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 MEMORIAL
on ECT Article 24(3) and the 2024 CJEU Decision

The Tribunal

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I. INTRODUCTION

1. This Supplementary Memorial on ECT Art. 24(3) and the 2024 CJEU decision (the **"Claimant's Third Supplementary Submission"**) is filed by the Claimant, Nord Stream 2 AG (**"Claimant"** or **"NSP2AG"**). Claimant's Third Supplementary Submission is based on Claimant's previous Memorials, the latest two being the Supplementary Memorial on Jurisdiction and Merits dated 27 February 2024 (the **"Claimant's Supplementary Memorial"**), and the Supplementary Rejoinder on Jurisdiction and Merits dated 2 September 2024 (the **"Claimant's Supplementary Rejoinder"**).

2. Claimant's Third Supplementary Submission provides factual and legal responses to the judgment of the General Court dated 27 November 2024 in Case T-526/19 RENV, *Nord Stream 2 v Parliament and Council* (the **"Second GC Judgment"**). Furthermore, it provides factual and legal responses to Respondent's Supplementary Reply on Merits dated 4 November concerning Art. 24(3) ECT (the "**Respondent's Supplementary Reply**").

3. Claimant's Third Supplementary Submission is being submitted pursuant to Procedural Order No. 15 dated 10 February 2025, and pursuant to the clarifications and the procedural timetable set out in Procedural Oder No. 16 dated 24 February 2025. It is accompanied by an expert report submitted by Dr Peter Roberts (the **"Second Roberts Report"**), and an expert report submitted by Swiss Economics SE AG (the **"Fourth SE Report**"), admitted by the Tribunal by Procedural Order No. 17 dated 2 April 2025.

4. In addition, 16 legal exhibits are being submitted along with Claimant's Third Supplementary Submission, starting at CLA-345.

5. Claimant starts out with its comments on the Second GC Judgment and then moves on to its comments on Respondent's efforts to rely on Art. 24(3) ECT. A related element of central importance in both those contexts is the discussion about security of supply and competition as advanced by Respondent, in the Second GC Judgment and in the Second Brattle Report.

II. THE SECOND GC JUDGMENT IS WRONG – AS WAS THE FIRST GC JUDGMENT

II.1 Introduction

6. In the Second GC Judgment rendered on 27 November 2024, the GC dismissed Claimant's action for annulment of the Amending Directive (AD). This Second GC Judgment is exhibited to Respondent's supplementary submission dated 18 December 2024.[1] Whilst elegantly drafted and quite detailed at first sight, the Second GC Judgment is in some key aspects manifestly and seriously wrong. This wrongfulness concerns the correct understanding of the AD and its impact on Claimant, both aspects clearly confirmed by the ECJ.

7. The most obvious example is the controversial discussion about the alleged and the real objectives of the AD. The GC in essence fully relies on the officially stated objectives, without itself analysing this crucial point. Hence, the Second GC Judgment is one-sidedly based on submissions of Respondent, whilst central arguments of Claimant are not assessed. Other important elements of the case concern the foreseeability of the AD, the flexibility and reversibility of Claimant's investment in 2017, and the alleged contribution of the AD to security of supply and to competition in the EU.

8. The GC's conclusions essentially result in saying that Claimant could have expected a *lex-Nord Stream 2* and that it should have accepted that by adapting its project, and this even prior to any legislation having been proposed, let alone adopted. These conclusions are detached from reality with respect to investments in major energy infrastructure projects of this kind. They are the result of a manifestly incorrect assessment of the facts and evidence before the GC and of a one-sided reliance on submissions of Respondent in the action for annulment.

9. Against this background, it is unsurprising that Respondent feels supported and confirmed in its positions, as Respondent repeats again and again in its supplementary submission of 18 December 2024. However, something that is wrong does not become right because the Second GC Judgment follows and confirms incorrect positions of EU institutions in the action for annulment. This is nothing more than the result of the GC one-sidedly and uncritically following the positions of the EU institutions, while not assessing Claimant's arguments and positions in a comparable manner - not even close to comparable. The Second GC Judgment also appears to show some lack of basic commercial expertise relating to projects of this magnitude.

10. As a consequence, Claimant has lodged an appeal to the ECJ on 5 February 2025. The Second GC Judgment cannot withstand scrutiny at the ECJ. As regards the relevance of the Second GC Judgment and Claimant's appeal for this arbitration, Claimant will in the following provide the proper context. [2]

II.2 The relevance of the Second GC Judgment and Claimant's appeal for this arbitration is limited

11. For the reasons set out below, Claimant respectfully asks the Tribunal to rely on the findings of the ECJ, rather than on the findings in the appealed Second GC Judgment. The ECJ judgments are final, hence the interpretation of the AD by the ECJ in its judgment of 12 July 2022 is final and binding. By contrast, GC judgments are subject to appeal to the ECJ. Thus,

[1] Exhibited by Respondent as exhibit **RLA-416**. The Second GC Judgment is also accessible at https://curia.europa.eu/juris/document/document.jsf?text=&docid=292696&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=20272149. It is summarized in the press release of the GC, which is accessible at https://curia.europa.eu/jcms/upload/docs/application/pdf/2024-11/cp240195en.pdf.

[2] See section II.2 below.

the findings in the Second GC Judgment should be taken for what they are, i.e. mere preliminary findings, which are subject to reconsideration by the ECJ on appeal.

12. The Second GC Judgment has limited consequences for this arbitration. Like the first judgment in Claimant's case for annulment, it is not final. By contrast, the ECJ Judgment is final and binding with respect to those questions and interpretations that the ECJ ruled on.

13. The procedures at the EU courts are subject to strict procedural rules of the EU and, as such, are limited in scope and with respect to evidence that can be submitted. This arbitration is obviously not so restricted. This fact has clear consequences both for the substance of the case as well as for the evidence available to the Tribunal. Similarly, the standard of protection under the ECT is different from that provided by EU law. The relief sought under the ECT is different from the EU case.[3] These differences have been explained by Claimant in previous submissions.[4]

14. Put differently: The interpretation of the AD is a matter of EU law. As explained several times before, in this regard the Tribunal can safely rely on the conclusions of the ECJ as to the meaning and effect of the AD, which is, of course, the central issue in this arbitration.[5] By contrast, the legal standards and parameters for the judicial review of the AD in light of higher ranking laws are different for the EU court procedures and are not relevant for this arbitration.

15. These differences have consequences for the evaluation and weight of evidence. They are the result of different procedural and material standards in the action for annulment, on the one hand, and in this arbitration, on the other hand.

The Second GC Judgment is not final with respect to law nor is it final with respect to facts

16. The Second GC Judgment is not final with respect to the *legal* assessment of the AD under EU law nor is it final with respect to the assessment of the *facts* of the case. In the latter respect, as a matter of EU law, the ECJ, on appeal, has limited jurisdiction with respect to the facts assessed by the GC.[6]

17. Pursuant to established case law, the assessment of the facts and evidence by the GC is, as a matter of principle, to be regarded as definitive by the ECJ. However, in exceptional circumstances a manifestly wrong finding of facts and evaluation of evidence by the GC may result in a point of law which can be reviewed by the ECJ on appeal.[7] This is the case with respect to the Second GC Judgment.

The evidence before the Tribunal is not identical to the evidence before the GC/ECJ

18. Claimant also notes, that the case records of the GC and the Tribunal are different for procedural reasons. The most obvious example is the fact that in the Tribunal's case record there are a number of witness statements and expert reports which the GC does not have. As will be recalled below, the Tribunal has documentary evidence, witness statements and expert reports regarding the un-foreseeability of the AD for Claimant when it made its investments, on the irreversibility of the project and the underlying contracts, and on the real intention and effects of the AD. The records of the Tribunal also include evidence in the form of three expert reports on the damage caused by the AD on Claimant. None of this was available to the GC.

[3] E.g. Claimant's Reply Memorial of 25 October 2021, paras 678-679.

[4] Claimant's Reply Memorial of 25 October 2021, section IX; Claimant's Supplementary Memorial of 27 February 2024, section IX.

[5] See for example, Claimant's Supplementary Rejoinder of 2 September 2024, section IX.2, esp. para 155, section IX.6, esp. para 191.

[6] See para 17 below.

[7] E.g. **Exhibit CLA-345,** *European Commission v Keramag Keramische Werke* (ECJ case C-613/13 P, ECLI:EU:C:2017:49, Judgment of 26 January 2017), para 39; **Exhibit CLA-346**, K. Lenaerts, K. Gutman, J. Nowak, *EU Procedural Law* (Oxford: 2nd edition, 2023), para 19.05 with references and further details.

II.3 **The real objectives and effects of the AD are not its officially stated objectives**

19. The correct interpretation of the AD and of the objectives it pursues is essential for any legal assessment under EU law, and also for any legal analysis under the ECT. For example, it is not possible properly to assess the proportionality of a measure like the AD, or the justification of a different treatment by the AD, without a correct understanding of the AD and its objectives. This is indispensable.

20. The GC, however, fully relied on the officially stated objectives of the AD, in particular as suggested by the EU Commission when it proposed the AD in November 2017. The GC based its assessment of the objectives of the AD and its ability to reach these objectives solely on the text of the AD and the related official Commission documents. It restricted its assessment to the preamble of the AD,[8] the related Commission explanatory memorandum[9] and to working documents.[10] The GC did not question these official statements. It is obvious, and unsurprising, that the official statements would support the narrative advanced by the Commission and the EU legislature.

21. However, the real aim and effects of the AD is one of the most controversial aspects in the dispute between Claimant and Respondent. Claimant has exposed the real objective of the AD and its targeted nature has been confirmed by the AG.[11] Claimant has explained in detail in this arbitration, why the AD cannot achieve its purported objectives, and that Respondent, with political motivation, developed and passed a piece of legislation which has the sole purpose and effect of deleteriously impacting one single offshore import pipeline, Nord Stream 2. Respondent's targeting of Claimant is undeniable from the available documentary record and the many contemporaneous public statements made by EU officials. It was confirmed by AG Bobek. It was, and is no secret that the AD was a *lex-Nord Stream 2*. Claimant also submits again, that Respondent's mask has fallen in this regard in this arbitration.[12] The fact that - and the manner in which - Respondent has changed its argumentation in this arbitration reveals and confirms that the AD was in reality a *lex-Nord Stream 2.*[13]

22. Against this background, it is seriously deficient, that the GC did not analyse the real objectives of the AD. Maybe that is the most obvious mistake in the Second GC Judgment. It is simply not credible to rely one-sidedly on the officially stated objectives. The Tribunal must rather fully review and assess the extensive evidence presented by Claimant in this arbitration. At the heart of the case lies precisely the fact that the real aim of the AD is completely different from the officially stated aim. The AD is simply a legal fig leaf!

II.4 **The application of the AD to Claimant was not foreseeable**

23. It was not foreseeable for Claimant, when it took its final investment decision and made its substantial investments in 2015, 2016 and early 2017, that a profound legal change in the form of the AD would be forthcoming, let alone that factually only Claimant would be affected by it. The public discussion preceding the proposal for the AD did not make the change in law foreseeable for Claimant or any of its financial investors. This discussion was largely general relating to gas supply security or internal onshore pipelines within the EU gas market. It did

[8] **Exhibit RLA-416**, Second GC Judgment, para 187.
[9] ***Ibid.*** paras 190-193, 196.
[10] ***Ibid.*** for example, paras 198, 209-210.
[11] Claimant's Reply Memorial of 25 October 2021, paras 4-11, 123 et seqq., 205-231; Claimant's Supplementary Memorial of 27 February 2024, paras 171 et seqq.; Claimant's Supplementary Rejoinder of 2 September 2024, paras 161-170; **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 197-200 and footnotes 137-141.
[12] Claimant's Supplementary Rejoinder of 2 September 2024, paras 68-77.
[13] Claimant's Supplementary Rejoinder of 2 September 2024, section V.

not relate to the extension of the scope of the Gas Directive to offshore import pipelines, nor did it focus before 2016 on Claimant's project ("**NSP2**"). In addition, to the extent that this public discussion took place after Claimant's final investment decision (FID), it was also irrelevant as it was too late for the Claimant to make significant and profound changes to the already concluded contracts and agreed project structures.

24. The Second GC Judgment, misrepresents the public discussion that took place between 2009 and 2017. The Second GC Judgment is entirely premised on the idea that Claimant knew or should have known that a *lex-Nord Stream 2* in the form of the AD would be forthcoming. This premise of the GC comprises several aspects: *that* Claimant would be in the future a target of legislative changes; *that* this would profoundly change the pre-existing practice of the operation of offshore gas import pipelines from third countries to the EU that had worked without problems for the past decades; *that* this profound change would ultimately in practice only affect Nord Stream 2 and none of the other offshore gas import pipelines to the EU.

25. The Second GC Judgment suggests that "The applicant decided to invest within a context in which several EU institutions had, clearly and for a long time, expressed their intention to apply the obligations laid down by Directive 2009/73, first, to pipelines between a Member State and a third country in general and, secondly, to the Nord Stream 2 pipeline in particular."[14] After this it proceeds to 'illustrate' this with examples which have little to do with external offshore import pipelines. In none of the documents referenced by the GC was there any proposal, nor even the idea, to change the legislation. The reasoning of the GC on this issue is seriously flawed.

