's statements in relation to the alleged impossibility are speculative and politically motivated.

xiii. Section XIV explains that Article 24.3 ECT does not release Respondent from liability for its breaches of the ECT.

xiv. Section XV sets out the following additional remarks: Claimant maintains that Respondent remains in breach of its obligations under the ECT and that the Tribunal has jurisdiction. Claimant also maintains its prayers for relief as articulated in its Supplementary Memorial dated 27 February 2024.

5. Below follows a short factual update of relevant developments since Claimant's submission on 27 February 2024:

i. Further to paras 90 and 91 of Claimant's Supplementary Memorial, and as expected, an extension of the definitive composition moratorium was granted until 10 January 2025.[1]

ii. Further to para 235 of Claimant's Supplementary Memorial, the hearing at the General Court concerning the action for annulment took place on 11 April 2024. The court is now deliberating. No indication as to the decision date has been given by the court so far. A decision could reasonably be expected within the next weeks or months. Once the General Court has rendered its decision, an appeal to the

[1] **Exhibit CLA-326**, Swiss Official Gazette of Commerce (SOGC), publication No. NA04-0000001033 "Extension of stay of bankruptcy Nord Stream 2 AG" (publication accessible at https://shab.ch/#!/search/publications/detail/afe07e2c-b5fa-4e0f-991e-75578a6e772d), 27 June 2024.

European Court of Justice is possible. It could be initiated by either party to the action for annulment.

II. SUMMARY

II.1 Overarching key aspects of this dispute

6. This dispute presents a number of overarching and central aspects which sometimes tend to get lost in the multitude of arguments and documents before the Tribunal. This is certainly the risk after having received Respondent's Supplementary Counter-Memorial. It is therefore important to highlight these overarching and decisive aspects.

7. *First*, the Amending Directive (AD) is only applicable to the relatively short section in the territorial waters of the EU Member States. In the case of Claimant's pipelines, 53 km of them (out of more than 1.200 km overall) are in German territorial waters, which translates to roughly 4% of the pipeline. As soon as the gas transported through Claimant's pipeline hits the German landfall at Lubmin, i.e. the so called entry point to the EU network, the Gas Directive applies. This means that EU regulations apply with full force and effect on the EU internal market. Extending the scope of the Gas Directive to offshore pipelines, which was the consequence of the AD, does not add anything to the regulated EU internal gas market. Until this day it remains Respondent's secret how the regulation of 53 km of an offshore pipeline in German territorial waters (which is part of a more than 1200 km offshore pipeline) contributes to the regulation of the EU internal market.

8. *Secondly,* the impact of the AD on Claimant, and hence the economic dimension of this case cannot be properly understood without taking into account the Gas Transportation Agreement (GTA) [redacted] However, to date, due to the AD Claimant has not received any transport tariff payments, as explained before:[3]

9. The AD, by imposing the unbundling requirements of the Gas Directive on Claimant, prevents Claimant from operating the German section of the Pipeline [redacted]

10. Respondent choses to ignore [redacted] which is standard practise in gas pipeline projects. In its Supplementary Counter-Memorial, including the Brattle

[2] Claimant's Supplementary Memorial dated 27 February 2024, para 199; Claimant's Memorial dated 3 July 2020, para 318.
[3] Claimant's Supplementary Memorial dated 27 February 2024, para 200.

report, Respondent does not engage with this key economic feature of this case. The Tribunal will remember, [redacted] for the correct understanding of the causal link between the AD and the impact on Claimant.

11. *Thirdly,* in its Supplementary Counter-Memorial Respondent has undertaken a radical shift in its defence in this arbitration. Over the years Respondent has argued t*ha*t the AD does not target Claimant, *that* the AD does not treat Claimant differently (neither intentionally nor objectively), *and that* any impact on Claimant is unintended. In a remarkable *volte face* Respondent now argues, supported by an expert report, that Claimant's project was different from the very beginning, because it threatens the EU's security of supply and it distorts competition within the EU.

12. This new approach is clearly generated by the decision of the ECJ and the ECJ Opinion in the case of NSP2AG both of which support and confirm Claimant's understanding and reading of the AD. Respondent now suggests that its discriminatory treatment of Claimant is justified based on Article 24.3 of the ECT. As Claimant will explain in this Rejoinder, this is wrong.[5]

13. *Fourthly,* in a new twist Respondent now argues that Claimant would not anyway have obtained an exemption under Article 36 of the AD or a derogation under Article 49a of the AD. As the Tribunal will recall, Claimant never asked for an exemption under Article 36, simply because it was not eligible for such an exemption pursuant to the text of that provision, a fact which has been confirmed by the ECJ. The debate concerning Article 36 of the AD launched by Respondent is a non-issue in this arbitration. Respondent is again tilting at windmills. The claim of discrimination which is advanced by Claimant is the fact that it – as opposed to all other offshore import pipelines – was denied the possibility of obtaining a derogation under Article 49a of the AD due the requirement "completed before 23 May 2019" in that provision.

14. *Fifthly,* it is absolutely clear that the only party on the claimant's side in this arbitration is Claimant. No matter how hard Respondent tries to politicize this arbitration, it will not – and cannot – change the law, in particular the ECT and the definition of Investor laid down therein.[6]

[4] Claimant's Supplementary Memorial dated 27 February 24, paras 17, 199-201; Claimant's Memorial dated 3 July 2020, para 318; See in this regard, Expert Report of Mr Peter Roberts, paras 14, 25; [redacted]

[5] See paras 39 et seqq. and Section XIV below.

[6] See para 16 and Section IV.3 below.

II.2 **Summary of Claimant's Supplementary Rejoinder**

The summary of Claimant's Supplementary Rejoinder follows the order of the sections in it.

15. 17 April 2019 remains the critical date for determining breaches of the ECT. Respondent's focus on events occurring during and after February 2022 cannot and do not *ex post facto* justify Respondent's breaches of the ECT in 2019.

16. Respondent's attempts to politicize this arbitration are misplaced. Investment disputes are to be de-politicized with the focus exclusively on the legal matters at hand. Respondent's dozens of repetitions of political slogans are therefore misguided and irrelevant. NSP2AG is the only claimant in this arbitration, not the Russian government and not Gazprom.

17. Respondent's mask has fallen in that it now admits that it has, from the very outset, classified Claimant's assets as being different from all other off-shore import pipelines to the EU: "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 risk to security of supply and competition".[7] This confirms that Respondent's intention in 2019 was specifically to target NSP2AG. It also confirms that the AD was a *lex-Nord Stream 2*. Targeting NSP2AG was the only *raison d'être* for the AD, for the timing of its adoption, and for how its content was tailored to capture in practice only Claimant's asset. The 'completed before 23 May 2019'-requirement in Article 49a of the AD was implemented to make a derogation unachievable for Claimant.

18. Respondent's mask falls again when it states that Claimant ¨would never have met the conditions for a derogation and an exemption¨.[8] This is confirmation that Respondent had a biased and preconceived view of Claimant from the outset.

19. After the incidents in September 2022, one line is still intact and could start gas transportation [redacted]. The other line could start gas transportation upon repair and commissioning [redacted]. This has been endorsed by an independent expert, based on analysis of technical documentation. Nothing in the Respondent's superficial comments and references to outdated statements, based on speculation, not supported by site surveys, offers anything which undermines the substance of the technical explanations provided by [redacted] and by the independent technical expert.

[7] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 29 and again para 247.
[8] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 299, 323.

20. Downstream infrastructure to transport gas arriving through NSP2AG remains available. Even if not, any alleged unavailability of the downstream infrastructure - if correct (*quod non)* - does not affect Claimant's [redacted]

21. The status of Claimant's certification procedure in Germany is irrelevant for this arbitration. The AD is the root of all evil. The certification requirement was imposed on Claimant by the AD. The AD is the first event in a chain of events. The certification requirement is secondary and accessory to the AD. Naturally, Respondent's initial breach of the ECT by adopting the AD cannot be justified by the direct consequence of that breach.

22. US Sanctions do not prevent the operations of Claimant's assets, neither from a legal perspective nor as a practical matter. US primary sanctions do not apply to non-US persons who provide services to or otherwise engage in ordinary commercial transactions with Claimant outside the territory of the United States and absent any other US nexus, which Claimant's activities do not have. US secondary sanctions are not so powerful so as to prevent Claimant from finding qualified companies. US secondary sanctions do not prevent all third-party actors from doing all the business which is prohibited for US persons. It cannot be assumed that the US will impose secondary sanctions on all persons that are eligible for such sanctions.

23. Respondent's attempts to downplay and undermine the ECJ judgment and the ECJ opinion in the case of NSP2AG fail. Its efforts to downplay the importance by asserting that the interpretations of the AD have no bearing beyond the admissibility before the EU courts fail, because the ECJ has provided authoritative interpretations of the AD.

24. Respondent's attempts to undermine the authoritative ECJ interpretation of the AD by re-interpreting the ECJ Judgment and ECJ Opinion, or by even openly disagreeing with conclusions in the ECJ Judgment and the ECJ Opinion as allegedly being legally incorrect are misguided. Within the EU legal system, the ECJ is the sole institution that can provide an authoritative and final interpretation of EU law. It is also the only EU institution that has the power to change that interpretation. The European Commission as an executive organ of the EU or the legislative organs of the EU do not have that power.

25. Respondent's continued assertion that there was no discriminatory intention nor effect of the AD is mystifying, given the very harsh and crystal clear wording of the Advocate General who specifically came to the obvious conclusion that "…not only were the EU institutions *aware* that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the *very intention*

of subjecting the appellant to that new regime." [9] The ECJ Judgment concluded in an equally crystal clear way, that Claimant's pipeline is the only pipeline that is not eligible to apply for an exemption under Article 36 or a derogation under Article 49a of the AD. In its Reply Memorial Claimant also demonstrated that the EU's true intention in connection with the AD was plain for example from an existing recording and a transcript from a highly relevant session at the European Parliament. [10]

26. The first part of the discrimination test – difference in treatment – has been established by the ECJ. Within the EU legal system, it is now for the General Court to rule on the second part of the test – the existence of any objective reason for the different treatment – based *on EU law*. Within the framework of this arbitration, it is for the Tribunal to rule on the discrimination issue *based on the ECT*.

27. Respondent mischaracterizes Claimant's claims in this arbitration by attempting to confuse the difference between being *eligible* to apply for an exemption under Article 36 or a derogation under Article 49a and being *granted* such an exemption or a derogation. By doing so, Respondent – unsuccessfully – tries to hide the fact, that Claimant was excluded from obtaining either of the two options. The claim put forward by Claimant concerning discrimination is about not being eligible to obtain either of the two options which were available to all other projects, existing or future. Claimant was not eligible for a derogation under Article 49a of the AD because of the requirement 'completed before 19 April 2019'. And Claimant was not eligible for an exemption under Article 36 of the AD. This has been clearly concluded by the ECJ, no matter how hard Respondent attempts to rescue its hopeless argument in clear contradiction to the ECJ. As a matter of fact, at the time when the AD was adopted, Claimant's project was far advanced beyond the final investment decision, which made it ineligible for an exemption under Article 36 of the AD.

28. Respondent has been, and remains, unable to show any direct competition and internal market, or security of supply benefits from imposing the EU gas market rules on a small stretch of pipeline bringing gas to the EU internal gas market. Respondent has now created a list of provisions it pretends has these types of benefits, in particular in the context of Claimant's pipeline. That list is nothing but a random compilation of provisions from various regulatory instruments of EU energy law. Respondent has not been able to explain how these provisions apply to external pipelines, or how they are supposed to have a positive impact on competition and market functioning, or on security of supply. The simple answer is that there is no explanation.

[9] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 204.
[10] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, e.g. para 11 with references in footnotes 8 and 9 to **Exhibit C-92** (transcript) and Exhibit **C-206** (recording).

29. Rather than convincingly explaining how the AD achieves its purported objectives such as security of supply and competition, Respondent, based on an expert report provided by Brattle, now relies on a new argument. Respondent asserts that Claimant could not be granted an exemption nor a derogation, because it would not meet the security of supply tests and the competition tests as stipulated in Article 36 and Article 49a of the AD respectively.

30. Respondent's attempts to defend the adoption of the AD by relying on competition and security of supply fail on all counts. *First,* Article 36 of the AD is the wrong provision, it is not applicable to Claimant. *Secondly,* Respondent's and Brattle's arguments are heavily inspired by the developments since February 2022 rather than on facts at the time when the AD was adopted in 2019. With respect to security of supply, Claimant received, on 26 October 2021, a positive security of supply assessment in the German certification proceedings, which is in contradiction to Respondent's long-winded *ex post* arguments according to which there is a security of supply issue with Claimant's pipeline.

31. *Thirdly,* Claimant's claim is about not being eligible to obtain an exemption under Article 36 nor a derogation under Article 49a, because the AD excludes Claimant from those options. Claimant's claim in this arbitration is not about not being granted such an exemption or a derogation, but about being excluded even from the possibility of obtaining either of them. Respondent's and Brattle's long-winded discussion does not explain anything in relation to the selected cut-off date 'completed before 23 May 2019' for derogations under Article 49a.

32. *Fourthly,* it was not necessary to adopt the AD in order to ensure security of supply and competition. As confirmed by the security of supply clearance issued by the German Federal Ministry for Economy and Energy (which is today the Federal Ministry for Economy and Climate Action) there was no security of supply issue in autumn 2021. And there was no competition issue, contrary to Respondent and Brattle. In addition, Respondent's argument is even less credible when considering the following: It would have been logical not to exclude Claimant from the scope of Article 49a by selecting the cut-off date 'completed before 23 May 2019' if Respondent really wanted to make sure that security of supply and competition are assessed in relation to Claimant. Instead, Respondent excluded Claimant from Article 49a.

33. Contrary to what Respondent is trying to argue, its lengthy discussion about security of supply and competition only shows the views of Respondent vis-à-vis Claimant's project. The true intention of Respondent was to treat Claimant's project differently from other comparable projects. This confirms that the AD is in fact a *lex-Nord Stream 2*. Other than this confirmation, the entire discussion in the Brattle Report is irrelevant for the Tribunal.

34. The Brattle Report is essentially an exercise in academic and theoretical ideas concerning competition in the gas sector and security of supply. None of these theories have materialized in real life. Indeed, there is not one single document before the Tribunal showing, or even suggesting, that the consequences that the Brattle Report refer to have occurred, or that there was any risk of them occurring. This is a report directly from a consultant's laboratory.

35. In the final analysis, Respondent and Brattle discuss security of supply and competition in a legal vacuum.

36. Claimant maintains that the catastrophic impact of the AD on Claimant and its investment has been confirmed by reality. No certification procedure would exist and could have prevented Claimant from starting gas transport without the AD. Respondent's arguments against the Second Swiss Economics Report are incorrect. Indeed they are minor in relation to the gigantic dimension of the impact of the AD on Claimant which is at stake in this arbitration. [redacted] This is central to the economics of this case.

37. A future gas transport from Russia to the EU is possible. Respondent's statements in relation to the alleged impossibility of future gas imports from Russia to the EU are speculative and purely politically motivated. There are no irreversible legal or factual developments that make this future impossible.

38. Even in the absence of actual gas transport via Claimant's pipeline, Claimant would continue to have stable gas transport revenue [redacted] If that is the case, Claimant is entitled to receiving its contractual transport tariff as agreed in the GTA. This ability is made impossible by the AD.

39. Article 24.3 does not release Respondent from liability for its breaches of the ECT. The exceptions listed in Article 24 of the ECT must be given a narrow interpretation. The wording of Article 24.3 makes clear that it is not applicable to the facts before the Tribunal. One central aspect of Article 24.3 is that the circumstances with respect to which the Contracting Party considers it necessary to take measures must have been at hand when it is decided to take the measure, i.e. here when Respondent adopted the AD in April 2019. When it was adopted Respondent did not raise any concerns relating to ¨essential security interests¨ nor to ¨public order¨. As Claimant has repeatedly explained in this Rejoinder, it is not possible to justify a measure by referring to circumstances which have occurred years later.

40. There was simply no ¨essential security interest¨, as stipulated in Article 24.3 (a) of the ECT, to worry about when the AD was adopted. Moreover, the decision to adopt the AD was certainly not taken in ¨time of war, armed conflict or other emergency in international relation¨ as required by Article 24.3 (a)(ii).

41. Claimant maintains that Respondent remains in breach of its obligations under the ECT, i.e. Respondent's breaches of various categories of the FET standard laid down in Article 10.1, of the protection standard laid down in Article 10.7 and of the protection against expropriation laid down in Article 13. Respondent's arguments relied on in the context of Article 24.3 also do not justify its breaches of Article 10.1 and Article 10.7 of the ECT. Claimant's arguments rebutting Respondent's case under Article 24.3 apply *mutatis mutandis* to Respondent's breaches of Article 10.1 of the ECT and Article 10.7 of the ECT.

42. Claimant maintains that the Tribunal has jurisdiction.

43. The Tribunal has the power to award a restitutionary remedy and its exercise of that power is justified in this case. In addition to previously submitted awards, Claimant refers to two awards, viz., *Enron v Argentina* and *Cairn v India*. Both cases clearly confirm that an arbitral tribunal in an investment dispute has the power to order restitutionary remedies. Claimant maintains its prayers for relief as articulated in its Supplementary Memorial dated 27 February 2024.

III. 17 APRIL 2019 REMAINS THE CRITICAL DATE FOR DETERMINING BREACHES OF THE ECT

44. The critical date for determining breaches of the ECT remains 17 April 2019 when the AD was adopted. Events occurring after this date cannot retroactively justify Respondent's breaches of the ECT.

45. This is trite law. Yet, Respondent's Supplementary Counter-Memorial is full of references, arguments and allegations relating to events post-dating 17 April 2019, focusing almost exclusively on events occurring during and after February 2022.

46. It is not – and cannot be – right to refer to events and circumstances which have occurred *ex post facto* in attempts to justify measures taken years before. It is not permissible to extrapolate backwards. Put in more pedestrian terms: What Respondent now seems to be arguing is tantamount to saying in 2024 that ¨it would have won the lottery in 2019, had it only had the numbers it has today¨. This is legal and logical *abrakadabra*. Respondent's Supplementary Counter-Memorial changes nothing in the analysis of its breaches of the ECT.

47. If anything – as Claimant will show throughout this Rejoinder – the arguments and allegations in Respondent's Supplementary Counter-Memorial confirm what Claimant has been saying from the outset, *viz.*, that Respondent has targeted Claimant by adopting the AD and thereby committed a number of breaches of the ECT.

IV. RESPONDENT'S ATTEMPTS TO POLITICIZE THIS ARBITRATION ARE MISGUIDED

IV.1 There is no room for politicization in investment arbitration

48. The ECT entered in to force in April 1998 after several years of negotiations at the initiative of the European Community. At a meeting of the European Council in 1991, the first formal steps were taken for the creation of a European Energy Community.

49. The European Union, represented by the Director of the European Commission's Energy Directorate, played a leading and decisive role in the negotiations for the ECT. Indeed, the EU prepared the first draft of the ECT.

50. The ECT is a complex treaty with an elaborate structure. One of the areas in the energy sector covered by the ECT is investment protection which is regulated in Part III of the ECT. This part of the ECT was not drafted in a vacuum. At the time, there were in place several thousands of bilateral investment protection treaties. They served as a model for the corresponding provisions in the ECT. Many provisions of the ECT are identical, or very similar, to provisions found in the bilateral investment protection treaties.

51. One of the widely accepted reasons for and advantages of investment protection treaties is the de-politicization of investment disputes. Given the fact that sovereign states and their interests are involved in such disputes, the generally held view is that both investors and state parties benefit from de-politicization, such that the focus is exclusively on the legal aspects of investment disputes. For the investor, it is a question of reliance on the rule of law, certainty and predictability and for the state it is primarily the possibility to avoid having to take political responsibility for steps and measures taken.

52. The ECT is based on, and enshrines the same philosophy as other investment protection treaties in this respect, i.e. investment disputes are to be de-politicizised with the focus exclusively on the legal matters at hand.

53. Respondent – the founding father of the ECT – is now trying to turn this arbitration into a forum for political debate. This is unfortunate. Indeed, it is unacceptable. More importantly, it is unhelpful for the Tribunal when analyzing the legal matters before it. The only helpful aspect of Respondent's Supplementary Counter-Memorial is that it confirms that the intention underlying the AD is based on political bias.

IV.2 Respondent's repetitions of political slogans are irrelevant

54. Respondent refers 35 times to 'Russia's invasion of Ukraine' and similar. These political slogans referring to events subsequent to 2019 do not – and cannot – justify Respondent's breaches of the ECT in 2019.

55. Respondent refers 8 times to 'Russia's illegal war of aggression against Ukraine'. Again, these statements do not – and cannot – justify Respondent's breaches of the ECT in 2019.

56. Respondent refers 12 times to the 'weaponization of gas'. Respondent's statements – which all relate to alleged events having occurred subsequent to April 2019 – are misleading and misconceived. Those statements have nothing to do with Claimant and its corporate activities. It is misleading and simply wrong to assert, that "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".[11] This statement completely ignores Claimant's separate legal status under Swiss law and its corporate governance and functions. It also ignores the difference between gas supply and gas transport. Claimant is not party to any gas supply contracts. Claimant offers gas transport capacities, no more no less. The Tribunal will recall that Claimant has explained this before.[12]

57. Respondent's statements referred to above, do not – and cannot – justify Respondent's breaches of the ECT in 2019.

IV.3 **Nord Stream 2 AG is the only claimant in this arbitration**

58. In further attempts to politicize this arbitration, Respondent is alleging that Claimant is not the only party to this arbitration, that Claimant is controlled by the Russian Government, that Claimant is an instrument of and controlled by the Russian Government and that Claimant, Gazprom and the Russian Government constitute one single economic unit. The conclusion that Respondent seemingly wishes to draw based on these allegations is that actions and measures taken by Gazprom and the Russian Government somehow can be attributed to Claimant.

59. These statements, inspired as they are by post-2019 events, are fanciful – some of them truly jawdropping – as well as simply wrong as a matter of fact and law. There is simply no support in international law for the statements, let alone for the conclusions that Respondent seems to be suggesting. In addition, the statements completely ignore Claimant's status as a separate legal entity under Swiss law.

60. Article 1(7) a)(ii) of the ECT defines Investor in the following way:

> *Investor means*
>
> *a) with respect to a Contracting Party*
>
> *(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party.*

61. Claimant is a duly organized/incorporated company under the laws of Switzerland, which is a Contracting Party to the ECT.

[11] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 12.
[12] Claimant's Supplementary Memorial dated 27 February 2024, para 84.

62. There is no doubt therefore that Claimant is an Investor under the ECT and that it enjoys the protections granted to Investors under the ECT. The only one criterion determining the status as Investor under the ECT is the place of incorporation. No other criteria are relevant.