Public discussion 2009 – 2015

26. The public discussion referenced by the GC can be divided into two time periods: 2009 – 2015, i.e. the period before the FID for NSP2 was taken, and the period 2016 – 2017, the period after the FID. At the time when the FID was taken by Claimant, there was no legislative change proposed or even discussed. The public discussion over the period 2009 – 2015 does not in any way relate to the possibility of extending the scope of the Gas Directive to include offshore import pipelines. There are no references to this possibility in any of the documents referenced by the GC. Instead, these documents relate to general concerns about gas supply[15] and other statements dating back to 2010,[16] objectives of the un-amended Gas Directive,[17] Decision No 994/2012/EU concerning IGAs,[18] and gas supply agreements.[19] Other documents relate to onshore pipelines like Yamal[20] and onshore sections of South Stream project.[21] Finally, there is a reference to a statement made in the context of EU climate

[14] **Exhibit RLA-416**, Second GC Judgment, para 54.

[15] ***Ibid.*** paras 55 and 64. These references are to supply of gas, not regulation of offshore pipelines.

[16] ***Ibid.*** para 57. This statement is clearly wrong. In its answer to question 7, Annex B 6, the Commission states: "*Whether a pipeline coming from Russia, crossing the territory of a Member State and extending to a non-EU Member State can qualify as an interconnector, will inter alia depend on whether the non-EU Member State is a Contracting Party of the Energy Community [...]. If not, the definition of interconnector does not apply and an exemption cannot be granted for the pipeline*." This statement is clear. The Commission has thus spelled out that pipelines from third countries that are not contracting parties to the Energy Community do not qualify as "*interconnectors*" within the meaning of Art. 2(17) of the Gas Directive and therefore do not fall within the scope of the Directive.

[17] ***Ibid.*** para 56. This reference is to internal EU pipeline networks.

[18] ***Ibid.*** para 58. This reference is to IGAs and compatibility with EU law. This does not suggest anything in relation to extending Gas Directive to offshore sections of import pipelines.

[19] ***Ibid.*** para 62. This reference is to gas supply agreements.

[20] ***Ibid.*** para 63. This reference is to Polish onshore section of Yamal and does not suggest anything in relation to offshore import pipelines.

[21] ***Ibid.*** paras 59-60. This reference is to the exemption for onshore interconnectors connecting two Member States, which clearly fell into the scope of the Gas Directive. It does not suggest a change to the scope of the Gas Directive.

policies that new infrastructure should be fully in line with the "Third Energy Package" as well as with the EU's energy policy objectives.[22] This very general discussion does not in any way suggest anything in relation to foreseeability of the AD, and even less so that Claimant would be targeted by a legislative change. Overall, the references by the GC give the impression that it has looked for references that would suggest foreseeability, but failed to find such references and then relied on a collection of general statements found in various statements and EU documents.

27. It must also be underlined that no legislative action in this respect took place during the period 2009 – 2015, and the extension of the Gas Directive to offshore pipelines is not mentioned in any policy documents prior to September 2017. If these statements and documents would have seriously suggested that there were concerns relating to the operation of offshore gas pipelines and that there was an intention to regulate the operation of offshore gas import pipelines, one would expect that measures would have been taken to address the concerns. However, nothing of this nature happened in the years before 2017. It is therefore very clear that the Second GC Judgment misinterprets the facts and reads something into these documents that is simply not there.

28. This notwithstanding, based on these more than 10-year-old statements, the GC concludes that it is "apparent […] that, between 2009 and 2015, several EU institutions had taken a position in favour of applying the rules governing the internal energy market to all pipelines between a Member State and a third country."[23] It is impossible to agree with this statement, because: (i) these are mostly political statements relating to Russian gas supply (not transport); (ii) they all relate to other issues than offshore gas import pipelines; and (iii) nothing had happened in terms of any indications that EU gas market regulation would be extended to offshore import pipelines.

29. During this period, there was no real discussion nor references in any official documents from the EU that could possibly imply that offshore import pipelines from third countries to the EU would somehow be seen as a risk for competition or security of supply. Nor was there any implication, let alone suggestion that the EU legal framework for these pipelines would be changed fundamentally from unregulated to fully regulated, not to speak of the fact, that such drastic legal change would be tailored to apply in practice only to Claimant, but to no other offshore import pipeline.

Public discussion 2016 – 2017

30. As to the period after Claimant's FID was taken and subsequent substantial contractual commitments were made, i.e. the discussion in 2016 – 2017, the documents referenced by the Second GC Judgment concern specifically Claimant's project. However, these documents - again - do not suggest that any legislative change extending the Gas Directive to offshore pipelines was forthcoming. The Second GC Judgment refers to political statements of several Member States (without disclosing the exact reference) and of the Commission and the Parliament.[24] To the extent these statements relate to the time-period after the FID was taken, which seems to be the case for all statements referenced by the GC, they are irrelevant.[25] At that stage, the FID was taken and it was simply too late to reverse the project and to change contractual structures. It is noteworthy that the Second Roberts Report states, that a

[22] ***Ibid.*** para 65. This is a reference to Energy Union's forward-looking climate policy and contains a very general statement about third energy package.
[23] ***Ibid.*** para 66.
[24] ***Ibid.*** paras 67-72.
[25] We assume that the GC refers to letters from November 2015 and March 2016, as referred to in Claimant's Memorial of 3 July 2020, para 190, i.e. letters after the FID was taken. But the Second GC Judgment does not specify exactly which statements (by which Member States and exact date) it references.

31. All large-scale energy projects give rise to political discussions by various parties and at various levels. Such political statements do not eliminate the protection of legitimate expectations. The conclusion of the GC that this political discussion eliminates the protection of legitimate expectations would mean that all projects that are subject to political discussion and/or measures lose this fundamental protection. In practice, this means all, or at least most, large energy infrastructure projects. This is a disturbing idea which cannot be accepted.

32. However, while the aforementioned political discussion does not suggest that a change in law was being planned or contemplated, it does concern NSP2 and shows the political pressure at the EU level to take action against the Nord Stream 2 pipeline. This political pressure ultimately led to the proposal and adoption of the AD.

33. The GC also suggests that the Commission's proposal to negotiate an IGA concerning Claimant's project was a clear sign of a forthcoming legislative change.[27] This suggestion is baffling. An international agreement is a completely different measure than the amendment of a directive. Claimant could obviously have expected that any such agreement between the EU and the Russian Federation, if it ever were to be negotiated and concluded, would have been negotiated on an equal footing and would not have resulted in a unilateral discrimination of Claimant. To suggest that a request for a mandate to negotiate an IGA means that the "*possibility that the applicant might be subject to the obligations laid down in Directive 2009/73 had materialised and it could expect those obligations to apply in the short term to the Nord Stream 2 pipeline*"[28] has no grounds in law nor in practice and is a clear misrepresentation of the facts.

34. Just like the referenced statements prior to 2015, these few examples from 2015 and onwards could not reasonably have been understood by Claimant to foreshadow a profound change of EU law with respect to the long-established practice of applying EU gas market regulation from the landing terminal onwards. While the proposal relating to an IGA concerning the operation of NSP2 clearly shows that Claimant was being targeted, it does not mean that Claimant should – nor could – have inferred from this that a profound legislative change was on the horizon, let alone that it would in practice only affect Claimant. Such a move was not foreseeable and was notably not discussed in any of the numerous expert commentaries relating to NSP2 prior to the proposal for the AD.[29]

35. The first indication that a legislative change could, at some point and in some form, be proposed came in September 2017. The actual proposal came in November 2017. At this

[26] Second Roberts Report, para 13.
[27] **Exhibit RLA-416**, Second GC Judgment, paras 77-83.
[28] ***Ibid.*** para 83.
[29] See for example, **Exhibit CLA-347,** Severin Fischer, "Lost in Regulation: The EU and Nord Stream 2" (*Policy Perspectives*, Vol. 5/ 5, 2017), p. 3, where the author specifically notes how "*Many observers of the debate were surprised when the Commission announced during a parliamentary hearing in October 2017 that it was planning to modify the Gas Market Directive, the cornerstone of EU energy market regulation in the area of natural gas*." See also, **Exhibit CLA-348,** Kim Talus, "An Intergovernmental Agreement for Nord Stream 2: Rationale, Content and Impact" (*Oil, Gas and Energy Law*, 2017), written just prior to the AD.

point, the FID for the NSP2 project had been taken two years earlier and high value contracts had been concluded. Also, as the Second Roberts Report explains:

36. It is readily apparent, that at the time of the FID for NSP2, there was nothing suggesting that a legislative change akin to the AD was on the horizon. Contrary to what the Second GC Judgment argues, Claimant could not have foreseen the AD. Claimant was therefore entitled to assume that it could continue to make its protected investment with the reasonable expectation that the existing regulatory approach and the scope of the Gas Directive would not radically change to the detriment of Claimant's project.

37. Claimant was not alone in this respect. It is clear that also the five EU financial investors (originally planned as co-owners) that participate in the project (Shell, OMV, Uniper, Engie, Wintershall) shared the same expectation that the NSP2 pipeline was and would remain beyond the scope of the Gas Directive. Otherwise they would not have agreed to participate in the project, or at least not under the same conditions. For some reason, the Second GC Judgment omitted this fact entirely.

38. Finally, from the perspective of foreseeability, it is utterly irrelevant that the actual construction of the Nord Stream 2 gas pipeline had not yet begun at the time of the proposal to amend the Gas Directive, i.e. 8 November 2017.[31] What matters here is not at what point in time pipe lay has started and ended. What matters is the fact that Claimant had already made substantial and irreversible protected investments by the time of the Commission's proposal to amend the Gas Directive was made. These investments were massively devalued by the AD, which singled out Claimant so as to make it in-eligible both for an exemption under Art. 36 of the AD and for a derogation under Art. 49a of the AD.

[30] Second Roberts Report, paras 12, 19-20.
[31] **Exhibit RLA-416**, Second GC Judgment, para 96.

II.5 Claimant could not reverse its project after it made its investments

39. It would have been unreasonable and in practice not possible for Claimant to terminate or amend its investments and concluded contracts. Any suggestion to the contrary by the GC is not correct. It is pure speculation and far from economic reality for large infrastructure projects.

40. Claimant has previously explained the key milestones of the Nord Stream 2 project, such as the incorporation of its company, the key construction contracts, the long-term gas transportation agreement (GTA), and the key finance agreements with the financial investors.[32] As further explained, [redacted].[33]

41. Moreover, Claimant has explained, that the key element underpinning the financial structure of the project was the GTA, and that the financing arrangements were negotiated in parallel with the GTA. The GTA, [redacted], was the foundation on which the Financial Investors' funding commitments were made. This is illustrated by the fact that: [redacted].[34]

42. As explained by [redacted] in his first witness statement, the GTA and its secure revenue stream was the key to securing finance. The importance of the GTA to the Financial Investors is underlined by their requirement that the GTA cannot be amended or terminated without their unanimous consent, which they have included in the financing agreements.[35] Further, [redacted]

43. In his first expert report, Mr Roberts explained that any substantial renegotiation at a time after the adoption and before the implementation of the AD to Claimant's project is [redacted].[37]

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[32] E.g. Claimant's Memorial of 3 July 2020, paras 106 et seqq.; [redacted]

[33] Claimant's Memorial of 3 July 2020, paras 129-131 together with footnote 135-137; [redacted] Claimant's Reply Memorial of 25 October 2021, para 858 (i) together with footnote 1266; [redacted]

[34] Claimant's Memorial of 3 July 2020, para 139 together with footnotes 147, 148, 149, and para 337 (i); [redacted] Claimant's Reply Memorial of 25 October 2021, para 275; [redacted]

[35] Claimant's Memorial of 3 July 2020, para 139 together with footnotes 147, 148, 149, and paras 337 (i), 341-242; [redacted]; Claimant's Reply Memorial of 25 October 2021, para 275; [redacted]; Roberts Report, paras 30.3-30.4.

[36] [redacted]

[37] Roberts Report, para 30.1.

44. More generally, Mr Roberts concluded as follows: [redacted] [38]

45. In his second expert report Mr Roberts makes the following comments with respect to the statements by the GC:

[redacted]

46. This is the commercial reality. The generic, oversimplified assumption by the GC, i.e. that Claimant could have paused, modified, or terminated its project, might perhaps sound plausible. Undoubtedly, it conveniently serves the GC's logic in its Second GC Judgment. However, that assumption lacks any basis in the real world. It is at odds with Claimant's contractual obligations. Moreover, the AD also affects the technical operation of the pipeline. The Tribunal will remember, that Nord Stream 2 was designed to be operated as one pipeline by one operator with full control and oversight. As a result of the AD, Claimant cannot operate its pipeline as intended. Separating the German section of Claimant's pipeline from the rest of the pipeline requires the development of technical solutions allowing such separation to be

[38] Roberts Report, para 31.
[39] Second Roberts Report, paras 22-24.

implemented in a safe manner which is challenging.[40] The GC in its Second Judgment simply shows a lack of understanding of commercial and technical realities.

II.6 The AD does not benefit security of energy supply nor competition in the EU

47. In the context of the stated as opposed to the real objectives of the AD, the GC expressed ideas about security of supply, competition, and transparency, and the contribution of the AD to these objectives. The statements of the GC lack any basis in economic theory as well as in economic practice.

48. *First,* there is a fundamental misconception in the GC's approach in that the GC erroneously considered the **impact of Claimant's pipeline** and not the **impact of the regulation** of that pipeline. The correct test must be, whether it makes a difference for security of supply and competition, if Claimant carries out its gas *transport* task **with** or **without** being regulated by the AD, i.e. with or without unbundling, third party access and tariff regulation. The result of applying this test is that regulating the transport of gas imported to the EU makes no difference for security of supply and competition in the EU. Once again, Claimant is not involved in the supply tasks of gas and the AD does not regulate the supply of gas.

49. This fundamental misconception leads to several statements and conclusions of the GC to be irrelevant and wrong. For example, the GC considers the impact of additional capacity of Claimant's pipeline, NSP2,[41] and the concentration of imports through NSP and NSP2[42] to be relevant. However, this has nothing to do with the AD. It rather relates to the existence (or non-existence) of Claimant's pipeline.

50. *Secondly*, the Second GC Judgment confuses the gas **supplier** with the gas **transporter**. This arbitration concerns Claimant as a gas transporter and the impact of the AD on the operation of its gas transport infrastructure. The arbitration does not concern the gas supplier. In some parts of the Second GC Judgment, the GC bases its assessment of the market position of Gazprom before and after the start of operation of Claimant's pipeline, which is of no relevance in relation to the impact of the AD.[43] The AD does not have any impact on the market share of Gazprom. Therefore, the references to EU import dependency[44] are not connected to NSP2. Similarly, the AD has no impact on import dependency, nor on whether gas is supplied through pipelines or not.

51. *Finally*, the reference to the fact that several Member States had experienced shortages in gas supply due to gas disputes connected to Russia[45] has nothing to do with the Claimant's pipeline but with the supplier of gas. Such shortages have nothing do with the AD.

Impact of the AD on competition and security of supply

52. As far as the impact of the AD on competition and security of supply is concerned, the Second GC Judgment contains a multitude of wrongful ideas. These mistakes are based on a lack of

[40] Claimant's Memorial of 3 July 2020, paras 349 et seqq.; [redacted]

[41] **Exhibit RLA-416**, Second GC Judgment, para 214. However, SE Report notes that the GC overestimates the capacity expansion through NSP2, see Fourth SE Report, para 32 (d).

[42] ***Ibid.*** para 215 and 216. The concentration of imports to the EU through Germany should also be of limited relevance as long as the EU internal market for gas works as an internal market. Gas can and is being transported onwards through the internal EU pipeline network to the locations where it is used. Unlike suggested by the Second Brattle Report, the impact of NSP2 is to reduce the transportation costs for most EU gas buyers.

[43] ***Ibid.*** para 216. In respect of the retail market, the GC believes that Gazprom is a significant player in the EU gas retail markets. It is not.

[44] ***Ibid.*** para 198.

[45] ***Ibid.*** para 213. These disputes where connected to transit of gas and if anything confirm the existence of transit risks that the NSP2 eliminate through its direct connection between the supplier and the end-market.

understanding of practical realities and on the confusion between the nature of offshore pipelines and internal pipelines within the EU.

53. With respect to positive effects of unbundling, the Second GC Judgment confuses unbundling in the context of internal pipelines with multiple connections and multiple users, on the one hand, with single offshore pipelines on the other hand. The GC suggests that without unbundling obligations there would be an obvious risk of discriminatory conduct by a vertically integrated gas supplier.[46] It supports this by reference to case C-718/18, which concerns internal EU pipelines, where this risk of discrimination against competing gas suppliers is real. However, it is clear that this risk does not exist in the context of a single import pipeline designed simply to move gas from a supplier to the end-markets in the most efficient manner: there are simply no other competing users for the pipeline. In other words, competition concerns or conflicts of interest[47] that could be alleviated through unbundling do not exist.[48] Claimant's pipeline is simply a singular infrastructure that moves gas from Russia to Germany. This has been explained by Claimant before.[49]

54. The GC also addresses third-party access which the GC suggests (only) to be a "possibility".[50] In practical reality third-party access to NSP2 remains highly theoretical. The GC suggests that there could be third-parties requesting connection to NSP2 in the offshore parts of the pipeline.[51] However, this suggestion is merely theoretical as it would not make any economic sense to connect to an offshore pipeline shortly before the landing terminal. This would simply cause considerable additional costs. Underwater connections to offshore import pipelines in territorial waters are simply not economically feasible. Only the section in the territorial waters of the respective Member State, i.e. in the case of the Claimant roughly 52 kilometers, would be subject to a hypothetical right physically to connect to the pipeline. A connection to an offshore import pipeline in territorial waters and thus shortly before the pipeline makes landfall in a Member State - where a connection on land would be much more feasible - would cause considerable and unnecessary costs. Therefore, like all EU import pipelines from Northern Africa, NSP2 will continue to operate with a single entry point in Russia and a single exit point in Germany. Claimant has previously explained[52] that unbundling and third-party access obligations cannot have any positive impact on competition nor on security of supply.

55. The Second GC Judgment makes a reference to the Commission's explanatory memorandum and suggests that the lack of transparency in the operation of offshore import pipelines is a risk factor from the point of view of security of supply.[53] Claimant has already explained that this suggestion regarding transparency is an empty-box[54] and that if this was a serious consideration, transparency for all import pipelines, not just NSP2, would have been easily achievable by simply regulating this aspect. Contrary to the catastrophic impact of the AD as

[46] ***Ibid.*** para 201.
[47] ***Ibid.*** para 202.
[48] Fourth SE Report, paras 39-40.
[49] For example, Claimant's Memorial of 3 July 2020, paras 7, 119. Relevance of GC's statement that the Gas Directive provides for a choice between three unbundling models (at para 247) is obscure. The ECJ judgment (at para 110) already confirmed that the impact on Claimant's project cannot be eliminated by any of these models.
[50] **Exhibit RLA-416**, Second GC Judgment, para 206.
[51] ***Ibid.*** para 207 and 208.
[52] Claimant's Supplementary Rejoinder of 2 September 2024, paras 338 et seqq, 349.
[53] **Exhibit RLA-416**, Second GC Judgment, para 210.
[54] Claimant's Supplementary Rejoinder of 2 September 2024, section X.

a whole, this would not have caused such impact on offshore pipelines and no derogations for all other offshore pipelines would have been necessary.[55]

56. The Second GC Judgment also suggests that the AD would eliminate distortions of competition and negative effects on security of supply by ensuring a level playing field for those pipelines that are already subject to Gas Directive and those that are not.[56] This statement is misleading, to say the least. For onshore pipelines the applicability of the Gas Directive always started when they entered EU territory.

57. In a similar manner, its applicability to offshore pipelines always started from the onshore connection point to the EU pipeline network. None of the offshore pipelines were within the scope of the un-amended Gas Directive prior to landfall. The impact of the AD only concerns these offshore pipelines, and in practice only Claimant's pipeline. In this context the GC also suggests that some of these offshore pipelines are already subject to the obligations laid down in the Gas Directive on the basis of other legal instruments, such as intergovernmental agreements.[57] The GC fails to provide any further explanation. As a matter of fact and law, this is simply incorrect with respect to the offshore import pipelines from Algeria and Libya to the EU. All other offshore import pipelines – except Claimant's – have applied for, and have obtained a derogation from the AD. Therefore, it is crystal clear that the level playing field argument was and remains substantially empty.

The regulation of Claimant's gas transport has no impact on other import projects

58. The GC suggests that increasing gas import capacity through Claimant's pipeline would deter the construction or development of alternative import infrastructure projects.[58] The GC, however, fails to explain how the regulation of NSP2 would prevent this. *First*, this again is a question of whether NSP2 **existed** or not, not whether it is **regulated** or not. The AD will not change the NSP2 capacity in one way or another, nor can the AD have any impact on investments to alternative infrastructure projects. *Secondly*, as described by Swiss Economics, additional transport capacity and additional gas volumes logically decrease prices in the downstream market.[59] This in itself is only beneficial. The additional capacity is only a problem in case a dominant gas supplier[60] starts to reduce volumes or increase prices, actions that depend on the gas supplier and not on the gas transporter, and actions that can be taken **with** or **without** the **AD** and **with** or **without Claimant's pipeline**.

59. In the event that such a development were to take place, investment in LNG import facilities would rapidly follow, as an increase in market prices within the EU would make LNG competitive. The GC does not at all consider this possibility that was clearly illustrated by the rapid increase in LNG import capacities in the period 2021 – 2023, as explained by Swiss Economics.[61] *Thirdly*, even in theory, the GC's suggestion only applies insofar as the alternative infrastructures supply the same area as Claimant. However, the GC does not mention any such projects for which an unregulated NSP2 would pose a significant risk, nor are any such projects known.[62]

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[55] These type of transparency obligations relating to methane emissions were imposed on all imports of natural gas generally under the EU Methane Regulation 2024/1787. Nothing would have prevented the EU from taking this approach in the context of operational transparency for import pipelines.
[56] **Exhibit RLA-416**, Second GC Judgment, paras 223 et seq.
[57] ***Ibid.*** para 221.
[58] ***Ibid.*** para 215.
[59] Fourth SE Report, para 32(a).
[60] Swiss Economics find that Gazprom did not have a dominant position in the relevant markets, see Fourth SE Report, section 3.2.
[61] Fourth SE Report, para 7.
[62] The opposite is more accurate, as illustrated by the construction of the Baltic Pipe from Norway to Poland. This project was initiated in 2015, when the plans for Nord Stream 2 where already known.

60. As regards *existing* gas import infrastructure to the EU, one of Respondent's arguments was, and continues to be, that upholding the use of the Ukranian gas transit infrastructure to the EU would protect the EU's security of energy supply. This aspect has once more gained momentum as one of the key elements in the Second Brattle Report.[63] That aspect was apparently also of concern in the Second GC Judgment, though without explicitly naming Ukraine. The GC stated that Claimant's "*project may therefore lead to the diversion of the existing terrestrial pipeline routes […] in favour of a corridor represented by Nord Stream 1 and Nord Stream 2 pipelines. That risk is all the greater since, as is apparent from the documents in the file submitted to the Court, the capacity of the pipelines in service, which already transported gas from Russia, was not fully exploited*."[64]

61. There is much one could discuss here. The main point, however, is that the AD is simply of no relevance for the question of whether the importer/shipper decides to use or not to use Claimant's offshore import infrastructure or the Ukrainian onshore import structure. That was not different when the AD was proposed in 2017 and adopted in 2019. This argument presupposes that the AD is somehow capable of preserving the Ukrainian gas transit. It simply is not.

62. As has been explained above and in previous submissions,[65] Claimant is a transporter of gas, nothing more, nothing less. It cannot influence the volume or price of gas supplied to the EU. Even if one would consider that Claimant's project somehow had a negative impact on security of supply or competition – *quod non* –, the AD cannot mitigate any of the alleged negative effects. As such, the risks painted by the Second GC Judgment in sole reliance on official EU documents are simply misplaced and based on fundamentally wrongful thinking.

63. Significant parts of both the Second GC Judgment as well as the arguments relied on by Respondent focus on the gas supplier, Gazprom, rather than Claimant. But this case concerns the legality or illegality of the AD and its impact on Claimant, not on the supplier of the gas which is transported through Claimant's pipeline or any other pipeline. This misplaced focus on the supplier can be illustrated by simply replacing Gazprom as the supplier of gas by another entity. If the alleged negative impacts and risks based on the identity of the supplier disappear, then it is obvious that the argument is solely based on the supplier of the gas, rather than the transporter. This is the case for most, if not all, arguments suggesting that Claimant's pipeline poses a threat to competition or security of supply within the EU.

II.7 **Swiss Economics' analysis concludes that the AD has no impact on security of supply nor on competition**

64. Arguments about the AD allegedly contributing to security of gas supply and competition within the EU have not only been put forward in the Second GC Judgment, but also in the Second Brattle Report. Claimant has asked Swiss Economics to assess such arguments from an economic perspective. The results of these assessments are summarized in the Fourth SE Report. Based on its assessments, the Fourth SE Report demonstrates, that NSP2 increases import capacity and does not pose a threat to security of supply or competition in the EU internal market. Nor does the regulation of the German section of NSP2 under the AD mitigate this potential threat, were it to exist. The Fourth SE Report makes clear that the focus on gas supply and Gazprom in this case is misplaced. In the case of the AD, the focus must be on gas transport and NSP2. The key points in the Fourth SE report are summarized as follows:

[63] Second Brattle Report, sections II, II.A, II.B.
[64] **Exhibit RLA-416**, Second GC Judgment, para 218.
[65] See paras 53-54 above; Claimant's Supplementary Memorial of 27 February 2024, para 84; Claimant's Supplementary Rejoinder of 2 September 2024, para 56.