63. Consequently, the nationality of shareholders, category of shareholders, the financial structure of the company and the source of capital of the company are all irrelevant; so is the control and management of the company, as well as the nature of its activities.

64. The shareholder of Claimant has the same rights and obligations as any other shareholder in a Swiss company. Such rights and obligations must be exercised in accordance with Swiss company legislation and the constitutional documents of the company. This has always been the case with respect to Claimant.

65. Claimant's board of directors and the management team have a duty under Swiss law always to act in the best interest of the company with a view to achieving the objectives laid down in the articles of association/charter of the company. This is how the board of directors and the management have consistently acted.

66. One fundamental legal principle of company legislation in Switzerland – and in most other legal systems – is the separation of rights and obligations, as well as liabilities and responsibilities between a separate legal entity and its shareholders. The shareholder's rights are limited to information and financial rights. This has always been observed with respect to Claimant.

67. In addition to being legally and factually incorrect and misplaced, in the final analysis, Respondent's megaphone statements from the EU political platform do not – and cannot – justify Respondent's breaches of the ECT in 2019.

V. THE MASK HAS FALLEN

68. Respondent's mask has fallen.

69. In a fundamental shift of its case, Respondent in its Supplementary Counter-Memorial confirms for the first time in this arbitration that it has classified Claimant's assets as being different from all other off-shore import pipelines to the EU. Quote:

> *"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 risk to security of supply and competition".*[13]

70. In short this confirms that Respondent's intention in 2019 was specifically to target NSP2AG. It also confirms that the AD was a *lex-Nord Stream 2*.

71. In its previous submissions, Respondent has alleged that the impact of the AD on Claimant is only accidental and unintended - a 'collateral damage'.[14] In an attempt to demonstrate a difference between Claimant's pipeline and the other 5 offshore import pipelines to the EU, Respondent alleged potential particular competition concerns due to the duplication of the capacity of Nord Stream AG ("NSPAG").[15] In its latest submission, this has fundamentally changed. Respondent openly acknowledges that it has treated Claimant's assets differently.

72. Respondent has thus confirmed its mindset towards Claimant and its assets from the outset. Targeting NSP2AG was the only *raison d'être* for the AD, for the timing of its adoption, and for how its content was tailored to capture in practice only Claimant's asset. The 'completed before 23 May 2019'-requirement in Article 49a of the AD was implemented to make a derogation unachievable for Claimant. For obvious reasons, Respondent tried to hide this by adopting a directive which was superficially of a general nature, but which in practice only affected Claimant and its asset. All other import pipelines to the EU have in fact been derogated.

73. As mentioned above, in its Supplementary Counter-Memorial Respondent has now explicitly confirmed that it considered Claimant and its assets different from all other offshore import pipelines to the EU.

74. Respondent's mask falls again when it is states in paras 299 and 323 of its Supplementary Counter-Memorial that Claimant ¨would never have met the conditions

[13] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 29 and again para 247.

[14] See in this regard, Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, Sections 1.2, 3; Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, Sections 1.5, 6; Respondent's Counter-Memorial on the Merits dated 03 May 2021, Sections 1.1.3, 2.3.

[15] Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, para 767.

for a derogation and an exemption¨. This is confirmation that Respondent had a biased and preconceived view of Claimant and NSP2AG from the outset.

75. Against the backdrop of the ECJ Judgment and the ECJ Opinion in the case of NSP2AG, Respondent seems to have accepted – albeit *sotto voce* and indirectly – that the AD violates several standards of protection in the ECT. Therefore, Respondent is now trying to hide behind Article 24.3 of the ECT. This is unconvincing.

76. Not only is the reference to this article late – indeed too late to be credible – but Respondent's arguments leading it to rely on this provision all have their roots in post-2019 events.

77. Moreover, as will be explained in Section XIV of this Rejoinder, these arguments do not hold water even if taken at face value.

VI. RESPONDENT'S OBJECTIONS IN RELATION TO THE TECHNICAL STATUS OF CLAIMANT'S NORD STREAM 2 AG ASSETS AND THE AVALABILITY OF DOWNSTREAM INFRASTRUCTURE ARE BASELESS

VI.1 As to the technical status of Claimant's assets

78. With regard to the technical status of Claimant's NSP2AG assets as of 2021 until end of 2022 and thereafter, Claimant has explained that one line is technically operable and the other line is reparable.[16] This is supported and further detailed by a witness statement "Regarding the Existing Condition of the Nord Stream 2 Pipeline System and the Technical Preparations Required to Initiate Gas Transportation".[17]

79. Claimant has explained, supported by the witness statement, that one line became operable in October 2021, the other in December 2021. After the incidents in September 2022, one line is still intact and could start gas transportation [redacted] The other line could start gas transportation upon repair and commissioning [redacted].[18]

80. In its Supplementary Counter-Memorial, Respondent attempts, in a very generic and unspecified manner, to raise doubts in the minds of the Tribunal by arguing, that Claimant's explanations are neither sufficiently evidenced nor independently confirmed.[19] Respondent highlights the fact, that [redacted] is a long standing employee of Claimant.

81. Nothing in the Respondent's superficial comments offers anything which undermines the substance of Claimant's and [redacted] explanations.

82. These explanations are supported by a Technical Expert Report, provided by Dr Raymond John Williams: "Regarding My Review of [redacted] Second Witness Statement and Related Documents Dealing with the Existing Condition of the Nord Stream 2 Pipeline System and the Technical Preparations Required to Initiate Gas Transportation". [20]

83. Mr Williams fully endorses the findings in the witness statements and provides additional comments in support of the expert's endorsement. Mr Williams' conclusions are based on a review of [redacted] second witness statement and related documents as listed in the reference section of the Technical Expert Report.[21]

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[16] Claimant's Supplementary Memorial dated 27 February 2024, Section III.
[17] [redacted]
[18] Claimant's Supplementary Memorial dated 27 February 2024, paras 24, 38.
[19] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, Section 1.1.2.
[20] Technical Expert Report of Dr Raymond John Williams.
[21] See Technical Expert Report of Dr Raymond John Williams, para 6.

84. Mr Williams concludes as follows:[22]

[redacted]

85. Mr Williams then moves on to summarize and to explain further that both lines A and B are fully technically certified. Mr Williams addresses the damage assessment, the internal and external corrosion assessment, the required pipeline repair works on line A as well as gas transport startup durations for line A and line B and related costs.[23]

86. Questioning Claimant's explanations about the technical status of its pipelines – explanations which have now been confirmed by an independent expert – Respondent also refers to some public statements in its Supplementary Counter-Memorial.[24] Most of the statements are outdated, based on speculation, and without any technical analysis supported by site surveys.

87. By contrast, Claimant's explanations, [redacted] Witness Statements and Mr Williams' Technical Expert Report are based on the results of site surveys and subsequent detailed technical analyses. This is first-hand information based on substantial technical documentation and analysis.

VI.2 **<u>As to the availability of downstream infrastructure to transport gas</u>**

88. When it comes to **downstream infrastructure** for further transporting gas from the landfall facilities in Germany, Respondent argues that no downstream infrastructure for transporting gas arriving through Claimant's pipelines is available anymore. Respondent argues that Claimant would not be able to transport gas via its pipelines and receive

[22] Technical Expert Report of Dr Raymond John Williams, Section 2.2.
[23] Technical Expert Report of Dr Raymond John Williams, Sections 2.3 et seqq.
[24] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 64 and 66, footnotes 38-41.

payments for transportation since the downstream infrastructure has been (or will be) repurposed for LNG and/or hydrogen.[25]

89. For a number of reasons, Respondent's assertions are irrelevant to the case before the Tribunal. They are also factually imprecise – in fact largely inaccurate –, not substantiated and not factually established. Before providing further explanations, Claimant notes that Respondent is inventing more and more far-fetched and incorrect arguments. This is well illustrated by Respondent's statements as to the alleged unavailability of downstream infrastructure to uptake gas transported through NSP2AG's pipeline.

90. *First*, Claimant notes, that as rapidly, as some downstream infrastructure might possibly be temporarily used for other purposes, it may be re-purposed again equally rapidly. It can change comparably quickly. Respondent has failed to prove that any such changes are irreversible. They are not. It is also of importance to note that without the AD, Claimant's pipelines would have been in operation for some years already at this stage, and this would have been a relevant fact for any decisions on repurposing of downstream assets.

91. *Secondly*, Claimant questions whether Respondent's assertions are factually accurate. Claimant doubts that there would be no downstream transport capacities to uptake, even on short notice, gas volumes transported through NSP2AG's pipeline in the range of the capacity of the intact line of Claimant. This would be up to 27,5 bcm per year. As a matter of fact, Claimant has an intact grid connection to the EUGAL downstream infrastructure at the grid connection point in Lubmin, Germany. That grid connection is ready for operation.

92. *Thirdly*, Claimant contests Respondent's general assertions about energy transition and the future energy market. The energy transition to hydrogen etc. in the EU and Germany is not as efficiently and rapidly underway as Respondent alleges. These are currently only plans and only time will tell, how much of these plans will become reality. There are good reasons to doubt that the hydrogen market will develop as rapidly as is planned. This was, for example, recognised in the recent report from the European Court of Auditors.[26] One of its conclusions was '*We found that the renewable hydrogen targets were not clearly defined. Moreover, they were driven by political will rather than being based on robust analyses. In addition, at the time of writing, it is unlikely that these targets for 2030 can be achieved*'.[27]

[25] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, Section 2.5.4, paras 126 et seqq.
[26] See **Exhibit C-312,** European Court of Auditors Report "Special report 11/2024: The EU's industrial policy on renewable hydrogen – Legal framework has been mostly adopted – time for a reality check" (available at https://www.eca.europa.eu/en/publications/SR-2024-11), 17 July 2024.
[27] Ibid, para 122.

93. It is also of importance to note that the immediate plan is not to repurpose the EUGAL pipeline but to blend hydrogen within the natural gas pipelines.[28] In addition, other downstream pipelines than EUGAL are, or could be made available, e.g. NEL[29] and OPAL. [redacted]

94. It is similarly far from clear that the repurposing for LNG supply would render the transportation of Russian gas completely impossible. The Deutsche Ostsee LNG terminal, for example, which is close to the landing terminal Lubmin, has a planned import capacity of 13.5 bcm, whereas Claimant's capacity was planned to be 55 bcm. Accordingly, it is likely that the landing terminal in Lubmin and the connected downstream pipeline capacity could easily accommodate 27.5 bcm of Claimant's undamaged line's capacity.

95. Be it as it may, the main reason why Respondent's assertions about the downstream infrastructure do not lead anywhere in this case is the following: Any alleged unavailability of the downstream infrastructure - if correct (*quod non*) - does not affect [redacted] This has previously been explained by Claimant.[30]

96. [redacted]

97. At any rate, developments in 2022, 2023, 2024, even if they were to be accurately described by Respondent *(quod non)*, cannot excuse Respondent's breaches of the ECT in 2019, when it adopted the discriminatory AD.

[28] This was reported in **Exhibit C-313,** Renewables Now website, "HH2E agrees grid connection for German green hydrogen project" (available at https://renewablesnow.com/news/hh2e-agrees-grid-connection-for-german-green-hydrogen-project-845469/), 12 January 2024; and in **Exhibit C-314,** Energate messenger website, "Hydrogen grid: Gascade and HH2E mix hydrogen into the Eugal" (available at https://www.energate-messenger.com/news/239991/gascade-and-hh2e-mix-hydrogen-into-the-eugal), 10 January 2024.

[29] German researchers also noted that 'we do not believe that the NEL will be repurposed very soon'. See **Exhibit CLA-327,** Kornél Télessy, Lukas Barner, Franziska Holz, Repurposing natural gas pipelines for hydrogen: Limits and options from a case study in Germany, International Journal of Hydrogen Energy, Vol. 80, 28 August 2024, pp 821-831. Available at: https://www.sciencedirect.com/science/article/pii/S0360319924027812#bib42.

[30] Claimant's Supplementary Memorial dated 27 February 24, paras 17, 199-201; Claimant's Memorial dated 3 July 2020, para 318; See in this regard, Expert Report of Mr Peter Roberts dated 22 October 2021, paras 14, 25; [redacted]

VII. RESPONDENT'S STATEMENTS IN RELATION TO THE STATUS OF THE CERTIFICATION PROCEDURE ARE IRRELEVANT

98. Respondent's elaborations in relation to the certification procedure are irrelevant and pointless in these arbitral proceedings. The certification requirement was imposed on Claimant by the AD. There was no such certification requirement for Claimant before the AD. In other words no such requirement would exist but for the AD.

99. The imposition of the certification requirement on Claimant is the sole responsibility of Respondent. There is no shared responsibility between Respondent and Claimant for the imposition of the certification requirement.

100. Consequently, the factual status of the certification procedure is entirely irrelevant for the assessment of Respondent's breaches of the ECT. Even if there were no ongoing certification procedure, or if it had never been initiated, that would be entirely irrelevant for the assessment of Respondent's breaches of the ECT.

101. To make it very clear: the AD is the root of all evil. The AD is the first event in a chain of events. The certification requirement is secondary and accessory to the AD. Needless to say, Respondent's initial breach of the ECT by adopting the AD cannot be justified by the direct consequence of that breach.

102. When the German government stopped the certification procedure in February 2022 it resulted in [redacted] The Tribunal will remember that Claimant has explained this before.[31]

103. The AD is, in other words, the reason why Claimant finds itself in the present situation, i.e. not able to operate the pipeline and deprived of the value of its investment. Or, to be more precise, not able to offer unregulated operations to the shipper of gas. [redacted] The Tribunal will recall that Claimant has explained this before[32] and will explain it again in this Rejoinder[33] simply because Respondent continues to ignore this key aspect for the correct commercial understanding of this case. But for the AD Claimant would be able to operate, or to offer transport. The adoption of the AD in April 2019 happened, of course, years before the damage incidents occurred in September 2022.

[31] **Exhibit C-289**, Claimant's letter to the Tribunal dated 1 February 2023, pp 5 et seqq.

[32] Claimant's Supplementary Memorial dated 27 February 2024, paras 17, 199-201; Claimant's Memorial dated 3 July 2020, para 318; See in this regard, Expert Report of Mr Peter Roberts dated 22 October 2021, paras 14 and 25; [redacted]

[33] See paras 8-10 above.

104. Needless to say, Claimant did not accept the certification requirement by applying for certification, as suggested by Respondent. Claimant's request for certification did not amount to "a recognition that the unbundling requirements of the Amending Directive […] did not, as such, pose an absolute bar to the operation of the NSP 2 pipeline".[34]

105. As Claimant has explained in previous submissions,[35] it acted as any prudent business would have acted to protect its assets/investments, i.e. Claimant exhausted all, even remote, possibilities to overcome the effect of the AD. The application for certification was, and is, a reasonable mitigation measure taken while the litigations and arbitration with respect to the AD have been, and still are, ongoing. Any other approach would have amounted to business negligence.

106. Accordingly, it is irrelevant why there is no progress in the certification procedure since it was stopped. [redacted] when the formal and positive security of supply review for Claimant was withdrawn by the German government on 22 February 2022. Without such assessment, no certification is possible. Claimant will explain the legal background, the outcome of the security of supply review in 2021 and its interplay with Claimant's certification procedure further below.[36] What matters here is that when the positive security of supply assessment was withdrawn in February 2022, [redacted].

107. Respondent asserts that "no new Security of Supply Assessment has yet been issued, given that the certification procedure remains suspended due to Claimant's own inaction". This is a self-serving allegation. [redacted] That withdrawal happened for political reasons, for reasons outside Claimant's sphere and control. The withdrawal had nothing to do with any action or inaction of Claimant.

108. Claimant has stated that the certification procedure has been "stopped". It may be correct that, from a purely administrative perspective, the certification procedure remains open – formally. In reality, however, without a positive Security of Supply assessment no certification of Claimant is possible. One may call the certification procedure "stopped", or "blocked", or "suspended", or the like. This is all semantics. The point here is, that but for the AD, Claimant would not need a certification.

[34] Cf. Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 37.
[35] Claimant's Reply Memorial dated 25 October 2021, esp. paras 14, 248, 374 et seqq.
[36] See paras 262 et seqq.

VIII. RESPONDENT'S ASSERTIONS CONCERNING THE IMPACT OF US SANCTIONS ON CLAIMANT ARE INCORRECT

VIII.1 US Sanctions do not prevent the operations of Claimant's assets, neither from a legal perspective nor as a practical matter

109. A key allegation of Respondent in relation to US sanctions is that Claimant's allegedly unduly narrow focus on legal impossibility implicitly asks the Tribunal to ignore the significant evidence that the sanctions foreclose Claimant's ability to operate its pipeline as a practical matter.

110. This is wrong. It is pure speculation. As was already explained by Claimant in previous submissions,[37] US sanctions, namely secondary US sanctions like the Countering America's Adversaries Through Sanctions Act (CAATSA), the Protecting Europe's Energy Security Act (PEESA), and OFAC's Specially Designated Nationals (SDN), did not prevent the completion of Claimant's project. As also explained previously, they had immediate and temporary effects on the Claimant's commercial activities after February 2022.[38]

111. Claimant already provided detailed explanations concerning the effect that the US sanctions currently have on NSP2AG.[39] In particular, Claimant demonstrated, and Respondent agreed, that US sanctions do not "*legally prohibit the Claimant from operating the NS 2 pipeline*."[40] Nor do they prohibit Claimant to operate from a practical point of view. *First,* Claimant is operating today by performing all [redacted]

Secondly, as another obvious example, Claimant is able to continue this arbitration. The foregoing demonstrates that US sanctions do not "effectively" paralyze Claimant contrary to Respondent's assertions.[41] In addition, Claimant is not prevented from performing other activities, including the commercial operation of the pipeline, for example, by transporting gas to the EU.

VIII.2 The correct understanding of the legal implications of US sanctions is essential to understand their practical implications and limits

112. Respondent overstates the practical consequences of US sanctions on Claimant. The potential **practical** consequences of US sanctions cannot be understood without a

[37] Claimant's Supplementary Memorial dated 27 February 2024, Section IV.2; Claimant's Reply Memorial dated 25 October 2021, in particular paras 378-381; and **Exhibit C-289**, Claimant's letter dated 1 February 2023, p 5.
[38] See **Exhibit C-289**, Claimant's letter dated 1 February 2023, and Claimant's Supplementary Memorial dated 27 February 2024, para 41.
[39] Claimant's Supplementary Memorial dated 27 February 2024, Section IV.
[40] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 69.
[41] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 69.

proper understanding of the **legal** implications of US sanctions. The relevant situation is explained in an US Sanctions Expert Report, provided by US counsel Mr Perry S. Bechky.[42] Claimant submits this report along with this Rejoinder in support of Claimant's position on US Sanctions.

113. In short, Mr Bechky agrees that neither primary nor secondary US sanctions legally prohibit Claimant from operating the pipeline.[43] Mr Bechky concludes that the primary US sanctions do not apply to non-US persons who provide services to or otherwise engage in ordinary commercial transactions with Claimant outside the territory of the United States and absent any other US nexus.[44] In order for OFAC to find a violation of its regulations and to impose civil penalties, the transaction in question must have some US connection, such as the involvement of a US person, US-origin goods, or activities taking place within the United States (US Nexus). A common US Nexus is the use of US dollars for electronic payments, because such payments normally involve US financial institutions.[45]

114. Furthermore Mr Bechky concludes, that Respondent's suggestion is incorrect, according to which US secondary sanctions are so powerful as to necessarily prevent Claimant from finding qualified companies that are willing to provide Claimant with necessary goods and services.[46]

115. Mr Bechky explains, that this is ultimately a business judgment and that various companies make different risk-management decisions.[47] As Mr Bechky further explains, foreign persons are not required to comply with secondary sanctions; they may choose to engage in conduct that may trigger secondary sanctions and accept the risks of the threatened economic costs. Thus, it is more accurate to describe conduct that may trigger secondary sanctions as "sanctionable" rather than "prohibited."[48]

116. Mr Bechky concludes that it would be inaccurate to assume that US secondary sanctions are completely successful at achieving their goal of having all third-party actors stop doing all business prohibited for US persons, and that one should not assume that the US will impose secondary sanctions on all persons that are eligible for such sanctions.[49] Simply because one is eligible to be sanctioned does not mean that one will be sanctioned.[50] Mr Bechky also concludes that it cannot be said with any certainty at all

[42] US Sanctions Expert Report of Mr Perry S. Bechky.
[43] US Sanctions Expert Report of Mr Perry S. Bechky, para 13.
[44] US Sanctions Expert Report of Mr Perry S. Bechky, para 14.
[45] US Sanctions Expert Report of Mr Perry S. Bechky, para 66.
[46] US Sanctions Expert Report of Mr Perry S. Bechky, para 16.
[47] US Sanctions Expert Report of Mr Perry S. Bechky, para 17.
[48] US Sanctions Expert Report of Mr Perry S. Bechky, para 47.
[49] US Sanctions Expert Report of Mr Perry S. Bechky, paras 18, 19.
[50] US Sanctions Expert Report of Mr Perry S. Bechky, paras 20, 43.

that there will be a high risk that the US Government will impose secondary sanctions in the future against non-US counterparties of Claimant.[51]

117. Mr Bechky summarizes his conclusions as follows:

[redacted]

[51] US Sanctions Expert Report of Mr Perry S. Bechky, para 21.

[redacted]

[redacted]

[footnotes omitted]

VIII.3 **Reality has already shown that Claimant can operate without involving US suppliers**

118. Respondent continues to argue, that 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**")*".[52]

119. Such statements ignore current technical activities performed by NSP2AG as listed above [redacted] Also, these statements cannot be reconciled with the expert conclusions on the implications of US sanctions on Claimant which are addressed above. In the light of these clear conclusions, Respondent's statements lack merit.

120. Despite the fact that US sanctions caused difficulties for Claimant it can indeed repair and operate the damaged line without sanctions making this impossible. The examples mentioned above show that sanctions do not exclude Claimant's technical and commercial activities.

121. Respondent refers to a Swiss comment according to which Claimant *"faced "massive payments difficulties" following its SDN designation that "made its ongoing operations impossible"."*[53] However, this quote refers to a Reuters article of 2 March 2022, i.e. at an early stage after the developments in February 2022. In the meantime Claimant has been operating for more than two years, [redacted] All these activities were possible precisely because US sanction did not paralyse Claimant.

122. Respondent also suggests that "*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*".[54] Respondent misses the point here, i.e. if there is no indirect US nexus then the primary sanctions will not

[52] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 71.
[53] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 74.
[54] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 76.

apply at all. As explained, Claimant has been able, and will continue to be able, to carry out its activities without any nexus to the US.

123. Moreover, Respondent's statement that Claimant's "*accounts at non-US banks were frozen after the US designated the Claimant as an SDN*"[55] is factually wrong and not relevant today.