The Fourth SE Report demonstrates, that NSP2 cannot threaten security of gas supply in the EU

65. As explained in the Fourth SE Expert Report, NSP2's additional transport capacity increases security of supply. Respondent argued, by contrast, that security of supply is at risk because of the additional capacity of NSP2; Respondent assumes a closure of the Ukrainian gas transit system (UGTS) if NSP2 remained unregulated. Respondent continues that Gazprom would leave the UGTS empty, which would prompt its closure and reduce overall import capacity and access to Ukrainian storage facilities.[66] Furthermore, LNG investments could be deterred. This reduction of diversity associated with multiple transport infrastructures and entry points would weaken security of supply in the EU.

66. In response to that, the Fourth SE Report explains, that and why additional transport capacity has a positive effect on security of supply, also taking into account the alleged risk of closure of the UGTS and the alleged deterrence of LNG investments because of NSP2.[67] Furthermore, the Fourth SE Report demonstrates that the Second Brattle Report bases some of its arguments on incorrect calculations comparing the transport costs of NSP2 and the UGTS.[68]

The Fourth SE report demonstrates that NSP2 does not harm competition in the EU internal gas market

67. The Second Brattle Report bases arguments about the alleged risks of NSP2 for the competition in the EU internal gas market, amongst other things, on a market definition using the so called **SSNIP-test**, which stands for "*small but significant non-transitory price increase*". Brattle conducted a so-called SSNIP test for market definition[69] and claimed that Gazprom is dominant on the market for upstream gas wholesale supplies.[70] The Second Brattle Report commented that Claimant did not engage with the SSNIP-test conducted in the First Brattle Report.[71] The Fourth SE Report explains and demonstrates that Brattle's market definition using the SSNIP-test is incorrect.[72]

68. The Fourth SE Report also explains and demonstrates that Brattle's assessment of Gazprom's market power using **market shares** is incorrect.[73] The report analyses and comments on various elements in the Second Brattle Report, such as that Brattle refers to market shares calculated for one year as the reference period,[74] that Brattle fails to consider LNG capacity as part of the relevant market, that Brattle uses incorrect data for its calculations.

69. The Fourth SE Report then continues to analyse Gazprom's alleged incentives to leverage market dominance. This analysis is based on the Second Brattle Report, where Brattle addresses theories of harm.[75] The first theory of harm concerns the deterrence of **LNG investments**. Respondent and the GC assert that NSP2 has the potential to strengthen imports from Russia to Germany and, as a result, deter investments in infrastructure linking the EU to other third countries.[76] The second theory of harm concerns the distortion of the

[66] Respondent's Supplementary Reply of 4 November 2024, paras 258 et seqq.; Second Brattle Report, esp. sections II.A, II.B. and III.C.
[67] Fourth SE Report, section 2.1.
[68] ***Ibid.*** section 2.3.
[69] First Brattle Report, Appendix D.
[70] ***Ibid.*** para 46.
[71] Second Brattle Report, para 36.
[72] Fourth SE Report, section 3.1.
[73] ***Ibid.*** section 3.2.
[74] ***Ibid,*** para 28.
[75] Second Brattle Report, section III.C.
[76] **RLA-416**, Second GC Judgment, para 215; Second Brattle Report, para 44.

transit market. The Second Brattle Report argues that a vertically integrated NSP2 would distort the use of transit infrastructures with the aim of closing the UGTS. As NSP2 would not charge the actual costs incurred, NSP2 would be cheaper for Gazprom, giving it an incentive to circumvent the UGTS.[77] Despite NSP2 being more expensive, it might charge lower transport tariffs and therefore foreclose the UGTS, which for some countries would increase transit cost for Russian gas.[78] The third theory of harm concerns the leveraging of dominance in the **storage market**. Since the Second Brattle Report no longer addresses this, the Fourth SE Report refrains from dealing with it.

70. The Fourth SE Report concludes, that neither of the first two theories of harm materializes in the case of NSP2. The report finds that there are no incentives nor any economic rationale for a strategy to deter LNG investments using NSP2. Nor does the report find any economic rationale for distorting the transit market using NSP2.[79] Consequently Swiss Economics finds no pre-emptive capacity expansion in NSP2, nor any distortion of the transit market by reducing transport tariffs of NSP2 below cost.[80] Gazprom would not be able to enforce excessive prices in the long term in any scenario, as LNG capacity would expand very quickly, as the expansion of LNG capacity after February 2022 shows.[81]

71. Claimant notes, that the above competition discussion is about Gazprom and gas supply. However, it is important to keep in mind that this is not a competition case of the EU against Gazprom concerning the EU internal gas market or concerning the use of an import pipeline. Hence, this competition discussion is completely irrelevant in the case before the Tribunal, precisely because it is not a competition case of the EU against Gazprom, but a case about the AD regulating the gas transport by Claimant. The Fourth SE Report confirms this, as will be addressed next.

The Fourth SE Report demonstrates that the AD does not contribute to security of supply and competition, even if they were at risk (*quod non*)

72. The Fourth SE Report makes clear that the risks alleged by Respondent, the GC and by Brattle for competition and security of supply in any event cannot be mitigated by the AD.[82] It is simply the wrong legal instrument to address any alleged risks concerning the behaviour of the gas supplier in the EU gas market.

73. The reason for this is that it is simply not meaningful to extrapolate the rationale of the Gas Directive for the internal gas market to gas import. This is because there is a fundamental difference between competition of gas suppliers *in* the EU gas market and competition between importers *to* the EU gas market using their own import infrastructure, as explained in the Forth SE Report.[83] Any suggestions to the contrary is unconvincing, they simply miss the point e.g. when Respondent argues that Claimant allegedly relied on an artificial and misleading distinction between gas supply and gas transport.[84] This distinction is central for the Tribunal when analysing Respondent's arguments in this dispute. It is also unconvincing and wrong when the Second Brattle Report confuses Gazprom and gas supply, on the one hand, with NSP2 and gas transport, on the other hand.[85]

[77] Second Brattle Report, para 45.
[78] ***Ibid.*** para 30.
[79] Fourth SE Report, section 3.3.
[80] ***Ibid.*** sections 2.2 and 3.3
[81] ***Ibid***. para 7 and footnote 9, para 22 and footnote 24.
[82] ***Ibid.*** section 4.
[83] ***Ibid.*** section 4.1.
[84] Respondent's Supplementary Reply of 4 November 2024, para 254.
[85] Second Brattle Report, paras 21-23.

74. This is mainly because there are no competing gas suppliers using the same import infrastructure that would justify discriminatory behaviour. Therefore, there is no conflict of interest between gas supply and gas transport for the operator of an import pipeline such as NSP2.[86] The importer cannot distort competition by abusing its vertically integrated pipeline infrastructure.[87] Hence, regulation of the operation of a pipeline by way of unbundling, TPA, and tariff regulation is not needed nor does it solve any issues of security of supply and competition connected to the use of an import pipeline by the gas supplier, if they were to exist.

75. As also demonstrated by Swiss Economics, any suggestions that the application of tariff regulation to the German section under the AD would increase transparency and therefore justify the AD[88] are unconvincing from an economic perspective. One of the Commission's key arguments is that a lack of transparency in the operation of pipelines to and from third countries could pose a risk to security of supply. Therefore, according to this logic, it is important to ensure that information on the operation and maintenance of important infrastructure is made available to the market and can be used by relevant national and EU authorities.[89]

76. Swiss Economics confirm that if transparency is deemed essential to inform the relevant authorities, this objective could be achieved by far less intrusive measures, such as simple transparency obligations, rather than the extensive regulatory intervention introduced by the AD, including ownership unbundling. The Fourth SE Report also notes the obvious, i.e. that such transparency obligations could be applied to all import pipelines, without the need for exemptions or derogations for all other offshore import pipelines, except NSP2.

II.8 **The GC circumvents conclusions of the ECJ**

77. Finally, the Second GC Judgment is detached from the clear interpretation of the AD by the ECJ. As Claimant has previously explained,[90] the correct interpretation of the AD, confirmed by the ECJ, is that it treats Claimant differently, because the arrangements for the conditions in Art. 36 of the AD for exemptions and in Art. 49a of the AD for derogations are such that Claimant is the only one that cannot benefit from either of the two options. This dispute concerns the fact that the EU legislature, with full knowledge of the factual situation and with the intent of targeting Claimant's project,[91] as confirmed by the Advocate General,[92] arranged the conditions for exemptions and derogations laid down in Art. 36 and Art. 49a of the AD, such that it produced effects for Claimant's legal situation in such a way as to distinguish it individually in a manner analogous to that of the addressee of a decision.[93]

78. As a consequence, contrary to what the GC has done, Art 36 and Art 49a of the AD must not be assessed separately, because their interplay is decisive. Moreover, the key question is

[86] Contrary to Respondent's Supplementary Reply of 4 November 2024, paras 216 et seqq. See also **Exhibit RLA-416**, Second GC Judgment, paras 202 et seqq.
[87] Fourth SE Report, section 4.
[88] See Respondent's Supplementary Reply of 4 November 2024, para 271; Second Brattle Report, paras 32 and 55 et seqq.; **Exhibit RLA-416**, Second GC Judgment, paras 210-211.
[89] **Exhibit C-4,** Staff Working Document Assessing the amendments to Directive 2009/73/EC setting out rules for gas pipelines connecting the European Union with third countries, SWD(2017) 368 final, 8 November 2017, pp. 4-5.
[90] Claimant's Supplementary Memorial of 27 February 2024, section VI, esp. section VI.6.
[91] The intent to discriminate is not a compulsory condition for discrimination under the ECT. A discriminatory effect is sufficient. In this case, both the discriminatory effect and intent are clear.
[92] **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.
[93] **Exhibit CLA-323**, ECJ, case C-348/20 P, *Nord Stream 2 AG vs. European Parliament and Council of the European Union*, 12 July 2022, para 162.

whether it can be legally justified that Claimant – and *only* Claimant – is being deprived from being **eligible** for an exemption or derogation. The clear answer to that question is no. The key question is not whether Claimant meets all requirements of those two provisions to be **granted** an exemption or a derogation. The GC has successfully muddled the waters in this respect. Its legal assessment lacks precision. For example, the statement that exemptions and derogations are not automatic[94] has nothing to do with the in-eligibility, i.e. with the exclusion of Claimant from those two options by excluding projects with a final investment decision already taken from an exemption under Art. 6 of the AD and by requiring to be "completed before 23 May 2019" for a derogation under Art. 49a of the AD. The GC does not engage with this crucial distinction. It works around the interpretation of the AD by the ECJ.

79. It is disturbing to note that the GC simply did not to take into consideration that all other offshore import pipelines have obtained a derogation on the basis of Art. 49a.[95] The exclusion of this important factual element by the GC is a misapplication of EU law. This central fact is, of course, of decisive importance in this arbitration.

[94] **Exhibit RLA-416**, Second GC Judgment, para 220.
[95] ***Ibid.*** para 39.

III. ART. 24(3) ECT IS NOT APPLICABLE

III.1 Introduction

80. As Claimant has pointed out before, Respondent's reliance on Art. 24(3) ECT is a hopeless argument which has been raised too late in the game to be credible.[96] In addition to what Claimant has relied on in previous submissions, Claimant notes the following:

81. The Tribunal will recall that Respondent introduced Art. 24(3) ECT in an attempt to avoid liability, following the ECJ Judgment and the AG Opinion. Although Respondent's reliance on this provision is now masquerading as an "alternative" defence, in reality it is now at the forefront of its case. This is illustrated by Respondent's heavy reliance on the two Brattle reports submitted only after the ECJ Judgment and the AG Opinion.

82. Relying on these two reports, Respondent is now desperately trying to squeeze the concepts of "security of supply" and "competition" into the structure of Art. 24(3) ECT. In doing so Respondent has unwittingly conceded that the AD violates several standards of protection in the ECT. This is so because the very starting point in Art. 24(3) ECT is that there has been, or would be, a violation of the treaty obligations under the ECT.

83. In the following sections Claimant will first show that Art. 24(3) ECT is not applicable to the facts before the Tribunal (Section III.2). In addition to what is explained in Section III.2 – and fundamentally – it is recalled that all the arguments relied on by Respondent have their roots in post 2019 events, i.e. after the adoption of the AD in 2019, and are therefore irrelevant for the determination of liability under the ECT.

84. Section III.3 sets out two central legal points of departure, viz., (i) that WTO cases are not relevant for the Tribunal in resolving the issues before it; and (ii) that Art. 24(3) ECT, as an exceptions clause must be interpreted in a restrictive manner.

85. Section III.4 explains that Art. 24(3) ECT is not wholly self-judging and that any self-judging element of the provision only covers the determination of "necessary/necessity" which in turn is subject to the obligation of good faith which Respondent has failed to observe.

86. Sections III.5 and III.6 go on to show that no "essential security interests" of the EU were at risk (Section III.5) and that there was no need to "maintain public order".