124. Respondent argues that "*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*".[56] It is not relevant to select a contractor which was engaged in the past for the **construction** of the pipeline, such as [redacted]. This contractor is not needed for the **operations** of the pipeline nor for repair works. Respondent is trying to blur the picture by referring to construction of the whole pipeline. The pipeline is there – it has been constructed. The relevant activities now are the operation of pipeline and repair of one line.

125. Respondent's statements based on comments by US President and by Republican members of the Senate Foreign Relations Committee, according to which "*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*",[57] are again speculation and purely politically motivated. As addressed above,[58] it is clear from the expert conclusion that US secondary sanctions are not so powerful so as to prevent Claimant from finding qualified companies. US secondary sanctions do not prevent all third-party actors from doing all the business which is prohibited for US persons. It cannot be assumed that the US will impose secondary sanctions on all persons that are eligible for such sanctions. And it cannot be said with any certainty at all that there will be a high risk that the US Government will impose secondary sanctions in the future against non-US counterparties of Claimant.[59]

126. Respondent states the following: *"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."*[60] Again, Respondent resorts to speculation about the future which no one can predict.

[55] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 77.
[56] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 78.
[57] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 81.
[58] Claimant's Supplementary Memorial dated 27 February 2024, paras 50 et seqq.
[59] US Sanctions Expert Report of Mr Perry S. Bechky, para 21.
[60] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 83.

VIII.4 [redacted]

127. [redacted]

128. *First,* if Respondent refers here to Claimant's pipelines, we note that Respondent's statement is factually not accurate. Claimant's line B is intact, line A is ruptured.

129. [redacted]

130. [redacted].[62]

131. [redacted]

132. [redacted]

[redacted]

133. [redacted]

134. Again, Respondent is not comparing like for like. [redacted]

[64] [redacted]

[65] See para 79 above and para 364 below; Claimant's Supplementary Memorial dated 27 February 2024, paras 24, 38.

IX. RESPONDENT'S ATTEMPTS TO DOWNPLAY AND UNDERMINE THE ECJ JUDGMENT AND THE ECJ OPINION IN THE CASE OF NORD STREAM 2 AG FAIL

IX.1 Respondent attempts to downplay the importance of the ECJ Judgment and ECJ opinion and mischaracterizes its content

135. In its Supplementary Memorial,[66] Claimant addressed the judgment of the European Court of Justice (the **"European Court of Justice"** or **"ECJ"**) dated 12 July 2022 in the case C-348/20 P, Nord Stream 2 AG vs. European Parliament and Council of the European Union (the **"ECJ Judgment"**). The judgment was preceded by the opinion of Advocate General Bobek at the European Court of Justice delivered on 6 October 2021 (the **"ECJ Opinion"**). Claimant has explained, that, and why, those documents are of decisive importance for the interpretation of the AD and for the outcome of this arbitration.

136. Claimant has explained,[67] that the ECJ made it very clear

- **that** the AD inevitably affects Claimant by changing its legal status;
- **that** those effects on Claimant did not exist prior to the adoption of the AD;
- **that** the AD treats Claimant differently from all other pipelines; and
- **that** this different treatment is fully attributable to Respondent and not to Member States, such as Germany.

137. Respondent's Supplementary Counter-Memorial includes an extensive section dedicated to the ECJ judgment and the ECJ opinion. This extensive treatment by Respondent of the ECJ judgment and the ECJ opinion is explained by their critical importance for these proceedings before the Tribunal and by the fact that they are fatal to Respondent's case.

138. In its submission, Respondent attempts to mislead the Tribunal in relation to the importance of the conclusions of the ECJ Judgment and the ECJ Opinion. It does so by mischaracterizing these conclusions, introducing alternative interpretations and, amazingly, denies the relevance of some of the conclusions for both the EU General Court during the current phase (and a potential next phase at the ECJ) and this Tribunal. Continuing with these efforts to argue against the clear findings of the ECJ Judgment and the ECJ Opinion, Respondent also makes unacceptable attempts to mischaracterize the claims of Claimant.

139. The fact that the conclusions of the ECJ Judgment and the ECJ Opinion clearly show that the interpretations and 'facts' provided by Respondent over the course of these

[66] Claimant's Supplementary Memorial dated 27 February 2024, paras 116 et seqq.
[67] Claimant's Supplementary Memorial dated 27 February 2024, paras 119, 138 et seqq.

proceedings are wrong and without foundation goes a long way to explain why Respondent now disputes these clear and legally binding interpretations and conclusions.

140. Respondent introduces very few new arguments that require a response from Claimant. Most of the arguments have been discussed extensively in prior submissions. Claimant's response now is therefore focused on correcting the most outrageous claims or statements of Respondent and to address the few new arguments, as well as old arguments with alternative explanations, suggested by Respondent. Most of these mischaracterizations and incorrect interpretations or claims are, it is submitted, obvious, but as they are raised by Respondent, they require a response.

141. These issues include in particular:

i. Respondent's failed efforts to **downplay** the importance of the ECJ Judgment and the ECJ Opinion by asserting that the interpretations of the AD have no bearing beyond the admissibility before the EU courts and are irrelevant for this dispute.

ii. Respondent's failed efforts to **undermine** the authoritative ECJ interpretation of the AD by re-interpreting the ECJ Judgment and ECJ Opinion, or by even openly disagreeing with conclusions in the ECJ Judgment and the ECJ Opinion as allegedly being legally incorrect.

iii. Respondent's continued assertion that there was no **discriminatory** intention or effect of the AD.

iv. Respondent's mischaracterization of Claimant's claims in this arbitration by attempting to confuse the difference between being **eligible** to obtain an exemption under Article 36 or a derogation under Article 49a and being **granted** such an exemption or a derogation.

v. Respondent's continued attempts to rescue its hopeless argument that Claimant would be eligible for an exemption under **Article 36** of the AD.

IX.2 Respondent's efforts to downplay the importance of the ECJ judgment and the ECJ Opinion are unconvincing

The ECJ's decision on the admissibility of Nord Stream 2 AG's action for annulment is based on a detailed and authoritative interpretation of the AD

142. In numerous sections of its Supplementary Counter-Memorial, Respondent attempts to downplay the importance of the ECJ judgment and the ECJ Opinion for these proceedings. It argues that Claimant is '*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'[68] *and that interpretations and statements of the Court are only 'relevant for the decision on admissibility*'.[69]

143. In a similar vein, Respondent describes the ECJ Judgment as concerning a '*highly technical and general procedural issue under EU law*'[70] and has selected brief sections from the ECJ Judgment which are indeed "technical" aspects of the judgment.[71]

144. In doing so, Respondent has intentionally left out those parts of the ECJ judgment, where the court explains how and why it has reached its conclusions. The conclusions of the ECJ did not come from thin air. They are the result of a careful analysis of the underlying legal provisions, in particular the AD, as well as the application of these legal provisions to the facts of the case – all of which highly relevant for the outcome of the case before the Tribunal.

145. The sections omitted by Respondent reveal the interpretations of the relevant rules by the ECJ and include sections where the ECJ makes findings that are directly relevant for the substance of the case before the General Court as well as for this arbitration.

146. Examples of this include the confirmation of the correct interpretation of Article 36 of the AD, i.e. that it was not available to Claimant,[72] confirmation that Claimant is treated differently from other relevant pipeline projects, confirmation that the AD itself caused this difference of treatment and left Member States with no opportunity for flexibility in implementing the discriminatory requirements of the AD. There is no doubt, contrary to the implied suggestion by Respondent,[73] that the ECJ Judgment is the result of careful and extensive analysis by the Grand Chamber of the Court.

147. It is true, as Respondent states, that the ECJ Judgment does not go as far as finding '*illegality under EU law or at all concerning the Amending Directive*'[74], but this was never argued by Claimant. Rather, Claimant argued that the correct interpretation of the AD and the Gas Directive has now been authoritatively decided by the highest court in the EU, which is the sole institution competent to give binding interpretations of EU law. The Tribunal can now proceed to assess Respondent's breaches of the ECT by the adoption of the AD on the basis of the interpretation of it by the ECJ.[75]

[68] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 186. Similar arguments are included, for example, in paras 190 et seqq., 201, 210 and 211.
[69] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 186.
[70] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 194.
[71] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 193-200.
[72] See Section IX.6 below.
[73] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, e.g. paras 226-227.
[74] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 189.
[75] Claimant's Supplementary Memorial on Jurisdiction and Merits dated 27 February 2024, para 129.

148. Respondent surprisingly suggests that it is uncertain if the interpretation of the AD as set out in the ECJ judgment will prevail when the EU courts decide on the merits of the case.[76] The EU courts will not decide differently on already concluded interpretations of the AD. This is basic procedural law, known to most lawyers as *res judicata*. They might address new and additional questions, but not change already given interpretations of the AD.

The ECJ Opinion is significant

149. It is true, as Respondent argues, that an opinion of an Advocate General is not legally binding for the judges of the ECJ. Claimant has made this clear in its Supplementary Memorial.[77] However, as is also explained by Claimant, Advocates General are subject to the same appointment procedure and the same qualifications as Judges of the EU Courts. As such, they are recognised as leading experts on EU law. To the extent that the ECJ has not denied the Advocate General's conclusions, the Tribunal can safely use the opinion as the basis for the interpretation of the relevant EU laws.

150. In a rather embarrassing way, Respondent – the European Union itself – is trying to undermine the authority and status of its own Advocate General, one of the key actors, indeed a pillar, of the EU legal system. As will be explained below, it is even worse: Respondent also shows little respect for the Grand Chamber of the ECJ.[78]

151. The opinions of Advocates General do not bind the Court, but are very influential, and are often followed by the Court. These opinions are intended to constitute impartial and independent advice, and in practice tend to be a comprehensive, reasoned account of the law governing all aspects of the case in question and will be helpful when interpreting judgments of the Court.[79]

152. The Advocate's General opinion plays an important role in developing EU case-law. This is witnessed by that fact that only where the Court considers that the case raises no new points of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without an Opinion from the Advocate General.[80] This importance of the Advocate's General opinion is also illustrated by the fact that it is published on the Court's website alongside the Court's judgment.[81]

[76] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 25 and 211.
[77] Claimant's Supplementary Memorial dated 27 February 2024, paras 130-132.
[78] See para 183 below.
[79] **Exhibit CLA-328,** P. Craig and G. De Burca, *EU Law – Text, cases and materials* (sixth edition), Oxford, 2015, p 61.
[80] **Exhibit CLA-329,** K. Lenaerts, K. Gutman and J. Nowak, *EU Procedural Law* (second edition), Oxford, 2023, para 2.16.
[81] **Exhibit CLA-329,** K. Lenaerts, K. Gutman and J. Nowak, *EU Procedural Law* (second edition), Oxford, 2023, para 2.17.

153. Respondent also argues that the '*Claimant 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.*'[82]

154. These claims are both peculiar and wrong. *First*, on several key points the ECJ Judgment agreed with the conclusions in the ECJ Opinion.[83] *Secondly*, although the ECJ did not repeat or specifically confirm other parts of the opinion,[84] the Tribunal will easily see that in substance and spirit, the ECJ agrees with the Advocate General on the interpretation and effects of the AD.

155. The Tribunal now has the benefit of the interpretations and conclusions of the highest authorities in the EU judicial system with respect to the AD and can safely rely on these interpretations and conclusions in its legal analysis of Respondent's breaches of the ECT.

IX.3 **Respondent's continued argument that there was no discriminatory intent or effect is belied by the ECJ Judgment and the ECJ Opinion**

The difference in treatment of Claimant by the AD has been established in very clear terms

156. Respondent argues that Claimant is wrong in emphasizing that the Advocate General found 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*'.[85]

157. Respondent seeks to argue that the '*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*.'[86]

158. Respondent furthermore argues that '*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*

[82] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 202.
[83] Including, for example, explicitly in paras 104 (exclusion of Claimant from the scope of Articles 36 and 39a) and 110 (direct impact of the amendment on Claimant's legal situation) of the ECJ Judgment and implicitly, for example, at 113 (**Exhibit CLA-330,** Judgment of the Court (Fourth Chamber) (C-125/06 P, *Commission* v *Infront WM*), 13 March 2008).
[84] This is common in the ECJ case law. The judgments are shorter and more succinct than the much more extensive opinions of the Advocate General. The ECJ does not tend to repeat everything included in the opinion of the case. See also **Exhibit CLA-328,** P. Craig and G. De Burca, *EU Law – Text, cases and materials* (sixth edition), Oxford, 2015, p 61.
[85] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 204.
[86] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 205.

is thus no definitive interpretation of EU law that would support the Claimant's argument.'[87]

159. This is another attempt to downplay the crystal clear conclusions in the ECJ Opinion and the ECJ Judgment. Given the very harsh and clear wording of the Advocate General, Respondent's attempt is simply not understood. The Advocate General said:

> '*It can hardly be disputed that only the appellant was in that position when the measure was adopted. No other company will ever be in that position in the future. Any other pipeline, whether built in the past or to be built in the future, could in principle benefit from either the derogation or the exemption.*
>
> *Third, not only were the EU institutions aware that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the very intention of subjecting the appellant to that new regime. In addition, I note that the appellant has provided, at first instance, several documents, other than those excluded by the General Court, which suggest that the extension of the EU gas rules to the activities of the appellant was in fact one of the main reasons, if not the main reason, that prompted the EU institutions to adopt the contested measure.*
>
> *I would add, in passing, that all of this appears to be a matter of common knowledge. A cursory look at the press and academic articles concerning the adoption of the contested measure would seem to confirm the appellant's argument on this point. In that regard, I hardly need to point out that, in order to establish the relevant facts, the Court may also rely on matters of common knowledge. Justice is often depicted as being blind. However, at least in my recollection, that allegory is not meant to be interpreted as Justice being unable to see something that is blindingly obvious to everyone else.*'[88] [footnotes omitted]

160. This language leaves no doubt as to the conclusions of the Advocate General in this respect. It goes significantly further than a mere statement that Claimant is subject to the new regime and specifically finds that Claimant was the target of the legislative change introduced by the AD.

161. The ECJ did not go into as much detail as the Advocate General, which is typical in most cases[89], and did not employ the same harsh wording. However, it reached the same conclusion: Claimant's pipeline is the only pipeline that is not eligible to obtain an

[87] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 207.
[88] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 196-198.
[89] **Exhibit CLA-328**, P. Craig and G. De Burca, *EU Law – Text, cases and materials* (sixth edition), Oxford, 2015, p 61.

exemption under Article 36 or a derogation under Article 49a.[90] The Court also found that '*the **arrangements for the conditions** for exemption and derogation laid down in Articles 36 and 49a of that directive, produced effects for the appellant's legal situation in such a way as **to distinguish it individually in a manner analogous to that of the addressee of a decision**.*' [91] [emphasis added]

162. The Court is very clear in explicitly finding that the effects of the AD are analogous to a decision that targets Claimant. As Claimant has repeatedly shown, and as the ECJ Opinion has explicitly confirmed, this difference in treatment between Claimant and other comparable pipelines was not an accident or an unintended consequence. It was the intentional strategy of Respondent.

163. The ECJ Judgment and the ECJ Opinion have thus established that there was a difference between the treatment of Claimant and all other comparable pipelines and that this difference of treatment was fully attributable to Respondent.[92]

It remains to be concluded, that the difference in treatment of Claimant is discriminatory and is not justified under the ECT

164. With the first limb of the test for discrimination now being confirmed, difference of treatment, Respondent makes an attempt to claim that '*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.*'[93]

165. The first part of the discrimination test – difference in treatment – has been established by the ECJ. As was explained by Claimant in its Supplementary Memorial,[94] within the EU legal system, it is for the General Court to rule on the second part of the test – the existence of any objective reason for the different treatment – *based on EU law*. Within the framework of this arbitration, it is for the Tribunal to rule on the discrimination issue *based on the ECT*.

IX.4 <u>There is Ample Evidence that Respondent Intended to Discriminate against Claimant</u>

166. It is almost absurd, bordering on depressing, to note how Respondent continues to argue that it was never the intention of the EU to target NSP2AG,[95] despite overwhelming

[90] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 161.
[91] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 162.
[92] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 119: *Therefore, there is a direct link between the entry into force of the directive at issue and the imposition, by the latter, on the appellant of the obligations laid down by Directive 2009/73.*
[93] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 230.
[94] Claimant's Supplementary Memorial on Jurisdiction and Merits dated 27 February 2024, para 125.
[95] This is also repeated in Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 244: '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.'

evidence showing this beyond any doubt and the clear conclusion of its own Advocate General who specifically came to the obvious conclusion that it is common knowledge that

> *"…not only were the EU institutions **aware** that, by virtue of the contested measure, the appellant was going to be subject to the newly established legal regime, but they acted with the very **intention** of subjecting the appellant to that new regime."*[96]

167. This point has already been established,[97] It is obvious and of common knowledge.[98] As also demonstrated by Claimant in its Reply Memorial,[99] the EU's true intention in connection with the AD is plain from the existing record, for example from public statements of Dr Klaus-Dieter Borchardt, a high-ranking official and ultimately Deputy Director-General of DG Energy of the Commission before he left the Commission in 2020. Dr Borchardt explained to the European Parliament's ITRE Committee in a public meeting a month before the Proposal for the AD was issued that, unable to "*veto*" the Nord Stream 2 pipeline due to the constraints of the EU's WTO membership, the EU intended to introduce a piece of legislation with the purpose of regulating the Nord Stream 2 pipeline.[100] Respondent's attempts to deny these facts[101] are unconvincing.

168. It is time to stop the make-believe game concerning the intention of Respondent. It must also be recalled that the ECT does not require intent to discriminate for discrimination to have taken place. It is sufficient that the effect of a measure – i.e. the AD – is discriminatory.

169. In this context and elsewhere in its submission, Respondent makes the point that significant pipeline investments like NSP2AG are not being made every day.[102] This only serves to underline the fact that the intention of Respondent was to target Claimant, its project being the only project that, at the time when the AD was adopted, had already taken the final investment decision, had already made substantial investments and was already at an advanced construction stage and therefore could not apply for an

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

[97] Claimant's Memorial dated 4 July 2020, Section VI; Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, e.g. para 11.

[98] The fact that Claimant was the real target of the AD, has also been described in one of the leading treaties on EU energy market regulation. **Exhibit CLA-331,** C. Jones and W-J. Kettlewell (eds), *EU Energy Law Volume I: the Internal Energy Marke*t, Deventer, 2021, p 824: 'The real negotiations was between the Member States supporting Nord Stream 2 – with Germany at the forefront – that tried to find a blocking minority and opponents of the project that were mostly in favour of the Commission's proposal'.

[99] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, e.g. para 11 with references in footnotes 8 and 9 to **Exhibit C-92** (transcript) and Exhibit **C-206** (recording).

[100] Ibid.

[101] See e.g. Respondent's assertions in relation to Dr Borchardt's presentation as referenced in the previous footnote: Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, paras 542-545.

[102] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 216 and 219.

exemption under Article 36 nor obtain a derogation under Article 49a created by the AD. This was clear at the time of the adoption of the AD,[103] but Respondent again tries to have the Tribunal believe that this was not the case.

170. Finally, as explained above,[104] Respondent's mask has fallen in its latest submission. Respondent admits that it considers, and always considered, Claimant's pipeline different from all other comparable import pipelines to the EU.[105]

IX.5 **Respondent mischaracterizes the claim of Claimant by attempting to ignore the difference between being *eligible* for an exemption or a derogation and being *granted* an exemption or a derogation**

171. Continuing to mischaracterize the discriminatory nature of the AD, Respondent is claiming that Claimant is '*relying on selected excerpts from the Court Judgment on admissibility*'.[106] This discriminatory nature of the AD, however, is a matter of fact that Respondent cannot and has not rebutted. This is why Respondent is now trying to distort the argument of Claimant and in doing so attempts to downplay, or deny, the fact that the first limb of the test for discrimination, difference in treatment, has been established by the ECJ.

172. Respondent argues that '*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. 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.*'[107]

173. It continues to suggest that '*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.*'[108]

174. This line of argument is simply another attempt to mislead the Tribunal by mischaracterizing the claims of Claimant.

175. It is true that exemptions under Article 36 of the AD and derogations under Article 49a of the AD are not automatic and that they can only be granted if the relevant criteria are

[103] See paras 27 above and 175, 286 below.
[104] See Section V above.
[105] See paras 69-70 above.
[106] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 214.
[107] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 214 and 215.
[108] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 231.

met. However, that is of no relevance for this case. Claimant has never argued that it should automatically be granted a derogation. That is simply not at stake here. Instead, the critical issue is that NSP2AG is the only pipeline project that is not eligible to obtain an exemption or a derogation. It cannot obtain an exemption or a derogation because of the *arrangement of the conditions*[109] for the two options: it is excluded from obtaining an exemption under Article 36 because it had already taken the final investment decision and it was excluded by the text of the AD from the scope of the derogation under Article 49a because it was not 'completed before 23 May 2019'.

176. This is why Claimant is treated differently from all others, something that the ECJ Judgment confirmed. The ECJ also emphasized that '*the arrangements for the conditions for exemption and derogation laid down in Articles 36 and 49a of that directive, produced effects for the appellant's legal situation in such a way as to distinguish it individually in a manner analogous to that of the addressee of a decision*.'[110] This is also why the ECJ Judgment found that Claimant has the standing to challenge the Amendment when it comes to Articles 36 and 49a of the AD.

177. In other words, the argument is not about a guarantee or even likelihood of being granted an exemption or derogation. Rather the claim put forward by Claimant concerning discrimination is about not being eligible to obtain either of the two options which were available to all other projects, existing or future.

178. Respondent's position that Claimant would not receive an exemption or derogation under any circumstances, is also revealing of Respondent's discriminatory treatment of Claimant. This is because under Respondent's own case everything inevitably comes down to the fact that Claimant would be caught by the new regime and would never obtain a derogation. This is a text book example of discriminatory treatment.

IX.6 **The ECJ is clear in its conclusions on Article 36 of the AD**

Respondent attempts to rescue its hopeless Article 36 argument contradict the conclusions of the ECJ

179. Respondent continues to argue that Claimant had the opportunity to apply for an exemption under Article 36 of the Gas Market Directive.

180. Respondent first argues[111] that the clear finding in the ECJ Judgment and it's the ECJ Opinion '*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*

[109] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 162.
[110] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 162.
[111] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 225.

at the date of adoption of the directive at issue'"[112] was '*only made in the context of an assessment on admissibility and for that purpose only.*'[113]

181. Respondent then suggests that the ECJ '*did not extensively consider this issue beyond its bare statement, and its conclusion relied solely on a reference to the Advocate General's Opinion relating to Article 36. As such, this is far from being a "decided issue" before the Court from a substantive point of view*.'[114]

182. Respondent continues to claim that '*Article 36 does not use "final investment decision" as criterion but refers to the "level of risk" 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.*'[115]

183. It is highly unusual – indeed unprecedented - that Respondent is arguing that its own highest Court would provide a legally binding interpretation of Article 36, a key provision for the outcome of the dispute before it, without extensive consideration. This is even more perplexing in the case at hand, where the ECJ Judgment was rendered by the Grand Chamber, illustrating that the Court considered the case to be complex or important.[116] This suggestion by Respondent that the ECJ would make important conclusions in such cases, or in any case for that matter, without careful consideration will raise many eyebrows in legal circles around the world, certainly in Europe.