87. In section III.7 Claimant explains that even if Art. 24(3) ECT were applicable, it does not relieve Respondent of responsibility and its obligation to provide compensation for losses caused by its violations of the ECT.

88. In a concluding section Claimant explains that the WTO cases relied on by Respondent do not support its Art. 24(3) ECT case.

III.2 Art. 24(3) ECT does not apply to the investment protection obligations of the ECT

89. At the outset Claimant notes – again – that Art. 24(3) ECT is not applicable to Art. 13 ECT dealing with expropriation – direct as well as indirect expropriation. This means that even if the Tribunal were minded to apply Art. 24(3) ECT, Claimant's case remains intact.

90. In fact it is doubtful that Art. 24(3) ECT is at all applicable to the investment protection obligations set out in Part III of the ECT. This would explain the fact that no ECT tribunal sitting in an investment protection dispute has applied this provision, and that no such tribunal has – as far as is publicly known – ever been asked to apply Art. 24(3) ECT.

91. When the ECT was negotiated and drafted the WTO Agreements had not yet entered into force. Also, at the same time many of the future signatories of the ECT were not members of

[96] Claimant's Supplementary Rejoinder of 2 September 2024, paras 386 et seqq.

the GATT arrangement. Much energy was therefore spent on aligning provisions of the ECT with the GATT system and the future WTO Agreements. This explains why Art. 24 ECT is clearly inspired by provisions which eventually found their way into the WTO Agreements.

92. In addition to the investment protection provisions in Part III, the ECT has several other parts covering various aspects of the energy sector. From a practical point of view the most important part of the ECT is Part II titled Commerce. A central role in that part of the ECT is played by Art. 7 dealing with many detailed aspects of transit, including transit by pipelines. The transit issue was very controversial during the negotiations and was never fully resolved in Art. 7 ECT, or elsewhere in the treaty. This is of particular relevance with respect to Art. 24(3) ECT which focuses on supply and transit, rather than on investment protection. This focus is confirmed by subsection (a)(i) of Art. 24(3) ECT which refers to the "supply of Energy Materials and Products" and by the last sentence of Art. 24(3) ECT which reads: "Such measures shall not constitute a disguised restriction on Transit."

93. It is significant that the core provision concerning investment protection – Art. 13 ECT Expropriation – is excluded from the application of Art. 24(3) ECT. This goes to show that Art. 24(3) ECT is not intended to be applied to the investment protection obligations in Part III of the ECT. Art. 24(3) ECT is located in Part IV of the ECT and is drafted in such a way so as to cover measures falling under Part II Commerce of the ECT, and in particular transit issues under Art. 7 ECT, and not investment protection obligations under Part III of the ECT. This is the likely explanation why no investment arbitral tribunal under the ECT has ever applied Art. 24(3) ECT. An additional likely explanation for this fact is that Art. 24 (3) ECT does not release a respondent from its responsibility to compensate for the damage it creates, as will be explained below.[97]

III.3 **Legal points of departure regarding Art. 24 (3) ECT**

94. If the Tribunal were minded to apply Art. 24(3) ECT, an important starting point is that while the provision is clearly inspired by provisions in the WTO Agreements, little guidance is to be had from decisions rendered within the framework of the WTO dispute settlement system. The ECT, as an investment protection treaty, establishes a completely different framework ensuring a high level of protection of private investments and interests from unlawful interference by a host State.

95. The WTO Agreements by contrast aim to reduce harmful trade protectionism among WTO Member States by creating relevant obligations binding on them, i.e. the States. These agreements do not confer any rights on private businesses which could be enforced against a host State. The WTO dispute settlement system is focused on marshalling and correcting the conduct of Member States with a view to having them comply with their obligations, rather than awarding compensation for any breach of a WTO Agreement. As a consequence of these substantial differences in approach and remedies, it is not appropriate to extrapolate conclusions from WTO decisions to Art. 24(3) ECT. Respondent's reliance thereon is misplaced. The relevant comparators are decisions by investment treaty tribunals dealing with similar provisions. This will be addressed below.[98]

96. Another important legal point of departure is that Art. 24(3) ECT must be interpreted on the basis of the general rule of interpretation of treaties in the Vienna Convention – Art. 31. This means that Art. 24(3) ECT must be interpreted in a narrow and restrictive manner. This follows from the reference in Art. 31 of the Vienna Convention to the ¨object and purpose¨ of the treaty. One of the most important – if not the most important – purpose of any investment

[97] See paras 147-151 below.
[98] See section III.8 below. For the sake of good order Claimant will address Respondent's arguments based on WTO cases.

protection treaty, including the ECT, is precisely to protect investments. It goes without saying that giving a host State a *carte blanche* to apply a provision like Art. 24(3) ECT as it deems fit would completely undermine the object and purpose of the investment protection treaty – in our case the ECT. To do so would violate the general principle of customary international law that no one may be a judge in its own case (*nemo iudex in sua causa*). It is therefore a natural and necessary starting point to treat Art. 24(3) ECT precisely as the heading of the provision indicates – as an *exception* – which cannot be allowed to undermine the main purpose of the investment protection treaty, unless very extraordinary circumstances can be established by the Contracting Party relying on it, i.e. Respondent, which Respondent has failed to do.

97. Delegating the assessment of the criteria in Art. 24(3) ECT completely to Respondent would defeat the whole purpose of the investment protection provisions of the ECT and would contradict the general principle that exceptions to treaty obligations should be interpreted narrowly.[99] The tribunal in *Enron v Argentina*[100] noted in this context, referring to treaty obligations to protect investments articulated in the object and purpose of the BIT in question, that:

> "*any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory*".[101]

98. As will be explained below, the fact that the chapeau of Art. 24(3) ECT uses the language "it considers necessary" does not change this conclusion nor the fact that subsection (a) of Art. 24(3) uses the word "including".

III.4 **Art. 24(3) ECT is not wholly self-judging**

Introduction

99. The chapeau of Art. 24(3) ECT refers to *"measure which it considers necessary"*. The relevant measure in this arbitration, and the necessity of which is to be tested, is the AD adopted in April 2019.

100. The words "it considers necessary" do indeed suggest a certain degree of so-called self-judging. As will be explained below the exercise of any such self-judging is not, and cannot be, unfettered. Reliance by a Contracting Party thereon is not completely free from review by an arbitral tribunal. Had it been the intention of the Contracting Parties to grant complete deference to a respondent State, they would have adopted clear language to this effect. They did not.

101. The Contracting Parties could, for example, have adopted language similar to Annex 5 of the India-Singapore Comprehensive Economic Cooperation Agreement[102] which states that:

> "*where the disputing Party asserts as a defence that the measure alleged to be a breach is within the scope of a security exception [...] any decision of the disputing Party taken on such security consideration shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of such decision*".

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[99] **Exhibit CLA-349,** Schill/Briese, "If the State Considers: Self-Judging Clauses in International Dispute Settlement" (*Max Planck Yearbook of United Nations Law*, Vol.13, 2009, 61-140), pp. 93.

[100] **Exhibit CLA-97**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3, Award of 22 May 2007).

[101] ***Ibid***. para 331.

[102] **Exhibit CLA-350**, "Non-justiciability of Security Exceptions", Annex 5 of the India-Singapore Comprehensive Economic Cooperation Agreement dated 29 June 2005.

102. Similar language is found in footnote 2 to Art. 22.2(b) of the Peru – United States Free Trade Agreement[103] which states that "for greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding [...] the tribunal or panel hearing the matter shall find that the exception applies".

103. No such, or similar, language is to be found in Art. 24(3) ECT, or anywhere else in the ECT.

104. At the outset it is important to note that the words "it considers" in the chapeau of Art. 24(3) ECT is limited to the chapeau and refers exclusively to the word "necessary" and not to sub-paragraphs (a) to (c) of Art. 24(3) ECT. This means that any self-judging can be exercised only with respect to what is purported to be "necessary". This also means that any limitation on the scope of the review by a tribunal is restricted to the determination of the meaning of "necessary". The existence of the circumstances in sub-paragraphs (a) to (c) – e.g. essential security interests and maintaining public order – is subject to a full objective analysis by a tribunal.

105. Respondent seems to ignore this structural difference between Art. 24(3) ECT and Art. XXI(b) GATT to which Respondent refers.[104] Respondent is simply wrong when it suggests that "*the invoking party enjoys wide discretion to identify its essential security interests*". Claimant has explained above[105] that this approach runs counter to the generally accepted rule that exceptions to treaty obligations must be given a restrictive interpretation. In the context of an investment protection treaty any other approach would completely emasculate the treaty protections for the investor.

106. At any rate, as will be explained below, Respondent has failed to establish the existence of the relevant circumstances at the time of the adoption of the AD. Respondent has not presented any contemporaneous evidence in support of its arguments purportedly underpinning its reliance on Art. 24(3) ECT. Risking to restate the obvious, Claimant nevertheless points out that mere statements from Respondent are not sufficient.

Respondent has not observed good faith

107. Whilst Respondent might exercise a degree of self-judging with respect to ¨necessary¨ any such exercise is subject to the obligation of good faith.

108. This very fundamental principle of international law is codified in Art. 26 of the Vienna Convention. Respondent has not observed this obligation. As Claimant has repeatedly pointed out, Respondent's reliance on Art. 24(3) ECT came late – very late – in this arbitration. Good faith would have required this argument to have been raised at the outset of this arbitration. Instead it was raised only after the ECJ had rendered its decision concerning the standing of Claimant in the annulment proceedings relating to the AD. As the Tribunal will

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[103] **Exhibit CLA-351**, "Exceptions", Section 22 of United States-Peru Free Trade Agreement (PTPA) dated February 1, 2009.

[104] **Art. XXI GATT** reads: *Security Exceptions*
Nothing in this Agreement shall be construed
(a) *to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or*
(b) *to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests*
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or other emergency in international relations; or
(c) *to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.*

[105] See paras 96 et seqq. above.

recall, the ECJ and the AG to a very large degree agreed with Claimant as to the nature, objective and effect of the AD.

109. Respondent's conduct is a textbook example of an ex-post attempt to rationalize; an attempt which actually proves the lack of a genuine belief on the part of Respondent that the AD was relevant to "the essential security interests" and the "maintenance of public order" as now argued by Respondent.

110. Respondent has also breached the obligation of good faith by specifically targeting Claimant with a view to trying to stop, or create problems for, the Nord Stream 2 pipeline. Respondent cannot now try to hide behind a general exception in the ECT – Art. 24(3) – and pretend that it tried to prevent a perceived threat relating to Russian energy supplies when adopting the AD. We note again, that the regulation of gas transport in any event has no impact on the supply of gas.

111. The word "necessary" is not defined in Art. 24(3) ECT. The ordinary meaning of the word is something that "needs to be done" and which is "inevitable", the latter word meaning "certain to happen"; unavoidable. Respondent must thus show that the AD was unavoidable to achieve its stated objectives. At the very least Respondent must show that the AD bears a rational and logical connection with, and materially contributes to the realisation of the objectives that Respondent now says were underlying the AD, and in particular Respondent's purported "essential security interests" and "maintenance of public order".

112. There is no contemporaneous evidence before the Tribunal showing that Respondent had such considerations in mind when the AD was adopted. This further confirms the lack of good faith on the part of Respondent.

113. Respondent's lack of good faith in exercising self-judging in relation to "necessary" becomes even clearer when looking at the customary international law understanding of "necessity". Respondent's use of "necessary/necessity" is very far from this understanding. The relevant provision is Art. 25 of the ILC Articles on State Responsibility.[106] The language of the provision makes it clear that the threshold is very high indeed for a State successfully to invoke necessity, i.e. that an act/measure is necessary.

114. Subsection (a) of Art. 25 stipulates that the wrongful act of the State – i.e. in this arbitration the AD – must be "the only way for the State to safeguard an essential interest from a grave and imminent danger". The gravity requirement means that the peril must be objectively established and not merely apprehended or possible. The requirement with respect to imminence in turn means that the peril must be "certain and inevitable".[107] Applying these requirements to the facts of this arbitration, it is clear that the purported concerns with respect to essential security interests and public order at the time of the adoption of the AD were far from reaching the required threshold.

115. In fact during 2014-2019 supplies of Russian gas were constant and reliable without any politically motivated interruptions. As a matter of fact Nord Stream 2 would have reduced energy instability by responding to EU's increased demand for natural gas, by creating viable

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[106] **Exhibit CLA-134**, International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001), Art. 25 "Necessity":

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
(a) the international obligation in question excludes the possibility of invoking necessity; or
(b) the State has contributed to the situation of necessity.

[107] ***Ibid***. commentary to Art. 25, para (16), p. 83.

alternatives to the dilipated and ageing pipelines in Ukraine and by reducing the uncertainty caused by the Ukrainian transit route.

116. When the AD was adopted in 2019 the alleged threat of weaponization of energy supplies by Russia was purely hypothetical. There was certainly no "objective" and "inevitable" grave peril.

117. Even if the threat had been real at the time – *quod non* – the AD was certainly not the only way to address such a threat. Under sub-section (a) of Art. 25 of the ILC Articles, the measure in question must be the only way to safeguard the State's essential interest.