184. The interpretation of the ECJ is clear. This is the end of the road concerning that point in the case pending before the EU Courts. The ECJ concluded that '*the investments for the Nord Stream 2 gas pipeline had already been decided at the date of the adoption of the directive at issue, which excluded that pipeline from the benefit of an exemption under Article 36 of Directive 2009/73, which applies to major new gas infrastructures or to significant increases of capacity in existing infrastructure'*.[117] Given that this was clear from the wording of the Directive and had been discussed by the Advocate General, there was no need for '*any further discussion or analysis*'.

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[112] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council*), 12 July 2022, para 104, see also paras 105 and 160.
[113] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 226.
[114] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 226.
[115] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 227.
[116] **Exhibit C-316,** Court of Justice of the European Union website (last access on 02 September 2024 at https://curia.europa.eu/jcms/jcms/Jo2_7024/en/): the Court 'sits in a Grand Chamber when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases.'
[117] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council*), 12 July 2022; para 104.

185. In other words, the ECJ simply confirmed the correct interpretation given by the Advocate General. Against this background, Respondent's argument that '*The Claimant's suggestion this criterion governs access to Article 36 is thus simply wrong as a matter of EU law*'[118] is in direct conflict with the authoritative interpretation provided by the ECJ and is simply not understood.

Respondent continues to make incorrect and misleading comparisons in its attempt to rescue its hopeless Article 36 argument

186. Respondent continues to argue that the exemption for the OPAL pipeline is an example where Article 36 of the AD was applied to projects that had clearly already passed the stage of the final investment decision.[119] Claimant has already explained that this is not correct and that the final investment decision had not been taken in the OPAL project prior to the exemption.[120]

187. In addition to the flawed OPAL example, Respondent now provides another equally flawed example. Respondent argues:

> '*A more recent decision in the same sense is the decision relating to the LNG Terminal of Deutsche ReGas in Lubmin. 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 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.*'[121]

188. Even a cursory reading of this exemption decision[122] shows that, like in OPAL, the final investment decision had not been taken. Illustrative sections from the exemption decision include:

> '*(10) Deutsche ReGas has signed binding capacity contracts with which are conditional on the granting of the exemption.*'
>
> '*(115) Germany introduced a framework for regulated access to LNG terminals on 16 November 2022. Deutsche ReGas explained that it would not take the final investment decision ('FID') if the terminal would be subject to the regulated regime.*'

[118] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 227.
[119] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 228.
[120] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, paras 186-190.
[121] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 228.
[122] **Exhibit CLA-332,** Commission Decision "on the exemption of Deutsche ReGas GmbH & Co. KGaA LNG Terminal in Lubmin (Germany) from certain provisions of Directive 2009/73/EC pursuant to Article 36 of that Directive" (document available at https://energy.ec.europa.eu/system/files/2023-01/2022_deutsche_regas_decision_en.pdf), 20 December 2022.

'*(119) Deutsche ReGas has confirmed that the final investment decision will depend on the exemption and the possibility for long-term capacity bookings. An exemption would set the regulatory framework allowing for long-term capacity bookings ensuring a targeted cash flow and reduce the risk to a level allowing the investment to go ahead. The measures that have been undertaken so far are considered to be preparatory measures and the "point of no return" has not yet been crossed according to the project promoters.*'[123]

189. This example illustrates Respondent's continuous attempts to mislead the Tribunal by mischaracterising facts. The other possible explanation is that Respondent is unfamiliar with large infrastructure investments. As pointed out by the Advocate General '*Pipelines are not clementines*'.[124] Pipeline projects require significant steps to be taken prior to the final investment decision. As has been explained by Claimant,[125] it is not unusual that investors enter into substantial financial commitments already prior to the final investment decision in the context of such large infrastructure projects. This is exemplified by the two cases referenced by Respondent. In both OPAL and Deutsche ReGas GmbH & Co. KGaA LNG Terminal, significant agreements were concluded prior to the final investment decision.[126] However, these financial commitments are not to be confused with the final and irreversible investment decision.

190. Be that as it may, Respondent's argument that the conclusions of the ECJ are wrong and should be ignored is in direct conflict with the constitutional division of powers within the EU. Within the EU legal system, the ECJ is the sole institution that can provide an authoritative and final interpretation of EU laws. It is also the only EU institution that has the power to change that interpretation. The European Commission as the executive organ of the EU, or the legislative organs of the EU do not have that power, and of course not the Legal Service of the European Commission which is representing Respondent in these arbitral proceedings.

191. The ECJ has provided an authoritative interpretation of the scope of Article 36 that the Tribunal can safely rely on. The views expressed by Respondent in this respect are irrelevant.

[123] Ibid.
[124] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 103.
[125] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, para 189.
[126] In relation to OPAL ibid. In relation to the LNG case see para 188 above.

IX.7 Respondent continues to make incorrect comparisons with future projects and other existing pipelines

192. Respondent's statement that interconnectors to third countries may in the future be built without an exemption (or, obviously, without a derogation)[127] is of no relevance to this case. It does not change the discriminatory nature of the AD that specifically targets Claimant.

193. This statement by Respondent is also connected to the financing model of such future projects. Privately funded projects, which require an exemption because of significant investment risks, are in this respect entirely different from publicly funded projects (such as EU or Member State financing). Publicly funded projects do not carry similar investment risks, do not require project financing. An exemption under Article 36 of the AD is therefore not a prerequisite for the investment in question to take place.

194. The exemption of Deutsche ReGas GmbH & Co. KGaA LNG Terminal in Lubmin, referenced by Respondent in a failed effort to show that projects that are almost completed can still be granted an exemption (discussed in paras 187 et seqq. above), explains some of the reasons why privately funded projects require an exemption in order to take the final investment decision.[128] These reasons are connected with the security that investors require with respect to utilisation, costs and foreseeability.

195. Respondent also continues to argue that there are other existing pipelines that are subject to the Gas Directive without benefiting from an Article 49a derogation.[129] Claimant has already explained how these other projects are different from NSP2AG's project.[130] For these projects, EU law applies on the EU side of the border crossings and their regulatory position was unaffected by the AD. These other pipelines are not comparable to Claimant's pipeline.

IX.8 Respondent continues to claim that the extension of the scope of the EU gas market framework to offshore pipelines was foreseeable

196. Respondent's position on the applicability of EU gas market rules to offshore pipelines has been incoherent and has changed throughout these proceedings, as already demonstrated by Claimant.[131]

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[127] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 216.
[128] **Exhibit CLA-332,** Commission Decision on the exemption of Deutsche ReGas GmbH & Co. KGaA LNG Terminal in Lubmin (Germany) from certain provisions of Directive 2009/73/EC pursuant to Article 36 of that Directive (document available at https://energy.ec.europa.eu/system/files/2023-01/2022_deutsche_regas_decision_en.pdf), 20 December 2022.
[129] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 217.
[130] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, Section III.3 (paras 73-89).
[131] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, para 17.

197. Respondent continues to suggest that a duly diligent investor should have known that the EU gas market framework already applied or stood likely to be rendered applicable to pipelines such as NSP2AG. Respondent now suggests that '*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.*'[132]

198. This is a poor attempt to undermine the fact that the ECJ has now confirmed that the EU gas market rules did in fact not apply to offshore pipelines such as Claimant's bringing gas to the EU market and that the AD extended the scope of the Gas Market Directive to apply to Claimant's project.

199. Contrary to what Respondent is trying to argue, the ECJ Judgment simply confirms that the position and interpretation of Claimant (non-applicability of the EU gas market rules to its investment) was sound and legally correct:[133]

> *"79. (…) as regards the argument that Directive 2009/73 already applied, before the entry into force of the directive at issue, to interconnectors such as that of the appellant, that argument is, in any event, clearly contradicted both by the object of the latter directive, as set out in recitals 3 and 4 thereof, and by the amendment of the definition of the concept of 'interconnector' laid down in Article 2(17) of Directive 2009/73."*

200. Claimant has repeatedly shown that there was no indication at the time of the final investment decision that this situation would suddenly change.[134] It was not a 'loophole' which resulted in the inapplicability of the gas market rules to Claimant's investment, but a logical approach (internal gas market rules apply in the internal market, i.e. starting at the entry to the EU gas network at the onshore border, not beyond that internal market). It had furthermore been the standard practice in relation to all offshore import pipelines, and, it must be emphasized, continues to be the *de facto* approach for all other pipelines except for NSP2AG. The AD thus changed the situation for Claimant, requiring it to introduce profound changes to its corporate and financial structure and to its business model.[135]

201. Respondent also continues to claim that Claimant's parent company Gazprom was aware in October 2015 that the Regulatory Requirements could apply to pipelines such

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[132] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 213.
[133] **Exhibit CLA-323**, Judgment of the European Court of Justice (Case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*), 12 July 2022, para 79. For further details see Claimant's Supplementary memorial dated 27 February 2024, paras 127 et seqq.
[134] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, paras 83-93.
[135] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, paras 96 and 199.

as NSP2AG.[136] In a lame effort to show this, Respondent repeats its earlier reference to the 'Gazprom October 2015 Prospectus' [137] and claims that 'this evidence stands unrefuted.'[138] In the following paragraphs Claimant will show how this is, once again, nothing but an attempt to mischaracterize facts.

202. As noted, in its 22 February 2022 Rejoinder on the Merits, Respondent made an attempt to show that the parent company of Claimant, Gazprom, would have known that the 2009 Gas Directive would apply to Nord Stream 2 project already in 2015. In doing so it made a reference to the "Gazprom October 2015 Prospectus".[139] It claims that '*In this context, Gazprom expressly warned that the original Gas Directive could result in the Regulatory Requirements being imposed against Nord Stream 2*'[140] and then re-produces a small section from the 457 pages of text in the prospectus, which it claims to be specifically about NSP2AG. This is a mischaracterization of facts.

203. In reality, this copied section has nothing to do with NSP2AG or offshore pipelines. Without any specific references, the text describes the general potential impact of the 2009 Gas Market Directive on Gazprom operations within the EU internal market. The sections around the selected part of the text are clear in this respect and read:

> '*In addition, as a result of its liberalization in recent years, the Western European gas market has undergone a significant structural change. [The 2003 and 2009 EU Gas Market Directives] have brought about significant liberalization of the EU gas market by introducing greater competition into the market in order to reduce gas prices for the end-user.'*[141]

204. The Prospectus goes on to describe the EU unbundling models and based on this states that

> *'The requirements relating to vertical disintegration apply not only to European undertakings but also to foreign vertically integrated undertakings* ***operating in the EU,*** *including the Group. The Third Gas Directive's precise effect on our operations is yet to be determined. If, pursuant to the Third Gas Directive, an EU state chooses to implement the most restrictive measures on participation of energy producers in ownership and management of the transportation networks, it may limit the activities in which we are permitted to engage which may force us to dispose of* ***our gas***

[136] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 213.
[137] Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, paras 199-205.
[138] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 213.
[139] Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, paras 199-205.
[140] Respondent's Rejoinder on the Merits & Reply Memorial on Jurisdiction dated 22 February 2022, para 201.
[141] **Exhibit R-166**, Public Joint Stock Company Gazprom Programme for the Issuance of Loan Participation Notes. Base Prospectus of October 1, 2015. The Irish Stock Exchange, p 14 (available at https://www.ise.ie/debt_documents/Base%20Prospectus_df7bcf97-61df-490e-a492-6e7ba158cb35.pdf).

***transportation assets in Europe**. These restrictions could affect our competitive position and our ongoing or contemplated projects, and, consequently, our results of operations. A number of disagreements have arisen between Gazprom and Lithuania as a result of the implementation of the Third Gas Directive in Lithuania. See "Gazprom—Litigation and Investigations."*

In addition, the implementation of the Third Gas Directive could negatively affect the timing and prospects of our gas transportation projects in Europe. In particular, inconsistencies between the provisions of the Third Gas Directive and the terms of bilateral intergovernmental agreements entered into by and between the Russian Federation and the countries that participated in implementing the South Stream pipeline project became one of the reasons for the cancellation of the project in 2014 and its substitution for an alternative project, the Turkish Stream pipeline.

*The liberalization of the gas market in Europe may also result in a declining role for long-term contracts, which could, in turn, adversely affect the stability of our revenues. Further, in the absence of a special permission granted in accordance with the EU laws, it may not be possible for us to own and control **gas transportation assets in Europe**. Our ability to implement gas transportation projects in Europe may also be affected by the provisions of the Third Gas Directive, which could have a material adverse effect on our operating results in Europe.*'[142] [emphasis added]

205. Nothing in the reproduced sections of the document suggests that the parent company of Claimant '*was well aware in October 2015 that the Regulatory Requirements could apply to pipelines such as Nord Stream 2*'.[143] This document refers generally to transport networks operating in the EU and reflects the difficulties Gazprom had faced in the context of the onshore sections of the South Stream project[144] as well as the legal challenges in relation to the third-country certification which had an impact on the ability of third-country companies' ownership and management of network assets within the EU internal gas market. There are no indications that Gazprom as the parent company of Claimant expected that the EU gas market rules would be radically changed to apply upstream of the landing terminal within the EU gas market or specifically to NSP2AG. This is clear. The reference to the 2015 prospectus is simply another attempt of Respondent to mislead the Tribunal.

[142] **Exhibit R-166**, Public Joint Stock Company Gazprom Programme for the Issuance of Loan Participation Notes. Base Prospectus of October 1, 2015. The Irish Stock Exchange, p 14 (available at https://www.ise.ie/debt_documents/Base%20Prospectus_df7bcf97-61df-490e-a492-6e7ba158cb35.pdf).

[143] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 199.

[144] As has been explained by Claimant before, the South Stream project consisted of several legally separate infrastructure sections. The imposition of the third energy package on onshore sections of this pipeline and EU views in relation to the intergovernmental agreements signed between Russia and several EU Member States, eventually led the cancellation of the South Stream project. See for example, Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, paras 114-115.

IX.9 **Other flawed arguments by Respondent**

206. Despite the clear wording of the AD, and the conclusions of the ECJ Judgment and the ECJ Opinion, Respondent continues to argue that '*There is no 'gap' for certain pipelines and no differential treatment for Nord Stream 2.*'[145]

207. As Claimant has shown,[146] the gap left for Claimant in the EU regulation is clear and cannot be disputed. This amounts to differential treatment of Claimant. The ECJ Judgment has identified and confirmed this.

208. In order to support its claim relating to the alleged difficulty in assessing market and security of supply impacts of new pipelines (despite of over a decade of continues practice in doing so), which Claimant will show to be another baseless argument,[147] Respondent makes a confusing effort to claim that the Gas Directive, which has been amended by the AD, includes other flexibility mechanisms for new pipeline projects,[148] including NSP2AG,[149] in addition to Article 36. It refers to the three unbundling models and Article 9(6) of the Gas Directive, which has been amended by the AD.

209. This is, again, misleading as none of these options concern, or are available for, individual pipeline projects. *First*, the unbundling options are a matter for the Member States to decide how to organize their national transmission system operator(s), without considering individual pipeline projects. *Secondly*, Article 9(6) of the Gas Market Directive relates to the organization of Member State ownership of gas market actors and provides that unbundling requirements are deemed to be met when the public ownership is organized in '*two separate public bodies exercising control over a transmission system operator or over a transmission system on the one hand, and over an undertaking performing any of the functions of production or supply on the other, shall be deemed not to be the same person or persons.*'[150]

210. Pipeline companies are not '*given the option of relying on [these] flexibilities*'.[151] Instead, they concern Member States and their decision on organisation of gas markets and State control of gas market undertakings. These provisions are thus irrelevant for these proceedings.

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[145] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 229.
[146] See Section IX.5 above.
[147] See Section XI.1 below.
[148] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 237.
[149] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 206.
[150] **Exhibit CLA-4**, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211 (the Gas Directive), Article 9(6).
[151] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 237.

X. RESPONDENT FAILS TO DEMONSTRATE ANY BENEFITS OF THE APPLICATION OF THE AD AND EU GAS REGULATION TO THE SHORT SECTION OF CLAIMANT'S PIPELINE IN GERMAN TERRITORIAL WATERS

X.1 Respondent presents a puzzling compilation of EU provisions with alleged benefits for security of supply if applied to Claimant

211. Respondent has been unable to show any direct competition and internal market or security of supply benefits from imposing the EU gas market rules on a small stretch of offshore import pipelines bringing gas to the EU internal gas market. Respondent has now created a list of provisions which it pretends have these types of benefits, in particular in the context of Claimant's pipeline. The Tribunal will recall that once the gas transported in Claimant's pipelines reaches the EU internal market – i.e. when the pipeline makes landfall at Lubmin – EU regulations apply with full force and effect.

212. The list seems to be a compilation of general rules designed for the transmission system operators **within** Member States. Some of the provisions simply refer to obligations of Member States or the role of the European Commission in certain procedures. There is no explanation why these provisions were included in the list and there is no explanation of the alleged benefits when applied to an external pipeline bringing gas to the EU internal gas market.

213. As Claimant will show separately below,[152] the list in Annex II is nothing but a random compilation of provisions from various regulatory instruments of EU energy law. Claimant will in the following address some of these items from the list which are also included in the text of its Supplementary Counter-Memorial. Respondent suggests that the list is a '*comprehensive overview of the main provisions to enhance security of supply*' allegedly '*demonstrating their importance and effectiveness to ensuring security of supply*'.[153]

214. *First,* Respondent claims that *'a number of provisions relate to the specific risks resulting from the operation of a pipeline by a third country owner*.'[154]

215. One such provision is the third-country certification under Article 11 of the Gas Directive, which has been amended by the AD.[155] Third-party certification is a regulatory tool to ensure that third-country control of **internal** gas infrastructure **within the EU internal market** does not lead to negative competition or security of supply consequences. Concerns in this respect relate to strategic under-investment and politically motivated measures that undermine the functioning of the **internal** gas market. This provision of the Gas Directive applies to operators of pipelines within the EU that uptake gas

[152] See Section X.2 below.
[153] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 267.
[154] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 268.
[155] Also Articles 36 and 49a are included in the list of security of supply related provisions highlighted separately in the text (paras 272 - 275).

transported through Claimant's pipelines as and when they are under third-country control. Respondent cannot explain what the justification is for extending the application of that provision to a short stretch of an offshore import pipeline in German territorial waters.

216. There is no role for Article 11 in the context of an external pipeline that only connects the EU gas market and a third country and is dedicated for gas imports by one exporter. Unbundling obligations do not play any role for a single pipeline that only transports gas from a single source, be that Russia, Algeria or any other exporting country. In this case the potential concerns relate to the export of gas, not the pipeline itself, as will be explained below at (para 221).

217. This is also demonstrated by the fact, as Claimant has already shown[156], that the certification mechanism is not applied to any other offshore import pipeline except NSP2AG. All other offshore pipelines have a long-term derogation from certification, which is furthermore renewable. If certification of offshore import pipelines had been critical for security of supply, the derogation under Article 49a of the AD would not have provided for the possibility to derogate from the certification requirement.

218. *Secondly,* Respondent argues, at length, how NSP2AG poses a significant risk to EU security of supply, with references to the Brattle Report.[157] As has been noted before,[158] most of this text, as well as the Brattle Report, focuses on post 2019 circumstances and makes an attempt to justify something that took place years before, with events that took place much later. As mentioned in para 46 this is legal and logical *abracadabra*.

219. At this juncture, suffice is to note again that Claimant received a positive security of supply assessment in the German certification proceedings. On 26 October 2021, the Germany's Federal Ministry for Economy and Energy (which is today the Federal Ministry for Economy and Climate Action) had concluded that the NSP2AG certification would not endanger the security of supply. This assessment is addressed below.[159] It definitively eliminates Respondent's long-winded arguments to the contrary. This decision is obviously of direct relevance for these proceedings and shows that after careful consideration, the German Ministry concluded that NSP2AG certification did not pose a security of supply risks at the time. The subsequent withdrawal of the Security of Supply assessment took place at a later stage and is not relevant for the proceedings before the Tribunal, as will be explained below.[160]

[156] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, para 66.
[157] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 281-299.
[158] See paras 39, 46, 103 below.
[159] See Section XI.2 below.
[160] See paras 106-107 above and 268 below.

220. *Thirdly,* Respondent highlights a number of measures intended to *minimise supply risks resulting from interruptions*.[161] These relate to transparency obligations under the EU regulatory framework. Also elsewhere in its Supplementary Counter-Memorial Respondent refers to transparency obligations of transmissions system operators (TSOs).[162]

221. Such transparency obligations under the EU regulatory framework are a key part of the regulation of the **internal gas market.** National TSO's may in certain situations have an incentive to misuse the control of their pipeline to manipulate markets, foreclose competition, etc.[163] However, these requirements do not fit with and are not applicable to a single pipeline bringing gas from a single source and by one exporting company, like Gazprom or Sonatrach. In such cases, the market and security of supply considerations are connected to the gas company shipping gas through the pipeline, rather than the pipeline itself, which only serves as a transporter. All gas volumes transported through offshore pipelines are fully within the scope of EU energy law at the landing terminal, the AD only moves the point of application of EU gas market rules about 50 km upstream of the landing terminal. It remains Respondent's secret what exactly such extension adds to the regulated internal gas market.

222. *Fourthly*, in relation to the REMIT Regulation, referenced by Respondent,[164] it must be noted that both the Gas Supply Agreement and the GTA fall within the scope of Remit Regulation regardless of the AD.

223. Again, if further transparency were critical, these rules would have been imposed on all pipelines, and not only on Claimant's pipeline. Moreover, imposing such information/transparency obligations could have been done through much less far-reaching legal instruments, instead of imposing the full extent of the EU gas market framework on offshore pipelines with all the negative consequences that follow.

224. Consequently, in terms of proportionality considerations, adopting the AD was neither necessary to impose information/transparency obligations, nor is there an adequate balance between the significant impact of the AD on Claimant, which goes far beyond information/transparency obligations, and the non-existent public benefit of the AD for the EU internal gas market. The very generic and vague explanations of Respondent as to an alleged public benefit are very far from outweighing the very concrete and intrusive

[161] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 276.
[162] E.g. Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, e.g. paras 277, 315.
[163] Examples include **Exhibit CLA-333,** Commission decision (Case COMP/B-1/39.402, *RWE Gas Foreclosure*), 18 March 2009; and **Exhibit CLA-334,** Commission Decision (Case COMP/39.316, *Gaz de France*), 03 December 2009.
[164] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 278.

impact of the AD on Claimant – notably an impact on no other offshore import pipeline to the EU, but Claimant's.

225. Regulating a short section of Claimant's pipeline makes even less sense, when considering the technical and safety aspects: As Claimant has explained,[165] Nord Stream 2 was designed to be operated as one pipeline by one operator with full control and oversight. Safe separation of the German Section is technically challenging.

X.2 The list of alleged 'benefits of the application of EU gas legislation to the EU Section of Nord Stream 2 AG' in Appendix II is an empty box

226. Many of the items on the list in Appendix II of the Supplementary Counter-Memorial make very little sense. For most part, the provisions in various gas market relevant directives and regulations are **irrelevant in this arbitration.** They only add to the confusion about the role of this list. In fact it undermines Respondent's credibility. By way of illustration, Claimant provides below some examples taken from this list:

Gas Directive

227. **Article 7** of the Gas Market Directive creates obligations for Member States and their transmission system operators ('TSO'). In particular, **Article 7(4)** provides that the integrated systems of TSOs at regional level shall cover two or more Member States for capacity allocation. The objective of this provision is to support the integration of national markets at one and more regional levels. While it makes perfect sense to apply this provision in the context of national TSOs in order to encourage market integration, this does not make sense for an external offshore gas pipeline, which functions only as an import infrastructure for gas from a third country.

228. **Article 39** of the Gas Market Directive simply deals with the establishment of national regulatory authorities and the related independence requirements. This has no relevance for this case.

Gas Market Regulation

229. **Article 3** of the Gas Market Regulation deals with the European Commission's role in the certification of national TSOs. This has nothing to do with the facts of this case.

230. **Article 12** of the Gas Market Regulation deals with, for example, creation of regional cooperation within the European Network of Transmission System Operators for *Gas* (ENTSOG), regional investment plans, promotion of the development of energy exchanges and coordinated allocation of cross-border capacities. This has nothing to do with the facts of this case.

[165] Claimant's Memorial dated 4 July 2020, paras 349 et seqq.

Remit Regulation

231. The **Remit Regulation** deals with insider trading and market manipulation and creates transparency obligations for market participants. As has been explained earlier,[166] the relevant concern for offshore import pipelines is not the operation of the pipeline but the flow of gas and both the Gas Supply Agreement and the GTA are already within the scope of the Remit Regulation. Also, the REMIT Regulation applies to the onshore extensions of offshore pipelines and their capacity usage.

Security of Gas Supply Regulation

232. **Article 3** of the Security of Gas Supply Regulation creates obligations for Member States. They must designate a competent authority and cooperate with the European Commission. This has no relevance to the facts of this case.

233. **Article 5(7)** of the Security of Gas Supply Regulation deals with investments for enabling or enhancing bi-directional capacity where this is not required by the market but is considered to be necessary for the security of gas supply purposes and where the investment incurs costs in more than one Member State or in one Member State for the benefit of another Member State. It provides that in such situations, the national regulatory authorities of all Member States concerned shall take a coordinated decision on cost allocation before any investment decision is taken.

234. The provision makes sense in certain internal EU situations. But it is completely irrelevant for an import pipeline, like Claimant's, which is a 'one-way highway' bringing large volumes of gas to the EU gas markets.

235. **Articles 7-10** concern procedural aspects of the security of supply related planning by Member States, their competent authorities and the European Commission and their roles and obligations.

236. These procedural obligations for Member States have little to do with external pipelines supplying gas to the EU market. Even the reporting obligations are only remotely connected with these pipelines where the main concern is the level supply of gas from the exporting country.

237. Similarly, **Articles 11-13** of Security of Gas Supply Regulation provide rules for Member States and the role of the European Commission, rules for regional and EU side measures and solidarity obligations. These are all internal EU measures that do not cover external pipelines bringing gas to the EU market.

[166] See para 222 above.

X.3 **Conclusion**

238. It is clear that the list provided by Respondent is nothing but a random collection of provisions from various EU directives and regulations. Respondent has not been able to explain how these provisions apply to external pipelines or how they are supposed to have a positive impact on competition and market functioning or security of supply. The simple answer is that there is no explanation.

239. Respondent does not even make an attempt to explain the alleged benefits in the situation where the AD only extends the EU gas market framework to one single pipeline and only to a short section thereof in German territorial waters. If one were to assume that the effects of the provisions included in Respondent's list would actually bring significant competition and internal market or security of supply benefits (*quod non*), these provisions would apply to all import pipelines, not only to Claimant's.

XI. RESPONDENT'S ASSERTIONS IN RELATION TO SECURITY OF SUPPLY AND COMPETITION, INCLUDING THE BRATTLE EXPERT REPORT, ARE IRRELEVANT AND INACCURATE

XI.1 Introduction

Respondent past attempts to rely on security of supply and competition have failed

240. The Tribunal will remember discussions in this arbitration about security of supply and competition. In a nutshell, this previous discussion can be summarized as follows:

241. In previous submissions Respondent has highlighted the two elements of ensuring competition in the EU internal market for natural gas and of ensuring security of supply as objectives of the Gas Directive.[167] Respondent has argued that also the AD aims, amongst other things, to ensure competition and security of supply.[168]

242. Claimant, and Professor Cameron in his two Expert Reports, have explained, that and why the AD does **not** contribute to any of its purported objectives, including competition and security of supply.[169] For example, none of the policy documents produced by Respondent prior to the AD regarding the regulation of the gas market or security of supply ever identified the non-application of the Gas Directive to offshore import pipelines as a problem. The Gas Directive has always applied on the EU side of border connection points, i.e. in the present case at Lubmin. Five of the six offshore import pipelines to the EU, i.e. all but Claimant's pipeline, have received a derogation pursuant to Article 49a of the AD. Respondent's arguments about the purported objectives of the AD are simply not credible.

243. In other words, the objectives allegedly pursued by the AD are spurious and invented. Respondent has addressed these points only on the most superficial level. The Expert Report of Professor Maduro omits any meaningful explanation of how the purported objectives of the AD could be achieved. He simply assumes that they can. Simply repeating that the AD can achieve its purported objectives does not change the fact that it does not.

244. Until this day, Respondent has not explained how – specifically – the competition in the EU internal gas market and security of supply can benefit from regulating only Claimant and only a short offshore section of its pipeline. This point will be addressed below.[170] Claimant also notes a second line of argumentation, which Respondent has relied on in

[167] Respondent's Counter-Memorial on the merits dated 3 May 2021, paras 72-80.
[168] Respondent's Counter-Memorial on the merits dated 3 May 2021, paras 92-98. And again in Respondent's Supplementary Counter-Memorial dated 4 July 2024, paras 248 et seqq.
[169] Claimant's Reply Memorial dated 25 October 2021, paras 211 et seqq., para 624.
[170] See Section X above and paras 330 et seqq. below.

the context of competition: Respondent has argued that – irrespective of the AD – requirements comparable to ownership unbundling, TPA and tariff regulation could have been imposed by the European Commission under EU competition law in order to address conduct by offshore pipeline operators allegedly amounting to abuse of a dominant position in violation of Article 102 TFEU.[171]

245. As explained by Claimant in further detail,[172] this line of argument leads Respondent nowhere in this arbitration. It is irrelevant for this arbitration. Claimant's claim is in respect of the enactment of the AD, not EU competition law, which, moreover, has never been enforced in relation to NSP2AG.

Respondent's new arguments in relation to security of supply and competition continue to fail on all counts

246. In its Supplementary Counter-Memorial, Respondent again relies on security of supply and competition. It now attempts to find a new hook to hang its argument on. After years of arbitration, Respondent and Brattle now rely on the argument, that Claimant could not be granted an exemption nor a derogation, because it would not meet the security of supply tests and the competition tests as stipulated in Article 36 and Article 49a of the AD respectively.[173] Claimant notes, and will explain below,[174] that these tests are different in the two provisions, a fact which Respondent ignores.

247. In this context, Respondent suggests that Claimant's asset, if in unregulated operation, would be a threat to security of supply in the European Union. Respondent further alleges that Claimant's asset, if in unregulated operation, would harm competition within the European Union.[175] Respondent also suggests, that it was necessary to adopt the AD in order to assess security of supply and competition, because these elements need to be assessed when deciding whether to grant a certification, an exemption or a derogation.[176]

248. In addition Respondent repeats that the right to third party access to Claimant's pipeline in German territorial waters could somehow be beneficial for the competition in the EU internal gas market.[177]

249. As will be explained below, Respondent's attempts to defend the adoption of the AD by relying on competition and security of supply fail on all counts.

[171] Respondent's Counter-Memorial dated 3 May 2021, e.g. para 150.
[172] Claimant's Reply Memorial dated 25 October 2021, paras 95 et seqq.
[173] Respondent's Supplementary Counter-Memorial dated 4 July 2024, paras 245 et seqq.
[174] See paras 289-291 below.
[175] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, e.g. paras 287, 290, 318.
[176] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 250 et seqq., paras 308-312.
[177] Respondent's Supplementary Counter-Memorial dated 4 July 2024, paras 313 et seqq.

250. Respondent's arguments which are largely based on Article 36 of the AD are flawed both with respect to competition and security of supply, to wit for the following reasons:

251. *First,* Article 36 of the AD is the wrong provision. Respondent's and Brattle's arguments are almost exclusively focused on exemptions under Article 36 of the AD and the requirements stipulated in that provision in relation to security of supply and competition. Respondent and Brattle are clearly missing the point. Claimant has explained, and will explain again that Article 36 is not applicable to Claimant's project.[178] The European Court of Justice has confirmed this.[179] This notwithstanding Respondent carries on with its Article 36 saga. It does not lead anywhere in this case. Claimant will return to this issue in more detail.[180]

252. *Secondly,* Respondent's and Brattle's arguments are heavily inspired by the developments since February 2022. Most of Respondent's description in relation to the alleged competition and market impact and the security of supply consequences focus on current, post-February 2022, circumstances. The relevant point in time here is 2019, when the AD was adopted. Nothing in what Respondent tries to argue to the contrary in this regard can change this. The world was clearly different in 2019 and before February 2022.

253. The post-February 2022 considerations in Respondent's Supplementary Counter-Memorial, and in the Brattle Report, are therefore irrelevant for the Tribunal. Respondent cannot justify the actions it took in 2019, with events that took place years after the adoption of the AD.

254. In addition, Respondent tries to ignore the fact that Claimant received, on 26 October 2021, a positive security of supply assessment in the German certification proceedings. This assessment is of decisive importance. It completely eliminates Respondent's long-winded *ex post* arguments to the contrary. Claimant will explain that in further detail below.[181]

255. *Thirdly,* Claimant's claim is about not being **eligible** to apply for an exemption under Article 36 nor for a derogation under Article 49a, because the AD excludes Claimant from those options. Claimant's claim in this arbitration is not about not being **granted** such an exemption or a derogation, but about being **excluded** even from the **possibility of obtaining** either of them. Respondent's and Brattle's long-winded discussion does not explain anything in relation to the selected cut-off date 'completed before 23 May 2019' for derogations under Article 49a.

[178] See paras 30, 179 et seqq. above, paras 285 et seqq. below.
[179] See Section IX.6.
[180] See paras 285 et seqq.
[181] See paras 262 et seqq.

256. It is telling that Respondent now argues at some length and in some detail, that had Claimant been able to apply for an exemption under Article 36, it would not have qualified for one.[182] This again clearly shows that from the outset Respondent intended to undermine NSP2AG. This confirmation directly contradicts Respondent's argument that it did not intend to target Claimant's project. Also, it is entirely irrelevant as Claimant's project does not fall within the scope of Article 36.

257. Claimant is not comparable to new interconnectors where the final investment decision has not been made. Claimant has never argued this point. It is, however, comparable to completed infrastructure, as it had already made significant irreversible investments in the pipeline that was almost completed, and should have been eligible to apply for a derogation under Article 49a. Claimant has also explained that compared to the derogation under Article 49a, the exemption under Article 36 is different in its scope. Article 36 and Article 49a are fundamentally different. Therefore an exemption cannot be considered as a "substitute" for a derogation.[183]

258. *Fourthly,* it was **not** necessary to adopt the AD in order to ensure security of supply and competition. As will be demonstrated below, there was no security of supply or competition issue in relation to Claimant's pipeline.[184] It provides transport services for gas deliveries to the EU market from one exporter, nothing more. Furthermore, as has already been demonstrated by Claimant, the AD does not add anything to these purported objectives.[185] In addition, Respondent's argument is even less credible when considering the following: It would have been logical **not** to exclude Claimant from the scope of Article 49a by selecting the cut-off date 'completed before 23 May 2019' if Respondent really wanted to make sure that security of supply and competition are assessed in relation to Claimant. Instead, Respondent excluded Claimant from Article 49a.

259. *Fifthly,* as Respondent confirms, there are already instruments in EU law to ensure security of supply and competition. With respect to competition this is EU competition law.[186] With respect to security of supply Respondent itself explains:[187]

> *The serious gas supply disruptions experienced by some EU Member States in 2006 and 2009 demonstrated the need to strengthen and coordinate the emergency*

[182] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 280 et seqq.
[183] Claimant's Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021, paras 169-185, in particular paras 183 and 184.
[184] See Section XI.3 below.
[185] See paras 240 et seqq. above.
[186] See Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, Section 4.3.3.3.1. See also in this regard paras 244 above and 337-338 below.
[187] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 260 with references in footnotes 228 and 229.

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, a dedicated instrument providing for various measures to safeguard security of gas supply, which was later replaced by Regulation (EU) Regulation (EU) 2017/1938, which currently contains the framework of the EU's security of gas supply rules. [footnotes omitted]

260. *Finally,* contrary to what Respondent is trying to argue, its lengthy discussion about security of supply and competition only shows the views of Respondent vis-à-vis Claimant's project. The true intention of Respondent was to treat Claimant's project differently from other comparable projects. This confirms that the AD is in fact a *lex-Nord Stream 2*. Other than this confirmation, the entire discussion in the Brattle Report is irrelevant for the Tribunal.

261. The Brattle Report is essentially an exercise in academic and theoretical ideas concerning competition in the gas sector and security of supply. None of these theories have materialized in real life. Indeed, there is not one single document before the Tribunal showing, or even suggesting, that the consequences that the Brattle Report refer to have occurred, or that there was any risk of them occurring. This is a report directly from a consultant's laboratory.

XI.2 **Claimant's asset does not threaten Security of Supply in the European Union, which has been formally confirmed**

Claimant obtained a positive security of supply assessment by the German Federal Ministry for Economy and Energy

262. Claimant's project obtained a positive security of supply assessment on 26 October 2021. This *"Review of Security of Supply pursuant to Section 4b (2) and (3) EnWG as part of the certification procedure for Nord Stream 2 AG (the Applicant) as a transmission system operator pursuant to sections 4a, 4b, 10 et seq. EnWG"* was conducted by the German Federal Ministry for Economy and Energy (which is today the Federal Ministry for Economy and Climate Action), as was rightly mentioned by Respondent in its Supplementary Counter-Memorial. However, Respondent 'forgets' to mention that the Ministry's conclusion was **positive**, i.e. that there is no risk for security of energy supply. In other words, the Ministry gave **green light** in relation to security of energy supply. The assessment together with a certified English translation is exhibited to this Supplementary Rejoinder.[188]

[188] Security of Supply Assessment by the German Federal Ministry for Economy and Energy dated 26 October 2021. Hereafter, the German original text of any referenced provision along with an English translation will be exhibited as **CLA-335.**

263. After careful consideration the Ministry summarizes its conclusions as follows:[189]

[redacted]

[189] **Exhibit CLA-335,** Security of Supply Assessment by the German Federal Ministry for Economy and Energy dated 26 October 2021, p 4 of the English translation.

264. The Ministry's conclusion is based on the following overall assessment:[190]

[redacted]

[190] **Exhibit CLA-335,** Security of Supply Assessment by the German Federal Ministry for Economy and Energy dated 26 October 2021, Section 8 (pp 50-52 of the English translation).

[redacted]

[redacted]

Legal implications of the German security of supply review for Claimant's certification procedure

265. The relevant legal basis for this security of supply review is Article 11 of the Gas Directive 2009/73,[191] as implemented by section 4b of the Energy Industry Act in Germany.[192] Pursuant to these provisions additional requirements apply in case of a certification for a pipeline owner or operator which is controlled by a person or persons from a third country, which is the case of Claimant as a Swiss company owned by a Russian entity. One of the additional requirements is, that granting certification will not put at risk the security of energy supply of the Member State and the EU, as further detailed in Article 11(3)(b) of the Gas Directive 2009/73.

266. The security of supply review of the Federal Ministry of Economy and Energy is binding on the Bundesnetzagentur, as set out by the German Ministry in its assessment.[193] The underlying provisions are as follows: Based on Article 11 of the Gas Directive 2009/73,

[191] **Exhibit CLA-4**, Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211 (the Gas Directive), Article 11.

[192] German Energy Industry Act (Energiewirtschaftsgesetz) (document available at https://www.gesetze-im-internet.de/enwg_2005/), 07 July 2005, Section 4b.The German original text along with an English working translation will be exhibited as **CLA-336.**

[193] See Exhibit **CLA-335,** Security of Supply Assessment by the German Federal Ministry for Economy and Energy dated 26 October 2021, Section 1, penultimate sentence.

the security of supply review can be designated to another competent authority than the regulator. In Germany, pursuant to section 4b of the Energy Industry Act, the designated competent authority for the security of supply review is the Federal Ministry of Economy and Energy, not the Bundesnetzagentur. Pursuant to Article 11(8) of the Gas Directive 2009/73, the Member State can stipulate that the security of supply review of the designated competent authority for this assessment is binding. In Germany this is the case. The relevant section 4(5), last sentence, of the Energy Industry Act stipulates, that the Ministry's security of energy supply review is, as such, part of the certification decision.

267. Respondent, as well as Brattle, fail to draw the correct conclusion from the German security of supply review for this arbitration: There can hardly be any stronger proof than this assessment that Claimant's project did not pose a threat to security of gas supply in the EU. At the relevant point in time for this arbitration this was formally acknowledged by the competent authority.

268. It is irrelevant, that things have changed since February 2022 and that the positive security of supply assessment for Claimant's project has been withdrawn by the German government – for reasons outside Claimant's control. The relevant point in time is April 2019.

269. It is furthermore irrelevant, that the German Ministry assessed the security of supply from the perspective of a certified and unbundled operation of the short NSP2AG section, whereas Brattle assessed security of supply from the perspective of an exempted, hence not unbundled NSP2. It is irrelevant, because the German Ministry, in its security of supply review, [redacted] Furthermore, a shipper of gas may decide not to honour supply contracts and not to use booked capacities regardless of whether unbundling is implemented or not.

The German security of supply review belies Respondent's and Brattle's assertions in relation to security of supply

270. The assessment by the Ministry covered the security of supply situation [redacted] The conclusions of the Ministry are clear in that certifying

[194] See Exhibit **CLA-335,** Security of Supply Assessment by the German Federal Ministry for Economy and Energy dated 26 October 2021, Section 4.

Claimant for gas transport does **not** place security of gas supply at risk for Germany nor the EU.

271. Against this background, it is not credible when Respondent alleges to base its security of supply argument on evidence that was available when the AD was adopted in 2019.[195] Respondent mentions very generically past gas supply disruption, and otherwise refers to Brattle's expert consideration.[196] Brattle focuses on impacts of Claimant's pipeline on the Ukrainian gas transit route.[197]

272. This leads Respondent and Brattle nowhere. When the German Ministry, concluded its review of the security of supply situation on 26 October 2021, it had all facts available at that time. The Ministry had considered the aspects put forward by Respondent and Brattle, such as [redacted] [198] Brattle assert that the German security of supply review did not consider [redacted].[199] That is simply not correct.

273. [redacted].[200] The formal conclusion of the Ministry is clear. The result of the Ministry therefore belies what Respondent and Brattle argue regarding security of supply.

XI.3 **Claimant's asset does not pose a risk to Competition in the European Union**

274. As a part of its changed strategy, Respondent now makes an attempt to argue that NSP2AG would have a significant negative impact on competition in EU gas markets.

275. Claimant has repeatedly explained[201] that the critical date for determining breaches of the ECT is April 2019 when the AD was adopted. Respondent is now referring to facts and arguments which have occurred many years later. This is simply too late to be credible. Moreover these facts and arguments are irrelevant from a legal perspective when determining breaches of the ECT. This is particularly true with respect to Respondent's attempts to rely on Article 24 of the ECT.[202] This is simply an *ex post facto*

[195] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 291.
[196] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 257, 258, 260, 281.
[197] Brattle Expert Report, Section V (B.).
[198] See Exhibit **CLA-335,** Security of Supply Assessment by the German Federal Ministry for Economy and Energy dated 26 October 2021, e.g. Sections 5, 5.1, 5.3, 5.4, 6.1.1, 6.1.3.
[199] See Brattle Expert Report, para 70.
[200] See Exhibit **CLA-335,** Security of Supply Assessment by the German Federal Ministry for Economy and Energy dated 26 October 2021, Section 4.
[201] See Section III above.
[202] See Section XIV below.

attempt against the backdrop of the ECJ Judgment and the Opinion of the Advocate General.

276. As explained,[203] the analysis in the Brattle Report on which Respondent relies, is based on the incorrect assumption that Claimant would have applied for an exemption under Article 36 of the AD. Brattle's analysis is performed on the basis of the requirements in Article 36. Claimant has earlier explained that it never applied for an exemption under Article 36, indeed it was not eligible for such an exemption.[204] This has been clearly stated by the ECJ.[205] The Brattle Report is thus not relevant for the Tribunal when determining Respondent's breaches of the ECT. The Brattle Report is simply barking up the wrong tree, as in the context of security of supply.[206]

277. When the AD was adopted and during the period leading up to its adoption, no specific concerns relating to competition were raised. Had there been any true concerns in this respect, Respondent could have – and would have – taken appropriate steps and measures, such as initiating an investigation similar to the one initiated against Gazprom. This will be addressed below.[207] At the very least Respondent would have raised this possibility. However nothing was done. It is simply not credible to raise these concerns five years after the adoption of the AD and after several years of arbitration between Claimant and Respondent. More importantly, the facts and arguments now relied on by Respondent do not – and cannot – justify the discriminatory treatment of Claimant.

278. In the light of the above, Respondent's and Brattle's arguments in relation to competition are not convincing, just as Respondent's comments in relation to security of supply are unconvincing.[208] Claimant's detailed comments in relation to Respondent's assertions regarding competition are set out below.

279. Respondent starts with a long-winded explanation of EU energy policy and competition objectives.[209] That has very little to do with the case before the Tribunal. Respondent continues to discuss the alleged competitive effect of Claimant's project by once again repeating the basic market rules of the EU gas market framework (third party access, capacity allocation, regulated tariffs and unbundling).