118. In 2019 the EU had several other choices to secure energy security, such as investing in additional LNG capacity, diversifying supplies and setting storage targets. None of this was done at the time, but some of these measures were introduced later, which confirms the availability and feasibility of them.

119. It follows from the foregoing that the requirements laid down in Art. 25 of the ILC Articles were simply not met when the AD was adopted. Respondent's reliance on necessity as articulated in Art. 24(3) ECT is simply an ex-post attempt at rationalization. It is not an exercise of good faith.

120. The good faith requirement with respect to self-judging has been confirmed in arbitral practice and international jurisprudence and has been said to require, *inter alia*, the following elements:[108]

- Consideration of alternative measures which could achieve the same objective in a manner compliant with treaty obligations;
- A rational connection between the measure and the stated objectives;
- No irrelevant considerations and no ulterior motives masquerading as the stated objectives.

121. Respondent has failed to provide any contemporaneous evidence showing that, at the time when the AD was adopted, any of these requirements were met.

122. It follows from the foregoing that Respondent has not exercised good faith when purportedly finding that the AD was "necessary". In fact, Respondent has not established that it, at the time of the adoption of the AD, found the AD "necessary" within the meaning of Art. 24(3) ECT, and customary international law, in relation to the alleged "essential security interests" and the "maintenance of public order".

123. Respondent's reliance on Art. 24(3) ECT thus falls away. For the sake of completeness, Claimant will, however, in the following explain that Respondent's arguments relating to "essential security interests" and "maintenance of public order" lack merit. As mentioned above,[109] these two concepts are not affected by the self-judging element in Art. 24(3) ECT, but are to be analysed and reviewed in an objective and substantive manner. Even if the Tribunal were to perform a good faith review – as required when exercising self-judging – with respect to these concepts, it is submitted that such a review would not significantly differ from the objective and substantive analysis performed below.

III.5 **No essential security interests were at risk**

124. To take "essential security interests" first. There is no definition of "essential security interests" in the ECT. As explained above, this term is not covered by the self-judging element referred to in the chapeau of Art. 24(3) ECT. It is rather the subject of a full review and analysis by the Tribunal as a result of which the Tribunal will establish the objective existence, or not, of "essential security interests". It is not for Respondent to make this determination. As Claimant

[108] See, for example, **Exhibit CLA-352**, Declaration of Judge Keith to Judgment, *Case concerning* Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), ICJ Reports 2008, para 6.
[109] See sections III.5 and III.6 below.

will explain in the following no "essential security interests" of the EU were at risk when the AD was proposed nor when it was adopted.

125. Pursuant to Art. 31 of the Vienna Convention one of the elements of the general rule of interpretation is the *context* of the treaty term to be interpreted. Relevant context for the interpretation of "essential security interests" is found in items (i) and (ii) of subsection (a) in Art. 24(3) ECT.

126. Item (i) refers to supply to a military establishment, and item (ii) refers to war, armed conflict or other emergency in international relations. These two references provide the context for the proper understanding of "essential security interests". The context is clearly of a military nature referring to a military establishment, to war, armed conflict or other emergency in international relations thus indicating some form of hostile interaction threatening political and military security. This is clearly very far from the situation in 2019 when the AD was adopted. It is significant that the reference to "other emergency in international relations" follows immediately after the reference to war and armed conflict which indicates that the "other emergency" must be of the same qualitative character.

127. Even if one were to go beyond political and military security and include "the economic security of States and of their population"[110] an economic and political crisis would reach the level of "essential security interests" only when the very existence of the State and its independence is at stake.[111] In *CMS v Argentina,* for example, the tribunal found that the crisis which Argentina argued it was trying to address by its measures did not reach the threshold of "essential security interest" because it had not resulted in a "total economic and social collapse".[112]

128. Again: the situation in 2017 when the AD was proposed, and in 2019 when the AD was adopted was very far from reaching the indicated threshold. There was no danger of war, armed conflict or other emergency in international relations affecting Respondent, but at most a hypothetical risk that could have been avoided, or mitigated by taking other measures, such as building LNG infrastructure and introducing gas storage obligations.[113] Respondent is trying to equate its alleged concerns with respect to security of energy supplies from Russia with ¨essential security interests¨ in the meaning of Art. 24(3) ECT. It follows from the foregoing that such concerns – even if they did exist at the time of the adoption of the AD – did not reach the level of "essential security interests".

129. The security of supply concerns relied on by Respondent must be understood as referring to the concerns of the EU as a Contracting Party. For this argument to work, Respondent must show that these concerns reflected the unanimous position of the EU Member States. Respondent has not shown this to be the case. It is in fact highly unlikely that all EU Member States would have found in 2019 energy supplies from Russia, and Nord Stream 2 in particular, to be equally problematic, if at all, to their very existence and independence. This is explained by the fact that each EU Member State has its own energy-related needs, policies and vulnerabilities resulting from its history, geographical location and commercial ties. This is confirmed in and guaranteed by Art 194(2) TFEU according to which EU measures shall

[110] **Exhibit CLA-353**, *Continental Casualty Company v. The Argentine Republic*, (ICSID Case No. ARB/03/9, Award of 05 September 2008), para 175.

[111] See for example, **Exhibit CLA-97**, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3, Award of 22 May 2007), paras 306 et seqq.; **Exhibit CLA-69**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8, Award of 12 May 2005), paras 353 et seqq.; **Exhibit CLA-122**, *Sempra Energy International v. Argentine Republic*, (ICSID Case No. ARB/02/16, Award of 28 September 2007), paras 347 et seqq.

[112] **Exhibit CLA-69**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8, Award of 12 May 2005), paras 355 et seqq.

[113] See para 118 above.

not affect a Member State's choice between different energy sources and the general structure of its energy supply. Respondent has not presented any contemporaneous evidence showing a unanimous position of the EU Member States. Germany, where Claimant's pipeline arrives, obviously supported the project.[114] In addition, Claimant's project was also of economic interest to other Member States, including Austria, Belgium, France and the Netherlands, as is also reflected in the structure of the 5 Financial Investors.[115]

130. Also, in 2018 construction and operation permits were granted by Germany, Finland and Sweden without any mentioning that the existence of Nord Stream 2 would in any way threaten their "essential security interests" or those of the EU.

131. Under Art. 24(3)(a)(ii) ECT the measure in question – i.e. the AD – must have been taken in time of war, armed conflict, or other emergency in international relations. The AD was not adopted under such circumstances. It is undisputed that in 2019 there was no state of war, no armed conflict involving the EU or any of its Member States, with Switzerland, the home State of Claimant, nor with Russia.

132. Respondent is now suggesting that the AD was adopted in a time of "other emergency in international relations". This is wrong. The use of the words "other emergency" immediately following the words "war, armed conflict" implies that a situation of emergency should qualitatively be comparable to war or armed conflict. A high degree of unexpected tension between States is necessary for a situation to reach the level of "emergency in international relations". Political and economic differences between States, no matter how urgent or serious from a political perspective, are not sufficient to constitute an emergency in international relations.[116]

133. Against this background it is clear that there was no emergency in international relations affecting the EU or Switzerland relating to Russia. Respondent's argument is solely based on the conflict between Russia and Ukraine dating back to 2014 – i.e. five years prior to the adoption of the AD – which has no link at all to the AD. Indeed, the AD does not with one syllable mention the Russia - Ukraine 2014 conflict. The reference to this conflict now is simply an ex-post attempt at rationalization which must be ignored.

134. As explained above, Art. 24(3) ECT must be interpreted narrowly,[117] it being an exception to the treaty obligations in the ECT. As a consequence, the reference to "other emergency in international relations" must also be interpreted in a restrictive fashion. It follows that this term should be applied solely and exclusively in the context of the parties to the dispute, i.e. Claimant and Respondent, and should not be extended to other actors whose disputes did not affect the parties at the time of the adoption of the disputed measure.

135. Even if one were to exclude the qualifier "essential" from "essential security interests", and even if one were to equate security of supply of gas with "security interests", Claimant has explained above[118] that Nord Stream 2 did not in any way threaten the security of supply of gas to the EU. On the contrary, it increased the security of supply. This is confirmed by Swiss Economics in Section 2 of its Fourth Report.[119]

136. As mentioned above, Respondent's arguments in this respect build on the two reports from Brattle. These reports ignore the crucial and decisive difference between ***supply*** of gas – provided by Gazprom – and pipeline ***transport*** of gas – provided by Claimant. The AD deals with gas pipeline transport. It has nothing to say in substance about the supply of gas and

[114] Claimant's Memorial of 4 July 2020, para 192.
[115] ***Ibid***. para 193.
[116] **Exhibit RLA-380**, Panel report *Russia – Traffic in Transit,* para 7.75. See also para 162 below.
[117] See paras 96 et seqq., 105 above.
[118] See paras 65 et seq., 130 above.
[119] Fourth SE Report, section 2.

does not purport to regulate the supply of gas. The two Brattle reports are simply barking up the wrong tree.

III.6 **No public order to be maintained**

137. The ECT does not have a definition of "public order". Given the context in which the term is used – i.e. in the exceptions clause of the ECT – these words must be given a restrictive interpretation.[120] It would seem obvious that "public order" is very different from something being of "public interest" or of "public concern". That the alleged competition and security of energy supply issues to which Respondent refers[121] might have been important and of public concern is one thing, but this is very far removed from a threat to the public order which would require a certain measure to ¨maintain¨ the public order, as is required under Art. 24(3) ECT.

138. In the context of an investment protection treaty the reasonable starting point is that the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. In the *Continental Casualty* case[122] the tribunal concluded that public order referred to "public peace" which was threatened by actual or potential insurrections, riots and violent disturbances of peace.[123]

139. A further confirmation of this approach is found in *Unison Fenosa v Egypt*[124] where the tribunal dealt with a shortfall of gas to claimant's plant. Egypt argued that the events during the so-called Arab Spring threatened the basic functions of the State and that the only way to maintain public order was to prioritize domestic needs. The tribunal was not convinced. It said that

> "*the non-supply of gas to the Plant was not attributable to the Egyptian revolution or social unrest; nor was it begun or maintained as the only way to safe-guard the Respondent's essential interests against a grave and imminent peril, within the meaning of Article 25 of the ILC Articles*".[125]

140. It follows from the foregoing that the circumstances now relied on by Respondent in an attempt to defend the adoption of the AD in April 2019 were very far from being necessary to "maintain public order" in the meaning of Art. 24(3) ECT.

141. To the extent that Respondent is seeking to squeeze competition issues in the EU into the category of "public order" in Art 24(3) ECT, Claimant has explained[126] that Claimant's pipeline does not in any way harm competition in the EU internal gas market, and that, even if it did, the AD could not mitigate the alleged negative effects. This is confirmed by Swiss Economics in Sections 3 and 4 of its report.[127]

142. In this context it is worthwhile recalling that there is a fundamental difference between a transport infrastructure **within** the EU internal market and an import infrastructure **to** that market. Claimant, of course, belongs to the latter category.

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[120] See paras 96 et seqq., 105 above.
[121] Respondent's Supplementary Reply of 4 November 2024, paras 328 et seqq.
[122] **Exhibit CLA-353**, *Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9, Award of 05 September 2008).
[123] ***Ibid.*** para 174.
[124] **Exhibit CLA-354**, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/14/4, Award of 31 August 2018).
[125] ***Ibid*.** para 8.48.
[126] See section II.6 above.
[127] Fourth SE Report, sections 3 and 4.

III.7 **Art. 24(3) ECT does not release Respondent of responsibility**

143. Art 24(3) ECT is based on the premise that it does not **prevent** a Contracting Party **from taking certain measures** – under certain circumstances – which constitute violations of its treaty obligations.

144. The first sentence of Art. 24(3) ECT reads in relevant parts: "*The provisions of this Treaty [...] shall not be construed to prevent any Contracting party from taking any measure*". The ordinary meaning of this language is that the Tribunal cannot ***stop*** Respondent from implementing certain measures which violate its obligations under the ECT. Importantly, the provision does not offer any waiver from the obligation to compensate for violations of treaty obligations. Respondent can thus not evade the consequences of its wrongful conduct. This follows from customary international law as codified in Art. 27(b) and Art. 36(1) of the ILC Articles on State Responsibility.

145. Art. 27(b) reads: "The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to [...] (b) the question of compensation for any material loss by the act in question"; and

146. Art. 36(1) reads: "The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution."

147. Consequently, even if Art. 24(3) ECT were found to be applicable, it does not relieve Respondent from its obligation to compensate for the damage caused by its violations of the ECT. As mentioned,[128] this is a likely explanation why Art. 24(3) ECT has never been invoked and applied in an investment protection case. Indeed, the application of this rule of customary international law to necessity/exceptions clauses has been confirmed by international jurisprudence.