280. Without repeating the extensive discussion on these topics, suffice is to recall that the AD extends the scope of EU law only to a very short stretch upstream of the landing terminal at Lubmin. Both the overall alleged impact on competition as well as the effect

[203] See paras 251 et seqq.
[204] See paras 13 above.
[205] See Section IX.6 above; See in this regard Claimant's Supplementary Memorial dated 27 February 2024, paras 154-156.
[206] See in this regard paras 250 et seqq. and 285 et seqq. above.
[207] See paras 336 et seqq.
[208] See Section XI.1 above.
[209] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 300-307.

of the access regime need to be put in this context. The dispute is about 22 nautical miles of German territorial waters, 53 kilometers of the pipeline, corresponding to roughly 4% of the total length of the pipeline. This fact completely undermines the alleged competition related effects, as will be explained below.

281. Relying on the Brattle Report, Respondent discusses at length the alleged negative competitive effect of Claimant's project, in particular in the context of Article 36.[210] This discussion is both irrelevant and misleading for the following reasons.

282. *First,* it must be recalled that the relevant time period for these proceedings is 2019, any subsequent events are irrelevant. Respondent cannot justify actions it took in 2019, with events that took place years later. This has been explained earlier in this submission.[211]

283. *Secondly,* Article 36 and its competition-related requirements are irrelevant. An exemption under Article 36 was not and is not available for investments where the final investment decision has been taken. This has been confirmed by the ECJ, making all discussion on this point unnecessary.[212]

284. *Thirdly,* Respondent and the Brattle Report make another attempt to mislead the Tribunal. The detailed discussion concerning Gazprom and its market position is irrelevant for this arbitration where Claimant is NSP2AG. To the extent that Respondent and the Brattle Report make allegations about the flow of natural gas from Gazprom to the EU markets, that is irrelevant. As Claimant has explained throughout these proceedings, flow of gas and transport of gas volumes are two separate issues. NSP2AG provides transportation services, and the decisions related to imports of gas to the EU market have nothing to do with the services provided by Claimant. In addition, the reduction in gas flows referred to by Respondent[213] took place irrespective of the Nord Stream 2 pipeline. Finally and as will be shown in the following the allegations relating to the market position and potential abusive behavior of Gazprom are both erroneous and misleading.

Respondent's continuous focus on Article 36 is wrong and its conclusions irrelevant

285. The focus of the Brattle Report on Article 36 is wrong and makes its core conclusions irrelevant. In its attempt to change the argument from 'Nord Stream 2 was not the target' to 'Nord Stream 2 was different from other comparable pipelines', Respondent has commissioned the Brattle Report to provide an opinion on '*the security of supply and competition concerns that the NS2 pipeline raised by May 2019; in particular, whether*

[210] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 318 et seqq.
[211] See Section III above.
[212] See Section IX.6 above.
[213] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 322.

NS2AG would have been likely to meet the criteria for an exemption from Article 36 of the Third Gas Directive, or a derogation under Article 49a.'[214]

286. The Brattle Report focuses almost exclusively on the conditions under Article 36 of the Gas Market Directive. This, from the very outset, is incorrect and misleading as Claimant was **no**t eligible for an exemption as it had already taken its final investment decision. This interpretation has been confirmed by the ECJ: '*the investments for the Nord Stream 2 gas pipeline had already been decided at the date of the adoption of the directive at issue, which excluded that pipeline from the benefit of an exemption under Article 36 of Directive 2009/73, which applies to major new gas infrastructures or to significant increases of capacity in existing infrastructure'.*[215]

287. It is therefore surprising – to put it in diplomatic terms – that Respondent continues to argue that Claimant had the opportunity to apply for an exemption under Article 36 of the Gas Market Directive and that it commissioned the Brattle Report to assess the application of Article 36 to Claimant's project. As explained earlier in this Rejoinder,[216] all efforts of Respondent to rescue its Article 36 argument contradict the clear conclusion of the ECJ and are hence hopeless.

288. Given that the exemption under Article 36 is not a relevant consideration in these proceedings, the Brattle Report is irrelevant to the extent it focuses on the conditions for an exemption. This is indeed the main focus and content of the report. By contrast, the Brattle Report only makes two references to derogation under Article 49a.

289. In the context of competition related impacts under Article 36, the Brattle Report claims that '*Article 49a has similar conditions for a derogation*.'[217] This is wrong and misleading. Given the clear difference between the two Articles, this statement is puzzling.

290. The relevant condition under Article 36 is '*the investment must enhance competition in gas supply and enhance security of supply*'. In other words, the focus is on the investment itself, i.e. an investment to be made in the future.

291. The relevant condition under Article 49a is '*provided that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas*'. In other words, the focus is on the derogation and its impact.

292. The underlying question in this dispute is not whether Claimant's pipeline should have been built – it had been largely constructed at the time of the adoption of the AD. Rather,

[214] Brattle Expert Report, para 9.
[215] **Exhibit CLA-323,** Judgment of the European Court of Justice (Case C-348/20 P, Nord Stream 2 AG v. European Parliament and Council), 12 July 2022, para 104, see also paras 105 and 160.
[216] See Section IX.6 above.
[217] Brattle Expert Report, para 30. The second reference (at para 66) is made in the context of security of supply related discussion under Article 36, where the report claims that '*Equally, Article 49a states that a derogation is only permissible if it is not detrimental to "the security of supply in the Union"*'.

the underlying question is whether the AD that made Claimant's project the only offshore import pipeline subject to the EU gas market framework was legal. Therefore, the focus on the impact of the investment itself is irrelevant. Thus, arguments in the Brattle Report focusing on deterrence impact of *additional* import capacities by Gazprom are entirely moot and not relevant in the context of these proceedings.

293. Although the dispute is not about being **granted** a derogation under Article 49a, but rather being **eligible** to obtain such a derogation, a discussion in the context of Article 49a (and focus on the impact of the derogation) is relevant. In this respect, an independent report from [redacted] from 2019 has confirmed that a derogation for NSP2AG would not have negative effects on competition or functioning of the internal market.[218]

294. In their report, [redacted] compared the level of competition in the relevant market between a situation with a regulatory derogation and a situation without a regulatory derogation. They found that '*despite the different framework conditions, regulation would not lead to different uses of the pipeline than in the case without regulation*'. Stating the obvious, they concluded that '*Regardless of whether the German section of the pipeline is regulated or not, only gas volumes owned by Gazprom exported are transported via Nord Stream 2. A derogation therefore has no effect on which producers can supply the market via Nord Stream 2. How Gazprom export ultimately uses transport capacity, with and without regulation, depends solely on commercial optimisation calculations*.'[219]

295. In other words, the alleged competition related impact has nothing to do with Claimant's asset and its regulatory status (regulated / unregulated).

296. The Brattle Report focuses on the hypothetical behaviour of Gazprom, instead of the impact of NSP2AG. Any action by Gazprom could be taken regardless of whether NSP2AG existed or not, or whether it was regulated or not.

297. As a further point, Claimant finds it noteworthy that Respondent has throughout these proceedings emphasised the competition benefits stemming from the AD and its application to Claimant's assets. Claimant has repeatedly asked for any evidence to this effect. None has been forthcoming.

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[218] **Exhibit C-104,** [redacted] "Effects of Infrastructure Investments such as Nord Stream 2 Pipeline on the European Gas Market", Report on behalf of Nord Stream 2 AG, May 2020, Section 4.5. This exhibit contains the public short report based on an expert report of December 2019 prepared by [redacted] in the context of Claimant's application for a derogation under Article 49a of the AD. The long version in German was exhibited to Brattle Expert Report as exhibit BR-0034.

[219] **Exhibit C-104,** [redacted] "Effects of Infrastructure Investments such as Nord Stream 2 Pipeline on the European Gas Market", Report on behalf of Nord Stream 2 AG, May 2020, Section 5.2.2.

298. Without the AD Claimant would be in an unregulated situation. Respondent claims that this would have the effect of distorting competition. In this respect, the [redacted] also implicitly deals with a relevant question: what is the competitive impact of NSP2AG in regulated (with Amendment) and non-regulated (without the Amendment) scenarios. The report convincingly shows the obvious: there is no difference. If anything, the regulated scenario can have negative effects on the relevant markets.[220]

299. To summarize, Respondent is mischaracterizing the claims of Claimant. Respondent now suggests Claimant is arguing that it should have been granted an exemption under Article 36 or a derogation under Article 49a.[221] This is not correct.

300. Claimant has always made clear, and again in this submission,[222] that an exemption under Article 36 of the AD is not applicable to its project. The ECJ has confirmed this. This is the end of the road of the debate on Article 36.

Respondent's arguments concerning dominance and potential abusive behavior of Gazprom are irrelevant and wrong

301. In addition to being irrelevant, as Gazprom is not part of these arbitral proceedings, Respondent's arguments concerning dominance and the potential abusive behavior of Gazprom are wrong and based on flawed logic. This is so both in terms of market definitions suggested and in terms of the theory of harm that Respondent and the Brattle Report seek to advance.

302. The definition of the relevant markets in the Brattle Report is questionable. Respondent argues that Gazprom had (as of 2019) a dominant position in the German and Northern European markets for upstream gas supplies. This claim is based on the Brattle Report, which limits the geographic market to six countries, giving Gazprom a 60% market share.[223]

303. Clearly, the market position of Gazprom in EU gas markets was, in 2019, strong. However, the Respondent and the underlying Brattle Report have intentionally selected a definition of relevant geographical markets which increase this market position. The markets considered in the Brattle Report are tailored to the alleged theory of harm which the report advances. However, there are serious flaws with regard to the market definitions of wholesale gas supply, transit and storage.

304. For *wholesale gas supplies markets*, the market definition refers to the European competition law proceedings, which considered the wholesale gas supplies in Central

[220] **Exhibit C-104,** [redacted] "Effects of Infrastructure Investments such as Nord Stream 2 Pipeline on the European Gas Market", Report on behalf of Nord Stream 2 AG, May 2020, Sections 5.2.3 and 5.2.4.
[221] See Section IX.5 above.
[222] See paras 30, 179 et seqq., 285 et seqq.
[223] Brattle Expert Report, para 156.

and Eastern Europe (CEE).[224] The whole sale gas supply market as defined in those proceedings seems to include both supply by pipeline and LNG. The European Commission defines the relevant geographical wholesale gas market in the CEE case as national markets because this region was dominated by territorial restrictions, which were in fact the reason of the market investigation. However, this limitation was remedied by commitments made by Gazprom during the investigation.[225] As a result, these and other restrictions (e.g. the restrictions on Gazprom's OPAL bookings) on the European internal gas market have been removed through the intervention of the EU regulatory authorities, which is why the market today covers most of mainland Europe. Moreover, since the Brattle Report assumes that most of the gas supplied by NSP2AG is likely to go to the CEE countries, for which there are no significant entry barriers, the exclusion of this region is not convincing.[226]

305. In addition, the European Commission limited its investigation to the CEE region, as the same market segmentation was not observed in north-west Europe. The Brattle Report also agrees that there is no lack of interconnection infrastructure between at least six countries.[227, 228] Therefore, the relevant geographic market comprises at least Germany, Czech Republic Netherlands, Denmark, Austria and Belgium. However, Brattle report excludes France and the United Kingdom from the market although there is sufficient interconnection infrastructure, especially between France, Belgium and Germany.[229] Of course the reason for this exclusion is that Gazprom's market share would otherwise drop well-below 50%. A good indicator that these countries are part of a single market is that wholesale prices are very homogeneous across this region.[230]

306. For the *separate transit market*, it is first unclear how the Brattle Report defines this market. When discussing Gazprom's dominance on this market, Brattle Report seems to include the capacity of other import pipelines than NSP2AG, such as NSPAG and TurkStream in the relevant market.

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[224] **Exhibit CLA-337,** Commission Decision (Case AT.39816, *Upstream Gas Supplies in Central and Eastern Europe*), 24 May 2018. Document available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.

[225] **Exhibit CLA-337,** Commission Decision (Case AT.39816, *Upstream Gas Supplies in Central and Eastern Europe*), 24 May 2018, paras 98 and 160-163. Document available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.

[226] Brattle Expert Report, para 36.

[227] Brattle Expert Report, para 156.

[228] According to the European Commission, a lack of interconnection infrastructure can be a reason for market segmentation; See in this regard **Exhibit CLA-337,** Commission Decision (Case AT.39816, Upstream Gas Supplies in Central and Eastern Europe), 24 May 2018, para 31. Document available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.

[229] **Exhibit C-317,** Eurostat website, Statistics Explained "Natural gas supply statistics", (available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Natural_gas_supply_statistics), May 2024.

[230] Brattle Expert Report 2024, para 149.

307. Secondly and more importantly, in its market investigation of Gazprom's behaviour in CEE,[231] the European Commission does not consider a separate market for transit because from an EU gas market perspective only the final gas supply is significant, not its transport to Europe. If anything, NSP2AG would have put pressure on transit tariffs in transit countries due to its lower transport tariffs.[232] It appears that the sole purpose of this separate market is to rationalise the alleged anti-competitive behaviour based on Gazprom's alleged abuse of transport tariffs to deter market entry. This is discussed separately below.

308. Finally for *storage*, it is unclear why the Brattle Report considers a separate storage market. Gazprom is not a major player in the provision of gas storage in the relevant geographic area. According to the figures presented in the report, Gazprom does indeed not have significant market shares. Moreover, the determination of this market is not transparent.[233] As gas storage is highly regulated, it is also not clear how Gazprom's presence in this market could increase its dominance in the wholesale supply market.

309. Based on these market definitions, the Brattle Report attempts to show that there were significant competition concerns in relation to German and North-Western European gas markets. This was not the case. In its antitrust case against Gazprom, the European Commission used Gazprom's long-term contract prices in Germany and European hub prices as benchmarks to prove excessive prices in the CEE region.[234] By treating these prices as a competitive price benchmark, it is clear that the Commission did not consider Gazprom to be dominant in Germany or at other European hubs.

310. The Commission also assumed competitive prices in this market in the long term, indicated by the agreed commitments in 2018: To ensure competitive prices, Gazprom committed to a price revision clause if the contract price exceeds the border prices in Germany, France and Italy and/or the development of the gas prices at liquid gas hubs in Continental Europe.[235]

Deterring market entry is based on false premises

311. According to the Brattle Report, the excess capacity, to which they claim NSP2AG contributes, was not intended to be utilised with excess gas supplies, but it was rather

[231] **Exhibit CLA-337,** Commission Decision (Case AT.39816, *Upstream Gas Supplies in Central and Eastern Europe*), 24 May 2018. Document available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.
[232] Bonn, Moritz und Jan Vosswinkel, *Die Gasversorgung in der EU, Stand und Perspektiven*, CepInput, June 2019, p 10. The German original text along with an English working translation will be exhibited as **CLA-338.**
[233] Brattle Expert Report, para 44.
[234] **Exhibit CLA-337,** Commission Decision (Case AT.39816, *Upstream Gas Supplies in Central and Eastern Europe*), 24 May 2018, paras 71-74. Document available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.
[235] **Exhibit CLA-337,** Commission Decision (Case AT.39816, *Upstream Gas Supplies in Central and Eastern Europe*), 24 May 2018, paras 103 and 164. Document available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.

meant to serve as a further deterrent of other producers (LNG and pipeline gas). The Brattle Report argues that the excess capacity served as a credible signal that Gazprom would enter a (mutually harmful) price war in case that competing gas suppliers increased quantities.[236]

312. In addition, the Brattle Report claims that by extending offshore pipeline landing capacity in Northern Germany and reducing transport costs locally, NSP2AG specifically targeted LNG suppliers, who could only access Central and Eastern Europe through LNG terminals located at the North Sea. Thus, it argues that NSP2AG aimed to foreclose LNG suppliers specifically, given its potential price effect at the only contestable offshore entry point to Central and Eastern Europe. NSP2AG would therefore lower costs where Gazprom sought to deter competition but would raise them in other countries with fewer alternatives.[237]

313. These claims are highly problematic – to say the least – when put in the context of realities, instead of hypothetical arguments.

314. *First*, building excess capacity serving as a deterrent would be extremely costly. In certain very narrow situations, excess capacity can destroy incentives for potential competitors to enter a market and, as such, preserve large market shares of a dominant incumbent.[238] However, the Brattle Report conceals the high cost of excess pipeline capacity. In the case of NSP2AG, the deterrent would have come at a cost for the construction of Claimant's pipeline of more than EUR 8 billion.

315. It is far from clear that, absent the alleged NSP2AG excess capacity and its alleged entry deterrence impact for additional LNG import projects, Gazprom's profits would have suffered more than this due to competition from LNG producers. To substantiate this argument the following would have been of central importance: estimating and comparing Gazprom's profit levels <u>with</u> NSP2AG and <u>absent</u> increased LNG competition; estimating Gazprom's profit levels <u>absent</u> NSP2AG <u>with</u> increased LNG competition; Compare the outcome of those two exercises. Brattle has done nothing of this.

316. *Secondl*y, the geographic location of NSP2AG's landing site is of no relevance to a predatory strategy. The fact that NSP2AG's landing site is located geographically close to now existing and potential LNG terminals is presented in the Brattle Report as if the

[236] Brattle Expert Report, para 14.
[237] Brattle Expert Report, paras 17 and 59.
[238] Literature on competition law and policy suggests that anticompetitive predation (or strategic investment to deter entry) is possible only in very specific circumstances and, for example, requires certainty that recoupment of losses incurred during the predation period is certain. This is discussed below. For literature, see **Exhibit CLA-339,** Massimo Motta, *Competition Policy – Theory and Practise*, Cambridge University Press, 2004, pp 412 and 454 and **Exhibit CLA-340,** Richard Whish and David Bailey, *Competition Law*, 8th edition, Oxford University Press, 2015, p 783.

resulting cost advantage for Gazprom gas in Germany would foreclose LNG suppliers from entering the European gas network altogether. However, this is not how gas markets function. Gas market equilibria are determined by quantity competition, i.e. as long as Gazprom would not have fully met European demand with its gas supply, and as long as the residual demand would have remained above at least some competitors' supply costs, there would be space for competition – independent of whether the local cost structure favours certain suppliers. The only assessment that matters is whether the market price at total supply allows for LNG suppliers to be market participants or not. This was clearly the case in 2019 with LNG imports to the EU gas markets soaring. ACER gas wholesale market monitoring reports between 2018 – 2019 show a significant increase of LNG supplies to the EU gas market.[239]

317. There is little doubt that the global expansion of LNG production and distribution had already in 2019 significantly reduced costs. LNG therefore exerted already in 2019 a competitive constraint on NSP2AG and Gazprom.[240] Additionally, Claimant is not aware of any LNG projects planned for the geographical location of NSP2AG at the time of its investment decision. This makes the entire argument moot.

Claimant cannot reduce its transportation tariffs

318. Respondent argues,[241] relying on the Brattle Report, that NSP2AG could distort competition and cause consumer harm by only considering a portion of the total costs associated with the pipeline in setting the transport tariffs. According to Figure 12 in the Brattle Report, the predatory pricing or price war episode would be initiated by reducing gas transportation tariffs to NSP2's OPEX. This claim is without foundation and conflicts with reality.

319. *First* and foremost, NSP2AG's transportation tariffs are set out in the GTA. [redacted] In May 2019 the financial investors comprised five major European energy suppliers (Germany's Wintershall DEA and Uniper, France's Engie, Austria's OMV and the UK's Shell). [redacted]

[239] See **Exhibit C-318,** Agency for the Cooperation of Energy Regulations (ACER), Market Monitoring Report 2019 "Gas Wholesale Market Volume" (document accessible at https://www.ceer.eu/wp-content/uploads/2024/05/ACER-Market-Monitoring-Report-2019-Gas-Wholesale-Markets-Volume.pdf), September 2020, para 98: '*The dynamics of EU LNG imports underwent a huge shift in 2019: deliveries rose by +90% YoY and LNG covered 20% of EU gas demand, its highest ever market share by far.*' Similarly, due to enhanced availability of LNG and global LNG markets shifting to more flexible supply terms the ACER Market Monitoring Reports for wholesale gas from 2018 to 2020 show a rapid increase of LNG supplies to the EU gas market.

[240] Ibid.

[241] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 320.

[redacted]

[redacted] *Secondly,* [redacted]

321. *Thirdly*, the transportation tariffs are set [redacted]. [redacted] Therefore, a reduction of gas transportation would not affect transportation tariffs. The alleged curtailing of supplies cannot affect transportation tariffs.

322. *Fourthly,* the ownership structure of NSP2AG, which is wholly owned by Gazprom, is the result of an intervention by the Polish competition authority, which alleged that the original joint venture between Gazprom and the five European energy companies mentioned above would have restricted competition. This originally planned setup shows clearly that NSP2AG's tariffs were never intended to implement a price war episode. This could have, even in theory and if at all, only been plausible if NSP2AG was originally planned as being wholly owned by Gazprom.

The alleged ability of Gazprom to recoup losses is not realistic

323. In addition to a phase of very low prices, the possibility to recoup losses incurred with a phase of high prices is one of the defining characteristics of predatory pricing.

324. As a preliminary remark, it is unclear how the Brattle Report's theory of harm with Gazprom curtailing supplies in order to get significantly higher market prices for natural gas and Gazprom reducing transportation tariffs could be reconciled. Either Gazprom can reduce volumes to increase prices on the supply market, or it reduces transportation tariffs in order to increase volumes. These strategies are mutually exclusive. The Brattle Report seems to make an attempt to use various theories of harm to drive its core that Claimant would cause harm to competition but in doing so confuses these theories and fails to notice that they contradict each other.

325. In any case, an increase in natural gas prices (especially more than 14 years later, after debt repayment period)[242] is highly uncertain. The EU aims significantly to reduce net greenhouse gas emissions by 2030, with the 2050 climate-neutrality as the objective. Although this is far from certain, the demand for fossil fuels such as natural gas could therefore fall sharply, depending on what climate targets the EU adopts and how these

[242] See para 320 above.

targets are implemented. This creates significant uncertainty for gas market operators. A predatory pricing strategy with such uncertainty in recoupment is not rational.

326. In this context it must again be noted that infrastructure and supply of LNG was quickly ramped up before and after 2019, and even faster after February 2022. As a result of the LNG capacity expansion, European gas prices fell sharply after 2022. This clearly shows that barriers to entry were not as high as the Brattle Report claims. The same could be expected if Gazprom were to raise its gas prices to monopoly levels. In this case, long-term recovery is threatened and a profitable predatory pricing strategy is highly unlikely.

327. These uncertainties that would undermine the ability of Gazprom to recoup losses from a price war that deters entry, coupled with high investment costs, are text-book examples of circumstances where predatory pricing or additional strategic investments are unlikely. The theories presented by Respondent are without any foundation or connection to reality.

328. The Brattle Report also argues that NSP2AG could be used to bypass the Ukrainian transit system. Though this might be harmful for the Ukrainian economy, from an economic point of view, it is efficient to use the most effective transportation infrastructure. Bypassing the Ukrainian transit system does not in itself have a negative competitive impact on European markets. Moreover, the Brattle Report's comparison of transit distances does not allow any direct conclusions to be drawn about costs.[243] Transit costs depend on many different factors, including topography, the age and condition of the infrastructure, the number of contracts and the bargaining power in those contracts. For seven of the nine countries analysed in the Brattle Report, there are no significant differences in distance between NSP2AG and the Ukrainian gas transport system. The Brattle Report's argument that NSP2AG excludes an efficient infrastructure is therefore unconvincing. It is much more likely that Gazprom was pursuing a diversification strategy, which is why the significance of Ukrainian transit became less important.

329. With regard to the transit market, the Brattle Report argues that Gazprom would reduce transportation cost for gas delivered to Germany and the Czech Republic but threatened to raise the costs of transiting gas to other countries.[244] However, it is unclear how Gazprom could raise transit costs to other European countries: From the point of entry, the European regulatory framework applies and prevents any anti-competitive price increase to recoup the alleged losses. If the internal gas market works, Gazprom will not be able to arbitrage on the basis of regional differences.

[243] Brattle Expert Report, paras 158-162.
[244] Brattle Expert Report, para 17.

Effect of the Gas Directive regulations is negligible or non-existent

330. A central element in the Brattle Report's argumentation is that cost-based transportation tariffs for NSP2AG under BNetzA tariff regulation and unbundling requirements could prevent any price wars and hence would be beneficial to effective competition.

331. However, besides the fact that absent regulation NSP2AG would not be able to reduce tariffs to Opex levels in any case, (see section above[245]), this argumentation suffers from flawed thinking. Specifically, there are two reasons why the EU Gas market regulations cannot affect Gazprom's incentives or ability to deter any other import infrastructure investments.

332. *First*, it is only the section of the pipeline in German territorial waters, representing only approximately 4% of total pipeline length that would be affected by the unbundling requirements. [redacted] Thus, the overall effect on short-run variable costs from the Gas Directive is negligible and irrelevant to Gazprom's alleged potential for abusive practices.

333. *Secondly,* short-run variable costs (i.e. Opex) may reflect the level of short-run equilibrium market prices during price wars. Short-run variable costs typically serve as the minimum benchmark used by competition authorities to assess whether a low price was predatory. This is because a price below short-run variable costs implies that a company made a choice to incur a loss with every additional unit sold – a situation that, absent of very specific market conditions, no company would accept except in the case of the substantial prospect of a recoupment later or elsewhere.

334. However, if Gazprom's aim were to deter LNG investment in Germany, there would be no reason to bind transport tariffs at short-run variable costs at all. Gazprom could simply price its gas below cost-based transport tariffs to induce similar costs on LNG suppliers as in the price war setting envisaged by Brattle. The AD has no effect on gas prices. This shows again how these theories and arguments by Respondent are simply wrong and tailored to apply to NSP2AG transportation services.

335. To conclude this discussion relating to Gazprom, it should *first* be emphasized again that Gazprom is not a party to this arbitration. In an effort to confuse the case Respondent continues to construct its arguments based on Gazprom's presumed behavior. This is the sole reason why Claimant has included this long section showing that Respondent's argument built on Gazprom are, in addition to being entirely irrelevant, also factually wrong.

[245] See paras 319 et seqq.

336. *Thirdly*, in relation to Gazprom it must be reiterated that the competition concerns in Central and Eastern European gas markets had been successfully resolved in 2018, just prior to the AD, to the satisfaction of the EU competition law authority, European Commission and its DG Competition.[246] This case focused on the free flow of gas, enabling diversification and pricing of gas supplies. The objective was to bring Gazprom's market behavior in line with EU competition law and to ensure that certain Central and Eastern European based businesses and consumers could benefit from increasing gas competition between different gas suppliers and supply sources. Such competition is already benefiting consumers in Western Europe, especially in markets where there is access to liquid and competitive gas hubs (e.g. Germany or the Netherlands).[247] The Commission considered that the commitments made binding by the final Commission decision, successfully eliminated the existing competition concerns and provided for a forward-looking framework to ensure that future market behavior would be in line with EU competition law.[248] No similar concerns where present in German and Northern European markets at the time of the decision, i.e. 2018.

337. This also shows how any potential anticompetitive behavior by Gazprom could have been remedied through the application of competition law in the area of gas supply, without the need to enact the AD with all the negative consequences to the gas transport of Claimant.

Third Party Access does not support Respondent's argument about ensuring competition either

338. As mentioned, Respondent also suggests that third party access pursuant to the AD, i.e. the entitlement of a third party to access Claimant's pipeline, could somehow be beneficial for the competition within the EU. Respondent asserts that the right to third-party access (TPA) comprises physical connection and transmission capacities in the section in German territorial waters and that the AD ensures that Claimant cannot legally dismiss such requests to protect the affiliated gas supply activities.[249]

339. This is not convincing. TPA cannot justify the AD as a *lex-Nord Stream 2*. Given the full application of the AD on the EU side of the border connection point and the non-application of the AD on the non-EU side of the border connection point, this clear and

[246] **Exhibit CLA-337,** Commission Decision (Case AT.39816, *Upstream Gas Supplies in Central and Eastern Europe*), 24 May 2018. Document available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.

[247] **Exhibit CLA-337,** Commission Decision (Case AT.39816, *Upstream Gas Supplies in Central and Eastern Europe*), 24 May 2018, para 161. Document available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.

[248] **Exhibit CLA-337,** Commission Decision (Case AT.39816, *Upstream Gas Supplies in Central and Eastern Europe*), 24 May 2018, para 133. Document available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.

[249] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 314-315.

standard legal situation would be sufficient. Physical connection and access of third parties to capacity is warranted on the EU side of the border connection, but not with respect to a short stretch of the pipeline in territorial waters.

340. Claimant is not aware of any discussion about physical connection to any of the 6 offshore import pipelines to the EU offshore. There is simply no practical need for such connection.

341. It is noteworthy that Claimant's pipeline has not been subject to any request for TPA. It would not make sense to create an offshore connection close to the onshore landing terminal. It seems more logical that the connection would either be requested much further upstream (in which case EU energy law would not apply) or onshore (which is cheaper and easier than offshore). As explained before, it is extremely unlikely that a third party infrastructure developer would ask to construct a physical connection with an offshore import pipeline in the territorial sea of an EU Member State. It would be much more efficient to build connecting infrastructure on land and connect at the coastal landing terminal, which is the practical reality for all offshore import pipelines.[250]

342. The fact remains, that Claimant's pipeline is the only pipeline to which TPA would apply, because all other 5 offshore import pipelines are derogated. This is sufficient proof that the alleged benefit of the AD is non-existent.

XI.4 **Respondent's attempts to confuse Claimant with Gazprom and Russia are baseless**

343. As already explained, NSP2AG is the only Claimant in this dispute.[251] Given the fact, that there was no security of supply issue and no competition issue concerning Claimant which could justify the adoption of the AD, there is even less basis for Respondent's mantra about "Claimant and its controller Russia/Gazprom",[252] or Claimant as Russia's organ.[253]

344. Nor is there any basis for alleging that there is a risk that Claimant would act contrary to its own commercial interests based on political influence.[254] It is also incorrect, that there is no distinction between Claimant and Russian owned gas suppliers.[255] The same is true for a number of other instances where Respondent seeks to mix Claimant, Gazprom, Russia, gas transport, gas supply, commercial considerations and political allegations into a cocktail that fits well into Respondent's narrative.[256]

[250] Claimant's Reply Memorial dated 25 October 2021, para 218.iv.
[251] See Section IV.3 above.
[252] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 5.
[253] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 98, 99, heading 3.4, para 181.
[254] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 251.
[255] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 114.
[256] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 167, 282, 322.

345. There is no basis for such narrative, because neither security of supply nor competition justify the AD, as explained in detail throughout this Rejoinder. Claimant adds that also from a corporate perspective, Russia is not in any way the controller of Claimant and Claimant is not in any way an organ of Russia. Claimant is a company set up under Swiss law and its shareholder is an affiliate of Gazprom. This does not mean that Russia/Gazprom is "the controller of the Claimant" as suggested by Respondent. There are no rules and principles of international law which could lead to such a conclusion. Nor is it factually correct. Claimant's shareholder has clearly defined rights under the Swiss corporate law and Claimant's constitutional documents.

346. The Company's purpose is "to plan, construct, develop, own, manage, operate, maintain and exploit a pipeline for the transportation of gas running from the Russian coast to the German coast through the Baltic Sea". The company is profit-oriented. Moreover, the corporate bodies of Claimant have clearly defined rights and obligations to ensure that it is governed within the framework of its purpose and to secure the property of the Company and its shareholders. The board of directors' obligation is to act in the interest of the Company by acting in accordance with the Company's purpose and to ensure the Company's profitability.

XI.5 **Conclusion**

347. For all the reasons set out above, Respondent's arguments concerning security of supply and competition do not hold water, neither as to their substance, nor to the – new – formal argument, that Claimant, even if it were eligible for an exemption or derogation, would not be granted an exemption no derogation.

348. Claimant and Professor Cameron have explained earlier that the AD does not serve its purported objectives.[257] Respondent's new attempts, supported by Brattle, are not credible either. There was no security of supply nor competition issue with respect to Claimant in 2019. Concerning security of supply, this has been formally confirmed by the German Ministry for Economy and Energy. With respect to competition, Claimant has explained, amongst other things, that Respondent confuses gas supply and gas transport, that Respondent confuses NSP2AG and Gazprom, that EU gas regulation anyway applies as soon as gas transported through Claimant's pipeline enters the EU internal gas market, that the only effect of the AD is to move the point of application of the EU gas market regulation slightly upstream of the point where this gas market framework would apply in any case, and that the Respondent's new arguments based on predation and preventing entry of new investments by potential competitors are nothing but unfounded theories from the Respondent's consultants laboratory.

[257] See paras 242-243 above.

349. Similarly, the entire third-party access and potential connection related discussion is similarly simply theoretical. It would make no economic sense to connect to an offshore pipeline shortly before the onshore facilities due to technical complexity and higher cost. Such request has also never been made in relation to NSP2AG. Finally, it must again be emphasised that the only pipeline subject to the application of the full force of EU gas market regulation is Claimant's pipeline, all other pipelines remain outside the scope of unbundling, third-party access, regulated tariffs and other rules of EU gas market framework.

350. In the final analysis, Respondent and Brattle discuss security of supply and competition in a legal vacuum.

XII. RESPONDENT'S ASSERTIONS IN RELATION TO THE IMPACT OF THE AD ON CLAIMANT, INCLUDING ANNEX I OF RESPONDENT'S SUPPLEMENTARY COUNTER-MEMORIAL, ARE INACCURATE

XII.1 The catastrophic impact of the AD on Claimant and its investment has been confirmed by reality

351. Claimant has demonstrated in its Supplementary Memorial that the catastrophic impact of the AD on Claimant and its investment has been confirmed by reality. Claimant summarized:[258]

> *"The catastrophic impact of the Amending Directive on Claimant and its investment, as explained in previous submissions, has been confirmed by factual developments.*
>
> [redacted]
>
> *The factual and legal developments since February 2022 have only to a limited extent altered the general dramatic economic impact of the Amending Directive on Claimant. Those developments have had only a limited, and hypothetical, impact on Claimant's entitlement to obtain transport revenues, assuming that the Amending Directive had not eliminated Claimant's revenue stream. Consequently, the Amending Directive continues to be the reason for Claimant's lost revenues. This loss of revenue translates into substantial amounts. This situation can, and will lead Claimant into bankruptcy, if no solution can be found. This is the reality.*
>
> [redacted]

352. Respondent suggests that there is no such causal link between the AD and the impacts on Claimant. Respondent further suggests that the Claimant's nonoperation is the consequence of its own inaction in the certification procedure and that "the German authorities decision to reassess the pipeline's impact on security of supply [within the

[258] Claimant's Supplementary Memorial dated 27 February 2024, paras 17-19.

certification procedure] was a justified response to Russia's full-scale invasion of Ukraine".[259]

353. Claimant has explained earlier in this Supplementary Rejoinder, that this is incorrect:[260] The certification requirement for Claimant only exists because of the AD. The certification procedure is blocked for reasons outside Claimant's sphere and out of its control. The introduction of the AD is the proximate cause of the destruction of Claimant's investment.

354. Respondent does not mention [redacted] in the GTA. As mentioned by Claimant earlier in this Supplementary Rejoinder, neither Respondent's Supplementary Counter-Memorial nor Brattle Report engage with this key economic feature in this case. The impact of the AD on Claimant and hence the economic dimension of this case cannot be understood without the GTA [redacted]. Any argumentation without taking this into account cannot accurately address the real impacts of the AD on Claimant.[261]

XII.2 [redacted]

355. [redacted]

356. [redacted]

[259] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 17, 22, Section 3.4.
[260] See Section VII above.
[261] See paras 8-10 above.
[262] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 22, 148 and 179.
[263] See Section VIII.4 above.

XII.3 **The financial impacts of the AD on Claimant, as calculated by Swiss Economics, are accurate**

357. In order to quantify the dimension of the financial impacts of the AD on Claimant, i.e. damage already occurred and future impact month by month, Swiss Economics provided a Second Expert Report.[264] Respondent, however, suggests that this report, "just like the First Swiss Economic Report, is deeply flawed and unreliable".[265] In Annex I to its Supplementary Counter-Memorial, Respondent comments on Second Swiss Economics Report.

358. Claimant has asked Swiss Economics to comment on Respondent's assertions. The expert's conclusion is clear: Respondent's assertions are incorrect and minor in relation to the gigantic dimension of the impact of the AD on Claimant which is at stake here. In summary, based on the Third Expert Report produced by Swiss Economics in support of this Supplementary Rejoinder, the experts conclude as follows:[266]

2 [redacted]

[264] Second Swiss Economics Report.
[265] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 22, Section 3.6.
[266] Third Swiss Economics Report, paras 2-6.

[redacted]

359. In addition to that, in its Third Expert Report, Swiss Economics also addresses Respondent's allegation, that Swiss Economics fail to address deficiencies of their First Expert Report, which Respondent believes to have identified.[267] Claimant refers to the response of Swiss Economics in their Third Expert Report.[268]

[267] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 184.
[268] Third Swiss Economics Report, Section A.

XII.4 **Second Swiss Economics Report is based on a realistic but-for scenario**

360. Respondent asserts in its Supplementary Counter-Memorial that Claimant has provided Swiss Economics with an unrealistic *but-for scenario*.[269] However, none of the reasons put forward by Respondent are convincing.

361. *First,* according to Respondent, Claimant could not expect to operate without the AD or similar regulatory requirement during its lifetime and there have been clear indications that regulatory requirements would apply to Claimant.[270] As explained elsewhere in this Supplementary Rejoinder, there was no reason for Claimant to expect that it would be subjected to EU rules to which no other offshore import pipeline has been subjected to so far.[271]

362. *Secondly,* Respondent is suggesting that given the gas supply behaviour from Gazprom through NSPAG, there is no reason for Claimant to assume that Gazprom would be willing to ship any gas through Claimant's pipelines.[272] However, that discussion is irrelevant [redacted]. Claimant has explained that before and explains it again in this Supplementary Rejoinder.[273] That is again ignored by Respondent.

363. *Thirdly*, according to Respondent, there is no prospect of a future gas market from Russia to the European Union.[274] This is as incorrect as it is irrelevant. As explained, things can change.[275] And here again, [redacted].[276]

XII.5 **The impacts of US sanctions are not underestimated and the acts of sabotage are accurately factored in in the calculation of damages and impacts**

364. Respondent asserts that the Second Swiss Economics report underestimates the impact of the US Sanctions and the acts of sabotage of September 2022.[277] This is not correct. Claimant has explained its situation under US sanctions.[278] This forms the basis of the Second Swiss Economics report. Claimant has explained the technical status of its pipelines, i.e. that one line became operable in October 2021, the other in December

[269] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 173-178.
[270] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 176.
[271] See paras 196 et seqq. above.
[272] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 177.
[273] See paras 8-10 above.
[274] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 178.
[275] See Section XIII.
[276] See paras 8-10, 103.
[277] Respondent's Supplementary Counter Memorial on Jurisdiction and Merits dated 4 July 2024, paras 182 et seqq.
[278] See Section VIII above.

2021. After the damage incidents one line is still intact and could start gas transportation [redacted]. The other line could start gas transportation upon repair and commissioning [redacted] [279] This again forms the basis of the Second Swiss Economics report.

XII.6 **Conclusion**

365. For the reasons set out above, Claimant maintains that the catastrophic impact of the AD on Claimant and its investment has been confirmed by reality.

366. Claimant reiterates that its pipelines are a very important asset for its company, NSP2AG. Claimant needs to make sure it is preserved. Claimant also needs to make sure that it is ready for any future operation of the pipeline. Claimant has an obligation to push back against any violation the rule of law so as to protect its financial backbone is protected, in the interest of the company and in the interest of its financial investors, which not only include the Claimant's shareholder, but also the five EU companies Shell, Engie, OMV, Uniper and Wintershall DEA.

[279] See Section VI.1 above.

XIII. RESPONDENT'S STATEMENTS IN RELATION TO THE ALLEGED IMPOSSIBILITY OF FUTURE GAS IMPORTS FROM RUSSIA TO THE EU ARE SPECULATIVE AND PURELY POLITICALLY MOTIVATED

367. Respondent argues that there is no future for Russian gas in the EU in the current legislative and practical context. It attempts to support its arguments by both legal and practical considerations. The interpretations and views of Respondent are partially wrong (legal) and partially speculative (practical).

368. In addition, the situation can change. No one holds a crystal ball. This is the bottom line. The views expressed by Respondent do not at all deny that a future gas import from Russia to the EU is possible. Instead, these views only demonstrate once again, that Respondent is adopting very politically motivated views. That is not a serious approach in this dispute before the Tribunal.

369. In terms of *legislation*, Respondent relies on several EU as well as German legislative acts.[280] However, none of these acts prohibits the supply of Russian gas.

370. *First*, Respondent argues that, as part of the 14th package of sanctions against Russia, the '*EU forbade reloading of Russian LNG in EU territory for the purpose of transhipment operations to third countries*'.[281] However, Decision (CFSP) 2022/1744 underlines that this '*prohibition does not affect imports into the Union'.*[282] The decision also specifies that a ban on new investment and provision of goods, technology, and services for the completion of LNG projects '*should not affect the purchase and import of LNG from Russian terminals*'.[283] The 14th package has also introduced import restrictions on Russian LNG supplies via certain facilities that are not connected to the EU natural gas system. As is emphasised in Decision (CFSP) 2022/1744, this '*does not impede in any way imports of Russian LNG through other facilities in the Union*'.[284]

371. Hence, the 14th package of sanctions has introduced restrictions that target further development of the Russian LNG sector and revenues from the sale of LNG to third countries. Importantly, it does not prohibit LNG import to the EU as such. Furthermore, there are no restrictions at all in respect of the import of Russian natural gas.

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[280] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, paras 124, 125, 138.

[281] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 124.

[282] **Exhibit CLA-341,** Council Decision (CFSP) 2024/1744 "amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine" (document accessible at: https://eur-lex.europa.eu/eli/dec/2024/1744/oj), 24 June 2024, Preamble 10.

[283] **Exhibit CLA-341,** Council Decision (CFSP) 2024/1744 "amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine" (document accessible at: https://eur-lex.europa.eu/eli/dec/2024/1744/oj), 24 June 2024, Preamble 11.

[284] **Exhibit CLA-341,** Council Decision (CFSP) 2024/1744 "amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine" (document accessible at: https://eur-lex.europa.eu/eli/dec/2024/1744/oj), 24 June 2024, Preamble 12.

372. *Secondly*, Respondent emphasises that '*concrete legislative measures to stop Russian gas imports have been adopted at EU level*'.[285] In this regard, Respondent relies on the new EU regulation that allows '*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*'.[286] Claimant has already acknowledged these latest developments at the EU level.[287]

373. Indeed, Article 6(7) of Regulation 2024/1789 provides that any such restrictions may be adopted to protect the essential security interests, provided that such measures:

(a) do not unduly disrupt the proper functioning of the internal market for natural gas and cross-border flows of natural gas between Member States, and do not undermine the security of supply of the Union or a Member State;

(b) respect the principle of energy solidarity;

(c) are taken in accordance with the rights and obligations of the Union and the Member States with respect to third countries.

374. Furthermore, Article 6(7) of Regulation 2024/1789 specifies that, '*before deciding on such measures, the Member State concerned shall consult the European Commission, in so far as they are likely to be affected by the measure concerned, other Member States, the Energy Community Contracting Parties, third countries that are Contracting Parties to the Agreement on the European Economic Area, and the United Kingdom of Great Britain and Northern Ireland. The restrictions may be set only for a fixed term, which may be renewed if justified.*'

375. Therefore, such provisions are not mandatory. As Claimant explained in its Supplementary Memorial, no Member State is obliged to restrict gas imports from Russia.[288] The EU's argument that energy is within shared competence under Article 4(2)(i), in conjunction with Article 2(2) of the TFEU does not hold water. Article 194(2) clearly stipulates that the measures adopted by the European Parliament and the Council '*shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources, and* the *general structure of its energy supply*.' Notably, the Fact Sheets on the European Union of the European Parliament states the following:

376. *'Article 194 TFEU makes some areas of energy policy a shared competence, in which each Member State maintains its right to 'determine the conditions for exploiting its*

[285] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 125
[286] Respondent's Supplementary Counter-Memorial on Jurisdiction and Merits dated 4 July 2024, para 125.
[287] Claimant's Supplementary Memorial dated 27 February 2024, paras 81-83.
[288] Claimant's Supplementary Memorial dated 27 February 2024, para 83.

energy resources, its choice between different energy sources and the general structure of its energy supply' (Article 194(2)).' [289]

377. Besides, even if a Member State wishes to adopt such restrictive measures under Regulation 2024/1789, it should satisfy the requirements under Article 6(7) of the Regulation. In particular, it should consider a possible shortage of gas on the market, consult with other states as well as take into account their interests. It remains to be seen whether this mechanism will ever be adopted in practice. Moreover, as underlined by Claimant, such EU legislation may well change again or be cancelled.[290]

378. In terms of *practical reasons* for the alleged impossibility of future gas imports from Russia, Respondent relies on EU policies and objectives to reduce demand for natural gas.

379. *First*, the current energy transition efforts within the EU (hydrogen etc.) may well take longer than expected.[291] At this point and in the foreseeable future, the required quantities of hydrogen to substitute natural gas are very far from being available. Investment decisions are required as well as years of research and development.