148. For example, in the *Gabcikovo-Nagymaros Project* case[129] the International Court of Justice dealt with Hungary's argument that the wrongfulness of its conduct in discontinuing work on the project was precluded by a state of necessity. In that context the ICJ noted that in any event "*such a state of necessity would not exempt it from its duty to compensate its partners*", a fact which had been expressly acknowledged by Hungary.[130]

149. In *CMS v Argentina*[131] an ICSID tribunal ruled on various aspects of the necessity clause (Art. XI) in the BIT between the United States and Argentina against the background of the financial crisis in Argentina beginning in the early 2000's. The tribunal in that case concluded that the necessity clause was not applicable. The claimant had argued that even if it had been applicable, it did not exempt Argentina from the obligation to provide compensation. On this issue the tribunal said the following:

> "*The claimants reasoning in this respect is supported by Art. 27 [of the ILC Articles on State Responsibility] and the decisions noted above [including the Gabcikovo-Nagymaros case], as well as by the principle acknowledged even in the generality of domestic legal systems: the plea of state necessity may preclude the wrongfulness of an act but it does not exclude the duty to compensate the owner of the right which had to be sacrificed [...]*".[132, 133]

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[128] See para 93 above.
[129] **Exhibit CLA-355**, Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p.7.
[130] ***Ibid*.** p. 39, para 48.
[131] **Exhibit CLA-69**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8, Award of 12 May 2005).
[132] ***Ibid*.** para 388.
[133] It is true that in a subsequent case – **Exhibit CLA-98**, *LG&E Energy Corp. and others v. The Argentine Republic* (ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2005) – the tribunal reached a

150. This reasoning was confirmed by another ICSID tribunal in 2012. *In EDF International SA et al v Argentina*[134] the tribunal said the following:

> "*Even if Respondent's conduct might be excused under the State of Necessity Defense, Respondent remains obligated to return to the pre-necessity status quo when possible. Moreover, the successful invocation of the necessity defense does not per se preclude payment of compensation to the injured investor for any damage suffered as a result of the necessity measures enacted by the State*".[135]

151. It is thus clear from the foregoing that even if Art. 24(3) ECT were applicable, Respondent cannot escape its obligation to compensate for the damage caused by its violations of the ECT.

III.8 **WTO cases are not relevant for the interpretation of Art. 24(3) ECT**

Introduction

152. Claimant has already explained, and maintains, that there is nothing to be extrapolated from WTO law and WTO cases for the interpretation of Art. 24(3) ECT.[136] For the sake of good order, Claimant will nevertheless address the WTO cases relied on by Respondent.

153. Respondent is relying on five WTO cases in support of its case concerning Art. 24(3) ECT. In the context of the alleged *protection of essential security interests* Respondent relies on three WTO cases concerning Art. XXI GATT, namely *Russia – Traffic in Transit*, [137] *Saudi Arabia – IPRs*[138] and *US – Origin Marking.*[139] With respect to the alleged *maintenance of public order* Respondent relies on *EU – Energy Package*[140] and *US – Gambling*.[141] Art. XXI GATT contains no public order exception, but Art. XIV GATS refers to public order.[142]

154. None of these WTO cases contribute meaningfully to Respondent's case concerning Art. 24(3) ECT. On the contrary, they contain elements which support Claimant's position that the requirements of Art. 24(3) ECT are clearly **not** met in the case before the Tribunal. Accordingly, also when viewed from a WTO case perspective, the AD has nothing to do with

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different conclusion concerning the obligation to pay compensation under the same necessity clause in the same BIT based on its own interpretation of Art. 27 of the ILC Articles on State Responsibility leading it to decide that the damages suffered during the state of necessity should be born by the investor. Claimant submits that this tribunal simply got it wrong.

[134] **Exhibit CLA-356**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23, Award of 11 June 2012).

[135] ***Ibid*.** para 1177.

[136] See paras 93-94 above.

[137] Respondent's Supplementary Reply of 4 November 2024, paras 300, 304, 306, 308, 315, 316, 320, 321, 344, and footnotes 395, 397, 400, 401, 404, 407, 408, 409, 437. The Panel Report (DS512) has been exhibited by Respondent as **RLA-380**.

[138] Respondent's Supplementary Reply of 4 November 2024, paras 308, 315, 320, and footnotes 401, 404, 407, 408. The Panel Report (DS567) has been exhibited by Respondent as **RLA-382**.

[139] Respondent's Supplementary Reply of 4 November 2024, paras 300, 317, and footnotes 395, 405. The Panel Report (DS597) has been exhibited by Respondent as **RLA-392**.

[140] Respondent's Supplementary Reply of 4 November 2024, paras 326, 330, and footnotes 413, 417. See already Counter Memorial of 4 July 2024, para 326, and footnote 286. The Panel Report (DS476) has been exhibited by Respondent as **RLA-386**.

[141] Respondent's Supplementary Reply of 4 November 2024, paras 324, 325, and footnotes 410, 411, 412. The Panel Report (DS285) has been exhibited by Respondent as **RLA-385**.

[142] **Art. XIV(a) GATS** reads: *General Exceptions*
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
(a) necessary to protect public morals or to maintain public order; […]

the ‘protection of essential security interests’ of the EU, nor with ‘maintaining the public order’ in the EU. This will be explained in the following.

The majority of the cases relied on by Respondent lack finality and binding force

155. Claimant notes that only two of the five WTO cases relied on by Respondent are final and binding within the WTO framework. These are *Russia – Traffic in Transit* relating to the protection of essential security interests, and *US – Gambling* in relation to maintaining public order. These panel reports have been adopted by the Dispute Settlement Body (DSB) of the WTO, in the latter case with modifications of the panel report.[143]

156. In all other cases either appellate proceedings are pending,[144, 145] or the parties have agreed to terminate the dispute without seeking DSB adoption of the panel report.[146] The appealed cases are hanging in the air until there will be a functioning Appellate Body (AB) or the parties withdraw the appeal.[147] Panel reports which have been appealed can be considered for adoption by the DSB only after completion of an appeal to the AB. Until such time the panel reports remain non-binding. Reports, which have not been adopted by the DSB, thus have little precedential value within the WTO framework, and even less so outside this legal framework. They lack relevance for the interpretation of Art. 24(3) ECT.

WTO cases support the limited scope of self-judging

157. As explained above, Art. 24(3) ECT is not wholly self-judging.[148] WTO case law relied on by Respondent supports this conclusion. Specifically, the final and binding WTO case *Russia – Traffic in Transit* confirms that the self-judging element is limited to the *chapeau* of Art. XXI(b) GATT whilst all circumstances in the subparagraphs of that provision are subject to full review.

158. The panel concluded – after a thorough analysis based on the meaning of the words, the grammatical construction, the logical structure, the object and purpose, and the negotiating history of the provision[149] – that the adjectival clause "which it considers" in the chapeau of Art. XXI(b) does not extend to the determination of the circumstances in each subparagraph. Rather, for a measure to fall within the scope of Art. XXI(b) GATT, it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision.[150] Consequently, Art. XXI GATT is not wholly self-judging.[151]

159. The same logic applies to the self-judging element in Art. 24(3) ECT. The "which it considers necessary" language in the *chapeau* of Art. 24(3) ECT limits the self-judging scope to the concept of necessity, whilst all other elements in Art. 24(3) ECT are subject to a full legal review, including the protection of essential security interest, time of war, conflict, emergency in international relations, and maintenance of public order.[152] The scope of the self-judging element in Art. 24(3) ECT is even more limited in light of an important textual difference: whilst

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[143] The Appellate Body (AB) has partially reversed the panel’s conclusions. The DSB adopted the panel report with the modifications made by the AB. We note that the Respondent relied on the panel report and not on the AB report. However, in the part relied on by the Respondent, the opinions of the AB do not really differ from those of the panel – see **Exhibit CLA-357**, Report of the Appellate Body, 07 April 2005, paras 298-299.

[144] Namely **Exhibit RLA-392**, Panel report, *US – Origin Marking (Hong Kong, China)*.

[145] Namely **Exhibit RLA-386**, Panel report, *EU — Energy Package.*

[146] Namely **Exhibit CLA-358**, *Saudi Arabia – IPRs*, particularly No. WT/DS567/11, C*ommunication from Qatar* (https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/567-11.pdf&Open=True), 25 April 2022.

[147] Namely **Exhibit RLA-392**, Panel report, *US – Origin Marking (Hong Kong, China)*; and **Exhibit RLA-386**, Panel report, *EU — Energy Package*.

[148] See section III.4 above.

[149] **Exhibit RLA-380**, Panel report *Russia – Traffic in Transit*, paras 7.53-7.104.

[150] ***Ibid*.** para 7.101.

[151] ***Ibid*.** para 7.102.

[152] See para 103 above.

the chapeau in Art. XXI(b) GATT refers to essential security interest, the chapeau in Art 24(3) ECT does not. In the latter provision, the essential security interest is a circumstance referred to only in one of the subparagraphs.

WTO cases support Claimant's interpretation of necessity

160. As regards the applicable legal standard for the review of the words "which it considers necessary", WTO cases do not question the interpretation of the necessity in Art. 24(3) ECT as described above.[153] This is mainly because the WTO cases leave a gap in this respect.[154] The only formally adopted WTO case which is relevant to this arbitration is meagre on this point. The panel did not define the term "necessity". It simply stated that Art. XXI(b)(iii) GATT requires that the measures at issue must meet "*a minimum requirement of plausibility in relation to the proffered essential security interests*".[155] This might seem like a low threshold. However, when this case is analyzed in full, it becomes clear that it does not support Respondent's Art. 24(3) ECT case in this arbitration. This will be explained next.[156]

WTO cases support Claimant's interpretation of essential security interests

161. The WTO cases do not question the above conclusion that *no* essential security interests of Respondent were, or could be, protected when it proposed and adopted the AD.[157] In an effort to demonstrate the opposite, Respondent relies on *Russia - Traffic in transit.* Whilst the panel in this case concluded, that the situation between Russia and Ukraine was a situation of "emergency in international relations" and justified the "protection of essential security interests", in fact that case does *not* support Respondent's position in this arbitration.

162. Respondent quotes selectively some definitions from this panel report.[158] However, it is important to note that these quotes do not reflect the complete legal standard that was applied by the panel in that case. The panel's legal analysis consisted of a number of steps:

- (1) The panel undertook a full legal assessment of "*war or other emergency in international relations*" in Art. XXI(b)(iii) GATT. It is noteworthy that in the relations between Ukraine and Russia[159] the panel defined this "*as a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state*".[160] The panel particularly noted that "*political or economic differences between Members are not sufficient, of themselves, to constitute an emergency in international relations*", even if such differences are "*urgent or serious in a political sense*".[161]
- (2) In the next step, the panel assessed, whether the disputed measures in the case before it between Ukraine and Russia were "*taken in time of"* the emergency.[162]
- (3) As a cumulative requirement, the panel then assessed whether the conditions of the chapeau in Art. XXI(b) GATT' were satisfied, i.e. whether the measures between Ukraine and Russia before the panel satisfied the conditions of "*which it considers necessary for*

[153] See paras 156 et seqq. above.
[154] For a detailed analysis pls. refer to **Exhibit CLA-359**, Senai W. Andemariam, The Concept of Necessity in International Law and the World Trade Organization: History, Lessons, and Prospects (*Brill*, 1st ed, 2024), p. 266.
[155] **Exhibit RLA-380**, Panel report *Russia – Traffic in Transit,* para 7.138.
[156] See paras 160 et seqq. below.
[157] See section III.5 above.
[158] Respondent's Supplementary Reply of 4 November 2024, para 320.
[159] **Exhibit RLA-380**, Panel report *Russia – Traffic in Transit,* paras 7.107-7.123.
[160] ***Ibid***. paras 7.76, 7.111.
[161] ***Ibid***. para 7.75.
[162] ***Ibid***. paras 7.124-7.125.

its essential security interests".[163] The panel concluded that the discretion of a Member is limited by the good faith requirement,[164] and that Members must not circumvent their obligations under the GATT.[165] The panel required that the invoking Member articulate the essential security interests sufficiently[166] and with the greater specificity the further it is removed from armed conflict, or a situation of breakdown of law and public order.[167]

- (4) In addition, a Member must demonstrate a *connection* between the situation of emergency in international relations necessitating measures for the protection of the essential security interests and the measure itself. The panel reviewed whether there was a plausible connection or whether the measure was unrelated to the essential security interest.[168]

163. All these conditions must be satisfied, i.e. a Member invoking an exception must define in good faith its essential security interests and must articulate those with sufficient specificity. The so defined and articulated essential security interests must arise from the particular emergency in international relations between the parties, which is subject to full objective review. In addition, the party relying on the exception must demonstrate a connection between the emergency and the measure.[169] By the way, the same legal standard and interpretation has explicitly been confirmed in one of the other cases relied on by Respondent, namely case *Saudi Arabia – IPRs.* In this case between Qatar and Saudi Arabia the panel interpreted the security exception in Art. 73(b)(iii) of the TRIPS Agreement which, as pointed out by the panel, is identical with XXI(b)(iii) GATT, and then applied the legal standard to the specific factual circumstances of the case before it.[170]

164. In this arbitration, Respondent would have to cross many bridges in order to demonstrate that the AD was proposed and adopted in times of an emergency in international relations between the EU, its Member States and Russia, as well as Switzerland, where Claimant is seated. In addition, Respondent would have to articulate in good faith and with sufficient specificity its essential security interests, which must arise from the particular emergency in international relations. In addition, Respondent would have to demonstrate a connection between the emergency and the AD.