380. It is true that natural gas demand within the EU market is projected to decline. However, the Europe's "Fit for 55" legislative package, for example, envisages a decrease in EU gas demand by 30% by 2030, relative to 2019 levels.[292] And as the Commission has recently stated, '*Oil and natural gas are the last fossil fuels to be phased out and significant imports still occur in 2050*.'[293] There is still demand for natural gas in the future.

381. In addition, it must be emphasized that projections and forecasts vary significantly. The European Commission's projections are essentially meant to provide a possible way to achieve net-zero emissions in 2050 (and the policies required to do so) rather than forecast what will most likely happen.

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[289] **Exhibit C-319,** European Parliament website, Fact Sheets on the European Union, Energy policy: general principles (last accessed on 30 August 2024 at: https://www.europarl.europa.eu/factsheets/en/sheet/68/energy-policy-general-principles), March 2024.

[290] Claimant's Supplementary Memorial dated 27 February 2024, para 84.

[291] As just one example, European Court of Auditors recently released a 2024 report '*The EU's industrial policy on renewable hydrogen Legal framework has been mostly adopted – time for a reality check*' where one of its conclusions (para 122) was '*We found that the renewable hydrogen targets were not clearly defined. Moreover, they were driven by political will rather than being based on robust analyses. In addition, at the time of writing, it is unlikely that these targets for 2030 can be achieved*'. **Exhibit C-312,** European Court of Auditors Report, "Special report 11/2024: The EU's industrial policy on renewable hydrogen – Legal framework has been mostly adopted – time for a reality check" (available at https://www.eca.europa.eu/ECAPublications/SR-2024-11/SR-2024-11_EN.pdf), 2024, para 122.

[292] **Exhibit C-320,** Agency for the Cooperation of Energy Regulations (ACER), Market Monitoring Report "Analysis of the European LNG market developments 2024" (document accessible at https://www.acer.europa.eu/monitoring/MMR/LNG_market_developments_2024), 19 April 2024, para 7.

[293] **Exhibit CLA-342,** Commission staff working document Impact assessment report "Securing our future Europe's 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society" (document 52024SC0063 (SWD/2024/63 final) available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024SC0063), 06 February 2024.

382. Consequently, there will be a need for natural gas for still some time. It also needs to be noted that making U-turns in energy policy has been a regular practice in Europe, as illustrated by the approach of Germany or France in relation to nuclear energy.

383. *Secondly*, Claimant has one line operable. By contrast, NSPAG has currently no transport capacities. The gas transit contract with the Ukraine is expiring and the Ukraine has announced that gas transit from Russia through the Ukraine will be stopped indefinitely. At the same time, there are still valid long term supply contracts that have relied on the Ukrainian transit, for example in the case of Austria, as well as other EU buyers that receive gas from Gazprom via the Turkstream pipeline. In such circumstances, there may well be a need to transport gas in the order of at least the 27,5 bcm capacity through the intact pipeline of Claimant. This is a realistic possibility.

384. *Thirdly*, and as has been explained above,[294] even in the absence of actual gas transport via Claimant's pipeline, Claimant would continue to have [redacted] The actual transportation of gas is of secondary importance for Claimant. The important thing is the ability to transport gas pursuant to the terms of the GTA. If that is the case, Claimant's is entitled to receiving its contractual transport tariff as agreed in the GTA. Claimant has explained that in its Supplementary Memorial.[295] This ability is made impossible by the AD.

385. To conclude, the discussion about possible future gas imports from Russia to the EU is, in any event, secondary. The important thing is the guaranteed transport revenue stream of Claimant if the AD does not apply to Claimant. Claimant does not need certainty that future gas imports from Russia to the EU will be possible. That is why Claimant has not argued, in its Supplementary Memorial, that future gas import from Russia to the EU is certain, but that it is possible. This is undeniably the case. There are no irreversible legal or factual developments that make this future impossible. For the reasons set out above, Claimant maintains its position that future gas transport is **not** Utopia.

[294] See paras 8-10, 38, 103 above.
[295] Claimant's Supplementary Memorial dated 27 February 2024, paras 199 et seqq.

XIV. ARTICLE 24.3 DOES NOT RELEASE RESPONDENT FROM LIABILITY FOR ITS BREACHES OF THE ECT

XIV.1 Introduction

386. In the following Claimant will show that Article 24.3 of the ECT does not release Respondent from liability under the ECT. Not only is Respondent's argument to this effect raised too late in the game to be credible, the facts and arguments relied on by Respondent simply do not hold water. As mentioned earlier in this Rejoinder,[296] this is a last minute attempt by Respondent against the backdrop of the ECJ Judgment and the ECJ Opinion.

387. Article 24 of the ECT is to a large extent inspired by Articles XX and XXI of the 1994 GATT. It is noteworthy that Article 24 has never been ruled upon by an arbitral tribunal sitting under the ECT. This fact and the wording of the provision – discussed below – confirm that this provison is intended to be applied in very extraordinary circumstances. It speaks volumes that this provision has not even been relied upon by respondents in ECT arbitrations – until now, by Respondent in this dispute. This arbitration will not be the first case where this provision is applied.

388. It is important to keep in mind that Article 24 is not applicable to Article 13 of the ECT, i.e. the expropriation provision. Claimant's case under Article 13 thus remains unaffected by Respondent's allegations made in relation to Article 24.3.

389. The ECT is intended to provide a high level of investor protection. Indeed a higher level of protection than in other investment protection treaties because of the nature of investments in the energy sector. They are capital intensive, requiring long-term financial commitments to achieve an acceptable return on the investment. As the Advocate General so elegantly put it: ¨Pipelines are not clementines¨.[297] In addition, energy investments are particularly susceptible to regulatory instability.

390. For all these reasons the exceptions listed in Article 24 of the ECT must be given a narrow interpretation – as indeed any exceptions in investment protection treaties – so as not to undermine the objective to provide a high level of protection in conformity with Article 2 of the ECT setting out the purpose of the ECT.[298]

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[296] See paras 75 and 275 above.

[297] **Exhibit CLA-176**, Opinion of Advocate General Bobek (Case 348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*), 6 October 2021, para 103.

[298] **Exhibit C-26**, ECT website, "The Energy Charter Treaty" (last accessed on 30 August 2024 at https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/), Article 2 "Purpose of the Treaty":

"This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."

XIV.2 **The wording of Article 24.3 makes clear that it is not applicable to the facts before the Tribunal**

391. Article 24.3 reads:

> *"(3) 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*
>
> *(i) relating to the supply of Energy Materials and Products to a military establishment; or*
>
> *(ii) taken in time of war, armed conflict or other emergency in international relations;*
>
> *(b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or*
>
> *(c) for the maintenance of public order.*
>
> *Such measure shall not constitute a disguised restriction on Transit."*

392. The *first* thing to note about the wording of the provision is that the provisions of the ECT shall not be understood so as to ¨prevent any Contracting Party from taking any measure¨ etc. The focus is thus not on releasing the Contracting Party, i.e. Respondent, from responsibility under the ECT. The focus is rather on ensuring the right of the Contracting Party to regulate its economy in certain very extraordinary circumstances.

393. The *second* central aspect of Article 24.3 is that the circumstances with respect to which the Contracting Party considers it necessary to take measures must have been at hand when it is decided to take the measure. This becomes especially clear when one reads subsection (a) (ii) of Article 24.3 – relied upon by Respondent - which refers to measures considered necessary for the protection of essential security interests of the Contracting Party ¨taken in time of war, armed conflict or other emergency in international relations¨. The same parallelism applies with respect to subsection (c) of Article 24.3 to which Respondent also refers, i.e. the circumstance in question – the need for the maintenance of public order – must have been at hand when the measure – the adoption of the AD – was taken.

394. None of the concerns that Respondent has now raised in its Supplementary Counter-Memorial relating to security of supply and competition were at hand when the AD was

adopted in 2019. When it was adopted Respondent did not raise any concerns relating to ¨essential security interests¨ nor to ¨public order¨. As Claimant has repeatedly explained in this Rejoinder,[299] it is not possible to justify a measure by referring to circumstances which have occurred five years later.

395. As explained above,[300] Claimant obtained a security of supply clearance from the German Government in the fall of 2021.This clearance was subsequently withdrawn for reasons beyond Claimant's control.

396. Relying on Article 24.3 Respondent has argued that the AD was necessary for the maintenance of public order, without explaining why and how this was necessary. This is an unconvincing argument.

397. *First,* one wonders how public order could be maintained by applying the AD only to Claimant and not to any other off-shore import pipeline.

398. *Secondly,* there is no definition in Article 24, nor elsewhere in the ECT, of ¨maintenance of public order ¨. Respondent seems to be arguing that security of supply and competition form part of public order for the EU. In support of this argument Respondent refers to a report from a WTO Panel concerning certain provisions of the WTO GATS.[301]

399. There is no support in the ECT for this interpretation. Needless to say, the WTO GATS and the ECT are different treaties, covering different areas and fulfilling different objectives. A concept and a term used in the WTO Agreements, and its purported meaning, cannot automatically be transposed to the ECT. Respondent has failed to show that its arguments concerning security of supply and competition are covered by the concept ¨maintenance of public order¨ in Article 24.3 of the ECT.

400. The WTO Panel report to which Respondent refers,[302] deals with certain measures regulating the internal natural gas market of the European Union and measures facilitating the development of the natural gas infrastructure within the European Union.

401. Paragraph 7.1156 of the WTO Panel report to which Respondent refers addresses Article XIV(a) of the GATS and foreign control of TSOs within the European Union. These are issues far removed from the ECT and from the matters before the Tribunal.

402. This is a meaningless reference, which does not take Respondent's case under Article 24.3 forward. Simply referring to the importance of energy supply is empty.

403. In addition, the reference in Article 2.3 (c) is to the ¨maintenance of public order¨, wording which seems to require something in addition to simply being ¨a matter of public order¨

[299] See paras 39, 275, 282 above.
[300] See paras 106-107, 268 above.
[301] Respondent's Supplementary Counter Memorial on Jurisdiction and Merits dated 4 July 2024, paras 326-327.
[302] Ibid.

as suggested by Respondent. The use of the word ¨maintenance¨ (of public order) also suggests that there must be some form of threat to the public order, or at least that such threat must be on the horizon, thus requiring that public order be maintained. Respondent has failed to explain why the AD was necessary to maintain public order.

XIV.3 **Respondent's arguments concerning security of supply and competition do not qualify as exceptions under Article 24.3 of the ECT**

404. Even if one were to analyse the substance of Respondent's arguments concerning security of supply and competition, they fail.

405. In Section XI.2 Claimant has explained in detail that its pipeline did not threaten security of supply in the European Union. This was confirmed on 26 October 2021 by the German Federal Ministry for Economy and Energy, as it was called at the time. There was simply no ¨essential security interest¨, as stipulated in Article 24.3 (a) of the ECT, to worry about when the AD was adopted. Moreover, the decision to adopt the AD was certainly not taken in ¨time of war, armed conflict or other emergency in international relation¨ as required by Article 24.3 (a)(ii).

406. Respondent's arguments concerning competition in the European Union are all based on the Brattle Report. This report focuses on the hypothetical conduct of Gazprom – not a party to this arbitration – and not on the impact of NSP2AG. The hypothetical conduct of Gazprom is derived from various competition theories which in turn are based on flawed assumptions.

407. In Section XI.3 Claimant has explained in detail that NSP2AG did not, and does not, pose a risk to competition in the European Union.

XV. FURTHER POINTS AND CLOSINGS REMARKS

XV.1 Respondent remains in breach of its obligations under the ECT

408. Claimant refers to and relies on all its previous submissions describing Respondent's breaches of various categories of the FET standard laid down in Article 10.1, of the protection standard laid down in Article 10.7 and of the protection against expropriation laid down in Article 13.

409. As explained in Section XIV. Respondent's reliance on Article 24.3 of the ECT does not release it from liability under the ECT.

410. Respondent's arguments relied on in the context of Article 24.3 also do not justify its breaches of Article 10.1 and Article 10.7 of the ECT. Claimant's arguments rebutting Respondent's case under Article 24.3 apply *mutatis mutandis* to Respondent's breaches of Article 10.1 of the ECT and Article 10.7 of the ECT.

XV.2 The Tribunal has jurisdiction: the fork-in-the road provision in Article 26 of the ECT has not been triggered

411. Claimant refers to all its previous submissions on jurisdiction in particular on its Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021.

XV.3 The Tribunal has the power to award a restitutionary remedy and its exercise of that power is justified in this case

412. Claimant refers to its previous submissions on this issue in the Reply Memorial & Counter-Memorial on Jurisdiction dated 25 October 2021 and in the Supplemental Memorial on Jurisdiction and Merits dated 27 February 2024. It maintains its arguments put forward therein.

413. Claimant notes that Respondent continues to refer to Claimant's request for restitution as permanent *injunctive relief*, as if this were a magic formula capable of changing the legal reality. This is hopeless. No matter what label Respondent is trying to apply to Claimant's request, it remains in fact and in law a request for a restitutionary remedy which the Tribunal has the power to order.

414. In addition to previously submitted awards, Claimant refers to and relies on the following two awards, viz., *Enron v Argentina* and *Cairn v India*.

415. In *Enron v Argentina*, the claimant contended that a tax assessment connected to the privatization of a gas transportation network, in which it held an interest through a subsidiary, was illegal under Argentine law and constituted an expropriation in violation of the USA–Argentina BIT. Enron sought to annul the assessed taxes and permanently prohibit their collection. Argentina countered that the Tribunal lacked the authority to grant such relief. The Tribunal concluded that "it has the power to order measures

involving performance or injunction of certain acts" (although it decided ultimately to award compensation): [303]

> *"An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available. The Claimants have convincingly invoked the authority of the Rainbow Warrior, where it was held:*
>
> *"The authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force. The delivery of such an order requires, therefore, two essential conditions intimately linked, namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued".*"[304]

416. In *Cairn v India* the tribunal granted the claimant restitution. It recognized that India breached its obligations under the UK-India BIT by retroactively applying its 2012 new tax law to the 2006 transactions. In its requests for relief, the claimant sought an order that India take steps "to neutralise the continuing effect of [the tax demand] [by] permanently withdrawing [the tax demand], and refraining from seeking to recover further the alleged tax liability or any interest and/or penalties arising from this alleged liability through any other means."[305]

417. Due to this breach, the tribunal underlined that India is obliged "to make reparation for its internationally wrongful act."[306] It also confirmed that "its jurisdiction to resolve the present dispute includes the power to order the Respondent, as a measure of restitution, to withdraw its internationally unlawful tax demand,"[307] referencing ARSIWA's Article 34, which establishes full reparation consists of restitution, compensation, and satisfaction, either individually or in conjunction.

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[303] **Exhibit CLA-343,** Decision on Jurisdiction (ICSID Case No. ARB/01/3, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*), 14 January 2004, para 81. Document accessible at https://www.italaw.com/cases/401.

[304] **Exhibit CLA-343,** Decision on Jurisdiction (ICSID Case No. ARB/01/3, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*), 14 January 2004, para 79. Document accessible at https://www.italaw.com/cases/401.

[305] **Exhibit CLA-344,** Final Award (PCA Case No. 2016-07, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*), 21 December 2020, para 1870. Document accessible at https://www.italaw.com/cases/5709.

[306] **Exhibit CLA-344,** Final Award (PCA Case No. 2016-07, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*), 21 December 2020, para 1872. Document accessible at https://www.italaw.com/cases/5709.

[307] **Exhibit CLA-344,** Final Award (PCA Case No. 2016-07, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*), 21 December 2020, para 1872. Document accessible at https://www.italaw.com/cases/5709.

418. Contrary to Respondent's position that *Chorzów Factory* does not provide that restitution is the "primary remedy" for breaching international law, the *Cairn* tribunal stated that restitution is the primary remedy and compensation comes into play only if restitution is impossible.

> *"[I]n the Factory at Chorzów case the PCIJ favoured restitution as the preferred form of reparation, with compensation to be granted only if restitution was not possible."*[308]

419. In the end, the tribunal ordered India "to withdraw [the tax demand] permanently and refrain from seeking to recover the alleged tax liability or any interest and/or penalties arising from [the tax demand]."[309]

420. Both the cases referred to above clearly confirm that an arbitral tribunal in an investment dispute has the power to order restitutionary remedies.

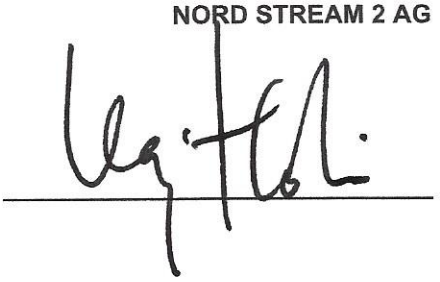
421. Claimant maintains its prayers for relief as articulated in its Supplementary Memorial dated 27 February 2024.

[308] **Exhibit CLA-344,** Final Award (PCA Case No. 2016-07, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*), 21 December 2020, para 1872. Document accessible at https://www.italaw.com/cases/5709.

[309] **Exhibit CLA-344,** Final Award (PCA Case No. 2016-07, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*), 21 December 2020, para 1877. Document accessible at https://www.italaw.com/cases/5709.

Submitted for and on behalf of

NORD STREAM 2 AG



Professor Dr. Kaj Hobér

2 September 2024

ANNEX 1 LIST OF EXHIBITS

No.	Description	Date
FACTUAL EXHIBITS		
C-312	European Court of Auditors Report, "Special report 11/2024: The EU's industrial policy on renewable hydrogen – Legal framework has been mostly adopted – time for a reality check" (available at https://www.eca.europa.eu/ECAPublications/SR-2024-11/SR-2024-11_EN.pdf).	2024
C-313	Renewables Now website, "HH2E agrees grid connection for German green hydrogen project" (available at https://renewablesnow.com/news/hh2e-agrees-grid-connection-for-german-green-hydrogen-project-845469/).	12 January 2024
C-314	Energate messenger website, "Hydrogen grid: Gascade and HH2E mix hydrogen into the Eugal" (available at https://www.energate-messenger.com/news/239991/gascade-and-hh2e-mix-hydrogen-into-the-eugal).	10 January 2024
C-315	Nord Stream AG's Amended Particulars of claim (Case CL-2024-000094, *Nord Stream AG v. Lloyd's Insurance Company S.A. and another*). Document available at https://caseboard.io/cases/8e1b07d4-632b-4d4d-9d18-d944d75c9d2e.	1 March 2024
C-316	Court of Justice of the European Union website (last access on 02 September 2024 at https://curia.europa.eu/jcms/jcms/Jo2_7024/en/)	-
C-317	Eurostat website, Statistics Explained "Natural gas supply statistics", (available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Natural_gas_supply_statistics).	May 2024
C-318	Agency for the Cooperation of Energy Regulations (ACER), Market Monitoring Report 2019 "Gas Wholesale Market Volume" (document accessible at https://www.ceer.eu/wp-content/uploads/2024/05/ACER-Market-Monitoring-Report-2019-Gas-Wholesale-Markets-Volume.pdf).	September 2020
C-319	European Parliament website, Fact Sheets on the European Union, Energy policy: general principles (last accessed on 30 August 2024 at: https://www.europarl.europa.eu/factsheets/en/sheet/68/energy-policy-general-principles).	March 2024
C-320	Agency for the Cooperation of Energy Regulations (ACER), Market Monitoring Report "Analysis of the European LNG market developments 2024" (document accessible at https://www.acer.europa.eu/monitoring/MMR/LNG_market_developments_2024).	19 April 2024

LEGAL EXHIBITS		
CLA-326	Swiss Official Gazette of Commerce (SOGC), publication No. NA04-0000001033 “Extension of stay of bankruptcy Nord Stream 2 AG” (publication accessible at https://shab.ch/#!/search/publications/detail/afe07e2c-b5fa-4e0f-991e-75578a6e772d).	27 June 2024
CLA-327	Kornél Télessy, Lukas Barner, Franziska Holz, Repurposing natural gas pipelines for hydrogen: Limits and options from a case study in Germany, International Journal of Hydrogen Energy, Vol. 80. Available at: https://www.sciencedirect.com/science/article/pii/S0360319924027812#bib42.	28 August 2024
CLA-328	P. Craig and G. De Burca, EU Law – Text, cases and materials (sixth edition), Oxford.	2015
CLA-329	K. Lenaerts, K. Gutman and J. Nowak, *EU Procedural Law* (second edition), Oxford.	2023
CLA-330	Judgment of the Court (Fourth Chamber) (C-125/06 P, *Commission* v *Infront WM*).	13 March 2008
CLA-331	C. Jones and W-J. Kettlewell (eds), EU Energy Law Volume I: the Internal Energy Market, Deventer.	2021
CLA-332	Commission Decision on the exemption of Deutsche ReGas GmbH & Co. KGaA LNG Terminal in Lubmin (Germany) from certain provisions of Directive 2009/73/EC pursuant to Article 36 of that Directive, (document available at https://energy.ec.europa.eu/system/files/2023-01/2022_deutsche_regas_decision_en.pdf).	20 December 2022
CLA-333	Commission decision (Case COMP/B-1/39.402, *RWE Gas Foreclosure*).	18 March 2009
CLA-334	Commission Decision (Case COMP/39.316, *Gaz de France*).	03 December 2009
CLA-335	Security of Supply Assessment by the German Federal Ministry for Economy and Energy. German original text along with an English translation.	26 October 2021
CLA-336	Extract from German Energy Industry Act (Energiewirtschaftsgesetz) along with English working translation (document available at https://www.gesetze-im-internet.de/enwg_2005/).	-
CLA-337	Commission Decision (Case AT.39816, *Upstream Gas Supplies in Central and Eastern Europe*). Document available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39816/39816_10148_3.pdf.	24 May 2018

CLA-338	Bonn, Moritz und Jan Vosswinkel (2019). Die Gasversorgung in der EU. Stand und Perspektiven, cepInput. English working translation of extracts	June 2019
CLA-339	Massimo Motta, Competition Policy – Theory and Practise, Cambridge University Press.	2004
CLA-340	Richard Whish and David Bailey, Competition Law, 8th edition, Oxford University Press.	2015
CLA-341	Council Decision (CFSP) 2024/1744 "amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine" (document accessible at: https://eur-lex.europa.eu/eli/dec/2024/1744/oj).	24 June 2024
CLA-342	Commission staff working document Impact assessment report "Securing our future Europe's 2040 climate target and path to climate neutrality by 2050 building a sustainable, just and prosperous society" (document 52024SC0063 (SWD/2024/63 final) available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52024SC0063).	06 February 2024
CLA-343	Decision on Jurisdiction (ICSID Case No. ARB/01/3, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*). Document accessible at https://www.italaw.com/cases/401.	14 January 2004
CLA-344	Final Award (PCA Case No. 2016-07, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*). Document accessible at https://www.italaw.com/cases/5709.	21 December 2020