165. Nothing of that was at hand in 2019, when the AD was enacted. The AD, including its preamble, does not mention the Russia-Ukraine conflict, nor any other alleged emergency in international relations. In the years following the proposal and the adoption of AD, the EU continued actively to trade gas with Russia and maintain diplomatic, consular and economic relations. At that time the world was different from the situation today. There was no "emergency in international relations" between the EU, its Member States and Russia, let alone between the EU, its Member States and Switzerland. In other words, no "emergency in international relations" existed in 2017 nor in 2019.

166. In light of the above, Respondent's argument, that case *Russia – Traffic in Transit* was considered directly relevant, and was quoted by the arbitral Tribunal in the ICSID case *Seda v Columbia,*[171] leads nowhere. As just demonstrated, even if the legal standards of *Russia –*

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[163] ***Ibid***. paras 7.127-7.148.
[164] ***Ibid***. para 7.132.
[165] ***Ibid***. para 7.133.
[166] ***Ibid***. para 7.134.
[167] ***Ibid***. para 7.135.
[168] ***Ibid***. paras 7.138-7.145.
[169] ***Ibid***. paras 7.138 et seqq.
[170] **Exhibit RLA-382**, Panel report *Saudi Arabia – IPRs,* paras 7.241 et seqq.
[171] Respondent's Supplementary Reply of 4 November 2024, paras 297, 300, 305, 309, 310 with references to **Exhibit RLA-379**, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024.

Traffic in Transit were to be applied in the case before the Tribunal, Respondent has *not* met the requirements of 'which it considers necessary for the protection of its essential security interests', when it adopted the AD.

167. With respect to *Seda v Columbia,* Claimant notes that this case is currently being challenged before an ICSID annulment committee.[172] The case concerned asset forfeiture proceedings in criminal investigations. That is very far removed from the matter before the Tribunal. The relevant security exception in that ICSID case was Art. 22.2(b) of the US-Columbia Trade Promotion Agreement.[173] This security exception is broader than Art. XXI(b) WTO. In its relevant part "*measures that it considers necessary for the […] protection of its own essential security interests*", this provision is indeed semantically almost identical with the *chapeau* of Art. XXI(b) GATT and similar to the *chapeau* of Art. 24(3) ECT. However, Art. 22.2(b) does not have any subparagraphs, which are subject to a full objective review. The conclusions of that tribunal therefore do not reflect the complete legal standard that was applied by the panel in *Russia – Traffic in Transit.*[174]

168. Accordingly, the tribunal in that case correctly made the following reservation:

> "At the same time, the Tribunal recognizes that the specific context of the international trade law is not directly applicable to the context of international investment law. Moreover, and most importantly, the qualifiers (i) to (iii) of Art. XXI(b) of the GATT distinguish it from the present case, as will be addressed in detail below."[175]

169. Moreover, Respondent tries to base its Art. 24(3) ECT argument on an "extension" of the relation between Ukraine and Russia to its own situation. Respondent's position is premised solely on the Russia - Ukraine conflict dating back to 2014.[176] It argues that a "*situation of war, armed conflict, or other emergency in international relations*" may also be invoked by other affected countries, in addition to those which are parties to the war, conflict or emergency.[177]

170. Importantly, however, *Russia – Traffic in Transit* does not support this idea. This WTO case is clearly focused on the armed activities between Ukraine and Russia at the time of the measure in question and hence the relations between those two parties.[178] Respondent does not mention that, and relies, instead, in this context on WTO case *US – Origin Marking*.[179] That case, however - contrary to case *Russia – Traffic in Transit* - is not final and binding.

171. Even if the conclusions of US – *Origin Marking* were to be taken into account (*quod non*), they would not support Respondent's position. This is because in that case the panel did **not** find a situation of "emergency", since there was an "ongoing cooperation" between the countries, and there was no "*evidence or argument on the record that the United States or any other Member has severed its diplomatic, consular, or economic relations with China or Hong Kong, China*".[180] No such severance took place between the EU and Russia either, let alone Switzerland, at the time of AD.

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[172] Case history accessible at https://jusmundi.com/en/document/decision/en-angel-samuel-seda-and-others-v-republic-of-colombia-annulment-proceeding-pending-thursday-31st-october-2024.
[173] The text is exhibited by Respondent as **RLA-383** and quoted in footnote 398 of Respondent's Supplementary Reply of 4 November 2024.
[174] See paras 157-158 above.
[175] **Exhibit RLA-379**, *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, para 687. Given the page limit for this submission, Claimant refrains from addressing further details.
[176] Respondent's Supplementary Reply of 4 November 2024, paras 342-347.
[177] ***Ibid.*** para 345.
[178] **Exhibit RLA-380**, Panel report *Russia – Traffic in Transit,* paras 7.120-7.123.
[179] Respondent's Supplementary Reply of 4 November 2024, paras 317-319.
[180] **Exhibit RLA-392**, Panel report, *US – Origin Marking (Hong Kong, China),* para 7.357.

WTO cases support Claimant's interpretation of the maintenance of public order

172. The WTO cases relied on by Respondent do not advance its case concerning the alleged maintenance of public order, Claimant's conclusion above that no public order was maintained by the AD thus remains correct.[181] Respondent's argumentation is fully premised on the idea, that the AD is a general measure that contributes to security of supply and competition as expressed in the recitals of the AD.[182] Claimant has demonstrated that this is simply wrong and that the officially purported objectives of the AD are not its real objectives and intended effects.[183] For this reason alone, Respondent's efforts to demonstrate that it considered the AD to be necessary to maintain the EU's public order must fail.

173. Moreover, also for other reasons the WTO cases relied on by Respondent in support of its alleged intention to maintain the EU's pubic order by adopting the AD must fail. Claimant first notes that *US – Gambling* – which is final and binding – deals with Art. XIV GATS. The texts of this provision and of Art. 24(3) ECT are very different, so is the interplay between the *chapeau* and the subparagraphs of those provisions. Art. XIV GATS is subject to a full review with no scope for self-judging. The legal standards developed and applied by the panel on roughly 40 pages were as follows:[184] The panel first assessed the public order and the necessity as two elements of Art. XIV GATS, calling this explicitly a *provisional justification.* Thereafter, the panel moved on to the *chapeau* requiring that a measure must not be an arbitrary or unjustifiable discrimination nor a disguised restriction.

174. It is obvious, that the precautions in Art. XIV GATS and their interplay are of relevance for the interpretation of the various elements of this provision. Consequently, one must not compare public order in that provision with public order in Art. 24(3) ECT.

175. In addition, Claimant notes that the thorough analysis in the panel report contains a number of important elements which Respondent leaves unmentioned, such as the requirement of weighing and balancing a series of factors including the obligation for the party relying on the exception to explore in a good faith manner options with a view to exhausting WTO-consistent alternatives.[185] As mentioned above, Respondent has not presented – and cannot present – any evidence that it in good faith explored any ECT-consistent legislative alternatives to the AD.[186] Claimant also notes, that the panel ultimately concluded that the US had *not* been able provisionally to justify their measures under the public order clause of Art. XIV(a) GATS, and that the US also had *not* demonstrated that the requirements of the chapeau in Art. XIV GATS had been fully satisfied.

176. With respect to *EU – Energy Package*, Claimant notes that this case is not final and binding. It thus remains to be seen if and when it will progress. Even if everything in this panel report would be confirmed by the AB, Respondent simply draws the wrong conclusions from this case. It is true, that the WTO panel agreed that security of energy supply constitutes a "*fundamental interest*" and, therefore, falls within the ambit of "*public order*".[187] This is explained, *inter alia*, by the fact that Russia did not challenge this assessment.[188]

177. However, contrary to what Respondent appears to suggest,[189] the panel did *not* conclude "*that the unbundling measure was fully compatible with the GATS*". Whilst the panel indeed

[181] See section III.6 above.
[182] Respondent's Supplementary Reply of 4 November 2024, paras 322-338.
[183] See section II.3 above.
[184] **Exhibit RLA-385**, Panel report, *US – Gambling*, paras 6.446-6.608.
[185] ***Ibid.*** esp. para 6.534
[186] See paras 120-121 above.
[187] See Respondent's Supplementary Reply of 4 November 2024, paras 207, 326, 330.
[188] **Exhibit RLA-386**, Panel report, *EU — Energy Package,* para 7.1146; **Exhibit CLA-360**, Anna-Alexandra Marhold, Energy in International Trade Law (*Cambridge University Press*, 2021), page 260.
[189] See Respondent's Supplementary Reply of 4 November 2024, para 326.

accepted the requirement of a third-country certification as necessary to maintain public order and hence *provisionally* justified under Art. XIV(a) GATS, the panel ultimately deemed the challenged unbundling measure (i.e. the third country certification) *inconsistent* with the *chapeau* of Art. XIV GATS due to being discriminatory. The panel decided that similar threats to the security of gas supply were posed by both foreign and domestic transmission system operators (TSOs).[190]

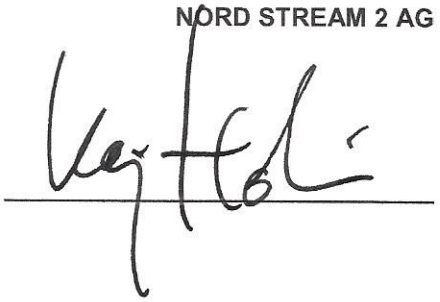
178. Claimant has explained that, and why, the legal standards in Art. XIV GATS cannot simply be extrapolated to Art. 24(3) ECT.[191] Even if one were to extrapolate *EU – Energy Package* to the case before the Tribunal, it speaks against Respondent and indeed for Claimant's case: The fact that the third country certification which had been introduced prior to the AD, was deemed discriminatory as per WTO standards, leads to the conclusion that the AD, which singles out only Claimant, must be even more arbitrary as per these standards. Accordingly, introducing an arbitrary measure targeted specifically at Claimant is arguably inconsistent with good faith obligations that must be observed with respect to self-judging.[192] As explained above, Respondent has not observed good faith.[193]

179. For the reasons set out above, WTO cases relied on by Respondent do not support Respondent's positions with respect to Art. 24(3) ECT.

[190] See **Exhibit RLA-386**, Panel report, *EU — Energy Package,* paras 7.1241-7.1253.
[191] See paras 173 et seqq.
[192] See **Exhibit RLA-380**, Panel report *Russia – Traffic in Transit*, para 7.138.
[193] See paras 107 et seqq. above.

Submitted for and on behalf of

NORD STREAM 2 AG



Professor Dr. Kaj Hobér

16 April 2025

ANNEX 1 LIST OF EXHIBITS

No.	Description	Date
LEGAL EXHIBITS		
CLA-345	*European Commission v Keramag Keramische Werke* (ECJ case C-613/13 P, ECLI:EU:C:2017:49, Judgment)	26 January 2017
CLA-346	K. Lenaerts, K. Gutman, J. Nowak, *EU Procedural Law* (Oxford: 2nd edition)	2023
CLA-347	Severin Fischer, "Lost in Regulation: The EU and Nord Stream 2" (*Policy Perspectives*, Vol. 5/ 5)	2017
CLA-348	Kim Talus, "An Intergovernmental Agreement for Nord Stream 2: Rationale, Content and Impact" (*Oil, Gas and Energy Law*)	2017
CLA-349	Schill& Briese,"If the State Considers: Self-Judging Clauses in International Dispute Settlement" (*Max Planck Yearbook of United Nations Law*, Vol.13, 61-140)	2009
CLA-350	"Non-justiciability of Security Exceptions", Annex 5 of the India-Singapore Comprehensive Economic Cooperation Agreement	29 June 2005
CLA-351	"Exceptions", Section 22 of United States-Peru Free Trade Agreement (PTPA)	1 February 2009
CLA-352	Declaration of Judge Keith to Judgment, *Case concerning* Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), ICJ Reports	2008
CLA-353	*Continental Casualty Company v. The Argentine Republic*, (ICSID Case No. ARB/03/9, Award)	5 September 2008
CLA-354	*Unión Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/14/4, Award)	31 August 2018
CLA-355	Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports, p.7	1997
CLA-356	*EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23, Award)	11 June 2012

CLA-357	Report of the Appellate Body**,** United States—Measures Affecting the Cross-border Supply of Gambling and Betting Services (WTO Doc. WT/DS285/AB/R; accessible at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/285ABR.pdf&Open=True)	07 April 2005
CLA-358	*Saudi Arabia – IPRs* (Case No. DS567, accessible at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds567_e.htm); particularly No. WT/DS567/11, C*ommunication from Qatar* (accessible at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/567-11.pdf&Open=True)	25 April 2022
CLA-359	Senai W. Andemariam, The Concept of Necessity in International Law and the World Trade Organization: History, Lessons, and Prospects (*Brill*, 1st ed.)	2024
CLA-360	Anna-Alexandra Marhold, Energy in International Trade Law (*Cambridge University Press*)	2021